

IN THE SUPREME COURT 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/Petitioners on Review,

v.

STATE of OREGON,

Defendant-Respondent/Respondent on Review.

Supreme Court
No. S056096

Court of Appeals
No. A133649

Multnomah County
Circuit Court
No. 0603-02980

PETITIONERS' BRIEF ON THE MERITS

Review of the Decision of the Oregon Court of Appeals
on Appeal from the Multnomah County Circuit Court

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Joined by: Ortega and Sercombe, JJ.

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PETITIONERS' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Whether the legislature's failure to comply with public education funding requirements of Oregon Constitution Article VIII sections 3 and 8 presents a justiciable matter, subject to injunctive and declaratory relief.
2. Whether the end of a biennium moots the Legislative Assembly's responsibility to meet a funding shortfall for that biennium, where (1) the adverse effects on Oregon students from the underfunding will continue into future biennia, (2) remediation of the adverse effects is feasible, and (3) ORS 14.175 specifically authorizes the continuation of the action to enforce the legislature's responsibility.
3. Whether the Legislative Assembly violates Article VIII section 8(1) of the Oregon Constitution when it admittedly fails to appropriate a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, whether or not the legislature then publishes a report that identifies the reasons for the insufficiency.
4. Whether the legislature violates Article VIII section 3 of the constitution when it fails to fund public education sufficiently to maintain an adequate system of common schools in the state.

NATURE OF THE ACTION

The named Plaintiffs ("Plaintiffs") are 18 Oregon school districts and seven Oregon public school students. They brought this action to correct constitutional

violations by the Oregon Legislative Assembly that affect every school district and public school pupil in the state.

With ringing language and popular acclaim, the Oregon Legislature enacted and the Governor approved the 1991 Oregon Education Act for the 21st Century. Oregon would have “the best educated citizens in the nation by the year 2000 and a work force equal to any in the world by the year 2010.” 1991 Oregon Laws ch 693 § 2; ER 8, ¶ 32.¹ The legislature’s aspiration was higher than the will to achieve it. On a per student basis, the state’s education funding between 1991 and 1998 *fell* by nearly 20 percent. ER 9, ¶35.

This lawsuit is before the Court because the members of the Oregon Legislature are failing to follow the charge delivered on November 7, 2000, when the voters approved Ballot Measure 1 and placed into the Oregon Constitution that rarest of provisions, an explicit funding mandate to the legislature:

“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 * * *.”

Or Const Art VIII § 8(1) (2000).

¹ “ER” references here are to the Excerpt of Record for Plaintiffs’ Opening Brief in the Court of Appeals.

The “sum of money” mentioned in Article VIII section 8(1) has been “established by law,” as a specific quantity. For the 2005-07 biennium, it is \$1.8 billion more than the Legislature’s appropriation. ER 17, ¶ 61.²

In this action, Plaintiffs demand (1) a declaration that the Legislature must recognize and abide by the constitutional funding mandate (ER 18, 19-20, ¶¶ 67, 73), (2) a mandatory injunction to carry out the declaration (ER 21, ¶ 79), and (3) their attorney fees, for vindicating the rights of Oregonians and their children (ER 18, 20; ¶¶ 68, 74).

FACTS MATERIAL TO THIS COURT’S REVIEW

No adjudicative facts are in dispute. Plaintiffs and the State filed cross-motions for summary judgment in the trial court. Except for the historical facts surrounding the drafting and submission of Ballot Measure 1 (discussed *infra*, pp. 20-23), the “Background” section of the court of appeals opinion (220 Or App at 60-63) is an adequate summary.

SUMMARY OF ARGUMENT

When the Oregon Constitution gives the legislature a specific nondiscretionary mandate, the very structure of a government of separated powers requires the judicial

² Those numbers are generated by the Quality Education Commission (“QEC”), formally authorized by the legislature after passage of Ballot Measure 1 to establish quality goals and to design a Quality Education Model (“QEM”) to fix best practice methods “based on research, data, professional judgment and public values.” ORS 327.506(3). The express duty of the QEC in each biennium is to “determine the amount of moneys sufficient to ensure that the state’s system of kindergarten through grade 12 public education meets the quality goals.” ORS 327.506(2).

branch to enforce that mandate. Where the harm from the legislature's failure is ongoing and cascading, mootness doctrine does not apply. Remediation is always available. Moreover, ORS 14.175 has blunted any mootness argument.

The text and context of an initiated constitutional amendment should in most cases be dispositive, and they are in this case. If the Court does see ambiguity and resorts to the history of 2000 Measure 1 (Article VIII section 8), the criteria are well established and the result is equally clear. The legislature *must* fund public education to meet the goals it has established, and this Court has authority (1) to declare any failure of funding and (2) to order that the necessary funding be done.

Article VIII section 3 of the Oregon Constitution is its own stand-alone mandate for adequate funding of education. Article VIII section 8(1) has clarified the intent of section 3, and cases from around the United States have interpreted other states' analogues of section 3 to the same effect, as mandates for adequate funding.

Finally, this Court need not fear an economic crisis in the state if it enforces the constitution in this case. The legislature has complete discretionary control over the establishment of quality education goals. If it is unable or unwilling in the future to fund its selected goals, the legislature is free to select lesser goals. The voters are watching, that is the nature of the political process, and the voters intended exactly that when they adopted Article VIII section 8.

The judgment below should be reversed and the case remanded for judgment in favor of Plaintiffs.

ARGUMENT

I. Plaintiffs' Claims Are Justiciable. An Express Constitutional Mandate to the Legislative Assembly Must be Enforced by the Judicial Branch with Injunctive and Declaratory Relief.

Because justiciability is a threshold matter, Plaintiffs discuss this question first, although they believe it is easily resolved and largely a distraction from the important merits of the case.

The State moved at the briefing stage to “determine jurisdiction,” repeating its arguments from the court of appeals that go to justiciability of Plaintiffs’ claims rather than to the Court’s subject matter jurisdiction. As stated on page 4 of its motion, the State argues that “the courts lack the *authority* to enjoin the legislature to enact or refrain from enacting future legislation, and * * * they similarly lack the *authority* to issue a declaration that would have equivalent effect” (emphasis added).

For this discussion of justiciability, the State must accept the truth of Plaintiffs’ allegation that the legislature has violated the educational funding requirements of Oregon Constitution Article VIII. Judicial correction of unconstitutional legislative action is conducted under the Court’s plenary “judicial power,” vested by Article VII (Amended) section 1 of the Oregon Constitution. Separation of powers inheres in that section to keep the other departments of government, by legislation or otherwise, from preventing or obstructing the courts’ exercise of the judicial power. *McFadden v. Dryvit Systems, Inc.*, 338 Or 528, 531, 112 P3d 1191 (2005). Where the Oregon Constitution is at stake, “a state legislative interest, no matter how important, cannot trump state constitutional command.” *State v. Stoneman*, 323 Or 536, 642, 920 P2d

535 (1996). No other branch of government can invoke policy or politics to avoid review by the judiciary of actions not authorized by law. *See Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 477 fn. 4, 753 P2d 939 (1988).

The State's challenge relies on *Tillamook Co. v. State Board of Forestry*, 302 Or 404, 413, 730 P2d 1214 (1986), but *Tillamook Co.* stands only for the proposition that the courts have no power to restrain a legislative body in advance from enacting an illegal statute or ordinance. It does not speak to the authority of Oregon courts, undoubted since statehood, to correct the unconstitutional acts of another branch of government. *See King v. City of Portland*, 2 Or 146, 153 (1865) (Oregon Legislative Assembly "is absolutely sovereign, except when limited by the terms of the Constitution alone").

Nor do Plaintiffs ask the Court here to regulate legislative discretion. Uniquely among all provisions of the Oregon Constitution, as far as Plaintiffs can determine, Article VIII section 8(1) is an explicit direction from the people to their legislature for a nondiscretionary appropriation: a sum of money sufficient to meet educational quality goals established by law (i.e. by the legislature itself). The legislature is further directed, if it violates that mandate, to identify the size of any deficiency. A court's order for correction of that deficiency is simply ministerial. To come into compliance with the constitution, the legislature must appropriate an amount of money, no more and no less, that is determined by the legislature itself.

The court of appeals has said that except for the supposed mootness of one of Plaintiffs' claims, they are all justiciable. 220 Or App at 63-64. The court's mootness

error must be reversed (see discussion immediately below), but otherwise the court of appeals' justiciability determination is correct.

II. Plaintiffs' Claims Are Not Moot.

The second element of the State's motion in this Court asserts that Plaintiffs' injunctive and declaratory claims are both moot. The court of appeals found the declaratory claim viable, but dismissed the injunctive claim as moot. 220 Or App at 64-67. In that latter respect, the court of appeals erred.

A. The Matter is Not Moot

This Court has recently addressed justiciability not only in the context of standing,³ but also in a mootness context. *Yancey v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004). The general principle has been stated this way:

“Under Oregon law, a justiciable controversy exists when ‘the interests of the parties to the action are adverse’ and ‘the court’s decision in the matter will have some practical effect on the rights of the parties to the controversy.’”

Barcik v. Kubiacyk, 321 Or 174, 182, 895 P2d 765 (1995), quoting from *Brunnett v. PSRB*, 315 Or 402, 405-406, 848 P2d 1194 (1993).

This controversy is not moot. Plaintiffs have alleged that the legislature failed in the 2005-07 biennium to appropriate the constitutionally required and lawfully determined “sufficient” sum of money. The close of that biennium did not end the legislative obligation. Relying only on *Tillamook Co.* (302 Or at 413), and preceding its nonsequitur with a boldly-stated “Thus,” the State asserts *Tillamook Co.* “held that

³ *Kellas v. Dept. of Corrections*, 341 Or 471, 145 P3d 139 (2006).

the judicial power does not extend to enjoining the legislature to enact or refrain from enacting future laws.” *Tillamook Co.* does not so hold. Instead, the case teaches that challenging the constitutionality of a yet-to-be-enacted statute is a nonstarter, for no court can put a prior restraint on legislation.

The State also says that “plaintiffs’ claims for relief directed at the 2005-07 biennium are moot because that biennium has passed.” The conclusion is given with neither a premise nor logic – the State must think the conclusion self-evident, but it is not. Plaintiffs’ prayer, that the legislature must “appropriate for the current [2005-07] biennium funding sufficient to * * * achieve quality goals established by law” (First Amended Complaint, ER 21), does not demand that the remedial appropriation be made *in* the biennium. Nor does the language of Article VIII section 8(1), which mandates a sufficient appropriation “in each biennium,” require remediation of a violation in the same biennium.

The government of the state does not go out of existence on the final day of each fiscal biennium, to be born again the following day. The General Fund is not zeroed out, nor do the state’s outstanding liabilities disappear. A Tort Claims Act judgment against the State in one biennium may be paid by a following biennium’s appropriation. The proposition is even constitutional. If the state government incurs an overall deficit for a particular fiscal year, the legislature finds revenue sources to make up that deficit in the ensuing fiscal year. Or Const Art IX sec 6.

So it is that the Legislative Assembly’s failure to make a constitutionally mandated appropriation in one biennium does not relieve its obligation for violation

of the constitution when the biennium ends. A justiciable controversy continues. The Plaintiffs – school districts and students – continue to have an interest adverse to that of the nonperforming legislature. Moreover, a remedial appropriation to make up the shortfall will necessarily have a practical effect on the Plaintiffs, by allowing school districts to employ personnel and offer curricula to make up for the lost educational opportunities of preceding biennia, and by giving students remedial learning opportunities to make up for past educational shortcomings. As *amicus curiae* Oregon Business Association points out in its brief, the downstream effect of an underfunded system of public education is immediate and ongoing, even for decades into the future.

Equally or more so, the judicial power extends to declaring the legislature out of compliance with the constitution, whether or not the courts can require the supplemental relief of an appropriation. Although the court of appeals failed to analyze adequately the justiciability of Plaintiffs’ injunctive claim, the court did comprehend the basis for justiciability of a claim for declaratory relief. The basis is the continuing harm from past underfunding and from the legislature’s ongoing failure to meet its funding obligations.

This case is not moot unless “because of a change in circumstances before review, the [Court] would merely resolve an abstract question without practical effect.” *PGE v. Int’l Brotherhood of Electrical Workers*, 206 Or 662, 667, 138 P3d 857 (2006). This Court’s declaration to the Legislative Assembly that it has violated the Oregon Constitution – something of which its members apparently are not aware –

will affect either future legislative funding of public education, or future voter choices in legislative elections, or both. The question is not abstract. The case is not moot.

B. ORS 14.175 Applies Here, and it Remedies Any Mootness.

Since January 1, 2008, ORS 14.175 has been in effect. It is a remedial, procedural statute, retrospectively applicable to this action. ORS 14.175 provides:

“In any action in which a party alleges that an act, policy or practice of a public body [the Legislative Assembly is such a body] * * * is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:

“(1) The party had standing to commence the action;

“(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and

“(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future.”

The statute responds to the State’s suggestion of mootness. Even if it were true that the legislature’s funding failure “no longer ha[d] a practical effect” on Plaintiffs, this case satisfies the three conditions that permit continued prosecution of the action:

(1) Plaintiffs had standing to bring the action (the State has not contended otherwise);

(2) The legislature must fund public education in every session, and it may repeat its past failures to do so sufficiently; and

(3) If the end of each biennium is indeed a fatal cutoff, and the end of each legislative session is the earliest possible date for commencement of an action challenging legislative inaction, no lawsuit can realistically run its course in few months remaining until the biennium's end.

With ORS 14.175 in place, nothing stands in the way of Plaintiffs' continued prosecution of this action.

III. The Oregon Constitution, Article VIII Sections 8(1) and 3, Requires the Legislature to Appropriate Sufficient Money to Ensure Compliance with Public Education Quality Goals Established by Law. The Legislature Has Failed to Do So.

We move to the merits of the case. Either singly or in conjunction with each other, sections 8(1) and 3 of Oregon Constitution Article VIII require what the legislature has failed to do: Fund Oregon's public education system with an adequate, sufficient amount of money to maintain a determined level of educational quality.

Here is the text of the provisions:

- Article VIII section 8(1):

“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 these goals.”

- Article VIII section 3:

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

The State does not contest that the Legislative Assembly failed by more than \$1.8 billion to fund Oregon public education, for the 2005-07 biennium, at the level determined by law as sufficient to ensure that quality goals would be met. *See 2004 Quality Education Model* (Dec 2004) at 2 (ER 34) (\$7.1 billion required); *compare* 2005 Or Laws ch 786 secs 1-2 (appropriating \$5.24 billion for public education).

We focus first on section 8(1). One interpretation of that section, and only one, could justify the legislature's failure to follow the people's direction to appropriate the legally-established amount of money. Section 8(1) would have to be read not as a funding mandate, but rather as a suggestion: *Either* the legislature funds public education to meet the lawfully established quality goals, *or* as a wholly sufficient alternative, it publishes a report that identifies reasons for the insufficiency. That is what the State has to argue. The argument fails.

A. Standard for Judicial Review of Initiated Constitutional Amendments

This Court reviews a lower court's interpretation of a constitutional provision for errors of law. *State v. Rangel*, 328 Or 294, 298, 977 P2d 379 (1999). The intent of the voters determines the meaning of an initiated constitutional amendment, *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993), but that rubric is not useful by itself. In *Roseburg*, the Court goes on:

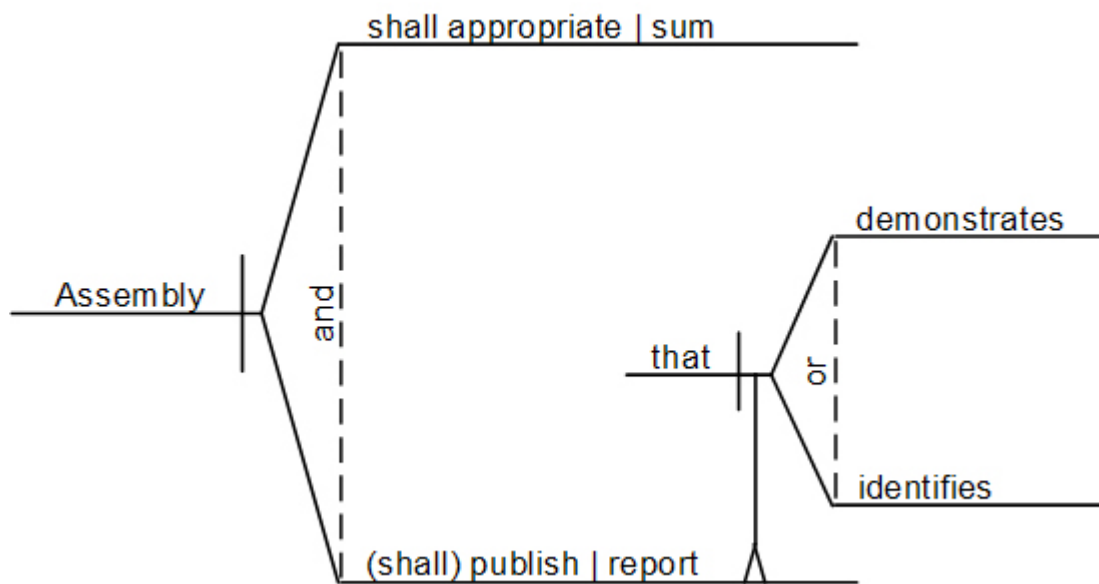
“The best evidence of the voters' intent is *the text of the provision itself*. The *context* of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.”

316 Or at 378 (emphasis added, citations omitted).

This is the classic *PGE/BOLI* formulation,⁴ and it applies to this case. In examining the constitutional text and context for possible ambiguity, the Court gives words of common usage “their plain, natural, and ordinary meaning.” *American Bankers Ins. Co. v. State of Oregon*, 337 Or 151, 156, 92 P3d 117 (2004).

B. The Text of Section 8(1) is Not Ambiguous. It Contains a Funding Mandate and a Separate Stand-Alone Reporting Requirement.

Article VIII section 8(1) has been quoted above (page 12). Plaintiffs’ opening brief in the court of appeals gave a graphic demonstration, by way of a sentence diagram, that the text of section 8(1) contains a funding requirement and an independent, stand-alone reporting requirement:



⁴ *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). See also *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 560, 871 P2d 106 (1994) (referring to *PGE/BOLI* as the template for interpretation of initiated constitutional amendments).

Grammatically, section 8(1) consists of two *independent* clauses, joined by the coordinate conjunction “and.” Each independent clause contains a separate mandate: The Legislative Assembly (1) *shall* appropriate a defined sum of money, *and* it (2) *shall* publish a report. The report must demonstrate the sufficiency of the appropriation to meet the quality goals, or it must identify why the appropriation is not sufficient to meet those goals.

We should consider what this Court has said about the meaning of the words “shall” and “and.” The principal case is *Preble v. Department of Revenue*, 331 Or 320, 14 P3d 613 (2000). The Court has left no doubt about the “plain, natural, and ordinary meaning” of those words.

“ ‘Shall’ is a command: it is ‘used in laws [* * *] to express what is mandatory.’ * * * The Department [of Revenue] has no discretion regarding [the act directed by the statute].”

* * * *

“The phrase ‘the notice shall’ is followed by three different requirements. * * * Those three requirements are connected by the word ‘and,’ which indicates that they are not alternatives.”

331 Or at 324-325. *See also Lommansson v. School Dist. No. 1*, 201 Or 71, 79, 261 P2d 860, 267 P2d 1105 (1954) (“There is no justification for using ‘or’ as meaning ‘and,’ unless the failure to do so would leave a statute meaningless or absurd”); *McCabe v. State of Oregon*, 314 Or 605, 611, 841 P2d 635 (1992) (same).

Flying in the face of that analysis, the court of appeals has construed “shall” as a discretionary instruction: “[T]he legislature *may*, in some cases, appropriate

insufficient funds.” 220 Or App at 70 (emphasis added). The court of appeals, also presupposing impermissibly that “and” in section 8(1) is “also plainly intended to mean *or*,” bootstraps itself to the conclusion that the dictionary requires an “or” meaning here. 220 Or App at 71. It is a grammatical blunder by the court, ignoring the function of “and” in section 8(1), as a connector of two independent clauses (*see* the sentence diagram above). In the sense understood by the court of appeals, “and” is a simple bridge between two words.⁵ Instead, unambiguously and beyond any question, “and” is used in section 8(1) as “a function word to * * * conjoin * * * clause with clause <said that he would be nominated ~ that he would be elected>.” *Webster’s Third New Int’l Dictionary* at 80 (unabridged ed 2002). It is simply not possible to construe the “and” in section 8(1) to mean “or.”

The conjunction “and” is not “followed by two alternatives,” as the court of appeals states (220 Or App at 70). The conjunction is followed by an independent clause. Referring to the sentence diagram, we see clearly that the “two alternatives” are contained wholly within the second clause, the one that deals only with *publication* of the report and not with the appropriation. The only legislative discretion is in the publication choice. The two alternatives follow the word “report.” The legislature’s report *may* demonstrate sufficiency of the appropriation, *or* it may disclose that the appropriation was insufficient.

⁵ The dictionary examples for the definition used by the court of appeals, joining words and not clauses, bear out the inapplicability of its definition here: “<bequeathed to a person ~ her bodily issue> <property taxable for state ~ county purposes>.” *Webster’s Third New Int’l Dictionary* at 80.

There are multiple scenarios, all of them plausible, under which an impermissibly insufficient appropriation is consistent with the reporting requirement. It may be that between the time the Quality Education Commission issues its statement of the required appropriation and the time the legislature makes the appropriation, the cost of meeting the identified goals has increased. It may happen that during the session for which it publishes its report, and before making the appropriation, the legislature has “established by law” its own new set of quality goals that exceed the QEC’s requirement but do not take effect until the following January. Or it may be that the legislature has simply failed its duty to make a sufficient appropriation, as happened in the 2005 session. Section 8(1) requires the legislature to self-report a violation of the first clause’s appropriation mandate. If a court never orders restoration of the deficiency (i.e. if these Plaintiffs or others do not bring a lawsuit to enforce the legislature’s duty), the legislature escapes with nothing more than a public admission of its failure, one that follows the legislators into the next election campaign.

There is nothing impossible or even surprising about a distinct two-part obligation on the legislature, to appropriate sufficiently *and* to report on the appropriation, sufficient or not. As Plaintiffs pointed out in the court of appeals (but the court’s opinion does not discuss it), the Internal Revenue Code imposes just such a dual obligation on every payer of income tax. Obligation One: A taxpayer must pay the tax that he or she owes, or be prosecuted for tax evasion (26 USC § 7201). Obligation Two: A taxpayer also must file an accurate tax return, whether or not the

payment reported is sufficient, or be prosecuted for filing a false return (26 USC § 7206). The analogy to the Legislative Assembly here is unmistakable. If the legislature fails to appropriate a sufficient sum of money to meet education quality goals, it commits one violation. If it then fails to publish a true report, it commits a second violation. The two obligations are independent of each other. Honestly reporting nonpayment of taxes does not relieve a taxpayer of liability for the nonpayment. Honestly reporting an insufficient appropriation does not relieve the legislature of liability for the insufficient appropriation.

The *context* of Article VIII section 8(1) gives conclusive weight to the separate funding mandate. Immediately after the adoption of Ballot Measure 1, the 2001 legislative session enacted enabling legislation that established the QEC and directed it to fix the exact dollar amount needed to meet quality goals, in accordance with a defined statutory methodology. ORS 327.506(2), (3). The legislative finding that preceded those directions left no doubt that the funding mandate was in addition to, and *not* in any way an alternative to, the report-publishing mandate:

“The Legislative Assembly finds that:

* * * *

“(3) The people of Oregon, through Section 8, Article VIII of the Oregon Constitution, have established 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 the quality goals established by law. Furthermore, the people of Oregon require that the Legislative Assembly publish a report that either demonstrates that 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.”

ORS 327.497; 2001 Or Laws ch 895 § 1. The word “furthermore,” used there to separate the funding and reporting mandates, means, “in addition to what precedes: BESIDES, MOREOVER.” *Webster’s Third New Int’l Dictionary* at 924. It is simply not possible to construe “furthermore” as a word that makes alternatives out of two separate requirements.

To summarize: The text and context of Article VIII section 8(1) clearly establish the intent of the voters to hold the Legislative Assembly to two independent obligations.

C. Historical Aids to Construction, If Needed, Confirm That Section 8(1) is a Funding Mandate.

The Court has made clear that initiated ballot measures are to be interpreted as if they were statutes (*i.e.* by the *PGE/BOLI* methodology), but it adds an apparent gloss to that rule. Nearly always in statutory construction, text and context are conclusive of the legislature’s intent. Although the Court has yet to explain why it should act differently in ordinary cases to determine voter intent in initiated amendments, a seemingly inconsistent statement from *Ecumenical Ministries* has been cited more than once:

“[C]autiousness is required in ending the analysis before considering the history of an initiated constitutional provision.”

Ecumenical Ministries, 318 Or at 559 fn. 7. The expressed rationale seems confined to cases where the amendment itself affects allocation of powers between the

branches of government. *Lipscomb v. State Board of Higher Ed.*, 305 Or 472, 484-485, 753 P2d 939 (1988) (Linde, J.). Article VIII section 8(1), directed solely to the legislature, is not such an amendment. Plaintiffs invite the Court to consider why text and context should be more decisive in construction of a statute than in the meaning of an initiated constitutional amendment. Legislators' intent in enacting statutes is grounded on consideration of and action on many intertwined policy issues. The separate vote rule for initiated amendments⁶ should minimize complexity and make the history of such amendments *less* critical to their meaning, not more so.

If history is consulted here, *Ecumenical Ministries* identifies some of the relevant elements for an initiated amendment:

“[T]he ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure.”

318 Or at 559 fn. 8.

The Court has since expanded the history pantheon to embrace all the items appearing in the voters' pamphlet, including the explanatory statement prepared by the five-person committee appointed under ORS 251.205 (*Shilo Inn v. Multnomah County*, 333 Or 101, 130, 36 P3d 954 (2001)); and in certain contexts the estimate of financial impact prepared pursuant to ORS 250.125 (*Flavorland Foods v. Washington County Assessor*, 334 Or 562, 576-577, 54 P3d 582 (2002)).

⁶ See *Armatta v. Kitzhaber*, 327 Or 250, 261, 959 P2d 49 (1998).

The court of appeals went past text and context of Measure 1 in this case to study its history, and to dwell at greatest length on the single “news reports and editorial comment” factor. 220 Or App at 74-76. Surreally, at that point the court of appeals was reading the text of Measure 1 almost unambiguously to substitute “or” for “and,” and “should” for “shall.” As it moved grudgingly to the secondary analysis, the court gave the plain text of the provision little credence:

“Even assuming for the sake of argument that plaintiffs' construction of Article VIII, section 8(1), is at least plausible, * * *.”

220 Or App at 73. For the fallacies in that court’s textual analysis of Article VIII section 8(1), see Plaintiffs’ Petition for Review, pp. 10-12

Plaintiffs urge this Court to end the inquiry where it fairly belongs, with the unambiguously clear text and context of the amendment as Plaintiffs have presented it. If the Court sees a need for historical analysis, though, Plaintiffs have nothing to fear.

1. How Measure 1 Reached the Ballot

Plaintiffs’ Petition for Review (pp. 1-3) tells the story. Measure 1 (Article VIII section 8) does indeed embody an “alternative,” but not the one for which the State contends. Measure 1 sent an ultimatum to the Oregon Legislative Assembly: *Either* fund Oregon public education at a level that matches your rhetoric, *or* cut back the empty promises, establish education quality goals that you *will* fund, and let the voters judge you accordingly.

From statehood up to 1990, funding of elementary and secondary public education in Oregon was almost entirely from local property tax assessments. The state General Fund was a backup source, and a small one at that. Ballot Measure 5 in 1990 made radical changes to that landscape, shifting the principal burden of K-12 education funding to the General Fund – mainly the state income tax – which is controlled by the Legislative Assembly. Ballot measures in 1996 and 1997 deepened the dependence on the General Fund, further strangled the ability of local school districts to raise money, and placed the funding responsibility almost entirely on the Legislative Assembly.⁷

In the meantime, the legislature was enacting lofty, unfunded educational goals. *See* the Oregon Education Act for the 21st Century (the “Act”), 1991 Or Laws ch 693, in particular section 2: “the best educated citizens in the nation by the year 2000.” To meet that ringing standard, the Act called for councils, agency coordination, student certificate programs, and evaluations. To show how serious it was, the legislature even inserted an emergency clause (§ 40). There was an inconspicuous loophole (§ 37), however: “Nothing in this Act is intended to be mandated without adequate funding support.” Per-pupil funding for public education was in decline.

A legislatively-appointed Council on the Oregon Quality Education Model, created in the 1997 session, developed a Model and in 1999 reported many

⁷ Or Const Art XI secs 11b-11f (1990); Art XI secs 11g-11j (1996); Art XI sec 11 (1997).

deficiencies in Oregon's public schools. Its report is Exhibit 10 to the Affidavit of David Angeli in Support of Plaintiffs' Motion for Partial Summary Judgment. The Council reported, between 1990 and 1998, a 20 percent *drop* in inflation-adjusted per-pupil Oregon public education funding. Exhibit 10 at 23. The 1999 legislative session took no action to fund the Council's Model.

The voters saw a serious disconnect – Legislative funding levels did not match legislative rhetoric, and the children of Oregon were the victims. To force legislative action, an initiative petition was drafted in 1999 to qualify Ballot Measure 1 for the November 2000 Oregon ballot. The chief petitioners included Governor John Kitzhaber and Superintendent of Public Instruction Stan Bunn (Exhibit 25).

By law, the Oregon Attorney General drafts a proposed ballot title – a Caption, a Statement of the effect of a “yes” or a “no” vote on the measure, and a 125-word Summary of the measure – for circulation with the initiative petitions. ORS 250.065. With a press release dated October 29, 1999 (ER 45), the Attorney General issued his draft ballot title for comment. His draft caption and “yes/no statement” both mentioned the funding mandate and the requirement for equalization grants. Neither one even mentioned the reporting function. ER 45.

The public commented, and the Attorney General responded to the comments. On November 15, 1999, he published and commented on a letter from the Oregon Public Employees Union (“OPEU”). The OPEU letter tried to make a record:

“The measure does state that the legislature ‘shall’ provide funding to meet quality goals but, in the same sentence, qualifies that language to provide that, if the legislature

fails to meet those goals, it must provide an explanation to the public. Based on that aspect of the proposed measure’s language, these commentators believe that the measure simply creates ‘legislative accountability.’”

Exhibit 26 at 1-2; ER 29-30.

The Attorney General would have none of it:

“That argument improperly asks us to disregard the proposed measure’s unambiguous language creating a funding mandate. We decline to do so.”

ER 26 at 2; ER 30.

Accordingly, the Attorney General certified a ballot title that “unambiguously” created an unqualified legislative funding mandate: “Legislature Must Fund School Quality Goals Adequately.”

The Measure 1 petitions circulated with the Attorney General’s ballot title. On November 7, 2000, with the same ballot title before them, the voters approved Measure 1 by a margin of almost 2-1, and it became Article VIII section 8 of the Oregon Constitution.

2. Ballot Title Caption and “Yes/No Statement”

Caption, Oregon Ballot Measure 1 (2000) (ORS 250.035(2)(a)):

“Legislature Must Fund School Quality Goals Adequately; Report; Establish Grants.”

The caption may be all that the great majority of voters read when they voted on Measure 1. That caption is unambiguous. Measure 1 contained three independent mandates to the legislature; the Attorney General used semicolons to separate the independent items. The “plain, natural, and ordinary” use of a semicolon is as a

substitute for the word “and.”⁸ No reasonable voter, reading the caption of Measure 1, could rationally take it to mean, “Legislature Must Fund School Quality Goals Adequately, [*or*] Report, [*and*] Establish Grants.”

“Yes/No Statement,” Oregon Ballot Measure 1 (2000) (ORS 250.035(2)(b) and (c)):

“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 equalization grants.”

The “Yes/No” statement is the only other item required by law to appear on every voter’s ballot. ORS 254.175(2). The Court should take special note of the “Result of ‘No’ Vote” statement. Even if an unusual voter could read the “Yes” vote statement as a mutually exclusive choice (fund school quality goals adequately *or* publish a report) along with a second mandated requirement (establish equalization grants), the “No” vote statement makes such a reading impossible. The “No” vote statement makes it clear that Measure 1 imposes *three* discrete mandates on the legislature: (1) fund school quality goals adequately, *and* (2) issue a report, *and* (3) establish equalization grants. If the conjunction “or” had been necessary to convey an intended meaning, the Attorney General could not lawfully have left it out. *See*

⁸ *See* R.W. Burchfield, ed., *Fowler’s Modern English Usage* at 699 (3d ed. 1996): “The best account of [the semicolon’s] function is that provided in Hart’s Rules (1904) * * *: ‘The semicolon separates two or more clauses which are of more or less equal importance and are linked as a pair or series.’”

ORS 250.035(7) (statements “shall not omit articles and conjunctions that are necessary to avoid confusion to or misunderstanding by an average elector”).

3. Measure Summary

Under ORS 250.035(1)(d), a measure’s ballot title includes a statement of up to 125 words, prepared by the Attorney General, “summarizing the state measure and its major effect.” On its face, the Summary of Measure 1, which became Article VIII section 8, gives only hints about the dual mandate of funding and reporting:

“SUMMARY: Amends constitution. Current statutes establish quality goals for education; constitution does not require legislature to fund schools adequately to meet those goals. Measure requires that, in each biennium, legislature fund schools adequately to meet law’s quality goals, publish report either demonstrating funding sufficiency or identifying reasons for insufficiency, its extent, and impact on state’s ability to meet goals. Also requires establishing equalization grant system to eligible districts whose voters approve local option taxes, consistent with any legal obligation to maintain substantial equity in state funding.”

Ballot Title, ER 32.

However, by negative pregnant (currently, “constitution does not require legislature to fund schools adequately”), the Summary does tell voters that Measure 1 will mandate adequate funding for schools. Moreover, the Attorney General had responded to a challenge to his draft of the ballot title with defense of “the proposed measure’s unambiguous language creating a funding mandate.” *Supra* p. 23; ER 29-30. It is clear that the Attorney General drafted a ballot title for public

consumption knowing that Measure 1 was a mandate, not a suggestion, for adequate funding of public education.

4. Explanatory Statement

Under ORS 251.205 and 251.215, a committee of five persons (proponents, opponents, and a joint appointee) prepared an Explanatory Statement, printed in the 2000 Voters' Pamphlet, explaining Measure 1 with “an impartial, simple, and understandable statement.” ORS 251.215(1). In relevant part, that statement read:

“Currently statutes establish quality goals for public education. The Oregon Constitution does not require the legislature to fund public education to meet these goals.

“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 that demonstrates to the public that the funding for public education is sufficient to meet the quality goals or must state the reasons for any insufficiency, the extent of the insufficiency and the impact that will have on the ability of public education providers to meet the quality goals.”

(CR 37-39, Ex 28 to Affidavit of David Angeli in Support of Motion for Partial Summary Judgment at 3, emphasis added).

Oregon voters were informed by an impartial statement, from a public committee established by law, of the dual requirements of section 8(1). The measure requires the legislature to fund a sufficient amount of money. The measure *also* (not “alternatively”) requires the legislature to publish a report – a report which may either demonstrate the sufficiency or admit the reasons for failure to fund a sufficient

amount. As with the word “and,” the word “also” does not indicate an alternative. *See Preble*, 331 Or at 324-325.

5. Estimate of Financial Impact

The financial estimate committee (“FEC”) appointed under ORS 250.125 reported on Measure 1 in the Voters’ Pamphlet:

“ESTIMATE OF FINANCIAL IMPACT: There is no financial effect in state or local government expenditures or revenues.”

220 Or App at 73.

The court of appeals took note of the “no effect” language as suggesting that “the voters could not have understood that passage of the measure would mandate state expenditures.” 220 Or App at 73.

In fact, the FEC’s estimate could not lawfully have said that Measure 1 would mandate additional state expenditures. The FEC’s statutory charge is to estimate the “direct” expenditures that “will” [not may] be required to satisfy the provisions of a measure if it is adopted. ORS 250.125(1)(a). Measure 1 was not a tax measure. It was an education funding measure, and until the legislature “established by law” the educational quality goals it would have to fund, no one could know whether additional funds would be required. As noted above, Measure 1 (now section 8(1)) was as much a call for the legislature to set its education goals realistically as it was a plea for greater school funding. The amount the legislature would have to appropriate, or how it would arrange the General Fund budget to pay for any increase in education funding, was and is *entirely within the legislature’s control*. The FEC

did not know, and could not know, that Measure 1 would have any financial impact on expenditures or revenues.

The record explicitly supports the FEC's final understanding that the legislature would control the quality goals. The draft estimate the FEC released for public comment in July of 2000 had set a \$200 million to \$255 million annual cost for implementation of the quality goals. Angeli Affidavit Ex 29. At a public hearing shortly afterward, the FEC heard testimony from Dave Fajer of the Oregon Department of Administrative Services, making the same point that Plaintiffs are making here – the future policy choices of the legislature, which has discretionary control over the nature and extent of the quality goals, would be the sole determinant of the financial impact, if any, of Measure 1. Before the legislature took action to establish the quality goals, the direct costs of Measure 1 could not lawfully be estimated. As Mr. Fajer testified, “[T]he legislative standards can certainly be changed under the requirements of the Constitutional amendment.” Angeli Affidavit Ex 30 pp. 5-6. The FEC draft statement was simply “a most-likely scenario of *indirect* costs,” which did not comport with the FEC's statutory charge. *Id.* (emphasis added); ORS 250.125(1)(a). In response to that testimony, the FEC revised its estimate of financial impact (final text *supra* p. 27; Angeli Affidavit Ex 32) and sent it to the Secretary of State for publication in the Voters' Pamphlet.

6. Arguments in Voters' Pamphlet and News Media

The court of appeals devoted a paragraph and a long footnote (220 Or App at 74) to the paid arguments pro and con from the 2000 Voters' Pamphlet. The message

the court pulls from those arguments is one of legislative “accountability.” To the extent that such arguments may be at all persuasive of the meaning of section 8(1), they buttress Plaintiffs’ argument that the voters were fed up with the legislature’s dodging of responsibility to fund public education to match its aspirations.

The court of appeals relied most heavily on newspaper editorials, which in the absence of data to show that they sway any voters are perhaps the least weighty extrinsic factor.⁹ Picking and choosing its data, the court of appeals has spent a good bit of its opinion citing newspaper editorials that support its conclusion, omitting entirely the materials cited to it by Plaintiffs (Opening Brief pp. 33-35) that support the view of Measure 1 as a clear funding mandate.

The point, however, is simply that Measure 1, like most other measures, was the subject of public debate in print media and, for all we know, in unreported public forums, office corridors, and taverns. Voter intent cannot reliably be deduced from the pros and cons of a debate, even with the most clearly-drawn of battle lines.

IV. Article VIII Section 3 is a Separate Funding Mandate to the Legislature.

Article VIII section 3 of the Oregon Constitution is short and simple:

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

⁹ See Justice Durham’s dissenting opinion in *Deras v. Myers*, 327 Or 472, 482 fn. 2, 962 P2d 692 (1998), noting that news articles and editorials are partisan views that “shed little or no light on the voter’s intention in approving a measure.”

Plaintiffs' First Amended Complaint requested declaratory relief under Article VIII section 3 of the Oregon Constitution, on the ground that "the Legislature has failed to appropriate a sum of money sufficient to maintain an adequate system of K-12 public schools for the 2005-07 biennium." ER 19-20.

Apart from section 8(1), section 3 is a stand-alone requirement, imposed upon the Legislative Assembly in the 1857 Oregon Constitution. In 1976, this Court addressed the function of section 3 in *Olsen v. State ex rel Johnson*, 276 Or 9, 554 P2d 139 (1976). Writing in a setting where local government provided 78 percent of Oregon's public K-12 funding and the state contribution was 16 percent (276 Or at 11 – in many districts the percentage of local funding was even higher), the Court said:

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

276 Or at 27.

Then came the local taxpayer revolt, with Measure 5 (1990) and Measure 50 (1997) effectively keeping local districts from exercising local control over their own funding. Today, funding of public K-12 education is predominantly from the General Fund, and the Legislative Assembly is the keeper of the purse for Oregon's school districts. Districts have very little authority to affect the overall funding level of their schools.¹⁰

¹⁰ Full analysis of property tax limits for education in Oregon is mind-numbing. In broadest terms, local operational levies for schools are limited to

Those sea changes make prior cases from this Court and the Oregon Court of Appeals, interpreting Article VIII section 3, inapposite. They address only the “uniformity” requirement of Section 3, which is not at issue here. *Olsen v. State ex rel Johnson*, 276 Or 9, 554 P2d 139 (1976), *Withers v. State of Oregon*, 133 Or App 377, 891 P2d 675 (1995) and *Sherwood School District 88J v. Washington County Education Services District*, 167 Or App 372, 6 P3d 518 (2000) did not involve challenges to the overall adequacy of Oregon’s public school system.

The only decision to address the issue of adequate funding, *Coalition for Equitable School Funding, Inc. v. State of Oregon*, 311 Or 300, 811 P2d 116 (1991), was decided before the 1997 repeal in Ballot Measure 50 of the “Safety Net,” which had directed local districts to meet state standards by taxing themselves. With disappearance of the Safety Net, the burden for funding an adequate public education system shifted to the State.

Article VIII section 3 provides context for interpretation of Article VIII section 8(1) as a funding mandate for Oregon education (*see pp. 17-18 supra*), but that context works both ways. The section 3 requirement of a uniform general system of common schools implies that those schools must be adequate to educate the children they serve. *Equitable School Funding*, 311 Or at 322 (Fadeley, J., concurring); *see*

the “gap” that exists between existing local school bonds and levies and the \$5 per \$1000 (real market value) property tax cap imposed by Measure 5. That amount is constrained further by assessment limits imposed under Measure 50. As a practical matter, most school districts are unable to raise more than a small percentage (less than 10 percent and sometimes much less) of the legislatively-provided funding. That last datum is not in the record in this case.

also Olsen v. State et rel Johnson, 276 Or at 27 (“a minimum of educational opportunities”). The adoption in 2000 of Article VIII section 8(1), with its express direction for funding “sufficient” to meet quality goals, is consistent with section 3, and for the first time it lends expressly to section 3 the funding contour that has been implicit since 1857.

As *amicus curiae* Education Law Center will point out in its brief on review, several other states’ highest courts have interpreted the “common school” equivalents in their state constitutions as mandating adequate funding for their own public schools, even in the absence of anything resembling Article VIII section 8(1).

Plaintiffs have pointed to a few of those in their court of appeals brief: *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 SW3d 472, 492 (Ark 2002); *Tennessee Small School Sys. v. McWherter*, 851 SW2d 139, 150-151 (1993); *Helena Elementary School Dist. v. State*, 769 P2d 684, 690 (1989).

V. Enforcement of the Article VIII Sections 8(1) and 3 Upholds the Political Process and Does No Harm to the State’s Revenue Structure.

Pervading the circuit court and court of appeals decisions in this case is the unspoken argument that Article VIII section 8(1) simply cannot mean what it says, because the additional funding required (\$1.8 billion for 2005-07, and supposedly similar amounts in future biennia) goes beyond what the state’s revenue structure might be able to provide. Continued underfunding of quality education goals, says the unspoken argument, will cause economic dislocations so draconian that a court

cannot interpret Article VIII section 8(1) as it is written, but must instead look the other way and absolve the legislature of its funding duties.

That chimerical argument overlooks the second most important feature of section 8(1) (after the funding requirement): The Legislative Assembly has *complete control* over the establishment of the quality goals it must fund. It is true that the legislature will need to make up the \$1.8 billion 2005-07 underfunding, over some indeterminate period of time. It is certain, however, that with regard to 2007-09 and succeeding biennia, the legislature may set quality education goals, “by law,” at any level it chooses, by whatever means it chooses. The legislature must appropriate enough money to meet those goals, but lowered goals could be funded at a level the legislature has historically met. That choice is the legislature’s, the constitution permits it, and the voters are watching. Voter intent and the political process are well served by Article VIII section 8.

Measure 1 became Article VIII section 8 because the voters were fed up with education funding that did not match the legislature’s lofty rhetoric. When they adopted Measure 1, the voters gave their legislators an edict: You *must* fund our schools at the quality level you establish, but you may establish that quality level, by law, at the quality level you have chosen.

CONCLUSION

This Court’s action, holding the Legislative Assembly to what the people have said it must do to support public education, does not invade the separation of powers, nor does enforcement of that funding mandate bankrupt the State’s General Fund.

The Oregon Constitution requires funding of quality goals, but it gives the legislature complete discretion to determine those quality goals.

The judgments of the circuit court and the court of appeals should be reversed, and the case remanded for entry of summary judgment for Plaintiffs.

Dated September 24, 2008.

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