

Filed: October 4, 2012

IN THE SUPREME COURT OF THE STATE OF OREGON

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

Plaintiffs-Appellants
Cross-Respondents,
Petitioners on Review,

v.

KATE BROWN,
Secretary of State of the State of Oregon;
and JOHN R. KROGER,
Attorney General of the State of Oregon,

Defendants-Respondents
Cross-Respondents,
Respondents on Review,

and

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

Intervenors-Respondents
Cross-Appellants,
Respondents on Review.

(CC 06C22473; CA A137397; SC S059245 (Control), S059246)

En Banc

On review from the Court of Appeals.*

Argued and submitted January 9, 2012.

Daniel W. Meek, Portland, argued the cause and filed the brief for petitioners on review Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell. With him on the brief was Linda K. Williams.

Linda K. Williams, Portland, argued the cause and filed the brief for petitioners on review Joan Horton and Ken Lewis. With her on the briefs was Daniel W. Meek.

John DiLorenzo, Davis Wright Tremaine LLP, Portland argued the cause for respondents on review Center to Protect Free Speech and Fred Vannatta. With him on the brief were Gregory A. Chaimov, Aaron K. Stuckey, and Paul J. Southwick.

Michael A. Casper, Deputy Solicitor General, Salem, argued the cause for respondents on review State of Oregon and John R. Kroger, Attorney General. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

P. K. Runkles-Pearson, Stoel Rives LLP, Portland, filed a brief on behalf of *amicus curiae* ACLU Foundation of Oregon.

DE MUNIZ, J.

The decision of the Court of Appeals and the judgment of the circuit court are affirmed.

Durham, J., concurred in part and dissented in part and filed an opinion.

*Appeal from Marion County Circuit Court, Mary Mertens James, Judge. 238 Or App 487, 242 P3d 743 (2010).

1 DE MUNIZ, J.

2 This case requires us to examine the operative text of a voter-approved
3 ballot measure that purported to depend for its efficacy upon the passage of a companion
4 measure that voters rejected. The trial court concluded that the text at issue was
5 severable from the ballot measure and ruled that the remaining provisions of the measure
6 were, according to the plain text of the measure itself, dormant. The Court of Appeals
7 affirmed that judgment. [Hazell v. Brown](#), 238 Or App 487, 242 P3d 743 (2010). For the
8 reasons set out in this opinion, we also affirm the trial court's judgment and the decision
9 rendered by the Court of Appeals.

10 FACTS AND PROCEDURAL BACKGROUND

11 In 2006, two ballot measures were placed before Oregon voters at the polls.
12 One -- Measure 46 (2006) -- sought to amend the Oregon Constitution to permit the
13 enactment of laws prohibiting or limiting electoral campaign "contributions and
14 expenditures, of any type or description." The other -- Measure 47 (2006) -- sought to
15 create new campaign finance statutes that would, essentially, statutorily implement the
16 constitutional changes proposed in Measure 46. Voters, however, rejected Measure 46
17 while approving Measure 47. Among other things, Measure 47 contained a clause at
18 section 9(f) that provided:

19 "If, on the effective date of this Act, the Oregon Constitution does
20 not allow limitations on political campaign contributions or expenditures,
21 this Act shall nevertheless be codified and shall become effective at the
22 time that the Oregon Constitution is found to allow, or is amended to allow,
23 such limitations."

24 Relying on that provision, the Secretary of State's office took the position

1 that, in light of Measure 46's defeat at the polls, Measure 47 was, by its own terms,
2 unenforceable. It stated:

3 "The plain text of Section (9)(f) requires that the entire measure is to be
4 codified as part of the statutory law of Oregon. That text also specifies that
5 'this Act' -- referring singularly to the entire measure -- will be ineffective
6 until such time as 'the Oregon Constitution is found to allow, or is amended
7 to allow,' limitations on campaign contributions and expenditures. Because
8 Measure 46 was not approved by the people, the conditions required by
9 Section (9)(f) for the rest of measure 47 to become operative will not have
10 been fulfilled on December 7, 2006. Accordingly, the effect of Section
11 (9)(f) is that no part of the measure presently is enforceable. According to
12 the plain, natural, and ordinary meaning of the words of Section (9)(f), all
13 of Measure 47 will remain dormant until such time as 'the Oregon
14 Constitution is found to allow, or is amended to allow,' limitations on
15 campaign contributions and expenditures."¹

16 Several of the measure's chief petitioners, together with other Oregon
17 voters, responded to that determination by bringing an action against both the Secretary
18 of State and the Attorney General (collectively, the state), seeking declaratory and
19 injunctive relief to compel enforcement of Measure 47. In response, the Center to Protect
20 Free Speech, Inc., and its president, Fred Vannatta, intervened to oppose that action,
21 asserting that section 9(f) of Measure 47 violated Article I, section 21, of the Oregon
22 Constitution, rendering the entire measure void. On cross-motions for summary
23 judgment filed by all the parties, the trial court ruled in the state's favor, concluding that
24 Measure 47 was presently inoperative.

¹ Measure 47 (2006) is currently codified as a "legislative note" at ORS chapter 259. Among other purposes, such notes are used to signify, as in this case, a special date on which a provision will take effect.

1 In a letter opinion to the parties, the trial court found the text and context of
2 section 9(f) to be unambiguous as to the meaning and effect of Measure 47:

3 "The text of section (9)(f) describes a condition, then mandates the
4 consequences if that condition obtains. The condition triggering section
5 (9)(f) is that 'on the effective date of this Act, the Oregon Constitution does
6 not allow limitations on political campaign contribution and expenditures.'
7 The mandated consequence if that condition obtains is that the 'Act shall
8 nevertheless be codified and shall become effective at the time that the
9 Oregon Constitution is found to allow, or is amended to allow, such
10 limitations.' As held above, the triggering circumstances unambiguously
11 existed and were not changed by Measure 46, which did not pass. The
12 unambiguous consequence is that Measure 47, in its entirety, presently is
13 not operative."

14 The trial court reached similar conclusions regarding the constitutionality
15 of section 9(f), rejecting the argument that the section violated Article IV, section 1(4)(d),
16 because it altered the effective date of Measure 47 rather than its operative effect. The
17 trial court wrote:

18 "That contention is answered completely by *State v. Hecker*, 109 Or 520
19 (1923). *Hecker* makes clear that section (9)(f)'s use of the term 'shall
20 become effective' must be construed to mean 'shall become *operationally*
21 effective.' So construed, as in *Hecker*, section (9)(f) conflicts with no
22 constitutional requirements as to the effective date of legislation passed by
23 initiative.

24 "Nor is the indeterminate nature of the contingency fatal to the
25 provision's effect. In *Hecker*, the challenged statute was to become
26 operative whenever constitutionally authorized, without any specification
27 of an election at which such a proposal might be considered. * * *
28 Nevertheless, the Oregon Supreme Court upheld the contingency. Section
29 (9)(f) similarly may be sustained under that directly controlling authority, at
30 least with respect to the operative effect being contingent on amendment of
31 the Oregon Constitution."

32 (Emphasis in original.)

33 As to intervenors' argument that section 9(f) violated Article I, section 21,

1 the trial court first held that

2 "the contingency rendering Measure 47 operative if it is authorized by
3 constitutional amendment is exactly the same contingency upheld in
4 *Hecker*. Section (9)(f)'s direction that Measure 47 shall become operative
5 upon amendment of the constitution to allow [campaign contribution and
6 expenditure] limits is permissible."

7 The trial court, however, declined to directly address the second
8 contingency in section 9(f), *i.e.*, whether Measure 47 could properly become operative on
9 a future judicial finding. It concluded, instead, that, even if the measure's operative effect
10 could not constitutionally depend on such an occurrence, ORS 174.040 permitted it to
11 sever the offending portion and to give effect to the remainder of section 9(f).

12 Plaintiffs appealed, and the Court of Appeals affirmed the trial court. In
13 doing so, the Court of Appeals similarly concluded that Measure 47 was inoperative:

14 "In sum, the substantive provisions of Measure 47 did not, and will
15 not, become operative unless or until Article I, section 8, is amended to
16 permit limitations of the sort deemed unconstitutional in *Vannatta I* or until
17 the Oregon Supreme Court revisits *Vannatta I* and determines that such
18 limitations are constitutional under Article I, section 8."

19 *Hazell*, 238 Or App at 512. We subsequently allowed plaintiffs' petitions for review. For
20 the reasons set out below, we affirm the Court of Appeals decision and the trial court's
21 judgment.

22 ADDITIONAL BACKGROUND -- MEASURE 47

23 The history of this case goes back nearly 18 years to 1994, when Oregon
24 voters enacted Ballot Measure 9 (1994), a citizen initiative that, among other things, set
25 mandatory limits on monetary contributions to state political campaigns. In 1997, this
26 court held in *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997) (*Vannatta I*), that

1 such limits -- together with campaign expenditure limits -- violated the free expression
2 rights guaranteed by Article I, section 8, of the Oregon Constitution. Later, specifically
3 citing *Vannatta I* for that proposition in 2006, this court stated:

4 "Since the inception of the Oregon Constitution, Article I, section 8, strictly
5 has prohibited any legislation 'restraining the free expression of opinion, or
6 restricting the right to speak, write, or print freely on any subject
7 whatever[.]' Under Oregon law, both campaign contributions and
8 expenditures are forms of expression protected by that constitutional
9 provision, thus making legislatively imposed limitations on individual
10 political campaign contributions and expenditures impermissible. *See*
11 *Vannatta v. Keisling*, 324 Or 514, 524, 931 P2d 770 (1997) (so holding)."

12 [*Meyer v. Bradbury*](#), 341 Or 288, 299, 142 P3d 1031 (2006) (brackets in original).

13 At the 2006 election that followed that decision, Oregon voters were
14 subsequently invited to amend Oregon's campaign finance laws by approving citizen-
15 initiated Measure 46 and Measure 47. If passed, Measure 46 would have amended the
16 Oregon Constitution to expressly allow laws limiting or prohibiting election contributions
17 and expenditures, as long as such laws were either the product of citizen initiatives or
18 otherwise adopted by three-quarters of both legislative houses.

19 While Measure 46 would have amended the Oregon Constitution, Measure
20 47, if adopted, was slated to amend the Oregon statutes to address the lack of "reasonable
21 limits on political campaign contribution and expenditures" contained in the current
22 statutes. As part of an extensive array of findings, section 1(a) of Measure 47 linked
23 virtually all of the provisions of the measure to the ultimate goal of reining in the undue
24 influence of campaign contributions and expenditures that, from its drafter's perspective,
25 were too large:

1 "The democratic process has not functioned properly in Oregon, due
2 to the lack of reasonable limits on political campaign contributions and
3 expenditures, including expenditures made independently of candidates, on
4 races for state and local public office. Oregon is one of only five states in
5 the United States with no limits on political campaign contributions. *All of*
6 *the prohibitions, limits, and reporting and disclosure requirements of this*
7 *Act are reasonable and necessary to curb the undue influence of large*
8 *contributions and expenditures."*

9 (Emphasis added.)

10 Measure 47 went on to set out a new chapter of Oregon laws devoted solely
11 to creating and implementing a variety of limitations on campaign contributions and
12 expenditures. For example, Measure 47 limited amounts that could be contributed to
13 candidates, political committees, or political parties. It limited contributions that
14 candidates could make to their own campaigns, and prohibited them from making loans
15 to their own campaign committees. It banned, with certain exceptions, corporations,
16 labor unions, and certain individuals from making campaign contributions altogether, and
17 prohibited campaigns and political parties from accepting contributions that were
18 impermissible under the measure's provisions.

19 Measure 47 also imposed mandatory limits on political expenditures by
20 limiting the amount that persons could spend to directly communicate support for, or
21 opposition to, a political candidate or party. In addition, the measure prohibited -- with
22 some exceptions -- similar expenditures by corporations, labor unions, and certain
23 individuals. Measure 47 further limited the amount that candidates and political
24 committees could spend to oppose or support a candidate or party.

25 In addition to those contribution and expenditure provisions, Measure 47

1 limitations."

2 In seeking declaratory and injunctive relief here, plaintiffs consist of two groups --
3 Hazell, Nelson, Civiletti, Delk, and Duell (Hazell plaintiffs), and Horton and Lewis
4 (Horton plaintiffs). Each group presents different arguments concerning the validity and
5 overall effects of section 9(f) on the other provisions of Measure 47.

6 We begin with the Hazell plaintiffs, who take the position that the
7 precipitating condition set out in section 9(f) has yet to occur. Section 1(r) of Measure
8 47, they point out, expressly provides that the measure "will take effect at a time when
9 the Oregon Constitution does allow the limitations *contained in this Act*." (Emphasis
10 added.) They argue that, in the context of that provision, the reference to "limitations" in
11 section 9(f) should be narrowly construed to mean only those limitations set out in
12 Measure 47 -- not the limitations previously held unconstitutional in *Vannatta I*. Because
13 Measure 47 became effective in December 2006, the Hazell plaintiffs continue,
14 determining whether the condition anticipated by section 9(f) has been met or not
15 requires this court to first determine the constitutionality of each provision of Measure
16 47, a process that, in turn, would implicitly require us to revisit *Vannatta I*.

17 Alternatively, they assert that a literal, less context-driven interpretation of
18 section 9(f) yields the same result. As they argued below, they again contend that, as of
19 the effective date of Measure 47, the Oregon Constitution did, in fact, allow some
20 finance-related campaign limitations. According to the Hazell plaintiffs, those limitations
21 presently take the form of various registration, reporting, and identification requirements
22 for contributors, as well as the requirement that contributions be used only for bona fide

1 campaign expenses or to defray the costs of a recipient's duties as a public office holder.
2 Given the existence of those restrictions, the Hazell plaintiffs argue, the condition set out
3 in section 9(f) has yet to arise, a circumstance that again places the onus of determining
4 the substantive constitutionality of all the provisions of Measure 47 with this court.

5 The problem with those arguments, however, is that they assume that we
6 must interpret section 9(f) in isolation, where the controlling context for our analysis is
7 Measure 47 and little else. That assumption, however, ignores the nature of legislative
8 power and the judicial decisions that arguably gave rise to the enactment of Measure 47.

9 We have recognized that the legislative power is a unitary authority that
10 rests with two lawmaking bodies, the legislature and the people. *Meyer v. Bradbury*, 341
11 Or 299-300. The exercise of that power is always "coequal and co-ordinate," regardless
12 of which of the two entities wields it. *Id.* at 300. For that reason, we apply a similar
13 method of analysis to statutes enacted by voter-initiated measures as we do to statutes
14 enacted by the legislature, with the goal of discerning the intent of the voters who passed
15 those initiatives into law. *State v. Guzek*, 322 Or 245, 265, 906 P2d 272 (1995).

16 We begin with the statutory text. *Roseburg School Dist. v. City of*
17 *Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993). As the Court of Appeals observed, the
18 pertinent "statutory language is 'limitations on' contributions or expenditures -- and not
19 'limitations relating to' contributions or expenditures." *Hazell*, 238 Or App at 507
20 (emphasis in original). In other words, the text of section 9(f) implies that that provision
21 is intended to refer to direct limitations on the act of contributing or expending campaign
22 funds, not on collateral requirements such as reporting and timely disclosure regarding

1 the receipt or expenditure of campaign funds.

2 The Court of Appeals also noted that the "enacting and operative effective
3 clauses of section 9(f) both have the same single and undivided referent: "This Act." *Id.*
4 Like the Court of Appeals, we view the use of the phrase "This Act" as evidence that the
5 voters intended and understood that, if and when Measure 47 became operative, it would
6 do so as a whole piece of legislation, not in some piecemeal fashion.

7 A well-established part of our interpretive methodology requires that we
8 presume that laws are enacted in light of the judicial decisions that preceded and bear
9 directly on them. [*Weber and Weber*](#), 337 Or 55, 67-68, 91 P3d 706 (2004). Here, our
10 holdings in *Vannatta I* and *Meyer* establish that, at the time that the voters considered
11 Measure 47, campaign contributions and expenditures in Oregon were constitutionally
12 protected forms of expression, and the legislature could not limit them. The plethora of
13 mandatory contribution and expenditure limitations set out in Measure 47 contrast
14 sharply with those holdings, leading us to conclude that *Vannatta I* and *Meyer* clearly
15 have a direct bearing on the measure. In that context, the limitations cited in section 9(f)
16 are most logically viewed broadly as the same kind of limitations struck down in
17 *Vannatta I* and *Meyer*, namely, "legislatively imposed limitations on individual political
18 campaign contributions and expenditures." *Meyer*, 341 Or at 299.

19 That reading of section 9(f) is further reinforced by the findings that make
20 up a substantial part of Measure 47. As we already have noted, the findings in section
21 1(r) acknowledge the campaign finance limitations passed by voters in 1994, the
22 similarity of those limitations to the restrictions of Measure 47, and the fact that this court

1 subsequently held that the Oregon Constitution did not permit such limitations. At the
2 same time, the findings in section 1(a) suggest that, now, the lack of reasonable limits on
3 campaign finances have interfered with the proper function of Oregon's democratic
4 processes by permitting undue influence from large campaign contributions and
5 expenditures; as a result "[a]ll of the prohibitions, limits, and reporting and disclosure
6 requirements" of Measure 47 are reasonably necessary to remedy that situation.

7 Those findings, however, depict a problem rooted in the broad
8 constitutional prohibition articulated in *Vannatta I* and *Meyer*. The substantive
9 provisions of Measure 47 are, according to the measure's own terms, aimed at correcting
10 problems that have arisen, at least in part, because legislatively imposed limitations on
11 campaign contributions and expenditures are subject to the constitutional bar articulated
12 in those decisions. However, if Measure 47 is to have any operative effect at all, that bar
13 must, at some point, be removed. Consequently, the "limitations on political campaign
14 contributions or expenditures " invoked in section 9(f) are best understood as the same
15 kind of limitations that were constitutionally invalidated in *Vannatta I* and that must, in
16 turn, be permitted by the Oregon Constitution if Measure 47 is to become operational.

17 Based on the foregoing, and because the Oregon Constitution did not allow
18 such limitations on the effective date of Measure 47, we conclude that the condition
19 provided by 9(f) for holding Measure 47 in operational abeyance has, indeed, been met
20 here.

21 The Hazell plaintiffs contend, however, that even if that condition has been
22 triggered, its effect is simply to suspend the limitations contained in Measure 47 pending

1 litigation to determine their validity. They assert that these proceedings are, in fact, that
2 litigation, making it incumbent upon this court to now engage in a provision-by-provision
3 determination of the constitutionality of Measure 47.

4 We disagree. The only issue properly before this court is whether the
5 Secretary of State and the Attorney General correctly relied on section 9(f) to determine
6 that Measure 47 is essentially a dormant statute. In that regard, plaintiffs have standing
7 under ORS 246.910 to challenge the Secretary of State's determination that Measure 47
8 is dormant as an operational matter. *See Ellis v. Roberts*, 302 Or 6, 11, 725 P2d 886
9 (1986) ("ORS 246.910(1) requires only that a person be 'adversely affected' before he can
10 bring an action challenging an election ruling of the Secretary of State. In effect, this
11 means that any registered voter -- and probably others as well -- can file an action.").

12 But, as noted above, plaintiffs have also invited us to rule on the
13 constitutionality of individual provisions of Measure 47. They neglect, however, to seek
14 any specific relief connected to the application or nonapplication of the individual
15 provisions in question. Requesting only that we now require the Secretary of State and
16 the Attorney General "administer and enforce all of the provisions of Measure 47" is not
17 enough, under the circumstances of this case, to allege a justiciable controversy under the
18 declaratory judgment act, as to the individual provisions of Measure 47. *See Eacret v.*
19 *Holmes*, 215 Or 121, 333 P2d 741 (1958) (complaint fails to state a justiciable
20 controversy under declaratory judgment act where plaintiffs requested no relief except
21 that court declare what the law is). Because plaintiffs have failed to raise an actual
22 controversy relating to the individual provisions of Measure 47, any attempted

1 reexamination of this court's decision in *Vannatta I* as it relates to individual provisions
2 of Measure 47 would be only advisory -- a function this court cannot undertake. *See*
3 *Gortmaker v. Seaton*, 252 Or 440, 444, 450 P2d 547 (1969) ("In this state, however, we
4 have strong precedent against advisory opinions. Mere difference of opinion as to the
5 constitutionality of an act does not afford ground for invoking a judicial declaration
6 having the effect of adjudication."); *see also* [TVKO v. Howland](#), 335 Or 527, 534, 73 P3d
7 905 (2003) (courts cannot issue declaratory judgments in a vacuum; they must resolve an
8 actual or justiciable controversy). As a result, both the trial court and the Court of
9 Appeals wisely refrained from addressing those questions, as will we. We now turn to
10 the Horton plaintiffs' contentions.

11 The Horton plaintiffs take a different approach to section 9(f) than did the
12 Hazell plaintiffs. According to the Horton plaintiffs, section 9(f) must be severed in its
13 entirety, because it allows Measure 47 to become operative without providing adequate
14 notice of that fact to Oregon citizens as required by due process principles and the
15 constitutional provisions related to the effective date of newly enacted measures. They
16 argue that the only legitimate contingencies recognized in Oregon case law have been
17 actual anticipated events -- like election outcomes -- that are germane to the substance of
18 the suspended law. Here, they contend, the contingency set out in section 9(f) would
19 allow the otherwise dormant law to become operative by inadvertence, surprise, or on an
20 arbitrary event completely decoupled from any expression of assent by the voters or their
21 representatives. The tenets around which a representative democracy are built, the
22 Horton plaintiffs assert, do not include "implied consent to be governed in an arbitrary

1 manner where laws can spring into operation upon later nonpublic contingencies entirely
2 divorced from the express or implied will of the people."

3 That argument is unpersuasive, given our interpretation of Measure 47 as
4 set out in this opinion. We have concluded that Measure 47 will become effective as a
5 whole or it will not become effective. We have explained that Oregon voters intended
6 Measure 47 to remain inoperative absent a constitutional amendment like Measure 46, or
7 a controlling judicial construction of Article I, section 8, that effectively reverses *Vanatta*
8 *I*. Measures 47 will not, therefore, spring to life based on events that are arbitrary,
9 difficult to describe, or unpredictable. If either of the contingencies noted above occurs,
10 Measure 47 will become effective according to the expressed will of the voters and under
11 terms that they intended. A change of that magnitude will not take place in a closet.

12 Like plaintiffs in this matter, intervenors also take issue with section 9(f),
13 albeit for different reasons. According to intervenors, when the drafters of Measure 47
14 provided that the act "shall nevertheless be codified and shall become effective" when the
15 required contingency is met, they used the word "effective" when they should have used
16 the word "operative." Intervenors contend that that flaw is fatal to the entire measure.
17 They note that, under Article IV, section 1(4)(d), initiative or referendum measures
18 become "effective" 30 days after those measures are enacted by a majority of voters.
19 Intervenors appear to argue that, as written, section 9(f) does not actually forestall the
20 *operation* of Measure 47 but rather resets the *effective date*, violating the constitutional
21 edict in Article I, section 21, that no laws shall "be passed the taking effect of which shall
22 be made to depend on any authority, except as provided in this Constitution." They go on

1 to assert that, as a result, all of Measure 47 is invalid and must be struck down.

2 Given that this court already has construed terms such as "effective" or
3 "shall take effect" as being synonymous and interchangeable with the word "operative,"
4 Oregon law presents an alternative construction to the one proffered by intervenors in this
5 case. In *State v. Hecker*, 109 Or 520, 221 P 808 (1923), this court examined the
6 constitutionality of a statutory contingency provision not unlike the one at issue here.

7 The contingency at issue in *Hecker* provided:

8 "This act *shall take effect* as soon as and whenever the constitutional
9 provisions of section 36 of article 1 of the Constitution of the state of
10 Oregon relating to the death penalty and any amendment or amendments
11 thereto, will permit."

12 *Id.* at 539 (emphasis added). The court concluded that, as part of that contingency
13 provision, the phrase "shall take effect" was not used in the same sense as the mandate
14 from the Oregon Constitution that legislative acts lacking an emergency clause "shall
15 take effect" 90 days after the end of the legislative session. *See* Or Const, Art IV, § 28,
16 (so stating). Instead, the court reasoned that, as used within the contingency provision,
17 the phrase was meant to postpone the active operation of the statute until it could operate
18 "contemporaneously with but not before the amendment of the Constitution." *Id.* at 547.

19 Intervenors acknowledge our holding in *Hecker*, but argue that, since then,
20 the vocabulary of lawmaking has become precise to the point that we should assume that
21 lawmakers now carefully differentiate between the terms "effective" and "operative" and
22 never mean the one when they use the other. Today, the art of drafting statutes may, as
23 intervenors urge, be more sophisticated than in 1920. However, that fact does not

1 circumvent the overarching duty of this court to "avoid any strained construction that
2 would defeat the will of the people, clearly expressed, in the method provided by the
3 Constitution." *State v. Tollerson*, 142 Or 192, 198, 16 P2d 625 (1932). Our decision in
4 *Hecker* is not only instructive here, it also never has been modified (much less overruled)
5 by this court, or countermanded by legislative action. Consequently, we conclude that
6 section 9(f), properly read, requires Measure 47 to be codified and held in abeyance
7 pending an appropriate constitutional amendment or judicial decision that will render it
8 operative. Neither the trial court nor the Court of Appeals erred in so holding.

9 The decision of the Court of Appeals and the judgment of the circuit court
10 are affirmed.

1 **DURHAM, J.**, concurring in part and dissenting in part.

2 I write separately because, despite some areas of agreement, I do not agree
3 fully with the majority opinion. Additionally, according to the majority, the outcome of
4 this case is that Measure 47 now will be "codified and held in abeyance pending an
5 appropriate constitutional amendment or judicial decision that will render it operative."
6 352 Or at ___ (Oct 4, 2012) (slip op at 15). Of those two options, a judicial decision
7 addressing whether the Oregon Constitution precludes enactment of the limitations
8 contained in Measure 47 seems more likely to occur. Because the majority dismisses the
9 Hazell plaintiffs' claims due to a shortcoming in their pleading -- a problem that future
10 litigants are likely to cure -- it is appropriate to anticipate some of the questions that that
11 later judicial decision might address.

12 I note at the outset that, for the reasons stated by the majority, I concur in
13 the dismissal of the claims submitted by the Horton plaintiffs. Concerning the claims of
14 the Hazell plaintiffs, the majority gives a case-specific reason for dismissing those
15 claims: the complaint alleges only a nonspecific desire for a declaratory judgment or
16 order requiring the Secretary of State and the Attorney General to administer and enforce
17 Measure 47. *Id.* at ___ (slip op at 12). If this case concerned nothing more than a
18 generalized request for a judicial directive compelling those state officials to comply with
19 Oregon law, I might agree that the dispute may be too indefinite to justify declaratory
20 relief. But, in my view, the plaintiffs have not drafted their complaint so narrowly. It
21 serves the interest of no one for the majority to narrowly construe the material allegations
22 of the complaint to avoid a decision here, and as a consequence, force other citizens to

1 initiate additional expensive and time-consuming litigation to get an answer to the same
2 issues raised here.

3 In that future litigation, as here, the most important question will be the one
4 correctly stated by the Court of Appeals below: absent a constitutional amendment, will
5 this court revisit *Vannatta v. Keisling*, 324 Or 514, 524, 931 P2d 770 (1997) (*Vannatta I*)
6 and decide that at least some statutory limitations on campaign contributions and
7 expenditures are constitutionally permissible? See [Hazell v. Brown](#), 238 Or App 487,
8 512, 242 P3d 743 (2010). Without answering that question directly, I see several
9 components of the issue that other parties necessarily must address in future proceedings.

10 *Vannatta I* began by asking whether political contributions and
11 expenditures constituted protected forms of expression under Article I, section 8, of the
12 Oregon Constitution.¹ 324 Or at 520. The court's discussion initially suggested that it
13 would give a nuanced answer to that question. For example, respecting political
14 campaign expenditures, the court said:

15 "Expenditures by a candidate, an organization, a committee, or an
16 individual, *when designed to communicate to others the spender's preferred*
17 *political choice*, is expression in essentially the same way that a candidate's
18 personal appeal for votes is expression."

19 *Id.* (emphasis added).

¹ Article I, section 8, of the Oregon Constitution provides:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

1 The court also carefully couched its discussion of campaign contributions,
2 stating:

3 "Under Oregon law, the sole remaining question is whether
4 contributions to political campaigns and candidates also are a form of
5 expression under Article I, section 8. For the reasons that follow, we
6 conclude that *many -- probably most -- are*.¹⁰

7 "* * * * *

8 "We think that it takes little imagination to see how *many* political
9 contributions constitute expression.

10 _____

11

12 "¹⁰ We qualify our statement with the limiting word, 'many,' because there
13 doubtless are ways of supplying things of value to political campaigns or
14 candidates *that would have no expressive content or that would be in a*
15 *form or from a source that the legislature otherwise would be entitled to*
16 *regulate or prevent*. To give but a few examples: A bribe may be an
17 expression of support (with an anticipated *quid pro quo*), but it is not
18 protected expression; a gift of money to a candidate from a corporation or
19 union treasury may be expression but, if it is made in violation of neutral
20 laws regulating the fiscal operation of corporations or unions, it is not
21 protected; a donation of something of value to a friend who later, and
22 unexpectedly, uses that thing of value to support the friend's political
23 campaign is not expression."

24 *Id.* at 522-23 (emphasis added).

25 The court illustrated its point -- that "many" contributions constitute
26 expression -- by indicating that individuals or groups have a right to pool their money to
27 produce advertisements in print or electronic media, or to hire professionals to produce
28 the ads. *Id.* at 523. Moreover, the court in the quoted footnote set out examples of
29 political contributions that the legislature permissibly could regulate because they *either*
30 would have no expressive content *or* would be from a source properly subject to some

1 legislative controls, such as corporations or unions. Those passages indicated that the
2 court's answer would turn not on whether a political contribution merely facilitated
3 speech by some speaker at some other time, but rather on whether the contribution itself
4 amounted to expressive conduct or bore an immediate connection to political speech.

5 Those nuanced passages in the court's opinion were accompanied by others
6 that, by contrast, seemed to leave little or no room for legislative regulation. For
7 example, the court said the following respecting a political contribution:

8 "In our view, a contribution is protected *as an expression by the*
9 *contributor*, not because the contribution eventually may be used by a
10 candidate to express a particular message. The money may never be used
11 to promote a form of expression by the candidate; instead, it may (for
12 example) be used to pay campaign staff or to meet other needs not tied to a
13 particular message. However, the contribution, in and of itself, is *the*
14 *contributor's expression of support for the candidate or cause* -- an act of
15 expression that is completed by the act of giving and that depends in no
16 way on the ultimate use to which the contribution is put."

17 *Id.* at 522 (emphasis in original).

18 Similarly, the court equated a citizen's act of making a political contribution
19 with a pure expression of opinion supporting a political candidate or cause:

20 "If, instead of giving a contribution, a citizen stood on a street corner and
21 announced, 'I support candidate X,' there would be no doubt that that
22 message constituted an expression of general support for that candidate, as
23 well as a more particular message: 'X deserves your vote.' From the
24 perspective of the contributor, the contribution is the same kind of message
25 as is the street corner announcement."

26 *Id.* at 524.

27 The *Vannatta I* court in those passages appears to have implied a political
28 communication from an act -- delivering money to a campaign -- whether or not any

1 evidence supported that implication and despite evidence that the money never supported
2 any political expression by either the donor or the recipient. Whether and to what extent
3 the court's conflicting statements about constitutional protections for contributions and
4 expenditures reflected a binding holding of the court was further complicated by the fact
5 that the Secretary of State *conceded* that campaign expenditures constituted free speech.
6 *Id.* at 520, 542. That concession obviated any need for a court decision on the question.
7 The court's answer was, therefore, *dictum*.

8 Nonetheless, the court summarily swept away the difficulties regarding its
9 analysis with one absolute and legally unnecessary conclusion:

10 "From the foregoing discussion, we conclude that both campaign
11 contributions and expenditures are forms of expression for the purposes of
12 Article I, section 8."

13 *Id.* at 524 (footnote omitted). And that sentence from *Vannatta I* has been repeated by
14 this court as if the more nuanced passages in *Vannatta I* did not exist. For example,
15 [*Meyer v. Bradbury*](#), 341 Or 288, 299, 142 P3d 1031 (2006), states:

16 "Under Oregon law, both campaign contributions and expenditures are
17 forms of expression protected by that constitutional provision [Article I,
18 section 8], thus making legislatively imposed limitations on individual
19 political campaign contributions and expenditures impermissible. *See*
20 *Vannatta v. Keisling*, 324 Or 514, 524, 931 P2d 770 (1997) (so holding)."

21 The majority simply repeats again, with no separate analysis, the same
22 absolute statement from *Vannatta I* and, later, *Meyer*, that shrouds rather than reveals this
23 court's actual reasoning in *Vannatta I*. Thus, according to the majority,

24 "[O]ur holdings in *Vannatta I* and *Meyer* establish that, at the time that the
25 voters considered Measure 47, campaign contributions and expenditures in
26 Oregon were constitutionally protected forms of expression, and the

1 legislature could not limit them."

2 ___ Or at ___ (slip op at 10).

3 The majority's reliance here on the absolute declaration, quoted above, in
4 *Vannatta I* is not correct. This court already has begun to reconsider and pull back from
5 that absolute statement. In [*Vannatta v. Oregon Government Ethics Comm.*](#), 347 Or 449,
6 464, 222 P3d 1077 (2009) (*Vannatta II*), this court acknowledged the extreme nature of
7 the statement in *Vannatta I*, but attempted to clarify and explain it, and, I submit, to alter
8 it. Thus, *Vannatta II* declared that the statement in *Vannatta I* that a campaign
9 contribution constituted free speech regardless of the ultimate use to which the
10 contribution was put

11 "was unnecessary to the court's holding. On further reflection, we conclude
12 that that observation was too broad and must be withdrawn. Second,
13 because *Vannatta I* assumed a symbiotic relationship between the making
14 of contributions and the candidate's or campaign's ability to communicate a
15 political message, this court did not squarely decide in *Vannatta I* that, in
16 every case, the delivery to a public official, a candidate, or a campaign of
17 money or something of value also is constitutionally protected expression
18 as a matter of law."

19 *Vannatta II*, 347 Or at 465. *Vannatta II* makes it clear that this court already has begun
20 the process of reconsidering the absolute position voiced in *Vannatta I* and, as a
21 consequence, to focus the free speech analysis under Article I, section 8, on whether a
22 financial contribution in fact constitutes not merely a delivery of property but an act of
23 protected expression by the donor.

24 Aside from the problems already noted, the court's reasoning in *Vannatta I*
25 for its absolute conclusion seems suspect. A campaign contribution, as noted, is a gift of

1 property. A delivery of property may be accompanied by a donor's protected expressions
2 of political or personal support, but that constitutional protection pertains to the donor's
3 words, not the delivery of property by itself. It may be possible to imagine circumstances
4 in which the delivery of an article of property or money might constitute expression,
5 perhaps akin to wearing a black armband. But an act -- giving property to another -- that
6 does not constitute free speech in most conceivable contexts is not transformed into
7 protected speech simply because the donee is a candidate or campaign and the donor is a
8 political supporter. The answer cannot consist of categorically pronouncing, as the court
9 did on occasion in *Vannatta I*, that contributing political money constitutes speech always
10 or even most of the time. Rather, the answer depends on a careful examination of all the
11 circumstances to determine whether and to what extent the conduct of giving or spending
12 political money itself constitutes a protected expression.

13 Some campaign expenditures might readily qualify as protected free
14 speech. The *Vannatta I* court's example of individuals or neighbors banding together to
15 publish political advertisements, either directly or through a retained professional ad
16 producer, describe instances of spending behavior that has a logical nexus to political
17 speech. The legislature may attach regulatory duties concerning, for example, the
18 disclosures of sources and amounts of such expenditures, but it is doubtful that
19 conventional laws simply could limit the number of supportive ads that an individual, a
20 candidate, or a campaign could purchase without violating Article I, section 8.

21 However, the *Vannatta I* court's hypothetical about the purchase of
22 advertising does not support the broad conclusion that every monetary expenditure by a

1 candidate or campaign constitutes free speech. For example, a campaign operative's use
2 of campaign funds to purchase ordinary consumer goods, without more, does not
3 constitute free speech simply because the purchaser is a political campaign organization
4 or because the expenditures will help campaign workers perform specific campaign tasks.
5 The fact that every campaign worker, while spending campaign funds, may hope that
6 their candidate wins an election does not turn every expenditure of campaign money into
7 an act of free speech. The *Vannatta I* court did not assist in the task of determining how
8 to identify the necessary nexus between a political expenditure and free speech by
9 positing too-easy hypotheticals that plainly sidestep the more difficult issues involved in
10 analyzing free speech issues.²

² This court must engage in a separate analysis of the distinct acts of *contributing* money to a campaign and *spending* money that a candidate or campaign has received from donors. Making a contribution to a candidate or campaign is conduct, and the court's analytical focus is whether that conduct amounts to constitutionally protected expression by the donor when the donation occurs. The answer does not depend on whether the recipient, *i.e.*, the candidate or campaign, will benefit generally from the donation or use the money later to engage in political speech.

The expenditure of money by a candidate or campaign similarly is conduct, and the court's analytical focus is whether the conduct constitutes expression. Some expenditures will have an obvious nexus to political advocacy, such as purchasing advertising space in a newspaper or air time from a radio or television station for a political spot. Any limitation on those expenditures clearly would stifle protected speech, but the same is not true for other campaign expenditures that have little or no tie to expression on any subject. The fact that an expenditure originates with a campaign does not demonstrate automatically that Article I, section 8, protects it as free expression. *Vannatta I* failed to engage in the careful analysis of those separate kinds of actions that Article I, section 8, demands.

1 Some academic commentators have begun to focus attention on the dearth
2 of logical support for broad judicial pronouncements that, without any consideration of
3 factual context, declare that the giving or spending of political money constitutes
4 protected political speech. For example, Professor Deborah Hellman has stressed the
5 importance of avoiding easy assumptions about whether contributing money to a
6 candidate or campaign constitutes protected expressive conduct simply because the
7 money might facilitate a political expression at some other place or time:

8 "While money surely facilitates speech, the facilitative function of money is
9 not sufficient to show that restrictions on giving and spending money
10 constitute restrictions on speech. Instead, I argue that while the fact that
11 money helps people to speak is relevant to the issue of whether restrictions
12 on giving and spending money restrict speech, the question is complex and
13 involves consideration of other important factors. Money facilitates the
14 exercise of many other rights as well. Sometimes spending money in
15 connection with a right is treated as a part of the right, and sometimes it is
16 not. When we note this fact, we see that a more comprehensive account is
17 necessary to determine when the right to spend or give money should be
18 treated as part of a First Amendment right. Spending money surely
19 facilitates speech -- about that the *Buckley*^[3] Court is right. But to move
20 from the obviously true claim that money facilitates speech to the
21 controversial claim that restrictions on spending money are restrictions on
22 speech requires much more."

23 Deborah Hellman, *Money Talks but It Isn't Speech*, 95 Minn L Rev 953, 974 (2011). In
24 my view, this court should be particularly sensitive to the need to reassess its past
25 statements concerning the impact of the constitution on the giving and spending of
26 political money because the exact scope of the legislature's authority in that area turns on

³ *Buckley v. Valeo*, 424 US 1, 16, 96 S Ct 612, 46 L Ed 3d 659 (1976).

1 the answer.

2 This court has expressed its willingness to reconsider prior interpretations
3 of the state constitution or statutes under the correct circumstances. [Stranahan v. Fred](#)
4 [Meyer, Inc.](#), 331 Or 38, 54, 11 P3d 228 (2000), states:

5 "Consistent with the foregoing, we remain willing to reconsider a
6 previous ruling under the Oregon Constitution whenever a party presents to
7 us a principled argument suggesting that, in an earlier decision, this court
8 wrongly considered or wrongly decided the issue in question. We will give
9 particular attention to arguments that either present new information as to
10 the meaning of the constitutional provision at issue or that demonstrate
11 some failure on the part of this court at the time of the earlier decision to
12 follow its usual paradigm for considering and construing the meaning of the
13 provision in question."

14 This court further articulated the criteria that it will follow in deciding
15 whether to alter or abandon a prior constitutional ruling in [State v. Ciancanelli](#), 339 Or
16 282, 291, 121 P3d 613 (2005). Those criteria include whether the rule was not
17 formulated by means of the appropriate paradigm or some suitable substitute, and
18 whether the application of the correct paradigm would confirm that the challenged
19 constitutional rule was incorrect. *Id.* The court also inquires whether, due to the passage
20 of time and the precedential use of the rule, overturning the challenged rule would unduly
21 cloud or complicate the law. *Id.*; see also *State ex rel Huddleston v. Sawyer*, 324 Or 597,
22 640-41, 932 P2d 1145 (1997) (Durham, J., concurring in part and dissenting in part)
23 (discussing application of rule of *stare decisis*) (citing *Safeway Stores v. State Bd. of*
24 *Agriculture*, 198 Or 43, 255 P2d 564 (1953)).

25 The Hazell plaintiffs question the correctness of *Vannatta I*, but their effort
26 here falls short of what is necessary under the cases just discussed to overcome the usual

1 effect of *stare decisis*. If future litigation presents that question to this court, this court
2 will consider that issue only if the plaintiffs preserve their arguments in the lower courts
3 and present their challenge in the manner prescribed by this court's precedents.

4 The majority declines to address even the brief challenge that the Hazell
5 plaintiffs present here, relying on the assertion that those plaintiffs, due to the generality
6 of their requested relief, have failed to identify an actual and substantial controversy
7 between the parties. Setting aside the inadequacies of the Hazell plaintiffs' challenge to
8 *Vannatta I*, or their attempt merely to distinguish that case from the circumstances posed
9 here, the majority's answer is not correct.

10 The majority agrees that the Hazell plaintiffs have standing to assert their
11 claims. Or at ___ (slip op at 12). The Hazell plaintiffs' contend in their complaint that
12 the action of the Secretary of State has harmed them irreparably because they are now
13 deprived of important information on the sources and amounts of money contributed to
14 and used by candidates for public office and their campaigns. They point to the text of
15 Measure 47, which would create reporting obligations for candidates, political
16 committees, political parties, and individuals, and compel the Secretary of State to
17 receive and publish to the public all reports of campaign contributions and expenditures
18 in an accessible, computer-based format.

19 We are obligated, in construing the complaint, to accord the Hazell
20 plaintiffs the benefit of every favorable inference that is available from their allegations.
21 Applying that rule, it is a simple step to recognize that the Hazell plaintiffs seek the
22 specific disclosure of political campaign information concerning contributions and

1 expenditures to remedy what they assert is their irreparable injury. The Secretary of State
2 was able to evade her specific obligation under Measure 47, section (8)(c) to supply that
3 information to the Hazell plaintiffs by declaring Measure 47 dormant and inoperative.

4 This court recently summarized the considerations that it addresses in
5 deciding whether a controversy is justiciable:

6 "Justiciability is a vague standard but entails several definite
7 considerations. A controversy is justiciable, as opposed to abstract, where
8 there is an actual and substantial controversy between parties having
9 adverse legal interests. The controversy must involve present facts as
10 opposed to a dispute which is based on future events of a hypothetical
11 issue. A justiciable controversy results in specific relief through a binding
12 decree as opposed to an advisory opinion which is binding on no one. The
13 court cannot exercise jurisdiction over a nonjusticiable controversy because
14 in the absence of constitutional authority, the court cannot render advisory
15 opinions."

16 *Pendleton School Dist. v. State of Oregon*, 345 Or 596, 604, 200 P3d 133 (2009) (quoting
17 *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982)) (citations omitted in
18 original).

19 Applying the criteria described in *Pendleton School Dist.* and *Brown*, it is
20 clear that the Hazell plaintiffs have alleged a justiciable controversy. The Hazell
21 plaintiffs assert, among other things, that defendants, the Secretary of State and the
22 Attorney General, erred in declaring that Measure 47 was not in effect. They also allege
23 that, due to defendants' conduct, they are now irreparably injured by their inability to
24 receive the campaign reports and information that Measure 47 obligates defendants to
25 receive and publish. If the court were to declare Measure 47 legally effective, the Hazell
26 plaintiffs would receive immediate relief from their claimed irreparable injury in that
27 Measure 47 would obligate the Secretary of State to provide the campaign information

1 that the Hazell plaintiffs seek. Thus, a declaration of law in the Hazell plaintiffs' favor
2 would resolve a dispute concerning present, not hypothetical, facts, and would result in
3 specific relief that would bind the Hazell plaintiffs and defendants. A declaration of law
4 in the Hazell plaintiffs' favor would not produce a mere advisory opinion that would bind
5 no one.

6 I conclude, contrary to the majority, that the Hazell plaintiffs have pleaded
7 a justiciable controversy that should result in a declaration of law about whether Measure
8 47 is legally effective. The court should decide the question of whether and to what
9 extent the people, exercising their power of initiative, may place regulatory limits on
10 campaign contributions and expenditures. Because this court authored *Vannatta I*, only
11 this court can decide whether that decision misinterpreted the effect of Article I, section
12 8, on legislative authority to enact campaign finance regulations and, thus, whether the
13 limitations in Measure 47 on campaign contributions and expenditures are consistent with
14 the Oregon Constitution.

15 For the reasons expressed above, I concur in the dismissal of the complaint
16 of the Horton plaintiffs. I dissent from the majority's dismissal of the complaint of the
17 Hazell plaintiffs due to an asserted lack of a justiciable controversy between the parties.

18