

November 20, 2006

LEGISLATIVE ALERT

BALLOT MEASURE 47

NOTE: Oregon's Secretary of State has declared that Ballot Measure 47, by its own terms, will not take effect until the Oregon Constitution allows for limits on campaign contributions and expenditures.¹ The following memorandum provides additional background about the measure.

QUESTION PRESENTED

Which, if any, provisions of Ballot Measure 47, relating to campaign finance reform, are likely to survive a legal challenge?

SHORT ANSWER

Under the Oregon Supreme Court's decision in *Vannatta v. Keisling*, 324 Or 514 (1997), the provisions of Measure 47 limiting or proscribing campaign contributions and expenditures will almost certainly be invalidated as the result of a legal challenge. The reporting requirements of Measure 47 are likely to survive a legal challenge intact.

DISCUSSION

In 1997, the Oregon Supreme Court, in its decision in *Vannatta v. Keisling*, struck down the campaign contribution restrictions contained in Ballot Measure 9, and approved by the voters of the State of Oregon as a violation of the right to free speech in the Oregon Constitution. Mindful of the Oregon Supreme Court's 1997 decision, in 2006, supporters of campaign finance reform placed two measures on the ballot. Measure 46 was an attempt to amend the Oregon Constitution to allow for campaign contribution and expenditure limits. Measure 47 was the vehicle through which those limits were meant to be imposed.

Ballot Measure 46 would have amended the Oregon Constitution to provide that;

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 any election.

¹ See Secretary of State Opinion Letter, available at http://www.sos.state.or.us/elections/m47_implementation.pdf.

The Oregon voters failed to approve Measure 46, which would have effectively overturned the Supreme Court's decision in *Vannatta* and allowed for statutorily imposed limits on campaign contributions. In an interesting turn of events, though failing to pass Measure 46, the voters of Oregon *did* approve Ballot Measure 47, which provides for statutorily imposed limits on campaign contributions and expenditures. Because Measure 46 (the constitutional amendment) did not pass, the Oregon Supreme Court's decision in *Vannatta* is still good law. This memo addresses which, if any, of the provisions of Measure 47 are likely constitutional under the holding in *Vannatta*, and which provisions of the measure are likely to be struck down by the Oregon courts in the event of a legal challenge to the measure.

VANNATTA V. KEISLING

In 1997 the voters of Oregon passed Ballot Measure 9, which incorporated a series of limits regarding contributions to and expenditures by political candidates and campaigns. A group of plaintiffs, including a political action committee, a for-profit corporation, a registered lobbyist and a potential political candidate for state office filed suit in the Oregon Supreme Court to challenge the Measure.² In its decision in the case, the Oregon Supreme Court declared that the provisions of Measure 9 proscribing or limiting campaign contributions were unconstitutional limitations on speech under Article I, section 8 of the Oregon Constitution.³

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 on any subject whatever; but every person shall be responsible for the abuse of that right." In *Vannatta*, the Oregon Supreme Court declared that both campaign contributions and campaign expenditures are forms of protected speech under Article I, section 8. The court declared first that campaign contributions are a protected form of expression under the Oregon Constitution. The court held that "[e]xpenditures by a candidate, an organization, a committee, or an individual, when designed to communicate to others the spender's preferred political choice, is expression in essentially the same way that a candidate's personal appeal for votes is expression."⁴ The court also declared that a campaign contribution is a protected form of expression. The court found that a campaign contribution constitutes "the contributor's expression of support for a candidate or cause – an act of expression that is completed by the act of giving and depends in no way on the ultimate use to which the contribution is put."⁵

CAMPAIGN CONTRIBUTIONS

Once the court determined that both campaign contributions and campaign expenditures were protected speech under Article I, section 8, it then analyzed whether Measure 9's campaign contribution restrictions were constitutional.

² *Vannatta*, 324 Or at 518 n.3.

³ *Id.* at 541.

⁴ *Id.* at 520.

⁵ *Id.* at 522.

In considering a challenge under Article I, section 8, a court must first determine whether on its face, the terms of the challenged provision are “directed to the substance of any opinion or any subject of communication.”⁶ If a statute by its terms is directed to the substance of an opinion, or the subject of communication, it is unconstitutional and invalid unless “it fits within an historical exception or can be justified under the ‘incompatibility’ exception to Article I, section 8.”⁷

The challenged campaign contribution provisions of Measure 9 limited the amount of money individuals could give as campaign contributions and prohibited corporations and unions from making contributions at all. Measure 9 also prevented a candidate or candidate’s principal campaign committee from accepting contributions prohibited by the Measure.

After considering the measure, the Supreme Court declared that “by their terms [the provisions limiting or prohibiting campaign contributions were] targeted at protected speech.”⁸ Thus, in order to be constitutional, the provisions of Measure 9 limiting or prohibiting campaign contributions had to fall within an historical exception to Article I, section 8, or be justified under the incompatibility exception to Article I, section 8. The Court concluded that no historical exception exists that “removes those [provisions restricting] expression from the protection of Article I, section 8.”⁹ In reaching this conclusion, the court held that;

At the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions. Neither [was there] any indication that, at the time of statehood, the possibility of excessive campaign contributions was considered a threat to the democratic process. No historical exception applies.¹⁰

Advocates of the Measure argued that unlimited campaign contributions are incompatible with the political function because money necessarily and inherently corrupts candidates.¹¹ The court disagreed, holding that the “periodic appearance on the political scene of knaves and blackguards cannot . . . be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions.”¹² Thus, campaign contributions are not incompatible with the protections of Article I, section 8.

Finally, the supporters of Measure 9 argued that its contribution provisions were intended to proscribe a particular harm, namely undue influence of the political process.¹³ If a statute implicating protected expression is not written in terms directed to the substance of an opinion or subject of communication, but instead is “written in terms of a

⁶ *Id.* at 536 (quoting *State v. Stoneman*, 323 Or 536, 543 (1996)) (internal quotations omitted).

⁷ *Id.*

⁸ *Id.* at 573-38.

⁹ *Vannatta*, 324 Or at 538.

¹⁰ *Id.*

¹¹ *Id.* at 540-41.

¹² *Id.* at 541.

¹³ *Id.* at 538-39.

harm that may be proscribed . . . the statute may survive Article I, section 8 scrutiny, even though the statute expressly prohibits expression used to achieve that harm, provided that the statute survives an overbreadth analysis.”¹⁴ The court declared that if the purpose of the contribution limits was to;

[I]mprove the tone of campaigns . . . the constitutional answer is [clear]: The right to speak, write, or print freely on any subject whatever cannot be limited whenever it may be said that elimination of a particular form of expression might make the electorate feel more optimistic about the integrity of the political process. A contrary result would make illusory the protections afforded by Article I, section 8.

The court found that the provisions of Measure 9 limiting or prohibiting campaign contributions were directed at protected expression under Article I, section 8, and that they restricted that expression. Therefore the court held that the provisions of Measure 9 limiting or prohibiting campaign contributions violated Article I, section 8 and were unconstitutional.

CAMPAIGN EXPENDITURES

In contrast to its finding that Measure 9’s campaign contribution limitations were unconstitutional; the Supreme Court declared that the provisions of the measure relating to campaign expenditures did not impermissibly restrict expression. Those provisions included: a voluntary limitation on expenditures and a filing to that effect with the Secretary of State; a requirement that the Secretary of State publish a statement in the Voter’s Pamphlet outlining whether a candidate had agreed to limit her campaign expenditures; if a candidate promised to limit expenditures and exceeded those limits, a requirement that the Secretary of State publish a notice in the Voter’s Pamphlet in the following election that the candidate failed to limit expenditures in the earlier election; and a prohibition on the receipt of a tax credit by contributors to candidates who did not agree to abide by expenditure limitations. The court declared that the expenditure requirements were voluntary, required only the publication of truthful statements, and while potentially coercive to a candidate, the provisions were not *impermissibly* coercive. In light of these findings, the court declared that the provisions of Measure 9 limiting campaign contributions were constitutional.

BALLOT MEASURE 47

Ballot Measure 47 is in some ways very similar to Measure 9. Measure 47 incorporates provisions limiting campaign contributions and campaign expenditures, as well as provisions prescribing civil penalties for violation of the measure, and provisions specifically relating to the construction of the measure. Because the Oregon voters did not approve Measure 46, the constitutionality of the provisions of Measure 47 must be determined under Article I, section 8, and the Supreme Court’s holding in *Vannatta*.

¹⁴ *Id.* at 536 (citing Stoneman, *supra* 323 Or at 543).

CAMPAIGN CONTRIBUTIONS

Sections 3, 4 and 6 of Measure 47 impose limits or prohibitions on campaign contributions. Under the decision in *Vannatta*, the specific limits on campaign contributions by individuals and entities (including corporations and labor unions) are likely to be found unconstitutional by the courts.¹⁵ Just as in *Vannatta*, the campaign contribution provisions of Measure 47 are, by their terms, directed to the substance of an opinion or the subject of communication. Therefore, they are unconstitutional and invalid unless they fit within an historical exception or can be justified under the incompatibility exception to Article I, section 8. As noted in *Vannatta*, no historical exception to the protections of Article I, section 8 exists for provisions limiting campaign contributions. In addition, campaign contributions are not incompatible with the quest for political office. Measure 47 incorporates an exhaustive list of findings regarding the harm campaign contributions can cause both to members of the electorate and to the appearance of the political process. These findings may have been included in an attempt to show the harm that the Measure attempts to mitigate.

In *Vannatta*, the court declared that supporters of Measure 9 could not show harm merely by establishing that “there is a debate in society over whether and to what extent” campaign contributions create undue influence over the political process.¹⁶ The court held that “the ‘harm’ that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions.”¹⁷ The findings incorporated in Measure 47 are likely an attempt to establish harm. However, the court only looks at the harm the statute is meant to mitigate if the statute passes the first level of the court’s Article I, section 8 analysis – that the statute is not on its face written in terms directed to the substance of any opinion or any subject of communication. In *Vannatta*, the Supreme court held that the provisions of Measure 9 limiting campaign contributions were directed to the substance of an opinion or subject of communication, and did not fall into an historical or incompatibility exception, therefore, the provisions were unconstitutional and invalid. There is no reason that the court should not also find the provisions of Measure 47 limiting campaign contributions unconstitutional, findings notwithstanding.

CAMPAIGN EXPENDITURES AND REPORTING REQUIREMENTS

The *Vannatta* court approved the provisions of Measure 9 limiting campaign expenditures because they were essentially voluntary. The court repeatedly mentioned however, that campaign expenditures are protected speech under Article I, section 8, and the court approved the expenditure provisions of Measure 9 because they were not impermissibly restrictive of speech.

The expenditure provisions of Measure 47 are for the most part *not* voluntary, and many of them are tied to the contribution limits that the courts are likely to invalidate. In

¹⁵ See Section 3 (excluding subsection (h)); and Section 4, subsections (a) and (d). Section 5, subsection (a); and Section 6 (excluding subsections (g) and (h)).

¹⁶ *Vannatta*, 324 Or at 539.

¹⁷ *Id.*

addition, the limits on independent expenditures are clearly restrictions on protected speech, as independent expenditures are defined by the measure to include express advocacy and electioneering communications – communications that essentially support or oppose a candidate for political office – the example used by the court in *Vannatta* of speech that is undeniably protected.¹⁸

The provisions of Measure 47 limiting or prohibiting campaign expenditures are likely to be invalidated by the courts.¹⁹ In contrast, the provisions regarding disclosure and reporting requirements are more likely to be found constitutional because, like the expenditure requirements of Measure 9, they do not limit speech directly, they merely require particular actions (reporting, disclosure etc.) once a particular monetary threshold has been reached. Like the expenditure provisions in *Vannatta*, the disclosure and reporting requirements of Measure 47 may be somewhat coercive (in that there may be public relations consequences for spending over a certain amount) but a court is likely to find that the reporting and disclosure provisions, like the expenditure provisions of Measure 9, are not *impermissibly* coercive. The court in *Vannatta* declared;

Admittedly, a candidate's knowledge that his or her refusal to agree to expenditure limitations will be brought to the attention of the voters might persuade some candidates to agree to expenditure limits when, in the absence of that voter notification, they would not have agreed. Indeed, we assume that such a result was the precise purpose behind [the provision]. But encouraging such an outcome does not amount to impermissible coercion. The candidate's choice to limit or not to limit expenditures will be based on the candidate's estimate whether, in his or her particular campaign, a majority of voters so desire expenditure limitations that they might choose not to vote for a candidate who refuses to limit them. But such calculation by a candidate, like a hundred other choices on public policy issues, is the essence of the political process.²⁰

Certainly a case could be made that some of the reporting requirements, specifically those in Section 6(h) relating to individuals, are so onerous that they will serve to chill protected speech. Such an issue was not addressed by *Vannatta*, so it is difficult to predict how the court would rule on such an argument.

SEPARATE SEGREGATED POLITICAL COMMITTEE FUNDS

Section 7 of Measure 47 provides that nothing in the Measure prohibits “any corporation, other business entity, or labor union from establishing or administering a separate, segregated fund that operates as a political committee” This section is voluntary and is therefore likely to be upheld. It will become fairly meaningless however, if as predicted, the courts invalidate the campaign contribution provisions because corporations and labor unions will then be able to contribute directly to campaigns instead of having to form political committees in order to donate.

¹⁸ *Id.* at 523.

¹⁹ See Section 5, subsection (a); and Section 6 (excluding subsections (g) and (h)).

²⁰ *Vannatta*, 324 Or at 543.

LIMITS AND THRESHOLDS

Section 9(d) of Measure 47 provides that if a court invalidates any portion of the measure as conflicting with the United States or Oregon constitutions based on;

1) numeric limits or thresholds, 2) percentage limits or thresholds, 3) time periods, or 4) age limits, then those limits will automatically increase until they have reached a level consistent with the requirements of the constitution at issue. As noted above, the courts are likely to invalidate the monetary limits on contributions and expenditures entirely, so this provision will likely have little effect. If reporting requirements are challenged based on time limits, this provision may come into play, but it is difficult to predict with any certainty what sort of limits a court might find appropriate.

NARROWING INTERPRETATION

Section 9(e) of Measure 47 provides;

If, in the absence of this Section 9(e), there would be entered in any court any order impairing the effectiveness of any part of this Act on the ground that the United States Constitution or the Oregon Constitution requires that any type of individual or entity be wholly or partially exempt from any of the prohibitions or limitations of this Act, then we, the electors of Oregon, acting in our legislative capacity, hereby declare that the provisions of this Act shall be given a narrowing interpretation so as to avoid invalidation of any provision of this Act and to preserve its effectiveness to the maximum degree consistent with the constitutions.

It is difficult to predict exactly what this section means in terms of statutory interpretation. However, read in context with the measure's severability clause, discussed below, it is likely an attempt to protect the provisions of the measure which are not clearly unconstitutional from invalidation. The Oregon Court of Appeals held in *State v. Maynard*, that "Oregon's constitutional jurisprudence prohibits the narrowing of a statute that restricts expression . . ." reasoning that it violates "the very wording of Article I, section 8, which forbids the enactment of legislation that may only be salvaged through such judicial construction."²¹ The statute in that case however, was expressed only terms of the forbidden effects of speech (furnishing obscene material to minors) and it is somewhat unclear how the prohibition on a narrowing construction applies in this case.

SEVERABILITY CLAUSE

Because Measure 47 includes a severability clause providing that "every section, subsection, and subdivision thereof of this Act, at any level of subdivision, shall be evaluated separately" it is unlikely that a court will broadly declare entire sections of the measure unconstitutional. Thus, in attempting to determine a course of action under the measure, individuals and entities should look closely at all the sections and subsections of

²¹ *State v. Maynard*, 168 Or App 118, 128 (2000).

the measure that are potentially applicable, and operate under the assumption that some subsections of even the contribution and expenditure provisions will survive scrutiny.

FUTURE EFFECTIVE DATE

Section 9(f) of Measure 47 provides;

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 the Oregon Constitution is found to allow, or is amended to allow, such limitations.

Under the Oregon Supreme Court's interpretation of the Oregon Constitution in *Vannatta*, limits on campaign contributions and expenditures (at least as defined in Measure 47) are prohibited, so by its own terms, Measure 47 cannot be enforced until the Oregon Constitution is amended to allow for limits on campaign contributions and expenditures or the Oregon Supreme Court's decision in *Vannatta* is overturned.

Article IV, section 1(4)(d) of the Oregon Constitution provides that "an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by the majority of the votes cast thereon." There is some confusion as to whether, in light of this constitutional provision, Measure 47 becomes effective 30 days after its enactment or at the time the Oregon Constitution is amended to allow for limits on campaign contributions. Constitutionally, Measure 47 becomes effective 30 days after its passage. By the measure's own terms however, it will remain dormant and unenforceable until the Oregon Constitution is amended to allow for limits on campaign contributions and expenditures or the Oregon Supreme Court's decision in *Vannatta* is overturned. The provisions of section 9(f) apply to the *entire* Ballot Measure, not just to the currently unconstitutional sections. Therefore, by its own terms, *all* the provisions of Measure 47 should remain unenforceable until a constitutional change occurs.

CONCLUSION

If section 9(f) of Measure 47 is somehow invalidated and takes effect prior to a constitutional change, the provisions of Measure 47 limiting campaign contributions and expenditures will likely be found unconstitutional by the courts of the state of Oregon. The reporting requirements of Measure 47 are likely to survive a legal challenge intact.