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.

Marion County Circuit Court No. 06C22473

CA A137397

SC S059245 (Control)
S059246

SUPPLEMENTAL ANSWERING BRIEF OF RESPONDENTS ON REVIEW, KATE BROWN, SECRETARY OF STATE OF THE STATE OF OREGON, AND JOHN R. KROGER, ATTORNEY GENERAL OF THE STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable MARY MERTEN JAMES, Judge

Opinion Filed: November 10, 2010
Before: Haselton, P.J., Armstrong, J. and Duncan, J.

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SUPPLEMENTAL ANSWERING BRIEF OF RESPONDENTS ON REVIEW, KATE BROWN, SECRETARY OF STATE OF THE STATE OF OREGON, AND JOHN R. KROGER, ATTORNEY GENERAL OF THE STATE OF OREGON

A. Introduction

As the state explained in its opening brief, contingent legislation like Measure 47 is both commonplace and constitutional. Notwithstanding this court's numerous decisions upholding such contingent legislation, however, intervenors Center to Protect Free Speech *et al*. (intervenors) insist that Measure 47 unconstitutional. Intervenors concede that the constitution allows the voters to adopt a law that will remain dormant until a contingency renders its provisions operative. (Intervenors Br 15-17). But according to intervenors, that is not what Measure 47 does. Intervenors contend that § (9)(f) does not suspend the *operative* date of Measure 47, but that it impermissibly purports to suspend the act's *effective* date, in violation of Article I, section 21 of the Oregon Constitution. (Intervenors Br 16). Intervenors are incorrect. As explained below, their argument depends on interpretation of Measure 47 that is flatly contrary to the intent of the voters and inconsistent with this court's case law.

B. Under *Hecker*, Measure 47's deferred operation clause is constitutional.

Measure 47's deferred-operation provision, § (9)(f), provides that the act will not "become effective" until laws allowing political campaign contributions or expenditures are constitutionally permissible. Intervenors argue that by making

the date upon which the law will "become effective" contingent on a future circumstance, the provision impermissibly delegates the legislative power, in violation of Article I, section 21. But this court already considered and rejected that argument in *State v. Hecker*, 109 Or 520, 545-47, 221 P 808 (1923).

At issue in *Hecker* was a death-penalty law that was enacted at a time when the Oregon constitution barred the death penalty. 109 Or at 532. The challenged law contained a section that provided that the act "shall take effect as soon as and whenever the constitutional provisions of section 36 of Article I of the constitution of the state of Oregon relating to the death penalty, and any amendment or amendments thereto, will permit." *Id*. at 539. The defendant argued that because the provision purported to make contingent the date on which the law would "take effect" it was an invalid attempt to alter the act's constitutionally mandated effective date. But this court rejected that argument.

This court concluded that the act's use of the words "shall take effect," meant that Chapter 20 *became a law* on its ordinary effective date (at the time, 90 days after its passage) but that the active *operation* of that law was postponed until the constitution was amended. 109 Or at 545-46 (emphasis added). With that construction, the court concluded that, although the challenged act *became law* at a time when it conflicted with the constitution, it was "saved" by postponing its

operation until such time as the constitutional conflict might be resolved. 109 Or at 547 (emphasis added). By construing "take effect" as a reference only to operative effect, and not the "effective date" of the law, the court avoided a construction of the statute that created a conflict with Article I, section 21.[1]

Section (9)(f) is a direct application of the method approved in *Hecker*: by its own terms, Measure 47 would *become law* on the date prescribed by the constitution—in this case, 30 days after the election pursuant to Article IV, section 1(4)(d), of the Oregon Constitution—but would not *operate* until such time as the limitations contained within the measure were constitutionally permissible.

C. Intervenors attempt to distinguish *Hecker* is without merit.

Despite the similarity between the deferred-operation provision at issue in *Hecker* and § (9)(f), intervenors argue that the reasoning of *Hecker* cannot be extended to this case. Intervenors concede that, when *Hecker* was decided, the words "effective" and "operative" were synonymous, as this court recognized. But in an effort to distinguish that case, intervenors insist that times have changed and

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[1] This court had earlier construed similar language and reached the same conclusion in *Fouts v. Hood River*, 46 Or 492, 499-500, 81 P 370 (1905) (statute that would "take effect" at an appointed time, depending on a specified contingency, was constitutional); and in *State v. Rathie*, 101 Or 339, 199 P 169

Footnote continued…

that the two words no longer mean the same thing. According to intervenors, "effective" now has a narrow, more technical meaning, which, when used in legislation, refers *only* to the date and which a law becomes enacted. (Intervenors Br 17-20). Intervenors point to various laws enacted over the years since *Hecker* that refer to provisions becoming "operative" rather than "effective," and argue that those laws demonstrate that the legislature understands the terms to have two separate meanings. *Id.* Based on these examples, intervenors claim that "legislation" now "carefully" distinguishes between "effective" and "operative." *Id* at 17.

This court does not need to decide whether "legislation" today carefully distinguishes between "effective" and "operative." Even if that proposition is true, it is irrelevant.

To ascertain the meaning of a word in a particular statute, this court does not ask how the word is used in "legislation" generally. Rather, this court asks what the word was intended to mean by those who enacted the particular statute. And in that regard, the underlying premise of intervenors' argument—that the meanings of

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(…continued)

(1921) (death penalty statute that would "take effect as soon as and whenever" the Oregon Constitution will permit was permissible)

"effective" and "operative" have changed and that the two words are no longer synonymous—is simply false.

In ordinary parlance, "operative" and "effective" are still synonymous, just as they were when this court decided *Hecker*. *Webster's* defines "effective" *inter alia* as "taking effect: VALID, OPERATIVE":

> ***1 a :*** capable of bringing about an effect : productive of results * * * **b :** capable of having its normal effect : able to function normally * * * **2 :** marked by the quality of being influential or exerting positive influence: **a :** exerting authority : carrying weight * * * **b :** able to accomplish a purpose : * * * **3 a :** capable of being used to a purpose * * * ***6 :*** *taking effect : VALID, OPERATIVE* * * *.

Webster's Third New Int'l Dictionary 724 (unabridged ed. 2002) (italics added; bold and uppercase in original; illustrations omitted). And *Webster's* similarly defines "operative" as:

> **1:** producing an appropriate of designed effect * * * **2:** having the power of acting : exerting force or influence.

Id. at 1581.[2] Webster's thesaurus lists synonyms of "effective" as "effectual, efficacious, efficient, fruitful, *operative*, potent, productive."[3] *See also Oxford*

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[2] Similarly, the *American Heritage Dictionary*'s definition of "operative" includes "Being in effect; having force; operating." *American Heritage College Dictionary* at 957 (3rd ed. 1997).

Desk Thesaurus at 137 (American Edition 1995) (citing "operative" as a synonym for "effective"). These references confirm that "operative" and "effective"—in modern, ordinary parlance—are often synonymous.

In light of the above, it is clear that "effective" has at least two senses that are relevant here. The first sense is that which intervenors identify, a narrow and more technical sense of "effective" that refers to the date in which a law becomes enacted. The second sense is a broader, more colloquial or "ordinary" sense, in which "effective" means "taking effect," or "operative." Used in that sense, something is "effective" if it has a present effect and "produces results." As the cases (including *Hecker*) involving contingent legislation demonstrate, a law can be "effective" in either of the two senses. Contingent legislation is legislation that is "effective" in the first sense on the date it becomes a law but does not become "effective" in the second sense until a contingency causes it to become operative.

In light of the two senses of the word "effective" just discussed, the issue presented here is simply this: Which of the two senses of the word "effective" did the voters intend § (9)(f) to have? More specifically: Did the voters understand

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(…continued)

[3] Webster's Online Thesaurus, available at http://www.merriam-webster.com/thesaurus/effective (last visited November 25, 2011).

and intend the word in its ordinary sense, in which case Measure 47 is constitutional just like the law in *Hecker*? Or did they intend it in the technical sense, in which case Measure 47 plainly violates Article I, section 21?

This court generally presumes that words used by voters are used in their ordinary sense. There is no reason to deviate from that rule here. As the state explained in its opening brief, the voters who adopted Measure 47 knew that CC&E limits were constitutionally impermissible. They intended, nevertheless, to enact a law that would put those limits in place in anticipation of future constitutionality. It was in accordance with that knowledge and desire that the voters approved a specific mechanism by which their intent would be put in effect. That mechanism was § (9)(f), which provided that the act would "be codified" upon passage but would not "become effective" until such time as the Oregon constitution allowed such limitations. In other words, the voters intended to put in place a deferred-operation provision of the kind upheld in *Hecker*, in order to shield the law from a constitutional challenge.

The voters' use of the terms "be codified" and "become effective" also demonstrates their understanding of a difference between making a law and enforcing the law. By providing that Measure 47 would "nevertheless *be codified* and shall become effective," the voters intended that it would become a part of

Oregon's system of laws as provided by Article IV, section 1(4)(d) of the Oregon Constitution, *i.e.* on its constitutionally "effective" date, but that it would not *take* effect, *i.e.*, become "operative," until some later date. Thus, contrary to intervenors' argument, the overlap between "effective" and "operative" observed by the court in *Hecker* continues to exist and, consequently, the analysis in *Hecker* properly guides this court's interpretation of those terms in this case.

Because the plain language of Measure 47 and this court's previous construction of similar provisions support the trial court's construction of § (9)(f), there is no need to resort to the legislative history or general maxims of construction. Even if this court were to look to the measure's history, however, that history does not require a different construction.

When considering the history of a provision adopted through the initiative process, the court considers, as legislative facts, other sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure. *Ecumenical Ministries*, 318 Or at 560 n 8. Such information includes the ballot title, arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure. *Id*.

Intervenors point to voters' pamphlet arguments for and against both Measure 47 and its companion Measure 46 (2006), and newspaper editorials about the two measures as evidence that the voters did not intend Measure 47 to "become law" unless Measure 46 were also approved. (Intervenors Br 24-25). Intervenors read too much into those statements. Although the statements demonstrate an understanding that the two measures were intended to work together, and a further understanding that, without a constitutional amendment, the limitations in Measure 47 would be barred, they do not offer any information about or explanation of how § (9)(f) would operate, and it is § (9)(f)'s construction that is at issue here. Accordingly, the legislative history does not offer the answer that intervenors suggest.

If after consideration of the text, context, and legislative history of a statute, the intent of the voters remains unclear, then the court resorts to general maxims of statutory construction to resolve the uncertainty. *PGE*, 317 Or at 312. Here, one obviously applicable maxim is that when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that those who enacted the law intended the constitutional meaning and will construe the statute accordingly. *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996). Notably, intervenors are asking the court to do just the

opposite. Intervernors are asking this court to assume that that the voters intended § (9)(f) to mean something that would render the law *obviously* unconstitutional. Intervenors fail to explain why the voters would have intended the law to mean something that is obviously unconstitutional. In any event, the court should decline to construe § (9)(f) in the manner intervenors suggest. The plausible, constitutional, construction of Measure 47 is that, just like the law in *Hecker*, Measure 47 became law, but was then suspended by its own terms until such time as it was constitutionally permissible. So construed, it does not violate Article I, section 21.

D. Conclusion

Intervenors argument that Measure 47 is unconstitutional rests on a mistaken interpretation of § (9)(f) and this court should reject it. In ordinary parlance, "effective" means "operative." If that is what the voters intended "effective" to mean when they adopted Measure 47, then the act is constitutional. And the text, context, and history of Measure 47 confirm that is exactly what the voters intended. The voters were adopting a deferred-operation provision just like that upheld in *Hecker* that would shield Measure 47 from direct review.

In arguing to the contrary, intervenors urge this court to ignore the ordinary meaning of the word "effective," to ignore *Hecker*, and instead to construe the

word in a more narrow sense—a sense that would make the law obviously unconstitutional. Intervenors fail to explain why this court should construe the law in manner that is both contrary to precedent and obviously unconstitutional when a constitutional construction is readily apparent and supported by this court's case law. This court should reject intervenors' argument and affirm the judgment of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 5, 2011, I directed the original Supplemental Answering Brief of Respondents on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system served upon Daniel Meek, Linda Williams, and Eric Winters, by using the electronic filing system. I further certify that on December 5, 2011 directed the Supplemental Answering Brief of Respondents on Review to be served upon Gregory A. Chaimov, John DiLorenzo and James Nicita, by mailing two copies, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE REGARDING BRIEF LENGTH

By order dated October 28, 2011, the court allowed the state to file a response brief of up to 18,000 words. On November 23, 2011, the state filed a response brief with 11,397 words. The state is filing this supplemental response brief to respond to arguments raised for the first time by intervenors. I certify that the word-count of this supplemental brief (as described in ORAP 5.05(2)(a)) is 2,276 words. Together with the state's original response brief, therefore, the combined length of the state's response briefs is 13,673 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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