

BRYN HAZELL, FRANCIS NELSON,
TOM CIVILETTI, DAVID DELK, and
GARY DUELL,

Marion County Circuit
Court No. 06C22473

Supreme Court Nos. S055474; S055477

Plaintiffs-Appellants/Cross-
Respondents,

and,

JOAN HORTON and KEN LEWIS,

Plaintiffs,

v.

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

DEFENDANTS-RESPONDENTS/CROSS
RESPONDENTS' REPLY TO PLAINTIFFS-
APPELLANTS/CROSS-RESPONDENTS'
RESPONSE TO ORDER TO SHOW CAUSE
REGARDING JURISDICTION

Intervenor-Defendants and Cross-
Claimants-Respondents/Cross-
Appellants.

INTRODUCTION

At the general election in November 2006, the people voted on two measures related to campaign contributions and expenditures (CC&Es). The people rejected Measure 46, a proposed constitutional amendment to authorize limits on CC&Es. The people approved Measure 47, which (among other things) proposed statutory limitations on CC&Es.

Measure 47 expressly provided for the possibility that it might be approved while constitutional authorization for CC&E limits remained lacking. Section (9)(f) defers the measure's (operative) effect in those circumstances. Defendants (the state) so construed section (9)(f) and concluded that the measure is not presently operative.

Various parties challenged that conclusion. One group of plaintiffs challenged the constitutionality of section (9)(f), arguing that the balance of the measure should be immediately operative. Intervenors argued the measure as a whole is unconstitutional.

The circuit court *rejected* each of those constitutional challenges. The court instead interpreted and applied section (9)(f)—consistent with the state's position—as rendering Measure 47 inoperative in the circumstances, and therefore shielding it from substantive constitutional attack. Because the circuit court held Measure 47 inoperative, not unconstitutional, ORS 250.044 provides no basis for a direct appeal to this court.

BACKGROUND

I. CC&E limits under the Oregon Constitution

At the general election in 1994, the people of Oregon approved Measure 9, which sought to impose specific limitations on campaign contributions in candidate elections. Or Laws 1995, ch 1, §§ 3,4, 16; *see also Vannatta v. Keisling*, 324 Or 514, 537, 931 P2d 770 (1997). Various petitioners brought facial challenges to those

limitations under Article I, section 8 of the Oregon Constitution. *Vannatta*, 324 Or at 517.

This court concluded that "the contribution, in and of itself, is the contributor's expression of support for the candidate or cause—an act of expression that is completed by the act of giving." *Id.* at 522. The court further rejected the state's proposed distinction between contributions and expenditures, explaining that expenditures and contributions are "not opposite poles, but closely related activities." *Id.* at 524. The court therefore held that "both campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8." *Id.* at 524. The court ultimately concluded that the limitations on campaign contributions could not be sustained under Article I, § 8. *Id.* at 541.[^]

This court recently had occasion to reiterate its *Vannatta* holding "that Article I, section 8, prohibits laws restricting campaign expenditures and contributions." *Meyer v. Bradbury*, 341 Or 288, 293 n 4, 142 P3d 1031 (2006). The *Meyer* court expanded further 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* * * * (so holding).

The petitioners in *Vannatta* also challenged various provisions related to campaign expenditures. This court disagreed, however, with their fundamental contention that Measure 9 imposed any mandatory limits on campaign expenditures. *See id.* at 542-45.

Meyer, 341 Or at 299. See also *Meyer v. Myers*, 343 Or 399, 404-405, ___P3d___(2007) (again reiterating the *Vannatta* holding).

11. The 2006 ballot measures related to CC&E limitations

At the general election in 2006, the ballot included two initiatives related to CC&Es. Measure 46 proposed a constitutional amendment; Measure 47 proposed a statute.

A. Measure 46

The proposed constitutional amendment. Measure 46, was relatively simple. In effect, it proposed to remove any constraint under the Oregon Constitution with respect to CC&E limits, whether such limits might be enacted by the Legislative Assembly or by the people through their reserved legislative power.[^] Under Measure 46, statutory CC&E limits in Oregon would be constrained by federal law, but not by the Oregon Constitution.

At the 2006 general election, Measure 46 was rejected. Thus, Article I, section 8, of the Oregon Constitution still generally prohibits mandatory CC&E limits, as resolved in *Vannatta* and *Meyer*.

The full text of Measure 46 is as follows:

Notwithstanding any other provision of this Constitution, the people through the initiative process, or the Legislative Assembly by a three-fourths vote of both Houses, may enact and amend laws to prohibit or limit contributions and expenditures, of any type or description, to influence the outcome of an election.

B. Measure 47

Anticipating state constitutional authorization, Measure 47 proposed statutory CC&E limits, as well as other requirements. The measure included a severability clause. Measure 47, § (11). But it also included a provision limiting its own operation *in toto*:

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).

The people approved Measure 47.

III. The Secretary of State's determination with respect to Measure 47

Measure 47 assigns the Secretary of State several responsibilities in his role as chief elections officer for the state. Accordingly, it fell to the Secretary of State, in the first instance, to determine whether any of Measure 47's substantive provisions were operative in light of section (9)(f).

On November 17, 2006, the Secretary of State issued his written determination that, under the plain terms of Measure 47, the Act as a whole should not become operative until the Oregon Constitution is found or amended to permit CC&E limits. Because neither of those contingencies has yet occurred, the Act as a whole, by its

own terms, remains dormant until one of those preconditions for its operative effect is realized.[^] The Attorney General concurs with that interpretation.

IV. The complaint and cross-claim in this case

The complaint in this case asserted parallel pairs of claims on behalf of two discrete sets of plaintiffs.

The first pair of claims—the first and second claims for reUef—were asserted by plaintiffs Hazell, Nelson, Civiletti, Delk, and Duel! (the Hazell plaintiffs). Those plaintiffs sought a declaration and injunction that defendants must implement Measure 47 in its entirety. The Hazell plaintiffs maintained that section (9)(f), properly understood, does not preclude defendants from implementing and enforcing the balance of the measure immediately.

The second pair of claims—the third and fourth claims for relief—were asserted by plaintiffs Horton and Lewis (the Horton plaintiffs). Those plaintiffs argued that section (9)(f) is itself unconstitutional. That invalid provision should be severed, they contended, and the balance of the measure should be immediately operative. The Horton plaintiffs sought declaratory and injunctive relief requiring immediate implementation and enforcement of the balance of Measure 47, excepting section (9)(f).

See Complaint, Ex. B (Secretary of State's determination letter).

Intervenors sued defendants on a cross-claim. That cross-claim sought a declaration that Measure 47 is void on the ground that its effectiveness "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." Answer and Cross-Claim, H 9.

V. The circuit court's ruling

The circuit court first determined, based on *Vannatta* and *Meyer*, that the Oregon Constitution did not allow CC&E limits at the time when Measure 47 was approved. The court noted also the rejection of Measure 46, which left the holdings of *Vannatta* and *Meyer* undisturbed. Opinion at 3-4.

The court then addressed, as "a matter of statutory construction," the question whether section (9)(f) therefore placed Measure 47's operative effect in abeyance, pending constitutional authorization. Finding the text and context unambiguous, the court held Measure 47 in abeyance by its own terms. Opinion at 4.[^]

ARGUMENT

ORS 250.044 provides for direct appeals to this court from circuit court judgments in certain cases. It applies only where several preconditions are met, including: (1) a plaintiff challenges the constitutionality of an approved initiative or

In a later portion of the opinion, the court considered the validity of the two separate contingencies on which Measure 47 purportedly would be animated. The court concluded that one of those contingencies was valid, and that it need not determine the validity of the other at this time. Even if that second contingency were invalid, it could be severed, such that the balance of section (9)(f) could be given effect. Opinion at 6-7.

referendum measure; and (2) the circuit court holds that the measure is unconstitutional, in whole or in part. ORS 250.044(1), (5).

In this case, the constitutionality of Measure 47 was challenged by two sets of parties: the Horton plaintiffs and the intervenor-defendants. The circuit court rejected the Horton plaintiffs' constitutional challenge to section (9)(t) of Measure 47. The court similarly rejected intervenor-defendants' constitutional challenge to the measure as a whole. The court instead agreed with the state that: (1) section (9)(f) is constitutional; and (2) as a matter of statutory construction, the measure's operative effect is deferred by that provision.

Thus, the constitutional challenges to Measure 47 failed in this case. Plaintiffs have incorrectly filed notices of appeal directly in this court, based on the mistaken premise that the circuit court ruled Measure 47 unconstitutional in part. The legislative purpose to expedite the appeal where a measure has been ruled unconstitutional does not apply here.

The opinion in *State v. Hecker*, 109 Or 520 (1923) provides further guidance and confirmation of that conclusion. There, the challenged statute included a provision very similar to Measure 47's section (9)(f)- The court rejected a substantive constitutional challenge to the statute, explaining that the statute's abeyance provision "absolutely prevent[ed the statute] from operating and hence from running counter to the then Constitution." *Id.* at 547.

Similarly, section (9)(f) prevents Measure 47 from operating and thereby offending the constitution. As the state argued, the abeyance provision effectively shields the statute—including its CC&E limits—from constitutional attack, pending authorization. The circuit court found that the abeyance provision was triggered and so concluded, consistent with *Hecker*, that the measure was inoperative, not unconstitutional. Accordingly, ORS 250.044 has no application in this case.

CONCLUSION

The circuit court rejected each of the constitutional challenges to Measure 47, and instead sustained the state's position that the measure is in abeyance and therefore shielded from constitutional attack. In these circumstances, ORS 250.044 provides no basis for a direct appeal to the Oregon Supreme Court. No good cause having been shown, this court should dismiss the notices of appeal for lack of jurisdiction.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Defendants-Respondents/Cross Respondents' Reply to Plaintiffs-Appellants/Cross-Respondents' Response to Order to Show Cause Regarding Jurisdiction to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on December 3, 2007.

I further certify that I directed the Defendants-Respondents/Cross Respondents' Reply to Plaintiffs-Appellants/Cross-Respondents' Response to Order to Show Cause Regarding Jurisdiction to be served upon Daniel Meek, attorney for Hazell appellants/cross-respondents; Linda K. Williams, attorney for Horton plaintiffs; and upon John DiLorenzo Jr., attorney for respondents/cross-appellants, on December 3, 2007, by mailing a copy, with postage prepaid, in an envelope addressed to:

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