

IN THE SUPREME COURT OF THE STATE OF OREGON

**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

<p>PETITION FOR REVIEW OF PLAINTIFFS-APPELLANTS/CROSS-RESPONDENTS BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, AND GARY DUELL ("HAZELL PLAINTIFFS")</p>

March 8, 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.**

PETITIONER ON REVIEW INTENDS TO FILE A BRIEF ON THE MERITS

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PRAYER FOR REVIEW

Petitioners on Review Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell (the "Hazell Plaintiffs") seek the opportunity for any and all of the provisions of Measure 47, duly enacted by the voters of Oregon in the 2006 general election, to be reviewed by this Court for constitutional validity. The Court of Appeals decision places Measure 47 in permanent limbo, so that those provisions can never be evaluated for constitutionality, under a theory that misreads Measure 47 and lacks internal sense. Respect for the voters of Oregon warrants that this Court review the provisions of Measure 47, including its limitations on political campaign contributions and independent expenditures, for validity under the Oregon Constitution.

I. STATEMENT OF FACTS.

The Hazell Plaintiffs adopt the Statement of Facts filed today in the Petition for Review of the Horton Plaintiffs, with the addition below. The Court of Appeals opinion in "Background" opines on the "voters' understanding of the then-existing state of the law." We offer a different understanding.

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 v. Keisling*, 324 Or 514, 931 P2d 770

(1997) ("*Vannatta I*"), also an amendment to the Oregon Constitution (which became Measure 46 of 2006).

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 subject to scrutiny for compliance with Article I, § 8, of the Oregon Constitution. Were some of the limitations to be found invalid, they foresaw 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 the time of enactment.¹ 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.

1. 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*.

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 not merely be discarded, should the Oregon Supreme Court rule them to be unconstitutional and Measure 46 not also pass. Instead, they would remain "on the books" and each would become operative after surviving court review. 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 an 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).² 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.
 - 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

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

(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.³

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 (other than § (9)(f) itself) but also precludes judicial review of the constitutionality of any of the substantive provisions of Measure 47 (while 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).

II. LEGAL QUESTIONS PRESENTED ON REVIEW AND RULINGS SOUGHT.

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 "limitations on political campaign contributions or expenditures" refer to those limitations contained in Measure 47 itself or to some generic, unknown future limitations that might come to the attention of the courts?

3. This specific briefing to the Court of Appeals included Opening Brief of Hazell Plaintiffs (pp. 28-49); Opening Brief of the Horton Plaintiffs (pp. 18-49); the entire Brief of Amicus Curiae The Better Government Project; and the entire Brief of Amici Elizabeth Trojan and Fair Elections Oregon.

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 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 v. OGEC*").

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.

III. WHY THE LEGAL QUESTIONS PRESENTED HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE DECISION BY THE SUPREME COURT

(1) Whether the case presents a significant issue of law. A significant issue of law may include, for example:

(a) The interpretation of a constitutional provision:

Yes, including Article I, § 8; Article II, § 8; Article II, § 22; and several other provisions discussed in the briefing.

(b) The interpretation of a statute and (c) constitutionality of a statute:

Yes, including all of ORS Chapter 259 (which is comprised of Measure 47).

(d) The legality of an important governmental action:

Yes, the legality of the refusal of the Secretary of State and Attorney General to implement a law duly enacted by the voters of Oregon, without seeking a court ruling that any provision in that law is unconstitutional.

(2) Whether the issue or a similar issue arises often:

Yes, the meaning and implications of *Vannatta I* and its analysis of Article I, § 8, seem to be arising often, as in *Vannatta v. OGE* (2010) and *State v. Moyer*, 348 Or 220, 230, 230 P3d 7,

cert den, --- U.S. ----, 131 SCt 326, --- LEd2d ----, 2010 WL 2988586 (2010).

(3) Whether many people are affected by the decision in the case. Whether the consequence of the decision is important to the public, even if the issue may not arise often.

Yes, everyone in Oregon is affected by having a system for electing state and local public officials that does not include limitations on political campaign contributions and/or independent expenditures. Oregon is one of only 3 states where such limitations are not operational (with Missouri and Virginia), as shown in the Appendix (table of State Limits on Contributions to Candidates by the National Conference of State Legislatures).⁴ The absence of enforced limits has contributed to the fact that races for the state House of Representatives are more expensive, per capita, in Oregon than those in any other state except New Jersey, according to THE OREGONIAN.⁵ It now often costs over

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4. The Appendix (pp. 1-13) includes a table of state limits prepared by the National Conference on State Legislatures, with citation to its internet location.
 5. The Appendix (p. 14) is J. Mapes, *Oregon's expensive legislative campaigns*, THE OREGONIAN (April 6, 2010) with citation to its internet location. It appears most accurate to compare money spent in the most recent races for each state's lower chamber for which data is available, since all of those seats are up during each 2-year election cycle in every state.

\$500,000 to win a contested seat in the Oregon Senate or in the Oregon House of Representatives.⁶

The decision also affects individuals and entities in all other jurisdictions who wish to make campaign contributions and/or independent expenditures affecting state or local candidate races in Oregon.

In addition, the effect of the Court of Appeals opinion is to nullify the operation Measure 47 entirely. **We are not aware of any court decision ever in Oregon nullifying a voter-enacted statewide ballot measure without Supreme Court review.**

(4) Whether the legal issue is an issue of state law:

Yes, the legal issues appear to be entirely of state law.

(5) Whether the issue is one of first impression for the Supreme Court.

Yes, many of the issues presented are of first impression, including:

- a. The questions presented in the Petition for Review of the Horton Plaintiffs;
- b. Other questions outlined at pages 5-7, *supra*.

6. The Appendix (p. 15) is a table showing each campaign for the Oregon House of Representatives that spent more than \$100,000 in the last year for which complete data has been compiled, 2008.
http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=OR&y=2008&f=H

(6) Whether the same or a related issue is pending before the Supreme Court.

Not that counsel is aware of.

(7) Whether the legal issue is properly preserved: and whether the case is free from factual disputes or procedural obstacles that might prevent the Supreme Court from reaching the legal issue.

Yes.

(8) Whether the record does, in fact, present the desired issue.

Yes.

(9) Whether present appellate case law is inconsistent.

Yes. Plaintiffs believe the Court of Appeals opinion in the instant case is inconsistent with several cases, including *Vannatta v. OGE*, *supra*, and *In re Fadeley*, 310 Or 548, 802 P2d 31 (1990). Further, this Court has recently acknowledged the "conflicting signals from this court" from *Vannatta I* and other cases involving Article I, § 8. *State v. Moyer*, *supra*, 348 Or at 230.

(10) Whether it appears that trial courts or administrative agencies are inconsistent or confused in ruling on the issue that the case presents.

Yes. Plaintiffs respectfully submit that the lower courts in this case were confused in ruling on the issues in this case.

(11) Whether the Court of Appeals published a written opinion.

Yes.

(12) Whether the Court of Appeals was divided on the case.

No.

(13) Whether the Court of Appeals decided the case en banc.

No.

(14) Whether the Court of Appeals decision appears to be wrong. If the decision appears to be wrong:

(a) Whether the error results in a serious or irreversible injustice or in a distortion or misapplication of a legal principle.

Yes. Plaintiffs' description of the legal issues, and the briefing below, demonstrate that the error results in the serious and irreversible injustice of completely nullifying a statewide ballot measure, duly adopted by the voters of Oregon, with no examination of the constitutionality of any of its substantive provisions and no conclusion that any of its provisions is unconstitutional. It also results in distortion or misapplication of several legal principles, including that the courts are to interpret statutes so as to preserve their effectiveness and avoid irrational or absurd results.

(b) Whether the error can be corrected by another branch of government, such as by legislation or rulemaking.

Practically, no. The Oregon Legislature in theory could adopt limits on political campaign contributions but has not done so.

(15) Whether the issues are well presented in the briefs.

Yes.

(16) Whether an amicus curiae has appeared, or is available to advise the court.

Yes. Two amicus curiae briefs were filed in the Court of Appeals.

IV. ARGUMENTS CONCERNING THE LEGAL QUESTIONS

A. THE COURT OF APPEALS OPINION MISCONSTRUES § (9)(f) OF MEASURE 47.

Plaintiffs have shown that the substantive provisions of Measure 47 are constitutional. Those provisions can be divided into 5 categories:

1. financial reporting requirements;
2. disclosure requirements in campaign advertisements;
3. other provisions, including penalties and administrative procedures;
4. limits on campaign contributions; and
5. limits on independent expenditures supporting or opposing candidates.

The trial court and Court of Appeals did not address the arguments pertaining to the constitutionality of any of the substantive limits, requirements, or procedures adopted in Measure 47. Instead, the Court of Appeals 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).

This does not make sense. Why would the constitutionality of the specific provisions of Measure 47, which differ from those of Measure 9 of 1994 addressed in *Vannatta I* (as demonstrated in the briefing), 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 (and repealed) years ago. *In the Matter of Constitutional Test of*

House Bill 3017, Oregon Laws, 1977, 281 Or 293, 300, 574 P2d (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 limitations in Measure 47, that the courts cannot evaluate the constitutionality of the Measure 47 substantive 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. Nor is there any prospect that the Oregon Legislature would ever enact the Measure 9 limits.

Further, this conclusion renders null the phrase "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 offer any rationale for

doing so.⁷ Thus, § (9)(f) calls for judicial findings on the constitutionality of the limits in Measure 47. That is what Plaintiffs seek.

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.

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*" are valid.

B. 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. How can § (9)(f), which is part of "the Act," place the entire Act (including itself) in

7. The trial court did strike those words. Plaintiffs appealed that portion of the trial court's decision and briefed it. See Opening Brief of the Hazell Plaintiffs, pp. 7, 12; Opening Brief of Horton Plaintiffs, pp. 14-17; Reply Brief of the Hazell Plaintiffs, pp. 2, 9, 11. Defendant did not defend it. The Court of Appeals opinion notes what the trial court did (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.

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." The construction adopted by the lower courts is thus inherently illogical. Such construction 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).

If the Court of Appeals' construction of § (9)(f) is adopted, however, then § (9)(f) itself should be stricken as an unconstitutionally illogical nullity.

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

- (1) campaign contribution and expenditure limits akin to those discussed in *Vannatta I* are contrary to the teachings of *Vannatta I*, *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 interprets "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. Section (1)(r) of Measure 47 states:

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

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 (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 is the correct method for determining whether the Oregon Constitution allows "such limitations," referring to the limitations in Measure 47.

Further, the Court of Appeals opinion is circular. Even if "such limitations" in § (9)(f) refers to "prohibitions or restrictions akin to those deemed unconstitutional in *Vannatta I*," 238 Or App at 512, the Court elsewhere concludes (on a high level of generality and without examining the specific structures of Measure 47) that the Measure 47 limitations are akin to the Measure 9 of 1994 limitations deemed unconstitutional in *Vannatta I*. Even in the view of the Court of Appeals, then, "the Act" is suspended until the Measure 47 limits are examined by the Oregon Supreme Court for constitutionality. That examination, by means of this declaratory judgment, is what Plaintiffs have

sought in this case. The outcome of that examination is to make operative the limitations that pass constitutional muster.⁸

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

The Court of Appeals opinion does not correctly apply *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 Opening Brief of the Hazell Plaintiffs, p. 41, which questioned the conclusion from *Vannatta I*, 324 Or at 521, 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 v. OGEC, 347 Or at 464-65, withdraws the above statement, explaining:

First, the court's statement in *Vannatta I* that campaign contributions were constitutionally protected forms of expression regardless of the

8. This outcome defeats any suggestion of mootness. A case can continue to have "practical effect" and sufficient adversity so long as it has an effect on any party. As *Kellas v. Department of Corrections*, 341 Or 471, 481, 145 P3d 139 (2006), notes in discussing *Marbet v. Portland Gen. Elect.*, 277 Or 447, 453-457, 561 P2d 154 (1977):

In fact, in *Marbet*, this court held the case to be justiciable even though its decision would have a practical effect only on the respondent, PGE, and not on the petitioner, Marbet, who had invoked the judicial power in the first place.

"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.

First, *Vannatta v. OGEC* 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.

Second, *Vannatta v. OGEC*'s withdrawal of *Vannatta I*'s statement appears to remove free speech protection for contributions which can be used for purposes other than "to communicate political messages." *Id.*, 347 or at 465. As pointed out in the Brief of Amicus Curiae The Better Government Project, pp. 17-19, 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."⁹ No party has disputed this. Since (without Measure 47) all contributions to candidates or committees

9. 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).

can be used for such non-communicative purposes, those contributions are now beyond the protection of *Vannatta I* and are subject to limits and/or prohibitions. Measure 47 does ban the use of campaign contributions for non-communicative purposes.¹⁰

Third, Measure 47, §(9)(c) requires that all unspent campaign funds:

shall revert to the State of Oregon to offset the cost of producing the Voters' Pamphlet, except for those funds reasonably necessary to pay the obligations of the committee and to terminate its operations. A candidate elected to the Oregon Legislature may deposit not more than ten thousand dollars (\$10,000) of the unexpended funds into the account maintained for legislative office expenses during the legislative session.

Vannatta v. OGEC appears to construe Article I, § 8, to allow such limits on use of campaign funds to prevent their later use for personal or other non-communicative expenses.

Fourth, *Vannatta v. OGEC* also 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. The same logic 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

10. Measure 47, § (2)(i)(2)(A), defines "expenditure" as payments "for the purpose of influencing the outcome of any contest." It does not include spending for non-communicative purposes, such as rent on a Salem apartment during the legislative session.

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.

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

The Court of Appeals assumed 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 Brief of Amicus Curiae Elizabeth Trojan and FairElections Oregon, 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 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.

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 and expenditures are invalid under *Vannatta I*:

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 v. OGEC*, *supra*.

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 (even though such reexamination has commenced in *Vannatta v. OGE*).

The Court of Appeals opinion operates at a level of extreme generality.

For example, it finds highly significant the fact that the ballot title for Measure 46 (2006) stated that the "Oregon Constitution currently bans laws that impose involuntary limits on, or otherwise prohibit, political campaign contributions or expenditures by any person or entity." Or App at 512. While everyone 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, 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. Thus, 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.¹¹

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

V. CONCLUSION.

For the reasons stated above, this Court should grant the Petitions for Review.

Dated: March 8, 2011

Respectfully Submitted,

/s/ Daniel W. Meek

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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 Petition for Review 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 4992 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 8, 2011

/s/ Daniel W. Meek

Daniel W. Meek

**CERTIFICATE OF ACCURACY OF
INFORMATION PRESENTED IN APPENDICES**

ORAP RULE 9.07

I certify that the documents contained in the Appendix to this Petition are accurate copies of the information that appears at the internet addresses provided for each document in the Petition for Review or on the document in the Appendix itself.

Dated: March 8, 2011

/s/ Daniel W. Meek

Daniel W. Meek