IN THE SUPREME COURT OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI,
DAVID DELK, and GARY DUELL,
Plaintiffs-Appellants
Cross-Respondents,
Petitioners on Review,
and
JOAN HORTON, and KEN LEWIS,
Plaintiffs-Appellants
Cross-Respondents,
v.
KATE BROWN, Secretary of State of the State of Oregon; and
JOHN R. KROGER, Attorney General of the State of Oregon,
Defendants-Respondents
Cross-Respondents,
Respondents on Review,
and
CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,
Intervenors-Respondents
Cross-Appellants,
Respondents on Review.
Court of Appeals
A137397

No. S059246

OPENING BRIEF ON REVIEW OF PETITIONERS BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, and GARY DUELL

September 29, 2011

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Petitioners Hazell, Nelson, Civiletti, Delk, and Duell [hereinafter "Hazell" or "Hazell Plaintiffs"] file this Opening Brief on Review of ***Hazell v. Brown***, 238 OrApp 487, 242 P3d 743 (2010). They also rely upon the briefs filed at the Court of Appeals, which they refer to as the "Hazell Opening Brief," the "Hazell Reply Brief", and the "Hazell Supplemental Memorandum."

They seek reversal of the decision of the Court of Appeals in ***Hazell v. Brown*** and an order requiring Defendants to implement all of Measure 47 (2006) or all parts that are not unconstitutional.

The Court of Appeals decision placed Measure 47 in permanent limbo, so that its provisions can never be evaluated for constitutionality, under a theory that misreads Measure 47 and lacks internal sense. Instead, the provisions of Measure 47 should rightfully be considered the law of Oregon and should be implemented, except for those provisions which may be found unconstitutional by this Court.

I. STATEMENT OF THE CASE.

The Hazell Plaintiffs adopt the Statement of the Case presented in the Opening Brief on Review of the Horton Plaintiffs and add this:

A. QUESTIONS PRESENTED.

1. Does Section (9)(f) of Measure 47 suspend the entire measure?

Ruling Sought: It does not.

2. Does Section (9)(f)'s reference to "such limitations" refer to those limitations contained in Measure 47 itself or to "prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***" or to some generic, unknown future limitations that might come to the attention of the courts?

    Ruling Sought: It refers to the limitations contained in Measure 47 itself.

3. Does Section (9)(f) excuse Defendants from implementing and enforcing any of Measure 47?

    Ruling Sought: It does not.

4. Does Measure 47 contain 12 severable and independently enforceable provisions, apart from its numeric limitations on political campaign contributions?

    Ruling Sought: It does.

5. Which of Measure 47's limitations, if any, are invalid, considering ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta I***"), as recently modified?

    Ruling Sought: None of Measure 47's limitations are invalid under ***Vannatta I*** as recently modified, due to (1) differences between Measure 47 and Measure 9 of 1994] and (2) this Court's decision in ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), cert den, --- U.S. ----, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***").

6. Should some aspects of ***Vannatta I*** be reconsidered?

Ruling Sought: Yes, because far more accurate historical analysis is now available regarding the meaning of the word "election" and whether freedom of speech allowed limits on political campaign contributions as of the time of adoption of the Oregon Constitution.

B. SUMMARY OF ARGUMENT.

Defendants are unlawfully refusing to implement and enforce Measure 47 (2006), a statute duly enacted by the people of Oregon. They claim that the operation of all of Measure 47 is somehow fully "suspended" by its own § (9)(f), despite the illogic of that assertion and despite the fact that § (9)(f) simply calls for preservation of all of Measure 47, pending judicial evaluation of the constitutionality of the substantive limitations in Measure 47 on political campaign contributions and expenditures.

The Court of Appeals in ***Hazell v. Brown*** misconstrued § (9)(f), both in concluding that the § (9)(f) condition had been met and in comprehending the consequences of such a conclusion. Even if the condition had been met, some party must prove the unconstitutionality of the provisions of Measure 47 in order to justify Defendants' refusal to enforce any of Measure 47. The Court of Appeals' opinion is internally inconsistent, does not use reasoned constitutionality analysis to the substantive provisions of Measure 47

No party has challenged the constitutionality of those specific substantive limitations, and no court has examined those specific provisions for

constitutionality. To defeat Oregon Supreme Court jurisdiction under ORS 250.044(5) to hear Plaintiffs' appeal from the Circuit Court, Defendants successfully asserted that no court had made any finding of unconstitutionality of any provision of Measure 47.[1] In any event, these limitations are valid under a complete reading of a correct history of the Oregon Constitution and under the rationales of ***Vannatta I*** itself, particularly as it has been modified by ***Vannatta II***. The Court of Appeals' opinion fails to apply the very recent and very relevant conclusions in ***Vannatta II*** to Measure 47.

If necessary, ***Vannatta I*** itself, as applicable to limits on campaign contributions and expenditures, should be reconsidered, a process this Court has begun in ***Vannatta II*** and ***State v. Moyer***, 348 Or 220, 230, 230 P3d 7, *cert denied*, --- US ----, 131 SCt 326, --- LEd2d ----, 2010 WL 2988586 (2010).

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1. Plaintiffs have incorrectly filed notices of appeal directly in this court, based on the mistaken premise that the circuit court ruled Measure 47 unconstitutional in part.

Defendants-Respondents/Cross Respondents' Reply to Plaintiffs-Appellants/ Cross-Respondents' Response to Order to Show Cause Regarding Jurisdiction (December 13, 2007), pp. 8, 9 (Nos. S055474 and S055477). This Court dismissed the appeals filed there from the instant decision of the Circuit Court (March 12, 2008), as further explained at Horton Opening Brief, p. 15, n8.

II. STATEMENT OF FACTS.

In the years preceding 2006, several public interest groups and concerned citizens organized to achieve limits on political campaign contributions and "independent expenditures" in state and local candidate races in Oregon. In 2005, they drafted both a comprehensive statute (which became Measure 47 of 2006) and, with awareness of ***Vannatta I"***, also an amendment to the Oregon Constitution (which became Measure 46 of 2006).[2]

The drafters realized that the voters might enact the statutory measure without the constitutional amendment. That would make Measure 47's numeric limitations on political campaign contributions and independent expenditures subject to scrutiny for compliance with Article I, § 8, of the Oregon Constitution. Were some of the limitations to be found invalid, they foresaw possibly pursuing another constitutional amendment without also enacting Measure 47 again. Thus, they wanted to avoid the outcome in ***Smith v. Cameron***, 123 Or 501, 262 P2d 946 (1928), which held that a later amendment to the Oregon Constitution did not revive a statute held to be unconstitutional at

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2. ***Hazell v. Brown***, 238 OrApp at 490 and 492 refers to Measure 46 as the "companion measure" to Measure 47. Oregon law contains no definition of "companion measure," and ***Hazell v. Brown*** does not explain it. Neither of the measures is conditional upon the adoption of the other one. See pp. 25-26 of this brief, *post*.

the time of enactment.[3] Accordingly, they inserted § (9)(f) into Measure 47 to ensure that the provisions of Measure 47 would:

(1) be codified, regardless of a constitutional infirmity at the time of enactment; and

(2) become operative as soon as either:

(a) Measure 47's limitations were found to be constitutional in court, or

(b) Oregon voters amended the Oregon Constitution to expressly allow limits on political campaign contributions and/or expenditures.

Section (9)(f) reads:

> If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

The function of § (9)(f), along with the severability clause § (11), is to ensure that the limitations on political campaign contributions or expenditures in Measure 47 would remain "on the books" and would become operative if the Oregon Constitution were later "amended to allow such limitations" or if the Oregon Supreme Court were to find that the Oregon Constitution does allow the limitations in Measure 47.

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3. While ***State v. Hecker***, 109 Or 520, 221 P 808 (1923), decided five years prior to ***Cameron***, concluded that a statute with a dormancy clause somewhat similar to that in Measure 47 was not in conflict with the existing Oregon Constitution, it was not clear to the drafters of Measure 47 whether ***Cameron*** had overruled ***Hecker***.

This evaluation of the constitutionality of each of the specific Measure 47 limitations is what Plaintiffs have sought in this case: declaratory judgment that each and every severable part of Measure 47 is constitutional.

Section (9)(f) provides a sort of internal "preliminary injunction" so that each limitation in Measure 47 would not operate until its constitutional validity is determined by the courts. Providing for judicial review of the limitations, prior to their operativeness, was a means to avoid the uncertainty and disruption of having limitations in place for an indefinite, yet perhaps temporary, period of time--as occurred with the Measure 9 of 1994 limitations, which were operative from December 1995 until struck down by this Court in February 1997.

One circumstance § (9)(f) addressed then occurred: In November 2006, the voters of Oregon enacted Measure 47 but not Measure 46. Pursuant to Oregon Constitution, Article IV, § 1(4)(d), Measure 47 became effective on December 7, 2006, and it was codified as ORS Chapter 259.

No suits were filed to challenge the constitutionality of any part of Measure 47. The Secretary of State and Attorney General both declined to implement any part of Measure 47 other than § (9)(f) (Complaint, Exhibit B, Horton ER 1).[4] So the Measure 47 Chief Petitioners (joined by others) filed this suit for:

1. A declaration that:

    a. Each Defendant is obligated to administer and enforce each of the provisions of Measure 47, as each is found valid.

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4. Section (10)(a) of Measure 47 directly orders both Defendants to administer and enforce its provisions.

b. Section (9)(f) does not authorize either Defendant to avoid administering and enforcing all of the provisions of Measure 47.

Or, alternatively

c. Section (9)(f) is unconstitutional and unenforceable.

d. Section (9)(f) is unconstitutional to the extent it contravenes the immediate enforcement of otherwise constitutional and enforceable statutory law, as required by Article IV, § 1(4)(d), of the Oregon Constitution.

2. An injunction directing Defendants to administer and enforce all provisions of Measure 47.

Plaintiffs presented extensive briefing on the constitutionality of virtually every part of Measure 47, including over 100 pages to the trial court specifically addressing Article I, § 8, Article II, § 8; ***Vannatta I***; many other cases (including ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982), and its progeny); the history of the Oregon Constitution; and the history of limits on political contributions.

Defendants prevailed in their argument to place Measure 47 into a permanent state of suspension by claiming that § (9)(f) not only precludes enforcement of any part of Measure 47 (except somehow § (9)(f) itself) but also precludes judicial review of the constitutionality of any of the substantive provisions of Measure 47 (while somehow allowing review of the constitutionality of § (9)(f) itself). Neither the trial court nor the Court of Appeals addressed the constitutionality of the specific provisions of Measure 47, other than § (9)(f).

III. STANDARD OF REVIEW UPON APPEAL.

> On review, this court views the facts and all reasonable inferences that may be drawn from them in favor of the nonmoving party--in this case, plaintiffs. ***Jones v. General Motors Corp.***, 325 Or 404, 408, 939 P2d 608 (1997). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Vannatta II, 347 Or at 451. The proponent of summary judgment must show that "no objectively reasonable" trier of fact could return a verdict" for the opponent of summary judgment. ***Jones***, 325 Or at 425.

There are no material facts in dispute. The lower court decisions are reviewed for error of law. ***Dept. of Forestry v. PacifiCorp***, 236 OrApp 326, 332, 237 P3d 861, *adh'd to as modified on recons*, 237 OrApp 228, 239 P3d 503 (2010).

As noted later, the Court of Appeals' opinion depends upon the conclusion that the limitations on campaign contributions or expenditures in Measure 47 are somehow unconstitutional in a generic, non-specific way. The courts are not to reach such a conclusion, if it is possible to construe the statute to avoid it. ***Wadsworth v. Brigham***, 125 Or 428, 464, 266 P 875 (1928).

> In construing a statute and in choosing between alternative interpretations of an ambiguous statute, this court must choose the interpretation which will avoid any serious constitutional difficulty.

State v. Duggan, 290 Or 369, 373, 622 P2d 316 (1981). *Accord*, ***State v. Meyers***, 153 OrApp 551, 560, 958 P2d 187 (1998).

There is a strong presumption that a duly-enacted statute is constitutional. ***Greist v. Phillips***, 322 Or 281, 298, 906 P2d 789 (1995); ***State ex rel. Juv.***

Dept. v. Orozco, 129 OrApp 148, 150, 878 P2d 432 (1994), *review denied*, 326 Or 58, 944 P2d 947 (1997). The burden of proof is on those who would challenge the validity of the statute, not those who assert its validity. ***Oregon-Nevada-California Fast Freight, Inc. v. Stewart***, 223 Or 314, 326, 353 P2d 541 (1960).

IV. FIRST ASSIGNMENT OF ERROR: THE COURT OF APPEALS ERRED IN UPHOLDING THE TRIAL COURT IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BASED ON § (9)(f) OF MEASURE 47.

A. OVERVIEW: THE COURT OF APPEALS OPINION MISCONSTRUED § (9)(f) OF MEASURE 47.

The substantive provisions of Measure 47 can be divided into 5 categories:

1. limits on the amounts of campaign contributions and expenditures that can occur without reporting of the details to the government;

2. limits on the amounts of campaign expenditures that can occur without each advertisements disclosing in some detail who paid for it;

3. other provisions, including penalties and administrative procedures;

4. limits on amounts of campaign contributions by individuals or entities, with separate limits for individuals and for various entities; and

5. limits on amounts of independent expenditures (supporting or opposing candidates) by individuals or entities, with separate limits for individuals and for various entities.

The trial court and Court of Appeals did not address the arguments pertaining to the constitutionality of any of the specific substantive requirements, limits, or procedures adopted in Measure 47. Instead, it ruled that § (9)(f)

precludes this ordinary judicial review for constitutionality of the provisions of an enacted statute.

> In sum, the substantive provisions of Measure 47 did not, and will not, become operative unless or until Article I, section 8, is amended to permit limitations of the sort deemed unconstitutional in ***Vannatta I*** or until the Oregon Supreme Court revisits ***Vannatta I*** and determines that such limitations are constitutional under Article I, section 8.

Hazell v. Brown, 238 Or App 487, 512 (2010).

As shown in detail below, this is not a sensible interpretation of Measure 47. Why would the constitutionality of the specific provisions of Measure 47, which significantly differ from those of Measure 9 of 1994 addressed in ***Vannatta I***, depend upon the Oregon Supreme Court revisiting ***Vannatta I*** and determining that "such limitations" (meaning those "of the sort deemed unconstitutional in ***Vannatta I***") are constitutional? The constitutionality of the limitations in Measure 9 of 1994 is irrelevant, except that ***Vannatta I*** is certainly a precedent to be considered in determining the constitutionality of each of the provisions of Measure 47. Courts do not decide the constitutionality of a statute at issue by disregarding the terms of that statute and instead examining the terms of some other statute enacted, struck down, and repealed by the Legislature years ago. ***In the Matter of Constitutional Test of House Bill 3017, Oregon Laws, 1977***, 281 Or 293, 300, 574 P2d 1103 (1978). But that is what the Court of Appeals decision requires.

Nor does the Court of Appeals explain how, under its interpretation, limits akin to those of Measure 9 of 1994 could ever reach the Oregon Supreme Court

for review. In effect, the Court of Appeals states, without having examined any of the specific substantive provisions of Measure 47, that the courts cannot evaluate the constitutionality of those provisions (including all of the 5 categories listed above), until somehow the Oregon Supreme Court is presented with the limits akin to those of Measure 9 of 1994 in some other new statute.

There is no reason that review of the limitations in Measure 47 for constitutionality need await enactment of yet some other statute. And that event, of course, will not happen, because no concerned citizens would ever again run a successful statewide statutory ballot measure campaign to re-enact the Measure 9 of 1994 limits merely to obtain judicial review of the Measure 47 limits.[5] Nor is there any prospect that the Oregon Legislature would ever re-enact the Measure 9 limits.

Further, the Court of Appeals' conclusion renders null the phrase in § (9)(f) "at the time that the Oregon Constitution is found to allow * * * such limitations." Courts are not to disregard words in a statute. ORS 174.010. The Court of Appeals did not attempt to strike the 5 words "is found to allow, or" or

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5. And any such later initiative, by re-enacting the Measure 9 of 1994 limits, would override the Measure 47 limits, anyway, as the later-enacted provisions would prevail.

offer any rationale for doing so.[6] Thus, § (9)(f) calls for judicial findings on the constitutionality of the limits in Measure 47. That is what Plaintiffs seek.

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6. The trial court did strike those 5 words. Plaintiffs appealed that portion of the trial court's decision and briefed it, demonstrating that the striking of the words:

   (1) was an unlawful application of severance under ***State v. Dilts***, 337 Or 645, 653, 103 P3d 95 (2004);

   (2) violated the severability terms of Measure 47 itself (***Advocates for Effective Regulation v. City of Eugene***, 176 OrApp 370, 376, 32 P3d 228 (2001));

   (3) violated the statutory mandate "not to insert what has been omitted, or to omit what has been inserted," ORS 174.010; and

   (4) violated principles of statutory construction: While a statute must be construed wherever possible to avoid unconstitutionality [***Easton v. Hurita***, 290 Or 689, 694, 625 P2d 1290, 1292 (1981)], the words must still be construed, not merely eliminated or changed to achieve a constitutional meaning. ***Bernstein Bros., Inc. v. Department of Revenue***, 294 Or 614, 621, 661 P2d 337, 541 (1983).

   See Hazell Opening Brief, pp. 7, 12; Horton Opening Brief, pp. 14-17; Hazell Reply Brief, pp. 2, 9, 11.

   No one sought the striking of those words in the trial court, and no one defended the striking of those words before the Court of Appeals. ***Hazell v. Brown*** notes that the trial court struck the 5 words (238 Or App at 494, n4) but does not decide whether the 5 words are stricken or not. The remainder of the Court of Appeals' opinion appears to assume the 5 words are not stricken (e.g, 238 Or App at 498, 504), so we assume that ***Hazell v. Brown*** reversed *sub silentio* the trial court's striking of the 5 words. This also means that the Court of Appeals found no constitutional infirmity in a statute which by its terms becomes effective (or operational) when "the Oregon Constitution is found to allow" its terms.

The Court of Appeals opinion also contradicts the law that courts are not "to omit what has been inserted" but are to construe a statute so as to give effect to all of its provisions. ORS 174.010. The result of the Court of Appeals decision is that no words of Measure 47 have meaning; the end result is the same as if the Oregon electorate never passed Measure 47 at all. According to the Court of Appeals' opinion, none of the provisions of Measure 47 are in operation, and there is no opportunity for obtaining judicial review of the constitutionality of the provisions of Measure 47 itself in order to place them into operation.

The Court of Appeals's approach also violates the principle that the courts shall interpret enacted statutes consistent with the intent of the Legislature. Here, the Legislature was the voters using the initiative process. ***Hazell v. Brown*** requires the conclusion that the voters in enacting Measure 47, actually meant to enact nothing or, at most, meant to place a lot of new text into ORS Chapter 259, with that text having utterly no effect on anyone.

The Court of Appeals' interpretation renders all of Measure 47 illusory. It states that none of the provisions of Measure 47 (except somehow § (9)(f) itself) are operative, until and unless the Oregon Supreme Court in some future case evaluating the constitutionality of some other statute decides that "prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***" (i.e., the provisions of Measure 9 of 1994) are valid.

B. REGARDING ALL OF MEASURE 47, IMPLEMENTATION IS NOT EXCUSED BY SECTION (9)(f).

Section (9)(f) is either a valid exercise of legislative power, or it is not. In either event, implementation of the rest of Measure 47 is not excused.

The Horton Plaintiffs and the Intervenors argue that § (9)(f) of Measure 47 is not valid under the Oregon Constitution, for different reasons. If any part of § (9)(f) is invalid, then § (11) of Measure 47, the severability clause, severs § (9)(f) from the remainder of Measure 47.[7] The remainder of Measure 47 is then to be implemented. That leaves Defendants with no basis for refusing to implement and enforce the limitations of Measure 47. Defendants do not dispute that, if § (9)(f) is invalid, it must be severed and therefore leave the remainder of Measure 47 intact and in effect.

If § (9)(f) is valid, it still does not afford Defendants an excuse for their refusal to implement and enforce Measure 47.

Section (9)(f) reads:

> If, on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions or expenditures, this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.

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7. For example, ***Advance Resorts of America, Inc. v. City of Wheeler*** 141 OrApp 166, 917 P2d 61, *review denied* 324 Or 322, 927 P2d 598 (Or 1996), ruled that an emergency clause was severable and that its severance would not affect the validity of the remainder of the statute.

1. BUT FOR SECTION (9)(f), MEASURE 47 BECAME OPERATIONAL ON ITS EFFECTIVE DATE OF DECEMBER 7, 2006.

The Oregon Constitution, Article IV, § 1(4)(d), provides that an initiative enacted by vote of the people shall become effective 30 days after the date (election day) on which it is enacted. Thus, Measure 47 became effective on December 7, 2006.

Section (9)(f) must be examined to see how it alters, if at all, this ordinary date of effectiveness (or "operation") of a duly-enacted initiative.

2. THE SECTION (9)(f) CONDITION HAS NOT BEEN MET.

The last clause of § (9)(f) ("this Act shall * * *) is not triggered, unless this condition exists: "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures" [hereinafter "the § (9)(f) condition"]. If that condition is not met, then all of Measure 47 became effective ("operational") on December 7, 2006.

The Court of Appeals concluded that this condition had been met, because the term "limitations on political campaign contributions or expenditures" referred not to the limitations of Measure 47 itself but somehow referred to something else.

> Rather, the overarching context and history of Measure 47 demonstrates that the voters, in approving that initiative, understood the phrase "limitations on political campaign contributions or expenditures" in section (9)(f) to refer to limitations on campaign contributions or expenditures of the sort that had been deemed to be unconstitutional in ***Vannatta I***.

Hazell v. Brown, 238 OrApp at 508.

The trial court and Court of Appeals did not address the arguments pertaining to the constitutionality of any of the specific substantive requirements, limits, or procedures adopted in Measure 47. Instead, they ruled that § (9)(f) precludes this ordinary judicial review for constitutionality of the provisions of an enacted statute.

> In sum, the substantive provisions of Measure 47 did not, and will not, become operative unless or until Article I, section 8, is amended to permit limitations of the sort deemed unconstitutional in ***Vannatta I*** or until the Oregon Supreme Court revisits ***Vannatta I*** and determines that such limitations are constitutional under Article I, section 8.

Hazell v. Brown, 238 Or App 487, 512 (2010). As the Oregon Supreme Court in ***Vannatta I*** held some of the limitations in Measure 9 of 1994 to be unconstitutional, the Court of Appeals reasoned that the § (9)(f) condition had been met.

The Court of Appeals has misinterpreted § (9)(f). First, if the § (9)(f) condition is interpreted literally, it is clear that the condition has <u>not</u> been met, because the Oregon Constitution on the effective date of Measure 47 did allow some, but not all, limitations on political campaign contributions or expenditures. Second, if § (9)(f) is interpreted less literally and in context, it is clear that the § (9)(f) condition is referring to the limitations in Measure 47 itself, so determining whether the condition is met requires evaluating the constitutionality of the specific provisions of Measure 47 itself.

It is clear under either analysis that the § (9)(f) condition has not been met. While perhaps the literal interpretation logically should be addressed first, we prefer the "in context" approach and thus present it first.[8]

a. EXAMINED IN CONTEXT, "LIMITATIONS" IN § (9)(f) REFERS TO THE LIMITATIONS IN MEASURE 47 ITSELF.

If § (9)(f) is interpreted in context, it is clear that the § (9)(f) condition is referring to the limitations in Measure 47 itself. The last clause of § (9)(f) states, "this Act shall nevertheless be codified and shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations." The term "such limitations" obviously refers to the "limitations on political campaign contributions or expenditures" mentioned in the § (9)(f) condition. **In context, these two references to "limitations" are intended to refer to the same "limitations."**

The most immediate context of § (9)(f) is the other sections of Measure 47.

> Ordinarily, only statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute. See ***Stull v. Hoke***, 326 Or 72, 79-80, 948 P.2d 722 (1997) (so observing).

State v. Gaines, 346 Or 160, 177 206 P.3d 1042 (2009). The other sections of Measure 47 show that the words "such limitations" refer to the limitations in Measure 47 itself. Section (1)(r) of Measure 47 (emphasis added) states:

> (r) In 1994, voters in Oregon approved a statutory ballot measure, Measure 9, establishing contribution limits similar to those in this

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8. Additional briefing on this subject is at Hazell Opening Brief, pp. 17-27.

> Act, by an affirmative vote of 72 percent. The Oregon Supreme Court in 1997 found that those limits were not permitted under the Oregon Constitution. **This Act shall take effect at a time when the Oregon Constitution does allow the limitations contained in this Act.**

Section (1)(r) thus provides a cogent explanation of the function of § (9)(f).

Section (1)(r) is obviously the other section of Measure 47 most relevant to the § (9)(f) inquiry. The Court of Appeals' opinion refers to it (238 Or App at 509) but misinterprets it. The lesson from it drawn by the Court of Appeals was:

> Thus, section (1)(r) expressly linked the operation of Measure 47 to constitutional authorization of the sort of limitations invalidated in ***Vannatta I*** in 1997 and, in doing so, reasonably informed the voters' understanding of section (9)(f).

How that conclusion can be drawn from §(1)(r) is a mystery. The obvious conclusion to be drawn is that § (9)(f) is referring to "the limitations contained in this Act," not some other set of undefined or ill-defined limitations ("the sort of limitations invalidated in ***Vannatta I*** ").[9]

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9. And, because such other limitations are not contained in Measure 47, they are not subject to judicial review. The Oregon Supreme Court does not issue advisory opinions.

> The court cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions.
>
> ***Pendleton School Dist. 16R v. State***, 345 Or 596, 604, 200 P.3d 133 (2009), quoting ***Brown v. Oregon State Bar***, 293 Or 446, 449, 648 P.2d 1289 (1982).

Defendants have actually agreed that the "limitations" referred to in § (9)(f) are the limitations in Measure 47 itself, not generic hypothetical limitations or "prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***, as the Court of Appeals' opinion concluded. Memorandum in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' and Intervenors' Motions for Summary Judgment (March 9, 2007) [OJIN No. 28] [hereinafter "Defendants' Summary Judgment Memorandum"], pp. 14-15 (Hazell ER 3-4), stated:

> Section (9)(f)'s phrase "limitation on political campaign contributions or expenditures" or close variations of it is used numerous times in Measure 47. * * *
>
> The measure's organization also confirms that "limitations on campaign contributions and expenditures" [in § (9)(f)] refers to the Act's numeric limits on CC&E [campaign contribution and expenditure[10]] amounts.

The Court of Appeals' opinion appears to disregard the last sentence of § (1)(r) and its phrase "does allow the limitations contained in this Act" and instead addresses only the first 2 sentences of §(1)(r). Those first 2 sentences refer to Measure 9 of 1994, noting that Measure 9 of 1994 adopted "contribution limits similar to those in this Act" and that this Court in 1997 found that the Measure 9 of 1994 contribution were not permitted. While this may be interesting historical information, the third and last sentence of Section (1)(r) clearly refers to "the limitations contained in this Act," not to the limitations of

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10. Some parties abbreviated the term "campaign contributions and expenditures" to "CC&Es."

Measure 9 of 1994. It is the third sentence of § (1)(r) that clearly relates to § (9)(f).

The Court of Appeals' opinion then spends pages describing ***Vannatta I*** and how this Court evaluated the limitations of Measure 9 of 1994.[11]

> What sorts of "limitations" were addressed in ***Vannatta I***? We return briefly to the court's holding in that case and to its assessment of certain provisions of Ballot Measure 9 (1995).

Hazell v. Brown, 238 Or App at 510. But the Court of Appeals' opinion never applies the ***Vannatta I*** or other constitutional analysis to the specific limitations of Measure 47, although the Hazell Plaintiffs, the Horton Plaintiffs, and two *amicus curiae* presented extensive briefing on the constitutional validity of those specific provisions. Hazell Opening Brief, pp. 28-49; Horton Opening Brief, pp. 18-49; Brief of Amici Elizabeth Trojan and Fair Elections Oregon, pp. 2-10 [hereinafter "FEO Amicus Brief"]; Brief of Amicus Curiae The Better Government Project, pp. 2-22 [hereinafter "BGP Amicus Brief"].

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11. The Court of Appeals also cites there ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006). There, the validity of laws restricting contributions or expenditures was not at issue. Instead, intervenor-defendant David Delk (here one of the Hazell Plaintiffs) prevailed against a lawsuit brought by employees of the Oregon Chapter of American Civil Liberties Union to remove Measure 46 (not Measure 47) from the ballot for constituting more than one amendment to the Oregon Constitution. As here, the Court of Appeals ruled against Delk, but the Oregon Supreme Court reversed. The passage cited by the Court of Appeals was the Oregon Supreme Court commenting upon its decision in ***Vannatta***, 324 Or 514, 931 P2d 770 (1997). The comments were *dicta*. No party in ***Meyer v. Bradbury*** argued that the ***Vannatta*** analysis did or did not render unconstitutional the specific limitations in Measure 47.

Instead, The Court of Appeals' opinion (238 Or App at 757) concludes that "***Vannatta I*** remains controlling law," after discussing only the limitations of Measure 9 of 1994 and not those of Measure 47. While the "controlling" nature of ***Vannatta I*** to those same Measure 9 of 1994 limitations would appear to be tautological, even that appears to have been eroded by ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), cert den, --- U.S. ----, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***",) and ***State v. Moyer***, 348 Or 220, 230, 230 P3d 7, cert den, --- U.S. ----, 131 SCt 326, --- LEd2d ----, 2010 WL 2988586 (2010)

In any event, the application of ***Vannatta I*** to the Measure 9 of 1994 limitations is not relevant to determining the meaning of § (9)(f). Section (9)(f), read in context with §(1)(r), clearly calls for the courts to evaluate the constitutional validity of "the limitations contained in this Act," not to somehow again evaluate Measure 9 of 1994.

The Court of Appeals' opinion then concludes (238 Or App at 512):

> Given the nature of the limitations addressed in ***Vannatta I*** and consistently with Measure 47, section (1)(r), voters considering Measure 47 reasonably understood the operative "limitations" in section (9)(f) to be prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***.

We see no logic in this. It is clear that voters considering Measure 47:

(1) wanted to enact campaign finance reform and

(2) to the extent they considered § (9)(f) at all, wanted Measure 47 to "become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations," with "such limitations" meaning "the limitations contained in this Act."

There is no logical way to harmonize § (9)(f) and § (1)(r) with the conclusion that voters understood that the effectiveness of Measure 47 would depend upon some consideration of undefined "prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***."

Section (9)(f) then specifies the two methods for determining "when the Oregon Constitution does allow the limitations contained in this Act":

(1) "at the time that the Oregon Constitution is found to allow * * * such limitations"; or

(2) "at the time that the Oregon Constitution * * * is amended to allow, such limitations."

This declaratory judgment action by Plaintiffs is the correct method for determining whether the Oregon Constitution allows "such limitations," referring to the limitations in Measure 47.

b. THE COURT OF APPEALS' OPINION LATER CONCLUDES THAT "SUCH LIMITATIONS" ARE THOSE OF MEASURE 47 ITSELF.

In a final twist of logic, the Court of Appeals' opinion later states:

> Consequently, voters understood that the limitations on campaign contributions or expenditures implicated by both Measures 46 and 47 were prohibitions and restrictions akin to those deemed unconstitutional in ***Vannatta I***.

Hazell v. Brown, 238 Or App at 512. The problems with this statement are numerous. Initially, consider the logic of the Court of Appeals' statements. If:

(1) § (9)(f) calls for placing "the Act" into operation "at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations,"

(2) the term "such limitations" refers to "prohibitions or restrictions akin to those deemed unconstitutional in ***Vannatta I***, and

(3) the Measure 47 limitations are "akin to those deemed unconstitutional in ***Vannatta I***,"

then when why did the Court of Appeals not engage in actual constitutional evaluation of any of the specific limitations in Measure 47 in order to determine whether "such limitations" are constitutional? Why did Court of Appeals not address any of the extensive briefing about the constitutionality of those specific limitations?

(1) THE OPINION OF VOTERS ON THE CONSTITUTIONALITY OF A STATUTE DOES NOT DETERMINE ITS CONSTITUTIONALITY.

The Court of Appeals' opinion appears to conclude (238 Or App at 512) that the Measure 47 "limitations on campaign contributions or expenditures" are unconstitutional, merely because voters thought that they were unconstitutional. ***Hazell v. Brown***, 238 OrApp at 491, states:

> The ballot title to Measure 46 reflected voters' understanding of the then-existing state of the law; it stated: "The Oregon Constitution currently bans laws that impose involuntary limits on, or otherwise prohibit, political campaign contributions or expenditures by any person or any entity," and warned that a "no" vote would "retain[ ] [the] current ban in [the] Oregon Constitution on laws that limit or prohibit campaign contributions or expenditures by any person or any entity."

First, this is an undocumented allegation about "voters' understanding of the then-existing state of the law." Consulting the Voters' Pamphlet can be

appropriate to help determine the meaning of an adopted measure,[12] but (1) Measure 46 was not adopted and (2) the Court of Appeals is using the ballot title not to discern the meaning of the measure but to somehow determine what voters understood about some aspect of Oregon constitutional law.

Second, such "voters' understanding" is irrelevant to <u>deciding</u> an issue of constitutional law. The Court of Appeals seeks to establish the "then-existing state of the law" by citing the ballot title of a measure (that was not enacted).

Third, the Court of Appeals relies for this conclusion on the ballot title for Measure 46 (not Measure 47). That Measure 46 ballot title is not part of the legislative history of Measure 47. The enactment of neither measure was dependent upon enactment of the other. The mere fact that Oregon citizens placed two measures on the 2006 ballot, and one of them failed, does not change the language or meaning of the measure that succeeded.

> Ordinarily, only statutes enacted simultaneously with or before a statute at issue are pertinent context for interpreting that statute. See ***Stull v. Hoke***, 326 Or 72, 79-80, 948 P.2d 722 (1997) (so observing).

State v. Gaines, 346 Or 160, 177 206 P.3d 1042 (2009). Measure 46 was not enacted simultaneously with Measure 47, as it was not enacted at all.

This Court rejects the notion that legislative history includes measures or bills that have <u>not</u> been enacted. In ***State ex rel. Kirsch v. Curnutt***, 317 Or 92, 97, 853 P2d 1312 (1993), the Court found "no relevant legislative history" when

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12. ***Shilo Inn v. Multnomah County***, 333 Or 101, 129-30, 36 P.3d 954 (2001), *adh'd to as modified on recons*, 334 Or 11, 45 P.3d 107 (2002).

offered the legislative history of a similar bill that was not enacted. J. Gillette, concurring, found "no meaningful assistance in the legislative history that the dissent relies upon--the history is of another, unsuccessful measure."). *Id.*, 317 Or at 99.

Fourth, while all would agree that enactment of Measure 46 would have precluded arguments about the state constitutionality of Measure 47's limitations on political campaign contributions and expenditures,[13] what voters might have thought about the constitutionality of Measure 47's limitations is not material. If voters had thought that Measure 47's limitations were constitutionally valid, would that make them constitutionally valid? Of course not. The assertion that voters thought that Measure 47's limitations were not valid, even if that belief existed, does not make them invalid. That is a legal determination for the courts, not a matter of voter intent.[14]

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13. Measure 46 read:

> Notwithstanding any other provision of this Constitution, the people through the initiative process, or the Legislative Assembly by a three-fourths vote of both Houses, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of any election.

With enactment of Measure 46, the Legislature would have been disabled from amending the provisions of Measure 47 (or similar laws adopted by initiative) without a three-fourths vote of both Houses. Without enactment of Measure 46, the Legislature can amend the provisions of Measure 47 with simple majority votes.

14. As for the ballot title on Measure 46, the proposed constitutional

(continued...)

(2) THE CONSTITUTIONALITY OF A STATUTE IS DETERMINED BY EXAMINING ITS SPECIFIC TERMS, NOT BY GENERIC DECLARATION.

In earlier cases, the Oregon Supreme Court examined specific sets of limits on campaign contributions and expenditures and found those limits to be valid (***State v. Moyer***, *supra*) or invalid. ***Vannatta I***, *supra*; ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975). In the course of adjudicating disputes, courts are routinely called upon to interpret and apply statutes to particular cases.[15] Oregon Constitution, Article III, §1; Article VII (Amended), §1. Cases are decided upon "adjudicative facts" [Oregon Evidence Code (Rule 201(a)], subject to being proved by evidence. Thus, there is no occasion for a judicial determination that **all** limitations on political campaign contributions or expenditures, no matter what they may be, are banned in Oregon. The determinations to date are that various limits in two earlier measures were invalid. Section 9(f) calls for an evaluation of whether "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures."

14.(...continued)
amendment, that language was written by the Attorney General in a proceeding where the substantive constitutionality of Measure 47 could not be, and was not, argued. Ballot titles are not Oregon Supreme Court opinions and are necessarily very truncated.

15. Although these clause do not, by their terms, strictly address the separation of governmental powers, this court has acknowledged that a separation of powers concept inheres in those words. ***Circuit Court v. AFSCME***, 295 Or 542, 547, 669 P2d 314 (1983).

This is not tied to the numeric limitations in the 1973 statute in ***Deras*** or the Measure 9 of 1994 in ***Vannatta***.

c. THE OREGON CONSTITUTION ON THE EFFECTIVE DATE OF MEASURE 47 DID ALLOW SOME, BUT NOT ALL, LIMITATIONS ON POLITICAL CAMPAIGN CONTRIBUTIONS OR EXPENDITURES.

The Circuit Court's statement "the Oregon Constitution does not allow limitations on political campaign contributions or expenditures," even if conceived as referring to the limitations in Measure 9 of 1994 or some sort of generic determination divorced from Measure 47's limitations, was literally not true on the effective date of Measure 47 and is not true today.

(1) EXISTING, ENFORCED OREGON STATUTES CONTAIN NUMEROUS LIMITATIONS ON POLITICAL CONTRIBUTIONS AND EXPENDITURES.

No one denies that existing, enforced Oregon statutes as of December 2006 contained numerous numerical and non-numerical limitations on political contributions and expenditures, such as:

1. If an entity or group (more than one person) makes contributions or expenditures to support or oppose a candidate in excess of $350 in a calendar year, it must register as a "political committee" and must file numerous reports detailing its contributions and expenditures. ORS 260.005(18), 260.035-043. This is a restriction or limitation applicable to contributions or expenditures over $350 per year.

2. If a person makes "independent expenditures" of more than $100 in the aggregate in a calendar year, to support or oppose any number of candidates, she must file a statement of independent expenditures with the appropriate elections officer within 7 days. ORS 260.044. This is

a restriction or limitation applicable to independent expenditures over $100 per year (upheld in ***Crumpton v. Keisling***, 160 OrApp 406, 982 P2d 3 (1999), *review denied* 329 Or 650, 994 P2d 132 (2000).

3. Contributions or expenditures above $300 per year can be lawfully made only if they are reported to the Secretary of State or local election officials. ORS 260.057 - .102.[16] This is a restriction or limitation applicable to contributions or expenditures over $300 per year.

4. Any and all contributions received can be expended only for campaign purposes or to "defray an expenses incurred in connection with the recipient's duties as a holder of public office." ORS 260.407. While this does not prevent candidates from using campaign contributions (1) for trips to Hawaii to meet with potential contributors, (2) for tickets to Blazer games to socialize with potential donors, (3) to pay friends or relatives for unsupervised work, or (4) pay himself $400 per month for use of a room in his home as a district office (as discussed at pages 42-46 *post*), it does constitute a restriction or limitation on expenditures in that it forbids a candidate from overtly, personally pocketing campaign contributions.

5. Every campaign contribution be made in the name "of the person who in truth provides the contribution," ORS 260.401 (prohibiting a practice referred to in the cases as money laundering) (upheld in ***State v. Moyer***, *supra*).

The above examples are "limitations on political campaign contributions or expenditures." Some of them rely upon numeric thresholds other than zero, while others, such as ORS 260.401 and ORS 260.407 (items 4 and 5 above), are prohibitions, which Measure 47 designates "a numeric limit of zero." Section (9)(d), following (4). This further shows that the term "limits" in Measure 47 was intended to mean more than merely "numeric quantitative limits" in the conventional sense. There are no cases in Oregon striking down such

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16. This threshold was later changed to $2,000 per year.

limitations as inconsistent with the Oregon Constitution or with the U.S. Constitution.[17]

Section § (9)(f) refers to "limitations" in the plural. If the Oregon Constitution currently allows some limitations but not all possible limitations, how does this language apply? Clearly, the § (9)(f) condition is met only if the Oregon Constitution does not allow any "limitations on political campaign contributions or expenditures." It is not met, if the Oregon Constitution allows some limitations. If some limitations are allowed, then the § (9)(f) condition is false. So the fact that the Oregon Constitution does allow some limitations means that the § (9)(f) condition is not triggered at all, even if the determination made is the generic one advocated by Defendants and adopted by the lower courts.

The Oregon Constitution clearly allows many sorts of limits on "political campaign contributions or expenditures" against which no one has launched a successful challenge. If any of those limitations are constitutional, then the § (9)(f) condition is not met, even under the theory that the "such limitations" are not those of Measure 47 itself.

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17. ***Vannatta I*** noted that some limitations involving money are permissible, such as sanctions against bribery or against corporate or union contributions or other circumstances. ***Vannatta I***, 324 Or at 522 n10. In the parlance of Measure 47, those prohibitions are "limits."

(2) THE TERM "LIMITATIONS" IN § (9)(F) DOES NOT EQUATE TO ONLY "NUMERIC LIMITS."

The Court of Appeals' opinion seeks to conclude that the term "limitations" in § (9)(f) must refer only to quantitative limits on the amounts of permissible campaign contributions and expenditures.

First, even if that were true, the above-mentioned five sets of limitations are quantitative, particularly in light of Measure 47's definition of a "prohibition" as "a numeric limit of zero." Section (9)(d), following (4).

Second, the term "limitations" is not explicitly defined in Measure 47, but § 9(d)(1) makes clear that the term is not exclusive to numerical limits. Section (9)(d)(1) distinguishes among "numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits."

Third, the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed 2000) defines "limitation" as:

1. The act of limiting or the state of being limited.
2. A restriction.
3. A shortcoming or defect.
4. Law: A specified period during which, by statute, an action may be brought.

Thus, a "limitation" is not necessarily a numerical limitation.

Fourth, the Court of Appeals offered a definition of "limitation" from WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002) [hereinafter "WEBSTER'S"], which is not substantially different, in an attempt to establish that "limit" must somehow have a numerical component: "a prescribed

maximum or minimum amount, quantity or number." 238 OrApp at 507.[18] But that is the fifth definition offered. The first four definitions do not refer to numbers.[19]

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18. This is an example of the Court of Appeals making arguments and consulting sources that no party offered. No party argued that "limitations" by definition refers to "things that prescribe a maximum or minimum amount," and no party cited any dictionary definition of "limitation" or "limit".

19. WEBSTER'S defines "limitations" by reference to "limits."

    "Limit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2002). http://unabridged.merriam-webster.com (24 Sep. 2011) (examples omitted):

    1 a : geographical or political boundary : BORDER, FRONTIER -- often used in plural

    b limits plural :the place or area enclosed within a boundary : BOUNDS

    2 a : something that bounds, restrains, or confines -- usually used in plural

    b : the utmost extent : a point beyond which it is impossible to go

    3 : LIMITATION <the sadness is without limit -- Shakespeare> <her opportunity is practically without limit other than the limitation of her own ability -- G.W.Johnson>

    4 : a determining feature or differentia in logic

    5 : a prescribed maximum or minimum amount, quantity, or number as

    a : the maximum quantity of game or fish that may be taken legally in a specified period

(continued...)

Fifth, the Court of Appeals further sought to restrict the definition of "limitations" to numerical limits by emphasizing that "the statutory language is 'limitations *on*' contributions or expenditures--and not 'limitations *relating to*' contributions or expenditures." 238 OrApp at 507.[20] The Court offered no references to support the contention that "on" means something different than "relating to" or has any numeric component. WEBSTER'S definition of "on" indicates no such restriction; it includes:

> "with regard to : with reference or relation to : ABOUT <agreed on a price> <a monopoly on wheat> <a satire on society> <at variance on what to do>

WEBSTER'S states that the word "about" means:

> 4 a -- used as a function word to indicate that which is dealt with as the object of thought, feeling, or action <resentment about this state of affairs> or that to which reference is made <the most exciting thing about the adventure>
>
> b : with regard to : CONCERNING
>
> c : on the subject of <a novel about Spain>

No definition of "about" suggests a numerical limitation.

19.(...continued)

> b (1) : a maximum established for a gambling bet, raise, or payoff
>
> (2) : an agreed time for ending a card game
>
> (additional definitions omitted)

20. This is another example of the Court of Appeals making arguments and consulting sources that no party offered. No party argued that "limitations *on*" is different from "limitations *relating to*."

Sixth, the Court of Appeals' opinion offers in footnote 13 an attempt to establish that "limits" must mean only numerical limits. Yes, parts of Measure 47 indeed refer to numerical limits as "limits," as when it refers to the size of contributions and avoiding the "adverse effects of large contributions." But other parts of Measure 47 refer to non-numerical limits as "limits." As noted above, § (9)(d)(1) distinguishes among "numeric limits or thresholds, percentage limits or thresholds, time periods, or age limits." No one has suggested any constitutional problem with any of Measure 47's percentage limits or age limits.

Footnote 13 further notes that § (1)(a) refers to "the prohibitions, limits, and reporting and disclosure requirements of this Act," further seeking to differentiate "limits" from other elements of Measure 47. But Measure 47 itself states that a "prohibition" is "a numeric limit of zero."

The Court of Appeals' opinion claims that recognizing that "limitations" can be non-numeric and can refer to existing Oregon restrictions other from those "akin" to the numeric limits of Measure 9 of 1994 "is implausible, because it would render section (9)(f) gratuitous" or "meaningless" or "illusory." 238 OrApp at 754-55. This is reasoning in reverse. Having otherwise concluded that § (9)(f) must have put "this Act" in suspension, the Court could not refute Plaintiffs' argument that the § (9)(f) condition has not been met--because, literally, the Oregon Constitution on the effective date of Measure 47 did allow some, but not all, limitations on political campaign contributions or expenditures. Section (9)(f) is not gratuitous, merely because the condition it

contains has not been met. We dare say that thousands of Oregon statutes contain conditions that have not been met. Section (9)(f)'s "prerequisites" are not "illusory," as the Court of Appeals claims.[21] Instead, those prerequisites have simply not been met.

3. EVEN IF THE § (9)(F) CONDITION HAS BEEN MET, SOME PARTY MUST PROVE THE UNCONSTITUTIONALITY OF THE SPECIFIC PROVISIONS OF MEASURE 47.

Even if the § (9)(f) condition has been met, the consequence is merely that the limitations in Measure 47 are suspended, pending the outcome of litigation to determine their validity. This is that litigation, as was recognized by the Circuit Court, Letter Opinion (Horton ER 46):

> As such, intervenors' potential injury is contingent on either a change in the Constitution, which is speculative, or the Court's determination that Measure 47 in whole or part can become effective as the Hazell plaintiffs urge here, which, at least theoretically, could happen in this litigation.

As explained by the Hazell Opening Brief (p. 27), the consequence of the § (9)(f) condition being met is merely the conduct of litigation on the

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21. The Court of Appeals states it is "constrained from attributing such an [illusory] intent to the citizens of Oregon." Yet, the Court of Appeals' opinion attributes to the citizens of Oregon the intent to adopt, after extensive public debate over a period of years, a campaign finance reform statute that is utterly meaningless. Under the Court of Appeals' opinion, adoption of Measure 47 meant nothing, because the statute is not in operation and never can go into operation (as there will be no future occasion for the Oregon Supreme Court to decide whether the limitations of Measure 9 of 1994 are constitutional; see p. 14 of this brief).

constitutionality of Measure 47's substantive limitations. Defendants have not contradicted this.

Thus, Plaintiffs could concede that the § (9)(f) condition has been met, which would mean that the limitations in Measure 47 are not in effect until their constitutionality has been determined by the Oregon Supreme Court. In this very litigation, Plaintiffs have contended and shown that the Measure 47 limitations are constitutional, while Defendants have denied that. The issues regarding the constitutionality of those limitations have been briefed.

So, even if the § (9)(f) condition has been met, it is now incumbent upon the Court to determine the substantive constitutionality of Measure 47's limitations, which requires examining each provision to determine its validity. And proceeding to those determinations would allow the Court to bypass the entire discussion about § (9)(f).

4. THE COURT OF APPEALS' CONSTRUCTION OF § (9)(f) IS INTERNALLY ILLOGICAL.

Neither the trial court nor the Court of Appeals addressed Plaintiffs' argument that their construction of § (9)(f) lacks internal logic. Illogical construction of statutes is highly disfavored. ***Hollinger v. Blair***, 270 Or 46, 53-54, 526 P2d 1015 (1974). The "customary rule [is] that unconstitutional and illogical results are to be avoided in construing statutes." ***General Electric Cr. Corp. v. Oregon State Tax Com'n***, 231 Or 570, 590, 373 P2d 974 (1962).

> "Notwithstanding occasional flights of fancy that may test the proposition, the law necessarily and correctly presumes that

> Legislatures act reasonably, knowingly, and in pursuit of sensible public policy. When there is a legitimate issue of interpretation, therefore, courts are required, to the extent possible, to avoid construing a statute in a manner that would produce farfetched, absurd, or illogical results which would not likely have been intended by the enacting body."

State v. Cervantes, 232 Or App 567, 587-88, 223 P3d 425 (2009) (quoting ***Kilmon v. State***, 394 Md 168, 905 A2d 306, 311 (2006)

a. How can § (9)(f), which is part of "the Act," place the entire Act (which must include § (9)(f) itself) in suspension?

That would mean that § (9)(f) itself would be in suspension and therefore would not be in operation to suspend any other part of "the Act."

b. How can the specific limitations in Measure 47 be ruled unconstitutional without examining those specific limitations?

Defendants did not claim that any particular substantive provision of Measure 47 was in conflict with the Oregon Constitution. The Court of Appeals did not engage in specific review of any substantive provision of Measure 47 but ruled that:

(1) campaign contribution and expenditure limits akin to those discussed in ***Vannatta I*** are contrary to the teachings of ***Vannatta 1***, *supra*, and ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006); and

(2) this generic conclusion somehow places all of Measure 47 into limbo, except § (9)(f) itself.

The Court of Appeals interpreted "such limitations" in § (9)(f) as referring to "prohibitions or restrictions akin to those deemed unconstitutional in

Vannatta I." 238 Or App at 512. But the words "such limitations" clearly refer to the limitations in Measure 47 itself, as shown at pages xx-xx *ante*.

C. THE COURT OF APPEALS' OPINION DOES NOT APPLY REASONED CONSTITUTIONALITY ANALYSIS TO THE SUBSTANTIVE PROVISIONS OF MEASURE 47.

The Court of Appeals' opinion declares some unspecified part or parts of Measure 47 to be unconstitutional but fails to engage in reasoned constitutional analysis.

Assume that a party had filed suit to challenge the constitutionality of the substantive, non-§(9)(f) provisions of Measure 47 and had made the same arguments on that subject that were presented to the trial court and Court of Appeals by Defendants and Intervenors. Judgment would surely have been granted against them, as there was presented no analysis of any specific substantive (non-§(9)(f)) provision of Measure 47 sufficient to prove unconstitutionality. Defendant added a few additional claims about unconstitutionality of those provisions before the Court of Appeals, but none were presented at a level that would warrant a conclusion of unconstitutionality.

Yet, the outcome of Court of Appeals' opinion depends upon its conclusion that there is something unconstitutional about the non-§(9)(f) provisions of Measure 47.

D. THE COURT OF APPEALS' OPINION DOES NOT APPLY *VANNATTA v. OREGON GOVERNMENT ETHICS COMMISSION* TO MEASURE 47.

The Court of Appeals opinion does not cogently apply ***Vannatta II*** (***Vannatta v. OGEC***), *supra*, to Measure 47, disregarding the analysis of Plaintiffs in a Supplemental Memorandum of Primary Authorities to Opening Brief of Hazell Plaintiffs (February 24, 2010) and in the Hazell Opening Brief (p. 41).

Vannatta I, 324 Or at 521, stated that a political campaign contribution is necessarily an "expression":

> However, the contribution, in and of itself, is the contributor's expression of support for the candidate or cause--an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.

Vannatta II, 347 Or at 464-65, expressly withdrew the above statement:

> First, the court's statement in ***Vannatta I*** that campaign contributions were constitutionally protected forms of expression regardless of the "ultimate use to which the contribution is put" was unnecessary to the court's holding. On further reflection, we conclude that that observation was too broad and must be withdrawn. Second, because ***Vannatta I*** assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message, this court did not squarely decide in ***Vannatta I*** that, in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a matter of law.

Vannatta II illustrates that ***Vannatta I*** is not immutable and that a statute which prohibits or limits the provision of money to candidates must be itself evaluated for its relationship with Article I, § 8, of the Oregon Constitution.

1. *VANNATTA II* RECOGNIZES THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY BY PUBLIC OFFICIALS OR CANDIDATES.

Vannatta II ruled that, while persons subject to the gift limits had a free speech right to offer unlimited gifts to public officeholders and candidates, there was no corresponding right of public officeholders or candidates to accept gifts. 347 Or at 457-67.[22] This Court concluded that, while offering gifts is "expression," receiving gifts is not "expression," and actually "giving gifts to public officials [or candidates] is nonexpressive conduct." 347 Or at 465. Further, "the act of delivering property to a public official [or candidate] is nonexpressive conduct." 347 Or at 462.[23]

> Lobbyists also may intend their gift-giving to communicate political support or goodwill toward the recipients-as this court has observed, "most purposive human activity communicates something about the frame of mind of the actor." ***Huffman and Wright Logging Co.***, 317 Or at 450, 857 P.2d 101. But something more is required to elevate mere purposive human activity into protected expression. To the extent that the gift receipt restrictions interfere with gift-*giving* by lobbyists, they impede only nonexpressive conduct. Moreover, the array of political expressions and communicative intentions that may

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22. ***Vannatta II***, 347 Or at 458, stated:

> The statutory restrictions are thus confined to the act of a public official, a candidate, or a relative or member of their household, in taking possession or delivery of a gift valued in excess of statutory limits.

23. Although both of these statements refer only to "public officials," the Court clarified that it used the term "public officials" to refer to anyone covered by the statutory phrase "a public official, candidate for public office or a relative or member of the household of the public official or candidate." ***Vannatta II***, 347 Or at 455 n6.

> surround the giving of gifts by lobbyists does not immunize the nonexpressive conduct of gift-giving from legislative regulation.

347 Or at 462-63.

This description of gifts is fully applicable to campaign contributions. Making a campaign contribution is delivering property (usually money but sometimes in-kind services) to a candidate. Like gift-givers, campaign contributors "may intend their [contributions] to communicate political support or goodwill toward the recipients." Like limiting receipt of gifts, limiting receipt of campaign contributions does not "apply restrictions to [contributors'] particular words or expression." A campaign contribution to a candidate may mean, "I support you" or "I oppose one or more of your opponents" or "I want you to view me favorably, after you are in office" or "I expect you to do what I want while in office" or "My husband wanted me to do this," etc. Measure 47 does not apply its restrictions to any of these particular words or expressions.[24]

Further, Measure 47 does not prevent any individual from expressing whatever is being expressed via a campaign contribution (of up to $500 in any

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24. ***Vannatta II***, 347 Or at 460, described ***Fidanque v. See Fidanque v. Oregon Govt. Standards and Practices***, 328 Or 1, 8, 969 P2d 376 (1998):

> [T]his court did not express or imply that public officials or others are entitled to take delivery of property or other largess, free of regulation, simply because lobbyists proffer it in connection with a political communication. Nor did ***Fidanque*** express or imply that those who listen to and interact with lobbyists--public officials and candidates for office, for example--have a constitutional free expression right to receive gifts of property, free of governmental regulation.

statewide race and $100 in a non-statewide race).[25] As noted in ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976), expression of support occurs when a contribution is made, regardless of its size. 424 US at 635-36. Measure 47 also allows any individual to make independent expenditures of up to $10,000 per year on races for non-federal Oregon offices.

Vannatta II applied to campaign contributions would find that, while persons subject to the contribution limits of Measure 47 may have a free speech right to offer unlimited contributions, there is no right of candidates or political committees to accept such contributions. Measure 47, § (3), contains in separate subsections:

(1) a ban on contributions by corporations and unions;

(2) limits on contributions by individuals; and

(3) a ban on the acceptance of any contribution not "in accordance with the contribution limits set forth in this Act."

Thus, like the gift limits, Measure 47 would be fully effective, even if only the limits on accepting contributions were upheld, because contributions (or gifts) which cannot lawfully be accepted also cannot, in practice, be made.

2. *VANNATTA II* RECOGNIZES THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY THAT CAN BE USED FOR NON-EXPRESSIVE PURPOSES.

Vannatta II's withdrawal of ***Vannatta I***'s statement appears to remove, at a minimum, free speech protection for contributions which can be used for

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25. The primary and general elections are considered two separate races.

purposes other than "to communicate political messages." *Id.*, 347 Or at 465. As pointed out in the BGP Amicus Brief (pp. 15-19) (which we incorporate by reference), Oregon law (apart from Measure 47 itself) presently allows campaign contributions to be used for many other non-communicative purposes, including "trips to Hawaii or elsewhere to meet with potential contributors" and "payments to friends or relatives for undocumented office work."[26] No party has disputed this. More recent examples (in 2011 alone) of use of campaign contributions in Oregon for purposes other than communicating with voters include:[27]

1. Bar tabs for meetings with lobbyists in Salem;

2. Hotel rooms in Salem for overnight lodging of legislators;

4. $400 per month in paid to the legislator for using a room in his home as his "District Office";[28]

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26. That brief also notes that ORS 260.407 allows campaign funds to be re-gifted by the receiving candidate or committee to any Internal Revenue Code § 501(c) organization, a category which includes religious and other charities under § 501(c)(3), social welfare organizations under § 501(c)(4), labor unions under § 501(c)(5), business leagues under § 501(c)(6), social clubs under § 501(c)(7), and so on through § 501(c)(27).

27. The Hazell Plaintiffs request judicial notice of the reporting of these incidents, pursuant to ORS 40.060, 40.065.

28. Examples 1-3 are documented in Nigel Jaquiss, *Perfectly Legal: How one lawmaker uses campaign money to subsidize his mortgage, pay his bar tabs and explore Canada*, WILLAMETTE WEEK, May 11, 2011 (http://www.wweek.com/portland/article-17463-perfectly_legal.html):

> Although the 2007 reform made it harder to give pricey gifts to lawmakers, it didn’t bar gifts disguised as campaign contributions. * * *

(continued...)

5. Purchase and installation of a $7,400 security system at the home of the Governor's former wife;[29] and

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28.(...continued)

> State elections director Steve Trout says those and other expenditures appear to fall within statute, which says [campaign] funds may be used for "any lawful purpose." * * *
>
> State filings show, for instance, that since Jan. 1, 2009, [Rep. Mike] Schaufler has charged his campaign nearly $6,000 for 91 separate visits to Magoo's, a Salem bar. Over the same period, he's charged his campaign $2,434 for 68 visits to another Salem bar called the Brick Bar & Broiler. * * *
>
> Since Jan. 1, 2009, his campaign paid for 58 nights at the Phoenix Grand Hotel, totaling $7,392. Schaufler says long Salem hours make commuting difficult.
>
> When the Legislature is out of session, he "rents" a district office in his home for $400 a month. That put nearly $5,000 in his pocket last year, which is allowed provided he charges himself a fair market rate.

29. Nigel Jaquiss, *Kitzhaber Uses Campaign Funds for Home Security System*, WILLAMETTE WEEK, July 21, 2011, states:

> Oregon's notoriously lax campaign finance laws mean that although candidates and elected officials cannot accept gifts worth more than $50, they are allowed spend campaign funds on virtually anything. But an expenditure this week by normally frugal Gov. John Kitzhaber was unusual even by Oregon pols' free-spending standards.
>
> On July 15, Kitzhaber reported using nearly $7,400 in leftover campaign funds to purchase a home security system [for the Portland home of his ex-wife].

(http://wweek.com/portland/blog-27411-kitzhaber_uses_campaign_funds_for_home_security_sy.html)

6. A two-week trip for 17 Oregon legislators (and family members and friends) to and around The People's Republic of China.[30]

Since all contributions to candidates or committees can be used for such non-communicative purposes, ***Vannatta II*** has rendered those contributions clearly beyond the protection of ***Vannatta I*** and subject to limits and/or prohibitions.

The distinction between "gifts" and "campaign contributions" is illusory:

1. Neither "gifts" nor "campaign contributions" need to be spent on communications. As noted above, campaign contributions can be used for many purposes other than to fund communications with voters about the candidacy.

2. Both "gifts" and "campaign contributions" can be spent on communications, if the candidate so chooses.

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30. Harry Esteve, *Oregon lawmakers, spouses, family members head to China for trade mission*, THE OREGONIAN, August 24, 2011, wrote:

> Rep. Dave Hunt's son is going. Rep. Matt Wingard is bringing his mom.
>
> Watch out China -- here comes Oregon. A total of 17 state legislators, along with their spouses or other family members and a handful of business leaders, are headed to the Fujian province for a two-week trade and goodwill mission.
>
> * * * In all, the delegation totals slightly more than three dozen.
>
> The costs of the trip are being handled differently by each lawmaker, said Angela Wilhelms, chief of staff for Hanna. * * * Some are using money that was donated to their campaign's political action committee.

(http://www.oregonlive.com/politics/index.ssf/2011/08/oregon_lawmakers_spouses_famil.html)

There is nothing that prevents a candidate who receives a gift from using it in a communicative manner. No law stops a candidate who receives, say, a $50 gift from a lobbyist (or anyone else) from using that $50 to fund her campaign activities.[31] Thus, if gift-receiving and gift-giving are not expressive, then contribution-giving and contribution-receiving are also not expressive.

It is fair to say that the limits on campaign contributions in Measure 47 are operational under § (9)(f), because "such limitations" have already been found allowable in ***Vannatta II***. Under Oregon law, campaign contributions are the

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31. Apart from Measure 47, the candidate can use a gift of any size to fund her campaign communications, as long as she reports it to the government pursuant to ORS Chapter 260. Note that ORS 260.005 (3) defines "contribution" (emphasis added) as:

> (a) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> > (A) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or
> >
> > (B) To or on behalf of a candidate, political committee or measure;
>
> Thus, "contribution" includes the "gift * * * of money * * * to or on behalf of a candidate." And the candidate can use any "gift" to fund campaign communications.

functional equivalent of gifts (as shown above and in the BGP Amicus Brief, pp. 16-19), so limits on them are just as valid as limits on gifts.[32]

E. THE COURT OF APPEALS FAILED TO ADDRESS THE DIFFERENCES BETWEEN MEASURE 47 AND MEASURE 9 OF 1994.

The Court of Appeals generalized that the limitations in Measure 47 are so similar to those in Measure 9 of 1994 that it disregarded the significant differences documented by Plaintiffs, including:

1. Measure 47 has extensive legislative findings of fact supporting and explaining the need for and state interest in each substantive provision. See FEO Amicus Brief, pp. 2-8.

2. Measure 47's limits applicable to corporations, unions, and other entities are entirely separate from, and severable from, its limits applicable to individuals. Measure 9 defined all individuals and entities as "persons" and then adopted limitations applicable only to "persons," thus not allowing the courts to preserve the constitutionality of limits applicable only to non-individuals. ***Vannatta I***'s legal conclusion was expressly based upon the rights of individuals under Article I, § 8, not the rights of non-human entities.

3. Measure 47 has a different severability clause than Measure 9, which instructed the courts "to conduct a 'clean-up' function, i.e., to examine the impact of our constitutional rulings on the balance of the provisions of Measure 9 and then to eliminate those additional sections of the measure that become ineffective as a consequence." ***Vannatta I***, 324 Or at 546.

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32. Campaign contributions are not restricted by the gift limits, because ORS 244.020(5)(b) excludes "contributions as defined in ORS 260.005" from the definition of "gift." "Contributions" defined in ORS 260.005 are campaign contributions. Note, thus, that the ORS Chapter 244 limits on gifts do not actually apply to "gifts * * * of money * * * to or on behalf of a candidate."

4. Measure 47 has numerous independently enforceable provisions against which there are no cognizable constitutional challenges, including disclosure and reporting requirements that do not set numeric limits on political contributions or expenditures.

5. Measure 47 has express instructions to the courts regarding preserving the effectiveness of its provisions by means of narrowing interpretations (§ (9)(e)).

6. Measure 47 has a clause that adjusts the numeric limits and thresholds to levels acceptable under the United States Constitution and Oregon Constitution (§ (9)(d)).

Nor did the Court of Appeals address any of these arguments, several of which defeat its generalized blanket declaration that all limits on political campaign contributions "akin" to those of Measure 9 of 1994 are invalid.

1. ***Vannatta I*** does not apply to many of the specific limitations of Measure 47.

2. A better review of historical documents than was practicable in the ***Vannatta I*** deliberations shows clear historical evidence that limits on political campaign contributions were considered consistent with free speech guarantees;

3. ***Vannatta I*** itself should be reexamined, a process already begun in ***Vannatta II***.

No statement in an opinion of this Court is forever immune from all scrutiny or revisiting. ***Stranahan v. Fred Meyer***, 331 Or 38, 54, 11 P3d 228 (2000). Yet, the Court of Appeals decision depends upon the notions that ***Vannatta I***:

1. Applies to the specific limitation in Measure 47, without having examined those specific limitations;

2. Was based upon a review of historical documents that could not be improved (although ***Vannatta I*** examined virtually no historical documents apart from WEBSTERS DICTIONARY); and

3. The conclusions in ***Vannatta I***, even if they do apply to the specific limitations in Measure 47, are forever immutable and cannot be reexamined.

F. THERE IS NO REMOTELY COGNIZABLE CHALLENGE TO LEAST 12 SEVERABLE AND INDEPENDENTLY ENFORCEABLE PROVISIONS OF MEASURE 47.

Section (9)(f) provides no basis for invalidating the severable and independently enforceable parts of Measure 47 which change requirements for disclosure and reporting of campaign contributions and expenditures.

1. MEASURE 47 CONTAINS A SPECIFIC SEVERABILITY CLAUSE.

See Hazell Opening Brief, pp. 13-14.

2. MEASURE 47 CONTAINS NUMEROUS INDEPENDENT PROVISIONS NOT SUSCEPTIBLE TO CHALLENGE UNDER *VANNATTA*.

Hazell v. Brown, 238 OrApp at 492, refers to "various, ancillary disclosure and reporting requirements" enacted by Measure 47. This implies that those requirements somehow merely implement the numeric limits on the amounts of allowable contributions or expenditures, which is not the case. The entire text of Measure 47 is reproduced at Horton ER 11-19. Among the independently enforceable provisions in Measure 47 are the 12 listed at Hazell Opening Brief, pp. 14-16.

Whether or not Measure 47's numeric limits on campaign contributions are upheld, these provisions are clearly capable of being enforced and are not void

for lack of purpose. ***Vannatta I***, 324 Or at 546. Consequently, there is no legal basis for Defendants to refuse to implement and enforce these provisions.

V. SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR FIRST CLAIM FOR RELIEF.

A. *VANNATTA*'S EVALUATION OF MEASURE 9 OF 1994 DOES NOT APPLY TO INVALIDATE THE LIMITS IN MEASURE 47.

In the Court of Appeals' opinion, there is an underlying conclusion that Measure 47's numeric limits on campaign contributions must be unconstitutional under ***Vannatta I***. But ***Hazell v. Brown*** never actually examined those specific limitations in a non-superficial way and never addressed the arguments of the Hazell Plaintiffs, the Horton Plaintiffs, and the two *amicus curiae* that the Measure 47 system of limits is considerably different from the Measure 9 of 1994 system in several ways that render the Measure 47 numeric limits valid under ***Vannatta I***.

The Hazell Opening Brief (pp. 28-49) presented at length numerous cogent reasons that ***Vannatta I*** does not apply to invalidate the Measure 47 limits. The Court of Appeals' opinion does not address any of this argument, and Defendants have barely mentioned it. We incorporate those arguments, list here the outline of this argument and update some of our discussion below.

1. UNLIKE MEASURE 47, MEASURE 9 OF 1994 WAS NOT SUPPORTED BY LEGISLATIVE FINDINGS OF FACT.

This is discussed further in the FEO Amicus Brief, pp. 2-10.

2. UNLIKE MEASURE 9 OF 1994, MEASURE 47 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS.

a. Unlike Measure 9 of 1994, Measure 47 Contains Severable Limitations on Campaign Contributions and Independent Expenditures by Corporations and Unions.

The Hazell Opening Brief (pp. 29-30) and particularly the BGP Amicus Brief (pp. 1-14) establish that ***Vannatta I*** left open the door for limits on political contributions or spending by corporations, unions, and other entities. ***Vannatta I***, 324 Or at 522 n10.

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta I, 324 Or at 524. Further, in ***Vannatta* I** the Court always referred to the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or at 522-23. Corporations and unions are not people or voters or citizens. ***Vannatta I*** does not even once refer to any rights of unions or corporations.

Hazell v. Brown quotes ***Meyer v. Bradbury***, 341 Or 288, 299, 142 P3d 1031 (2006) for the conclusion that "[u]nder Oregon law, both campaign contributions and expenditures are forms of expression protected by [Article I, section 8], thus making legislatively imposed limitations on individual political campaign contributions and expenditures impermissible." 238 Or App at 511. Notice the word "individual." Unlike Measure 9 of 1994, Measure 47 in

separate, severable sections contains limits on the political campaign contributions and expenditures of non-individuals--corporations, unions, and other entities--and the Hazell Plaintiffs have shown how those limits are both valid and severable. Hazell Opening Brief, pp. 29-30. This illustrates the need for the Court to examine the specific provisions of the statute at issue and not to rely on sweeping generalities derived from past cases dealing with different statutes.[33]

In sum, Measure 47, §§ (3) and (6), contains severable limitations on political contributions and expenditures by corporations, unions, and other entities. No one has stated why such independently enforceable and severable limits are in violation of ***Vannatta I***. And § (11) of Measure 47 demands that such severable limitations be preserved.

b. Unlike Measure 9 of 1994, Measure 47 Contains Severable Limitations on Campaign Contributions and/or Independent Expenditures by Corporations, Unions, and other Entities Authorized by Article II, Section 22, of the Oregon Constitution.

In addition, ***Vannatta I*** discusses Article II, § 22, and concludes that it may well remove Article I, § 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate

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33. And, as noted in the Hazell Opening Brief (p. 6 n3), the quotation from ***Meyer*** was *dicta*. ***Meyer*** was "separate amendment" challenge to Measure 46, such as ***Armatta v. Kitzhaber***, 327 Or 250, 959 P2d 49 (1998), and its progeny. No party there needed to argue that the ***Vannatta*** analysis did or did not apply to Measure 47; it was not an issue.

in question. 324 Or at 527. The reason the Court found that Article II, § 22, did not validate the limits in Measure 9 of 1994 was:

> No party has separately argued for any partial application of Article II, section 22, to corporations, unions, or PACs. Article II, section 22, has been presented to us only in the form of an "all or nothing" pre-emption. As we have explained, that argument is not well taken.

324 Or at 527 n13.

Unlike the litigants in ***Vannatta I***, the Hazell Plaintiffs have argued for partial application of Article II, § 22, to validate all of the limitations in Measure 47 that do not pertain to individuals residing inside the voting district of the candidate receiving the contributions. See BGP Amicus Brief, pp. 7-14. Again, in Measure 47 the contribution limits on non-individuals are separate and severable.

B. *VANNATTA I* RELIED UPON INCOMPLETE HISTORICAL ANALYSIS OF ARTICLE I, SECTION 8, OF THE OREGON CONSTITUTION.

Thanks to months of research and the creation of Google Books, an historical record far superior to any considered in ***Vannatta I*** is presented in the Horton Opening Brief (pp. 40-49) and the Horton Opening Brief on Review (pp. 35-36). That record shows that limits on political campaign contributions and expenditures were a recognized way of limiting undue influence in elections and campaigns, well before 1858.

C. *VANNATTA I* RELIED UPON INCOMPLETE HISTORICAL ANALYSIS OF ARTICLE II, SECTION 8, OF THE OREGON CONSTITUTION.

Article II, § 8, of the Oregon Constitution states:

> The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

Vannatta I concluded that Article II, § 8, does not authorize limitations on campaign contributions but should be construed narrowly to allow regulation only of conduct which might impinge upon the act of voting. Again, an historical record far superior to any considered in ***Vannatta I*** is presented in the Horton Opening Brief (pp. 20-40) and the Horton Opening Brief on Review (pp. 32-59). It shows that by 1857 the term "election" had come to include the "campaign" phase of the process of choosing public officials. The consequence is that the limitations of Measure 47 are fully authorized (as "election" regulations) by Article II, § 8, of the Oregon Constitution, which (as the more specific provision) here overrides Article I, § 8.[34]

D. *VANNATTA I*'S CONCLUSIONS BASED ON ORIGINALISM ARE CONTRADICTED BY THE NUMEROUS STATES HAVING THREE FACTORS IN COMMON WITH OREGON.

See Hazell Opening Brief, pp. 31-33.

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34. ***Vannatta I*** appeared to accept the contention of the Secretary of State that, if "elections" were interpreted to include the campaign phase, then Article II, § 8, would "remove[] the contribution and expenditure restrictions imposed by Measure 9 from any protection under Article I, § 8." 324 Or at 528.

E. INDIANA, THOUGHT TO BE THE SOURCE OF OREGON'S ARTICLE I, § 8, HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

See Hazell Opening Brief, pp. 34-37.

F. THE HISTORICAL ANALYSIS IN *VANNATTA I* PLACED THE BURDEN OF PROOF ON THE WRONG PARTY.

See Hazell Opening Brief, pp. 37-39.

G. THE STATE CLAIMS IN BRIEFING ELSEWHERE THAT MONEY PROVIDED TO INFLUENCE A PUBLIC OFFICIAL OR CANDIDATE CAN BE LIMITED UNDER ARTICLE I, SECTION 8.

See Hazell Opening Brief, pp. 39-40. As shown at pages 39-47 of this brief, *ante*, this Court in ***Vannatta II*** concluded that laws can validly limit the receipt of property by public officials and candidates, even if that transfer is intended to convey a message to the recipient (public official or candidate).

H. LIMITS ON CAMPAIGN CONTRIBUTIONS AND INDEPENDENT EXPENDITURES ARE NOT RESTRICTIONS ON EXPRESSION OR THE CONTENT OF SPEECH.

See Hazell Opening Brief, pp. 41-45. As shown at pages 39-47 of this brief, this Court in ***Vannatta II*** has withdrawn the statement in ***Vannatta I*** that "the contribution, in and of itself, is the contributor's expression of support for the candidate or cause." This Court now recognizes that transfers of property (including money) are not expression.

We also argued here a somewhat unrelated point, that limits on contributions do not apply to the context of any expression and are akin to

content-neutral time, place, and manner restrictions upheld in ***Outdoor Media Dimensions, Inc. v. Dept. of Transportation***, 340 Or 275, 132 P3d 5 (2006) (size and placement of billboards), and in ***State v. Rich***, 218 OrApp 642, 180 P3d 744 (2008) (statute prohibiting "unreasonable noise").

Vannatta II has now recognized that transfers of property are not expression, so limits on such transfers are not "directed to the *substance* of any opinion or any subject of communication" and "do not refer to expression at all." ***State v. Moyer***, *supra*, 348 Or at 229. Thus, they must be "analyzed for vagueness or for as-applied constitutionality. *Id.* (citing ***State v. Plowman***, 314 Or 157, 164, 838 P2d 558 (1992), *cert denied*, 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993)). No one has claimed that any part of Measure 47 is vague, and there is no as-applied challenge to any of its limitations.

I. MEASURE 47 FOCUSES ON THE HARMS OF UNLIMITED CONTRIBUTIONS, NOT ON SUPPRESSING CONTENT OF THE SPEECH.

See Hazell Opening Brief, pp. 45-46.

J. LIMITS ON RECEIVING CAMPAIGN CONTRIBUTIONS ARE WITHIN THE INCOMPATIBILITY EXCEPTION TO ARTICLE I, SECTION 8.

See Hazell Opening Brief, pp. 46-47. This Court in ***Vannatta II*** reviewed the decision of the Circuit Court, which upheld (at the State's urging) the gift limits under the incompatibility exception from ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990). ***Vannatta II***, 347 Or at 459, did not reach that issue.

Vannatta I rejected the compatibility exception, based upon a undocumented recitation of history.

> Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions.

324 Or at 541. These statements were not supported by evidence in the record of the case or by citations to historical documents. In any event, these factual findings are now comprehensively contradicted by the specific findings of fact adopted by the voters of Oregon in Section (1) of Measure 47. These legislative findings are entitled to near complete judicial deference. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938).

K. IF NECESSARY, *VANNATTA I* SHOULD BE RECONSIDERED AND REVERSED.

Petitioners have also argued at length that ***Vannatta I***, for reasons other than those presented above, should be reconsidered and reversed. Those arguments were presented in the Horton Opening Brief (pp. 18-50)

The Hazell Opening Brief (pp. 48-50) also argued that the approach of ***Robertson***, *supra*, be abandoned, as applied to limits on campaign contributions and expenditures.

VI. THIRD ASSIGNMENT OF ERROR: THE COURT ERRED IN DENYING HAZELL PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR SECOND CLAIM FOR RELIEF.

The applicable facts, as alleged in the Complaint and not disputed by Defendants, are that the Hazell Plaintiffs and other Oregon residents and electors are irreparably harmed by Defendants' refusal to administer and enforce the provisions of Measure 47 other than their incorrect interpretation of § (9)(f), as alleged in the Complaint. Horton ER 1-10. Pursuant to ORS 28.080, ORS 183.486(1), ORS 183.490, and ORS 246.910, *inter alia*, the Hazell Plaintiffs are entitled to an order directing Defendants to administer and enforce all provisions of Measure 47, as of December 6, 2007, or all parts of Measure 47 that are not ruled to be unconstitutional.

VII. CONCLUSION.

The Court of Appeals in ***Hazell v. Brown*** erred in concluding that § (9)(f) placed Measure 47 into suspension. This Court should reverse that conclusion and, as § (9)(f) contemplates, examine the constitutionality of the substantive provisions of Measure 47. The Hazell Plaintiffs, Horton Plaintiffs, and amici have shown that the substantive provisions of Measure 47 pass constitutional

muster, particularly in light of ***Vannatta II***.

Dated: September 29, 2011

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP RULE 5.05 and ORAP 9.05(3)(a)

Length of Opening Brief

I certify that (1) the foregoing Opening Brief complies with the word-count limitation of ORAP 9.05(3)(a) and (2) the word count of this Opening Brief as described in ORAP 5.05(2)(a) is 13,875 words.

Type Size

I certify that the size of the type in this Petition for Review is not smaller than 14 point for both the text and footnotes as required by ORAP 5.05(4)(f).

Dated: September 29, 2011

/s/ Daniel W. Meek

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original OPENING BRIEF ON REVIEW OF PETITIONERS BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, and GARY DUELL by Efile this date and further that I SERVED it by Efile on the parties listed in No. S059246. I SERVED it also by emailing a true copy to each counsel below.

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