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

PETITION FOR REVIEW OF PLAINTIFFS-APPELLANTS JOAN HORTON and KEN LEWIS ("HORTON PLAINTIFFS")

March 7, 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

This a Petition for Review by Plaintiffs-Appellants/Cross-Respondents JOAN HORTON and KEN LEWIS [hereinafter "Horton Petitioners"]. The parties below included two groups of Plaintiffs-Appellants/Cross-Respondents who filed separate notices of appeal, filed separate briefs and joined portions of one another's briefs on appeal. These groups were referred to as: (1) the "Hazell Plaintiffs" (Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell) and (2) the "Horton Plaintiffs" (Joan Horton and Ken Lewis). The Horton Petitioners request that this Court grant review and:

1. reverse the decision of the Court of Appeals;

2. declare that § (9)(f) of Measure 47 (2006) either:

    a. requires that the substantive terms of Measure 47 itself be reviewed in the instant litigation for conflict with the Oregon Constitution, or

    b. has become invalid and must be severed in its entirety, thus leaving the remainder of Measure 47 immediately operative.

If Measure 47 is immediately operative, then its terms must promptly be evaluated for conflict with the Oregon Constitution as Plaintiffs' requested in their action for declaratory judgment. All Plaintiffs (along with Amici Curiae) have presented extensive argument to that end, and Defendants have responded, so the constitutional issues can and should be resolved by this Court, as there are no facts to try on remand. ***Samuel v. Board of Chiropractic Examiners***, 77

Or App 53, 63, 712 P2d 132 (1985). *E.g*. ***State v. Herbert***, 302 Or 237, 244, 729 P2d 547 (1986). This Court is "fully competent to determine the issues presented on the record." ***State v. Somfleth***, 168 Or App 414, 421, P3d 221 (2000). Moreover, remand does not serve the interests of judicial economy, since this is a case where "whatever determination the trial court would make on a putative remand might well spawn a second appeal, [and] 'remand may only serve to delay' the ultimate disposition of the case." *Id.*, quoting ***Ashley v. Hoyt***, 139 Or App 385, 396, 912 P2d 393 (1996).

No court has ruled on the current constitutionality of the terms of Measure 47 in this particular case, despite the request for declaratory relief and the principle that:

> There is always a presumption in favor of the constitutionality of a legislative enactment. Until the contrary is shown beyond a reasonable doubt, it is the duty of the courts to assume that the challenged statute is valid. [Citations omitted].

Wright v. Blue Mountain Hospital Dist., 214 Or 141, 144, 328 P2d 314, 315-316 (1958).

The Horton Petitioners intend to file a brief on the merits to supplement the briefs before the Court of Appeals. ORAP 9.05(3)(v).

I. STATEMENT OF FACTS.

Petitioners accept the procedural facts as stated in the Court of Appeals opinion.

A. HISTORICAL FACTS.

This is a case of first impression. On November 6, 2006, Oregon voters enacted Measure 47 to establish a system of campaign finance reform. ER 11-19. A companion constitutional amendment intended to eliminate any question of the constitutional validity of such a system, Measure 46, failed. ER 20.

Measure 47 contains limitations of dollar contributions to state and local candidate campaigns and new provisions on reporting and disclosure of contributions and expenditures, as summarized by the Court of Appeals. ***Hazell v. Brown***, 238 Or App 487, 492, 242 P3d 743 (2010). It also contains the following, § (9)(f):

> 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 parties referred to § (9)(f) as a "dormancy clause."

In the past, the Legislature has enacted laws which contain somewhat similar dormancy clauses, providing that a law become operative contingent upon voters amending the Oregon Constitution at the next general election or at a special election called to consider the referred amendment. In each case, the voters have approved the amendment, so the law became operative at a definite time after it was passed by the Legislature. No case has considered what

happens under a dormancy clause when the anticipated constitutional amendment fails.

B. RECORD FACTS.

The Hazell Plaintiffs argued that § (9(f) required the trial court to determine whether either contingency currently exists by undertaking findings and conclusions about the constitutionality of the terms of Measure 47. Defendants (Respondents on Review) contended that § (9)(f) is the only operative section of Measure 47 and that its reference to a finding by a court whether campaign contribution or expenditure limits are constitutional must refer to findings in other unforeseen future litigation regarding another potential statute. The Court of Appeals agreed.

Plaintiffs' counsel argued that only through the trial court's findings upon provisions of Measure 47 *in this instant litigation* could "the Oregon Constitution [be] found to allow" a limitation set out in Measure 47. The judge posited that the necessary finding could be made by any court in a case at any time involving entirely different parties:

> Mr. Meek: And without litigation [in the instant case], how would there be a finding that the Oregon constitution allows the limitations?
>
> The Court: Well, it may not be litigation on this particular case. It may be litigation on another case involving other limitations.

TR July 13, 2007 Hearing, at 61:4-9. ER 38. The Assistant Attorney General, representing Defendants, agreed.

> Mr. Leith: But another possible eventuality is that, as the Court posits, another limitation, perhaps a local campaign contribution and expenditure limitation might be adopted without an operativeness provision and might be challenged and it might be appealed to the Supreme Court, and the Supreme Court might say, you know, we got it wrong in ***Vannatta*** and in ***Meyer***.

TR July 13, 2007 Hearing, at 70:25-71:1-5. ER 39-40.

The Horton Plaintiffs joined the Hazell Plaintiffs' contention that § (9(f) required judicial review of Measure 47 in the instant case (and join that argument now) but, alternatively, sought a declaration that § (9)(f) became invalid under Oregon Constitution, Article IV, §§ 1(4)(d) and 1(2), and should be severed pursuant to Measure 47's severability clause, S (11). The failure of Measure 46 at the anticipated election left the eventual operation of the statute to unforeseen events which would allow Measure 47 to spring into operation without notice to later-voters amending the Oregon Constitution in some other way, such as by adopting what is known as "public funding" of candidate elections that bans all private campaign contributions to candidates who accept public campaign funds.

Petitioners refuted Defendants' construction of § (9(f) as unconstitutional because it would allow the dormant statute to become enforceable by surprise

through a decision upon different issues and other parties in an unknown future case, as discussed below.

C. TRIAL COURT DECISION.

The trial court did not conclude that any voter-approved contribution or expenditure limit in Measure 47 was forbidden under Article I, § 8, of the Oregon Constitution but instead concluded that generally any and all of what it referred to as Campaign Contributions and Expenditures ("CC&Es") violate that section of the Oregon Constitution [Letter Opinion, p. 3; ER 43], citing ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) [hereinafter ***Vannatta I***]. The court held § (9)(f) was valid, relying upon ***State v. Hecker***, 109 Or 520 (1923), which it found to be "directly controlling authority." Letter Opinion, p. 4; ER 44-45.

The trial court did not determine whether the second contingency in § (9(f) currently exists (that "the Oregon Constitution * * * allow[s]" the Measure's terms). Instead, the court *sua sponte* rewrote § (9(f) to strike reference to this judicial role, eliminating the words "is found to allow, or," resulting in: "this Act shall * * * become effective at the time that the Oregon Constitution ~~is found to allow, or~~ is amended to allow, such limitations." Letter Opinion, p. 7, ER 47.

D. COURT OF APPEALS DID NOT CONSIDER ALL THE ISSUES PRESENTED.

The Court of Appeals also found ***Hecker*** controlling for the proposition that "the legislature could validly enact legislation the operation of which was dependent upon some future, contingent event." 238 Or App at 502. Petitioners contend this is erroneous. Prior holdings are that a law's operation may be contingent upon a future event (in each case, the outcome of a date certain election), but no case holds that the future event itself--the election--may be merely contingent or conceptually possible.[1] In each Oregon case, the law was enacted and the constitutional amendment referred to voters by the same session of the Legislature.

> [A]s the Horton plaintiffs note, the contingency that would trigger the operation of the challenged legislation was a proximate and known event. * * *. However, that circumstance, albeit common to each of those cases, was not material to their disposition. Rather, as defendants emphasize, the gravamen of the Supreme Court's reasoning in those decisions did not turn on the proximity or anticipated nature of the contingent event.[2]

238 Or App at 503.

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1. WEBSTER'S REVISED UNABRIDGED DICTIONARY (2008) defines contingent: "Possible, or liable, but not certain, to occur, incidental, casual."

2. Note that the Court of Appeals again, incorrectly, refers to the election itself as a "contingent event."

The Court of Appeals also dismissed without discussion related arguments presented that § (9(f) was contrary to Article IV, § 1(2). We discuss those arguments later in this Petition.

The Court of Appeals did not endorse the trial court's revision of § (9)(f), which all plaintiffs argued was contrary to both:

1. the express severability clause in Measure 47, § (11), which limits severance to "each section, subsection, and subdivision" but does not allow severance of individual words, phrases, or sentences; and

2. ORS 174.040.

Instead, the Court of Appeals adopted its own construction of § (9)(f) but inexplicably failed to apply that construction to the instant litigation, again avoiding the judicial role of evaluating the constitutionality of the statute at issue, Measure 47. It construed voter intent so that the "found to allow" clause of § (9)(f) would not apply to the present litigation but only to some other future litigation presenting the contribution and expenditure limits "akin" to those reviewed in ***Vannatta I*** and then only upon judicial abrogation of ***Vannatta I***.

> [V]oters 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***.
>
> 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.

238 Or App at 512.

This offers no rationale why voters did not intend that the limits in Measure 47 be reviewed for constitutionality, as they (1) are "akin to" (although different from) the Measure 9 of 1994 limits, (2) are enacted, and (3) are before the courts. Moreover, cases are decided upon matters at issue, not upon generic constitutional pronouncements. Article VII "precludes adjudication of constitutionality in the abstract." ***In the Matter of Constitutional Test of House Bill 3017, Oregon Laws, 1977***, 281 Or 293, 300, 574 P2d (1978). The Court of Appeals decision is thus merely "advisory" about the application of ***Vannatta I*** in general.

> The judicial power extends equally to the least important case within its reach and the greatest, but not beyond. It does not extend to quiet anyone’s title to the constitutional validity of a statute against the world at large.

281 Or at 302. The terms of the new statute must be evaluated for constitutionality in this concrete adversarial setting.

E. PRACTICAL EFFECT OF ERRONEOUS DECISION.

The practical result of the Court of Appeals decision is to allow legislative drafting which has no limit on the time or obscurity or randomness of a

contingent event which may alter the legal obligations of citizens by triggering the operation of a dormant law.

The second result is to place a whole category of campaign contribution and expenditure limits outside the scope of judicial review and yet insist that Measure 47 be kept dormant until some other litigants in some other case at some other time are somehow able to get the Supreme Court to undertake a case with specific campaign contribution limits. If not now, when? If not the courts reviewing Measure 47, then what court reviewing what future law?

II. CONCISE STATEMENT OF LEGAL QUESTIONS FOR REVIEW AND REQUESTED RULE TO BE ESTABLISHED.

Under the Oregon Constitution, may the operation of a statute be postponed until:

1. "some future, contingent event" (238 Or App at 502) which is conceptually possible, but unanticipated; or

2. a "finding" made by an unspecified judicial officer in future potential litigation at an unknown time and involving litigants who do not refer to (or necessarily know of) the existence of the dormant statute?

Horton Petitioners urge the Court to adopt the rule that potentially operative laws may become operative contingent upon known anticipated events, but not by surprise, and that in this case the courts must review the actual substantive terms in the new statute.

III. WHY THE ISSUES HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE DECISION BY THE SUPREME COURT.

A. THE CASES PRESENT SIGNIFICANT ISSUES OF STATE CONSTITUTIONAL LAW.

As noted in the fact statement, this case presents an issue of first impression of Oregon constitutional law. It is significant because public awareness of what the law requires is essential to governance. Notice to the general public of when laws become operative is necessary, if persons are to conform their conduct to such laws. Clear guidelines are especially necessary in situations such as this, when a law shall become operative by unconventional procedures or contingent upon events which do not usually trigger the enforceability of laws.

The question must first be asked whether Measure 47 conflicts with the current Oregon Constitution. If it does, then its operation may be postponed, as ***State v. Hecker***, 109 Or 520 (1923), holds. But to what extent does the dormancy clause remain vital and allow an inoperative law to spring into operation, without notice, upon passage of some later-enacted amendment, perhaps decades later? Both the trial court and the Court of Appeals simply assumed, without specific inquiry, that some terms in Measure 47 are in conflict with Article I, § 8, and found no limit upon the power to "postpone" the operation of a statute indefinitely until the occurrence of a possible future event,

however unintended the activation of the statute at the later time. Since the adoption of the initiative and referendum constitutional amendments to Article IV in 1902, Oregonians have sought to use the initiative process to propose laws and constitutional changes hundreds of times. It is highly likely that questions regarding the operation of initiated changes will arise again. The entire public is affected by the decision, and the Legislature and citizen-legislators will be guided in drafting laws and measures by the decision of this Court.

B. OTHER CONSIDERATIONS OF ORAP 9.07.

The Court of Appeals published a written opinion. It was not divided and did not decide en banc. Its decision was wrong, for the reasons presented in the arguments above. The error cannot be corrected by another branch of government, short of referral of a constitutional amendment by the Legislature or another successful constitutional amendment initiative petition adopted by the people. There were Amicus briefs filed with the Court of Appeals which may assist this Court.

IV. SUMMARY OF HORTON PLAINTIFFS' ARGUMENT: COURT OF APPEALS WAS IN ERROR AND FAILED TO CONSIDER ARTICLE IV, § 1(2).

A. *HECKER* LINE OF CASES IS INAPPOSITE IN THIS CASE.

In this case, had Measure 46 (2006) passed, ***Hecker*** would have compelled the conclusion that Measure 47 did not conflict with the Oregon

Constitution, as it would have become operative contemporaneously with the effective date of the companion proposed amendment. Just because § (9)(f) would be constitutional, had Measure 46 passed, does not mean that § (9)(f) can be constitutionally applied after the failure of Measure 46.

The issue in ***Hecker*** was whether the statute (which became effective by operation of law prior to the vote on the constitutional amendment), conflicted with the then-current Constitution. ***Hecker*** found the statute duly enacted and effective but operationally postponed so that it did not conflict with the then-unamended constitution.

> [T]he operation of chapter 20 was by its own restraining language absolutely prevented from operating, and hence from running counter to the then Constitution. Since the language is apt, we quote from ***Pratt v. Allen***, 13 Conn 119, 126:
>
> > The act is not intended to, nor does it, oppose any existing article in the Constitution; but it is intended to meet and accord with its proposed substitute.

Hecker, 109 Or at 547.

Horton Petitioners accept the distinction between "taking effect" and postponing "operation" for the purpose of deciding when a potential constitutional conflict ripens. This does not foreclose finding a need and intent for some notice of the date for operative effect of a statute inherent in fundamental due process. Petitioners contend that any "postponement" of a law's operation must have a knowable end-point. In every Oregon case this

end-point would be known from the results of the planned election on the "proposed substitute" constitutional amendment. The election date is anticipated, and, if the amendment was approved at that election, the dormant statute becomes operative upon the effective date of the amendment.

The rule of constitutional interpretation Petitioners urge is consistently applied in every other state which has had occasion to rule. In sum:

> It is the general rule in this country that a legislature has power to enact a statute not authorized by the existing constitution of that State when the statute is passed in anticipation of an amendment to its constitution authorizing it or which provides that it shall take effect upon the adoption of an amendment to its constitution specifically authorizing and validating such statute.

Henson v. Georgia Indus. Realty Co., 220 Ga 857, 862, 142 SE2d 219, 224 (1965).

Section (9)(f) fails both prongs of this formula under the reasoning of the Court of Appeals. It no longer "anticipates" an actual election.[3] The necessary nexus between a statute and the anticipated constitutional amendment is missing, because the Court of Appeals construes § (9)(f) to allow operation if and when the Constitution is amended to allow *any* "limitations on political campaign contributions or expenditures," but not the specific limits on CC&Es contained in Measure 47. Only the construction offered by the Horton and Hazell

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3. WEBSTER'S REVISED UNABRIDGED DICTIONARY (2008) defines anticipate, as "To foretaste or foresee."

Petitioners preserves the nexus by requiring a determination of the constitutionality of Measure 47 in this litigation.

In all previous Oregon cases, the dormant statutes and the elections upon the proposed Constitutional amendments which could trigger the operative effect of the statutes have been close in time--either the next regularly scheduled election in the same year or an election specially called. Thus, the elections were clearly anticipated when the statutes were passed (as set out in the Court of Appeals opinion).[4] The subject matter of the suspended statute and the proposed constitutional amendment (and the short time interval between passage of the suspended statute and the planned election) assured compliance with the fundamental requirement that voters must expressly or implicitly endorse the dormant statutory terms which may become operative contingent upon the vote on the constitutional amendment.

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4. ***Libby v. Olcott***, 66 Or 124, 134 P 13 (1913), (1913 Legislature passed a number of laws and authorized a special election for November 1913, should any referral be taken); ***State v. Rathie***, 101 Or 339, 199 P 169, 200 P 790 (1921) (statute providing for death penalty for murder in the first degree passed in January 1920 contingent upon outcome of election called for May 20, 1920, on a constitutional amendment re-authorizing death penalty); ***Marr v. Fisher***, 182 Or 383, 187 P2d 966 (1947) (Legislature passed statutes in April 1947 relating to income tax exemptions contingent upon outcome of a constitutional amendment authorizing a sales tax referred by same session for election to held in November 1947).

Hazell v. Brown, 238 Or App at 502.

B. THE *NORTHERN WASCO PUD* REASONING SHOULD CONTROL.

Under Oregon case law, a subsequent constitutional amendment could not unintentionally revive a void statute, unless later voters clearly evidenced such an intent in enacting the subsequent amendment. ***Smith v. Cameron, et al.***, 123 Or 501, 262 P 946 (1928); ***Northern Wasco County People's Utility Dist. v. Wasco County***, 210 Or 1, 12-13, 305 P2d 766 (1957) [hereinafter ***Northern Wasco PUD***]. The Court of Appeals declined to use this reasoning to hold that later voters cannot unintentionally give operative effect to a dormant statute when approving a later constitutional amendment. ***Hazell v. Brown***, 238 Or App at 501-2.

Petitioners urge that there is no meaningful distinction between reviving a law and making a law operative. In each circumstance, there is existing text which is not currently enforced. In each case the legal status and obligations of persons will be altered, if the text becomes operative. The rule should be the same in both circumstances. Later voters must intend that an inoperative law become operative upon them, and they must have notice of the new obligations so they can conform their future conduct to the terms of such law.

Under the Court of Appeals decision, a later electorate could pass a constitutional amendment and unintentionally enable a law unknown to, or even opposed by, those later voters.

> That would give the amendment the effect of enacting laws instead of merely authorizing the legislature to do so, and it would be to enact a law to which no reference was made, and which the people in adopting the amendment could not have had in mind. Such is not the ordinary function of a constitutional provision, and such effect will not be given to it unless it is expressly so provided.

Banaz v. Smith, 133 Cal 102, 104, 65 P 309 (1901), cited and quoted with approval, ***State ex rel Woodahl v. District Court of Second Judicial District***, 162 Mont 283, 294-5, 511 P2d 318, 324 (1973); ***Fellows v. Schultz***, 81 NM 496, 501, 469 P2d 141, 146 (1970).

C. "EFFECTIVE" IN ARTICLE IV IS SUSCEPTIBLE TO SEVERAL CONSTRUCTIONS.

Despite the fact that all previous Oregon cases involved specific "proposed" amendments which passed, the Court of Appeals concluded that Article IV, 1(4), does not offer any limit upon the power of the citizen-legislators to make the operation of a law contingent upon any future uncertain, unplanned, or difficult to discern event, because "Article IV, section 1(4)(d), governs the effective date, not the operative date, of laws adopted by initiative or referendum." 238 Or App at 502. This fails to consider when and how an Act impacts those to be governed by unannounced operation and enforcement of the law.

The Court of Appeals found a bright line between "operation" and "effective" dates for statutes, but these were synonyms and not terms with distinct meanings in usage at the time of the adoption of the Oregon

Constitution. WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), defines "effective," as " Operative; active; having the quality of producing effects." ***Maize v. State***, 4 Ind 342, 1853 WL 3340 (1853), decided that the phrase, "operation of laws" in § 26 of Article 1 of the 1851 Indiana Constitution meant "taking effect and continuing in force." "[T]he words 'take effect,' 'be in force,' go into operation,' *etc*., have been used interchangeably ever since the organization of the state." *Id*., 1853 WL 3340 at 5.

This Court gives great weight to the Indiana Supreme Court's construction of terms used in the Indiana Constitution prior to adoption of the Oregon Constitution, which included such terms verbatim. ***McIntire v. Forbes***, 322 Or 426, 436, 909 P2d 846 (1996). We know that, as used in the Indiana and Oregon constitutions, the word "effective" is elastic and sometimes synonymous with "operative." To the extent that Article IV allows "postponement" of operational effects, we look to the text and context to find any limitations on this power of postponement either in Article IV, § 1(4), or its historical context.

1. THE OREGON CONSTITUTION PROVIDES PROCEDURAL SAFEGUARDS TO ASSURE PUBLIC KNOWLEDGE OF THE CONTENTS AND OPERATION OF LAWS.

As for context, the Oregon Constitution provides a number of guarantees that the public shall know the content of laws, when they are passed, and when they must obey them. It establishes a specific time for the effective date of

laws. Article IV, § 28. Laws must be "public" (Article IV, § 27), deliberations open to the public (Article IV, § 14), and all amendments to existing law must be specifically set out in the text of the existing law and "published at full length." Article IV, § 22.

Article IV, § 20, requires all bills to contain notice of their content through a "title," to prevent deception. "The principal purpose for the title requirement of Article IV, section 20, is to provide fair notice to legislators (and to others) of the contents of a bill * * *." ***McIntire v. Forbes***, *supra*, 322 Or at 438.

As for voter information when approving changes to the Constitution, Article XVII, § 1 assures notice of the content of proposed amendments through the separate-vote requirement.

2. VOTERS DID NOT INTEND FOR INITIATED LAWS TO APPLY BY SURPRISE.

As noted above, the Court of Appeals declined to consider arguments presented under Article IV, § 1(2). Giving operative effect to an inoperative statute *sub silentio* by later constitutional amendment without reference to the earlier dormant legislation would be contrary to the spirit of procedural protections of Article IV, § 1(4), and 1(2).[5] In construing later amendments to

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5. In addition to the public nature of the campaigns, Article IV, §1(2)(d), (continued...)

the Oregon Constitution, "it is the people's understanding and intended meaning of the provision in question" that prevails . ***Stranahan v. Fred Meyer***, 331 Or 38, 57, 11 P3d 228 (2000); *accord*, ***George v. Courtney***, 344 Or 76, 84-85, 176 P3d 1265, 1269 (2008). "If, however, the voters' intent is not clear after that inquiry, this court will turn to the provision's history." *Id.*

While this Court noted there was no Voters Pamphlet statements for the 1902 referral creating the Oregon initiative and referendum [***Stranahan***, *supra*, 331 Or at 65], other primary sources of voter information have become accessible. The whole point of initiative and referendum reform was to encourage an informed electorate, not to allow surprise activation of laws passed by initiative. In modern terms, the reformers sought "transparency." They saw "no reason why every farmers' club, labor union, and lyceum in the State cannot become in effect a miniature legislative assembly." Joseph Schafer, "Oregon As a Political Experiment Station," AMERICAN MONTHLY REVIEW, Vol XXXIV (New York July-December 1906), p. 176. Of course, as noted in the preceding

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5.(...continued)
requires notice of the full text of a measure:

> An initiative petition shall include the full text of the proposed law or amendment to the Constitution. A proposed law or amendment to the Constitution shall embrace one subject only and matters properly connected therewith.

section, the existing Legislature had constitutional requirements for public notice and protections against deceptive identification of proposed acts.

Proponents of the initiative amendment included George H. Williams, a delegate to the Oregon Constitutional Convention, who had first proposed citizen direct democracy at the Convention in 1857, as quoted in, "Sure to Prevail: No Opposition to Initiative and Referendum," *The (Portland) Oregonian*, May 14, 1902.[6] In the spring of 1902, Williams was running for mayor of Portland and active in the campaign to pass the initiative and referendum amendment.[7] Days after voters approved the amendment, Williams reiterated that citizens would never vote to deprive anyone of fundamental rights because "every individual is interested in the preservation of those rights * * *." "Amendment Now Law: Initiative and Referendum Has Large Majority," *The Oregonian*, June 7, 1902. There is no reason to believe that Williams intended to alter the principles in the original Oregon Constitution (which he voted to adopt), which assured proper notice to the populace of the passage and operation of laws, or that he perceived that the initiative would deprive citizens of such

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6. *Oregonian* articles are available online at "Oregonian Historical Archive" within "America's Historical Newspapers," both at: multcolib.org/ref'a2z.html

7. Early Oregon cases looked to the later careers of the delegates to Constitutional Convention for their understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 497, 103 P 505, 511 (1909): "'He who made the law knows best how it ought to be interpreted.'"

fundamental rights to information and notice when the initiative process was used to pass laws.

D. A "FINDING" CANNOT BE A VALID CONTINGENCY UNLESS IT OCCURS IN THE CURRENT LITIGATION.

In contrast to the failure of the first contingency in § (9)(f), the second contingency contemplated in § (9(f), that substantive terms of Measure 47 shall take effect "at the time that the Oregon Constitution is found to allow * * * such limitations" is capable of immediate resolution in the present lawsuit. A judicial interpretation of the constitutionality of the terms of Measure 47 is not uncertain in time. The current litigation, like countless other cases decided by the courts, will announce what the law under consideration means, but will not have the unintended consequence of activating another dormant law not at issue between the litigants.

Ignoring the command of § (9(f) to engage in a review of the constitutionality of its terms (many of which are currently not of constitutional magnitude) would lead to an unfair, even absurd result. If § (9(f) does not apply to the instant litigation, but some finding in another matter (the Court of Appeals position), then Measure 47 could become enforceable by inadvertence.

While the Oregon Supreme Court could indeed revisit ***Vannatta I***, doing so in some unrelated proceeding could not validly effectuate Measure 47. Letting unrelated court proceedings trigger a dormant statute would be contrary to the

"procedural protections" of Article IV, § 1(2). There is absolutely no case law to support the position that a dormant law could spring into effect, taking future electors, litigants and judicial officers unawares, when the courts address the constitutionality of some other statute. The Oregon Constitution does not allow the operation of statutes by accident. For example, the City of Portland had (and other states and cities still have) instituted what is called public funding of political campaigns. In the Portland scheme, once a candidate qualified by initial showing of support, she received specific amounts of public funding for her campaign but was prohibited from accepting any private contributions. This is a limit on persons who might want to contribute and a limit (zero) on private campaign contributions that the political campaign can receive. If such a public finance law had been enacted statewide or in any political jurisdiction and was challenged and found constitutional in Oregon, would that decision be a finding the "limitations on political campaign contributions" are constitutional and thus trigger immediate operation of all of Measure 47? In error, the Court of Appeals decision says "yes." We say "no."

V. CONCLUSION.

For the reasons stated above, this Court should grant the Petition for Review of the Horton Petitioners and the Petition for Review of the Hazell

Petitioners, filed this date. Consideration of all the issues presented in the two petitions will afford the fullest consideration of the questions and issues raised.

Dated: March 7, 2011

Respectfully Submitted,

/s/ Linda K. Williams

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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 4947 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).

March 7, 2011 /s/ Linda K. Williams