

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PENDLETON SCHOOL DISTRICT 16R;
EUGENE SCHOOL DISTRICT 4J; CROW-
APPLEGATE-LORANE SCHOOL DISTRICT
66; COOS BAY SCHOOL DISTRICT 9;
CORVALLIS SCHOOL DISTRICT 509J;
JOSEPHINE COUNTY UNIT/THREE
RIVERS SCHOOL DISTRICT; ASTORIA
SCHOOL DISTRICT 1C; CRESWELL
SCHOOL DISTRICT; LINCOLN COUNTY
SCHOOL DISTRICT; SIUSLAW SCHOOL
DISTRICT 97J; CENTENNIAL SCHOOL
DISTRICT; AMITY SCHOOL DISTRICT 4J;
REYNOLDS SCHOOL DISTRICT #7;
COQUILLE SCHOOL DISTRICT #8;
PARKROSE SCHOOL DISTRICT #3; PINE
EAGLE SCHOOL DISTRICT #61;
JEFFERSON SCHOOL DISTRICT;
MCKENZIE SCHOOL DISTRICT;
ALEXANDRA KIESLING and TIMOTHY
KIESLING, minors, by Amy Cuddy, their
guardian ad litem; GRACE PEYERWOLD, a
minor, by David and Maria Peyerwold, her
guardians ad litem; MARSHALL TAUNTON
and HARRISON TAUNTON, minors, by Tim
and Wendy Taunton, their guardians ad litem;
BENJAMIN SHERMAND and CLAIRE
SHERMAN, minors, by Larry Sherman and
Diane Nichol, their guardians ad litem,

Plaintiffs-Appellants,

v.

STATE OF OREGON,

Defendant-Respondent.

Multnomah County Circuit
Court No. 060302980

CA A133649

RESPONDENT'S BRIEF

Continued.....

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable`, Judge

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The state accepts plaintiffs' statement of the case as adequate for review, except as supplemented below.

Nature of Proceedings and Judgment

Plaintiffs sought a declaratory judgment that the legislature's appropriation of \$5.3 billion for the kindergarten through 12th grade (K-12) school budget for the 2005-07 biennium violated Article VIII, sections 3 and 8, of the Oregon Constitution. Plaintiffs also sought a similar declaration for future biennia and corresponding injunctive relief to require the legislature to appropriate additional funds.

The trial court agreed with the state that Article VIII, sections 3 and 8 do not require the Legislative Assembly to appropriate additional funds for the K-12 public schools budget and granted judgment in the state's favor.

Questions Presented

1. Did the legislature violate Article VIII, section 8 of the Oregon Constitution (Measure 1) when the legislature appropriated \$5.3 billion for K-12 public schools for the 2005-07 biennium and issued a report that determined that the amount appropriated was not sufficient to meet quality goals established by law, identified the reasons for the insufficiency, its extent, and its impact on the state system's ability to meet those goals in the future?

2. Did the legislature violate Article VIII, section 3 of the Oregon Constitution when the legislature appropriated \$5.3 billion for K-12 public schools for the 2005-07 biennium?

Summary of Argument

Plaintiffs allege that Article VIII, sections 3 and 8, of the Oregon Constitution obligate the Legislative Assembly to provide more state funding for K-12 public schools than was provided by the 2005 Legislative Assembly for the 2005–2007 biennium. Article VIII, section 8 states that the Legislative Assembly “shall appropriate” sufficient funds to meet quality education goals “and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state’s system of public education to meet those goals.” Plaintiffs argue that the word “and” between the Measure’s two major portions can mean only that the legislature must appropriate funds at the level plaintiffs identify. But the measure also states that the legislature shall publish a report that “either” demonstrates the sufficiency of the appropriation “or” identifies the reasons why not and the effects of that shortfall. Proper application of the rules of construction for initiated amendments demonstrates that the trial court correctly concluded that, in light of the full text of the measure, plaintiffs’ reading is untenable.

Even if construction of the text alone were insufficient to defeat plaintiffs’ reading, the measure’s history is not as plaintiffs would have it. That history demonstrates that the measure sought to require the legislature to explain why it fell short of full funding, if it did so, not to take the ultimate decision out of its hands.

Plaintiffs are also incorrect in asserting that Article VIII, section 3 of the Oregon Constitution requires the legislature to fund K-12 education at a particular level. Controlling Oregon Supreme Court case law establishes that Article VIII, section 3 does not pertain to school funding at all. That section requires the legislature to “provide by law for the establishment of a uniform, and general system of Common schools.” It says nothing about minimum funding levels. Plaintiffs’ reliance on out-of-state cases interpreting other states’ constitutional provisions is misplaced in light of Article VIII, section 3’s text and controlling case law. Moreover, none of the out-of-state cases cited by plaintiffs were interpreting a provision substantially similar in text, context, and history to Article VIII, section 3.

ANSWER TO ASSIGNMENT OF ERROR

The trial court correctly granted the state’s motion for summary judgment and denied plaintiffs’ similar motion.

Preservation

The state agrees that both sides filed motions for summary judgment, thereby preserving the issues presented on appeal.

Standard of Review.

The correct interpretation of a statute or constitutional provision is a question of law, which this court reviews anew. *See, e.g., Liberty v. DOT*, 342 Or 11, 17, 148 P3d 909 (2006).

ARGUMENT

In *Withers v. State*, 133 Or App 377, 379-81, 891 P2d 675, *rev den* 321 Or 284 (1995), this court briefly canvassed the recent history of school funding in Oregon.

That history and common knowledge reveal that, especially since the voters enacted property tax limitations, the weight of providing school funding has largely been shifted from local government to the state, that the state has been engaged in efforts to eliminate disparities created under the former system, and that funding of schools has been a perennial bone of contention in the legislature and among the citizens. This case is another chapter in that ongoing controversy. Plaintiffs seize upon a constitutional amendment that, as demonstrated in part IB3, below, was intended to put pressure on the legislature to fund the schools more fully or be forced to explain why they did not do so. In pursuit of their arguably laudable goals, however, they incorrectly ignore the demonstrable intentions of the drafters and enactors and read that measure to take the funding decision out of the legislature's hands.

This brief examines the text, context, and history of Measure 1 to demonstrate why plaintiffs' reading of that measure is incorrect. The state then explains that Article VIII, section 3 of the Oregon Constitution has been authoritatively construed to have nothing to do with school funding, a result consistent with that provision's text and context.

I. Article VIII, section 8, of the Oregon Constitution does not include a funding mandate.

A. Legislative implementation in the face of continuing financial difficulty.

In 2001, the Legislative Assembly enacted into law a system for carrying Article VIII, section 8 into effect. *See* Or Laws 2001, ch 895, codified as ORS 327.497-.506, 291.228, 171.898. That law established a Quality Education Commission, consisting of 11 members to be appointed by the Governor.

ORS 327.500(1). That commission is charged with gathering information and issuing reports to the Governor and the Legislative Assembly for each biennium. The report identifies (1) current practices in the state's K-12 public education system, the cost of continuing current practices, and the expected student performance under those practices; (2) the best practices for meeting the quality goals, the cost of implementing the best practices, and the expected student performance under the best practices; and (3) two alternatives for meeting quality goals. *See* ORS 327.506(4).

Plaintiffs' challenge here focuses on the 2005-07 biennium.¹ For the 2005-07 biennium, the 2004 Commission Report determined that the state would need to invest \$7.1 billion to implement fully the best practices identified in the Quality Education Model (QEM), and that it would take \$5.3 billion for schools to maintain current levels of service and programs. (ER 34, 41). The Governor's proposed budget for 2005-07 was \$5 billion. In his budget report (ER 40-42), the Governor explained that "the current severe shortfall and revenue structure" does not allow funding of K-12 at a higher level. (ER 42).

The Legislative Assembly appropriated \$5.3 billion for the 2005-07 biennium, a 6.6 percent increase over funding for the 2003-05 biennium. (ER 16). In its 2005 Measure 1 Report, the special legislative committee recognized that "the amount of moneys appropriated for the 2005-07 biennium for K-12 public education is insufficient to meet the recommended funding levels of the Quality Education Commission." (SER 5). As required by Article VIII, section 8, the report went on to

¹ The relief plaintiffs sought, however, addresses all future biennia as well. Complaint, ER 21, ¶ a; Motion for Partial Summary Judgment, ER 25.

explain the reasons why funding was below the preferred level. The report explained that passage of Ballot Measures 5 (1990), 47 (1996) and 50 (1997) limited the amount of local property taxes that can be collected and used for schools. (SER 8-10). In addition, as a result of attempts to equalize the amount of funding school districts received per student, *see Withers* (addressing equalization efforts), “highly funded school districts’ funding was frozen and then reduced, while lower-spending districts funding was increased.” *Id.* The report explained: “In addition to the impact of Ballot Measures 5, 47 and 50, Oregon’s ability to increase funding in 2001-03 and 2003-05 was affected by the state’s economic recession and voter defeat of Ballot Measure 28 in January 2003, and the defeat of Ballot Measure 30 in February 2004.” *Id.*² According to the report, the defeat of Measure 30 by the voters reduced the State School Fund by a total of \$298.9 million compared to the 2003 legislatively approved budget. (SER 9). The report also cited additional factors that contributed to funding insufficiency, including the costs of implementing the Individuals with Disabilities Education Act and the No Child Left Behind Act, two federal laws that are not fully funded by the federal government. Finally, costs, such as health care, pensions, and fuel, have increased. (SER 9-10).

² Funding at the legislatively approved \$5.2 billion level for 2003-05 depended upon a package of temporary revenue increases, which were expected to raise approximately \$800 million. Following the end of the 2003 legislative session, citizens gathered enough signatures to refer that revenue package to the people, who rejected it on February 4, 2004. *See* 2003-05 Measure 1 Report at 5; http://www.leg.state.or.us/comm/commsrsvs/educationfunding_03.pdf

B. Construing Article VIII, section 8

Article VIII, section 8, of the Oregon Constitution was approved by the people as Ballot Measure 1 in 2000. It provides in pertinent part:

The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals.

The question presented here is relatively straightforward: Does this provision mandate that the legislature appropriate a specified level of funding or does it require the legislature to explain itself if it cannot or does not appropriate that level of funding?

In interpreting a constitutional provision adopted through the initiative process, the court's task is to discern the intent of the voters. The court applies the same structure it uses for statutory analysis – resort to text, context, and history – to the interpretation of laws and constitutional amendments adopted by initiative or referendum. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). The best evidence of the voters' intent is the text of the provision itself. The context of the ballot measure may also be considered. *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 559, 871 P2d 106 (1994). The context of a constitutional provision adopted through the initiative process “includes related ballot measures submitted to the voters at the same election.” *Id*, citing *O'Mara v. Douglas County*, 318 Or 72, 76 n 1, 862 P2d 499 (1993) (considering, as part of the

context of a legislative enactment, a related provision enacted as part of the same act). If the intent of the voters is clear from the text and context of the initiated constitutional provision, the court may elect to go no further. *Ecumenical Ministries*, 318 Or at 559. If the voters' intent is not clear, the court turns to the history of the provision. *Id.*

Although plaintiffs argue that the court should be reluctant to go beyond the language of the measure, App Br 14-15, the Supreme Court has reached the opposite conclusion. The court explicitly stated that courts should be cautious about ending their analysis of an initiated constitutional amendment without considering the measure's history. *Shilo Inn Portland/205, LLC v. City of Portland*, 333 Or 101, 129, 36 P3d 954 (2001). Consequently, the state addresses text, context, and history.

1. The text of Article VIII, section 8 does not support a funding mandate.

The text of Article VIII, section 8 states that the Legislative Assembly "shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law," and "publish a report that *either* demonstrates the appropriation is sufficient, *or* identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals." (Emphasis added). Plaintiffs emphasize that the two major sections of the measure – requiring appropriation and publication – are separated by the word "and," and they conclude that the measure therefore requires the legislature both to appropriate sufficient funds and to publish a report. That argument is not without appeal.

But that appeal notwithstanding, the complete text of the measure points most strongly in the other direction. To make their argument, plaintiffs are forced in large measure to ignore the portion of the measure that follows the “and” on which they rely so heavily. That portion unmistakably states that the legislature shall publish a report that “either” demonstrates that the appropriation is sufficient “or” (1) identifies the reasons why it is not; (2) describes how great the shortfall is; and (3) describes the impact of the shortfall on the state’s ability to meet its education goals.

As should be obvious, plaintiffs’ reading of the measure renders all of those specific requirements meaningless. That is, if, as plaintiffs assert, the legislature must – without fail or excuse and without consideration of the availability of funds or the state’s other needs – appropriate the amount determined to be necessary by the Quality Education Commission, there can never be occasion to publish a report detailing the level of the shortfall and its causes and effects. Thus, plaintiffs’ proposed reading would violate the oft-repeated principle that the court should not read any portion of a constitutional provision to be superfluous or without meaning. *See Armatta v. Kitzhaber*, 327 Or 250, 262, 959 P2d 49 (1998); *State ex rel Adams v. Powell*, 171 Or App 81, 95-96, 15 P3d 54 (2000), *rev dismissed* 334 Or 693 (2002).

Relying on this same rule of construction, plaintiffs assert that the trial court’s construction “makes the entire first clause of section 8 superfluous.” App Br 20. But that assertion is both unexplained and difficult to understand. And contrary to plaintiffs’ assertion, the state’s construction is the only one that harmonizes the two clauses and gives both meaning. Under the state’s construction, the first clause states

the preferred result: the legislature shall appropriate funds sufficient to fund K-12 education at the ideal level. The second clause acknowledges the reality that doing so may be imprudent or impossible in light of the amount of money the economy and tax-resistant voters make available to the legislature – a reality of which the voters can hardly be deemed ignorant – and requires the legislature to explain why it did not meet the first clause’s goals and the effects of that failure.

But plaintiffs’ construction cannot possibly be harmonized with the full text of the measure. Under their reading, there can never be occasion to publish a report explaining the reasons for, extent, and effects of a shortfall because there can never be a shortfall. In sum, while the trial court’s reading gives effect to both clauses of the measure, plaintiffs’ construction simply writes the second clause out of the constitution.

Indeed, if plaintiffs’ reading of Measure 1 were correct, it is simply impossible to understand why the measure would have said anything more than that the legislature must appropriate sufficient funds. That is, if the intent were to mandate a particular level of appropriation, the measure would simply have said as much and have stopped there. There would be no reason for publishing a report saying that it had done so, that would be a given. And there would obviously be no occasion for publishing a report identifying the reasons for a shortfall because no shortfall would be permitted.

Thus, considered in its entirety, the text of Measure 1 does not support plaintiffs’ argument that the measure imposes a funding mandate. To the contrary, in

light of the whole text, plaintiffs' construction is simply impermissible. And the whole text obviously cannot support their argument that the voters' intent to impose a funding mandate is so clear that the court need not consider the history of the provision.

2. The context does not support a funding mandate.

Plaintiffs next argue that the context of Measure 1 includes “ten years of unfunded mandates,” and that this “context” makes it plausible that voters intended to impose a specific funding level mandate by adopting Article VIII, section 8. App Br 21. Plaintiffs point to education funding problems in the years leading up to the election at which Measure 1 was adopted and conclude that the voters must, therefore, have intended to impose a mandatory level of education funding. *Id.* at 24-26. But even if it were possible to quantify the effects on the electorate of that generalized history, school funding woes were hardly the only things of which the voters were necessarily aware in that same period. Economic recession, voter-approved limits on property taxes, and the rejection of efforts to raise additional funds were, as the legislature's report explained, equally prominent features of the political landscape. (SER 8-10).

Plaintiffs also argue that other materials – none ever considered by the voters during the 2000 election – form a part of the historical context of Measure 1. *See* App Br 26-29. But the measure's history is not relevant in the abstract; it is relevant to the extent it is probative of voter intent. Yet a review of the historical materials relied upon by plaintiffs demonstrates that they say nothing about voter intent; they are all background documents that formed part of the discussions concerning drafts of the

proposal before it was fully formulated and qualified for the ballot. Plaintiffs do not suggest that those background materials were distributed to the voters or were even a part of the debate during the 2000 election campaign. The relevant history includes only sources of information that disclose the public's understanding of the measure: the ballot title, arguments for and against, other materials in the Voters' Pamphlet, and contemporaneous news reports and editorials. *See Ecumenical Ministries*, 318 Or at 560 n 8. Plaintiffs' materials do not fall into those categories because they provide no insight into voter intent. Consequently this court should not consider them any more than the electorate considered them in the 2000 campaign.

Accordingly, neither the text or context of Article VIII, section 8 supports plaintiffs' argument that the voters' intended that section to impose a funding mandate, and to *require* the legislature to adopt, for each biennium, the highest funding level recommended by the Commission's report.

3. Evidence extrinsic to the text and context of Article VIII, section 8 supports the conclusion that voters did not intend a funding mandate.

Contrary to plaintiffs' assertions, the Oregon Supreme Court "has noted that caution is required in ending the analysis before considering the history of an initiated * * * constitutional provision." *Shilo Inn Portland/205*, 333 Or at 129 (quoting *Ecumenical Ministries*, 318 Or at 559 n 7). "It is an unusual case in which the text and context of a constitutional provision reflect the intent of the voters so clearly that no alternative reading of the provision is possible." *Coultas v. City of Sutherlin*, 318 Or 584, 590, 871 P2d 465 (1994). *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 57, 11 P3d 228 (2000) (reiterating principle). Indeed, the Supreme Court

apparently views whether to consider the history of an initiated constitutional amendment as discretionary. *Shilo Inn Portland/205*, 333 Or at 129. Moreover, the court has stressed the importance of doing so “when the provision deals with essential governmental authority.” *Ecumenical Ministries*, 318 Or at 559 n 7, citing *Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 484-85, 753 P2d 939 (1988). Thus, resort to history is appropriate here. That history confirms that the voters did not intend to enact a funding mandate.

Because the purpose of the historical analysis is to discern voter intent, the Supreme Court has directed consideration of “sources of information that were available to the voters at the time the measure was adopted and that disclose the public’s understanding of the measure.” *Ecumenical Ministries*, 318 Or at 560 n 8. “Such information includes the ballot title and arguments for and against the measure included in the voters’ pamphlet, and contemporaneous news reports and editorial comment on the measure.” *Id.* Materials not available to the public are irrelevant in discerning what the voters intended, and plaintiffs are not free to ignore key aspects of what was available for public consideration. *Cf. Flavorland Foods v. Washington County Assessor*, 334 Or 562, 571, 54 P3d 582 (2002) (rejecting consideration of matters not probative of what the voters intended).

The history plaintiffs ask the court to consider is both underinclusive and overinclusive. They ask this court to ignore parts of the ballot title, parts of the Voters’ Pamphlet, and the contemporaneous news reports and editorials that explained, as the Estimate of Financial Impact made unmistakable, that Measure 1

would not create a funding mandate. In addition, they ask this court to give particular weight to materials that predated the 2000 campaign and that were never distributed to the voters, meaning that they cannot be probative of voter intent.

a. The ballot title, read as a whole, demonstrates that the voters did not intend Measure 1 to create a funding mandate.

The ballot title helps illuminate the voters' intent. *Ecumenical Ministries*, 318 Or at 560 n 8. Plaintiffs acknowledge that point but urge this court to examine closely the question and caption from the ballot title and ignore the remainder. App Br 22-24. The entire ballot title is part of the record in this case. SER 25. The question and caption relied upon by plaintiffs merely restate the measure itself, including the conjunctive and disjunctive constructions that form the basis of the parties' disagreement over Measure 1's meaning. For that reason, they offer little insight into voter intent not already provided by the text of the measure itself.

But after setting forth the result of a "yes" vote, the result of a "no" vote, the text of the measure, and a summary of the measure, the ballot title concluded with this bottom line for voters interested (either favorably or unfavorably) in a possible funding mandate:

Estimate of Financial Impact: There is no financial impact on state or local government expenditures or revenues.

The estimate of financial impact is designed "to inform the people of the cost of a measure being voted upon." *See Bassien v. Buchanan*, 310 Or 402, 408, 798 P2d 667 (1990). Consequently, the assurance that the measure would have no financial impact at all is particularly probative of voter intent here. After a voter read the rest of the

ballot title, if he or she was unclear as to what Measure 1's effect would be, that concluding statement provided voters with the answer in plain terms. Voters cannot have understood "no financial impact on state expenditures" to mean that they were voting to *mandate* state expenditures, as plaintiffs contend.

Plaintiffs urge the court to ignore this indicator of voter intent for two reasons. First, plaintiffs contend that in some counties the Estimate of Financial Impact did not appear on the ballot itself. App Br 22-23, 32. But plaintiffs point to only three counties – Marion, Benton, and Yamhill – that failed to include the Estimate of Financial Impact on the ballot itself. More importantly, the Voters' Pamphlet, which was mailed to *every* registered voter in the state – including those in Marion, Benton, and Yamhill Counties – incorporated the Estimate of Financial Impact. SER 25.

Plaintiffs' second basis for urging this court to ignore the Estimate of Financial Impact presented to every registered voter asserts that its purpose is to estimate *direct* financial impacts, and Measure 1 would create only *indirect* financial impacts. App Br 32-33. But the goal here is to discern voter intent, and when voters were told there would be "no financial impact on state * * * expenditures," they were not provided with plaintiffs' obscure statutory explanation for why that statement did not mean exactly what it said. *See State ex rel. Bunn v. Roberts*, 302 Or 72, 81, 726 P2d 925 (1986) (process by which estimate is prepared is not such a public one as to put the public on notice of that process). They were told only that there would be no financial effect on state expenditures. That is the relevant point for discerning voter intent.

Second, plaintiffs' attempt to dismiss the Estimate of Financial Impact is inconsistent with their claims in this case. Plaintiffs claim that Measure 1 imposed a *mandatory* funding obligation on the legislature, measurable against identifiable guidelines. Plaintiffs' complaint alleges that the legislature has under-funded K-12 education by billions of dollars and seeks a mandatory injunction to require greater appropriations. *See* Complaint, ¶¶ 5-6 (ER 3); Prayer for Relief (ER 21). Plaintiffs' complaint contends that Measure 1 imposed a *direct* and quantifiable financial obligation on the legislature, which plaintiffs seek to enforce in this action. That simply cannot be reconciled with the financial impact estimate.

Finally, even if their argument were relevant to the voters' intentions, plaintiffs' rely on the wrong section of the statute. Plaintiffs correctly note that ORS 250.125(1) requires inclusion of an estimate of "direct" financial impact under certain circumstances. But that is not the relevant part of the statute. The part of the statute that applied to Measure 1 in 2000 was ORS 250.125(4).³ That subsection

³ ORS 250.125 has been amended since 2000 in ways not relevant here. The references here are to the 1999 edition of the Oregon Revised Statutes, which governed the preparation of the Estimate of Financial Impact in Measure 1. At that time, ORS 250.125(1) and (4) provided in relevant part as follows:

(1) When a state measure involves expenditure of public money by the state * * *, the Secretary of State, the State Treasurer, the Director of the Oregon Department of Administrative Services and the Director of the Department of Revenue shall estimate the amount of direct expenditures * * * which will be required to meet the provisions of the measure if it is enacted.

* * * * *

(4) If the officials named in subsection (1) of this section determine that the measure, if it is enacted, will have no financial effect

provided that the phrase in the Measure 1 ballot title – “no financial effect on state or local government expenditures or revenues” – is mandatory, but reserved for situations in which it has been determined “that the measure, if it is enacted, will have *no* financial effect[.]” *Id.* (Emphasis added).⁴ The word “direct” did not appear in subsection (4).

Ultimately, however, which subsection of the statute applies is irrelevant. That is, even if subsection (4) implied that the “no financial effect” language refers only to *direct* financial effects, the voters cannot be expected to have been aware of that arcane statutory question. What they were told is: “There is no financial effect on state or local government expenditures or revenues.” The voters were not given a qualified statement that any effects would be only indirect or explaining what that might mean. Smuggling a mandate for billions in expenditures past voters who were told they were not mandating any expenditures cannot reasonably be described as consistent with the intentions of those voters.

b. The rest of the Voters’ Pamphlet also demonstrates that the voters did not intend Measure 1 to impose a funding mandate.

Like the ballot title, the rest of the Voters’ Pamphlet materials on a measure are to be considered in discerning voter intent. *Ecumenical Ministries*, 318 Or at 560 n 8. That includes the arguments for and against a measure. The Oregon Supreme Court

***, the words “no financial effect on state or local government expenditures or revenues” shall be printed on the ballot in the voters’ pamphlet and on the ballot.

⁴ The statute contains an exception, not applicable here, for situations in which the estimated financial impact is greater than zero but less than \$100,000.

routinely relies on the Arguments in Favor section of the Voters' Pamphlet when interpreting initiated measures. *See, e.g., Coalition for Equitable School Funding v. State*, 311 Or 300, 310, 811 P2d 116 (1991); *In re Complaint of Fadeley*, 310 Or 548, 595, 802 P2d 31 (1990); *Rogers v. Lane County*, 307 Or 534, 544-45, 771 P2d 254 (1989). That reliance is consistent with the court's repeated statements that materials presented to the voters, forming a basis for discerning voter intent, should be considered.

Plaintiffs counter that the Supreme Court "has cautioned strongly against" reliance upon such "partisan" statements, citing *Northwest Natural Gas Co. v. Frank*, 293 Or 374, 383, 648 P2d 1284 (1982). In *Northwest Natural*, the court urged "caution in relying on the statements of advocates contained in the pamphlet." That makes sense in circumstances where advocates might have "spun" the interpretation of a measure through the insertion of partisan comments in the Voters' Pamphlet. Here, the only relevant arguments were all in favor, and the explanations of the effects of Measure 1 came from Governor and chief petitioner Kitzhaber, John Marshall (Oregon School Boards Association), Ozzie Rose (Confederation of Oregon School Administrators), and Jim Sager (Oregon Education Association).⁵ None of those commentators had an incentive to "spin" Measure 1's contrary to its intent.

Moreover, *Coalition for Equitable School Funding*, *In re Fadeley*, and *Rogers* all

⁵ The only argument against the measure was submitted by Dennis R. Tuuri, Parents Education Association, who opposed state funding of public schools: "By assuming the responsibility to educate all children, the State has excluded God as the foundation for learning and has levied very high taxes. This makes it difficult for most parents to fulfill their God given obligation to fund their children's education." Voters' Pamphlet, SER 28.

post-date *Northwest Natural* and, therefore, must be deemed controlling to the extent of any conflict.

A review of what the voters read when they read the Arguments in Favor of Measure 1 confirms the other indicia of voter intent: Measure 1 would not create a new funding mandate. After reading in the Voters' Pamphlet that Measure 1 would have "no financial impact on state or local government expenditures or revenues," voters were presented with the following Arguments in Favor, underscoring what the Estimate of Financial Impact had already told them.⁶

Governor Kitzhaber was the only chief petitioner to submit an argument in favor of the measure. He explained that the measure would hold legislators accountable to the people. In addition, by focusing on quality goals, the funding discussion in the legislature would emphasize what is being bought with school funding, not arguing over an arbitrary figure. He stated:

The measure was crafted to change the debate about school funding from 'how much to spend?' to 'what education services are we buying?' It does so by requiring the legislature to fund schools so students can reach the high standards set in law. *If the legislature fails to do so, its members must detail the effects of their funding decision on the ability of our students to meet standards.*

Currently, the school funding debate in the legislature focuses on large numbers rather than on what those dollars actually buy in terms of education. By requiring the legislature to develop the school budget in terms of student achievement – that is, to determine the relationship between dollars and student performance – the legislature can be held

⁶ Plaintiffs take fragments of quotations out of context to create the impression that the Arguments in Favor support their construction of Measure 1. *See* App Br 31-32. The state includes that context, which demonstrates that the explanations offered to the voters by the Arguments in Favor all recognize that the measure would not create a funding mandate.

accountable for the consequences of its funding decisions. The governor will similarly be held accountable for the relationship between the recommended K-12 budget and anticipated student performance.

Voters' Pamphlet, SER 26 (emphasis added).

An argument in favor also was submitted by John Marshall, Oregon School Boards Association, and Ozzie Rose, Confederation of Oregon School Administrators. Their argument stated that: "Measure 1, introduced by Governor Kitzhaber and state Schools Superintendent Stan Bunn, is a common-sense way to hold the legislature accountable for school funding. We support Measure 1 *because it allows voters to understand where their education dollars are going.*" "The Oregon Legislature is obligated to provide a public school system. It has also set in law ambitious student achievement standards. Unfortunately, its appropriations have not matched its ambitions. Measure 1 will correct the problem by directing the legislature to underwrite its educational goals *or explain why not.*" They concluded by stating: "The state provides 70 percent of school funding. It requires school districts to pursue certain educational goals and standards. Local school boards, however, determine school budgets, *guided by available resources*, state law, and local priorities. *Measure 1 does not change this.* Measure 1 simply holds state decision-makers responsible for their funding decisions." *Id.* (emphasis added).

Jim Sager, Oregon Education Association, argued in favor of the measure. "By requiring the Legislature to provide adequate funding to meet Oregon's quality education goals, Measure 1 will hold the state accountable, just as schools are held accountable for using tax dollars wisely and well. Additionally, the measure requires

the Legislature to report how their budget meets or fails to meet these goals – so that citizens **do** get the full story.” *Id.* at 27 (emphasis in original).

Each of these statements, viewed in its entirety, emphasizes accountability, not mandated funding.

c. Contemporaneous news reports and editorials informed the voters that Measure 1 would not create a new funding mandate.

Contemporaneous news reports and editorial commentary, published during the election campaign, are relevant indicia of a measure’s meaning because they form part of the basis of voter understanding of a measure. *Ecumenical Ministries*, 318 Or at 560 n 8; *State v. Wagner*, 305 Or 115, 134 n 10, 752 P2d 1136 (1988), *vacated on other grounds*, 492 US 914 (1989). Where, as here, those contemporaneous news reports and editorials reflect a “fairly consistent point of view * * *, [courts] have greater reason to assume that such views were relied upon by the voting public and are obliged to give that history careful consideration.” *State v. Allison*, 143 Or App 241, 253, 923 P2d 1224, *rev den* 324 Or 487 (1996). The contemporaneous news reports and editorials explaining Measure 1 were consistent with one another and inconsistent with plaintiffs’ characterization of Article VIII, section 8. Each of the explanations of Measure 1 described below was published in October or November of 2000, immediately before the election.⁷

⁷ All of the cited articles are in the record of this case. The Oregonian and Statesman Journal materials were exhibits to the Bushong affidavit filed with the state’s opening brief, and the others were exhibits to the Fletcher affidavit filed with the state’s reply. All are included in the Supplemental Excerpt of Record.

On October 2, 2000, *The Oregonian* described Measure 1 as a proposal “that tweaks Oregon’s year-old law allowing property tax levies for schools and that requires the Legislature to provide adequate money for public education *or explain why it cannot.*” *The Oregonian*, October 2, 2000. (SER 29) (emphasis added). The article went on to say that “Measure 1 directs the Legislature to allocate enough money to schools so students can meet the education standards of Oregon’s school reform act, passed in 1991, and refined in the years since. * * * *If lawmakers are unable to find the money, Measure 1 says they must issue a report explaining the amount of the shortfall and its impact on improving student performance.*” *Id.* (emphasis added).

An editorial in *The Oregonian*, dated October 8, 2000, supported Measure 1. It explained the proposal as follows:

Measure 1 is the only honest statewide effort to improve Oregon’s public schools in the Nov. 7 election ballot. It’s disappointing only because it’s such a modest effort. Sponsored by Gov. John Kitzhaber and state school superintendent Stan Bunn, Measure 1 would direct the Legislature to allocate enough money for schools to ensure that students meet the state’s education standards. If the Legislature cannot or does not fully fund schools, the measure would require it to issue a public report explaining the shortfall and how it would affect student achievement. * * * It is a thoughtful, well-intentioned proposal that would change for the better the infuriating biennial debate in the Legislature over public-school funding. *But no one should be under any illusions that Measure 1 would resolve the issue. It requires a written excuse from the Legislature, not stable and adequate money for schools.*

The Oregonian, October 8, 2000. (SER 31) (emphasis added).

The *Statesman Journal* urged a “no” vote in an opinion piece dated October 12, 2000. The article said:

Measure 1 requires the Legislature to provide enough money for Oregon's public schools to meet the academic goals set by a 1991 law. *If they fail, they must tell voters why, and how public education will be affected.* * * * The initiative is all that remains of Kitzhaber's ambition to overhaul the state tax system and reform school financing. The chief organizations for Oregon teachers, school boards and administrators support it[,] so does the Salem-Keizer School Board. Then why vote no? First, because even a worthwhile effort like this does not belong in the Oregon Constitution. * * * Second, because this effort is doomed from the start. * * * If voters approve any of the tax-cut and spending-cap measures on November's ballot, legislators will have to make cuts so deep they'll affect every classroom. *Writing excuse notes to the electorate will be the least of their problems.*

Statesman Journal, October 12, 2000. (SER 32) (emphasis added).

On October 18, 2000, the *Statesman Journal* also reported on Measure 1. The article stated: "Measure 1 is designed to guarantee school funding. The Legislature would have to supply enough money *or explain why it could not.*" (Emphasis added). It continued: "The measure would require that the Legislature provide schools adequate funding to meet the quality goals already in state law. *If lawmakers couldn't come up with the money, they would have to issue a report outlining why they couldn't and what effect that might have on schools.*" The article explained that "not all legislators are pleased with the initiative." Sen. Gene Derfler, R-Salem was quoted as stating that "he's in favor of more cooperation between the Legislature and the governor in setting school funding levels but rejected Measure 1 as unneeded and divisive. *Under the measure, if education was not funded at an adequate level, the Legislature would have to write a report explaining why.*" According to the article, Senator Derfler "sees that requirement as an attempt by Kitzhaber to cast blame on the Legislature." (SER 33) (emphasis added).

The article went on to report on the ballot title summary, fiscal impact statement, and a summary of arguments for and against the measure taken from the Voters' Pamphlet. It reported: "Fiscal Impact: There is no financial effect on state or local government expenditures or revenues." The article summarized the arguments in favor of the measure: "A report on why education wasn't adequately funded would hold legislators accountable. By focusing on quality goals, the funding discussion in the Legislature would focus on what is being bought with school funding, not arguing over an arbitrary figure." *Statesman Journal*, October 18, 2000. (SER 34)

On November 2, 2000, the *Statesman Journal* reported that "Measure 1 is Gov. John Kitzhaber's initiative to require the Legislature to fully fund education *or explain why not*. The *Statesman Journal* editorial board believes this measure is inappropriate as a constitutional amendment, but many educators support it as a declaration of the importance of schools." *Statesman Journal*, November 2, 2000. (SER 35) (emphasis added).

The Eugene *Register-Guard's* explanation of Measure 1 began with the following lead:

Measure 1 wouldn't raise a dime for Oregon schools, but its chief petitioner—Gov. John Kitzhaber—says it would bring a significant and necessary change to the way state lawmakers fund schools.

Under Measure 1, the state Legislature would have a choice each biennium: Give schools enough money to meet the goals of Oregon's decade-old education reform law, or explain—in detail—why it won't and what effect the shortfall will have.

The Eugene Register-Guard, October 20, 2000 (SER 36). The rest of the article, which explained the measure in detail, was consistent with that lead. Both the chief

petitioner and a leading opponent, Senate President Brady Adams, were quoted as recognizing the lack of any funding mandate in the measure.

The *Medford Mail Tribune* also explained the measure to voters, urging a “yes” vote in an editorial, despite the lack of any funding mandate in Measure 1:

Measure 1 is not perfect, because the Legislature is given plenty of wiggle room to determine if it has met the funding goal or, if it determines the goal cannot be met, the Legislature can produce a report explaining why.

* * *

While the measure is largely toothless, it does require the Legislature to issue a report explaining how it met the standards or why it didn’t meet the standards.

The Medford Mail Tribune, October 12, 2000. (SER 39).

Plaintiffs address the extent and uniformity of explanation in the contemporaneous news reports by contending that the “press coverage of Measure 1 was contradictory” and “not revealing voter intent in either direction.” App Br 34-35. Yet the only support plaintiffs offer are four sentence fragments from earlier in the election cycle. And each of those snippets was no more than a brief and off-hand reference to Measure 1 that did not purport to offer any analysis or explanation. None was as close in time to the election as those the state has quoted and none purported to examine the measure in any detail. Consequently, they are not the sort of “contemporaneous news reports and editorials” that would have informed voter understanding months later, particularly in light of the detailed and uniform analysis provided by the same (and other) newspapers much closer to the election.

In sum, the text and history of Article VIII, section 8 comport with the state's reading of that provision. Plaintiffs have misread both the constitutional provision itself and its history. The provision does not mandate a level of school funding. Instead, it requires the Legislative Assembly either to fund schools at a certain level *or* explain any shortcoming. Plaintiffs do not allege that the 2005 Legislative Assembly failed to satisfy the latter alternative requirement. As a matter of law, that is sufficient for compliance with the provision. The trial court properly granted the State of Oregon summary judgment on plaintiffs' Article VIII, section 8 claim.

II. Article VIII, section 3, of the Oregon Constitution does not support a funding mandate.

Plaintiffs also attempt to fashion a constitutional school-funding mandate out of Article VIII, section 3. But each appropriate level of analysis confirms that section 3 does not pertain to school funding.

A. Applying the proper analysis, Article VIII, section 3 does not relate to school funding.

Article VIII, section 3 was part of the original 1859 Oregon Constitution. Interpretation of a provision of the original constitution focuses initially on the text and context of the provision. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). The analysis then turns to the case law surrounding the provision, and finally to the historical circumstances that led to its creation. *Id.*

1. The text and context of Article VIII, section 3, of the Oregon Constitution provide no support for plaintiffs' novel construction.

Article VIII, section 3 was part of the original 1859 Oregon Constitution. Interpretation of a provision of the original constitution focuses initially on the text

and context of the provision. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). The analysis then turns to the case law surrounding the provision, and finally to the historical circumstances that led to its creation. *Id.*

The text of Article VIII, section 3 mandates a uniform system of common schools: “The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.” It says nothing about qualitative requirements, much less about minimum funding levels.⁸ The neighboring provision, however, Article VIII, section 2, establishes the “common school fund” to finance that system of schools. The provision for funding in section 2 suggests that section 3 is not concerned with funding, but as the courts have concluded, solely with uniformity.

Plaintiffs offer neither textual nor contextual support for their view, a failure that should doom their argument at the outset.

2. Case law is uniformly contrary to plaintiffs’ proposed construction.

Plaintiffs assert that their Article VIII, section 3 claim presents a question “of first impression in Oregon[.]” App Br 38. To the contrary, the Oregon Supreme Court expressly rejected the contention that section 3 requires anything more than minimum funding.

We are of the opinion that Art VIII, § 3, is complied with if the state requires and provides for a minimum of educational opportunities in the

⁸ It is true that to “provide for” something can, in some contexts, have a financial meaning. For example, a person could “provide for” her children in her will. But Article VIII, section 3 states that the legislature shall “provide by law for” the schools. That usage obviously carries a different meaning.

district and permits the districts to exercise local control over what they desire, and can furnish, over the minimum.

Olsen v. State ex rel. Johnson, 276 Or 9, 27, 554 P2d 139 (1976). And this court, after considering text, context, and prior case law, held that Article VIII, section 3 “does not pertain to school funding at all.” *Id.* at 382. *Sherwood Sch. Dist. 88J v. Washington County Educ. Serv. Dist.*, 167 Or App 372, 382, 6 P2d 518, *rev den* 331 Or 361 (2000). Rather, section 3 requires only that the state’s public school system be “uniform in terms of prescribed course of study and educational progression from grade to grade.” *Sherwood*, 167 Or App at 382 (internal quotation marks omitted) (citing and quoting *Olsen*, 276 Or at 27); *accord Withers*, 133 Or App at 384 (“according to *Olsen*, Article VIII, § 3, requires only a uniform prescribed course of study”). Plaintiffs attempt to explain *Olsen*, *Withers*, and *Sherwood* away by arguing that they “address only the ‘uniformity’ requirement of Section 3, which is not at issue here.” App Br 36 n 8. But that misses the point those cases uniformly seek to make: Article VIII, section 3, imposes *nothing but* a uniformity requirement in education.⁹

The Oregon appellate courts’ pronouncements on the meaning of Article VIII, section 3 are definitive and binding in this case. Article VIII, section 3 mandates only

⁹ To be sure, the method of school funding has changed since the court decided *Olsen*. But that cannot affect the meaning of that original provision of the Oregon Constitution. *Stranahan*, 331 Or at 54, *quoting Jones v. Hoss*, 132 Or 175, 178, 285 P 205 (1930) (goal of constitutional construction is “to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it”) (brackets by *Stranahan* court).

a uniform course of study. It does not mandate anything with respect to school funding.

3. History is also contrary to plaintiffs’ proposed construction.

Finally, the history of the provision provides no support for plaintiffs’ proposed construction. The original draft of Article VIII, section 3 differed from the provision ultimately adopted. *See* Burton, *A Legislative History of the Oregon Constitution of 1857—Part III (Mostly Miscellaneous: Articles VIII-XVIII)*, 40 WILLAMETTE L. REV. 225, 250 (2004). That draft mandated the establishment of “a uniform and general system of common schools which schools shall be free and without charge for tuition to all children between the ages of four and twenty years—and the instruction in such schools Shall be free from party or sectarian bias.” *Id.* After the introduction of this provision, Mr. Bristow successfully moved “to strike out all [language] except that the legislature should provide for a system of common schools.” *See* Charles Henry Carey, *THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857* at 331 (1926). After removing the specific language, “[t]he details * * * were left to the legislature, the only provision being that the system be established in a general and uniform manner.” Lewis, *Education in the Oregon Constitutional Convention of 1857*, 23 OR HIST. SOC’Y Q. 220, 225 (1922).

Thus, each level of analysis indicates the same conclusion: Article VIII, section 3 does not pertain to school funding. Plaintiffs fail to address this proper methodology for interpreting an original constitutional provision. Instead, they rely on inapposite out-of-state authority. Those cases are discussed immediately below.

B. Plaintiffs' reliance on out-of-state authority is misplaced.

Rather than relying on Oregon cases interpreting the Oregon Constitution, plaintiffs' Article VIII, section 3 argument focuses on how other states have interpreted their constitutions in an apparent attempt to create the impression of a national trend in favor of finding funding mandates in provisions requiring only uniformity of instruction. *See* App Br 35-38. Those cases would be irrelevant in this case even in the absence of the controlling Oregon authority discussed immediately above. Interpretation of the original constitution proceeds under the analysis set forth in *Priest v. Pearce*. Cases from other jurisdictions are no part of the text or context of the provision. Moreover, the "case law" surrounding the provision, as used in *Priest*, refers to Oregon cases construing the provision at issue. *See Priest*, 314 Or at 417-18 (addressing only Oregon cases construing the provision at issue under the "case law" prong of the analysis). Out-of-state cases are considered, instead, only to the extent they shed light on the historical circumstances that led to the provision's adoption. *See id.* But to be relevant for that purpose, a case must either shed light of the language and history of the provision at issue or have been extant at the time the constitution was adopted. *See id.* at 418-19 ("decisions made after Oregon's statehood do not establish the meaning of the earlier-adopted language of the Oregon Constitution"). Because none of the cases relied on by plaintiffs addresses the language or history of Article VIII, section 3, and none was decided by 1859, they are irrelevant. And "developing national trends" obviously cannot shed any light on the meaning of a constitutional provision adopted in 1859 unless that trend is based on the history leading to the enactment of that provision.

But even if those cases were pertinent, they do not support plaintiffs' position in any event. Each of the seven cases cited by plaintiffs as supporting an "adequacy" requirement was construing a constitutional provision different from Oregon's. In five of those seven out of state cases, the courts were interpreting a provision that expressly included an "adequacy" or other qualitative component or had definitive history demonstrating that the framers intended such a component.

For example, in *Lake View School District v. Huckabee*, 91 SW3d 472 (Ark. 2002), the court discerned an adequacy requirement under Ark. Const., Art. 14, § 1, which provided that "the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education[.]" In *Leandro v. State*, 346 NC 336, 488 SE2d 249 (1977), the court was interpreting constitutional provisions very different from Oregon's that had been interpreted since at least 1917 to include an adequacy requirement. *See Leandro*, 488 SE2d at 254-55.

In *Campaign for Fiscal Equity v. State*, 100 NY2d 893, 769 NYS2d 106, 801 NE2d 326 (2003), New York's highest court also applied a constitutional provision different from Oregon's and based on that provision's 1894 legislative history. *See Campaign for Fiscal Equity*, 801 NE2d at 330. In *Campbell County School District v. State*, 907 P2d 1238, 1257 (Wyo. 1995), the Wyoming Supreme Court was applying a constitutional provision that explicitly imposed a funding-level mandate on the legislature: "The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and

maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state * * *.”

In *Claremont School District v. Governor*, 138 NH 183, 635 A2d 1375 (1993) involved a long and florid “Encouragement of Literature” clause of the New Hampshire constitution that made it a legislative “duty” to “encourage” learning of specific types. The New Hampshire Supreme Court interpreted that clause to impose upon the legislature an obligation to fund public schools, but the court explicitly stated that it was up to the political branches to decide at what level. It merely reversed the lower court’s ruling that there was no legislative obligation to fund schools at all. *See Claremont School District*, 635 A2d at 1381 And in *Tennessee Small School Systems v. McWherter*, 851 SW2d 139 (Tenn. 1993), the Tennessee Supreme Court interpreted a provision of its constitution, which also suggested an adequacy requirement in the text, to require minimum and equal funding. But the court began its analysis by noting the wide range of results in cases throughout the country, which according to the court was a product of the widely varied constitutions. Thus, noted the court, such out of state cases provided little guidance to Tennessee:

This is true because the decisions by the courts of other states are necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education and, to a lesser extent, organization and funding.

Id. at 148. The court went on to interpret its constitution, not by reference to the law in other states, but by reference to the text and history of its own constitution. *See id.* at 148-52.

In summary, even if there were not controlling Oregon appellate cases on point, and even if Oregon's interpretive methodology permitted influence by the courts of other states, plaintiffs' interpretation of Article VIII, section 3 would still not be aided by the foreign cases they cite.

The trial court correctly granted summary judgment in favor of the state of Oregon on plaintiffs' Article VIII, section 3 claim.

CONCLUSION

This court should affirm the judgment of the Circuit Court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on April ____, 2007.

I further certify that I directed the Respondent's Brief to be served upon James N. Westwood, Robin Beck Skarstad, David H. Angeli, and Robert D. VanBrocklin, attorneys for appellants, on April ____, 2007, by mailing two copies, with postage prepaid, in an envelope addressed to:

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SUPPLEMENTAL EXCERPT OF RECORD

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

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