

IN THE SUPREME COURT OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI,
DAVID DELK, GARY DUELL, JOAN HORTON, and KEN LEWIS,

Plaintiffs-Appellants
Cross-Respondents,
Petitioners on Review,

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

Supreme Court S059245 (Control) S059246

**INTERVENOR-RESPONDENTS' RESPONSE TO MOTION TO
STRIKE PORTIONS OF ANSWERING BRIEF OF INTERVENOR-
RESPONDENTS AND BRIEF OF AMICUS CURIAE ACLU
FOUNDATION**

ARGUMENT

Petitioners on Review (Petitioners”) seek to strike those portions of Intervenors’ answering brief advancing Intervenor’s argument that Measure 47 is invalid, in its entirety, as a violation of Article I, section 21 of the Oregon Constitution. Although the Article I, section 21 issue was before and decided by the Court of Appeals, Petitioners claim that the issue is “not properly before this Court.” Petitioners pay little attention to, however, the rule that governs what issues are properly before the Court. That rule, ORAP 9.20 (2), provides:

“If the Supreme Court allows a petition for review, the court may limit the questions on review. If review is not so limited, the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court. The Supreme Court’s opinion need not address each such question. The court may consider other issues that were before the Court of Appeals.”

Thus, at a minimum, “the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided” by the Court of Appeals. And this Court may also consider any “other issues that were before the Court of Appeals,” whether or not a petition or response claims that a particular issue was erroneously decided. Obviously, such flexibility may be necessary from time to time to allow this Court to reach a complete, accurate and just resolution of case before it.

Petitioners focus on the question of whether Intervenors' response to the petition for review claims that the Article I, section 21 question was erroneously decided. The answer is that it does.¹ But this Court need not reach that issue because ORAP 9.20 (2) authorizes it to consider all questions before the Court of Appeals, irrespective of whether the response claimed it was erroneously decided. The dispositive issue here is thus whether this Court should commit, here and now, before the merits have even been briefed, that it will not exercise its option to consider the Article 1, section 20 question. Petitioners do not explain why this Court would want to tie its own hand in this regard, essentially waiving its authority to consider an important issue of constitutionality. There is no reason for this Court to do that before even considering the merits of the Article 1, section 20 arguments and deciding whether and how those arguments fit into the ultimate resolution of this appeal.

Finally, it is worth noting Petitioners fail to show any prejudice in allowing this Court to consider the arguments in Intervenor's brief. Intervenors

¹ ORAP 9.10 (1) provides that a party need file a response to the petition for review after the petition is filed and that, if no subsequent response is filed, "the party's brief in the Court of Appeals will be considered as the response." Intervenors did not file a subsequent response, so their brief in the Court of Appeals is their response. Intervenors' Court of Appeals brief argues extensively that it *would be* error if the Court of Appeals did not hold that Measure 47 is not invalid, in its entirety, as a violation of Article I, section 21. See, pages 1-3, 4-6, 8-28. Read in the context of a response to the petition, filed after the Court of Appeals decision, Intervenors' brief argues that it *was* error that the Court of Appeals did so hold. Intervenors response thus claims that the Article I, section 21 question was erroneously decided.

arguments certainly are not new to Petitioners. Petitioners addressed those arguments extensively in their briefs to the Court of Appeals, which are available to this Court. Petitioners can also address those arguments in their reply brief which has yet to be filed. If Petitioners find it necessary to request leave to file a longer reply brief to address those issues, Intervenors will not object.² In any event, notwithstanding any logistical issues regarding briefing, this Court should consider the Article I, section 21 question on its merits.

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² Although Respondents and Intervenors were each granted up to 18,000 words for their answering briefs, Respondents only consumed 11,397 and Intervenors only consumed 11,552. Petitioners should therefore have ample space in their reply brief to address these issues.

CONCLUSION

This court should not strike any portion of Intervenor's brief and should consider on the merits Intervenor's argument that Measure 47 is invalid, in its entirety, as a violation of Article I, section 21 of the Oregon Constitution.

DATED this 5th day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED the original INTERVENOR-RESPONDENTS' RESPONSE TO MOTION TO STRIKE PORTIONS OF ANSWERING BRIEF OF INTERVENOR-RESPONDENTS AND BRIEF OF AMICUS CURIAE ACLU FOUNDATION by Efile this date and further that I SERVED it by Efile on the parties listed below.

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