IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

Plaintiffs-Appellants /Cross-Respondents,

v.

BILL BRADBURY, Secretary of State of the State of Oregon, and HARDY MYERS, Attorney General of the State of Oregon,

Defendants-Respondents/ Cross-Respondents,

and

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

Intervenors- Respondents/ Cross-Appellants.

Marion County Circuit Court No. 06C22473

Court of Appeals No. Al 37397

CROSS-APPELLANTS' OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
For the County of Marion
Honorable Mary Mertens James, Judge

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STATEMENT OF THE CASE

A, Nature of the Action and Relief Sought.

The Act that comprises Chapter 3, Oregon Laws 2007 (Ballot Measure 47 (2006)), was proposed by initiative petition and was approved by the people at the regular general election on November 7, 2006. By proclamation of the Governor dated December 7, 2006, the Act was declared to have received an affirmative majority of the total number of votes cast and to be in full force and effect as provided in Article IV, section 1 of the Oregon Constitution. However, on November 17, 2006, the Secretary of State interpreted section (9)(f) of the Act to mean that the Act is not currently enforceable.'

Plaintiffs commenced this action with the filing of a complaint under ORS 184.484, 246.910, and 28.010, seeking to require the Secretary of State and Attorney General to implement and enforce the provisions of Measure 47. Cross-Appellants Center to Protect Free Speech, Inc., and Fred VanNatta intervened as defendants ("Intervenors"), seeking a declaration that Measure 47 is void because section (9)(f) makes the effectiveness of the measure contingent on conditions prohibited by Article I, section 21 of the Oregon Constitution. ER 1.

B. Nature of the Judgment Sought to Be Reviewed.

The trial court granted the Secretary and Attorney General's motion for summaryjudgment against Plaintiffs' and Interveners' claims, denied Plaintiffs' and

^ Chapter 3, Oregon Laws 2007 is printed as a note at the beginning of Chapter 259 of the Oregon Revised Statutes.

Interveners' Motions for Summary Judgment, then entered a General Judgment as follows:

> (1) Contrary to the declaration sought by intervenor-defendants in their cross-claim against defendants. Measure 47 (2006) is not unconstitutional under Article 1, § 21, of the Oregon Constitution;
>
> (2) Contrary to the declaration sought by the Horton plaintiffs, § (9)(f) of Measure 47 is not unconstitutional, and defendants therefore did not err by implementing that section according to its terms;
>
> (3) Contrary to the declaration sought by plaintiffs, the operative effect of Measure 47 is deferred in the present circumstances by the terms of § (9)(f), such that Measure 47 is not presently operative;
>
> (4) Consistent with the position asserted by defendants, § (9)(f) validly defers Measure 47's operative effect in the present circumstances, such that Measure 47 is not presently operative;
>
> (5) Plaintiffs' complaint is otherwise dismissed with prejudice;
>
> (6) Intervenor-defendants' cross-claim against defendants is otherwise dismissed with prejudice; and
>
> (7) Defendants are entitled to their costs and disbursements incurred herein. ER 20-21.

C. Statutory Basis for Appellate Jurisdiction.

This Court has jurisdiction over the cross-appeal under ORS 19.205, 19.255(3) and 19.270.

D. Timeliness of Cross-Appeal

The trial court entered the General Judgment October 31, 2007. ER 22. Plaintiffs filed their notices of appeal November 20, 2007. Intervenors filed their

notice of cross-appeal December 10, 2007, within the period prescribed by ORS 19.255(3).

E. Question Presented on Appeal.

Whether Measure 47 is void because the measure's effectiveness is contingent on the occurrence of changes in the text or interpretation of the Oregon Constitution?

F. Summary of Argument.

Measure 47 restricts campaign expenditures and contributions, but "Article I, section 8, prohibits laws restricting campaign expenditures and contributions." *Meyer* **V.** *Bradbury,* 341 Or 288, 293 n4 (2006) (citing *VanNatta v. Keisling,* 324 Or 514 (1997)).

The proponents of Measure 47 knew, therefore, that, for the measure to stand, the constitution needed to change. As a result, the proponents of Measure 47 proposed a,companion constitutional amendment. Measure 46, that would have permitted laws "limit[ing] contributions and expenditures * * * to influence the outcome of any election," and they told voters that "Measures 46 and 47 must both be passed[.]"^

Section (9)(f) of Measure 47 incorporates this link. Section (9)(f) provides that "this Act * * * *shall become effective* at the time that the Oregon Constitution is found to allow, or is amended to allow, * * * limitations [on political campaign contributions or expenditures]. (Emphasis added.) However, by making the measure's effectiveness contingent on a change in the text or interpretation of the

^ Argument in Favor of Ballot Measure 46 by Irene Saikevych, Avis Adee, Robert Altaras, Gerald Cavanaugh, Michael Dawkins, Marshall Fox, Becky Hale, and Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

constitution, the proponents offered a measure in a form that voters could not lawfully adopt.

Article I, section 21, provides in pertinent part:

> [N]or shall any law be passed the taking effect of which shall be made to depend on any authority, except as provided in this Constitution[.]

Section (9)(f) makes the effectiveness of Measure 47 contingent on one of two events: (1) a reinterpretation of the constitution by the courts, or (2) the amendment of the constitution by the people. Article I, section 21 prohibits making the effectiveness of a law dependent on a change in the interpretation *or* terms of the constitution. Therefore, the inclusion of either one of those contingencies renders Measure 47 invalid.

G. Summary of Material Facts.

At issue in this proceeding is the meaning and effect of section (9)(f) of Measure 47. The facts pertinent to that issue are set forth above on page 1 under Nature of the Action.

ASSIGNMENT OF ERROR

The trial court erred by granting the Secretary of State and Attorney General's motion for summary judgment and denying Intervenors' motion for summary judgment, then entering a General Judgment that declared that (1) "Measure 47 (2006) is not unconstitutional under Article I, §21, of the Oregon Constitution," and (2) "§(9)(f) validly defers Measure 47's operative effect in the present circumstances, such that Measure 47 is not presently operative."

A. Preservation of Error.

After receiving permission from the trial court to intervene as defendants, on January 30, 2007, Intervenors filed an Answer and Cross-Claim for Declaratory Judgment, ER 1, that sought the following declaration:

> [T]he Secretary of State may not implement Measure 47 and that the Attorney General may not enforce Measure 47 because Measure 47 is void and of no effect as a measure the taking effect of which is made to depend upon an authority other than as provided in the state constitution in violation of Article I, section 21 of the state constitution. ER 3.

On February 16, 2007, Intervenors filed their motion for summaryjudgment, asking the trial court to "declare that Measure 47 is void." ER 7.

On March 9, 2007, the Secretary and Attorney General filed their Motion for Summary Judgment on All Claims, ER 9, asking the trial court to declare that "Measure 47 should be codified but not given operative effect at this time." ER 5.

In a letter opinion dated September 25, 2007, the trial court "construed" section (9)(f) to be "a direction that the measure's operative effect shall be deferred in specified circumstances, though its effective date remains as provided in Article IV, section l(4)(d)." ER 16. The trial court, therefore, determined that "[sjection (9)(f)'s direction that Measure 47 shall become operative upon amendment of the constitution to allow [campaign contribution and expenditure] limits is permissible." ER 17. Based on the letter opinion, the trial court filed an Order October 23, 2007, that granted the Secretary and Attorney General's motion for summaryjudgment and denied Intervenors' motion for summaryjudgment. ER 18.

Also on October 23, 2007, the trial court filed a General Judgment that included the provisions set forth above on page 2. ER 20-21. The trial court entered the General Judgment October 31, 2007. ER 22.

B. Standard of Review.

Johnson v. *SAIF Corp.,* 202 Or App 264, 270 (2005), *adh'd to on recons,* 205 Or App 41 (2006), *aff'd,* 343 Or 139 (2007), sets forth the standard of review in declaratory judgment proceedings decided on cross-motions for summary judgment:

> On appeal, plaintiff assigns error both to the entry of summary judgment in favor of defendants and to the denial of plaintiffs cross-motion. Because the parties have stipulated to the facts, the only issues are legal. Accordingly, we review the trial court's entry of summary judgment to determine whether the record establishes that defendants were entitled to judgment as a matter of law.

The issues raised—the meaning and effect of a statutory term—are a question of law. *PEBB* ***V.*** *OHSU,* 205 Or App 64, 69 (2006). Therefore, this Court reviews the trial court's ruling for "errors of law" without deference to the trial court's decision. *Oregonians For Sound Econ. Policy, Inc.* v. *State Accident Ins. Fund Corp.,* 218 Or App 31, 42 (2008).

ARGUMENT

A. Introduction

Ordinarily, an initiative measure becomes effective 30 days after adoption. Or Const, Art IV, § 1 (4)(d). If, upon the adoption of a law, the constitution does not permit the government to enforce or implement that newly effective law, then the people may give force to the law by amending the constitution to expressly validate the measure. *People's Util. Dist.* v. *Wasco Co.,* 210 Or 1, 12 (1957) ("a constitutional provision which from the language used shows expressly or by necessary implication that it was intended to operate retrospectively by validating antecedent

unconstitutional legislation, renders valid all such legislation * * * without reenactment by the legislature") (citation omitted).

But the proponents of Measure 47 did not follow the ordinary course. They chose instead to defer the measure's effectiveness until such time as the constitution changed. Section (9)(f) states:

> [T]his Act * * * *shall become effective* at the time that the Oregon Constitution is found to allow, or is amended to allow, * * * limitations [on political campaign contributions or expenditures]. (Emphasis added.)

Perhaps the proponents were trying to avoid having to craft a future constitutional amendment with language that expressly validated Measure 47. *See* Or Const, Art XI, § 11(7) ("Notwithstanding any other existing or former provision of this Constitution, the following [previously adopted tax laws] are validated * * *:"). Perhaps the proponents simply made the political choice that voters would be more likely to vote for Measure 47 if the measure assured voters that voters or judges would need to change the scope of the constitution before the measure took effect. Whatever the reason, the measure's proponents, like others before them, offered voters a measure that contained too much for the measure to be validly adopted. *See, e.g.. League of Oregon Cities v. State of Oregon*, 334 Or 645, 673-74 (2002) (measure unlawfully adopted because proposed too many amendments); *Mclntire v. Forbes,* 322 Or 426, 445 (1996) (measure unlawfully adopted because contained too many subjects).

Section (9)(f) makes the effectiveness of Measure 47 contingent on one of two events: (1) a reinterpretation of the constitution by the courts, or (2) the amendment

of the constitution by the people. Article I, section 21 prohibits making the effectiveness of a law dependent on a change in the interpretation *or* terms of the constitution. Therefore, the inclusion of either one of those contingencies renders Measure 47 invalid.

B. The Effectiveness of Measure 47 Impermissibly Depends Upon Reinterpretation of the Constitution

Portland v. Coffey, 67 Or 507 (1913), addressed a law that provided for certain electoral procedures to take effect depending on whether the Oregon Supreme Court interpreted the constitution to permit them:

> [I]n case the Supreme Court should hold the * * * provisions for compulsory registration invalid, then * * * the elector may register * * * by subscribing to the following [procedures]." 1913 Or Laws, ch 323, § 6.

Because "the validity of the enactment [wa]s to depend upon a decision of the Supreme Court[,]" the law violated Article I, section 21. *Portland,* 67 Or at 513. Although the courts are part of state government, they are an "authority" outside of the legislative branch on whose decisions, under Article I, section 21, the effectiveness of legislation cannot depend.^

Section (9)(f) of Measure 47, therefore, confers authority that the courts cannot accept. The courts may not join the process of declaring whether there is to be a law:

The rule in *Portland* v. *Coffey* remains good law: "a provision of law that takes effect only upon a judicial declaration of the invalidity of another provision of law violates Article I, section 21, of the Oregon Constitution, which provides that no law shall be passed, "'the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.'" *Eckles v. State of Oregon,* 306 Or 380, 383 n3 (1988), *appeal dismissed,* 490 US 1032 (1989) (questioning, but not deciding, whether 1982 Oregon Laws (3rd Spec Sess) chapter 3, section 2 violated Article I, section 21, because tax's "tak[ing] effecf' made contingent on the courts' enforcement of another law).

> [When] the vaHdity of the enactment is to depend on a decision of the Supreme Court[, tjhis is in effect combining independent departments of the state government which the organic law declares shall be kept separate[.]

Portland, 67 Or at 513 (citation omitted).

InMarr v. *Fisher,* 182 Or 383, 388 (1947), the Supreme Court expounded on the principle of separation of powers that underlies this rule:

> The purpose of the constitutional provision (Art. I, § 21) * * * is to prevent unlawful delegation of legislative authority. The law-making power, under the Constitution of Oregon (Art. IV, § 1) is vested in the legislature, but the people have reserved unto themselves the power to initiate laws and to approve or reject at the polls any act of the legislative assembly. The people, having thus vested the legislative assembly with the law-making power, have in effect said that the legislature cannot confer such power upon any authority, except as provided in the Constitution. It is the constitutional function of the legislature to declare whether there is to be a law; and, if so, what are its terms. (Citations omitted.)

Under this rationale, the inclusion of section (9)(f), making Measure 47 "effective" upon a reinterpretation of the constitution, violates Article I, section 21.

C. The Effectiveness of Measure 47 Impermissibly Depends Upon Amendment of the Constitution

1. "Effective" Once Meant "Operative," But Only 80 Years Ago

Even if a measure could make itself "effective" upon the reinterpretation of the constitution, a measure cannot makes itself "effective" upon an amendment to the constitution. At one time, the Supreme Court appeared to have permitted a law to "take effect" upon the adoption of a constitutional amendment, but the Supreme Court no longer grants that permission. A law cannot depend for its effectiveness on the adoption of another law by a later group of legislators or voters: a law is valid only if

the law is "complete in itself, requiring nothing else to give it validity[.]" *Portland,* 67 Or at 513.^

In *State v. Rathie,* 101 Or 339 (1921), a party challenged the validity of a law, 1920 Or Laws, ch 19, that the Legislative Assembly wrote to "take effect" upon the adoption of a constitutional amendment. The Supreme Court rejected the argument in a single sentence, explaining that the contention was "fully answered in the negative and settled" by the Supreme Court's decision in *Libby v. Olcott, 66* Or 124 (1913). *Rathie,* 101 Or at 364. The Supreme Court's reliance on *Libby* was curious because *Libby* did not address a law's taking effect upon the adoption of an amendment. The law at issue in *Libby* had merely set a date for the election on any laws that citizens might refer to the ballot. The Legislative Assembly's setting the date for an election that might or might not occur did not implicate Article I, section 21 at all. *Libby, 66* Or at 132. The only contingency was whether citizens would refer laws to the ballot, and the constitution itself prescribed when laws were to take effect depending on whether they became subject to referendum. *Compare* Or Const, Art IV, § 28 (not subject to referendum: effective "ninety days from the end of the session") *with former* Or Const, Art IV, § 1 (subject to referendum: effective "when it is approved"). As a result, *Libby* provided no support for the decision in *Rathie.*

Not surprisingly, the Supreme Court soon retreated from *Rathie.* In *State* v. *Hecker,* 109 Or 520 (1923), a party (1) sought to overrule *Rathie* and the approval of

^ The people have modified this rule for income tax laws. Article I, section 21 allows the people to provide in the constitution for a law to take effect upon the actions of another authority and, in 1970, the people exercised that authority to add Article IV, section 32, which allows state income tax laws to become effective upon an action by Congress. Article IV, section 32, is, however, the only provision that authorizes a law to become effective upon subsequent action.

1920 Or Laws, ch 19, and (2) challenged a second law, 1920 Or Law, ch 20, that the Legislative Assembly had also written to "take effect" upon the adoption of the constitutional amendment.^

If a law could "take effect" upon the adoption of a subsequent constitutional amendment, then the Court could have disposed of the appeal in *Hecker* simply by citing to *Rathie.* The Supreme Court did not, however, follow that path to a decision. The Supreme Court disposed of the renewed challenge to 1920 Or Laws, ch 19, by noting that the renewed challenge did not present a justiciable controversy. The constitutional amendment on which 1920 Or Laws, ch 19, depended to "take effect" was "a repetition" of 1920 Or Laws, ch 19; therefore, a successful challenge to 1920 Or Laws, ch 19, would gain nothing. *Hecker,* 109 Or at 543-44. The Supreme Court in *Hecker* did not say so, but the clear implication of the decision was that the Supreme Court in *Rathie* should not have reached the merits of the challenge. If the adoption of the constitutional amendment rendered the renewed challenge to the law moot, then the original challenge to the law in *Rathie* must have been moot, too.

The Supreme Court could not avoid deciding the validity of 1920 Or Law, ch 20, because the constitutional amendment did not repeat that law. The Supreme Court upheld 1920 Or Law, ch 20, but in a way that demonstrates that Measure 47 is invalid. To uphold 1920 Or Law, ch 20, the Supreme Court interpreted the law to have taken effect 90 days after adjournment as provided in Article IV, section 28, and then to

^ The discussion in *Hecker* can be confusing, because the court initially refers to *Rathie* as addressing 1920 Or Law, ch 20, 109 Or at 542, but *Rathie* addressed "Chapter 19," not chapter 20. *See Rathie,* 101 Or at 363 (citing and quoting provision).

have become operative *{i.e.,* capable of enforcement) upon the adoption of the later constitutional amendment. *Hecker,* 109 Or at 544-46. Under this interpretation, the law did not depend on the constitutional amendment to become effective. To reach its decision, the Supreme Court relied on *Fonts v. Hood River,* 46 Or 492, 497 (1905), which had ruled that "the legislative assembly * * * cannot leave it to a vote of the people to determine whether or not [a law] shall become a law, because the taking effect thereof is thereby made to depend upon an authority other than that provided for in the Constitution." Although Article I, section 21, did not permit a law to "take effect" upon a decision in a future election, the Supreme Court in *Fonts* said that "the Legislature [could] enact a law, and make its *operation* depend on the contingency of a popular vote[.]" 46 Or at 501, (emphasis added).

In *Hecker,* 109 Or at 546, the Supreme Court acknowledged that the Legislative Assembly had used the phrase "take effect," but interpreted "take effect," which would have been unconstitutional under Article I, section 21, to mean to "become operative," which was permissible under Article I, section 21:

> It is true that section 4 of chapter 20, Laws 1920, uses these words: "Shall take effect"; but for the purpose of this case we shall assume that the language of section 4, chapter 20, is not used in the sense in which like language is employed in article 4, section 28, of the Constitution, and we shall also assume that section 4 of chapter 20 merely means that the active operation of chapter 20 is postponed until the adoption of the 1920 amendment to the Constitution.

109 Or at 546.

The trial court followed *Hecker* to interpret the phrase "shall become effective" in section (9)(f) to mean "shall become operative" and, based on that interpretation.

ruled that section (9)(f) was consistent with Article I, section 21. ER 16-17. The trial court's reliance on *Hecker* was misplaced; therefore, the interpretation of section (9)(f) and the application of Article I, section 21 were in error.

2. "Effective" Can No Longer Mean "Operative"

Language changes over time. In the 1920s, a "bimbo" meant a tough guy and eyeglasses were "cheaters"; neither of those terms bears the same meaning today. ^ And, just as the vocabulary of Scott Turow differs from the vocabulary of Scott Fitzgerald, the vocabulary of legislative measures is different now than it was generations ago. Since *Hecker,* legislation has carefully distinguished between a measure's becoming "effective" and a measure's becoming "operative."

Marr, 182 Or at 389, demonstrates how, by using the prescribed terminology, the legislative branch may leave a law dormant pending future action without violating Article I, section 21. In *Marr,* the Legislative Assembly had passed a tax law that provided different exemptions and credits depending upon whether the people adopted or rejected a measure that would create a sales tax. Opponents challenged the tax law under Article I, section 21, contending that the contingency of a future vote rendered the tax law invalid. The Supreme Court upheld the tax law because, to avoid making the effectiveness of the tax law dependent on the later measure, the Legislative Assembly expressly made the tax law *effective* as the constitution prescribed (90 days after adjournment as prescribed by Article IV, section

^ For these (and many other changes) in the meaning of words from the 1920s to today, *see* http://www.fcps.edu/westspringfieldhs/academic/engHsh/lproiect/99gg/99gg4/language.htm and http://local.aaca.org/bntc/slang/slang.htm.

28), but made the *operation* of the law dependent on the outcome of the vote on the subsequent measure. Oregon Laws 1947, chapter 536, section 7 reads: "this act shall not become *operative* * * * jf * * * ^^^ other] act * * * has become *effective and operative"* (emphasis added). By using both "effective" and "operative" together, the Legislative Assembly demonstrated that the two terms have different meanings.

The Supreme Court explained this pivotal distinction between *effective* (which may not be dependent on a subsequent measure) and *operative* (which may be dependent on a subsequent measure):

> The Act went into effect as a law upon the expiration of ninety days from and after the final adjournment of the legislative session. Its operative effect was suspended until the happening of the contingency designated in the Act. If the Act was complete in the sense that the legislative assembly had exercised its discretion and judgment as to the expediency or inexpediency of the income tax exemption provisions-and we think it did-it had the power to determine the conditions on which such Act should go into operation. Indeed, the Constitution itself (Art. I, § 22) expressly confers upon the legislative assembly the right to suspend the operation of laws.

Marr, 182 0rat389.

Operative is the key term: "the legislature may constitutionally enact a law and make its *operation* depend upon the contingency of the [subsequent law] being, or not being, in effect[.]" *Marr,* 182 Or at 392 (emphasis added). As a result, when in the exercise of legislative power a law is made contingent on a future occurrence, it is the operation—^not effect—of the law that remains dormant. Regardless of the nature of the contingency, the lawful term "operative" is used uniformly and the unlawful term "effective" is not used at all:

1. Future judicial interpretation, 2003 Or Laws, ch 801, § 25(1):

> The amendments to ORS 293.535 by section 22 of this 2003 Act *become operative* 31 days after entry of a final judgment that invalidates the amendments to ORS 293.535 by section 21 of this 2003 Act.

2. Future action by voters, 1987 Or Laws, ch 565, § 2:

> If approved by the electors of the Port of Coos Bay * * *, this * * * Act *becomes operative* on January 1, 1988.

3. Future adoption of rules, 1995 Or Laws, ch 662, § 7:

> ORS 465.315(l)(b)(B), (d) and (e) as set forth in this Act shall not *become operative* until the Environmental Quality Commission adopts implementing rules pursuant to ORS 465.315(2) as set forth in this Act.

4. Future legislative action by other states, 1999 Or Laws, ch 164, § 4(2):

> This section *remains operative* only while laws or administrative rules in California and Washington are operative that contain, in substance or effect, provisions similar to the provisions of ORS 508.840(1).

5. Future action by Congress, 1995 SB 8, § 9:

> Section 8 of this Act and the amendments to statute sections by sections 1 to 7 of this Act *become operative* when Congress enacts a law repealing the federal maximum speed limits or otherwise lifts any requirement that states enact specific speed limits in order to receive federal funds.

6. Future action by the Legislative Assembly, 2005 SB 3402, § 164(2):

> Notwithstanding subsection (1) of this section, sections 33 to 148 and 162 of this 2005 Act and the amendments to statutes by sections 149 to 160 of this 2005 Act do not *become* operative if this state has not entered into the Streamlined Sales and Use Tax Agreement, as defined in section 25 of this 2005 Act, by January 1, 2006.

The proponents of Measure 47 did not make the law's *operation* contingent on a change in the interpretation or terms of the constitution; they provided for the contingencies to make the law "effective," and those contingencies Article I, section 21 does not permit.

D. Voters Cannot Have Intended for "Effective" to Mean "Operative"

Following *Ecumenical Ministries* v. *Oregon State Lottery Comm,* 318 Or 551, 559 (1994), the trial court must have believed that, when voters read "effective," they, like the Supreme Court in 1923, understood the term to mean "operative." This position might have had some force if the voters whose intention mattered were voters of 1923, but the intention necessary to discern was of voters of 2006—^voters for whom, after the change in legislative terminology since *Hecker,* the term "effective" cannot have meant "operative." When interpreting legislation, a court must give effect to "a deliberate choice of words[.]" *Gen. Elec. Credit Corp. v. Tax Com.,* 231 Or 570, 594 (1962). This the trial court did not do.

The context in which voters adopted Measure 47 includes the terminology that the Legislative Assembly employs in its exercise of legislative power. The Legislative Assembly treats "effective" and "operative" as having special legal significance by using the terms to express different concepts and in different contexts. The Bill Drafting Manual that the Legislative Assembly follows, and which is available to drafters of initiatives at www.lc.state.or.us, *requires* the use of "operative" instead of "effective" when an initiative Act is made contingent upon a change in the constitution:

> Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective. *If the enabling legislation is to be adopted by initiative, the provision should indicate that the enabling legislation does not become "operative" unless the accompanying constitutional amendment or revision is approved by the people (because section 1 (4)(d), Article IV, Oregon Constitution, says that an initiative law becomes effective 30 days after the election at which it is approved).*

Bill Drafting Manual, p. 17.11 (Office of Legislative Counsel 2006, (emphasis added). ^

In addition. House Rule 13.01(2) and Senate Rule 13.01(3) require that legislative measures conform to the *Form and Style Manual for Legislative Measures,* which draws a careful distinction between "effective" and "operative." To avoid running afoul of Article I, section 21, the Legislative Assembly prescribes the use of "operative"—^not "effective"—when a law is to come to life upon the happening of a future event: "If approved by the electors * * * this 1987 Act becomes operative[.]" *Form and Style Manual for Legislative Measures,* p 32.

The history of the adoption of Measure 47 also shows that voters understood "effective" to mean "effective," not "operative." First, information on which voters relied referred to Measure 47 as "becom[ing] law," not becoming "operative." The Voters' Pamphlet informed voters that "[sjupporters wrote Measure 46 to allow the

The Bill Drafting Manual read the same way when Measure 47 was drafted and adopted.

otherwise unconstitutional provisions in Measure 47 to *become law"*^ and that voters would "have to surrender [their] existing constitutional rights through Measure 46 for Measure 47 to even be able *to take effect."*^ From *The Oregonian,* voters knew that Measure 47 "would *become law* only if voters approve both it and Measure 46."'°

Supporters of Measure 47 also told voters that adopting Measure 46 was imperative, not just beneficial—a position that supporters would not have taken if Measure 47 could become law despite the failure of Measure 46: "Measures 46 and 47 must both be passed, because they work together."'' Opponents made the same point:

> 1. Measures 46 and 47 * * * are designed to work together[.]"'^
>
> 2. [The] limits [in Measure 47] could not be imposed without Measure 46 taking away the Constitutional protections on freedom of speech[.]"'^
>
> 3. Even its sponsors admit that Measure 47 violates your existing free speech rights. That's why they also are asking for you to surrender those rights by constitutional amendment (Measure 46).'''

Argument in Opposition to Ballot Measure 46 by American Federation of Teachers-Oregon (Official Voters' Pamphlet, General Election, Nov. 7, 2006) (emphasis added).

^ Argument in Opposition to Ballot Measure 47 by *SEIU Local 49 and SEIU Local 503,* OPEt/(Official Voters' Pamphlet, General Election, Nov. 7, 2006) (emphasis added).

'° "Measures promise volatile shift in Oregon campaign spending," http://www.oregonlive.com/elections/oregonian/index.ssf?^ase/news/l 158980195219080.xml«fecoll-7 (Sept 23, 2006).

" Argument in Favor of Ballot Measure 46 by Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

Argument in Opposition to Ballot Measure 46 by Oregon School Employees Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

'^ Argument in Opposition to Ballot Measure 47 by Planned Parenthood Advocates of Oregon (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

Argument in Opposition to Ballot Measure 47 by *Oregon Education Association* (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

All of the evidence of voters' understanding of "effective" leads to the conclusion that voters understood the term to mean what it says-"effective"-and not the different concept, "operative." Voters are not like Humpty Dumpty, able or prone to use the same word in the same context, but to mean different things:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean - neither more or less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master - that's all." Lewis Carroll, *Through the Looking-Glassche**{m2)}*^

Since the 1920s, citizens exercising the powers of the legislative department—whether through bills or initiative measures-have said "effective" when they meant "effective" and "operative" when they meant "operative." For example, in section 34(2) of 2000 Ballot Measure 6, which also sought to reform campaign spending, voters showed they knew that "operative" was the term to use to defer the application of a law:

> In accordance with subsection (1) of this section:
>
> (a) The amendments to ORS 260.18 8 and 316.102 by sections 27 and 28 or 29 of this 2000 Act become o/>era?/ve January 1, 2001;
>
> (b) Sections 4, 7 to 19 and 22 to 26 of this 2000 Act become *operative* July 1, 2001; and
>
> (c) Subject to section 39 of this 2000 Act, the repeal of statutes by section 33 of this 2000 Act becomes *operative* January 1, 2001.

Quoted by Edmunds, J., dissenting in *State v. Weaver,* 121 Or App 362, 371, *adhered to on reconsideration,* 124 Or App 615 (1993) *{en banc), aff'd,* 319 Or 212 (1994) (complaining that "reasonable" could not mean "unreasonable").

> (3) The Secretary of State may take any action prior to the operative date of any provision of this 2000 Act that is necessary to implement any provision of this 2000 Act on or after the operative date of any provision of this 2000 Act. (Emphasis added.)

Likewise, in section 6 of 1996 Ballot Measure 38, voters delayed a law through the use of "operative," not effective:

> This Act shall become *operative:*
>
> (1) On public land, which includes federal lands:
>
> (a) On January 1, 1997, for waters of the state that supply drinking water or constitute salmon, steelhead or trout habitat; and
>
> (b) On January 1, 2002, for all other waters of the state.
>
> (2) On private land:
>
> (a) On January 1, 2002, for waters of the state that supply drinking water or constitute salmon, steelhead or trout habitat; and
>
> (b) On January 1, 2007, for all other waters of the state. (Emphasis added.)

There is no contrary evidence from which the trial court could have concluded, as it did, that, by using "effective," voters intended to ignore 85 years of legislative practice and to express the concept "operative."

E. The Trial Court's Declaration Lacks Internal Logic

The trial court's decision suffers from the additional defect of being illogical. The trial court reads section (9)(f) to render the entire Act inoperative until the constitution is amended or reinterpreted, but to reach that interpretation, the trial court must treat section (9)(f) as if that section were itself operative. The problem with this logic is that section (9)(f) is itself part of the Act that the trial court says is not yet in

effect. The trial court's interpretation, therefore, "presents a variation on the 'chicken or the egg?' conundrum." *State* v. *Pine,* 181 Or App 105 (2002) (Haselton, J., dissenting), *rev'd,* 336 Or 194 (2003). If section (9)(f) renders "the Act" inoperative, then section (9)(f) must be inoperative, too.

F. An Act that Violates Article I, Section 21 Is Void

The consequence of making the effectiveness of a law depend upon a future constitutional amendment or interpretation is the invalidation of the entire law. Severing section (9)(f) from Measure 47 is not an option. A measure must be lawfully adopted before the measure's severability provision can come into play. *Armatta* v. *Kitzhaber, 321* Or 250, 285 n19 (1998), explains:

> Because this case concerns the procedural requirements for amending or revising the constitution, the question of severability, which was raised as an issue below in relation to plaintiffs' "revision" challenge to Measure 40, is not an issue here. Severability relates to a substantive challenge, based upon a superior source of law, to certain provisions of a law or amendment that has been properly enacted or adopted. *Hart* v. *Paulus,* 296 Or. 352, 361, 676 P.2d 1384 (1984); *see also Oregon State Police Officers' Assn.* **V.** *State of Oregon,* 323 Or. 356, 380, 918 P.2d 765 (1996) (in concluding that a constitutional amendment, adopted by initiative petition, violated the Contracts Clause of the United States Constitution, the court applied principles of severability and concluded that no section could be saved). .In contrast, this case concerns "the legality of the enactment [or adoption] process itself" *Hart,* 296 Or. at 361. *See also Lane Transit District v. Lane County,* 327 Or. 161, 169-70, 957 P.2d 1217 (1998) (stating that the severability clause in the measure at issue "is (and would h^ve to be) aimed at judicial construction of the measure after (and if) * * * it is adopted").

A contingent effective clause is not a substantive provision; the effective clause is part of the enactment process:

> Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective.

Bill Drafting Manual, p. 17.11.

As a result, when an Act violates Article I, section 21, the result is always the invalidation of the entire measure. *General Electric Co. v. Wahle, 101* Or 302, 333 (1956) (Act is "unconstitutional and void, being in violation of* * * Art. 1, § 21"); *LaForge* v. *Ellis,* 175 Or 545, 554 (1945) ("the challenged act is unconstitutional and void"); *Van Winkle v. Meyers,* 151 Or 455, 470 (1935) (violation of Article I, section 21 "in itself alone * * * render[s] the act void"); *State ex rel Bissinger & Co. v. Hines,* 94 Or 607, 617 (1920) (because in violation of Article I, section 21, "the act * * * is unconstitutional and void"); *Portland v. Coffey,* 67 Or 507, 515 (1913) (invalidating entire Act when "the validity of the enactment [wa]s to depend upon a decision of the Supreme Court").

Invalidation makes sense for three reasons. First, invalidating the entire measure avoids the "'chicken or the egg?' conundrum."

Second, without the invalidation of all of Measure 47, the state of the state's law will remain certain: Measure 47 would otherwise float on the wind like a spore waiting until such time as a judge may decide that conditions are ripe for the spore to grow.

Third and finally, and perhaps most important, severing a contingent effective clause necessarily ignores voters' intent that Measure 47 not take effect unless the

terms or interpretation of the constitution changed. Voters were repeatedly told that Measures 46 and 47 worked in tandem: "Measures 46 and 47 must both be passed, because they work together."^^ Virtually every argument for or against the measures referred to both of them: "Measures 46 and 47, together[,]" "Measures 46 and 47—working in concert[,]"'^ and "Measure 46 is paired with * * * Measure 47."'^ It is hard to conceive of a result more contrary to voters' expectations than breaking up the pair.

CONCLUSION

The proponents of Measure 47 presumably did not have the subjective intent to propose a law that the constitution prohibits voters from adopting, but good intentions do not suffice for compliance withthe constitution. *See, e.g., Christ/Tauman v. Myers,* 339 Or 494, 499 (2005) (proponents erroneously proposed law instead of constitutional amendment); *Kerr* v. *Bradbury,* 193 Or App 304, *rev dism'd,* 340 Or 241, *adh'd to on recons,* 341 Or 200 (2006) (proponents erroneously failed to include entire text of provision measure proposed to amend).

As Judge Byers noted with respect to another Measure 47 that voters passed in an earlier election cycle, a consequence of citizens crafting legislation can be laws that are "poorly drafted and thought out" and that, as a result, "reap unwanted and unanticipated consequences." *Chart Development Corp. v. Dept. of Rev., 2* Or St Tax

Argument in Favor of Ballot Measure 46 by Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

^^ Argument in Opposition to Ballot Measure 46 by Oregon School Employees Association (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

Argument in Opposition to Ballot Measure 46 by Stand for Children (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

Rptr 1400-345 at 15,175 (CCH 2000). Although the invalidation of Measure 47 was not the proponents' anticipated consequence, invalidation is the consequence that the constitution prescribes.

The supporters of Measure 47 could have drafted the measure to have become "operative" rather than "effective." The result of their failure is that they presented to voters a measure that voters could not validly adopt. As a result, this Court should reverse the General Judgment in favor of the Secretary and Attorney General and remand the action to the trial court to declare that Measure 47 is void.

DATED this 16th day of April, 2008.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

J^hA A. Diiore^zo, Jr., OSB #802040
rdory AVChaHmov, OSB #822180

Attorneys for Intervenors-
Respondents/Cross-Appellants

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Plaintiff,

v.

BILL BRADBURY, Secretary of State of the State of Oregon,

and

HARDY MYERS, Attorney General of the State of Oregon,

Defendants,

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon not-for-profit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants.

Case No. 06C22473

CENTER TO PROTECT FREE SPEECH, INC. AND FRED VANNATTA'S ANSWER AND CROSS-CLAIM FOR DECLARATORY JUDGMENT

(Cross-Claim Not Subject to Mandatory Arbitration)

For their answer to the Complaint, Intervenor-Defendants Center to Protect Free Speech ("Center") and Fred VanNatta ("VanNatta") admit, deny, and allege as follows:

///

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1.

Admit paragraphs 4. 5. 8, 13, and 14.

2.

Deny paragraphs 10, 17. 18, 25, 26, 27, 29, and 30, and each and every other allegation not expressly admitted.

3.

Lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 2 and 3, and, therefore, deny those allegations.

4.

Paragraphs 7, 9, 11, 12, 16, 22, and 24 allege legal conclusions to which no response is required.

5.

Admit subparagraphs A and B of paragraph 1, lack knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence and subparagraphs C, D, and E of paragraph 1, and, therefore, deny those allegations, and deny the remaining allegations of paragraph 1.

6.

Admit that plaintiffs Hazell and Nelson are entitled to appeal from the order of the Secretary of State declining to implement portions of Measure 47, and deny the remaining allegations of paragraphs 6, 19, and 21.

7.

Admit and deny the allegations of paragraphs 15, 20, 23, and 28 as hereinbefore alleged.

///

///

///

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CROSS-CLAIM

(Declaratory Judgment)

For their cross-claim against defendants, the Center and VanNatta allege as follows:

8.

The Center is an Oregon not-for-profit corporation dedicated to protecting rights guaranteed by the state and federal constitutions, including Article I, section 8 of the state constitution. VanNatta is an elector and taxpayer and the president of the Center. The Center and VanNatta engage in and plan to engage in activities that would be prohibited or regulated if the Secretary of State were to implement Measure 47 or the Attorney General were to enforce Measure 47.

9.

The Center and VanNatta contend that the Secretary of State may not implement Measure 47 and that the Attorney General may not enforce Measure 47 because Measure 47 is void and of no effect as a measure the taking effect of which is made to depend upon an authority other than as provided in the state constitution in violation of Article I, section 21 of the state constitution.

10.

The Center and VanNatta have no plain, speedy, and adequate remedy in the ordinary course of the law.

11.

The Center and VanNatta are entitled to recover their reasonable attorney fees from defendants because the Center and VanNatta are seeking to vindicate an important constitutional right applying to all citizens and not to vindicating individualized and different interests or any pecuniary or other special interest of their own aside from that shared with the

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public at large.

12.

Defendants deny the Center and VanNatta's contentions.

WHEREFORE, the Center and VanNatta demand judgment as follows:

1. Declaring that Measure 47 is void and of no effect as a measure the taking effect of which is made to depend upon an authority other than as provided in the state constitution in violation of Article I, section 21 of the state constitution; and

2. Awarding the Center and VanNatta their reasonable attorney fees and costs and disbursements incurred herein.

DATED this day of January, 2007.

DAVIS WRIGHT TREMAINE LLP

By _____
John DiLorenzo, Jr., OSB #80204
Gregory A. Chaimov, OSB #82218

Attorneys for Intervenor- Defendants Center To Protect Free Speech, Inc., and Fred VanNatta
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201
Telephone: 503-241-2300
Facsimile: 503-778-5499

CERTIFICATE OF SERVICE

1 hereby certify that I served a copy of the foregoing **CENTER TO PROTECT FREE SPEECH, INC. AND FRED VANNATTA'S ANSWER AND CROSS-CLAIM FOR DECLARATORY JUDGMENT** on:

Linda Williams, OSB No. 78425
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Attorney for Plaintiffs Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell

David Leith, OSB No. 93341
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^ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

Z] by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

m by personally handing a copy thereof to said attorney on the date set forth below;

^ by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

^ by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or

^ by using Cm/ECF electronic service.

Dated this day of January, 2007.

DAVIS WRIGHT TREMAINE **LLP**

By _____

J6iin DiLorenzo, Jr., OSB #80204
Griaory A. Chaimov, OSB #82218

Attorneys for Intervenor- Defendants Center To Protect Free Speech, Inc., and Fred VanNatta

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Plaintiff,

v.

BILL BRADBURY, Secretary of State of the State of Oregon,

and

HARDY MYERS, Attorney General of the State of Oregon,

Defendants.

and

CENTER TO PROTECT FREE SPEECH, INC., AND FRED VANNATTA,

Intervenor-Defendants/Cross-Claimants.

Case No. 06C22473

INTERVENOR-DEFENDANTS/CROSS-CLAIMANTS' MOTIONS FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

Pursuant to ORCP 47, Intervenor-Defendants/Cross-Claimants move for summary judgment on Plaintiffs' Complaint and on their Cross-Claim for Declaratory Relief There are no material factual disputes and Intervenor-Defendants/Cross-Claimants are entitled to judgment as a matter of law. This Motion is supported by the following Points and Authorities. Intervenor-

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Defendants/Cross-Claimants request oral argument and official court reporting services. Intervenor-Defendants/Cross-Claimants estimate that the time required for oral argument on this Motion (and on the other parties' motions) will be two hours.'

POINTS AND AUTHORITIES

QUESTION PRESENTED

The question that this case presents is how much, if any, of Measure 47 has become (or can become) law. The answer is none; the Measure is void in its entirety.

INTRODUCTION

Measure 47 proposed a law to restrict campaign expenditures and contributions, but "Article I, section 8, [of the state constitution] prohibits laws restricting campaign expenditures and contributions." *Meyer* v. *Bradbury*, 341 Or 288, 293 n4 (2006) (citing *VanNatta* ***V.*** *Keisling, 2,2A Or 5U {1991)).*

The proponents of Measure 47 knew, therefore, that, for the Measure to stand, the constitution needed to change: "Measures 46 and 47 must both be passed[.]"'^ They made this constitutional change a prerequisite to the Measure's taking effect. Section 9(f) of the Measure reads:

> [T]his Act shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, *** limitations [on political campaign contributions or expenditures].

However, by making the Measure's effectiveness contingent on a change in the constitution, the proponents offered a measure in a form that voters could not lawfully adopt.

///

///

As explained in the declaration of Fred VanNatta in support of the motion to intervene, Defendant-Intervenors/Cross-claimants are persons to whose conduct the provisions of Measure 47 are directed.

^ Argument in Favor of Ballot Measure 46 by Irene Saikevych, Avis Adee, Robert Altaras, Gerald Cavanaugh, Michael Dawkins, Marshall Fox, Becky Hale, and Jackson County Citizens for the Public Good (Official Voters' Pamphlet, General Election, Nov. 7, 2006).

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Plaintiffs,

v.

BILL BRADBURY, Secretary of State of the State of Oregon, and HARDY MYERS, Attorney General of the State of Oregon,

Defendants,

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon not-for-profit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants.

Case No. 06C-22473
Honorable Mary Mertens James

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ALL CLAIMS

(ORAL ARGUMENT REQUESTED)

Defendants move, under ORCP 47B, for summary judgment on plaintiffs' complaint and on interveners' cross-claim. This motion is supported by the memorandum and the Affidavit of

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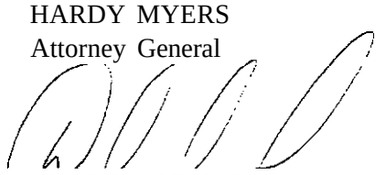
] David Leith submitted herewith. The court has scheduled oral argument for June 18, 2007, at 2 9:30 a.m. Court reporting services are requested.

3 DATED this _3_ day of March, 2007.

4 Respectfully submitted,

5 HARDY MYERS
6 Attorney General

7 

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September 25, 2007

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Re: Hazell, et al v Bradbury, et al
Case No. 06C22473

Dear Counsel,

This matter was scheduled for hearing on Plaintiffs', Defendants' and Interveners' Cross Motions for Summary Judgment. Plaintiffs Hazell, Nelson, Civiletti, Delk and Duell ("Hazell plaintiffs") are represented by

Daniel Meek. Plaintiffs Horton and Lewis ("Horton plaintiffs") are represented by Linda Williams. Defendants are represented by Assistant Attorney General David Leith. Intervenor-defendants and cross-claimants are represented by Gregory Chaimov. On July 13, 2007, the court heard oral argument from all counsel. The court then took the motions under advisement.

I have carefully reviewed the pleadings submitted by counsel, and taken into account the arguments you each presented. I want to thank the parties and their counsel for your extensive briefing as well as your patience with the court. A serious illness, followed by the death of my mother-in-law caused me to take time for my family In the interim. Now, being fully advised, this letter sets forth my decision.

Summary of Issues for Summary Judgment

The issue raised by Plaintiffs' Complaint is whether defendants Bradbury and Myers ("State" or "defendants") incorrectly placed Measure 47 In abeyance. Measure 47 was a 2006 ballot measure that was validly approved by the people in 2006 but which—by its terms, specifically section 9(f)"—will take effect In the future only if the Oregon Constitution is amended or reinterpreted in a pertinent manner.

Proponents of two 2006 ballot measures sought to amend the Constitution to authorize and simultaneously to enact CC&E limits. Measure 46 proposed a constitutional amendment; Measure 47 proposed a statute. Measure 46, if passed, would have removed the existing state constitutional impediment to Campaign Contribution and Expenditure ("CC&E") limits. In turn, Measure 47 proposed to enact statutory CC&E limits, as well as other related requirements, applicable to candidate-election campaigns. Measure 47 provided for the contingency that the

^ 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.
Measure 47, section (9)(f).

Oregon Constitution still might not permit CC&E limits on its effective date. In that event, section (9)(f) directed that the Act nevertheless should be codified and "become effective at the time that the Oregon Constitution is found to allow, or Is amended to allow, such limitations."

At the election, voters rejected the proposed constitutional amendment but approved Measure 47, the statutory initiative. The central issue in this case concerns the validity and effect of the provision placing Measure 47 in abeyance in the event that CC&E limits are not permitted on its effective date.

The Hazell plaintiffs and the State argue that section 9(f) is constitutionally valid. The State argues that the entire Act is dormant until either the Supreme Court revisits the constitutionality of limits on GC&E's and finds them to be permitted or the voters amend the constitution to allow such limitations. All plaintiffs argue that whether or not the Court finds section 9(f) to be an unconstitutional contingency provision as the Horton plaintiffs and the intervenors argue, it must sever the provision and Implement the rest of Measure 47, considering the validity of each of the remaining provisions of the Act. Intervenors argue that the entire Measure is invalid because section 9(f) purports to hinge the effectiveness of the Act on a contingency that violates Article I, Section 21 of the Oregon Constitution which provides, in pertinent part, "nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided In this Constitution;".

Conclusions and Analysis

First, as a matter of law, I find that at the time of Measure 47's passage in 2006, the Oregon Constitution precluded any limitations on CC&Es. In *Meyer v. Bradbury,* 341 Or. 288, (2006), the Oregon Supreme Court explained that an earlier decision, *Vannatta* "held that *Article I, section 8,* prohibits laws restricting campaign expenditures and contributions." *Meyer,* 341 Or. at 293 n. 4. The *Meyer* court later expanded upon that proposition: "Under Oregon law, both campaign contributions and expenditures are forms of expression protected by [Article I, section 8], thus making legislatively imposed limitations on individual political campaign contributions and expenditures impermissible. See *Vannatta v.*

Keisling, 324 Or. 514, 537 (1997). * * * (so holding)." *Meyer,* at 299. At the 2006 general election, Measure 46 was rejected, leaving the holdings in *Vannatta* and *Meyer* intact. Thus, Article I, section 8, of the Oregon Constitution still prohibits CC&E limits. This court is bound by the Oregon Supreme Court's holdings in *Vannatta* and *Meyer.*

This premise then requires that the court address the question whether Measure 47's plain terms place its operative effect in abeyance, pending authorization. I conclude that it does. The meaning and proper application of section (9)(f) in this case is a matter of statutory construction. As set forth in defendants' memorandum of law in support of summary judgment, a court interpreting an initiated statute should look first to the text and context of the provision at issue. Insofar as the text and context may be ambiguous, the court should then turn to the history of the measure, including voters' pamphlet information and contemporaneous newspaper items.

I find the text and context unambiguous as to meaning and effect. The text of section (9)(f) describes a condition, then mandates the consequences if that condition obtains. The condition triggering section (9)(f) is that "on the effective date of this Act, the Oregon Constitution does not allow limitations on political campaign contributions and expenditures." The mandated consequence if that condition obtains is that the "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." As held above, the triggering circumstances unambiguously existed and were not changed by Measure 46, which did not pass. The unambiguous consequence is that Measure 47, in its entirety, presently is not operative.

The Horton plaintiffs and intervenors argue that section (9)(f) must be construed as an attempt to alter the *effective date,* not just the *operative effect,* of Measure 47, making it constitutionally impermissible. That contention is answered completely by *State v. IHecker,* 109 Or. 520 (1923). *Hecker* makes clear that section (9)(f)'s use of the tenn "shall become effective" must be construed to mean "shall become *operationally* effective." So construed, as in *Hecker,* section (9)(f) conflicts with no

constitutional requirements as to the effective date of legislation passed by initiative.

Nor is the indeterminate nature of the contingency fatal to the provision's effect. In *Hecker,* the challenged statute was to become operative whenever constitutionally authorized, without any specification of an election at which such a proposal might be considered. The section relating to that statute's contingent operation provided:

> This act shall take effect as soon as and whenever the constitutional provision of section 36 of Article I of the constitution of the state of Oregon relating to the death penalty, and any amendment or amendments thereto, will permit.

1920 Oregon Laws, ch. 20, section 4 (as quoted in *Hecker,* 109 Or. at 539). That statute, like the one at issue here, did not specify any election at which an amendment to the constitutional death-penalty prohibition might be considered. Nevertheless, the Oregon Supreme Court upheld the contingency. Section (9)(f) similarly may be sustained under that directly controlling authority, at least with respect to the operative effect being contingent on amendment of the Oregon Constitution.

Intervenors also contend that Measure 47 is void under Article I, section 21, of the Oregon Constitution, which provides, in pertinent part, that no law shall be passed "the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Intervenors contend that the contingency contained in section (9)(f) that permits court interpretation to breathe life into the Act also renders Measure 47 invalid under Article I, section 21.

To address this question, the court must determine whether intervenors have standing to raise the challenge, as they are the only parties to raise this argument.

I conclude that intervenor-defendants have standing under the Declaratory Judgment Act, ORS 28.010 *et seq.* ORS 28.020 requires that a petitioner be "affected":

> Any person * * * whose rights, status or other legal relations *are affected* by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ORS 28.020 (emphasis added).

Interveners' alleged standing is predicated solely on interests that might be affected if Measure 47's substantive provisions ever were to become operative. As such, interveners' potential Injury is contingent on either a change in the Constitution, which is speculative, or the Court's detemnination that Measure 47 in whole or part can become effective as the Hazell plaintiffs urge here, which, at least theoretically, could happen in this litigation. Accordingly, I find that the intervenor-defendants assert more than an abstract interest in the application of a law.

Addressing interveners' cross-claim en the merits, the challenged provision is net unconstitutional. As /-/ec/fer demonstrates, a term directing that legislation shall take effect contingently is most reasonably construed as a reference to operative effect, not as an unconstitutional attempt to adjust the legislation's effective date. Accordingly, in the absence ef any indication ethenwise, section (9)(f) ef Measure 47 is censtmed as a direction that the measure's operative effect shall be defen-ed in specified circumstances, though its effective date remains as provided in Article IV, section 1(4)(d).

Intervenors also challenge the specific contingencies on which Measure 47 would be animated. Section (9)(f) directs that Measure 47 shall become operative when either the constitution is amended to permit CC&E limits, or when it is construed to allow CC&E limits. As noted above, the contingency rendering Measure 47 operative if it is authorized by

constitutional amendment is exactly the same contingency upheld in *Hecker.* Section (9)(f)'s direction that Measure 47 shall become operative upon amendment of the constitution to allow CC&E limits is permissible.

The alternative contingency—that the constitution is found to allow CC&E limits—presents a somewhat more difficult question. The Supreme Court in *Portland v. Coffey,* 67 Or. 507, 135 P. 358 (1913), did strike down a provision that made part of the statute operative only if another part of the statute was ruled unconstitutional. That holding is Inapposite here, however, because the contingency in this case is not that a provision of the current measure is held invalid. Rather, the contingency is that an existing Supreme Court precedent may be overruled rendering the present measure valid or that the Supreme Court may determine that portions of Measure 47 are valid limits on CC&Es. While these contingencies are effectively identical to the first contingency: all merely provide that the measure is in abeyance until its CC&E requirements become constitutionally permissible, it relies on the activity of a third party, rather than the legislative process to give effect to the legislation.

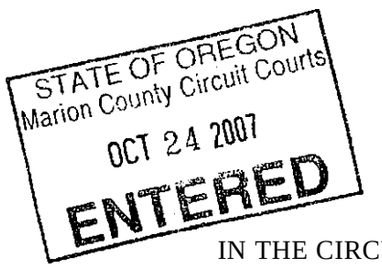
Hecker does not assist defendants as to this challenge. I need not decide whether the measure's operative effect can be made to depend on a judicial finding, for even if this contingency is indefensible constitutionally. There is no justification, however to find the entire Act unconstitutional. ORS 174.040 permits the court In such instances to merely strike and sever that specific clause of section (9)(f). The balance of the section is valid and should be given effect. ORS 174.040.

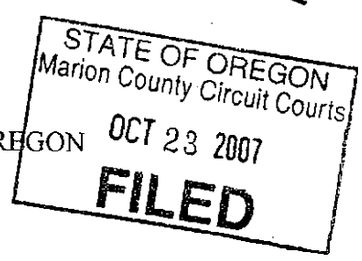
Accordingly, the State's Motion **fpF**-SucQmary Judgment is allowed. Will Mr. Leith please prepare an order and jtra^ment consj^tent with this letter opinion?

Very truly yours,

Mary Mertens James
Circuit Court Judge

MMJ/sg
cc: File





IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Plaintiffs,

v.

BILL BRADBURY, Secretary of State of the State of Oregon, and HARDY MYERS, Attorney General of the State of Oregon,

Defendants,

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon not-for-profit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants.

Case No. 06C-22473
Honorable Mary Mertens James

ORDER

On July 13, 2007, this matter came before the Honorable Mary Mertens James on the parties' cross-motions for summary judgment. Plaintiffs Hazell, Nelson, Civiletti, Deik and Duel! were represented by Daniel Meek. Plaintiffs Horton and Lewis (the Horton plaintiffs) were represented by Linda Williams. Defendants were represented by David Leith. Intervenor-defendants were represented by Gregory Chaimov. The court being first fully advised, incorporating by reference the court's letter opinion dated September 25, 2007,

NOW THEREFORE IT IS HEREBY ORDERED THAT:

(1) ' Defendants' motion for summary judgment is GRANTED; and

Department of Justice
1162 Court Street NE
Salem. OR 97301-4096
(503) 947^700 / Fax: (503) 947-4793

(2) Each of the other cross-motions for sumrnary judgment is DENIED.

DATED this r7?3^dav of October, 2007.

HONORABLE MARY MERTENS JAMES
Circuit Court Judge

Submitted by: David E. Leith
Attomey-in-Charge
Special Litigation Unit
Of Attorneys for Defendants

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4700 / Fax: (503) 947-4793

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

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

Plaintiffs,

v.

BILL BRADBURY, Secretary of State of the State of Oregon, and HARDY MYERS, Attorney General of the State of Oregon,

Defendants,

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon not-for-profit corporation, and FRED VANNATTA,

Intervenor-Defendants and Cross-Claimants.

Case No. 06C-22473
Honorable Mary Mertens James

GENERAL JUDGMENT

The court having previously granted defendants' motion for summary judgment and having previously denied each of the other cross-motions, and the court having previously set forth its analysis and conclusions in its September 25, 2007, letter opinion, which is incorporated herein under ORS 18.082(2),

NOW THEREFORE IT IS ADJUDGED THAT:

(1) Contrary to the declaration sought by intervenor-defendants in their cross-claim against defendants, Measure 47 (2006) is not unconstitutional under Article I, § 21, of the Oregon Constitution;

Department of Juslice
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(2) Contrary to the declaration sought by the Horton plaintiffs, § (9)(f) of Measure 47 is not unconstitutional, and defendants therefore did not err by implementing that section according to its terms;

(3) Contrary to the declaration sought by plaintiffs, the operative effect of Measure 47 is deferred in the present circumstances by the terms of § (9)(f), such that Measure 47 is not presently operative;

(4) Consistent with the position asserted by defendants, § (9)(f) validly defers Measure 47's operative effect in the present circumstances, such that Measure 47 is not presently operative;

(5) Plaintiffs' complaint is otherwise dismissed with prejudice;

(6) Intervenor-defendants' cross-claim against defendants is otherwise dismissed with prejudice; and

(7) Defendantsare entitled to their costs and di^bursemgms^ncurred h^em.

DATED this ,^3 of October, 2007.

HONORABLE MARY MERTENS JAMES
Circuit Court Judge

Submitted by: David E. Leith
Attomey-in-Charge
Special Litigation Unit
Of Attoriieys for Defendant

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IN HE CIRCUIT COURT OF THE ST/.. OF OREGON
FOR MARION COUNTY
100 High Street NE, Marion County Courthouse
P.O. Box 12869 Salem, Oregon 97309-0869
(503) 588-5228

November 1, 2007

JOHN DILORENZO JR
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1300 SW FIFTH AVENUE SUITE 2300
PORTLAND OR 97201-5682

Bar#: 80204

Hazell Bryn/Bradbury Bill
Case#: 06C22473 C Civil Contract

NOTICE OF ENTRY OF JDDCT1KNT

A General Judgment was entered in the register of the court in the above-noted case on October 31, 2007. This judgment does not create a judgment lien.

This notice is sent in accordance with ORS 18.078.

Client(s) of Addressee:
FRED VANNATTA

CC:
DANIEL W MEEK
LINDA K WILLIAMS
DAVID E LEITH
GREGORY CHAIMOV

CERTIFICATE OF MAILING

I hereby certify that, on April 16, 2008,1 filed the foregoing **INTERVENORS-RESPONDENTS/CROSS-APPELLANTS OPENING BRIEF AND EXCERPT OF RECORD** with the State Court Administrator by causing to be mailed the original thereof, plus 20 true and complete copies, contained in a sealed package, with first-class postage prepaid, deposited in the post office at Portland, Oregon, and addressed as follows: State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, Oregon 97301-2563.

I further certify that on the same date, I served the foregoing **INTERVENORS-RESPONDENTS/CROSS-APPELLANTS OPENING BRIEF AND EXCERPT OF RECORD** on the following attorneys by causing to be mailed two true and complete copies thereof, contained in a sealed package, with first-class postage prepaid, deposited in the post office at Portland, Oregon, and addressed as follows:

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Mary H. Williams, OSB #911241
David Leith, OSB #933412
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Department of Justice
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