

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; and
BENJAMIN SHERMAN and CLAIRE
SHERMAN, minors, by Larry Sherman and Diane
Nichol, their guardian ad litem,

Plaintiffs-Appellants,

v.

STATE of OREGON,

Defendant-Respondent.

Court of Appeals
No. A133649

Multnomah County Circuit Court
No. 0603-02980

APPELLANTS' REPLY BRIEF

Appeal from the General Judgment of the Multnomah County Circuit Court
Hon. Christopher J. Marshall, Judge

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May 18, 2007

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QUESTIONS PRESENTED ON APPEAL

The parties seem to agree on the ultimate questions before the Court: (1) whether the legislature is in compliance with Oregon Constitution Article VIII section 8, and (2) whether Article VIII section 3 of the constitution mandates adequate legislative funding of public education, independently or as the pathfinder for section 8. *Compare* Plaintiffs’ Opening Brief p. 3 with the State’s Answering Brief pp. 1-2.

REPLY ARGUMENT

1. **The Legislature Has Not Followed the Mandate of Article VIII Section 8 of the Oregon Constitution.**
 - A. **The Text of Section 8 Mandates Legislative Funding of Public Education As the Law Has Provided.**

At the beginning of its argument about the crucial issue of construction of the text of Article VIII section 8, the State makes a crucially revealing mistake. It frames the construction question with a *presumption* that “and” means “or.” This is verbatim from the State’s brief:

“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?” (emphasis added.)

Answering Brief p. 7. The State is not confronting the crux of Plaintiffs’ argument, one that wins the case for Plaintiffs by itself. The text of section 8 imposes two distinct mandates upon the legislature: (1) it shall appropriate a sufficient sum of money, **and** (2) it shall publish a report. “And” does not mean “or.”

The Court will have to indulge the State's presumption that the word "and" in section 8 really means "or" in order to make sense of the State's argument that appropriation of the required sum is "the preferred result" (Answering Brief pp. 9-10), to which publication of a failure-acknowledging report is a wholly sufficient alternative. The State says a textually dual mandate (to "appropriate" *and* "publish") "cannot possibly be harmonized," apparently because the State views an obligation of self-reporting of violations as an impossibility.

The State's position is essentially a concession that if a rational basis exists for the dual mandate, its argument will fail. The basis is much more than rational. By initiating and adopting section 8, the voters of the state have imposed on their recalcitrant legislators the dual obligation that all taxpayers have under the Internal Revenue Code, to pay taxes and to report. The law recognizes separate violations for failure to pay owed taxes and for failing to file a tax return reflecting the nonpayment. Opening Brief p. 21. The legislature has two separate functions here, as the Internal Revenue Code has with respect to individual taxpayers, and both of them are mandatory: appropriation (payment of taxes), and reporting. Whether legislators meet or fail to meet the appropriation mandate of Article VIII section 8, they must report.

Textual analysis of Article VIII section 8 is not difficult. As in a statute, "shall" does not mean "should," and "and" does not mean "or." *See Preble v. Department of Revenue*, 331 Or 320, 324-325, 14 P3d 613 (2000), discussed in Opening Brief pp. 18-19. The State has not responded to that point.

B. The Context of Section 8 Supports the Funding Mandate.

The State's flawed textual argument that funding and reporting can be treated as alternatives – that “and” means “or” – is also a contextual argument, that adequate funding is not really a requirement. The State would have the Court interpret the second clause's reporting requirement as a contextual clue that the first clause's words “shall appropriate” actually mean “should appropriate.” Again, however, *Preble v. Department of Revenue* is an absolute barrier to the rewriting of constitutional text. 331 Or at 324.

The context of section 8 also includes related measures and case law. *Favorland Foods v. Washington County Assessor*, 334 Or 562, 569, 54 P3d 582 (2002) (examining precursor Measures 47 and 5, in discussion of Measure 50.) Here, related measures are the 1991 Oregon Education Act for the 21st Century (1991 Or Laws ch 693 – unfunded by the legislature), and the 1997 legislative creation of the Council on the Oregon Quality Education Model (which identified deficiencies needing correction, which the legislature failed to address or fund). The context of section 8 includes Article VIII section 3 (*infra* pp 8-11), which entrusts the future of Oregon's public school students ultimately to the legislature, and analogues of which around the country are being found sufficient in themselves to mandate legislative appropriations.

Further context for section 8 comes unambiguously from the legislature itself, in its 2001 enactment implementing section 8. In ORS 327.497(3) the legislature has treated the two clauses of section 8 in two sentences (*see* Opening Brief p. 18).

The first sentence recites the funding mandate, without qualification. The second sentence states a *further* requirement, not an alternate one, “that the Legislative Assembly publish a report.”

The text and context of section 8 are not doubtful. In *Shilo Inn Portland/205, LLC v. City of Portland*, 333 Or 101, 36 P3d 954 (2001), the supreme court decided the meaning of an initiated constitutional amendment on its text and context alone, examining its history only to confirm a conclusion already reached. 333 Or at 129. The court did much the same in *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 64-65, 11 P3d 228 (2000), taking only a cursory look at history after deciding that text and context were almost but not quite dispositive. This is a case where the Court’s analysis of text and context alone provide a clear rule of decision – that the legislature has not followed the mandate of Article VIII section 8.

C. Extrinsic Evidence Establishes the Voters’ Intent to Mandate Legislative Funding.

(1) Historical Context and Statement of Financial Impact

The State’s answering brief deals at length with the history of Article VIII section 8, notwithstanding that history is plainly secondary to text and context, that this is demonstrably a case where text and context are redundantly conclusive about the dual mandate, and that historical analysis cuts sharply against the State.

A history of repeated failures by the legislature to fund its own goals for education prompted an initiative and adoption of an unambiguous constitutional direction to Oregon’s legislators in Measure 1: First establish by law how much money you need to meet your education quality goals, and then appropriate that

sum. The message of Measure 1 (now section 8) is, “Don’t give us any more lofty sounding educational goals unless you fund them.”

The State argues that the year 2000 was one of economic recession and limits on taxation. However, Measure 1 was not geared to short term economic conditions, nor was it a tax measure. It was an education funding measure, indisputably prompted by the absence of educational funding geared to identified educational goals. That fact explains and refutes the State’s argument that the Estimate of Financial Impact proves the voters did not really expect the legislature to fund the standards it would establish by law. The estimate, that “there is no financial effect on state or local government expenditures or revenues,” proves only that Measure 1 is not a tax measure. Until the legislature could establish by law the educational quality goals, no appropriation could possibly be estimated. The legislature was free under section 8 to establish the goals it would fund. Those goals could not be known, nor could anyone say they would require additional funding. Assigning a financial impact to the funding of requirements not yet established would have been presumptuous, speculative, and even unlawful.

The State overlooks another historical factor. The State is appearing in this case through the Oregon Attorney General. It is surely an embarrassment, if not an outright estoppel, that the attorney general now wants to repudiate his office’s express opinion, when he officially certified the ballot title for Measure 1 in 1999, that the measure’s “unambiguous language creat[es] a funding mandate.” Letter submitting certified ballot title to Oregon Secretary of State, Nov. 23, 1999; ER 30.

Compare the attorney general’s answering brief here, at page 4: “Article VIII, section 8, of the Oregon Constitution does not include a funding mandate.” The State implies moreover that the attorney general’s letter “was never distributed to the voters” and “cannot be probative of voter intent” (Answering Brief p. 18), but the letter is a statutory requirement (ORS 250.067(2)). It is far more of an official public record, and far more probative of objective voter intent, than the selected news articles and editorials with which the State has filled five pages of its brief (Answering Brief pp. 21-26; *cf.* Opening Brief pp. 33-35.) The articles and editorials are evidence of a subjective debate, not an indication of “voter intent.”

(2) Ballot Title and Voters’ Pamphlet

The State’s entire argument about the ballot title is confined to a discussion of the Estimate of Financial Impact (*see* Plaintiffs’ reply to that *supra*, pp. 5-6.) Answering Brief pp. 14-17. Without saying a thing about them, the State merely alludes in its answering brief (p. 14) to the Caption, Question, and Summary of the ballot title, and then it moves on. The Court’s attention should not be diverted from what the State has failed to discuss, in particular the Caption¹ and the Question.² Those are the only items required by law to appear on *every* ballot in the

¹ **The Caption:**

“Amends Constitution: Legislature Must Fund School Quality Goals Adequately; Report; Establish Grants”

² **The Question:**

“Result of ‘Yes’ Vote: ‘Yes’ vote requires legislature to fund school quality goals adequately, issue report, establish equalization grants.
“Result of ‘No’ Vote: ‘No’ vote rejects requirements that legislature fund school quality goals adequately, issue report, establish grants.”

state. ORS 245.175(2). A voter could not read “Legislature must fund school quality goals adequately” without knowing what the measure required. The same voter could not read “‘Yes’ vote requires legislature to fund school quality goals adequately” without having that understanding confirmed. Article VIII section 8 is a funding mandate.

The State also passes by the ballot title’s Summary without comment. The Summary has been quoted in full at page 29 of Plaintiff’s opening brief. The Court can see what the voters in 2000 would have seen – an explanation that the legislature would be required (1) to fund schools adequately to meet the law’s quality goals, (2) to publish a report either demonstrating funding sufficiency or explaining an insufficiency, and (3) to establish an equalization grant system. There is no hint in the Summary that the reporting requirement is an alternative to the funding requirement.

The same is true of the Explanatory Statement, which also appeared in the fall 2000 Voters’ Pamphlet and which the State also fails to discuss. *See* Opening Brief, p. 30, for its full text. The Statement was prepared jointly by proponents and opponents of the measure, and it leaves no doubt about the issue at hand:

“This measure requires the legislature to fund a sufficient amount of money to meet public education quality goals as established by the legislature. The measure *also* requires the legislature to publish a report * * *.”

Exhibit 28, p. 3; SER-25 (emphasis added.) Article VIII section 8 is a funding mandate.

2. Article VIII Section 3 of the Constitution Reinforces the Funding Mandate.

Citing *dictum* from this Court, the State says that Article VIII section 3 of the Oregon Constitution ““does not pertain to school funding at all.”” Answering Brief p. 28, quoting *Sherwood Sch. Dist. 88J v. Washington Cty. Ed.*, 167 Or App 372, 382, 6 P3d 518, *rev denied*, 331 Or 361 (2000). The quote is accurate, but with all respect, the Court’s *dictum* is mistaken. In *Sherwood*, this Court was making the same point that Plaintiffs have made in their opening brief, that prior cases interpreting Article VIII section 3 deal with the “uniformity” aspect of section 3.³ This Court relied on the supreme court’s *Olsen v. State ex rel Johnson*, 276 Or 9, 554 P2d 139 (1976), which specifically contradicts the idea that section 3 does not pertain to school funding. The Oregon Supreme Court in *Olsen*, speaking before the 1997 repeal of the “Safety Net” and thereby upholding the “uniformity” of the then-existing school funding scheme, held that section 3 was complied with if the state (the legislature) requires and provides for a minimum of educational opportunities and permits local districts (under the former Safety Net) to decide what they can furnish, over the minimum. 276 Or at 27.

If section 3 “does not pertain to school funding,” the supreme court’s description of the provision’s function in *Olsen* is meaningless. The instruction that the legislature must “require” and “provide for” educational opportunities, with

³ In its entirety, Article VIII section 3 reads:

“The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.”

extras to be supplied by local districts, is purely and simply a funding requirement. Article VIII section 3 is indeed about school funding. The State is mistaken (1) to deny that fact, and (2) to believe that any prior decisions, from this Court or the supreme court, are apposite to the issue here at hand – the legislature’s post-1997 obligation to fund, on its own, an adequate public education system. *See* Opening Brief p. 36 and fn. 8.

This Court is writing on a clean slate, but with extensive and useful notes from other states’ appellate courts. Those notes, discussed by Plaintiffs at pages 36 through 38 of their opening brief and dismissed by the State as “irrelevant” (Answering Brief p. 30), deserve the Court’s close attention.⁴ The State actually makes Plaintiffs’ point by trying to distinguish other states’ cases. The similarities in wording of those states’ constitutional provisions to Article VIII section 3 (like section 3, they do not contain the word “adequate”), and those states’ conclusions that their constitutional provisions *are* “adequacy” requirements, is exactly what Plaintiffs have pointed out in this case.

The State does not deny that the other states’ courts have enforced funding adequacy under their constitutions’ provisions, even where the word “adequate” does not appear. Most of those provisions are functionally indistinguishable from

⁴ The Oregon Supreme Court acknowledges that if other states’ constitutional provisions are similar to Oregon’s, and “if the interpretation placed on the constitution by the courts of those states is predicated on logic and clear thinking, such interpretation is persuasive and entitled to favorable consideration.” *Portland Pendleton Trans. Co. v. Heltzel*, 197 Or 644, 653, 255 P2d 124 (1953) (relying on Missouri and Arkansas courts’ interpretations of their state’s initiative and referendum provisions.)

Article VIII section 3; the State simply states the nonprobative truism that other states' provisions are "different" from section 3, without analyzing how the "difference" might produce a different result here. For example, New York's constitutional requirement that the legislature "provide for the maintenance and support of a system of free common schools" is the same in tone and purpose as Oregon's, and New York's highest Court has interpreted the requirement as one of educational funding adequacy. *Campaign for Fiscal Equity v. State*, 100 NY2d 893, 801 NE2d 326, 328-330 (2003). See also *Roosevelt Elem. School Dist. V. Bishop*, 179 Ariz 233, 877 P2d 806, 812, 814-815 (1994), which finds a funding mandate in the requirement of Ariz Const Art XI sec 1: "The Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system."

Many other states' highest courts have taken the bold and necessary step of holding legislatures constitutionally accountable for correction of inadequate educational funding. This Court will not be alone, nor will it be amiss, in taking the same step. Article VIII section 3 of the Oregon Constitution is a general funding mandate to the legislature, and similar provisions in other states' constitutions have been so construed. If the Oregon Constitution did not contain an Article VIII section 8 at all, section 3 would be enough in itself to support Plaintiffs' claims here for adequate school funding. At the very least, though, section 3 is the pathfinder for section 8. It points unavoidably toward the emphatically clear statement of

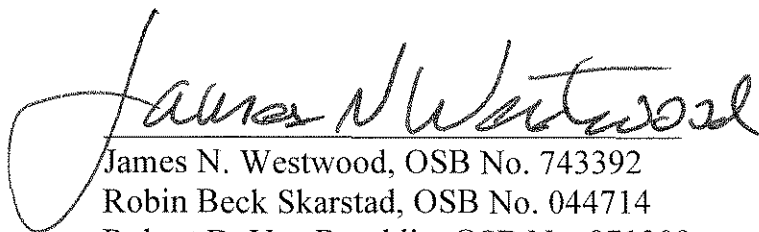
Article VIII section 8, that the legislature *shall* set a quality education level by law and then *shall* fund it.

CONCLUSION

The State's answering brief is notable for what it has overlooked. The Court should vacate the judgment below and remand the case to the trial court for entry of judgment in favor of Plaintiffs.

DATED: May 18, 2007.

STOEL RIVES LLP

A handwritten signature in cursive script that reads "James N. Westwood". The signature is written in black ink and is positioned above the typed names of the attorneys.

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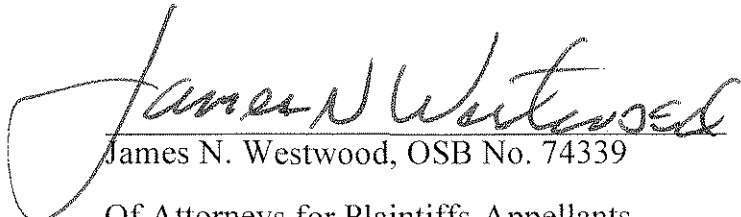
CERTIFICATE OF FILING AND SERVICE

I hereby certify that I served the foregoing **Appellants' Reply Brief** on May 18, 2007, by mailing the original and 20 copies thereof by first-class mail via the U.S. Postal Service to:

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I further certify that I served the foregoing **Appellants' Reply Brief** on May 18, 2007, by mailing two correct copies thereof by first-class mail via the U.S. Postal Service to:

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