

IN THE SUPREME COURT OF THE STATE OF OREGON

No. S059246

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

**PETITIONERS ON REVIEW
Plaintiffs-Appellants/Cross-Respondents,**

v.

**KATE BROWN, Secretary of State of the State of Oregon,
JOHN KROGER, Attorney General of the State of Oregon,**

RESPONDENTS ON REVIEW

and

**CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit
corporation, and FRED VANNATTA,**

RESPONDENTS ON REVIEW

**MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND
MEMORANDUM ON BEHALF OF THE BETTER GOVERNMENT
PROJECT IN SUPPORT OF PETITION FOR REVIEW OF
PLAINTIFFS-APPELLANTS/CROSS-RESPONDENTS
BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID
DELK, AND GARY DUELL ("HAZELL PLAINTIFFS")**

March 16, 2011

Review of the Opinion of the Oregon Court of Appeals (Case No. A137397)
Affirming the Judgment of Marion County Circuit Court
(Case No. 06C-22473) before The Hon. Mary Mertens James

Opinion by Oregon Court of Appeals: November 10, 2010
Author of Opinion: P.J. Haselton
Before: Haselton, P.J., Armstrong, J., Duncan, J.

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The interests of the applicant are as follows: The Better Government Project is a nonprofit organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. It was incorporated in Oregon in January 2007 (under the name "Oregon Better Government Project"). The mission of The Better Government Project is "to promote accountable, open, objective and transparent government." Within the scope of this purpose, it has focused efforts on studying campaign finance systems and proposals.

Additionally, it supports efforts intended to protect the integrity and efficacy of institutions that promote citizen activism, such as the initiative and referendum processes.

The Better Government Project has a further interest in this case, because the limitations and reporting requirements applicable to political campaign contributions and expenditures in Measure 47 are applicable to corporations and thus apply to The Better Government Project itself and would affect its operations and activities.

MEMORANDUM IN SUPPORT OF PETITION FOR REVIEW

I. Legal questions presented on review and rulings sought.

1. Does Measure 47, unlike Measure 9 of 1994, Contain Severable Limitations on Campaign Contributions and Independent Expenditures by Corporations and Unions?

Ruling Sought: Yes.

2. Does Measure 47, unlike Measure 9 of 1994, Contain Severable Limitations on Campaign Contributions and/or Independent Expenditures by Corporations and Unions Authorized by Article II, Section 22, of the Oregon Constitution?

Ruling Sought: Yes.

3. Does Measure 47 Survive Review, if Given a Narrowing Construction to Apply its Limits Only to Contributors with "a Legislative or Administrative Interest"?

Ruling Sought: Yes.

II. The legal questions presented have importance beyond the particular case and require decision by the Supreme Court: Questions of this importance and urgency militates strongly for allowance of review.

Hazell v. Brown, 238 Or App 487, 242 P3d 743 (2010) (the instant Court of Appeals opinion), completely nullifies the voters' adoption of Measure 47 (2006). If that opinion is not overturned or modified by the Oregon Supreme Court, then the enactment of Measure 47 will have no effect at all and will have

been nullified, *ab initio*. Such a sweeping decision deserves Oregon Supreme Court review. Respect for the initiative power of the voters of Oregon also warrants such review.

We have not found any Oregon court decision nullifying a statewide voter-adopted ballot measure that has not been reviewed by the Oregon Supreme Court. Recent examples of Oregon Supreme Court review of such ballot measures include:

Vannatta v. Keisling, 324 Or 514, 931 P2d 770 (1997)

Armatta v. Kitzhaber, 327 Or 250, 959 P2d 49 (1998)

Swett v. Bradbury, 333 Or 597, 43 P3d 1094 (2002)

Lehman v. Bradbury, 333 Or 231, 37 P3d 989 (2002)

League of Oregon Cities v. Oregon, 334 Or 645, 56 P3d 892 (2002)

Lowe v. Keisling, 320 Or 570, 889 P2d 916 (2005)

Lincoln Interagency Narcotics Team v. Kitzhaber, 341 Or 496, 145 P3d 151 (2006)

Even pre-enactment challenges to the constitutionality of ballot measures are routinely addressed by this Court, even when voters have not yet enacted them.

See *Meyer v. Bradbury*, 142 P3d 1031, 341 Or 288 (2006).

Among the important questions before the Court is whether, as the Court of Appeals concluded and Defendants contended below, the holding of *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997) (hereinafter "*Vannatta I*"), was so

broad that it reached beyond the terms of the statutory terms before it and is therefore precedential and conclusive on the meaning of Oregon Constitution, Article I, Section 8, so that any and all statutory measures which impose upon any real or fictional person¹ any limits on political campaign contributions or expenditures are unconstitutional, notwithstanding Oregon Constitution, Article II, Sections 8 and 22. This Court has begun the reexamination of *Vannatta I* 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 v. OGE*"). Such reexamination is even more fundamental to the instant case.

III. Argument Concerning the Legal Questions.

TBGP believes that Measure 47 enacted valid campaign finance restrictions on non-individuals, such as corporations, unions, and other entities, due to (1) the existence in the Oregon Constitution of Article II, Section 22 (enacted by the people in 1994) and (2) the reduced nature of the free expression rights of non-individuals (compared with individuals), which has been recognized not only by the United States Supreme Court but by Oregon Supreme Court decisions, including *Vannatta* itself.

1. Measure 47 does not use the term "persons" but instead uses the defined term "individual" (Section (2)(s)) that includes only "any human being." We use this terminology throughout.

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

The Oregon Supreme Court in *Vannatta I* left open the door for limits on political contributions or spending by corporations and unions.

[T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; **a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected**; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression.

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.

It is not surprising that *Vannatta I* would recognize the validity of limits on campaign contributions by corporations. After all, Oregon for decades had and enforced a statutory ban on political campaign contributions by certain corporations, with no known constitutional challenges. See 260.415 (formerly

260.472, formerly 260.280; repealed Oregon 1983 Session Laws, c. 71, section 12.²

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

The Court of Appeals opinion does not discuss this issue at all, even though it was properly raised there and to the trial court. The Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007) [hereinafter "Defendants' Reply Memorandum"], p. 6 [Hazell ER 30] stated:

2. The statute read:

No corporation, and no person, trustee or trustees owning or holding the majority of the stock of a corporation, carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, water, cemetery or crematory company, or (a) any company engaged in business as a common carrier of freight or passengers by railroad, motor truck, motor bus, airplane or watercraft or (b) any company having the right to take or condemn land or to exercise franchises in public ways granted by the state, county, city or town, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or holders of a majority of such stock.

Properly understood, those passages merely acknowledge specific rules that already govern corporations and unions, and which are no part of Measure 47's CC&E limits.

This evades the issue. Either the Oregon Constitution allows laws which limit corporation and/or union political contributions and/or expenditures, or it does not. Defendants fail to refute that *Vannatta 1* recognized that there can be valid, constitutional limits on political campaign contributions or expenditures by non-individuals, such as corporations and unions. This entirely refutes Defendants' sweeping statements that *Vannatta 1* bans all limits on political campaign contributions or expenditures.³

Defendants' Reply Memorandum (p. 7) [Hazell ER 31] continued:

But so long as corporations and unions are "spending their own money," they enjoy ordinary constitutional protection for their expressive activity, including their campaign contributions.

What does "spending their own money" mean? Where does "their own money" come from? In *Vannatta 1*, the Court specifically cited these examples of entities "spending other people's money on a political message without their

3. Defendants (*Id.*, p. 7) state that "corporate spending may be constrained to some extent by neutral laws, such as those prohibiting waste of corporate assets. See, e.g., *Klinicki v. Lundgren*, 298 Or 662, 678, 695 P2d 906 (1985)." That case does not pertain to political contributions or expenditures. If it did apply to such contributions and expenditures, and did limit them, then Defendants have failed to explain why such limits are not invalid under their sweeping assertions that *Vannatta* forbids all limits on political campaign contributions and expenditures. In *Vannatta*, however, the Court stated that laws could indeed validly place limits on "spending other people's money on a political message," and referred specifically to a corporation spending its shareholder's money.

consent": "compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar." 324 Or at 524 (emphasis added). Where, in Defendants' view, is the corporation's "own money" coming from? All of a corporation's money belongs to its shareholders.

Further, in *Vannatta 1* 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 1* does not even once refer to any rights of unions or corporations. Why, then, did the Measure 9 limits on corporate and union contributions not survive *Vannatta 1*? Because Measure 9 contained no separate or severable limits on union and corporate contributions. Instead, it defined "person" as "an individual or a corporation, association, firm, partnership, joint stock company, club, organization or other combination of individuals having collective capacity." ORS 260.005(15) [then ORS 260.005(11)]. It then expressed its substantive limitations on contributions (its Section 3) as applicable to "a person." Thus, Measure 9 afforded no way, by means of severance at any level, to preserve limits on contributions that would be applicable only to corporations and unions. Striking down Measure 9, Section 3's contribution limits applicable to any "person" thus necessarily struck down its contribution limits applicable to any corporation or union. The construction of Measure 9 in that manner indicated

the intent of the drafters that the individual and non-individual limits would stand or fall together.

Measure 47, on the other hand, contains clearly severable limitations on contributions by corporations and unions in its Section (3)(a):

No corporation or labor union shall make any contribution to a candidate committee, political committee, or political party.

Measure 47 does not use the term "persons" but instead uses the defined term "individual" (Section (2)(s)) that includes only "any human being." Measure 47 states its contribution limitations on "individuals" in separate subsections [see Sections (3)(b), (3)(d), (3)(i), (3)(j)] from its limitations on corporations and unions [see Section (3)(a)], thus making each set of limitations easily severable pursuant to Section (11) of Measure 47. Measure 47's limits on independent expenditures (Section (6)) are similarly bifurcated between those applicable to any "corporation or labor union" [Section (6)(a)] and those applicable to any "individual" [Section (6)(b)].

There is no Oregon case holding that corporations or unions have the right to make unlimited political campaign contributions in Oregon candidate races. Further, in *State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005), the Court concluded that the framers of the Oregon Constitution were probably either influenced by the Blackstone restrictive approach to free speech or were influenced by the "natural rights" approach. In either approach, the rights adhere to individuals, not to entities such as corporations or unions.

The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.

William Blackstone, Commentaries on the Laws of England 121 (1765).

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

Vannatta I discusses Article II, Section 22, of the Oregon Constitution and concludes that it may well remove Article I, Section 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. This section of the Oregon Constitution was enacted by Measure 6 of 1994. It provides:

Section 22. Political campaign contribution limitations.

Section (1) For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.

The Explanatory Statement stated (emphasis added):

The measure would allow a candidate for a local or state office (such as judge, city council, the legislature, or governor) to "use or direct" only contributions which "originate" from individuals who reside in the district of the office for which the candidate is running. Candidates could not "use or direct" contributions from people who reside outside the district. For example, someone who resides outside a city and works in the city could not contribute to a candidate for city council.

Political Action Committees (PAC's) could under this measure contribute funds to candidates only if they could show that the funds originated from individuals who reside in the same district as the candidate.

Note that the Explanatory Statement refers to "individuals," "people," and "someone," all terms which exclude corporations and unions.

The reason that *Vannatta I* found that Article II, Section 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 and Amicus TBGP in this case have argued for partial application of Article II, Section 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.

1. The Federal Court Litigation Involving Direct Enforcement of Measure 6 does not Remove it from the Oregon Constitution.

The litigation in federal courts about Measure 6 is immaterial to the effect of Article II, Section 22 in this case. The fact is that Article II, Section 22, is part of the Oregon Constitution. While direct enforcement of all of the provisions of Measure 6 of 1994 may violate the U.S. Constitution, because of the discrimination based on location of the residence of the contributor, the federal courts did not, and could not, remove Article II, Section 22, from the Oregon Constitution, where it today remains. The other provisions of the Oregon Constitution, including Article I, Section 8, are subject to the terms of the later-enacted Article II, Section 22, whether or not all of the provisions of Article II, Section 22 are directly enforceable.

The existence of Article II, Section 22, in the Oregon Constitution negates the contention that Article I, Section 8, prohibits limitations on political campaign contributions by corporations or unions. That negation of the prohibition does not offend the U.S. Constitution in any way, since (as the federal courts noted above), there is nothing in the U.S. Constitution that establishes any right by corporations or unions to make political campaign contributions in the first place. Thus, corporations and unions (and other non-individuals) cannot use Article I, section 8, as a defense to the application of a statute, such as Measure 47, that bans their campaign contributions.

This "removal of defense" effect of Article II, Section 22, even after the federal court's injunction, was explained in the Respondent's Brief of the Secretary of State in *Vannatta I*, pp. 13-18 (App 1-6).

States are free to write their constitutions so that they do not protect some conduct that is affirmatively protected by the federal constitution. * * * The person wishing to engage in that conduct may rely on federal law to avoid the state prohibition, but may not insist that the state constitution be rewritten to contain protection for that which it affirmatively prohibits.

* * *

Even if Article II, Section 22 is ultimately found unconstitutional as a matter of federal law, it still remains a part of the Oregon Constitution and petitioners may not claim that their rights under the Oregon Constitution are violated if Article II, Section 22 forbids the conduct they claim a right to engage in.

Id., pp. 16, 18.

Stated another way, no party has contended that any of the limitations in Measure 47 are contrary to the U.S. Constitution.⁴ So the question is whether Measure 47's limitations are authorized by the continuing presence of Article II, Section 22, in the Oregon Constitution. Article II, Section 22, expressly forbids all contributions that do not "originate from individuals." This provides constitutional authority for Measure 47's ban on corporation and union contributions, as those entities are not "individuals."

4. Missouri's limits similar to Measure 47 were upheld against such challenges in *Nixon v. Shrink Missouri Government PAC*, 528 US 377 (2000).

Let us assume that, as Defendants assert, corporations and unions have the same Article I, Section 8, free speech rights as individuals. These rights would then be in conflict with the authority provided by Article II, Section 22 (and implemented by Measure 47) to ban political contributions by those entities. When provisions of the Oregon Constitution are in conflict, the later-enacted provision prevails.

We have no difficulty in holding that, in this context, it is Article I, section 8, that is modified. When the people, in the face of a pre-existing right to speak, write, or print freely on any subject whatever, adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due. See *Hoag v. Washington-Oregon Corp.*, 75 Or 588, 612, 144 P 574, 147 P 756 (1915) (It is a familiar rule of construction that, where two provisions of a written [c]onstitution are repugnant to each other, that which is last in order of time and in local position is to be preferred * * *). To hold otherwise would be to deny to later-enacted provisions of the constitution equal dignity as portions of the same fundamental document.

In re Fadeley, 310 Or 548, 560, 802 P2d 31 (1990). Thus, Article II, Section 22, prevails over Article I, Section 8, to the extent of (1) authorizing limits on political contributions by non-individuals or (2) negating the asserted Article I, section 8, prohibition on campaign contribution limits applicable to non-individuals.

IV. CONCLUSION.

This Court should grant review in this case. Upon review, it should uphold the parts of Measure 47 that prohibit corporations, unions, and other non-individuals from making campaign contributions in contests for state and local offices in Oregon. The other limits in Measure 47 are easily severable from these limits on non-individuals, and Measure 47 itself directs that all severable sections, subsections, and subdivisions be preserved.

Dated: March 16, 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 Petition for Review

I certify that (1) the foregoing MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND MEMORANDUM ON BEHALF OF THE BETTER GOVERNMENT PROJECT IN SUPPORT OF PETITION FOR REVIEW OF PLAINTIFFS-APPELLANTS/CROSS-RESPONDENTS BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, AND GARY DUELL ("HAZELL PLAINTIFFS") complies with the word-count limitation of ORAP 9.05(3)(a) and (2) the word count of this Petition for Review as described in ORAP 5.05(2)(a) is 3356 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: March 16, 2011

/s/ Eric Winters

Eric C. Winters

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED by Efile this date:

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE AND
MEMORANDUM ON BEHALF OF THE BETTER GOVERNMENT PROJECT
IN SUPPORT OF PETITION FOR REVIEW OF PLAINTIFFS-
APPELLANTS/CROSS-RESPONDENTS BRYN HAZELL, FRANCIS NELSON,
TOM CIVILETTI, DAVID DELK, AND GARY DUELL ("HAZELL
PLAINTIFFS")

I hereby certify that I SERVED the above document by Efile on the parties and
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Service at Portland, Oregon, in sealed envelopes, first class postage prepaid, this date
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