



MEASURE 47 (2006) AND THE MEHRWEIN DECISION

ISSUE BRIEF

BALLOT MEASURE 47 (2006)

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. Ballot Measure 47 set specific limits on campaign contributions and expenditures, among other related election provisions. At the same time, Ballot Measure 46, a companion constitutional amendment, failed. Had that amendment passed, it would have effectively overturned the Oregon Supreme Court's decision in *Vannatta v. Keisling*, 324 Or. 514 (1997), which prohibited campaign finance limits under the state Constitution's Article 1, section 8 free speech provisions.

The following summary of the legal challenges and decisions related to the operability of Ballot Measure 47 is contained in the introduction to [ORS Chapter 259](#), which is where the measure is codified in statute:

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 thereon and to be in full force and effect as provided in section 1, Article IV, Oregon Constitution. However, on November 17, 2006, the Secretary of State interpreted section (9)(f) of the Act to mean that the Act was not currently enforceable. On September 25, 2007, the Marion County Circuit Court in *Hazell, et al. v. Bradbury, et al.*, affirmed the Secretary of State's interpretation, holding that "...Measure 47, in its entirety, presently is not operative." The decision of the circuit court was appealed to the Oregon Court of Appeals.

In *Hazell v. Brown*, 238 Or. App. 487, 512 (2010), the Oregon Court of Appeals held that the circuit court did not err in its holding and that "the substantive provisions of Measure 47 did not, and will not, become operative unless or until Article I, section 8, is amended to permit limitations of the sort deemed unconstitutional in *Vannatta I* or until the Oregon Supreme Court revisits *Vannatta I* and determines that such limitations are constitutional under Article I, section 8." (original emphasis)

In *Hazell v. Brown*, 352 Or. 455, 470 (2012), *rehearing denied*, 2013 Ore. LEXIS 484 (June 20, 2013), the Oregon Supreme Court affirmed the holdings of the

trial and appellate courts, stating “we conclude that section 9(f), properly read, requires Measure 47 to be codified and held in abeyance pending an appropriate constitutional amendment or judicial decision that will render it operative.” (original emphasis)¹

FINDINGS IN *MULTNOMAH COUNTY V. MEHRWEIN*, 366 OR. 295 (2020)

On April 23, 2020, the Oregon Supreme Court issued its opinion in *Multnomah County v. Mehrwein*, which was a challenge to Multnomah County’s campaign finance regulations enacted by voters in November 2016. The Court held that limits on campaign contributions are not per se invalid and, in doing so, partially overruled *Vannatta v. Keisling (Vannatta I)*, 324 Or. 514 (1997).

While the Supreme Court found that some campaign contribution limits are allowed under the Oregon Constitution, it did not rule on whether Multnomah County’s limits are valid. The Court remanded the \$500 contribution limits contained in MCC § 5.201(A) and (B) to the Multnomah Circuit Court to determine whether these limits are too low and thus violate the First Amendment to the U.S. Constitution. The circuit court is likely to issue written findings after requesting that the parties submit new briefings on the issue and hold a hearing. Any decision on the First Amendment issue may be appealed to the Oregon Supreme Court and potentially to the U.S. Supreme Court.

WHAT’S NEXT?

Constitutionality of Measure 47 after *Mehrwein*

The *Mehrwein* case is significant because of its implications for campaign finance regulation in the State as a whole. The *Hazell v. Brown*, 352 Or. App. 455 (2012) decision holds Measure 47 “in abeyance pending an appropriate constitutional amendment or judicial decision that will render it operative” but the Court did not provide guidance on what such a judicial decision would look like, other than to say:

“We have explained that Oregon voters intended Measure 47 to remain inoperative absent a constitutional amendment like Measure 46, or a controlling judicial construction of Article I, section 8, that effectively reverses *Vannatta I*. Measure 47 will not, therefore, spring to life based on events that are arbitrary, difficult to describe, or unpredictable. If either of the contingencies noted above occurs, Measure 47 will become effective according to the expressed will of the voters and under terms that they intended. A change of that magnitude will not take place in a closet.”²

In *Mehrwein*, the Court has overturned the portions of *Vannatta I* prohibiting limits on campaign contributions, perhaps providing the “spring to life” described above.

¹ ORS 259 (2019)

² *Hazell v. Brown*, 352 Or. App. 455 (2012)

However, the Court has not explicitly stated that those portions of Measure 47 limiting contributions are now operative. Furthermore, the Court declined to overrule the portions of *Vannatta I* prohibiting limits on campaign expenditures, another significant piece of Measure 47. Therefore, given the lack of clarification from the Court, it is likely that additional litigation will be needed to both resolve the question of whether Measure 47 is now operative and whether certain provisions are constitutional.

For example, according to a [December 31, 2019 Legislative Counsel opinion](#) requested by Rep. Rayfield, House District 16, there are four elements of Measure 47 that are similar to laws or regulations that have been found to be unconstitutional by the U.S. Supreme Court:

1. Aggregate contribution limits (Measure 47, section 3);
2. Limits on individual contributions that are too low (Measure 47, section 3);
3. Limits on a candidate's personal contributions or expenditures (Measure 47, section 4); and
4. Limits on independent expenditures (Measure 47, section 6).³

Rep. Rayfield also requested an additional informal opinion from Legislative Counsel on the equal protection challenge by candidates subject to different campaign contribution limits. That [February 3, 2020 opinion](#) concluded that "a court would likely find that a candidate who entered an election at a later date that is subject to different rules regarding campaign contribution limits violates the Fourteenth Amendment's equal protection guarantees."⁴

Implementation Issues

Testimony provided by former Secretary of State Jeanne Atkins in public hearings on House Bill 4124 (2020) identified the following implementation issues once Ballot Measure 47 is operative:

- Secretary of State procedures and rulemaking, including establishing penalties for violations;
- Tracking and reporting aggregate contributions by donors; and
- Establishing a process for the reversion of campaign funds to the State of Oregon within 60 days of the close of each election cycle as required by Measure 47, section 9 (c).⁵

³ Letter from Dexter A. Johnson, Legislative Counsel, by Christopher P. Allnatt, Staff Attorney, Legislative Counsel Office, to Dan Rayfield, State Representative, HD 16, (December 31, 2019) (on file with Legislative Policy and Research Office).

⁴ Letter from Christopher P. Allnatt, Staff Attorney, Legislative Counsel Office, to Dan Rayfield, State Representative, HD 16 (February 3, 2020) (on file with Legislative Policy and Research Office).

⁵ Jeanne Atkins, *Testimony on House Bill 4124*, <https://olis.oregonlegislature.gov/liz/2020R1/Downloads/CommitteeMeetingDocument/215298> (last visited April 28, 2020).

Pending Constitutional Amendment

[Senate Joint Resolution 18](#) (2019) proposes an amendment of Article 1, section 8 of Oregon's Constitution to permit enactment of laws by state and local governments and the people of Oregon to regulate the use of money in political campaigns, if approved by voters at the next regular general election (November 2020). The measure:

1. Authorizes limits on contributions so long as resources that are necessary for effective advocacy may be gathered;
2. Requires disclosure of contributions and expenditures;
3. Requires identification of the persons or entities responsible for political advertisements; and
4. Allows limits to expenditures to the extent permitted under the U.S. Constitution.

SJR 18 only applies to state or local laws and ordinances enacted on or after January 1, 2016. Without the *Mehrwein* decision, passage of the SJR 18 referral would have blocked the Measure 47 (2006) contribution limits but would have allowed the 2018 Portland and 2016 Multnomah County contribution limits to take effect.

As stated above, the Court in *Mehrwein* declined to reconsider *Vannatta*'s prohibition on campaign expenditure limits. Therefore, a separate court decision overturning that portion of *Vannatta* or a constitutional amendment such as SJR 18 would be needed before campaign expenditure limits enacted on or after January 1, 2016 could take effect.

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