

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 SD 28J; AMITY SCHOOL DISTRICT 4J; REYNOLDS SCHOOL DISTRICT #7; COQUILLE SCHOOL DISTRICT #8; PARKROSE SCHOOL DISTRICT #3, PINE EAGLE SCHOOL DISTRICT #6; 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 BWENJAMIN SHERMAN and CLAIRE SHERMAN, minors, by Larry Sherman and Diane Nichol, their guardian ad litem,

Plaintiffs-Appellants,

v.

STATE OF OREGON,

Defendant-Respondent.

Multnomah County Circuit
Court No. 060302980

Appellate Court No. A133649

Continued ...

RESPONDENT'S BRIEF ON THE MERITS

Opinion filed: May 14, 2008
Author of Opinion: Presiding Judge Landau
Joined by: Judges Ortega and Sevcombe

JAMES N. WESTWOOD #74339
ROBIN BECK SKARSTAD #04471
DAVID H. ANGELI #0204
ROBERT D. VAN BROCKLIN #87130
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 284-9187

Attorneys for Plaintiffs-Appellants

HARDY MYERS #64077
Attorney General
MARY H. WILLIAMS #91124
Solicitor General
ROBERT M. ATKINSON #
JEFF J. PAYNE #05010
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
First Proposed Rule of Law	1
Second Question Presented.....	2
Second Proposed Rule of Law	2
Third Question Presented.....	2
Third Proposed Rule of Law.....	2
Summary of Argument	3
1. This court has no jurisdiction over plaintiffs’ claims.....	3
2. Article VIII, section 8, is not a funding mandate.	4
3. Article VIII, section 3, also is not a funding mandate.....	7
ARGUMENT	8
I. Plaintiffs’ request for a declaration that the 2005-07 legislature violated Article VIII, sections 3 and 8, is moot.....	9
A. ORS 14.175 does not save this case from mootness.	12
1. This case has become moot because of the manner in which plaintiffs pled it, not because it is inherently likely to go moot.	13
2. This issue could readily reach and be resolved by this court within the course of a single biennium.....	15
II. Plaintiffs’ claims are not justiciable.	15
III. Article VIII, section 8, of the Oregon Constitution does not include a funding mandate.....	17
IV. Article VIII, section 3, even if read in conjunction with Article VIII, section 8, is not a funding mandate.....	24
CONCLUSION.....	26

TABLE OF AUTHORITIES

Cases Cited

<i>Barcik v. Kubiacyk</i> , 321 Or 174, 895 P2d 765 (1995)	11
<i>Crandon Capitol Partners v. Shelk</i> , 342 Or 555, 157 P3d 176 (2007)	11
<i>Ecumenical Ministries v. Oregon State Lottery Comm.</i> , 318 Or 551, 871 P2d 106 (1994)	5, 19
<i>Kerr v. Bradbury</i> , 340 Or 241, 131 P3d 737 (2006)	12
<i>LaGrande/Astoria v. PERB</i> , 284 Or 173, 586 P2d 765 (1978)	19
<i>Lobato v. State</i> , __ P3d __, 2008 WL 194019 (Colo App)	25
<i>Neb. Coalition for Educ. Equity and Adequacy v. Heineman</i> , 273 Neb 531, 731 NW2d 164 (2007)	25
<i>Pendleton Sch. Dist. v. State</i> , 220 Or App 56, 185 P3d 471 (2008)	9, 11, 12
<i>PGE v. Bureau of Labor and Industries</i> , 317 Or 606, 859 P2d 1143 (1993)	5, 17
<i>Priest v. Pearce</i> , 314 Or 411, 840 P2d 65 (1992)	25
<i>Roseburg School Dist. v. City of Roseburg</i> , 316 Or 374, 851 P2d 595 (1993)	4, 5
<i>Shilo Inn</i> , 333 Or 101, 36 P3d 954 (2001)	6, 19
<i>State Farm Fire & Cas. V. Reuter</i> , 294 Or 446, 657 P2d 1231 (1983)	12
<i>Vaughn v. Pacific Northwest Bell Tel. Co.</i> , 289 Or 73, 611 P2d 281 (1980)	5
<i>Yancy v. Shatzer</i> , 337 Or 345, 97 P3d 1161 (2004)	12

Statutes and Constitutional Provisions

Or Const, Art IX, § 4..... 16
Or Const, Art VIII, § 8..... 1, 2, 3, 4, 5, 8, 9, 14, 17, 22, 23
Or Const, Art VIII, § III..... 1, 2, 3, 8, 9, 14, 23, 25
ORS 14.175..... 12
ORS 19.405 15

Other Authorities

Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the
Constitutional Convention of 1857* (1926) 8
ORAP 10.10 15
ORAP 8.45 14

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Plaintiffs' complaint—which they filed in 2006—asked for the following declarations: (a) that Article VIII, section 8, of the Oregon Constitution requires the legislature to “appropriate for each biennium” sufficient money to ensure that the public education system “meets the quality goals established by law”; (b) that Article VIII, section III, requires the legislature to “appropriate funds sufficient to maintain an adequate system of K-12 schools”; and (c) that the legislature failed to appropriate the funds purportedly required by those provisions “for the 2005-07 biennium.” Plaintiffs also requested an injunction requiring “appropriate” educational funding “for the current biennium.”

(a) Are plaintiffs' requests for relief with respect to the 2005-07 biennium moot?

(b) Are plaintiffs' requests for relief with respect to the obligations that apply to future legislative sessions justiciable?

First Proposed Rule of Law

Because the 2005-07 biennium has ended, plaintiffs' requests pertaining to that biennium are moot. Plaintiffs' requests for relief pertaining to future legislative sessions are not justiciable. Accordingly, this court is without jurisdiction over this case.

Second Question Presented

Article VIII, section 8, provides:

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.

Does that provision necessarily require the legislature to appropriate money for public education that satisfies "quality goals established by law," or does it permit the legislature to provide funding at some lower level while simultaneously reporting the reasons for the insufficiency?

Second Proposed Rule of Law

Article VIII, section 8, permits the legislature to appropriate funds that do not satisfy the "quality goals established by law" so long as it publishes a report that, among other things, identifies the reasons for the insufficient funding.

Third Question Presented

Article VIII, section 3, of the Oregon Constitution provides that the legislature "shall provide by law for the establishment of a uniform, and general system of Common schools." Does that provision pertain to school funding, and does it require the legislature to fund public education at any particular level?

Third Proposed Rule of Law

Article VIII, section 3, does not pertain to funding, and it does not require the legislature to fund public education at any particular level.

Summary of Argument

Plaintiffs appeal the Court of Appeals' ruling that Article VIII, sections 3 and 8 of the Oregon Constitution, do not mandate that the legislature fund schools at the level determined necessary by the Quality Education Commission (QEC). The Court of Appeals held that plaintiffs' claim for injunctive relief with respect to the 2005-07 biennium was moot. But, because it determined that plaintiffs "alleged continuing harm," it reviewed plaintiffs' claim for declaratory relief and held that neither Article VIII, section 3, nor Article VIII, section 8, constitutes a funding mandate. Yet this court has no jurisdiction over plaintiffs' claims. If it does have jurisdiction, it should conclude, as the Court of Appeals did, that nothing in Article VIII, sections 3 and 8, constitute a funding mandate.

1. This court has no jurisdiction over plaintiffs' claims.

Plaintiffs ask for two types of relief: injunctive and declaratory. App Br ER 21-22. Plaintiffs' claims for injunctive relief in the 2005-07 biennium are moot, because any ruling with respect to the 2005-07 biennium, which is long over and done with, will have no practical effect on the parties. Plaintiffs now attempt to dodge this problem by recasting their prayer for relief in the trial court as one asking that a remedial appropriation for the 2005-07 biennium be made *now*. But the substantive allegations of plaintiffs' complaint, which this court looks at to determine mootness, plainly ask for an injunction requiring the legislature to appropriate sufficient funding "for the *current* biennium." App Br ER 21-22 (emphasis added).

For the same reasons, plaintiffs' prayer for declaratory relief with respect to the 2005-07 biennium is also moot. Moreover, plaintiffs' claims for declaratory relief in

future biennia are not justiciable, because it is outside this court's power to declare that the legislature must enact specific future legislation.

2. Article VIII, section 8, is not a funding mandate.

In any event, even if plaintiffs' claims are justiciable and not moot, the Court of Appeals correctly held that text, context, and history of the Article VIII, section 8's enactment demonstrate that the voters of Oregon did not intend it to be a funding mandate.

The state, no less than plaintiffs, has a strong interest in educating Oregon's children. Unlike plaintiffs, however, the state does not have the luxury of single-mindedness. Rather, the state must live within its means, means dictated by limitations on the patience and pocketbooks of the taxpayers—who are, of course, also the voters who enacted Article VIII, section 8. At the same time, the state must pursue, prosecute, and incarcerate lawbreakers, fix roads, care for the mentally disturbed, protect the environment, promote economic development, and do the myriad other things required of state governments in a modern, industrialized nation. Ultimately, of course, those state responsibilities do not matter to the resolution of this case any more than plaintiffs' assertions about the harms caused by underfunded schools, nor should they.

What does matter is what the voters understood and intended when they enacted Article VIII, section 8. *See Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993) (“In interpreting a constitutional provision adopted through the initiative process, [the court's] task is to discern the intent of the voters.”). And as the lower courts concluded, the voters did not intend to require the legislature

to fund schools at an aspirational level settled on by the QEC, a body having no practical responsibility to find the amount in question; they intended only that the legislature accept responsibility if it fails or is unable to fund schools at that level.

Plaintiffs make numerous assertions about the voters' understandings and intentions. They refer to "ringing language and popular acclaim." Plaintiff's BOM 2.¹ They describe the measure as an "ultimatum" requiring the legislature to, in effect, put up or shut up. *Id.* at 20, 27. They assert that "[t]he voters saw a serious disconnect" between rhetoric and appropriations and were "fed up." *Id.* at 22, 29, 33. And they describe the "edict" the voters gave to the legislature. *Id.* at 33. But plaintiffs offer no support for any of those assertions about voters' opinions. To the contrary, all of them appear to flow from plaintiffs' conclusions about Article VIII, section 8's meaning, rather than from any data about public attitudes or understandings about that provision. That is, having concluded that the measure is an "edict" for increased funding, plaintiffs conclude that the voters must have been fed up with the lack of such an edict. In sum, rather than offering objective evidence about the voters' intentions to support their view of the provision's meaning, plaintiffs use their subjective view of the provision's meaning to support their claims about the voters' intentions.

Plaintiffs' characterization of the measure's context is equally flawed. For example, they rely on post-enactment legislative action, on obscure statutory

¹ That language and alleged acclaim, of course, were for a 1991 statute, not the measure at issue here. Plaintiffs' BOM 2, 21.

definitions, on a letter from the Attorney General's office, and on small-group discussions about the estimate of financial impact. Plaintiffs' BOM at 17, 22-23, 27-28. Plaintiffs have made no effort to show that any of the sources they cite was generally available or widely discussed. Consequently, plaintiffs have provided no basis for their implicit assertion that the sources they refer to played any role in the public debate about this measure or could possibly suggest anything about the voters' intentions. *See Shilo Inn*, 333 Or 101, 129-30, 36 P3d 954 (2001) (“[O]nly those materials that were presented to the public at large help to elucidate the public's understanding of the measure and assist in [the court's] interpretation of the disputed provision.”)²

Plaintiffs also attempt to explain away the estimate of financial impact, which expressly told the voters that the measure would have no financial impact at all. Plaintiffs' BOM 27-8. But plaintiffs' argument cannot mask reality; the voters were told that the measure would have “no financial effect on state or local government expenditures or revenues.” “Estimate of Financial Impact,” included in Voter's Pamphlet and *quoted at* Plaintiffs' BOM 27. No voter reading that estimate of financial impact could be expected to understand it in the arcane manner plaintiffs propose.

² In the same vein, plaintiffs offer a sentence diagram and accuse the Court of Appeals of having committed a “a grammatical blunder.” Plaintiffs' BOM 13, 15. But as with the other sources on which plaintiffs' arguments depend, they make no effort to show that the voters went through a similar technical exercise to resolve the measure's facial ambiguity.

Additionally, while plaintiffs ask this court to rely on sources the voters could not have considered, they simultaneously urge the court to ignore the very sources the court has identified as informative, such as contemporaneous news and editorial commentary. The state provided extensive evidence of those sources below, Resp Br 18-26, and the Court of Appeals found them persuasive.

Plaintiffs have good reason to want this court to ignore those sources, while simultaneously taking the Court of Appeals to task for being unimpressed with the news sources on which plaintiffs relied. Plaintiffs' BOM 29. As the state explained in the Court of Appeals, the sources that plaintiffs cited were few, out of context, and appeared very early in the election cycle. Resp Br 25-26. Read objectively and in full, the public commentary on this measure overwhelmingly supports the Court of Appeals' conclusion that the voters did not—indeed, could not—have understood this measure to be the funding mandate plaintiffs demand.

3. Article VIII, section 3, also is not a funding mandate.

Plaintiffs also rely on Article VIII, section 3, of the Oregon Constitution and, in the Court of Appeals, cases from other states considering differently worded provisions in the constitutions of those other states. (Plaintiffs' BOM, 29-32; App Br 35-38). Much of that reliance appears to be an unabashed invitation to this court to engage in policy-making on the subject of school funding. That is, the text of section 3 plainly says nothing about the amount that should be appropriated for schools and it is virtually impossible to make a realistic case for the proposition that the authors of the Oregon Constitution, who were deeply concerned about keeping the costs of

government down,³ would have intended to put themselves on the hook for an unknowable amount for schools. Thus, plaintiffs are forced to rely on vague generalizations about Article VIII, section 3, rather than any actual evidence of the enactors' intentions.

Moreover, nothing in the text of Article VIII, section 8, supports plaintiffs' construction of section 3. Ultimately, the state's position is straightforward. The language of Article VIII, section 8 is, as every judge to look at it so far has concluded, ambiguous at best from plaintiffs' perspective. Pertinent context and history demonstrate that the public was told that a vote for this measure would neither fix the schools nor cost anyone a dime. Neither plaintiffs' intentions nor their "lofty rhetoric," *see* Plaintiffs' BOM 33, can justify their effort to transform either this accountability measure, or the generalized language of Article VIII, section 3, into a funding mandate.

ARGUMENT

The Court of Appeals held that plaintiffs' claims for injunctive relief with respect to the 2005-07 biennium were moot, but that their remaining claims presented justiciable issues. *Pendleton Sch. Dist. v. State*, 220 Or App 56, 185 P3d 471 (2008). Following this court's grant of review, the state filed a Motion to Determine Jurisdiction and Notice of Probable Mootness ("Defendant's Notice"), recapitulating its arguments before the Court of Appeals, addressing the Court of Appeals' response

³ *See* Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 55-6 (1926).

to those arguments, and explaining its disagreement with that court's resolution. That motion is still before this court.

This court should conclude that plaintiffs' request for declaratory relief on injunctive relief pertaining to the 2005-07 biennium are moot. The court should conclude that plaintiffs' remaining requests, for declaratory relief affecting future biennia, are not justifiable.

The state primarily relies on and summarizes the arguments it made in its brief to the Court of Appeals and in Defendant's Notice that it filed with this court. The state also responds in greater detail to some of plaintiffs' assertions that vary from its arguments before the Court of Appeals.

In the event that this court addresses the merits of plaintiffs' constitutional arguments, it should affirm as well. Here the state relies primarily on the brief it filed in the Court of Appeals.

I. Plaintiffs' request for a declaration that the 2005-07 legislature violated Article VIII, sections 3 and 8, and its request for an injunction affecting the 2005-07 biennium are moot.

Whether this court possess jurisdiction is contingent on how it reads plaintiffs' complaint. Plaintiffs' complaint asserts that two provisions of the Oregon Constitution, Article VIII, sections 3 and 8, require the legislature to fund public schools, Kindergarten through 12th grade (K-12), in a greater amount than what the legislature appropriated for the 2005-07 biennium. Plaintiffs seek the following: (1) relief in the form of a declaratory judgment addressed both to past legislative actions and to future ones, *viz.*, the 2005-07 biennium and to future biennia; (2) relief in the

form of an injunction requiring the legislature to appropriate funds for the 2005-07 biennium.

The prayer of plaintiffs' complaint asks for judgment as follows:

a. Declaring that (i) the Legislature must abide by the Oregon Constitution and, pursuant to article VIII, section 8 of the Oregon Constitution, must appropriate for each biennium a sum of money sufficient to ensure that the state's system of K-12 public education meets the quality goals established by law, and (ii) the Legislature has failed to appropriate a sum of money sufficient to ensure, for the 2005-07 biennium, that the state's system of K-12 public education meets the quality goals established by law;

b. Declaring that (i) the Legislature must abide by the Oregon Constitution and, pursuant to article VIII, section 3 of the Oregon Constitution, must appropriate funds sufficient to maintain an adequate system of K-12 schools, and (ii) 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;

c. Issuing a mandatory injunction requiring defendants to appropriate for the current biennium funding sufficient to provide the Required Service Levels, *i.e.*, the service levels that the Commission determined were necessary to achieve quality goals established by law;

d. Awarding plaintiffs their costs and reasonable attorney fees incurred in the prosecution of this action; and

e. Awarding such other and further relief as this Court may deem just and proper.

(App Br ER 21-22).

Thus, plaintiffs seek both a declaration with respect to the legislature's past actions and a future-oriented declaration that the legislature, "for each biennium," must appropriate sufficient funds to "meet the quality goals established by law." Plaintiffs also seek an injunction requiring K-12 school funding for the 2005-07 biennium—in the complaint's terms, "for the current biennium" at the level they deem appropriate. Plaintiffs complaint did not seek damages for past harms.

Plaintiffs' claims the 2005-07 biennium – that is, their request for declarations that the 2005-07 legislature violated the state constitution, and for an injunction requiring additional 2005-07 appropriations – are moot.

The Court of Appeals held that plaintiffs' request for declaratory relief with respect to the 2005-07 biennium was not moot. *Pendleton Sch. Dist.*, 220 Or App at 66-67. But that holding directly contradicts this court's holding in *Barcik v. Kubiaczyk*, 321 Or 174, 895 P2d 765 (1995). Indeed, *Barcik* demonstrates that plaintiffs' claim for injunctive and declaratory relief with respect to the 2005-07 biennium is moot.

In *Barcik*, this court held that a case is moot if a court's decision will no longer have a "practical effect" on the rights of the parties. 321 Or at 182. This court specifically noted that the Declaratory Judgment Act was "not an independent grant of jurisdiction" contravening the requirement that a declaratory judgment affect "*in the present*" some rights of the parties. *Id.* at 188 (emphasis in original).

To determine mootness, this court first looks at the substantive allegations of the complaint. *See Crandon Capitol Partners v. Shelk*, 342 Or 555, 562, 157 P3d 176 (2007). Plaintiffs' complaint, in paragraphs a (ii) and b (ii) of the prayer, asks the court to declare that the 2005-07 legislature failed to appropriate funds at the level plaintiffs deem appropriate. But because the 2005-07 biennium has ended, and because the legislature has adjourned, any declaration by this court that the 2005-07 legislature did not properly fund education will have "no practical effect" on the parties. *Crandon*, 342 Or at 562. Plaintiffs' request for an injunction requiring

additional appropriations “for the current biennium” (that is, for 2005-07) is moot for the same reasons. This court cannot enjoin the legislature to appropriate additional funds, and a declaration that the legislature failed to appropriate sufficient funds would have no controversy on which such a declaration could “effectively operate.” *State Farm Fire & Cas. V. Reuter*, 294 Or 446, 449, 657 P2d 1231 (1983); *see also Kerr v. Bradbury*, 340 Or 241, 244, 131 P3d 737 (2006) (“the judicial power extends to only ‘the adjudication of an existing controversy,’” quoting *Yancy v. Shatzer*, 337 Or 345, 362, 97 P3d 1161 (2004)).

The Court of Appeals apparently believed that it avoided the problem posed by the lack of an existing controversy by noting that plaintiffs “allege continuing harm.” *Pendleton Sch. Dist.*, 220 Or App at 67. Such a holding, however, necessarily requires the court to rule with respect to harm in future biennia. As discussed below, that requires the court to exceed its power by enjoining a future legislature from enacting particular legislation or issuing a declaration having the same effect.

A. ORS 14.175 does not save this case from mootness.

Plaintiffs argue that ORS 14.175, enacted by the 2007 legislature, saves this case from mootness.⁴ As plaintiffs explain, that statute provides that Oregon courts

⁴ ORS 14.175 provides:

In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, 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

Footnote continued...

may continue to adjudicate certain cases after those cases become moot if they are, in standard parlance, capable of repetition yet evading review. But this case is not “likely to evade review in the future” for two independently sufficient reasons, one based on plaintiffs’ pleadings and one based on their ability to obtain expeditious judicial review of any future school budget they might find insufficient.

1. This case has become moot because of the manner in which plaintiffs pled it, not because it is inherently likely to go moot.

The state has described why it contends that this case is moot as some length. Defendant’s Notice 2-4, 6-7. In Defendant’s Notice, the state explained that plaintiffs’ complaint did not seek relief designed to remedy past harms. Rather, the prayer of plaintiffs’ complaint expressly asked the court to “[i]ssu[e] a mandatory injunction requiring defendants *to appropriate for the current [2005-07] biennium funding sufficient to provide the Required Service Levels, i.e., the service levels that the Commission determined were necessary to achieve quality goals established by law.*” Defendant’s Notice 3, emphasis added. In other words, plaintiffs expressly chose to ask for an appropriation that would provide “the Required Service Levels” “for the current biennium.” Stated differently, plaintiffs did not seek *retrospective*

(...continued)

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

Footnote continued...

relief in the nature of damages for the harm suffered as a result of the allegedly unconstitutional appropriation. Rather, they asked the court to order the legislature to appropriate funds that would have provided those “required” service levels during the 2005-07 biennium. And that claim is moot because the court simply cannot do anything to affect the levels of service provided during the 2005-07 biennium. Although plaintiffs now seek to recast the relief they sought as being retrospective and in the nature of damages to avoid mootness, that simply is not the relief prayed for in the complaint. *See* Plaintiffs’ BOM 8, describing the relief sought as “remedial”,

And that, of course, explains why plaintiffs’ claim does not evade review. The end of the biennium moots *this* complaint because of the manner in which plaintiffs framed their claim for relief. Had they framed it—as they now claim they did—as a request for present damages to remedy past harm, the state would not be required to assert that the case is now moot. *See* ORAP 8.45 (“[W]hen a party becomes aware of facts that probably renders an appeal moot, that party shall provide notice of the facts to the court[.]” (Footnote omitted)). In other words, the “challenged policy, or practice, or similar acts” could be capable of evading review in the future only because of the manner in which plaintiffs framed their complaint, not because the act in question is inherently likely to evade review.

(...continued)

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

2. This issue could readily reach and be resolved by this court within the course of a single biennium.

This case is not likely to evade review for a second reason. The Court of Appeals has issued a decision construing Article VIII, sections 3 and 8, contrary to plaintiffs' contentions. Assuming, for the sake of argument, that a legislative appropriation falls below the level plaintiffs deem appropriate in some future biennium, plaintiffs could readily obtain expedited review in this court. A circuit court would be bound—as the state would assert and plaintiffs would necessarily concede—by the Court of Appeals decision in this case.⁵ Thus, circuit court proceedings could be completed in little time. The Court of Appeals, having already decided the issue in this case, would almost surely certify the case to this court upon request. *See* ORS 19.405; ORAP 10.10. And as the expedited briefing schedule that this court established in this case demonstrates, this court is able to accelerate its review when needed. The issue presented here simply does not qualify as evading review.

II. Plaintiffs' claims are not justiciable.

Plaintiffs' request for injunctive relief is not justiciable because it asks this court to enjoin the legislature to enact specific legislation, a charge that is beyond the power of this court. Additionally, plaintiff's request for declaratory relief for future biennia presents the same problem as does its request for injunctive relief, *viz.*, it asks

⁵ Even if the case was moot when the Court of Appeals decided it, any reasonable trial court would recognize the writing on the wall.

this court to act outside of its power and declare that the legislature must take specific future action. What follows is a synopsis of the state's argument made below.

- Judicial power does not extend to enjoining the legislature to enact specific legislation with respect to future biennia. That restraint on judicial power includes both injunctions and declaratory judgments. This court has squarely held that the courts may not enjoin the legislature to enact legislation, nor may they issue a declaration having an equivalent effect. *Tillamook County v. State*, 302 Or 404, 413, 730 P2d 1214 (1986); *see also Brown v. Oregon State Bar*, 293 Or 446, 449, 684 P2d 1289 (1982) (“[F]or a court to entertain an action for declaratory relief, the *complaint* must present a justiciable controversy.”(emphasis added)). Defendant’s Notice 4-6.
- Despite the terms of plaintiff’s prayer, the Court of Appeals apparently concluded that plaintiff’s request for injunctive relief was addressed only to the 2005-07 biennium. But plaintiff’s request for an appropriation for “each biennium” is logically read as a prayer for relief in future biennia. Accordingly, *Tillamook Co.* prohibits such action by this court. Defendant’s Notice 9-10.

Plaintiffs now argue that *Tillamook Co.* is inapplicable, and paint their request that this court order the legislature to fund “each biennium” as merely a “ministerial” action designed to “correct the unconstitutional acts of another branch of government.” Plaintiffs’ BOM 6. Far from it. Plaintiff’s pleading specifically asks

the court declare that the legislature “must appropriate for *each* biennium a sum of money.” (Emphasis added). Such terms constitute a prayer for the court to command the legislature to pass future statutes. *See e.g.*, Or Const, Art IX, section 4 (“No money shall be drawn from the treasury, but in pursuance of appropriations made by law.”) (emphasis added). *Tillamook Co.* prohibits this court from issuing such a declaration. Defendant’s Notice 9-10.

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

Even if this court has jurisdiction over plaintiffs’ claims, plaintiffs are entitled to no relief because Article VIII, section 8, is not a funding mandate. Article VIII, section 8, 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 before this court is whether Article VIII, section 8, requires the legislature to appropriate a specified level of funding or whether it merely requires the legislature to explain itself if it does not appropriate that level of funding. To interpret a ballot initiative this court must discern the intent of the voters, using the analytical framework set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). Here, application of that framework demonstrates that Article VIII, section 8, does not create a funding mandate. To support that assertion, the state

primarily relies on the Court of Appeals reasoning and on the arguments that appear in its Court of Appeals brief at pages 7-26.

The Court of Appeals reasoning and the state's arguments in that court are summarized below:

- Plaintiffs propose that the text of Article VIII, section 3, simultaneously requires the legislature to appropriate sufficient funding *and* to issue a report with respect to that funding. As the Court of Appeals observed, that construction requires courts to “ignore” the implication—found in the text itself—that the legislature may, in some cases, appropriate insufficient funds. *Pendleton Sch. Dist.*, 220 Or App at 70. “If, as plaintiffs suggest, it is unlawful for the legislature to appropriate insufficient funds, then there would be no occasion to issue a report explaining an insufficiency.” *Id.* at 72. Such a reading would fail to give effect to every part and every word of the amendment, rendering the second clause superfluous. *Id.*

Plaintiffs argue that enabling legislation enacted *after* Measure 1's passage supports its textual analysis. (Plaintiffs' BOM 17). That assertion defies logic. The task before this court—determining the voters' intent in passing Measure 1—cannot be achieved by examining action taken by the legislature *following* the enactment. Accordingly, the legislature's post-enactment actions have no bearing in determining

whether the voters intended section 8's text to require the legislature to fund schools at the level plaintiffs deem necessary.

Moreover, while asking the court to rely on sources the voters could not have considered, plaintiffs urge the court to ignore the very sources the court has identified as informative, such as contemporaneous news and editorial commentary. *Compare* Plaintiffs' BOM at 18-19 (court should decline to go beyond text and context in construing initiated constitutional provision), *with Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 560 n 8, 871 P2d 106 (1994) ("In considering the history of a constitutional provision adopted through the initiative process, this court examines, as legislative facts, other 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. 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."); *LaGrande/Astoria v. PERB*, 284 Or 173, 182 n 7, 586 P2d 765 (1978) (relying on newspaper editorial). The state provided extensive evidence of those sources below, (Resp Br 18-26), and the Court of Appeals found them persuasive. As the state documented in its Court of Appeals brief:

- The enactment history of the provision confirms that the voters intended the interpretation that the state propounds. *Pendleton Sch. Dist.* 220 Or App at 73-75; *see also Shilo Inn Portland/205, LLC v. City of Portland*, 333 Or 101, 129, 36 P3d 954 (2001) (noting that

“caution is required in ending the analysis before considering the history of an initiated * * * constitutional provision”).

- The ballot title, read as a whole, supports the conclusion that the voters did not intend Measure 1 to create a funding mandate. The “Estimate of Financial Impact” included in the ballot title stated: “There is no financial impact on state or local government expenditures or revenues.” The assurance to voters that the measure would have no financial impact at all is particularly probative of voter intent. As the Court of Appeals correctly observed, the explanatory statement, which included the Estimate of Financial Impact, “implicitly and necessarily assumes the possibility of inadequate funding.” *Pendleton Sch. Dist.*, 220 Or App at 74.
- Plaintiff’s argument that this court should ignore the Estimate of Financial Impact is misplaced. The fact that the Estimate only estimates direct, rather than indirect, financial impacts, is not indicative of voter intent. Indeed, plaintiffs have cited nothing in the historical record suggesting that voters were aware of the arcane procedures by which the estimate was calculated. Plaintiffs’ BOM 27-28. The ballot title told them only that the measure would provide no financial effect on state expenditures, and that is what the voters understood. Resp Br 15-17.

- The Voters’ Pamphlet further demonstrates that voters did not intend to impose a funding mandate. *See Ecumenical Ministries*, 318 Or at 560 n 8 (Voters’ Pamphlet materials on a measure are to be considered in discerning voter intent). All of the relevant arguments in the Voters’ Pamphlet supported Measure 1, but none of them described it as a funding mandate. (Resp Br 18-21). As the Court of Appeals correctly concluded, the statements “emphasized the measure’s requirement of accountability on the part of the legislature,” but did not refer to mandated funding. 220 Or App at 74.
- The Court of Appeals examined contemporaneous newspaper editorials and correctly observed that the editorials did not describe Measure 1 as a funding mandate.⁶ Editorials in favor of Measure 1 made it plain that, if the legislature did not adequately fund education, it had to explain why it did not. The *Oregonian* specifically noted that Measure 1 would not resolve the funding problems: “It requires a written excuse from the Legislature, not stable and adequate money for schools.” Other newspapers opined

⁶ Plaintiffs criticize the Court of Appeals for “picking and choosing” newspaper editorials that support its conclusion. Plaintiffs BOM 29. However, the Court of Appeals specifically noted that the editorials to which it gave the most weight were those with “collectively, statewide readership,” *viz.*, *The Oregonian*, the *Salem Statesman Journal*, and *The Eugene Register-Guard*. 220 Or App at 74-75.

that it “wouldn’t raise a dime for Oregon schools” and that it was “largely toothless.” Resp Br 21-26. As the Court of Appeals noted, “although a superficial reading of portions of the ballot title” might support plaintiffs’ proposed reading, examination of the “broader range of statements” supported the conclusion that Measure 1’s goal of full funding for education was “aspirational,” and allowed the legislature the “option of providing less than full funding, along with an explanatory report.” 220 Or App at 75.

Plaintiffs attempt to make much of the Attorney General’s letter in support of the ballot title for Measure 1, apparently wanting this court to believe that the letter is somehow determinative of the voter’s intent in passing the measure. Plaintiffs’ BOM 22-23. But the Attorney General’s response to comments from Oregon electors with respect to the draft ballot title did not become part of the certified ballot title, nor part of the Voters’ Pamphlet. Plaintiffs present no evidence that the letter was disseminated to the voters at large or had any influence on their perception of Measure 1’s effect. Indeed, the only voters who would have seen that letter were the handful of electors who publicly commented on the draft ballot title and, accordingly, received the Attorney General’s letter in response. The views of those few electors—even assuming that they agreed with the Attorney General’s letter—cannot be cited as evidence that the voters of Oregon, as a whole, understood Measure 1 to create a

funding mandate. Thus, the Attorney General’s letter has no bearing on determining the intent of Oregon voters.⁷

In sum, pertinent text, pertinent context, and pertinent historical evidence demonstrate that Article VIII, section 8, does not create a funding mandate.

⁷ Acknowledging that no one has suggested as much, plaintiffs attempt to reassure this court that a decision in their favor would not result in a financial crisis for the legislature to resolve. Plaintiffs’ BOM at 32-33. They claim that the legislature could simply “set quality education goals, ‘by law,’ at any level it chooses[.]” *Id.* at 33. In other words, plaintiffs urge that the reference in Article VIII, section 8 to “quality goals” can be met by directing the QEC or some other designated body to state that quality education for Oregon’s students can be purchased for \$100.

That suggestion is, of course, plainly at odds with plaintiffs’ claims that the provision was intended to force the legislature to make real changes to school funding in Oregon; plaintiffs effectively assert that the voters were authorizing the legislature to lie to them. But doing what plaintiffs suggest would neither produce the better schools that plaintiffs insist the measure demands (because the legislature could simply assert by law that only \$100 was needed) nor the greater accountability that the proponents stated that they intended (because the report would, then, not have to admit failure to appropriate the amounts actually necessary). Thus, in an effort to persuade the court to adopt their view of Article VIII, section 8, plaintiffs essentially ask this court to construe it to be ineffective. That the court should not do. Moreover, the state submits, doing so would be, at best, an unseemly approach to constitutional interpretation and governance.

This court uses the same template to construe statutes and initiated constitutional provisions. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559, 871 P2d 106 (1994) (citing *Roseburg School District v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993)); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). It should, therefore, follow that the court will not construe an initiated constitutional provision in a manner that would make it ineffective. *See Vaughn v. Pacific Northwest Bell Tel. Co.*, 289 Or 73, 83, 611 P2d 281 (1980) (courts are to avoid construction that renders statute ineffective).

IV. Article VIII, section 3, even if read in conjunction with Article VIII, section 8, is not a funding mandate.

Plaintiffs argue that Article VIII, section 3, also creates a funding mandate.

Plaintiffs' BOM 29-32. Plaintiffs argue that cases holding that Article VIII, section 3, merely requires uniformity within the state's schools are no longer valid, and they cite out-of-state cases that consider differently worded constitutional provisions to support their claim. Plaintiffs' BOM 32. Yet Article VIII, section 3, creates no funding mandate. The state primarily relies on the argument it made to the Court of Appeals (Resp Br 26-33), and it summarizes those arguments below:

- Article VIII, section 3, provides only for 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." The text and context of that provision, which was part of the original 1859 Oregon Constitution, says nothing about qualitative requirements, much less about minimum funding levels. Plaintiffs provide neither textual nor contextual support for their assertion that Article VIII, section 3, nonetheless is a funding mandate. (Resp Br 27).
- This court's case law has uniformly held that Article VIII, section 3, does not require anything more than minimum funding. (Resp Br 28-29).

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.

Olsen v. State ex rel Johnson, 276 Or 9, 27, 554 P2d 139 (1976); *see also Sherwood Sch. Dist. 88J v. Washington County Educ. Serv. Dist.*, 167 Or App 372, 382, 6 P2d 518, *rev den* 331 Or 361 (2000) (Article III, section 3 “does not pertain to school funding at all,” but only requires that Oregon’s public school system be “uniform in terms of prescribed study and educational progression from grade to grade”); *accord Withers v. State of Oregon*, 133 Or App 377, 891 P2d 675 (1995).

- Plaintiffs argue that *Olsen*, *Sherwood*, and *Withers* are inapplicable because they address “only” the uniformity requirement, which is not at issue in this case. (Plaintiffs’ BOM 30-31). But that is just the point. Those cases make plain that Article VIII, section 3, has no bearing upon funding; rather, it imposes *only* a uniformity requirement in education. (Resp Br 28-29).

Plaintiffs argue that this court should look to the holdings of other state’s supreme courts which have, in various instances, interpreted their respective constitutional provisions to mandate “adequate funding” for their public schools. Plaintiffs’ BOM 32. Plaintiffs’ reliance on out-of-state authority is misplaced. Resp Br 30-33. Case law from other jurisdictions, interpreting different constitutional provisions, is not part of the pertinent text or context in construing an Oregon constitutional provision. *See Priest v. Pearce*, 314 Or 411, 417-18, 840 P2d 65 (1992) (addressing only Oregon cases construing the provision at issue under the

“case law” prong of the analysis). Because the cases cited by plaintiffs do not address the language or history of Article VIII, section 3, and were not decided by the time it was adopted, they are irrelevant.⁸

In essence, plaintiffs’ argument with respect to that provision is an invitation to this court to ignore its well-established framework for constitutional interpretation and to engage in blatant policy-making. Instead, this court should heed the words of the Nebraska Supreme Court when it declined to take similar action. “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.” *Neb. Coalition for Educ. Equity and Adequacy v. Heineman*, 273 Neb 531, 556, 731 NW2d 164 (2007); *see also Lobato v. State*, __ P3d __, 2008 WL 194019 (Colo App) (examining the experiences of other state supreme courts and declining to exercise ongoing judicial review of the school finance system).

CONCLUSION

This court should dismiss this case on jurisdictional grounds. In the alternative, this court should affirm the trial court’s judgment granting the state’s summary judgment motion.

Respectfully submitted,

HARDY MYERS
Attorney General

⁸ The cases cited in plaintiffs’ BOM were decided in 1989, 1993, and 2002.

MARY H. WILLIAMS
Solicitor General

JEFF J. PAYNE
Assistant Attorney General

Attorneys for Defendant-Respondent
State of Oregon

JJP:elk/1065381

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, on October ____, 2008.

I further certify that I directed the Respondent's Brief on the Merits to be served upon James N. Westwood, attorney for appellants, on October ____, 2008, by mailing two copies, with postage prepaid, in an envelope addressed to:

James N. Westwood
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204

JEFF J. PAYNE
Assistant Attorney General
Attorney for Defendant-Respondent

JJP:elk/1065381