IN THE SUPREME COURT OF THE STATE OF OREGON

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| MARQUIS COUEY, an individual,<br><br>Plaintiff-Appellant,<br>Petitioner on Review,<br><br>v.<br><br>KATE BROWN, in her official capacity as Secretary of State for the State of Oregon,<br><br>Defendant-Respondent,<br>Respondent on Review. | Marion County Circuit Court No. 10C14484<br><br>CA A148473<br><br>SC S061650 |

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# BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, SECRETARY OF STATE KATE BROWN

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Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable CLAUDIA M. BURTON, Judge

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Opinion Filed: July 10, 2013
Author of Opinion: Presiding Judge Schuman
Concurring Judges: Wollheim and Nakamoto

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*Continued…*

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases Cited

**Constitutional and Statutory Provisions**

**Administrative Rules**



**Other Authorities**

# BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

## INTRODUCTION AND STATEMENT OF THE CASE

During the 2010 election cycle, plaintiff worked as a paid signature gatherer for two initiative petitions. Plaintiff also wanted to work as a volunteer signature gatherer for an additional petition, but was afraid that doing so would violate *former* ORS 250.048(9) (since renumbered as ORS 250.048(10)). That provision prohibits working as a volunteer signature gatherer "at the same time" that one "obtain[s] signatures on a petition or prospective petition for which the person is being paid."

Plaintiff then filed a complaint—while still employed as a paid signature gatherer—challenging *former* ORS 250.048(9)'s constitutionality and naming the Secretary of State as defendant. At issue here is whether subsequent events rendered plaintiff's claims moot. After filing his complaint, plaintiff stopped working as a petition circulator. In the Secretary's view (and as the trial court and Court of Appeals agreed), because plaintiff was no longer circulating any petitions, either for pay or as a volunteer, no "present facts" implicated the prohibition in *former* ORS 250.048(9). Because assessing the statutory provision's constitutionality would not resolve any ongoing controversy between the parties, plaintiff's challenge was moot.

Plaintiff argues that his claims, even if moot, are reviewable under ORS 14.175, which permits Oregon courts to review moot claims that are "likely to evade judicial review in the future." But because Oregon courts repeatedly have resolved election-law disputes before those disputes could go moot, future challenges to ORS 250.048(10) (formerly ORS 250.048(9)) are unlikely to evade review.

## QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

### First Question Presented

When the trial court ruled on the Secretary of State's summary judgment motion, were plaintiff's claims—which challenged *former* ORS 250.048(9)'s constitutionality—moot?

### First Proposed Rule of Law

When the trial court issued its ruling, plaintiff was no longer circulating any initiative petitions. As a result, a decision about the constitutionality of *former* ORS 250.048(9)—and its prohibition on circulating an initiative petition for pay "at the same time" one circulates a petition as a volunteer—would not have involved an actual controversy involving "present facts," and would not have had any practical effect on plaintiff. Plaintiff's claims thus were moot.

### Second Question Presented

If a plaintiff seeks a declaration that a particular statute is unconstitutionally overbroad, but the issue becomes moot as to that particular

plaintiff, does the case remain justiciable? That is, does the fact that the plaintiff has raised an overbreadth challenge change the pertinent mootness analysis?

**Second Proposed Rule of Law**

Whether or not a plaintiff pursues an overbreadth challenge to a statute, the mootness test under the Oregon Constitution is the same: A case is justiciable, and not moot, only if a decision on the claim's merits would involve an actual controversy involving "present facts," and only if it would have a practical effect on the plaintiff.

**Third Question Presented**

ORS 14.175 authorizes courts to decide a case, even if a decision "no longer has a practical effect" on the plaintiff, if—among other things—the "challenged policy or practice, or similar acts, are likely to evade judicial review in the future." Are future challenges to the constitutionality of ORS 250.048(10) (formerly ORS 250.048(9)) likely to evade review by Oregon courts?

**Third Proposed Rule of Law**

Due to the availability of (1) expedited review under ORS 246.910(4); (2) the Court of Appeals' authority to certify appeals directly to this court; and (3) original-jurisdiction mandamus proceedings in this court, Oregon courts are fully capable—as they have repeatedly shown—of resolving election-law

challenges before they go moot. Future challenges to ORS 250.048(10)'s constitutionality are not likely to evade judicial review.

## SUMMARY OF PERTINENT FACTS

Assessing whether plaintiff's claims went moot in this case requires an understanding of the events that prompted plaintiff's complaint; of the claims that plaintiff asserted in his complaint; and of the events that followed the filing of that complaint and ended with the trial court's ruling. Ultimately, as is recounted below, the basis for the trial court's ruling was the change in plaintiff's circumstances after he filed his initial complaint: Although plaintiff had challenged a state-law prohibition that applies only to paid petition circulators, he had stopped working as a paid petition circulator by the time the trial court ruled.

### A. Prior to filing his complaint, plaintiff worked as a paid initiative-petition circulator and was deterred by *former* ORS 250.048(9) from circulating another petition as a volunteer.

Effective January 1, 2010, the Oregon Legislative Assembly adopted *former* ORS 250.048(9) (since renumbered as ORS 250.048(10)), which prohibits a person from working as a paid petition-signature gatherer while, "at the same time," obtaining signatures on a "petition for which the person is not being paid." Or Laws 2009, ch 533, § 14.[1]

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[1] *Former* ORS 250.048(9) provided:

*Footnote continued…*

By then, plaintiff—as required by ORS 250.048(1)—had already registered with the Oregon Secretary of State as a paid signature gatherer for Initiative Petition 28. (*See* ER-41, Opinion Letter at p 2, finding that plaintiff registered on December 28, 2009)[2]; ORS 250.048(1)(a) (prohibiting a person from receiving payment "for obtaining signatures of electors on a state initiative, referendum or recall petition" unless the person "[r]egisters with the Secretary of State in the manner prescribed by this section and by rule of the secretary"). On April 1, 2010, plaintiff also registered as a paid signature gatherer for Initiative Petition 70. (ER-41, Opinion Letter at p 2). Plaintiff worked as a paid signature gatherer in the "winter and early spring" of 2010. (ER-12, Couey Declaration).

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*(...continued)*

> A person registered under this section may not obtain signatures on a petition or prospective petition for which the person is being paid and, at the same time, obtain signatures on a petition or prospective petition for which the person is not being paid. The secretary may not include any signatures obtained in violation of this subsection in a count under ORS 250.045(3) or 250.105 or ORS chapter 249 for purposes of determining whether a state initiative, referendum or recall petition or a prospective petition for a state measure to be initiated contains the required number of signatures of electors.

In 2013, the legislature renumbered ORS 250.048(9) so that its text now appears in ORS 250.048(10). Or Laws 2013, ch 519, § 1.

[2] "ER" refers to the Excerpt of Record that accompanied plaintiff's opening brief in the Oregon Court of Appeals.

While working as a paid petition circulator, plaintiff was also interested in circulating Initiative Petition 42 (2010) as a volunteer, but did not do so because of *former* ORS 250.048(9)'s prohibitions. (*See* ER 12-13, Couey Declaration, stating that he was "often at * * * events, where I met people when I was not being paid as a petitioner, and I could have easily gotten signatures at those times," but did not know "what volunteer work might get me in trouble with the Elections Division"; ER-41, Opinion Letter at p 2, finding that IP 42 was approved to be circulated between August 27, 2008 and July 2, 2010). During the 2010 election cycle, plaintiff "never actually attempted to circulate IP 42 as a volunteer at any time." (ER-42, Letter Opinion at p 3). Nothing in the record suggests that he ever attempted to circulate any other petitions as a volunteer.

**B. Plaintiff's complaint challenged the validity of Oregon's statutory prohibition on circulating an initiative petition for pay "at the same time" one circulates a petition as a volunteer.**

On April 19, 2010, plaintiff filed his initial complaint in this case, challenging *former* ORS 250.048(9)'s constitutionality. (Trial Court Register, Document No. 1). On October 13, 2010, plaintiff filed his first amended complaint—the complaint at issue when the trial court issued its ruling in this case.[3] (Trial Court Register, Document No. 30).

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[3] References to the "complaint" in this brief generally refer to the first amended complaint.

Plaintiff's complaint challenged the constitutionality of *former* ORS 250.048(9) and of "[a]ny rule promulgated [by the Secretary of State] under the purported authority of said statute." (Trial Court Register, Document No. 30, First Amended Complaint at p 10). Plaintiff sought a declaration that the statutory provision violated state and federal constitutional free expression rights, and he sought an order enjoining the Secretary of State from enforcing the statute or her "interpretations of ORS 250.048(9), including any final rule implementing said statute." (First Amended Complaint at p 12).

Plaintiff's complaint identified three separate provisions of law as permitting him to pursue his constitutional free-speech challenges to *former* ORS 250.048(9): (1) ORS 28.010 (Oregon's declaratory judgment act); (2) ORS 246.910 (authorizing an appeal to circuit court by a person who is "adversely affected" by an act or omission by the Secretary of State, or by a rule made by the Secretary "under any election law"); and (3) 42 USC § 1983 and the First Amendment. (First Amended Complaint at pp 1, 10).[4]

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[4] Neither the trial court nor the Court of Appeals addressed the constitutionality of *former* ORS 250.048(9), or any rules promulgated under its authority. And, although plaintiff's brief in this court argues that the statute is unconstitutional (Pet Br 17-32), his petition for review did not ask this court to review the constitutionality of *former* ORS 250.048(9) or of any administrative rule. (Petition for Review 5-7).

Consequently, neither the constitutionality of *former* ORS 250.048(9) nor the constitutionality of any administrative rule is before this court. Should the court conclude that plaintiff's claim is justiciable, it should remand so that the

*Footnote continued…*

**C. By the time the trial court ruled in this case, plaintiff had stopped working as a petition circulator, and the court relied on that fact to deem plaintiff's claims moot.**

In May 2010, plaintiff stopped working as a petition circulator. (ER-41, Opinion Letter at p 2). On June 8, 2010, plaintiff's registration with respect to Initiative Petition 70 expired. (ER-41, Opinion Letter at p 2). On July 2, 2010, plaintiff's registration with respect to Initiative Petition 28 expired. (*Id.*).

On November 5, 2010 (roughly three weeks after plaintiff filed his first amended complaint), the Secretary of State adopted OAR 165-014-0285, which defines "at the same time"—as used in *former* ORS 250.048(9)'s prohibition on gathering signatures voluntarily "at the same time" that one gathers signatures for pay—as "during any time period for which the person is being paid to circulate any petition or prospective petition."[5]

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*(…continued)*
trial court can assess the merits of plaintiff's constitutional challenges in the first instance.

[5] OAR 165-014-0285 provides:

> Under ORS 250.048(9), a person may not obtain signatures on a petition or prospective petition for which the person is being paid and, at the same time, obtain signatures on a petition or prospective petition for which the person is not being paid. For purposes of ORS 250.048(9), "at the same time" means during any time period for which the person is being paid to circulate any petition or prospective petition. "At the same time" does not include any lunch or other break period for which a person is not paid to circulate any such petition, as reflected in the person's

*Footnote continued…*

On December 1, 2010, the Secretary filed the summary judgment motion that the trial court ultimately ruled on, arguing that plaintiff's claims were not justiciable. (Trial Court Register, Document No. 33).

In February 2011, plaintiff registered to circulate Initiative Petition 8 during the 2012 election cycle. (ER-22, Circulator Registration). By the time litigation on the Secretary's summary judgment motion ended, plaintiff had not resumed actually working as a paid circulator. (*See* Pet Br 6, implicitly acknowledging that fact).

Further, nothing in the record suggests that plaintiff was circulating any petitions as a volunteer at that time. The record contains "no evidence in the record that plaintiff wishe[d] to serve as a volunteer circulator for any petition which has been approved for circulation during [the 2012] election cycle * * * ." (ER-42, Opinion Letter at p 3). In addition, the record contains "no evidence * * * that the company which propose[d] to hire plaintiff to solicit signatures for IP 8 would permit him to solicit signatures on a volunteer basis at the same time he is being paid to circulate IP 8." (*Id.*).

On March 30, 2011, the trial court granted the state's motion. (ER-40, Opinion Letter).

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*(...continued)*

> payroll records required to be submitted under OAR 165-014-0100.

## SUMMARY OF ARGUMENT

This case involves the application of various "justiciability" principles under state law. Although standing and ripeness principles are somewhat pertinent, the trial court ultimately—and correctly—relied on mootness principles to dismiss plaintiff's claims, each of which challenged *former* ORS 250.048(9)'s constitutionality.

To assess whether mootness principles required dismissal, two questions are pertinent: (1) Did the Oregon Constitution affirmatively authorize the trial court, in light of existing circumstances, to resolve the merits of plaintiff's claims; and (2) if not, did any statute nonetheless authorize the court to do so? Under the Oregon Constitution, the pertinent inquiry was whether plaintiff's claims involved an "actual" controversy involving "present facts," such that a decision on the merits would have a practical effect on his rights. The statute that plaintiff challenged—*former* ORS 250.048(9)—prohibited him from circulating an initiative petition as a volunteer if he was working, "at the same time," as a paid circulator. Yet when the trial court ruled, plaintiff was no longer circulating any petitions, either for pay or as a volunteer. Therefore, no basis existed for concluding that his current conduct either violated the statute or was somehow affected by it; that is, had he wished to circulate a petition as a volunteer at that point, he could have done so without violating or implicating *former* ORS 250.048(9). As a result, no "present facts" implicated that

statutory provision, and the relief plaintiff sought—a judgment declaring *former* ORS 250.048(9) unconstitutional—would not have resolved any existing controversy between the parties. For state constitutional purposes, plaintiff's claims were moot.

Moreover, no statute—including ORS 14.175, which plaintiff invokes—authorized the trial court to resolve the merits of plaintiff's claims. In the end, those claims cannot satisfy ORS 14.175(3)'s criterion for review of a moot claim: that "[t]he challenged policy or practice, or similar acts, are likely to evade judicial review in the future." Due to the availability of (1) expedited judicial review of election-law issues under ORS 246.910(1), (2) certified appeals from the Court of Appeals to this court, and (3) original mandamus proceedings in this court, Oregon courts repeatedly have resolved election-law disputes before events rendered them moot. Due to the continuing availability of those procedural options, future challenges to ORS 250.048(10) (formerly ORS 250.048(9)) are not likely to evade judicial review.

Plaintiff also asserts that ORS 246.910(1) gave him standing to challenge the constitutionality of *former* ORS 250.048(9) and of OAR 165-014-0285 (which defines the phrase "at the same time," as used in *former* ORS 250.048(9)), and asserts that standing under ORS 246.910(1) "assures justiciability" generally. In fact, plaintiff did not satisfy ORS 246.910(1)'s standing requirements, and any claims under that provision would have suffered

from fatal ripeness and mootness problems as well. The trial court correctly deemed plaintiff's claims not justiciable.

## ARGUMENT

### A. Plaintiff's declaratory-judgment-act claims are moot and thus not justiciable.

In challenging the constitutional validity of *former* ORS 250.048(9)—and of OAR 165-014-0285—plaintiff claimed that three separate statutes entitled him to assert his claims in circuit court: (1) ORS 28.020; (2) ORS 246.910; and (3) 42 USC § 1983 and the First Amendment. Plaintiff first argues that his claims under ORS 28.020 (the declaratory judgment act) are justiciable and not moot. (Pet Br 8).

The Secretary agrees with plaintiff that ORS 28.020 gave plaintiff standing to seek a declaratory judgment that *former* ORS 250.048(9) was unconstitutional. But by the time the trial court ruled on the Secretary's summary judgment motion, plaintiff's claims had become moot and not justiciable. Because an understanding of how plaintiff had standing helps set the stage for understanding how and why his claims subsequently became moot, the Secretary first explains how ORS 28.020 gave plaintiff standing, and after that explains how his claims became moot.

**1. When plaintiff filed his initial complaint, he had standing to pursue his declaratory-judgment-act claims.**

In assessing whether a matter "is one that is appropriate for judicial disposition," this court "[h]istorically * * * has described that undertaking as a determination whether a 'justiciable controversy' exists." *Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004). "Encompassed within the broad question of justiciability are a constellation of related issues, including standing, ripeness, and mootness." *Id.* The question of standing asks "who" is entitled to seek a particular form of relief. *See Kellas v. Dept. of Corrections*, 341 Or 471, 477 n 3, 145 P3d 139 (2006) (noting that "[u]nlike the concepts of ripeness and mootness, which inquire about whether litigation has occurred too soon or too late (*i.e.*, they ask the question 'when?'), standing asks the question 'who?'"). The standing inquiry asks whether a plaintiff "possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties." *Id.*, 341 Or at 476-77. Whether a person possesses standing is essentially a statutory question. *See id.* at 477 ("[t]he source of law that determines" whether a party possesses standing "is the statute that confers standing in the particular proceeding that the party has initiated, 'because standing is not a matter of common law but is, instead, conferred by the legislature'"), quoting *Local No. 290 v. Dept. of Environ. Quality*, 323 Or 559, 566, 919 P2d 1168 (1996).

Here, when plaintiff filed his initial complaint, he had standing to seek a declaration that *former* ORS 250.048(9) was unconstitutional. The operative statute is ORS 28.020, which provides a mechanism for a person to obtain a judgment declaring whether a particular provision of law is constitutional. Under ORS 28.020, a person may seek a judgment declaring a particular provision of law unconstitutional if the person's "rights, status, or other legal relations *are affected* by" the provision's validity. (Emphasis added.)[6]

When plaintiff filed his initial complaint on April 19, 2010, he was still working as a paid petition circulator. (ER-41, Opinion Letter at p 2). As a result, his desire to also "seek signatures as a volunteer on another petition" (ER-12, Couey Declaration) directly implicated *former* ORS 250.048(9), which prohibited paid petition circulators from circulating, "at the same time," another petition on a volunteer basis. Had plaintiff, while continuing to work as a paid signature gatherer, started gathering signatures as a volunteer "at the same time," his conduct would have invalidated any signatures that he gathered. *See*

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[6] ORS 28.020 provides:

> Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

*former* ORS 250.048(9) (prohibiting Secretary of State from "includ[ing] any signatures obtained in violation" of the provision "for purposes of determining whether a * * * petition * * * contains the required number of signatures of electors" to be circulated or placed on the ballot). Plaintiff stated, moreover, that he was interested in circulating Initiative Petition 42 as a volunteer, but that he did not do so because he feared that doing so would violate *former* ORS 250.048(9). (ER 12-13, Couey Declaration). In that sense, plaintiff—while working as a paid petition circulator—could claim that his ability to circulate a petition as a volunteer was currently "affected" by *former* ORS 250.048(9).

Plaintiff's paid-circulator status, when he filed his initial complaint, gave him standing under ORS 28.020 to seek a declaration that *former* ORS 250.048(9) was unconstitutional.[7] *See* ORS 28.020 (a person may seek a

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[7] In contrast, although plaintiff appears to believe that he had standing under ORS 28.020 to seek a declaration that OAR 165-014-0285 was unconstitutional, he did not. (*See* Pet Br 4, quoting OAR 165-014-0285; Pet Br 9, stating that "[t]his particular Declaratory Judgment Act * * * challenge hinges on present and future threat of enforcement of ORS 250.048(9) (and associated rule)"; Pet Br 23, asserting that his claims "include the facial invalidity of the enactments," and thereby suggesting that he is challenging both the statutory provision and OAR 165-014-0285). For essentially the same reasons (discussed later in this brief) that plaintiff had no standing under ORS 246.910 to challenge OAR 165-014-0285, he had no standing to do so under ORS 28.020. Moreover (and as is more fully discussed in the section of this brief that discusses ORS 246.910), any such challenge was not justiciable under both a ripeness and mootness analysis.

judgment declaring a particular provision of law unconstitutional if the person's "rights, status, or other legal relations *are affected* by" the provision's validity; emphasis added).

**2. When a plaintiff has standing to file a declaratory-judgment action, subsequent events can render the claim moot and nonjusticiable.**

That a plaintiff had standing, under ORS 28.020, to file a declaratory-judgment action in a trial court does not, by itself, require the court to resolve the merits of the plaintiff's claim. If subsequent events render the claim moot, the court will have no power—at least under the authority expressly conferred by the state constitution—to do anything other than dismiss the case.

As this court has explained, Article VII (Amended), of the Oregon Constitution, "is the source of this court's power." *Yancy*, 337 Or at 351 n 2; *see* Or Const, Art VII (Amended), § 1 ("[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law"). At the same time, and as the state discusses later in this brief, Article VII (Amended) contemplates that the legislature may supplement or expand the judicial authority conferred by the constitution. *See* Article VII (Amended), § 2 ("[t]he courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted *until otherwise provided by law*"; emphasis added). But with respect to "the constitutional grant of governmental power to the

judiciary," the judiciary's authority "is limited by the justiciability requirement." *Yancy*, 337 Or at 351.

In part, that means that, due to the limited judicial authority granted by Article VII (Amended), Oregon courts may not decide moot cases. *See Yancy*, 337 Or at 349 ("justiciability contemplates 'that the court's decision in the matter will have some practical effect on the rights of the parties to the controversy,'" and rejecting notion that state constitution grants authority to review moot claims, even when they are capable of repetition yet evading review), quoting *Brumnett v. Psychiatric Security Review Board*, 315 Or 402, 405, 848 P2d 1194 (1993). If a case no longer involves an "actual" controversy involving "present facts," or if a decision will have no practical effect on the parties' rights, a court has no authority—at least with respect to the limited judicial authority conferred by the Oregon Constitution—to do anything other than dismiss the case as moot. *See Brumnett*, 315 Or at 406 ("[c]ases that are otherwise justiciable, but in which a court's decision no longer will have a practical effect on or concerning the rights of the parties, will be dismissed as moot"); *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982) ("[a] controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests"; "[t]he controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical issue").

That same principle applies to declaratory-judgment claims: "Simply put, plaintiffs cannot sidestep the justiciability requirement by requesting declaratory relief." *Barcik v. Kubiaczyk*, 321 Or 174, 188, 895 P2d 765 (1995). In *Barcik*, certain plaintiffs filed a declaratory-judgment-act claim, and "sought a judgment from the circuit court that their Article I, section 8, rights were violated in the past * * * ." 321 Or at 187. Because those plaintiffs "suffered no continuing harm from the alleged past deprivation of their Article I, section 8, rights," and because they had no existing "right or claim that would be affected by a declaratory judgment," their claim was moot and had to be dismissed. *Barcik*, 321 Or at 187-88. This court explained that "declaratory relief is available only when it can affect *in the present* some rights between the parties * * * ." 321 Or at 188 (emphasis in original).

When a plaintiff has standing under ORS 28.020 to seek a declaration that state law violates constitutional free-speech principles, subsequent events can render the claim moot. When a claim is moot, trial courts have no authority under the Oregon Constitution to address the claim's merits.

**3. When the trial court ruled, plaintiff's claims no longer were "based on present facts," and his claims thus were moot.**

When the trial court granted the Secretary's summary judgment motion, no actual controversy based on "present facts" existed, and the declaratory judgment that plaintiff sought would not—in light of plaintiff's changed

circumstances—resolve any ongoing controversy. As a result, nothing in the Oregon Constitution authorized the trial court to address the merits of plaintiff's claims. The trial court correctly concluded that plaintiff's declaratory-judgment-act claims were moot. (*See* ER-44, Opinion Letter at p 5, explaining that plaintiff had "not demonstrated that ORS 250.048(9) is currently affecting his activities in any way").

Plaintiff had sought a judgment declaring that *former* ORS 250.048(9)—which prohibited him from working as a paid signature gatherer while, "at the same time," voluntarily gathering signatures for a separate petition—was unconstitutional. But by the time the trial court ruled on the Secretary's motion on March 30, 2011, plaintiff was not working as a paid petition circulator. (ER-41, Opinion Letter at p 2). He had stopped working as a petition circulator in May of 2010, and his registrations to work as a paid circulator during the 2010 election cycle had expired on June 8 and July 2, 2010. (ER-41, Opinion Letter at p 2). Although plaintiff registered in February 2011 to work as a paid signature gatherer on Initiative Petition 8, he was not actually working as a paid circulator when the trial court granted the Secretary's motion. (ER 41-42, Opinion Letter at pp 2-3). Moreover, it is undisputed that petitioner had not circulated any petitions on a volunteer basis during the 2010 election cycle, and that he was not circulating any petitions on a volunteer basis when the trial court ruled. (*See* ER-42, Opinion Letter at p 3, containing finding that "[t]here

was no evidence in the record that plaintiff wishes to serve as a volunteer circulator for any petition which has been approved for circulation during [the 2012] election cycle").

At that point, then, petitioner was not engaging in any behavior that *former* ORS 250.048(9) prohibited or penalized. *Former* ORS 250.048(9) would have assumed significance in plaintiff's life only if, at some future point, certain contingent or hypothetical facts became actual facts. Because plaintiff was not circulating petitions for pay, he could not say that the statutory provision was preventing him from circulating a petition on a volunteer basis. And because he was not circulating any petition as a volunteer, he could not say that the provision was preventing him from taking work as a paid signature gatherer.[8]

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[8] Plaintiff stated that "[i]f and when another measure dealing with protecting the environment starts to circulate and needs volunteer help, I'd like to support it." (ER-13, Couey Declaration at p 2). He made no statement, however, suggesting that any future desire to circulate petitions as a volunteer was likely to run afoul of *former* ORS 250.048(9)'s prohibition on doing so "at the same time" that one circulates petitions for pay. Significantly, OAR 165-014-0285—which further defines "at the same time," and which was adopted after plaintiff stopped working as a paid circulator—would permit a person to circulate a petition on a volunteer basis so long as he refrains from doing so during "any time period for which the person is being paid to circulate" a petition. In plaintiff's declaration, he stated that he had previously hoped to gather signatures as a volunteer at events "when I was not being paid as a petitioner," but had not done so because he did not want to break the law. (ER-12, Couey Declaration at p 1). OAR 165-014-0285, however, seems to reflect

*Footnote continued…*

In short, the requested declaration—that *former* ORS 250.048(9) was unconstitutional—could have had a practical effect on plaintiff only if hypothetical facts (his commencement of work as a paid circulator, or his commencement of work as a volunteer circulator) became actual facts. Plaintiff's declaratory-judgment-act claims, it follows, were moot. *See TVKO v. Howland*, 335 Or 527, 534, 73 P3d 905 (2003) ("[t]o be justiciable, a controversy must involve a dispute based on present facts rather than on contingent or hypothetical facts").

Plaintiff suggests that this case is analogous to *Pendleton School District 16R v. State of Oregon*, 345 Or 596, 200 P3d 133 (2009), in which this court deemed a request for a declaratory judgment justiciable. (Pet Br 37). Yet the circumstances presented in *Pendleton School District 16R* are not analogous to those presented here. In *Pendleton School District 16R*, the plaintiffs sought a declaration that "Article VIII, section 8, [of the Oregon Constitution] imposes a duty on the legislature to fund the public school system at a specified level every biennium." 345 Or at 606. This court held that the requested relief presented a justiciable controversy—"a set of present facts"—rather than "an abstract inquiry about a possible future event." *Id.* In *Pendleton School*

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*(…continued)*
that plaintiff would—in the future—be free to circulate petitions as a volunteer under the circumstances that he described in his declaration.

*District 16R*, however, no doubt existed that the legislature would meet during the next biennium and that—when it did—it necessarily would make a school-funding decision (even if that decision might be to provide no funding at all). *See* Or Const, Art IV, § 10 (requiring annual legislative sessions). As a result, a declaration that the state constitution requires the legislature—each biennium—to fund the public school system "at a specified level" necessarily would have practical significance.

In contrast, nothing requires plaintiff to ever again gather signatures for an initiative petition, either as a paid circulator or as a volunteer. It instead is possible that, in the future, and regardless of *former* ORS 250.048(9)'s constitutional validity, plaintiff will decide that he has no interest in working as a paid petition circulator, that he has no interest in gathering signatures on a volunteer basis, or that he has no interest in either of those activities. Because it was far from certain, when the trial court issued its judgment, that plaintiff's future activities would implicate *former* ORS 250.048(9), the question presented in this case cannot be analogized to the question in *Pendleton School Dist. 16R*. The trial court correctly concluded that plaintiff's declaratory-judgment-act claims were moot.

**4. Plaintiff's overbreadth challenge to *former* ORS 250.048(9) does not make this case justiciable.**

Plaintiff contends that his challenge to *former* ORS 250.048(9) as constitutionally overbroad on its face—rather than merely as applied to him—alters the justiciability analysis such that his claims are not moot.[9] Specifically, he argues that "overbreadth expands the scope of the 'practical effects' for maintaining declaratory judgment act justiciability." (Pet Br 14). *Amicus curiae* ACLU likewise suggests that plaintiff's overbreadth challenge salvages plaintiff's case because whether an overbreadth challenge is moot does not depend on the particular circumstances of any individual litigant. (ACLU Br 36-52). Plaintiff and the ACLU misread both the overbreadth doctrine and its interplay with justiciability principles. Plaintiff's overbreadth claims notwithstanding, his declaratory judgment action was justiciable only if it involved "present facts" and only if the requested relief would have a practical effect on him personally.

The ACLU argues that an overbreadth challenge to a law "is moot only if the challenged statutory restriction can have no further chilling effects on

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[9] The trial court found that although plaintiff did not assert an overbreadth theory in his amended complaint, "the pleadings were effectively amended through the conduct of the parties in litigating the summary judgment motion." (ER-42, Opinion Letter at pp 6-7). The trial court concluded that plaintiff was unable to establish standing even under an overbreadth doctrine. (ER-42, Opinion Letter at pp 7-8). The Court of Appeals did not discuss overbreadth in its decision.

*anyone's* constitutional rights of expression." (ACLU Br 47; emphasis added). Because an overbreadth challenge does not depend on the rights of on the individual bringing the challenge, the ACLU contends, the challenge can be moot only if the challenged law has been "effectively repealed." (ACLU Br at 47-48). But the ACLU identifies no legal support for that contention. It identifies no Oregon decisions, and the Secretary is aware of none, that have allowed a plaintiff to maintain an overbreadth challenge in a case in which the individual plaintiff's claim had become moot. Nor do this court's prior decisions regarding the nature and scope of the mootness doctrine allow such a result.

Overbreadth claims assert that "the terms of a law exceed constitutional boundaries" by prohibiting conduct that is constitutionally protected. *State v. Robertson*, 293 Or 402, 410, 649 P2d 569 (1982). Such claims therefore necessarily extend beyond the rights of specific plaintiffs to others affected by the challenged law. But this court has noted that the function of overbreadth claims is "a limited one at the outset." *State v. Rangel*, 328 Or 294, 307 n 8, 977 P2d 379 (1999) (quoting *Broadrick v. Oklahoma*, 413 US 601, 615, 93 S Ct 2908, 37 L Ed 2d 830 (1973)). As a result, this court has limited application of the overbreadth doctrine to a narrow set of circumstances, *see State v. Illig-Renn*, 341 Or 228, 234, 238, 142 P3d 62 (2006) (courts may invalidate a statute on overbreadth grounds only if the statute "expressly or obviously proscribes

expression" and "proscribes a substantial amount of protected conduct in relation to its legitimate sweep"), and to a single domain—free speech claims under article I, section 8 of the Oregon Constitution. *See State v. Christian*, 354 Or 22, 40, 307 P3d 429 (2013) ("the justification for recognizing overbreadth challenges in freedom of expression and assembly cases does not apply in the context of Article I, section 27, cases").

Using the overbreadth doctrine to render otherwise moot cases justiciable, as the ACLU suggests, would not only stretch the doctrine beyond its original limited purpose and scope but would also contravene constitutional limitations on justiciability. This court has repeatedly stated that a case is rendered moot if it no longer affects the rights *of the parties* to the action. *See Barcik*, 321 Or at 188 ("declaratory relief is available only when it can affect *in the present* some rights between the parties"; emphasis in original); *Brumnett*, 315 Or at 406 (case is moot where "a court's decision no longer will have a practical effect on or concern[] the rights of the parties"); *Brown*, 293 Or at 449 (case is justiciable only "where there is an actual and substantial controversy between parties having adverse legal interests"). Moreover, this court held in *Yancy* that courts' inability to decide moot cases stems from the limited judicial authority granted by Article VII (Amended), and explained that courts cannot create a rule that exceeds that "circumscribed grant of power." *Yancy*, 337 Or at 362. Thus, the constitution prohibits courts from empowering themselves to

decide moot cases using any judicial rule or doctrine—much less a narrow and limited one such as the overbreadth doctrine.

Because the overbreadth doctrine as used in this court derives from the federal doctrine, *see State v. Blocker*, 291 Or 255, 261, 630 P2d 824 (1981), *overruled on other grounds by Christian*, 354 Or 22, federal law on the issue is instructive. The ACLU suggests that federal jurisprudence supports its position and that the United States Supreme Court's decision in *Bigelow v. Virginia*, 421 US 809, 95 S Ct 2222, 44 L Ed 2d 600 (1975), which held that an overbreadth challenge was moot because the challenged statute had been amended, is "the proverbial exception that proves the rule." (ACLU Br 48). In fact, the *Bigelow* decision—as is true of other federal decisions—demonstrates that a plaintiff may not pursue a federal overbreadth challenge absent a "personal stake" in the controversy's resolution. In *Bigelow*, the Court stated that to even have standing to bring an overbreadth claim, a plaintiff must present more than "(a)llegations of a subjective 'chill,'" and that "there must be a 'claim of specific present objective harm or a threat of specific future harm.'" 421 US at 816-17 (quoting *Laird v. Tatum*, 408 US 1, 13-14, 92 S Ct 2318, 33 L Ed 2d 154 (1972)). That requirement is met only "where there can be no doubt concerning the appellant's personal stake in the outcome of the controversy" and where the appellant "is not seeking to raise the hypothetical rights of others." 421 US at 817.

The Eleventh and Second Circuits similarly have explained that an overbreadth challenge may be sustained only if the plaintiff's *own* rights or interests are affected. *See Cole v. Oroville Union High School District*, 228 F3d 1092, 1099 (9th Cir 2000) ("a litigant cannot sustain an overbreadth or *jus tertii* claim if he no longer has a personal interest in the outcome which itself satisfies the case or controversy requirement"; "a plaintiff can invoke the rights of third parties who are not before the court only if that plaintiff has a 'sufficiently concrete interest in the outcome of the [] suit to make it a case or controversy subject to a federal court's Art III jurisdiction" (quoting *Singleton v. Wulff*, 428 US 106, 112, 96 S Ct 2868, 49 L Ed 2d 826 (1976)); *Hedges v. Obama*, 724 F.3d 170, 204 (2d Cir 2013) (overbreadth doctrine "[r]elax[es] the general prudential rule against third-party standing" but "does not provide a reason to find [] injury where none is present or imminently threatened in the first instance").

Although those federal cases are rooted in Article III "case or controversy" justiciability concerns that are specific to federal courts, an analogous principle applies to Oregon courts. Federal courts may relax prudential standards to allow a plaintiff who has standing to bring third-party claims *in addition* to his own claims, but Article III prohibits courts from ultimately *adjudicating* such third-party claims in the absence of standing for the plaintiff. *See KH Outdoor, L.L.C. v. Clay County*, 482 F3d 1299, 1305

(11th Cir 2007) ("because we find KH Outdoor lacks constitutional standing, we cannot reach the merits of its challenges, either as applied or under the overbreadth doctrine, to Clay County's sign ordinance"). Likewise, under *Yancy*, even when a plaintiff is entitled to assert third-party claims, Oregon courts do not have the power to decide cases that, with respect to the plaintiff, are moot. In other words, just as the overbreadth doctrine does not allow federal courts to ignore Article III requirements, it does not allow Oregon courts to sidestep constitutional mootness concerns.[10]

Finally, even if Oregon courts did have the power to adjudicate overbreadth challenges that are moot with respect to the individual litigants, prudential concerns would caution heavily against exercising such power in cases such as this. Application of the overbreadth doctrine "is 'strong medicine,' to be employed 'sparingly' and 'only as a last resort.'" *Rangel*, 328 Or at 307 (quoting *Broadrick*, 413 US at 613). In federal courts, the use of overbreadth challenges must be justified by "weighty countervailing policies,"

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[10] This court's application of the overbreadth doctrine confirms this conclusion. Although this court has allowed litigants to assert facial overbreadth claims even when the challenged statute is constitutional as applied to them, the litigants in each of those cases have had a continued stake in the outcome. Neither this court nor any other court—to the Secretary's knowledge—has ever allowed an overbreadth challenge to continue when no party in the case has any stake in its outcome. The ACLU and petitioner are thus asking this court to extend the overbreadth doctrine in an entirely unprecedented manner.

*United States v. Raines*, 362 US 17, 22, 80 S Ct 519, 4 L Ed 2d 524 (1960), and "there are substantial social costs *created* by the overbreadth doctrine." *Virginia v. Hicks*, 539 US 113, 119, 123 S Ct 2191, 156 L Ed 2d 148 (2003) (emphasis in original).

By allowing overbreadth claims under Article I, section 8, this court has already created a significant exception to its state constitutional jurisprudence—one recognizing the danger of laws that "chill" free speech—that does not apply to other constitutional provisions. But entitling a plaintiff who is not personally affected by a statute to nonetheless obtain a judgment declaring the statute unconstitutionally overbroad would convert a narrow exception to this court's constitutional jurisprudence into an unlimited right of action, one that would force courts to issue advisory opinions and adjudicate purely hypothetical claims. Accordingly, confining overbreadth challenges to cases "where there is an actual and substantial controversy between parties having adverse legal interests" and involve "present facts as opposed to a dispute which is based on future events of a hypothetical issue," *Brown*, 293 Or at 449, is not only required by constitutional limitations on justiciability, but grounded firmly in prudential considerations. *See Sabri v. United States*, 541 US 600, 608-10, 124 S Ct 1941, 1948-49, 158 L Ed 2d 891 (2004) ("Facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records." (quoting *Raines*, 362 US at 22)).

**5. ORS 14.175 also does not authorize review of plaintiff's claims.**

Plaintiff argues that, even if his claims otherwise are moot, "ORS 14.175 precludes mootness." (Pet Br 12; bold and capitals omitted). ORS 14.175 reflects that the legislature has supplemented or expanded the judicial authority conferred by the Oregon Constitution, by permitting courts to decide moot cases under certain limited circumstances. Even so, ORS 14.175 ultimately cannot assist plaintiff.[11]

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[11] Incidentally, nothing in ORS 28.020's text suggests that it somehow was intended to supplement or expand judicial authority with respect to moot cases, and plaintiff does not appear to argue otherwise. ORS 28.020 entitles a person to a "declaration of rights, status or other legal relations" only if his or her rights "are affected" by the statute being challenged. ORS 28.020 thus entitled plaintiff to declaratory-judgment relief only if, when judgment issued, plaintiff currently was affected by *former* ORS 250.048(9). *See Oregon Creamery Mfrs. Ass'n v. White*, 159 Or 99, 107, 78 P2d 572 (1938) ("courts have quite universally established the rule that no relief can be had under the Declaratory Judgment Act unless there is actual bona fide controversy between adverse parties"); *US West Communications, Inc., v. City of Eugene*, 336 Or 181, 191, 81 P3d 702 (2003) ("[a]s the legislature's use of the present tense phrase 'are affected' [in ORS 28.020] implies, the controversy must involve a dispute based on present facts rather than on contingent or hypothetical events").

That requirement mirrors the state constitution's limited conferral of judicial authority—that is, neither ORS 28.020 nor the state constitution confers authority on a court to decide a case that no longer presents an actual controversy based on "present facts," or to decide a case when doing so will have no practical effect. *See Barcik*, 321 Or at 187-88 (that certain plaintiffs in a declaratory-judgment action "sought a declaration from the circuit court that that their Article I, section 8, rights were violated in the past * * * does not help them avoid mootness"; "declaratory relief is available only when it can affect *in the present* some rights between the parties" (emphasis in original)).

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, 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 parties agree that plaintiff, in challenging *former* ORS 250.048(9)'s constitutionality, satisfied ORS 14.175(1) and (2). First, plaintiff, when he commenced his action, had standing under ORS 28.020 to do so. Second, the statutory provision that plaintiff challenges—prohibiting working as a paid signature gatherer and as a volunteer signature gatherer "at the same time"—is, for ORS 14.175(2)'s purposes, a legislative "policy" of a "public body" (the legislature) that "continues in effect." *See* ORS 174.109 ("'public body' means state government bodies, local government bodies and special government

bodies").[12] This case does not, however, satisfy ORS 14.175(3)'s criterion for reviewing moot claims.

**a. Because future constitutional challenges to ORS 250.048(10) (formerly ORS 250.048(9)) are not likely to evade review, ORS 14.175 cannot help plaintiff.**

A constitutional challenge to *former* ORS 250.048(9) (since renumbered ORS 250.048(10)) is not—in ORS 14.175(3)'s words—"likely to evade judicial review in the future." As a result, ORS 14.175 did not authorize the trial court to review plaintiff's claims.

The phrase "likely to evade judicial review" has a long history of use in state and federal law. *See Yancy*, 337 Or at 375-83 (listing state court decisions

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[12] The Secretary agrees with plaintiff that he need not—to satisfy ORS 14.175(2)—prove that "he will be repeatedly harmed" by the policy at issue, and agrees that plaintiff must merely show that the policy remains in place. (Pet Br 47). Below, the Secretary argued that ORS 14.175 could assist plaintiff only if the act, policy or practice at issue likely would be applied to *him* in the future. Although that is the general rule in federal court, the Oregon legislature—in adopting ORS 14.175—rejected proposed wording that would have adopted that same rule. *See Murphy v. Hunt*, 455 US 478, 482, 102 S Ct 1181, 1183, 71 L Ed 2d 353 (1982) (review of a moot claim on the basis that a dispute is "capable of repetition, yet evading review" is permissible only if "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again"); House Judiciary Committee hearing, HB 2324, April 19, 2007, Exhibit F (proposed amendment, offered by Oregon Department of Justice, requiring courts, as a prerequisite to reviewing an otherwise moot claim, to first find that "the injury alleged by the party is capable of repetition (as to that party)"; audio recording of House Judiciary Committee hearing, HB 2324, April 19, 2007 (containing discussion of Exhibit F); audio recording of Senate Judiciary Committee hearing, HB 2324, May 23, 2007 (containing discussion of proposed amendment).

recognizing the doctrine). It appears that the legislature, in adopting the phrase, generally intended it to have the same meaning that it has in federal courts and in other jurisdictions. *See* House Judiciary Committee Staff Measure Summary of HB 2324 A, dated April 25, 2007 ("[t]he federal courts, as well as every state in the union, recognize an exception to the mootness doctrine for controversies that might come up repeatedly, but would never be reviewed by appellate courts if a strict mootness standard were to apply"). A dispute may be described as "evading review" if "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein v. Bradford*, 423 US 147, 149, 96 S Ct 347, 46 L Ed 2d 350 (1975).

Under ORS 14.175(3), the question is whether future disputes that implicate the constitutionality of ORS 250.048(10) are likely to become moot before Oregon courts can resolve them.[13] The answer is no. As plaintiff acknowledges, the length of the "registration cycle"—that is, the length of time that a paid petition circulator could gather signatures during a particular election

[13] Plaintiff asserts that federal courts have generally held that, with respect to challenges to federal election laws, (1) it is unreasonable to expect finality within the two-year election cycle, and (2) the likely-to-evade-review principle thus justifies review of cases that otherwise would be deemed moot. (Pet Br 43). But whether *federal* courts have found themselves unable to resolve election-law disputes within two years is not pertinent. This is not a federal-court case, and ORS 14.175 necessarily is directed at state courts exclusively. Under ORS 14.175(3), the pertinent question is whether future challenges to the statutory provision at issue are likely to evade judicial review by *state courts*.

cycle—can last roughly two years. (*See* Pet Br 48, stating that "the registration cycle is of two years' duration at most" (emphasis omitted); Trial Court Register, Document No. 34, Declaration of Stephen Trout supporting defendant's summary judgment motion at p 3, containing statement by Oregon Director of Elections that "[t]he potential registration period is approximately two years").[14] In fact, one of the petitions that plaintiff circulated—Initiative Petition 28—was eligible to be circulated for roughly one year and ten months: It "was approved for circulation between August 27, 2008 and July 2, 2010." (ER-41, Opinion Letter at p 2); *see* Or Const, Art IV, § (2)(e) ("[a]n initiative petition shall be filed not less than four months before the election at which the proposed law or amendment to the Constitution is to be voted upon").

As is recounted below, Oregon courts repeatedly have resolved elections-related issues within a two-year period. In fact, various procedural options have enabled them to do so within much shorter time spans, and before the claims at issue could go moot. The continued existence of those same procedural options

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[14] Plaintiff notes that, in this particular case, the period between *former* ORS 250.048(9)'s effective date and the end of the "petitioning window" for the 2010 election cycle was roughly six months long. (Pet Br 45). The question under ORS 14.175(3), however, is whether the challenged legislative policy will likely evade judicial review "in the future." For future election cycles, of course, ORS 250.048(10) (formerly ORS 250.048(9)) will be in effect for the entire two-year cycle.

suggests that Oregon courts will be able to act with equal swiftness in future cases.

**(1) For future challenges to ORS 250.048(10), expedited judicial review under ORS 246.910(4) will be available.**

First, in future cases in which a petition circulator seeks a declaration that ORS 250.048(10) is unconstitutional, expedited court review under ORS 246.910(4) generally will be available. ORS 246.910(1) and (3) authorize a "person adversely affected by any act or failure to act by the Secretary of State * * * under any election law" to challenge—in circuit court—the Secretary's act or failure to act, and to then obtain appellate review. ORS 246.910(4) provides that "[t]he circuit courts and Court of Appeals, in their discretion, may give precedence on their dockets to appeals under this section as the circumstances may require."

Hence, if a plaintiff (1) files a complaint under the declaratory judgment act; (2) claims that the Secretary adversely affected him by concluding that his signature-gathering conduct violated ORS 250.048(10); and (3) seeks a declaration that the Secretary thereby applied an unconstitutional statute, the plaintiff will be eligible for expedited review under ORS 246.910(4). Future claims challenging ORS 250.048(10)'s constitutionality likely will match the above description, thereby decreasing any chance that they will go moot before judicial review can be completed.

**(2) In future cases, certified appeals that bypass the Court of Appeals also will be available.**

Second, ORS 19.405(1) authorizes the Court of Appeals to certify appeals directly to this court, condensing the amount of time required to complete the appeals process. *See* ORS 19.405(1) ("[w]hen the Court of Appeals has jurisdiction of an appeal, the court, through the Chief Judge and pursuant to appellate rules, may certify the appeal to the Supreme Court in lieu of disposition by the Court of Appeals"); ORS 19.405(2) (requiring Supreme Court to accept or deny certified appeal within 20 days of certification from Court of Appeals). The certified-appeal option will help ensure that future challenges to ORS 250.048(10) will not evade judicial review.

Historically, the Court of Appeals' willingness to certify appeals to this court has enabled Oregon courts to resolve challenges to the Secretary's election-related decisions within three months. In *Ecumenical Ministries of Oregon v. Paulus*, 298 Or 62, 64-66, 688 P2d 1339 (1984), the plaintiff—on August 27, 1984—filed a claim under ORS 246.910 (one of the statutes that plaintiff relies on in this case) that challenged the Secretary's placement of a measure on the ballot. The trial court granted the Secretary's motion to dismiss, the Court of Appeals certified the resulting appeal to this court, and this court issued an opinion on October 11, 1984—roughly a month and a half after the claim was filed. 298 Or 62, 65.

In *Crumpton v. Roberts*, 310 Or 381, 383, 386, 389, 798 P2d 1100 (1990), the plaintiff—on July 13, 1990—filed a claim under the declaratory judgment act, under ORS 246.910, and under ORS 183.484, alleging that the Secretary failed to apply certain statutory requirements to initiative petition signature sheets. The trial court granted the Secretary's summary judgment motion, the Court of Appeals certified the ensuing appeal to this court, and this court issued its decision on September 27, 1990—two months and two weeks after the plaintiff filed his claim. 310 Or 381, 383. The continued availability of the certified-appeal option suggests that Oregon courts, in the future, will resolve election-law disputes in a similarly expeditious fashion.

**(3) In future cases, original mandamus review by this court will be available.**

Third, in cases in which a direct appeal is unlikely to provide sufficiently speedy review of a trial court ruling or Secretary of State decision, a plaintiff can petition directly to this court for a writ of mandamus. *See* Art VII (Amended), § 2 ("the supreme court may, in its own discretion, take original jurisdiction in mandamus"); ORS 34.110 ("[a] writ of mandamus may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law specially enjoins," although it may "not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law"). The continued availability of that procedural

mechanism further ensures that future challenges to ORS 250.048(10) will not evade judicial review.

Indeed, parties have invoked mandamus procedures to successfully obtain judicial review of an election-law claim before the claim could go moot. In *Kucera v. Bradbury*, 337 Or 384, 97 P3d 1191 (2004), this court resolved the claim at issue two weeks after the plaintiff filed her claim. On September 3, 2004, the plaintiff filed a claim in circuit court that was based in part on ORS 246.910, challenging the Secretary's refusal to count certain signatures supporting Ralph Nader's placement on the presidential ballot. 337 Or at 390-91. The trial court issued an order requiring the Secretary to place Nader's name on the ballot, and the Secretary then filed a mandamus petition in this court. *Id.* at 387, 395. This court issued a writ, requiring the trial court to withdraw its order, on September 17, 2004—two weeks after the plaintiff filed her claim. *Id.* at 384, 387.

In sum, Oregon courts repeatedly have demonstrated that—with the assistance of the procedural mechanisms described above—they can resolve election-law issues within extremely short time spans. Nothing suggests that Oregon courts will be unable to act with equal swiftness in the future. Because challenges to ORS 250.048(10) are not "likely to evade judicial review in the

future," ORS 14.175 gave the trial court no authority to resolve the merits of plaintiff's declaratory-judgment action.[15]

**b. Although amicus ACLU suggests that ORS 14.175 conflicts with this court's *Yancy* decision, that assertion is incorrect.**

The ACLU presumably supports plaintiff's argument that ORS 14.175's text makes his claims reviewable, but appears to assume that, in light of the *Yancy* decision, ORS 14.175 is unconstitutional. *See Yancy*, 337 Or at 363 ("[t]he judicial power under the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review'"); (ACLU Br 1, stating that *Yancy* construed the Oregon Constitution as creating a "jurisdictional *bar* on deciding moot cases"). The ACLU asserts that *Yancy* should be overruled. (ACLU Br 4). As recounted above, however,even if ORS 14.175 is presumed to be valid, it did not authorize the trial court to review plaintiff's claims. As a result, this court need not assess ORS 14.175's constitutionality.[16]

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[15] Even if plaintiff can show that the prerequisites in ORS 14.175(1) through (3) are satisfied, that would not, on remand, *require* the trial court to review the merits of plaintiff's declaratory-judgment-act claims. If a court finds that the prerequisites in ORS 14.175(1)-(3) are satisfied, the court "*may* issue a judgment on the validity of the challenged act, policy or practice" even though a judgment will "no longer ha[ve] a practical effect on the party." ORS 14.175 (emphasis added). On remand, the trial court would have to decide whether to exercise its discretion to issue a judgment.

[16] The ACLU does not expressly assert that ORS 14.175 is unconstitutional. Moreover, no party in this case asserts that ORS 14.175 is unconstitutional, or asks this court to declare it invalid. For that reason also,

*Footnote continued…*

In any event, the *Yancy* decision is consistent with the conclusion that ORS 14.175 is constitutional. The *Yancy* court held that "[t]he judicial power *under the Oregon Constitution* does not extend to moot cases that are 'capable of repetition, yet evading review.'" 337 Or at 363 (emphasis added). The court held that the state constitution confers authority to decide the merits of a case only if the resulting decision would be something other than "advisory," and only if a "controversy" continues to exist "between the parties." *Id.* Nothing in *Yancy*, however, suggests that the state constitution prohibits the *legislature* from supplementing or expanding the judicial authority conferred by the state constitution. Nothing in *Yancy*, or in this court's other case law, suggests that the constitution forbids the legislature from authorizing judicial review—as it did in ORS 14.175—of moot cases that are capable of repetition yet likely to evade review. *See Kellas*, 341 Or at 478 (noting that "[t]he Oregon Constitution contains no 'cases' or 'controversies' provision").

In fact, Article VII (Amended), § 2, expressly contemplates the possibility that the legislature might supplement the courts' authority: "[T]he courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted *until*

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*(...continued)*
ORS 14.175's constitutionality is not before this court, and this court need not address the issue.

*otherwise provided by law*." (Emphasis added.) Section 2 does not provide that court jurisdiction may only be altered by constitutional amendment. In more generally providing that Oregon's "courts, jurisdiction, and judicial system" may be changed "by law," section 2 contemplates that the legislature—which possesses "plenary lawmaking authority"—constitutionally may supplement the judicial authority conferred by the Oregon Constitution. *See Kellas*, 341 Or at 478 (noting that "[t]he plenary lawmaking authority of the Oregon legislature stands in marked contrast to the limitations that pertain to lawmaking by the United States Congress").

The legislature thus acted constitutionally, in adopting ORS 14.175, by authorizing courts to decide the merits of a case under circumstances in which Article VII (Amended) does not confer such authority. That conclusion also is consistent with this court's holding, in *Kellas*, 341 Or at 486, 145 P3d 139 (2006), that "the standing component in ORS 183.400(1) [which entitles "any person" to challenge the validity of any administrative rule in the Court of Appeals] does not violate any limitation imposed by the Oregon Constitution."[17]

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[17] In *Yancy*, then-Justice Balmer wrote a concurrence concluding that the state constitution's grant of judicial authority *does* permit courts to review moot cases that are capable of repetition yet evading review. *See Yancy*, 337 Or at 364 (Balmer, J., concurring) ("I find nothing in the text, context, or historical background of [Article VII (Amended), § 1] to suggest that a case that presents

*Footnote continued…*

## B. Plaintiff's claims under ORS 246.910(1)—which authorizes challenges to actions taken "under any election law"—are not justiciable.

Plaintiff argues that, because he also invoked ORS 246.910 to challenge the validity of *former* ORS 250.048(9) and of OAR 165-014-0285 (which further defined the statutory phrase "at the same time"), those challenges are justiciable. (Pet Br 12). But because ORS 246.910(1) authorizes challenges only to actions taken "under" election laws, it does not authorize challenges to statutes (such as *former* ORS 250.048(9)) that themselves are election laws. And although ORS 246.910(1) authorizes challenges to administrative rules that are promulgated under election-law statutes, any challenge by plaintiff to OAR 165-014-0285 was not justiciable under standing, ripeness, and mootness principles.

### 1. ORS 246.910(1) does not provide a vehicle for challenging a statute's constitutionality.

In part, plaintiff's claims under ORS 246.910(1) challenged the constitutional validity of *former* ORS 250.048(9), which prohibited him from

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*(...continued)*
a dispute that is subject to the 'judicial power' when it is filed somehow moves beyond that power simply because the events involved are so brief that they inevitably conclude before the courts can render a final decision"). Justice Balmer's reasoning would provide an additional and defensible basis for deeming ORS 14.175 constitutional. That is, under that reasoning, the judicial power conferred by the Oregon Constitution includes the power to decide moot cases that are likely to recur while evading review. ORS 14.175 merely codifies that power.

working as a paid initiative petition circulator while, "at the same time," circulating another petition as a volunteer. Nothing in ORS 246.910, however, authorized plaintiff to challenge the validity of *former* ORS 250.048(9), or of any other statute. Instead, ORS 246.910(1) permits challenges only to actions (or failures to act) by certain officials "under any election law":

> *A person adversely affected by any act or failure to act* by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official *under any election law*, *or by any order, rule, directive or instruction* made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official *under any election law, may appeal therefrom to the circuit court* for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.

(Emphasis added.) *Former* ORS 250.048(9), however, cannot be described as an act or failure to act "under any election law." Instead, it *is* an "election law." ORS 246.910(1) thus provided no vehicle for challenging *former* ORS 250.048(9)'s constitutionality. (*See* revised memorandum supporting Secretary's amended summary judgment motion at p 14, dated 12/1/2010, making that argument).

Further, even if ORS 246.910 permitted plaintiff to challenge *former* ORS 250.048(9)'s constitutionality, any such challenge would not have been justiciable. For the same reasons that plaintiff's declaratory-judgment-act claims were moot, any challenge to *former* ORS 250.048(9) under ORS 246.910 would have been moot as well.

**2. Plaintiff did not have standing to challenge OAR 165-014-0285.**

ORS 246.910(1) does permit a person to challenge an administrative rule—such as OAR 165-014-0285—that was adopted "under any election law," so long as the person was "adversely affected" by it. Plaintiff appears to assert that he was entitled to a declaration that OAR 165-014-0285 is unconstitutional. (*See* Pet Br 4, quoting OAR 165-014-0285; Pet Br 9, referring to *former* ORS 250.048(9) and the "associated rule" as unconstitutional; Pet Br 23, asserting that his claims "include the facial invalidity of the enactments," and thereby suggesting that he is challenging the validity of both *former* ORS 250.048(9) and OAR 165-014-0285). Yet plaintiff had no standing to challenge OAR 165-014-0285's validity.

OAR 165-014-0285 defines "at the same time"—for purposes of *former* ORS 250.048(9)'s prohibition on working, "at the same time," as both a paid petition circulator and as a volunteer circulator—as "during any time period for which the person is being paid to circulate any petition or prospective petition."[18] That rule, however, was not adopted until November 5, 2010. In

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[18] *Former* ORS 250.048(9) (since renumbered as ORS 250.048(10)) provided

> A person registered under this section may not obtain signatures on a petition or prospective petition for which the person is being paid and, at the same time, obtain signatures on a petition or prospective petition for which the person is not being paid. The secretary may not include any signatures obtained in

*Footnote continued…*

other words, the rule was adopted only *after* plaintiff had already ceased his activities as a petition circulator, and only after his registrations as a paid petition circulator had expired. (ER-41, Opinion Letter at p 2, finding that plaintiff quit work in May 2010, and that his registrations expired on June 8 and July 2, 2010). The undisputed facts in the record thus demonstrate that—when the trial court dismissed plaintiff's claims—OAR 165-014-0285 had not "adversely affected" him previously, and was not currently adversely affecting

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*(...continued)*

> violation of this subsection in a count under ORS 250.045(3) or 250.105 or ORS chapter 249 for purposes of determining whether a state initiative, referendum or recall petition or a prospective petition for a state measure to be initiated contains the required number of signatures of electors.

OAR 165-014-0285 provides:

> Under ORS 250.048(9), a person may not obtain signatures on a petition or prospective petition for which the person is being paid and, at the same time, obtain signatures on a petition or prospective petition for which the person is not being paid. For purposes of ORS 250.048(9), "at the same time" means during any time period for which the person is being paid to circulate any petition or prospective petition. "At the same time" does not include any lunch or other break period for which a person is not paid to circulate any such petition, as reflected in the person's payroll records required to be submitted under OAR 165-014-0100.

him. Plaintiff thus had no standing under ORS 246.910(1) to challenge the rule.[19]

**3. Even if plaintiff had standing to challenge OAR 165-014-0285, his challenge—under both ripeness and mootness principles—was not justiciable.**

For essentially the same reasons discussed above, plaintiff's allegations also failed to show that any challenge to OAR 165-014-0285 could be deemed ripe. Plaintiff was not working as a petition circulator when OAR 165-014-0285 was adopted. As a result, that rule might have become significant to plaintiff's conduct, and might apply to him, only if he again worked as a signature gatherer. Until then, any challenge to the rule was not ripe, and thus was not justiciable. *Cf. US West,* 336 Or at 191 (because plaintiff's claim under declaratory judgment act "seeks a declaration concerning city code provisions

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[19] Because OAR 165-014-0285 was not adopted until over three weeks after plaintiff filed his first amended complaint, the complaint makes no reference to it. The complaint did note that the Secretary "had proposed a rule that would * * * apply to [p]laintiff's efforts to circulate any petition as a volunteer once he registers as a paid circulator in the current petitioning cycle, which concludes in 2012," and asked the trial court to enjoin the Secretary from enforcing her "interpretations of ORS 250.048(9), including any final rule implementing said statute." (First Amended Complaint 8, 12). Because those portions of the complaint referred only to the *potential* adoption of a rule, they did not refer to any rule that had already "adversely affected" plaintiff or was currently adversely affecting him, and they failed to establish standing under ORS 246.910. In plaintiff's response to the Secretary's summary judgment motion, he did address OAR 165-014-0285, and he challenged its constitutionality. (Trial Court Register, Document No. 46, Plaintiff's Memorandum at p 71). But for the reasons discussed already, plaintiff had no basis at that point to claim that the rule "adversely affected" him.

that the [defendant, the City of Eugene,] may or may not apply to it in the future," "US West's claim that ORS chapter 759 preempts various city code provisions is not ripe for adjudication" and is not justiciable).

Similarly, even if a challenge to OAR 165-014-0285 had somehow been ripe when plaintiff filed his complaint, it would have been moot by the time the trial court granted the Secretary's summary judgment motion. By then, plaintiff had already stopped working as a paid petition circulator. For the same reasons recounted when discussing plaintiff's claims under the declaratory judgment act, the change in plaintiff's circumstances rendered any claim under ORS 246.910 moot as well.

Plaintiff argues that "standing conferred by ORS 246.910 assures justiciability." (Pet Br 38; bold and capitals omitted). But even if plaintiff did, in fact, have standing under ORS 246.910 to challenge OAR 165-014-0285, that could not have defeated the Secretary's justiciability argument. At most, ORS 246.910(1) permits a person to "*appeal* * * * to the circuit court" to review certain actions or failures to act (emphasis added). Nothing in ORS 246.910 requires—or even authorizes—a circuit court to resolve an appeal's substantive merits when doing so will no longer have a practical effect. In other words, although ORS 246.910(1) confers standing to seek circuit court review of particular types of conduct, it does not purport to supplement or expand the limited conferral of judicial authority—a conferral that does not

authorize review of moot claims—found in the Oregon Constitution. *See Yancy*, 337 Or at 362 (describing the "grant of judicial power" in the Oregon Constitution as a grant of "authority limited to the adjudication of an existing controversy").

In arguing that "standing conferred by ORS 246.910 assures justiciability," plaintiff cites *Kellas*. (Pet Br 40). *Kellas*, however, does not support that argument. In *Kellas*, this court first concluded that the plaintiff had standing under ORS 183.400(1), which provides that the "validity of any rule may be determined upon a petition by any person to the Court of Appeals." 341 Or at 477, 486. The court then considered whether the Oregon Constitution "imposes any additional requirement or limitation regarding a party's standing to challenge an administrative rule," and held that "the standing component in ORS 183.400(1) does not violate any limitation imposed by the Oregon Constitution." 341 Or at 477, 486. The *Kellas* court did *not* hold that once a person satisfies a statute's standing criteria, the person's claim must be deemed justiciable for the rest of time. The *Kellas* court instead was careful to note that questions of standing and questions of mootness are "distinct." *See Kellas*, 341 Or at 486.

Even if plaintiff had standing under ORS 246.910 to challenge OAR 165-014-0285, any such challenge was not justiciable.

**C. Plaintiff's claims under the First Amendment and 42 USC § 1983 are not justiciable.**

Plaintiff also argues that his claims under 42 USC § 1983 and the First Amendment—that is, his claims that Oregon law violates the First Amendment by prohibiting a paid petition circulator from, "at the same time," circulating another petition as a volunteer—are not moot. (Pet Br 13). Although plaintiff argues that federal justiciability principles apply to those claims instead of state principles (Pet Br 13-14), that would be true only if "application of [state] standards would preclude a plaintiff's federal claim, but application of federal standards would not." *Barcik*, 321 Or at 185. In fact, Oregon law, as expressed in ORS 14.175, appears to give state courts greater authority, compared to the authority that federal courts possess, to review moot claims. (*See* page 32 n 12 in this brief, noting that Oregon legislature, in adopting ORS 14.175, refused to adopt federal rule requiring a plaintiff to show that the challenged act or policy likely would be applied to that same plaintiff in the future).

It follows that this court, to determine whether plaintiff's section 1983 claim is justiciable, should apply the same analysis that applies to plaintiff's state-law claims. For the same reasons that plaintiff's state-law claims are not justiciable, his federal-law claims are also not justiciable. The trial court correctly granted the secretary's summary judgment motion.

## CONCLUSION

This court should affirm the trial court's judgment.

Respectfully submitted,

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**NOTICE OF FILING AND PROOF OF SERVICE**

I certify that on May 9, 2014, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Linda K. Williams and Daniel W. Meek, attorneys for appellant/petitioner on review; and upon Alan J. Galloway, attorney for amicus curiae American Civil Liberties Union of Oregon, Inc., by using the court's electronic filing system.

I further certify that on May 9, 2014, I directed the Brief on the Merits of Respondent on Review to be served upon Robert M. Atkinson, amicus party, by mailing two copies, with postage prepaid, in an envelope addressed to:

Robert M. Atkinson
2437 NE 20th Place
Portland, Oregon 97212

*Continued…*

**CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 12,150 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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