IN THE SUPREME COURT OF THE STATE OF OREGON

MARQUIS COUEY, an individual,
Plaintiff-Appellant,
Petitioner on Review,

v.

KATE BROWN, in her official capacity as Secretary of State of Oregon,
Defendant-Respondent,
Respondent on Review.

Circuit Court for Marion County 10C14484
Judge Claudia Burton

Court of Appeals
A148473

S061650

OPENING BRIEF ON MERITS BY PLAINTIFF-APPELLANT, PETITIONER ON REVIEW MARQUIS COUEY

Includes Challenge to Constitutionality of ORS 250.048(9)

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This Court granted review of ***Couey v. Brown, Secretary of State of Oregon***, Court of Appeals No. A148473, 257 OrApp 434 (2013), ("the Opinion").

I. STATEMENT OF THE CASE.

Petitioner Couey [hereinafter "Plaintiff" adopts his "Statement" presented in the Opening Brief of Plaintiff-Appellant Marquis Couey to the Court of Appeals ("Opening Brief of Plaintiff to CoA") and his Petition for Review. Legal questions and rulings sought are integrated into the brief below.

A. FACTS.

The following terms are used herein:

"paid circulator":	person registered with the State and approved by Chief Petitioners to circulate a petition for pay
"paid petition":	statewide initiative petition for which a paid circulator is employed
"volunteer petition":	petition for which a paid circulator wishes to obtain signatures, for no pay, which is not the paid petition

Plaintiff moved to Oregon to be near family members. Declaration of Marquis Couey ("Couey Decl."), ¶ 5; ER-12 (OJIN Item 43). He combined part-time work with paid petitioning in 2008-10, enjoys political exchanges and intends to continue working on initiatives. *Id.*, ER-12-14. Plaintiff was a paid circulator for Petitions #28 and #70 (2010). He wished to circulate Petition #42 (2010) as a volunteer in early 2010. Plaintiff's employer did not prohibit that,

but his contract required him to "comply with all applicable state and federal election laws." ER-17.

ORS 250.048(9) became effective on January 1, 2010.

> 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.

The kinds of "petition or prospective petition" to which the disability applies are those enumerated in ORS 250.048(1): Anyone being employed as a paid circulator cannot, as an unpaid volunteer, obtain "signatures of electors on a state initiative, referendum or recall petition or a prospective petition for a state measure to be initiated," other than the petition for which she is being paid. Recall petitions are provided for by Article II, § 18 of the Oregon Constitution. Direct democracy petitions for initiatives and referenda are provided for in Article IV, §§ 1(2)(a) and 1(3)(a), wherein voters in 1902 created new citizen rights: "the people reserve to themselves the initiative power" and "the referendum power."[1]

If a circulator violates ORS 250.048(9), all voter signatures she collects are disqualified, including those on both the paid and the unpaid petition. Violations have serious personal penalties, including fines of $1,000 per

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1. "The right under Article IV, section 1, to solicit signatures on initiative petitions is a form of speech." ***Lloyd Corp., Ltd. v. Whiffen*** (***Whiffen II***), 315 Or 500, 514 (1993).

violation (ORS 260.995(1)) and a bar from employment as a paid circulator for 5 years (ORS 250.048(4)). See Opening Brief of Plaintiff to CoA, p. 4.

Plaintiff was perplexed as to the meaning of ORS 250.048(9), because it is physically and temporally impossible to "obtain signatures" on two different petitions literally "at the same time." Obtaining a signature requires the circulator to interact with a voter and "witness the signing of the signature sheet by each individual." ORS 250.045(1)(a). A circulator literally cannot accomplish that for two different petitions at exactly "the same time."

Plaintiff was provided, by his counsel, written answers by Defendant's Elections Division to questions about ORS 250.048(9). Those emailed answers, dated November 3, 2009, stated that a paid circulator could never circulate any petition as a volunteer at any time his circulator registration was in effect. Declaration of Stephen Trout (September 15, 2010) ("Trout Decl."), Ex. 1, pp. 1-2 [OJIN Item 15] (Review ER-1-2). A year later, Defendant's Director of Elections conceded that that response was wrong. Trout Decl. p. 7, ll. 7-10.

Remaining confused, Plaintiff in writing sought guidance from Defendant's Elections Division as to the meaning of ORS 250.048(9). He asked, for example, if he could circulate a volunteer petition during the same day for which he was paid. Of, if he was paid weekly, could he circulate the volunteer petition during that week? Could he keep the volunteer petition at a nearby location or in his backpack when circulating the paid petition?[2] Election

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2. Plaintiff's repeated efforts to obtain clarity, and resulting chill, are detailed in *Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary*

(continued...)

Division personnel continued to give conflicting responses, and the Director of the Elections Division instructed his personnel to stop responding to questions on this subject. Review ER-11. Plaintiff was chilled from volunteer petitioning by the uncertainty.[3] Couey Decl., ¶ 5; ER-12. He sued within 3.5 months of the effective date of the statute but 2.5 months before the conclusion of the ballot measure cycle on July 2, 2010, which automatically ended his circulator registration for 2010 under ORS 250.048(3)(c)).

Plaintiff conducted discovery to ascertain what was permitted or prohibited and Defendant's rationales. While the case was pending, Defendant adopted OAR 165-014-0285 in November 2010. It defines "at the same time" in a manner that chills paid circulators' rights to obtain signatures on volunteer petitions for periods of time while they remain registered to circulate paid petitions.

> OAR 165-014-0285 Circulating Unpaid Petitions by Paid Petition Circulators:
>
> 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

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2.(...continued)
Judgment and Response to Defendant's Motion for Summary Judgment [OJIN Item 45], pp. 8-17, 35-37 (Review ER-3-14). Many of the issues in this case are briefed in this memorandum to a higher level of detail than allowed by the page limits applicable to this Opening Brief.

3. Since a violation carries severe penalties, the Director of Elections agreed that efforts to contact them to clarify the law were reasonable at the time. Director Trout testified that, without a rule in place, "It would be a safe thing to do" to "call the Elections Division for advice," so the circulator "could comply with the law." Trout Depo., p. 56: ll. 18-19, 22-25 [in Declaration of Linda Williams, Ex. 2 (OJIN Item 44)].

> 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.[4]

Plaintiff filed a First Amended Complaint ("FAC") [ER-1-11] alleging the statute (1) on its face and (2) as implemented by rule [FAC ¶¶ 23-24; ER-8] limits his rights (and the rights of others) to circulate petitions as a volunteer and thus limits expressive rights in violation of (1) Oregon Constitution, Article I, §§ 8 and 26,[5] and (2) the First Amendment (and 42 USC § 1983). FAC ¶ 1, realleged at FAC ¶ 27 (First Claim) [ER-9] and FAC ¶ 30 Second Claim [ER-10].

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4. Some paid circulators are weekly wage earners. Director of Elections, Stephen Trout, stated that paid circulators must prove by the employer's "payroll records" that they were on break while showing anyone any volunteer petition. If the employer does not maintain "payroll records" showing breaks (such detail is not required), then the petitioner is prohibited from obtaining a signature on a volunteer petition for entire day of paid work. Trout Depo., 38:25, 39:1-12. 40:1-25; *Id.*

5. Oregon Constitution, Article I, § 8, provides:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Oregon Constitution, Article I, § 26, provides:

> No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of grievances (sic).

The Opinion (257 OrApp at 436) errs in reciting that Plaintiff claimed *only* federal overbreadth. The FAC allegations of state and federal overbreadth are set out at Opening Brief of Plaintiff to CoA, pp. 7-8.

The future constitutional harms to Plaintiff and others include:

A. Harms to initiative and referendum Chief Petitioners (FAC ¶¶ 6 and 7, realleged at FAC ¶¶ 27 and 30) who rely upon paid circulators and must "accept responsibility (including liabilities and penalties) for any of their circulator's mistakes or violations of the law" (FAC ¶ 7);

B. Harms to "the Chief Petitioners of the paid and unpaid Petitions [subject] to disqualification of the signatures [Plaintiff] obtains, among other potential penalties" (FAC ¶ 19, realleged at ¶¶ 27 and 30);[6] and

C. Harms to "others who contemplate employment as paid circulators and who similarly wish to express themselves" (FAC ¶ 24, realleged at FAC ¶¶ 27 and 30).

In his federal (second) claim, FAC ¶ 32, Plaintiff alleged that his:

> rights (and those of others) under the United States Constitution were violated and continue to be violated in one or more of the following ways:
>
> A. ORS 250.048(9) violates the First Amendment, as made applicable to Oregon through the Due Process Clause of the Fourteenth Amendment, on its face;
>
> B. Any rule promulgated under the purported authority of said statute will be unconstitutional, overbroad and violate the First Amendment rights of Plaintiff and others[.]

Plaintiff submitted uncontroverted evidence of the chill upon him, his desire to work as a circulator, his efforts to secure such employment, and his

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6. Plaintiff alleged additional substantive rights under Oregon Constitution, Article IV. Article IV, § 1(2)(a), provides:

> The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.

concern that some employers might limit their paid petitioners from circulating volunteer petitions out of uncertainty about ORS 250.048(9), thus affecting his future employment relations. He submitted uncontroverted evidence of harms to others, such as Chief Petitioners and other signature gathering campaigns:

A. Paid circulators lawfully carry and obtain signatures on multiple paid petitions "at the same time" [Declaration of Travis Diskin ("Diskin Decl.") ¶¶ 20-21, ER-27 (OJIN Item 42)].

B. Declarant Diskin actually supervises and prepares the records for paid circulators. He details the impossibility of requiring, substantiating or recording minute-by-minute accounts of paid circulator times when "on the clock." Diskin Decl., ¶¶ 8-12, ER-26.

C. Employers of paid circulators do not automatically ban their paid circulators from carrying volunteer petitions [*Id.*, ¶ 13, ER-26].

D. These same employers sometimes encourage paid circulators to carry multiple petitions, including volunteer petitions, to increase their efficiency in obtaining signatures by drawing more potential signers into communication on several topics. *Id.* at ¶¶ 15-19, ER-26; Declaration of Edward Agazarm ("Agazarm Decl.") ¶¶ 11-13; ER-30 (OJIN Item 41).[7]

Oregon paid circulators do not "register" in the abstract. Rather, in each 2-year election cycle Plaintiff can register to circulate for pay only those petitions for which he has been authorized and hired by the Chief Petitioners. In addition to being employed as a paid circulator during the 2010 cycle, Plaintiff sought similar employment in the 2012 cycle. He learned of a draft measure on renewable energy proposed for the 2012 ballot in September 2010. Couey Decl., ¶¶ 13, 15; ER-13. The Chief Petitioners for the "2012 Oregon Renewable

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7. Additional evidence of the harms to measure campaigns of the volunteer petitioning ban is summarized at Opening Brief of Plaintiff to CoA, pp. 8-10.

Energy and Fuel Development and Security Act" received approval from Defendant to circulate petitions on January 7, 2011, after completing the required procedures, which took several months. Declaration of John Bartels ("Bartels Decl."), ¶¶ 4-5, ER-20 (OJIN Item 50). In February 2011, Plaintiff re-took the "Circulator Training" [*Id.*, Ex. 4; ER-23] and registered to circulate this petition. *Id.*, ER-22. Two of three Chief Petitioners had authorized Plaintiff's registration as a paid circulator on Form 309 before the trial court record closed. *Id.*, ER-24.

The trial court dismissed all of Plaintiff's claims as moot. The Opinion concludes that the case become moot when Plaintiff's paid registration expired in July 2010 for lack of a "live" controversy and therefore the Opinion did "not reach the question of standing." Opinion, 257 Or App at 440. It held Plaintiff had waived his right to invoke ORS 14.175 by not seeking expedition under ORS 260.910(4).

B. STANDARD OF REVIEW.

Justiciability, mootness, standing, and statutory interpretation are each a question of law. The standard of review is for legal error without deference to the trial court. ***Trabosh v. Washington County***, 140 OrApp 159, 163 n6 (1996).

C. SUMMARY OF ARGUMENT.

1. PLAINTIFF'S CLAIMS UNDER THE DECLARATORY JUDGMENT ACT ARE NOT MOOT.

This Court has held that, if a dispute involves the interpretation of an existing constitutional provision that could apply to a party in the future, that

situation itself creates present facts which can be adjudicated. ***Pendleton School Dist. 16R v. State***, 345 Or 596, 606 (2009). Further, Plaintiff pled facts and provided unrefuted evidence sufficient to show the likelihood that he and others suffer continuing chill of political speech, satisfying any personal stake and "practical effects" [as those phrases are used in ***Kellas v. Department of Corrections***, 341 Or 471 (2006) ("***Kellas***")] to maintain a "live controversy" necessary for a declaration under ORS 28.010-.080. The pleading also triggers both state and federal overbreadth analyses of Plaintiff's claims. The reviewing courts erred in finding all claims "moot" when Plaintiff's circulator registration automatically expired in July 2010.

This particular Declaratory Judgment Act ("DJA") challenge hinges on present and future threat of enforcement of ORS 250.048(9) (and associated rule) by Defendant. Plaintiff challenged them as overbroad, violative of the First Amendment and Oregon Constitution, Article I, §§ 8 and 26, and as presently chilling the political speech of many paid circulators, all potential paid circulators, Chief Petitioners and signature gathering campaigns. The statute and rule force individuals to self-censor their political speech at certain times. Chief Petitioners seeking knowledgeable volunteer circulators, and campaigns which have allowed and encouraged paid circulators to carry multiple paid and unpaid petitions because it increases overall citizen interaction, are now limited in the ways they can get their political messages delivered or are coerced by the threat of enforcement to deny their paid circulator employees their rights to protected political expression.

Upon facial challenge under Article I, §§ 8 and 26, Oregon overbreadth analysis requires a reviewing court to apply the framework of ***State v. Robertson***, 293 Or 402, 413-14 (1982) ("***Robertson***"). First, the court is to first to analyze the challenged text for "overbreadth." The Opinion apparently considered overbreadth to implicate only "standing," because it declined to discuss overbreadth, or reach standing, holding instead that the entire controversy had become moot upon expiration of Plaintiff's circulator registration. 257 OrApp at 446. This approach misconceives the Oregon overbreadth doctrine, which allows the party in court standing to assert harms to others. Overbreadth also expands the scope component of justiciability referred to as "practical effects" to include the practical effects of relieving unconstitutional infringements upon expressive rights, thereby maintaining a live controversy.

Disabling any aspect of Plaintiff's right to obtain signatures on petitions explicitly and necessarily targets expression and expressive conduct, which the Legislature cannot limit under Article I, §§ 8 and 26. ORS 250.048(9) by its express terms disables Plaintiff, a private citizen who is a paid circulator, from the political speech and conduct of gathering signatures as a volunteer on other petitions during hours or days or weeks or months at a time, while "being paid" for circulating the paid petition.

Here, ORS 250.048(9) is facially invalid (overbroad), because it impermissibly targets protected expression regardless of any meaning given the phrases "at the same time" or "obtain signatures on a petition." ***State v. Moyer***,

348 Or 220, 229, *cert den,* 131 SCt 326 (2010) ("***Moyer***"); ***Vannatta v. Oregon Government Ethics Comm.***, 347 Or 449, 455 56 (2009), *cert den*, 130 SCt 3313 (2010) ("***Vannatta v. OGEC***").

"Obtaining" petition signatures is protected interactive communication. Article I, §§ 8 and 26. "[P]etition circulation is core political speech because it involves interactive communication concerning political change." ***Buckley v. American Constitutional Law Foundation, Inc.***, 525 US 182, 186, 119 SCt 636 (1999) ("***Buckley v. ACLF***"). Had the reviewing courts looked first to the text of the statute, that would have showed that "speech" was targeted and therefore Plaintiff could proceed to assert the right for meaningful declarative relief for (1) himself seeking future paid petitioning employment and (2) others chilled by the enactments. ORS 28.020.

Since he argues "that statutory prohibition impermissibly restrains expression in violation of Article I, section 8," the Court must then apply the ***Robertson*** constitutional analysis. In short, Oregon overbreadth doctrine expands the scope of "practical effects" in free speech and assembly challenges to include speech and assembly rights of others, sufficient to continue a suit for declaratory judgment.

Only if the challenged texts were not overbroad should the courts have reached the "as applied" challenge and considered whether Plaintiff's request for relief after expiration of the 2010 election cycle was "moot." Plaintiff argues that he provided sufficient and uncontroverted evidence of his continued "interest" to continue under ORS 28.020.

2. ORS 14.175 PRECLUDES MOOTNESS FOR PLAINTIFF'S CLAIMS.

If (1) Oregon courts cannot retain jurisdiction to make the initial ***Robertson*** determination whether the challenged enactment "targets" speech, or (2) the state overbreadth doctrine does not enlarge the "practical effects" by enlarging the persons upon which those practical effects will operate, then ORS 14.175 should have been applied to overcome any suggestion of mootness that might arise from temporary interruption in Plaintiff's status as a paid circulator.

If there is a question of "when" to apply the ***Robertson*** analysis, it was error to not apply ORS 14.175 in concert with ORS 28.020 to review the challenged text to determine whether it targeted speech. A basis for continued adjudication is especially important in this case, because that statutory grant of standing and justiciability works in concert with the ***Robertson*** constitutional mandate that the court must <u>first</u> consider the text of the challenged statute for overbreadth restricting Article I, §§ 8 and 26, rights, discussed in the immediately following sections.

3. PLAINTIFF'S CLAIMS UNDER ORS 246.910(1) ARE NOT MOOT.

Distinct from the DJA, Plaintiff had standing to continue to seek meaningful declaratory relief with far-reaching practical effects under ORS 246.910(1) regardless of automatic expiration of his circulator registration. Plaintiff argues that ORS 246.910 is in the category of "public interest" statutes which confer standing initially by identifying a statutorily identified injury for

which a claimant may seek redress [***Kellas,*** 341 Or at 480] and the concomitant right to continue to seek redress for that initial injury for public policy reasons.

Even if that were not the legislative intent of ORS 260.910(1), the Opinion erred in holding that Plaintiff's failure to request expedition of the case under ORS 260.910(4) (and to proceed without discovery in an effort to reach complete appellate finality in the first six months of 2010) amounted to a waiver of Plaintiff's right to request findings under ORS 14.175.

ORS 246.910 is "obviously remedial" [***Columbia River Salmon & Tuna Packer Assoc. v. Appling***, 232 Or 230, 236 (1962)] and should not be construed to defeat elections law challenges. There is nothing to suggest the express potential remedy of expedited review under ORS 246.910(4) evinces an intent that the remedy be used as a shield by the state actor or effectively function to force a litigant to forego discovery. The Opinion "inserts" language of limitation into ORS 14.175, requiring parties to request some expedited review under statute or in equity. Further, 28.020 has no expedition clause, but the Opinion also refused to apply ORS 14.175 to Plaintiff's claims under that statute.

4. PLAINTIFF'S CLAIMS UNDER THE FIRST AMENDMENT AND 42 USC § 1983 ARE NOT MOOT.

ORS 14.175 is inapplicable to the federal claims, so the Opinion offered no reason why the federal claim was no longer justiciable. The facts adduced through discovery and presented in the record satisfied elements of the federal overbreadth doctrine and the federal exception to mootness doctrine, satisfying

any "injury in fact" for federal Article III justiciability. The Opinion errs in not applying federal law to consider and hold that Plaintiff's federal claim remains justiciable. ***Barcik v. Kubiaczyk***, 321 Or 174, 185 (1995) ("***Barcik***").

II. THE CASE WAS NOT MOOT UNDER THE OREGON DECLARATORY JUDGMENT ACT AND DOCTRINE OF OVERBREADTH.

The Petition for Review stated these questions:

> Does an overbreadth challenge to an elections law limiting political speech by paid petitioners, based on a record showing harms to Plaintiff and others, remain justiciable under the Oregon and federal constitutions, regardless of expiration of the election cycle during which the claim arose?
>
> Ruling requested: Yes.
>
> Did Plaintiff's ORS 28.010 claim ever become "moot" when he showed unrefuted evidence (1) Respondent will continue enforcement, (2) the injuries continue or are likely to recur, and (3) requested relief will resolve uncertainty?
>
> Ruling requested: No.
>
> Do ORS 260.910(1) and/or ORS 28.010 confer continued standing on an aggrieved party to continue an elections law challenge after expiration of an election cycle?
>
> Ruling requested: Yes.

A. OVERBREADTH EXPANDS THE SCOPE OF "PRACTICAL EFFECTS" FOR PURPOSES OF MAINTAINING DECLARATORY JUDGMENT ACT JUSTICIABILITY.

Plaintiff is mindful that this Court will look first to Plaintiff's statutory arguments on why his claims did not become moot, but his argument for his continued "interest" under ORS 28.020 and the evaluation of whether a decision will have "practical effects" includes the argument that under overbreadth

analysis he may assert claims of chill upon his own intended future conduct. Facial challenges to ORS 250.048(9) under the First Amendment and Oregon Constitution, Article I, §§ 8 or 26, "tend to raise hypothetical questions." ***State v. Christian***, 354 Or 22, 39 (2013) ("***Christian***").

"Overbreadth" is a legal conclusion that a challenged law facially violates the constitutional rights of expression (and/or assembly) of the plaintiff or that plaintiff has demonstrated that the law violates or could violate his expressive rights or those of others not before the Court. In Oregon, the terms used under the ***Robertson*** analysis are that the challenged statute facially either "targets" or "reaches" speech or assembly, but in both state and federal courts the legal conclusion of unconstitutionality may be based on allegations and evidence about harms to third parties or upon hypothetical (pre-enforcement) harms to the plaintiff and others that may result in the future from enforcing the law.

> The most common example of such an attack arises under the first amendment, when a litigant whose speech may not itself be constitutionally protected claims that the relevant statute must be struck down because it could be applied to restrict speech that cannot constitutionally be burdened. Thus, overbreadth attacks involve both the application of the challenged law to the claimant and a different, hypothetical application of the law to third parties.

Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV L REV 423, 424 (1974).

The Opinion (257 OrApp at 439) notes that "'standing' and 'mootness' are two aspects of justiciability; to be justiciable * * * the plaintiff must have standing and the controversy must not be moot," citing ***Yancy v. Shatzer***, 337 Or 345, 349 (2004). ***Yancy*** does not hold that overbreadth challenges become

moot. Plaintiff seeks meaningful declaratory and prospective relief; all prospective relief was unavailable to Yancy, because the writ of review was his exclusive remedy.

Years after ***Yancy***, ***Kellas*** (341 Or at 480) held that "personal stake" or the "practical effects" of a court's decision on a particular litigant are not Oregon constitutional requirements for justiciability. The Legislature may "empower any citizen to act as a private attorney general to enforce public rights." *Id.* (abrogating ***Utsey v. Coos County***, 176 OrApp 524, 539-40 (2001), *pet rev dismissed*, 335 Or 217 (2003)). "[A]ny permissible legislative interest * * * is sufficient to meet any constitutional requirement that might exist." 341 Or at 483. Thus, depending on the injury the Legislature identifies to confer standing, the "practical effects" of a court's decision may be broader than the immediate impact of a decision on a particular litigant and may include vindication of public rights.

In this case, Plaintiff argues that the exercise of legislative power to identify and confer elements sufficient to maintain justiciability for a declaration of "public rights," is both found in ORS 28.020, ORS 246.910 and ORS 14.175 but also springs from the people of Oregon themselves adopting the original Oregon Constitution. ***Robertson,*** 293 Or at 412, explains that an overbreadth challenge to a statute amounts to a claim that the state constitution "forbade its very enactment as drafted."

B. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE *ROBERTSON* ANALYSIS.

Since Plaintiff argued "that [a] statutory prohibition impermissibly restrains expression in violation of Article I, section 8," the courts should have applied the ***Robertson*** constitutional analysis. Instead, it appears not at all.

Robertson Category I:

> Does this statute, as written, restrain the "free expression of opinion" or restrict the "right to speak" on any subject whatever[8] and is thus subject to facial challenge,[9] with special rules for standing?[10]

If it does not, then proceed to:

Robertson Category II:

> Does the statute reach privileged "expression of opinion" or "speech" by overbreadth [***Robertson***, *supra*], such as by "targeting" some kind of harmful result which sometimes is accomplished by expression protected by

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8. ***State v. Moyle***, 299 Or 691, 695 (1985); ***Robertson***, 293 Or at 412 (quoting ***State v. Spencer***, 289 Or 225, 228 (1980) ("***Spencer***").

9. "A facial challenge to a law is a claim that the law, as written, is 'invalid *in toto*.'" ***In re Fadeley***, 310 Or 548, 577 n7 (1990).

10. > If a law concerning free speech on its face violates this prohibition [Oregon Constitution, Article I, § 8], it is unconstitutional; it is not necessary to consider what the conduct is in the individual case.
>
> ***State v. Spencer***, 289 Or 225, 228 (1980).

Article I[11] and is thus subject to overbreadth challenge, also with special rules for standing, and potentially subject to a "narrowing construction?[12]

If it does not, then proceed to:

Robertson Category III

Does enforcement of the statute violate Plaintiff's communicative rights only under a particular set of facts, so that Plaintiff may bring an "as applied" challenge which vindicates his rights and forbids enforcement of the statute as to him under the facts?[13]

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11. [A] law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as "broad" and inclusive as it chooses unless it reaches into constitutionally protected ground.

State v. Blocker, 291 Or 255, 261, 630 P2d 824, 827 (1981).

12. ***Robertson***, 293 Or at 434-36. See ***State v. Moyle***, 299 Or at 705-708 (overbroad anti-harassment statute prohibiting a person from causing another harm narrowed to the constitutional confines intended by lawmakers):

> If the [enactment] potentially reaches substantial areas of communication that would be constitutionally privileged and that cannot be excluded by a narrow interpretation or left to a case-by-case defense against the application of the [enactment], it would be unconstitutional.

13. [L]aws that focus on proscribing the pursuit or accomplishment of forbidden results are divided further into two categories: (a) laws that focus on forbidden effects, but expressly prohibit expression used to achieve those effects, which are analyzed for overbreadth; and (b) laws that focus on forbidden effect, but do not refer to expression at all, which are analyzed for vagueness or for as-applied unconstitutionality. [***State v.***] ***Plowman***, 314 Or 157] at 164.

State v. Moyer, *supra*, 348 Or at 229 (2010).

The distinction between ***Robertson*** Category I and II laws is not significant in this case, since prohibiting Plaintiff to "obtain" a signature either (1) expressly bans protected expressive conduct, or (2) reaches and impairs all verbal and nonverbal conduct necessary to invite a voter to sign a particular volunteer petition and to receive that show of support for the political message.

Can the Legislature without violating Article I, §§ 8 and 26, adopt any law limiting the right to discuss governmental change through petitioning or the right to peaceably assemble to sign petitions--or obtain signatures on petitions--seeking governmental change? Under ***Robertson***, the answer is "No," because Article I, § 8, contains a limit upon power of the Legislature to enact certain laws: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." It does not allow enactment "of laws that restrain or punish expression of opinion" and forbids passage of:

> laws that limit speaking, writing, or printing on any subject. Needless to say, that is a very broad prohibition. It precludes any restraint on most forms of expression as well as laws directed at limiting or restricting any conceivable kind of communication.

State v. Ciancanelli, 339 Or 282, 311 (2005) ("***Ciancanelli***").

The burden should have shifted to Defendant Secretary of State to "save" the statute from facial invalidity or overbreadth invalidity by showing:

(1) an historical exception which allowed that restraint on such expression in Oregon at the time of ratification of the Oregon Constitution in 1958 [*State v. Plowman*, 314 Or 157, 164, (1992), *cert den*, 508 US 9746 (1993) (summarizing *Robertson*)]; or

(2) that subsequent specific Constitutional amendment clearly evidenced an intent to amend the Oregon Constitution, Article I, § 8 [the

> "incomparability" exception described in ***In re Fadeley***, 310 Or 548, 563 (1990)].

However, any argument regarding whether an exception applies in the case of an overbreadth challenge can only be heard after a court first applies the ***Robertson*** analysis to the text, because any argument suggesting an "exception" can only follow a finding that Article I, § 8 or § 26 is violated. This is the orderly process required by ***Robertson*** and followed, *inter alia*, in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) (applying ***Robertson*** framework to conclude that a statute limiting political contributions restrained protected Article I, § 8, expression before reaching Defendant's argument that such limit on expression was authorized by Article II of the 1858 Constitution); ***Picray v. Secretary of State***, 140 Or App 592, 916 P2d 324 (1996) (applying ***Robertson*** framework to conclude that a ban on wearing political buttons in a polling place was protected Article I, § 8, expression before reaching Defendant's argument based on Article II); ***In re Fadeley***, *supra* (applying ***Robertson*** analysis to conclude that a judicial canon prohibiting judicial candidates from personally soliciting contributions was protected expression before reaching question of whether a limit on speech by judicial officers was intended by voters when adopting amendments to Article VII in 1978).

Since the ***Robertson*** analysis and its corrective for legislative overreach is implicitly part of Article I, § 8 [***Ciancanelli***, 339 Or at 314-15], the "judicial power" in Articles III and VII (Original) of the Oregon Constitution adopted by voters in 1858 should be construed to include judicial power to hear overbreadth

claims in order to protect expressive rights from legislative overreach.[14] Litigants are "empowered" by the framers to vindicate individual and "public rights" assured by Article I, §§ 8 and 26. Hence, properly brought overbreadth challenges are not "mooted" before the Court exercises judicial power to review the actual text. ***TVKO v. Howland***, 335 Or 527, 535 (2003) (Opinion, 257 OrApp at 443), is inapposite to any discussion of overbreadth for the reasons discussed in the Petition for Review (pp. 14-15) and the Reply Brief of Plaintiff-Appellant Marquis Couey to the Court of Appeals ("Reply Brief CoA"), p. 4.

This Court recently reviewed the development of federal "overbreadth" doctrine protecting First Amendment rights, reiterating that this Court will continue to apply overbreadth when a state enactment is alleged to limit expressive rights in violation of Oregon Constitution, Article I, § 8 or § 26. "The 'overbreadth' doctrine, which is a departure from traditional rules of standing, permits a [litigant] to make a facial challenge to an overly broad statute restricting speech" and the "individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court." ***Alexander v. United States***, 509 US 544, 555, 113 SCt 2766, 125 LEd2d 441 (1993).

Christian, *supra*, 354 Or at 37-39, appears to endorse the rationale of the United States Supreme Court's First Amendment overbreadth doctrine: the

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14. ***Yancy*** concluded that Article VII (Amended) (1910) does not alter the meaning of "judicial power." 337 Or at 352.

primacy of Constitutional guarantees of expression requires "breathing space" [***Broadrick v. Oklahoma***, 413 US 601, 602, 93 SCt 2908 (1973)], which can only be assured by the "expansive remedy" of overbreadth invalidation. ***Christian***, 354 Or at 38, quotes ***Virginia v. Hicks***, 539 US 113, 123 SCt 2191 (2003):[15]

> Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, ***Dombrowski*** [***v. Pfister***, 380 US 479, 486-487, 85 SCt 1116, 14 LEd2d 22 (1965)]--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

Dombrowski v. Pfister, 380 US 479, 486, 85 SCt 1116, 14 LEd2d 22 (1965), held:

> [W]e have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression--of transcendent value to all society, and not merely to those exercising their rights--might be the loser.

Overbreadth analysis under the Oregon Constitution also springs from a related (but distinct) governance concern. Unlike the United States Constitution granting limited powers to the federal government, the Oregon Constitution imposes limitations on the otherwise plenary legislative power of the state [***King v. City of Portland***, 2 Or 146, 152-3 (1865)]. Thus, the overbreadth doctrine allows courts to correct abuse of the limits the framers and voters intended upon the Legislature's power to restrict expression. ***Ciancanelli*** [*Id.*, at 315]

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15. Cited at Opening Brief of Plaintiff to CoA, p. 23.

specifically rejected the federal "balancing approach"[16] in retaining the ***Robertson*** framework.

> This constitutional provision [Oregon Constitution, Article I, § 8] is a prohibition on the legislative branch. It prohibits the legislature from enacting laws restraining the free expression of opinion or restricting the right to speak freely on any subject. If a law concerning free speech on its face violates this prohibition, it is unconstitutional; *it is not necessary to consider what the conduct is in the individual case*.

State v. Spencer, *supra* (at n8, *ante*), 289 Or at 228 (emphasis supplied). ***State v. Hirsch***, 338 Or 622, 628-629 (2005), summarized the many cases following this rule and repeated:

> [C]onsistently with the nature of overbreadth challenges, the court did not examine the particular facts of the cases before it. Rather, the court concluded in each case that the fact that the statute at issue, on its face, impinged on constitutionally protected conduct in certain circumstances compelled invalidation of the statute.

1. THE ENACTMENTS TARGET EXPRESSION.

Since Plaintiff's claims include the facial invalidity of the enactments for violation of Oregon Constitution Article I, §§ 8 and 26, affecting both him and many others, ***Robertson*** required the court to first determine whether speech is

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16. For the First Amendment analysis, the court evaluates evidence at each of several steps and weighs the quantum of evidence. First, Plaintiff must show a "substantial" burden to expressive rights. This showing shifts the burden to the State to produce evidence of both a particularized and "compelling" interest in suppressing that expression, and that the restriction at issue is the one most narrowly tailored to meet the stated government interests. ***Citizens United v. Federal Election Com'n***, 558 US 310, 340, 130 SCt 876, 898 (2010).

"targeted" (***Robertson*** "Category I" or "II"). *Accord*, ***Moyer; Vannatta v. OGEC***. If speech *is* targeted, that expands the "practical effects" for DJA purposes, allowing a court to remove threats (chill) upon the Plaintiff and/or others. This allows the court to remove all "uncertainty" from potential enforcement of a constitutionally infirm law, even before actual enforcement by government.

a. SIGNATURE GATHERING IS PROTECTED POLITICAL SPEECH AND ASSEMBLY.

Petitioning is protected expressive activity. ***Leppanen v. Lane Transit Dist***., 181 Or App 136, 145-6 (2002), considered a challenge brought by a volunteer petitioner to the constitutionality, under Article I, § 8, of the transit district's ordinance prohibiting "solicitation" of signatures near the bus boarding platform.

> In prohibiting the solicitation of initiative petition signatures, subsection (b) certainly prohibits a form of speech; no one contests that much. It also forbids only certain types of speech, based on the content of that speech. It prohibits canvassing and solicitation, but not preaching a religious message, for example.

Gathering signatures on initiative petitions "is a form of political speech." ***Lloyd Corporation v. Whiffen***, 307 Or 674, 684 (1989). "The circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." ***Meyer v. Grant***, 486 US 414, 421-22, 108 SCt 1886 (1988).

Ciancanelli, 339 Or at 311, held that Article I, § 8, protects <u>physical acts</u> that express "any ideas":

> [W]e have little trouble in concluding that the people who framed and adopted Article I, section 8, as part of the original Oregon Constitution intended to prohibit broadly any laws directed at restraining verbal or nonverbal expression of ideas of any kind.[17]

"Obtaining" signatures on initiative petitions requires both verbal and other expressive conduct. Then-Director of the Elections Division, Stephen Trout, testified that a petitioner "presenting" a petition for "obtaining" a signature on a petition requires verbal or nonverbal "invitation" by the petitioner to the voter. That invitation would violate ORS 250.048(9), according to Director Trout:

> Q. * * * Suppose you have a person who is a registered paid circulator, they're sitting at a table; and on the table, at different ends of the table but within the line of sight, there are two different clipboards so that she can observe the voter signing in her presence. On one clipboard, there's exclusively the petition for which she is registered and being paid; and on the other clipboard, there's only the petition for which she volunteers. If someone asks a question about either, she'll answer them, but she doesn't have them in her physical possession and they're not next to each other. Is that in violation -- Is that conduct in violation of ORS 250.048(9)?
>
> A. [Trout] Yes.
>
> Q. And why is that?
>
> A. [Trout] Because they had both been presented -- They are both being presented, inviting people to sign them.

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17. A law which stops anyone from soliciting expressions of political support or responding to solicitations violates Article I, § 8. ***Leppanen***, *supra*. For example, Gulf War protestors who held up signs asking motorists to honk horns in support of their anti-war messages (and the motorists who responded by blasting their horns) could not be prosecuted under a City ordinance which banned using automobile horns except for "warnings." Under the facts, the honking was in "support or disapproval of a political issue or matter of public concern." ***City of Eugene v. Powlowski***, 116 Or App 186, 189 (1992). See ***State v. Hagel***, 210 Or App 360 (2006) (applying ***Powlowski*** to state statute forbidding horn blowing).

Trout Depo. 30:19-25, 31:1-15 [in Declaration of Linda Williams, Ex. 2 (OJIN Item 44)].

> Q. How about a scenario where a person * * * keeps one clipboard, which contains only the volunteer petition, in her backpack, while she carries in her hand the paid petition for which she is registered. A voter asks her if she knows anyone who is circulating the volunteer petition, because they'd like to sign. She reaches into her backpack and pulls out the volunteer petition for the voter to sign. Is that circulator, volunteer circulator, in violation of ORS 250.048(9)?
>
> A. [Trout] Yes. She is trying to obtain signatures. Even-- Even though it was in her backpack, she is now presenting it to the voter.

Trout Depo. 33:11-25, 34:1-5; *Id*.

The prohibition upon obtaining unpaid signatures on an initiative petition or prospective petition for hours or days at a time targets "speech itself" under the Oregon Constitution, Article I, §§ 8 and 26, and petitioning under Article IV.

Vannatta v. OGEC, *supra*, 347 Or 449, considered statutes which prohibited lobbyists from offering a public official or candidate for public office any gift with an aggregate value in excess of $50 [ORS 244.025(2) and (3)] or any payment for expenses for entertainment [ORS 244.025(4)(b) and (c)].

> [T]he restrictions on "offering" gifts, when examined under the ***Robertson*** methodology, are a type of law that focuses on the content of speaking or writing: offering a gift. The restrictions on offering a gift are not aimed at the pursuit or accomplishment of some forbidden results, such as, perhaps, the regulation of conflicts of interest involving government officials. Rather, they focus on every utterance of an offer, of the kind described in the statute, whether or not such an offer produces any invidious effect. See ***City of Portland v. Tidyman***, 306 Or 174, 183-84, 759 P2d 242 (1988) (city ordinance prohibiting "adult bookstores" was addressed to one disfavored type of communication by words and pictures; ordinance was not written in terms of asserted negative effects of adult bookstores). The trial court

> correctly determined, insofar as the restrictions on offering gifts are concerned, that those restrictions expressly regulate speech by lobbyists.
>
> "[A]rticle I, section 8 prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end." ***Robertson***, 293 Or at 416-17, 649 P2d 569. Applying that standard here, we also conclude that the restrictions on "offering" gifts do not focus on the pursuit or accomplishment of forbidden results.

347 Or 466-467.

Plaintiff's offer of a petition sheet to a voter for the purpose of obtaining a signature from the voter enjoys at least the same Constitutional protection from government interference as the lobbyist's offer of a gift to a public official or candidate. ORS 250.048(9) is a content-based prohibition, as it targets only speech which constitutes the offer of an initiative petition to a prospective signer.

"Obtaining" a signature is never a solitary act. Obtaining a valid signature of a registered voter requires face-to-face communication of ideas in word and deed.

> [T]he right of assembly * * * protects an important aspect of the freedom of expression protected by Article I, section 8--it assures that those who speak may have an audience.

State v. Illig-Renn, 341 Or 228, 236 (2006). The circulator has state-imposed duties to inquire whether a person is registered to vote. ORS 250.045(10)(b); 250.042. The circulator is required to attest that she "witnessed" the signing of the sheet. ORS 250.045(10)(a); ORS 250.042. This exchange and witnessing

can only be done in a face-to-face meeting of two persons. ORS 250.048(9) forbids a paid circulator from meeting with another for that purpose, if the signature sought is on a petition for which the circulator is not an officially registered paid circulator.

In construing the objections to the speech restrictions imposed by a statute, the correct inquiry is whether the persons "would experience any change in the constitutional right to free expression to which they currently are entitled under Article I, section 8." ***League of Oregon Cities v. State***, 334 Or 645, 670 (2002). Here the answer is obvious: Plaintiff loses the right to circulate petitions as a volunteer that he unambiguously had from the time of the adoption of the Oregon Constitution until January 1, 2010 (effective date of ORS 248.049). ***City of Eugene v. Miller***, 318 Or 480, 491 (1994), held that freedom of expression means that the state may not treat those who gain a profit from expressive material "more restrictively" than those who engage in similar commercial activity.[18] This Court summarized that holding:

> It is equally clear under ***Miller*** that a governmental enactment that allows some persons to participate in a certain activity, but prohibits others engaged in expression from participating in that same activity, constitutes a prohibited burden upon expression.

League of Oregon Cities, 334 Or at 671.

In ***Moser v. Frohnmayer***, 315 Or 372, 376 (1993), the majority found that a distinction between commercially-motivated speech and other speech violated Article I, § 8.

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18. Discussed at Opening Brief of Plaintiff to CoA, p. 25; Reply Brief of Plaintiff to CoA, p. 8.

> Under the statute, automatic dialing and announcing devices legally may be used to transmit any message, except messages that are a commercial attempt to sell realty, goods, or services. In this respect, it restricts expression because it is directed at a specific subject of communication, excluding some speech based on the content of the message.

In the present case, ORS 250.048(9) makes a similar distinction between the paid and unpaid speech of Plaintiff. It allows unlimited solicitations for ballot measures which pay Plaintiff as circulator while banning his voluntary solicitations on other petitions while he is a paid employee ("at the same time"). The statute clearly limits the expressive conduct of Plaintiff by dictating the permitted and impermissible subjects of his solicitations for hours or days or weeks or months at a time, based only on the commercial and noncommercial aspects of the two kinds of expression. It violates Article I, § 8.

Speech and assembly are cognate rights. According to then-Defendant's Director of Elections, even the passive display of volunteer petitions (laying signature sheets out on a table, see pp. 25-26, *ante*) is prohibited conduct, even though it is as protected as the passive display of political buttons found to be protected expression under Article I, 8, in ***Picray***.

b. ORS 246.048(9) TARGETS POLITICAL EXPRESSION.

Robertson, 293 Or at 416-17, requires "that laws must focus on proscribing the pursuit or accomplishment of forbidden results * * *" and cannot target expression "as an end in itself or as a means to some other legislative end." There are easy questions to pose to determine whether speech is

unconstitutionally targeted or whether some "forbidden effect" is targeted by a statute.

In this case, identifying the "target" is simple. The question is: Does Plaintiff violate the law by his expressive act, without regard to whether any "harm" occurs? If the law "focus[es] on every utterance of an offer, whether or not such an offer produces any invidious effect," then the expression itself is the impermissible target. ***Vannatta v. OGEC***, *supra*. As noted in ***Spencer***, *supra*, 289 Or at 229:

> The statute makes the speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm was caused or threatened.
>
> With this dissection of the statute it is apparent that the law does restrain freedom of expression of opinion and restricts the right to speak.

Spencer struck down a statute criminalizing disorderly conduct, because it criminalized speech. It pre-dates ***Robertson***, but the result and analysis were expressly endorsed in ***Robertson***, 293 Or at 416-17. A similar test applies to freedom of assembly. ***State v. Ausmus***, 336 Or 493, 506-507 (2003).

ORS 250.048(9) targets the most essential part of petitioning--obtaining a voter's signature on a petition. A circulator who violates ORS 250.048(9) faces monetary penalties [$1000 per violation, ORS 260.995(1)] and loss of petitioning employment for 5 years [ORS 250.048(4)(b)] and attendant stigma, merely for (1) having the volunteer petition on his person at certain times or (2) in any way offering or discussing the volunteer petition with any prospective

signer of it during work days. That is the stated position of Defendant; see pp. 25-26, *ante*).

Thus, ORS 250.048(9) fails the test of ***Vannatta v. OGEC*** and ***Spencer***: Does a violation occur only if and when some purported "real" targeted harm occurs? The answer is "No." The violation occurs when Plaintiff engages in the protected activity of offering a volunteer petition, not when (if ever) someone else does something that violates election laws and causes some sort of harm.[19]

The statute at issue here is both facially invalid and overbroad, because it is an impermissible content-based restriction on protected expression, because it:

(1) limits one type of political speech (petitioning) but not other types;

(2) limits political speech on specific topics (proposed ballot measures) but not on other topics;

(3) specifically limits political speech that the speaker is not paid for, while not limiting such speech that the speaker is paid for; and

(4) limits the opportunities for political speech by voters who would otherwise be asked to sign volunteer petitions.

Leppanen v. Lane Transit Dist., *supra,* 181 OrApp at 145-6. It imposes these limits regardless of any meaning given "at the same time" or "obtain signatures on a petition." "Signatures on a petition" are protected expressions of voters'

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19. In this case, the statute does not indicate what harm, if any, it is intended to prevent. "The law must specify expressly or by clear inference what 'serious and imminent' effects it is designed to prevent." ***Oregon State Police Assn. v. State of Oregon***, 308 Or 531, 541, 783 P2d 7 (1989) (Linde, J., concurring) (quoting ***In re Lasswell***, 296 Or 121, 126, *cert denied*, 498 US 810, 111 SCt 44 (1990)).

political support under Article I, § 8. There is no historical curtailment, recognized as of 1858, upon such expression or peaceful assembly to discuss potential legislation.

2. OVERBREADTH ALLOWS PLAINTIFF TO ALLEGE "FUTURE" HARM TO HIMSELF.

This Court recently summarized many cases explaining the "expansive remedy" provided by overbreadth for facial challenges brought under the First Amendment or Oregon Constitution, Article I, §§ 8 or 26, noting "overbreadth challenges tend to raise hypothetical questions." ***Christian***, *supra*, 354 Or at 39, quoting ***Virginia v. Hicks***, 539 US 113, 119, 123 SCt 2191 (2003).

> The plaintiff in an overbreadth or facial challenge objects to hypothetical enforcements of the allegedly vague or overbroad regulation, which can include hypothetical enforcement against the plaintiff himself. In other words, the third parties whose rights are at issue may include the plaintiff.

Farrell v. Burke, 449 F3d 470, 495 n10 (2nd Cir 2006).

Plaintiff's overbreadth challenges necessarily raise "hypothetical" harms in the sense the injury to himself will occur in the future, but there is ample evidence in the record to support the conclusion the injuries persist.

The trial court declined to apply the overbreadth doctrine,[20] because the

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20. The trial court questioned whether Plaintiff had stated an overbreadth "claim." Plaintiff discussed ***Robertson*** and state overbreadth and federal overbreadth repeatedly in briefing to the trial court, including in *Plaintiff's Response to Inquiry of the Court* (March 18, 2011). OJIN Item 55. Plaintiff argued that overbreadth is not a "claim" as that term applies to Oregon fact-pleading, but is a method of analysis in state and federal courts. The method is triggered when a statute is challenged as being so overinclusive that it impinges upon

(continued...)

court concluded that Oregon overbreadth analysis does not allow a person "not affected by a statute to raise a Constitutional overbreadth challenge in an action for declaratory relief" and "the failure to put forth a plaintiff with an actual stake in the litigation precludes proper development of the record." Circuit Court Letter Opinion, ER-46-47. The court then summarily concluded that, under federal overbreadth, the claimant must also show "some application of the statute to himself." *Id*.

The Opinion of the Court of Appeals does not discuss overbreadth at all, despite the fact it was briefed at length to the trial court and to the Court of Appeals.

C. PLAINTIFF SHOWED SUFFICIENT LIKELIHOOD OF FUTURE HARM TO HIMSELF TO MAINTAIN A LIVE CONTROVERSY.

The DJA by its terms requires that a plaintiff show initially that her "rights, status or other legal relations are affected by a * * * statute"[21] and that the requested declaratory relief "will terminate the controversy or remove an

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20.(...continued)
constitutionally guaranteed expressive rights of plaintiff (now or in the future) or impinges on the rights other persons not before the court.

21. ORS 28.020. Writings and laws

> Any person * * * 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.

uncertainty." ORS 28.050. The purpose is to "afford relief from uncertainty and insecurity" [ORS 28.120] "by adjudicating rights and duties before wrongs have actually been committed or damages have been suffered." ***Cornelius v. City of Ashland,*** 12 OrApp 181, 188 (1973) ("***Cornelius***"). "No actual wrong need be committed or loss incurred in order to invoke declaratory relief." ***Gaffey v. Babb***, 50 OrApp 617, 621 (1980), *rev den*, 291 Or 117, (1981) ("***Gaffey***"). "Declaratory judgment is preventive justice, designed to relieve parties of uncertainty by adjudicating their rights and duties before wrongs have actually been committed." ***Beason v. Harcleroad***, 105 OrApp 376, 380 (1991). This controversy is justiciable. It (1) "concerns [Defendant's] continuing state-wide official conduct under the statutes" [***Brown v. Oregon State Bar***, 293 Or 446, 450 (1982)] and (2) a present and continuing controversy about the constitutional validity of enactments.

The power to grant declaratory relief satisfies that aspect of justiciability that the court have power to offer a remedy, which then has the practical effect of "removing uncertainty" for the plaintiff and others. Plaintiff argues that he actually demonstrated through evidence in the record (1) sufficient likelihood of future harm to himself in his future efforts as employment as a paid circulator and (2) present threat of harm for which he could receive meaningful relief imposed on the losing state actor.

While the Opinion (257 OrApp at 438-42) concludes that Oregon appellate decisions on justiciability and standing are "apparently conflicting," it finds a distinction between disputes that are "active and certain, as opposed to

contingent and hypothetical" and holds that Plaintiff falls on the "contingent and hypothetical side of the divide." *Id.*, p. 443. The Opinion misapprehends the term "hypothetical" in connection with overbreadth and errs in stating the legal standard and applying it to the facts.

There is no case law rule that "hypothetical" injury renders claims for declaratory relief *per se* non-justiciable merely because the injury has not actually yet occurred. ***Gaffey***, *supra*, 50 OrApp 50, concludes that declaratory relief is available when "a fact situation is unnecessary to test the challenged law because it is alleged to be invalid on its face." In ***Advocates for Effective Regulation v. City of Eugene***, 160 OrApp 292 (1999), plaintiffs challenged a local enactment imposing limits on the use of toxic substances. Plaintiffs claimed (*inter alia*) that the enactment conflicted with state law. *Id.* at 298. At the time the limits had not been adopted or enforced. In rejecting the city's claim that the question was merely "hypothetical" and not justiciable, the Court of Appeals observed, "A facial challenge to the validity of an enactment generally presents * * * a concrete controversy" and is therefore justiciable. *Id.* at 299. It then identified the issue as whether the enactment conflicted with state law and held: "That question is not hypothetical, and its answer requires no speculation as to future facts. Either the Initiative on its face conflicts with state law, or it does not." *Id.* Accord, ***Thunderbird Mobile Club, LLC v. City of Wilsonville***, 234 OrApp 457, 228 P3d 650, *review denied*, 348 Or 524, 236 P3d 152 (2010) ("the mere enactment of the ordinance has affected plaintiff's legal interests"). Plaintiff suggests that is the correct rule of law in this case.

The case law rule is that cases seeking declaratory relief become nonjusticiable when the alleged harm is "contingent" upon a series of unpredictable events, or while some injury might be conceivable, it is unsupported by allegations and left to "judicial speculation." ***Gruber v. Lincoln Hospital Dist.***, 285 Or 3, 9 (1979). The Opinion lists what it deems "hypothetical" about Plaintiff's claims, but recites factors in error or ignores unrefuted evidence to the contrary in the record.

> He must (1) remain an Oregon resident (2) continue to seek employment as a petition circulator, (3) be hired by a chief petitioner, (4) discover an initiative for which he is ready, willing, and able to be a volunteer circulator, and * * * he must remain unwilling to limit his volunteer circulating activity to "any lunch or other break period for which [he] is not paid to circulate." OAR 165-014-0285.

Id., p. 443.

The Opinion errs. Plaintiff need not "remain" in Oregon, as Oregon residency is not a paid circulator requirement. It errs in presuming that Plaintiff must "cause" his own injury by "remain[ing] unwilling to limit" his speech. His injury is caused by the chill through threat of enforcement, not "unwillingness" to abide by unconstitutional restrictions. The Opinion itself engages in "judicial speculation" to defeat the alleged and proven facts. It speculates that Plaintiff *might* not find petitioning employment, despite his proven previous success, or *might* not wish to volunteer on another petition. "Mere disbelief of [Plaintiff's] positive assertion of fact would not constitute evidence to support the finding of a contrary fact." ***State v. Simpson***, 308 Or 102, 109 (1989).

"Hypothetical" and "contingent" are <u>not</u> synonymous. "Hypothetical" refers to conclusions drawn from actual record evidence. OEC 703. Decisions under

the DJA do not find threats of future harm moot but do require more than allegations of future sequential, presently unplanned events and unpredictable decisions by third parties, such as the chain of possible choices by future officials and voters alleged in ***Morgan v. Sisters School Dist. #6***, 353 189, 201 (2013) which might occur should the District become insolvent, discussed at Opening Brief of Plaintiff to CoA (pp. 20-21); Petition for Review, p. 17. Here, Defendant has a duty and has said she will enforce the statute, and Plaintiff showed a continued intent to circulate petitions both as a paid and volunteer petitioner.

Regarding the "presentness" of a controversy, in ***Pendleton School Dist. 16R***, *supra*, 345 Or at 606, plaintiffs sought a judgment declaring that the legislature failed to fund adequately the school district in violation of a recent constitutional amendment. The state argued that, with respect to future budget biennia, there was no present, justiciable controversy. This Court disagreed:

> The issue whether Article VIII, section 8, imposes a duty on the legislature to fund the public school system at a specified level every biennium presents a set of present facts regarding the interpretation of a constitutional provision; it is not simply an abstract inquiry about a possible future event.

This Court did not speculate that the school district *might* dissolve or merge or *might* find other funding. Plaintiff's "change" in circulator status was an artifact of the 2-year election cycle that does refute his sworn intentions. The expired cycle is as irrelevant as the expiration of the State's budget biennium in ***Pendleton School Dist. 16R***, *supra*.

Plaintiff is like the business owner plaintiffs in ***Cornelius***, *supra*, and ***Gaffey***, *supra*, forced to live in fear of serious penalties (and loss of employment) while trying to conduct business. In both cases, pleadings alone were sufficient (without judicial conjecture that plaintiffs *might* relocate from the towns which passed restrictive ordinances or *might* choose different business endeavors.

D. STANDING CONFERRED BY ORS 246.910(1) ASSURES JUSTICIABILITY.

Also discussed in this section are the following questions:

Does failure to request expedition under ORS 260.910(4) (because discovery was necessary):

(1) render challenge under ORS 260.910(1) moot upon expiration of the election cycle?

(2) preclude the injured party from invoking ORS 14.175 in connection with standing under ORS 246.910(1) or ORS 28.010?

Rulings requested: No and No.

Plaintiff invoked ORS 246.910(1), which provides:

> A person adversely affected by any act * * * by the Secretary of State under any election law may appeal therefrom to the circuit court * * *.

The Opinion errs in finding that:

(1) Plaintiff's claims under ORS 246.910(1) ever became moot by operation of the elections calendar, and

(2) Plaintiff's failure to request discretionary "expedited" review under ORS 246.910(4) (which would have precluded development of a factual record through discovery) defeats a request for findings to support justiciability under ORS 14.175. Opinion, p. 444.

The Legislature's power to grant standing is plenary. ***Kellas***, *supra*.

Marbet v. Portland Gen. Elect., 277 Or 447 (1977), upheld a private party's continued right to maintain his appeal after intervening in an energy facility siting case, explaining that the Legislature can confer standing to represent a broad public interest. The statute at issue [ORS 469.370(5)]

> gives no greater procedural weight to an intervenor's personal self-interest than to an interest that he shares with other members of the public. It expresses the legislature's judgment that the important decisions of public policy entrusted to the Energy Facility Siting Council are not to be treated as a dispute between opposing private interests.

277 Or at 453-54. Standing (and the right to obtain relief which would operate upon the state actor), thus depended on the intervenor's representation of the public interest in a matter of public concern, not on the intervenor's personal stake in the decision. This Court's emphasis in ***Marbet*** on the public policy conferral of standing for greater public benefit is significant in this case because of the special role that election laws and petition rights have in the Oregon governance process. Elections laws which limit ability to speak about certain political topics do not simply affect campaigns and paid circulators. The right to discuss and learn of proposed changes in law is important to all.

League of Oregon Cities, *supra,* 334 Or at 655 n9, explains that ORS 246.910 standing to pursue election law challenges requires far less showing of direct "interest" than the DJA, as need only be "registered" with the Secretary of State and opposed to an action:

> * * * Plaintiffs also alleged that they were registered voters. That allegation, together with those plaintiffs' opposition to Measure 7, was sufficient to establish that they were "person[s] adversely affected" by an action of the Secretary of State, as ORS 246.910(1) requires. ***Ellis v. Roberts***, 302 Or 6, 10-11, 725 P2d 886 (1986) ("adversely affected"

> requirement of ORS 246.910(1) means that any registered voter can file action challenging Secretary of State election ruling). We contrast that requirement with ORS 28.020 * * * which requires for purposes of the UDJA that a person's "rights, status, or other legal relations" be affected * * *.

The right to sue by anyone "adversely affected" by Defendant's acts under elections laws is as broad as ORS 183.400(1), which this Court found "unambiguous" in its intent to legislatively confer standing and preserve the practical effects of the litigation for the overall public benefit.

> The legislature intends by the statute to authorize any person to invoke the judicial power of the court to test the validity of every administrative rule under existing statutory and constitutional law and, thus, to advance the objective that all agency rulemaking shall remain within applicable procedural and substantive legal bounds.

Kellas, *supra*, 341 Or at 477. ORS 246.910 satisfies similar Legislative objectives.

ORS 246.910 evidences a legislative choice to give free voice to challenge irregularities or problems for the benefit of the citizens and voting public state-wide. That is why the Legislature gives members of the public who participate in election processes the right to challenge those decisions in Circuit Court when they are "adversely affected." ORS 260.910(1). Their vigilance and ability to achieve final resolution (through appeals if necessary) protect and benefit the people of the state. The Legislature conferred standing to test the constitutionality of the Defendant's acts and of the laws she administers. Plaintiff's continued standing requires nothing "further" beyond the initial adverse affect upon him.

ORS 246.910(4) does not mandate that an expedition request be made nor that such a request may be made. It merely states that courts, "in their discretion, may give precedence on their dockets to appeals under this section." Further, the statute is "obviously remedial" [***Columbia River Salmon & Tuna Packer Assoc***, *supra*, 232 Or at 236] and should not be construed to defeat the remedy it and other statutes provide.[22]

Plaintiff also argues that if Article VII "judicial power" includes judicial power to hear overbreadth claims in order to secure expressive rights from legislative abuse (as argued at pages 10-11 and 14-35, *ante*), then ORS 246.910(4) cannot be construed to conflict with that Constitutional grant of power or limit ORS 14.175 to the extent it confirms a procedure for invoking judicial power in free expression cases.

III. ORS 14.175 SECURES JUSTICIABILITY OF THE STATE CONSTITUTIONAL CHALLENGE IN THIS CASE.

The Petition for Review stated these questions:

> Where Respondent will enforce the challenged statute in future election cycles and evidence shows Plaintiff will come within the Respondent's enforcement jurisdiction, is it error to find that the "capable of repetition, likely to evade review" prong of ORS 14.175 is not fulfilled?
>
> Ruling requested: Yes.
>
> May the Court of Appeals abstain from ruling on the properly preserved issue of applicability of ORS 14.175 based on its own *sua sponte* concern that the statute is unconstitutional, an issue neither raised nor briefed by the parties?

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22. ORS 246.910(5) states that the remedy "is cumulative and does not exclude any other remedy."

Ruling requested: No.

The Opinion errs in finding that ORS 14.175 was unavailable to this Plaintiff because he failed to request discretionary "expedited" review under ORS 246.910(4) (which would have precluded development of a factual record through discovery). Opinion, 257 OrApp at 444. The panel should have reached the substantive meaning of the statute, but avoided doing so by claiming it perceived Constitutional infirmity in ORS 14.175, although no party raised such issue. *Id.*

The Opinion places the ORS 246.910(1) plaintiff complaining of overbreadth unconstitutionality in a no-win situation: A plaintiff whose aggrievement arises from the application of a law or policy during a particular election cycle must either:

(1) seek expedition of the case by foregoing discovery and thus have weak or no evidence of burdens on the expressive rights of others and Defendant's rationales for the statute (needed for federal claims; see, p. 54 *post*), or

(2) undertake reasonable and necessary discovery and in doing so cause the case to become "moot" when appellate finality is not reached within the same election cycle.

The Opinion (257 OrApp at 445) did not even allow until the end of the election cycle for final resolution of the case:

> When, at the latest, plaintiff ceased to be a registered paid circulator who was prohibited from circulating initiative petitions as a volunteer, this case became moot * * *.

Thus, the Opinion held that the case became moot on July 2, 2010 (4 months before the end of the election cycle). The Opinion penalized Plaintiff for his successful efforts to produce testimonial evidence on the chilling impact of ORS

250.048(9) on others and evidence of Defendant's interpretation of the statute and rationale for its "compelling interest" (necessary for the federal claim).

Nor should this Court adopt the trial court's analysis.[23] While courts could conceivably exercise discretion and expedite a similar challenge, the need to exercise such inherent power underscores how "unlikely" it is that judicial review can be completed within 7 months (this maximum time between approval of the petition for circulation and expiration of all circulator registrations in this case) or 2 years (maximum time of the petitioning cycle) in the ordinary course. While some rare election law cases are fast-tracked (when the decision will definitely affect what will appear on an imminent ballot to be printed or distributed), the overwhelming majority of cases do not present such time-sensitive situations.

The Federal Bipartisan Campaign Reform Act (BCRA) contains a mandate to expedite challenges "to the greatest extent possible" [§ 403(a)(4), 2 USC § 437h], but the United States Supreme Court has consistently held it unreasonable to expect challenges to federal election laws, including BCRA, to be completed with finality within a 2-year elections cycle and has applied the "likely to evade" review prong despite the requirement for expedited review.

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23. The trial court erred in concluding that:

    1. "Capable of repetition" means that Plaintiff must demonstrate that he will suffer the same harm from the same act. Letter Opinion, ER 44-45; and

    2. Any challenge could conceivably be decided in less than the few months after the statute took effect here. Letter Opinion. ER 45.

In ***Federal Election Comm'n v. Wisconsin Right to Life, Inc.***, 551 US 449, 127 SCt 2652 (2007), the advocacy group [WRTL] wished to run radio and TV ads within 30 days of the 2004 Wisconsin primary, contrary to a restriction imposed by BCRA known as the federal "blackout period." WRTL sued the FEC, seeking declaratory and injunctive relief. The suit was not resolved before the 2004 election, and the FEC argued "that the 2-year window between elections provides ample time for parties to litigate their rights." 551 US at 462. The Court disagreed (quoting the District Court) that "it would be 'entirely unreasonable ... to expect that [WRTL] could have obtained complete judicial review of its claims.'" *Id.* (ellipsis in original).

In ***Davis v. Federal Election Comm'n***, 554 US 724, 735, 128 SCt 2759, 2770 (2008), a self-financing candidate challenged limits on his spending (the "Millionaires' Amendment"). The Supreme Court held that:

> [D]espite BCRA's mandate to expedite and Davis' request that his case be resolved before the 2004 general election season commenced, Davis' case could not be resolved before the 2006 election concluded, demonstrating that his claims were capable of evading review.

That case spanned several election cycles.

Elevating the mere possibility that courts *might* expedite review of election law disputes to a case law rule that ORS 14.175 is unavailable to litigants who undertake such challenges would immunize fundamental abuses of power regarding voting and political speech and political actions by government officers. And even the swiftest expedition is not likely to resolve such cases before the next election occurs.

On the facts, requesting expedition in April 2010 would not have assured completion of all judicial review before July 2, 2010, when Plaintiff's registration expired by operation of law. At most, any petitioner would have had only about 6 months from the date ORS 250.048(9) took effect to the end of the 2010 petitioning window. Moreover, every instance of suppressed core political speech is too fleeting to review. First Amendment protection for petitioning is "at its zenith." ***Meyer v. Grant***, 486 US 414, 425, 108 SCt 1886 (1988). Yet there is no possibility of obtaining judicial review so swift that the unconstitutionality of the restraint upon any particular interaction can be timely decided. From this perspective, the completion of judicial review within a few months of the filing of the complaint is hardly "likely." Review will almost always be evaded, absent ORS 14.175.

Should there be any question that the cited statutes have conferred standing and defeat mootness on that basis, the Legislature has further "deputized" persons, such as Plaintiff, to continue litigation of "constitutional magnitude" under ORS 14.175. In so doing, the Legislature followed the guidance of ***Kellas***, *supra* (that it could constitutionally confer standing to vindicate important public policy) and tasked the courts with determining on a case-by-case basis when the criteria set out by the Legislature were met to accomplish this purpose.

The Opinion does not state the basis for its *sua sponte* doubt about the constitutionality of ORS 14.175, an issue not briefed by the parties. Plaintiff posits that, whatever infirmities might otherwise exist, the statute is

constitutional at the very least to the extent it assures continuation of overbreadth challenges. Free expression cases are of the highest "constitutional magnitude," as discussed at pp. 14-35, *ante*.

The ORS 14.175 conditions were met. Plaintiff unquestionably had standing when he filed suit. The case concerns violations of Constitutional provisions protecting expressive rights. Very similar harms will result from continued enforcement by Defendant. The policy is in place, the threat remains.

The trial court erred in concluding that ORS 14.175 requires proof that the Secretary, Defendant, will seek to enforce the prohibition on volunteer circulation on Plaintiff in the future. Instead, it requires only that "the challenged policy or practice, or similar acts, are likely to evade judicial review in the future." The term "likely" refers to "evade judicial review," not to the likelihood that the challenged policy or practice will be repeated or repeated as to this Plaintiff. The plain meaning of the statute is that, <u>when</u> the challenged policy or practice is repeated in the future, it is likely <u>then</u> to evade judicial review. This is the only reading consistent with subsection (2), which refers to an act which is "capable of repetition" <u>or</u> "continues in effect." "Capable of repetition" means only that repetition is possible. Here, it is more than merely possible, because Defendant's Director of Elections stated that his office will indeed enforce her interpretation of ORS 246.048(9). The conduct capable of repetition is that <u>of the government</u>, and what Plaintiff will repeat is seeking paid circulator employment, which he intends to do and has done successfully.

Plaintiff need not show that the exact facts will arise again (same employer, same volunteer petition), only that he initially had standing (showing legislative acknowledgment that the statute is meant to apply when standing may become problematic) and that "[t]he policy or practice" challenged by the party is capable of repetition and will chill him and others. This plain language does not require that the same plaintiff prove he will be repeatedly harmed by Defendant, only that her policy (leading to complained of acts) remains in place.

The focus for assuring adversarialness is whether Defendant's conduct will continue, so that the conduct and the kind of harm will recur. Defendant by rule and in the record acknowledges she will enforce ORS 250.048(9) (OJIN Item 47) against Plaintiff and all others. Plaintiff has shown he will suffer future harm that is "capable of repetition" with his unrefuted evidence that he moved to Oregon to be near family, intends to continue to seek paid circulator employment in Oregon, and undertook concrete steps to obtain such employment (including obtaining authorization from several Chief Petitioners). He states he wishes to be able to obtain signatures on other petitions as a volunteer. See, pp. 1-4, *ante*.

ORS 14.175 does not require that a question must "always" and inevitably evade review in order for the court to retain jurisdiction--only that in the ordinary course, the issue is "*likely* to evade judicial review in the future." ORS 14.175. "Likely" to evade review is a standard employed in every case cited herein. The point of the statute (and case law doctrine) is to allow matters to be fully developed in litigation by a trial court without resorting to hasty briefing

followed by disruptive and rarely granted emergency motions for expedited review to Oregon Supreme Court.

Here, the time between the effective date of the statute and the end of the ballot measure cycle and expiration of paid petitioner registrations was just over 6 months. In any case, the registration cycle is of two years' duration at most. In practice, campaigns cannot pay circulators until many months into the 2-year cycle. It takes months of preparation, including securing 1000 valid signatures upon a prospective petition and completion of the ballot title process (ORS 250.045(1); 250.065; 250.067), subject to many months of comment and judicial review. See, Bartels Decl., ¶¶ 2-5, ER-20.

It is common knowledge that paid petitioning drives require and hire many circulators in the spring of even-numbered years, as the first-week-in-July deadline looms for petition sheet turn-in for potential qualification for that year's general election ballot.[24] Under the trial court's ruling, effectively none of the paid circulators hired in the spring of even-numbered years could challenge the constitutionality of any elections law affecting them, unless they requested and achieved circuit court and appellate finality before the first week of July of the same year, when those circulators' paid circulator registrations automatically expire under ORS 250.048(3)(c).

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24. The deadline is "four months before the election at which the proposed law or amendment to the Constitution is to be voted upon." Oregon Constitution, Article IV, § 1(2)(e). Defendant has interpreted that to mean that (for example), if the general election falls on November 5, then the deadline for submitting petition signatures is July 5.

When the Legislature adopts a rule from another jurisdiction, Oregon courts "assume that the Oregon legislature also intended to adopt the construction" given by the other jurisdictions' courts. ***Jones v. General Motors Corp.***, 325 Or 404, 408 (1997). Oregon legislators would have been aware that federal courts routinely presume that issues "evade" review, if only two years are available until they otherwise become moot. ***Southern Pacific Terminal Co. v. Interstate Commerce Commission***, 219 US 498, 515, 31 SCt 279, 283 (1911); ***In re Reporters Comm. for Freedom of the Press***, 773 F2d 1325, 1329 (DC Cir 1985); ***LaRouche v. Fowler***, 152 F3d 974, 978, 332 US App DC 25 (1998) ("This two-year mark, however, serves only as a rule-of-thumb; we did not intend it to exclude periods of slightly greater duration.")

The Legislature surely was aware that the United States Supreme Court has often considered constitutional attacks on state elections statutes. Such controversies are not mooted after each election, because the issues persist and will affect others similarly situated. Under federal law the party alleging mootness bears the "heavy burden" of demonstrating mootness. ***United States v. WT Grant Co.***, 345 US 629, 632-33, 73 SCt 894, 897-98 (1953). Cases arising under state election laws are routinely considered as "capable of repetition, yet evading review."

> The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review," [citations omitted]

Storer v. Brown, 415 US 724, 737 n8, 94 SCt 1274 (1974). *See, e.g.*, ***Norman***

v. Reed, 502 US 279, 287-88, 112 SCt 698 (1992); ***Rosario v. Rockefeller***, 410 US 752, 756 n5, 93 SCt 1245 (1973); ***Moore v. Ogilvie***, 394 US 814, 816, 89 SCt 1493 (1969).

In election cases, the United States Supreme Court has held that, although elections concluded before the issues raised during the particular cycle were decided by the courts, the challenged actions or decisions were capable of repetition yet evading review where the plaintiff made the slightest assertion about his future conduct, even through remarks made "in public." For example, the plaintiff challenging federal campaign spending limits on his own expenditures in his run for office satisfied the capable of repetition prong when he "made a public statement expressing his intent to [self-finance another bid for a House seat]," ***Davis v. FEC***, *supra*, 554 US at 736. In ***Chandler v. Miller***, 520 US 305, 313 n2, 117 SCt 1295 (1997), it was sufficient that the plaintiff "represented, as an officer of this Court, that he plans to run again." In ***First Nat'l Bank v. Bellotti***, 435 US 765, 775, 98 SCt 1407, 1415 (1978), plaintiffs satisfied the capable of repetition prong by "insisting they will continue to oppose the constitutional amendment."

Wisconsin Right to Life, *supra*, 551 US at 463, stated:

> The FEC argues that in order to prove likely recurrence of the same controversy, WRTL must establish that it will run ads in the future sharing all "the characteristics that the district court deemed legally relevant."
>
> The FEC asks for too much.

The Supreme Court held the assertion that the advocacy group intended to run "materially similar" ads in the future was sufficient. *Id.* In every instance, the

Court considered the assertions, however slight, of the plaintiff's intention to engage in the challenged conduct in the future as sufficient to show the controversy met the capable of repetition prong of the exception to mootness.

In ***Lawrence v. Blackwell***, 430 F3d 368 (6th Cir 2005), *cert den*, 547 US 1178, 126 SCt 2352 (2006), plaintiffs challenged a state law requiring independent congressional candidates for the general election to file nominating petitions with a required number of signatures before the major parties' primary election. *Id*. at 369-70. The plaintiffs were Lawrence (the congressional candidate) and a voter who wanted to vote for Lawrence. *Id.* at 370. After dismissal, plaintiffs appealed, and the State defendants argued that the controversy was moot because the election had already taken place. *Id*. The Sixth Circuit determined that the plaintiffs had "easily met" their burden of establishing the "evading review" exception to the mootness doctrine. *Id*. at 371.

> Challenges to election laws are one of the quintessential categories of cases which usually fit this prong because litigation has only a few months before the remedy sought is rendered impossible by the occurrence of the relevant election.

Id. Neither the candidate nor his supporter needed to "prove" that Lawrence would in fact run again for Congress and that the same voter would again want to vote for him.

In ***Schaefer v. Townsend***, 215 F3d 1031, 1033 (9th Cir 2000) (decided prior to adoption of ORS 14.175), a nonresident potential candidate for California office challenged the statute requiring him to reside in-state to file nomination papers. California first argued the case became moot when the

election was held, which the Court rejected. It then argued that plaintiff's challenge was not capable of repetition because he refused to declare he would run again while remaining nonresident.

> The capable-of-repetition prong should not be construed as narrowly as California suggests. See ***Dunn*** [***v. Blumstein***], 405 US [320] at 333 n2, 92 SCt 995 [1972]. In ***Dunn***, plaintiff Blumstein had been denied the right to vote because he had not resided in the state long enough to meet the durational residency requirements. See *id*. at 331, 92 SCt 995. In an action challenging the residency requirements, the Supreme Court determined that the case was not rendered moot by the fact that he had by then resided in the jurisdiction long enough to vote in the next election. See *id*. at 331-32, 92 SCt 995. The Court reasoned that "the laws in question remain on the books, and Blumstein has standing to challenge them as a member of the class of people affected by the presently written statute." *Id.* at 333 n2, 92 SCt 995. In ***Joyner v. Mofford***, 706 F2d 1523, 1527 (9th Cir 1983), we followed ***Dunn*** stating: "If [election law] cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws * * * could never reach appellate review." * * * Schaefer's challenge is capable of repetition, yet evades review and is therefore not moot.

In this case, Plaintiff fully disclosed his intentions to seek paid petitioning employment and still participate as a volunteer on other petitions. He thus fully met the test for showing the likelihood he will continue to engage in political speech in new election cycles.

See, also, ***Baldwin v. Redwood City***, 540 F2d 1360, 1365 (9th Cir 1976) (controversy was capable of repetition, yet evading review, because plaintiff testified that he wanted to engage in the challenged conduct in future elections); ***Miller v. California Pac. Med. Ctr.***, 19 F3d 449, 454 (9th Cir 1994) (to meet the second prong "the complaining party need only show that it is reasonable to expect that [it] will engage in conduct that will once again give rise to the assertedly moot dispute").

Clark v. City of Lakewood, 259 F3d 990, 1001 (9th Cir 2001) (decided prior to adoption of ORS 14.175), held that the facts that an owner's business license had expired and he had not sought renewal did not moot his constitutional claim, as his "stated intention * * * to return to business" was sufficient. *Id.* at 1012. Plaintiff goes further. He alleges his intentions and demonstrated steps he had undertaken to re-register as a paid circulator. Plaintiff urges that the legislature intended a similar and expansive meaning when it adopted similar language in ORS 14.175, and did so without reference to additional demands for proof or procedure.

Unlike a student making an "as applied" Constitutional challenge to prayers at his graduation ceremonies after he has graduated,[25] Plaintiff never "graduates" or escapes Defendant's control, so long as he wishes to exercise his Constitutional rights while being employed as a paid circulator. His stated intention to re-register as a paid circulator (and potential future threats to others' rights) satisfies the capable-of-repetition test under federal law and ORS 14.175.

Any need to re-register resulted from the operation of the election cycle. Therefore, most relevant for ORS 14.175 purposes (and to refute Defendant's argument that the case lacks justiciability for 42 USC § 1983) are the federal cases which find constitutional challenges to elections laws not mooted by the end of an elections cycle because the conduct is capable of repetition. See pages 50-53, *ante;* Opening Brief of Plaintiff to CoA, pp. 24-25, 40-41.

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25. ***Barcik v. Kubiaczyk***, 321 Or 174, 182 (1995).

Oregon legislators also had the extensive appendix containing decisional law from 49 states in the special concurring opinion of Justices Balmer and Riggs in ***Yancy*** in 2004, agreeing with the instant dismissal for mootness but questioning scope of the ***Yancy*** majority's decision. When in 2007 lawmakers adopted the "capable of repetition, yet evading review" standard in ORS 14.175, they were also well informed what the phrase meant in Oregon's pre-***Yancy*** cases, summarized in ***Oregon State Grange v. McKay***, 193 Or 627, 632-633 (1952). ORS 14.175 provides an unambiguous statutory basis for continuing adjudication of socially important claims, when the complained-of conduct persists (or the complained-of statute persists).

IV. THE COURT OF APPEALS ERRED IN FAILING TO REACH THE FEDERAL CLAIM.

This discussion relates to the federal aspect of the overbreadth and justiciability issues in the first question for review (p. 14, *ante*) and discussed at pages 14-30, *ante*. The Opinion errs in applying its interpretation of Oregon mootness to all of Plaintiff's claims, including the federal claim. It fails to apply federal mootness standards to the federal claims. To succeed in his 42 USC § 1983 claims against Defendant, Plaintiff must establish that: (1) his constitutional rights were violated and (2) the conduct that harmed him was under color of state law (not in dispute here). ***Ketchum v. Alameda County***, 811 F2d 1245 (9th Cir 1987).

"[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence" and "First Amendment standards * * * must

give the benefit of any doubt to protecting rather than stifling speech." ***Citizens United v. Federal Election Com'n***, 558 US 310, 349 (2010). Federal courts apply strict scrutiny when an election law singles out and prevents classes of individuals from circulating petitions. See, e.g., ***Buckley v. ACLF,*** *supra*, 525 US 182 (striking down exclusion of circulators not registered to vote); ***Meyer v. Grant***, *supra* (striking down exclusion of all paid circulators); ***Nevada Com'n on Ethics v. Carrigan***, 131 SCt 2343, 2351 (2011) (petition signing is "core political speech" and "an inherently expressive act"); ***Nader v. Brewer***, 531 F3d 1028, 1030 (9th Cir 2008) (striking down residency requirement for petition circulators).

We incorporate by reference the federal case authority cited in the previous section demonstrating how federal courts apply the "capable of repetition, yet evading review" exception to mootness in cases arising during elections. Applying federal precedent to Plaintiff's federal claim, required under ***Barcik***, *supra*, shows that claim remains justiciable.

> The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Matter of Citizens for Merit Selection of Judges, Inc., 1988 WL 60448, 2 (Ohio App 10 Dist 1988). Plaintiff has overbreadth standing, and Defendant's complained-of conduct remains "capable of repetition, yet evades review," as consistently construed in federal constitutional challenges to state election laws.

> [A]n Oregon court cannot apply state standards of mootness and justiciability to a section 1983 claim brought in state court if application of those standards would preclude a plaintiff's federal claim, but application of the federal standards would not.

Barcik, *supra*, 321 Or at 185. His federal claim remained justiciable under the "capable of repetition, yet avoiding review" mootness exception to state election laws challenges.

V. CONCLUSION.

Based on the record and foregoing discussion, the Court of Appeals opinion should be reversed and the case remanded to Circuit Court for further proceedings consistent with the rulings of this Court.

Dated: March 21, 2014

Respectfully Submitted,

/s/ Linda K. Williams

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Of Attorneys for Petitioner on Review Marquis Couey

CONTENTS OF REVIEW EXCERPT OF RECORD

From: Carla M CORBIN
To: DAVIS, Summer S
Date: 5/18/2010 10:30 AM
Subject: Fwd: questions re paid circulators collecting signatures asvolunteers

>>> Carla M CORBIN 11/3/2009 8:22 AM >>>
Dan

A-1. A circulator approved by this office to circulate a petition is a paid circulator whether or not he has received any pay. A paid circulator may not collect signatures as a volunteer on the same petition.

A-2. A circulator approved by this office to circulate a petition remains approved as a paid circulator until we suspend the approval. The circulator could not be a volunteer circulator.

A-3. We do not have a process for a circulator to withdraw or cancel an approval by this office to circulate. The circulator could not be a volunteer circulator.

A-4. If we did not receive approval from the chief petitioners, we would not approve the circulator to circulate the petition. Without our approval the circulator is not a paid circulator and could be a volunteer circulator.

B-1. The circulator could not be a volunteer circulator on any petition

B-2. The circulator could not be a volunteer circulator on any petition.

B-3. The circulator could not be a volunteer circulator on any petition.

B-4. The circulator could be a volunteer circulator on any petition.

Let me know if I can help further,
Carla

>>> Dan Meek <dan@meek.net> 10/30/2009 1:09 PM >>>
Sorry, but I hit send before I was finished with the questions. So please use this version. Thank you.

Say I am registered to be a paid circulator on IP XXX Am I banned from collecting signatures on a volunteer basis on IP XXX under each of these circumstances? Please answer for each circumstance separately.

1. I have not been paid anything in this election cycle for collecting signatures.

2. IP XXX has not yet qualified for the ballot, but paid signature gathering has been completed and is no longer occurring

3. I withdraw or cancel my registration as a paid circulator for IP XXX.

4. I registered to be a paid circulator for IP XXX, but the chief sponsors for IP XXX did not approve my registration.

Say I am registered to be a paid circulator on IP XXX Am I banned from collecting signatures on a volunteer basis on IPs _other than IP XXX_ under each of these circumstances? Please answer for each circumstance separately.

1. I have not been paid anything in this election cycle for collecting signatures.

2. IP XXX has already qualified for the ballot.

3. IP XXX has not yet qualified for the ballot, but paid signature gathering has been completed and is no longer occurring

4. I withdraw or cancel my registration as a paid circulator for IP XXX.

5. I registered to be a paid circulator for IP XXX, but the chief sponsors for IP XXX did not approve my registration.

Thank you.
--

Dan Meek
10949 S.W. 4th Ave
Portland, OR 97219
503-293-9021 phone
503-293-9099 fax
dan@meek.net

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

MARQUIS COUEY, an individual, **Plaintiff,** **v.** **KATE BROWN, in her official capacity as Secretary of State for the State of Oregon,** **Defendant.**	**Case No.10C 14484** **PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** **The Hon. Claudia Burton** **Hearing** **February 23, 2011** **3:00 pm**

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III. PLAINTIFF'S CONCISE STATEMENT OF FACTS.

A. FACTS ABOUT PLAINTIFF AND HIS EFFORTS TO SUPPORT HEALTHY FORESTS INITIATIVE.

Plaintiff is a young man now living in Oregon to be near his sister's family. He is interested in politics, especially in the initiative process. Couey Decl. ¶ 5. He has supported himself through a combination of part-time and flexible time jobs in the service sector, as a musician, and as a registered paid circulator. Couey Depo. pp. 10, 11; Ex. 1, Declaration of Linda Williams ("Williams Decl."); Couey Decl. ¶¶ 3-4. He did not work consistently "full-time" as a petitioner but found the work satisfying and easy to do in combination with other part-time employment. *Id.* He wished to circulate another petition, IP 42 ("Healthy Forests"), solely on a volunteer basis Couey Depo. 58:3-12, Ex. 1, Williams Decl.; Couey Decl. ¶¶ 5-6.

His employer did not prohibit this volunteer activity, but the employment contract required Plaintiff to "follow the laws of Oregon." Ex. 20, Williams Decl. He sought guidance from his supervisor on the paid petition campaign, Kyle Locasio. [Couey Depo. 52:1-3; Ex. 1, Williams Decl.; Locasio Decl. ¶ 6], lawyers advising the Chief Petitioners on IP 28 [Couey Depo. 52:12-22, Ex. 1 Williams Decl.], and (through counsel) from staff of the Elections Division of the Secretary of State. Couey Depo. 54:13-25. *Id.*

Plaintiff intends to register again to be paid as a circulator in the current cycle and has taken some preliminary steps. Couey Decl. ¶ 15.

B. DEFENDANT CHILLED EXPRESSION.

Director Trout testified that a petitioner "presenting" a petition for "obtaining" a signature on a petition requires verbal or nonverbal communication by the petitioner and the voter. Trout Depo. 33:11-25, 34:1-5; Ex. 2, Williams Decl.

Defendant may impose monetary penalties of up to $10,000 upon Plaintiff [ORS 260.995(2)(c)] and bar him from being a paid circulator for 5 years after a violation is found [ORS 250.048(4)(b)]; impose monetary penalties on the Chief Petitioners for ballot measure campaigns using signatures collected by Plaintiff; and disallow all signatures of electors collected by Plaintiff while in violation of ORS 250.048(9) from the signatures necessary to achieve ballot access for each measure submitting signatures collected by Plaintiff. ORS 250.048(5) and (9).

Defendant concedes that the Plaintiff acted reasonably in seeking clarification about enforcement of the statute. Director Trout testified that, without a rule in place, "It would be a safe thing to do" to "call the Elections Division for advice." [Trout Depo. 56:18-19; Ex. 2, Williams Decl.] so the petitioner "could comply with the law."Trout Depo. 56:22-25; *Id.* Compliance Specialist 3 Summer Davis testified at deposition that a paid circulator wanting to circulate an unpaid petition should seek advice: "They don't have to seek our advice first, but I would say that it would be prudent." Davis Depo. 30:19-20; Ex. 3, Williams Decl.

Plaintiff could not learn from Defendant what conduct or expression Defendant would prosecute and was afraid to risk the penalties.

> I am often at social gatherings, or playing 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 I could not get an answer as to what volunteer work might get me in trouble with the Elections Division or cause problems for the Chief Petitioners who had acknowledged me as a paid petitioner. My crew leader was not sure.
>
> Attorneys Dan Meek and Linda Williams sent a number of questions to the Secretary of State about what limits there were on any volunteer petitioning in the spring of 2010, but they did not get an answer and I still didn't know for sure what the law was.

Couey Decl. ¶¶ 7-8.

> He did not circulate IP 42 at all because of Defendant's conduct. Couey Decl. ¶ 11.
>
> IP 42 did not qualify for the ballot. If I had been able to collect signatures, maybe it could have made it, or at least the Chief Petitioners would have reached

> more people and gotten more support as they keep trying to raise environmental issues with the public."

Couey Decl. ¶ 12.

Defendant argues that ORS 250.048(9) was never "enforced." RMSSJ, p. 14. If Defendant had told Plaintiff he could collect signatures as a volunteer whenever he wanted to because the statute was not "enforced," he would have obtained signatures on IP 42.

> If the Elections Division had told me or the attorneys or made an announcement that it was not going to enforce ORS 250.048(9) because it went in effect in the middle of a petitioning cycle, I would have circulated IP 42 in the spring of 2010 without worries of being prosecuted.

Couey Decl. ¶ 9. But Defendant most certainly did not tell that to Plaintiff, despite his numerous inquiries.

Obtaining signatures on initiative potations involves speech, consultation and small and large assemblies, regardless of whether a proposed measure qualifies for the ballot, or fails at an election. Marbet Decl. ¶¶ 1-18 describes initiative campaigns and calls for change which succeeded in altering public perception and regulatory conduct, while falling short of passing on the ballot.

IV. UNDISPUTED FACTS.

Circulators who will be paid to obtain signatures on a petition or prospective petition must register with Defendant. A Chief Petitioner must acknowledge liability for violations of law or rule committed by a circulator obtaining paid signatures on a petition or prospective petition, including violations of ORS 250.048(9).

Paid petitioners in Oregon may lawfully and do carry multiple petitions for pay and seek to obtain signatures on them at the same. Diskin Decl. ¶¶ 20-21. Employers of paid petitioners in Oregon do not ban paid employees from carrying volunteer petitions. Diskin Decl. ¶ 13; Locasio Decl., Ex.1. Carrying multiple petitions is often encouraged by

employers (or not forbidden) as it increases efficiency in obtaining signatures on all petitions by allowing different synergistic communications with voters on several topics and reducing the need to make the same inquiries about a signer's current voter registration status. Diskin Decl. ¶¶ 15-19; Agazarm Decl. ¶¶ 11-13.

Carrying several petitions for which he was paid at the same time did not inhibit the total number of signatures Plaintiff obtained on each petition, which was dependent on the location and size of crowds addressed by Plaintiff. Couey Depo. 61:3-17; Ex. 1, Williams Decl.

Paid signature gathering campaigns are currently subject to multiple layers of scrutiny by the Secretary of State, Attorney General and Bureau of Labor and Industries. See Appendix and discussion for statutes and rules setting forth duties, liabilities and penalties. Diskin Decl. ¶¶ 24-33.

The Elections Division has 3 full time investigators on staff for investigation of petitioning activities. Trout Depo. 71:21-26, 72:14-17; Ex. 2, Williams Decl. It has employed up to 10 contract investigators to do covert and overt observations of petitioning activities. "Elections Division Signature Gathering Investigation Pilot Project," Ex. 4. at p. 4, Williams Decl.

Those who employ paid circulators are vigilant in policing for violations of the law and are responsible for the investigations and indictments of the great majority of cases of misconduct. Diskin Decl. ¶¶ 38-39; Agazarm Decl. ¶¶ 8, 18-24, 25-27; Marbet Decl. ¶ 33; Corbin Decl. ¶ 5 (a)-(c), (g)-(h), (j)-(f).

There is no evidence that any Chief Petitioner has been convicted of conspiring with a petitioner to commit a violation of election laws through illegal payments.

There is no evidence of anyone ever conspiring with a registered circulator to secretly pay that individual to obtain signatures on another petition and not report such payments.

Director Trout testified that a paid petitioner would have to keep extremely detailed time records to "prove" he had obtained signatures on a volunteer petition during some time off from paid employment. Trout Depo. 38:25, 39:1-12. 40:1-25; Ex. 2, Williams Decl.[6]

Counsel asked Director Trout, what in his opinion was the point of a rule which would allow paid circulators to obtain signatures for 5 minutes as an unpaid circulator so long as their employer maintained, within his payroll records, very detailed time records for each circulator.

> Q. * * *. What are investigators looking for?
>
> A. Well, I think just the ability to track what the circulator is doing and who they are representing. You know, I think that's the objective of the--of the law. How successful it is, I don't think it will be very successful.

Trout Depo. 51:8-16, *Id.*

The Secretary issued "Changes to Oregon Initiative, Referendum and Recall Laws," dated July 1, 2009 [Ex. 5 at p. 1, Williams Decl.] alerting the public of new election laws.

> A registered circulator 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. In practical terms, at any given time a paid petitioner may only carry petitions for which they are being paid or only carry petitions for which they are not being paid.

6.Q. Do the payroll records indicate the exact hours of employment?

A. [Trout] They should.

Q. The payroll records should indicate 9:00 to 9:30, take a break for ten minutes * * *?

A. [Trout] Well, that's -- that's left up to the circulators. But I think it's incumbent on them, to prevent a violation of [ORS 250.048] sub nine here, to be able to keep those records. And that -- that is really how we are going to administer this via rule going forward.

The duration of "any given time" and the new word "carry"--a term not used in the statute--remained unclear. Undersigned counsel sent an inquiry dated October 30, 2009, including (among other questions) the following questions about ORS 250.048(9):

> Say I am registered to be a paid circulator on IP XXX. Am I banned from collecting signatures on a volunteer basis on IPs other than IP XXX under each of these circumstances? Please answer for each circumstance separately.
>
> 1. I have not been paid anything in this election cycle for collecting signatures. * * * [followed by 4 more specific examples].

The complete email exchange is included with Defendant's filing, Declaration of Stephen Trout (September 15, 2010) (Trout Decl.), Ex. 1. Ms Corbin's responses were that a paid circulator could never circulate a volunteer petition at any time his registration was in effect. *Id.* A year later, Defendant now concedes Corbin's response was wrong. Trout Decl. p. 7, ll. 7-10.

> Undersigned counsel tried again by email in February 2010 to clarify the law.
>
> Does the prohibition against circulating a volunteer petition "at any time" a person is registered and paid as a circulator prohibit that person from circulating a different petition as a volunteer on the person's days off (or other personal time) when the volunteer is not carrying the petition or prospective petitions for which he or she is a paid circulator?

Trout Decl. Ex. 2.

> Compliance Officer 3, Summer Davis responded:
>
> No. At the same time, means literally at the same time. The example that was provided during testimony, if it helps, is that a circulator may not have on the same clipboard a sheet for which they are a volunteer and a sheet that they are being paid to circulate. They need to be separate and distinct activities.

Id. Undersigned made further inquiries on February 8, 2010 [included at Trout Decl. Ex. 3], to which Ms Davis answered as shown in italics:

> 1. Is it correct that the Elections Division is interpreting the phrase "at the same time" as it appears in ORS 250.048(9) exclusively as a prohibition upon a person who is registered (and approved by a chief petitioner) as a paid circulator from

> also carrying another statewide initiative petition (or prospective petition) as an unpaid volunteer on the same clipboard? *NO*
>
> 2. If not, what other factual circumstances would amount to a violation of ORS 250.048(9)? For example:
>
> [a] The person sits at a table and has 2 different clipboards before her: one with the paid petition for which she is registered and one with only the petition for which she volunteers. She answers questions about either one as voters approach and inquire and decide to sign one or the other or both petitions. *PROHIBITED*
>
> [b] Same as (a) but the person carries 2 different clipboards as she walks about. *PROHIBITED*
>
> [c] The person carries the volunteer petition in her backpack while circulating the paid petition for which she is registered. A voter asks her whether she knows who is circulating the other (volunteer) petition, so she reaches into her backpack and the voter signs the volunteer petition resting on the "same" clipboard. *PROHIBITED*

Since Defendant intended to enforce the ORS 250.048(9) as a strict liability violation when a paid circulator was near a paid petition and a volunteer petition, counsel tried to determine how long <u>after</u> "obtaining" signatures on a paid petition one could begin to obtain signatures on a volunteer petition.

> Thank you for your fast response on my earlier email on this topic. Your answers give rise to more questions, as you might imagine. The critical question is the meaning of "at the same time." In my last e-mail exchange I provided hypothetical situations (2a, 2b, 2c), where the circulator was in close physical proximity to the unpaid, volunteer petition while she was circulating a petition as a paid (registered) circulator, and you responded that each of those situations would be a violation of ORS 250.048(9).
>
> Perhaps my questions should have focused more clearly on the nearness in time aspect of "at the same time" in addition to the physical nearness of the petitions in the examples (which included petitions on the same table or simultaneously in the physical possession of the same person).
>
> To clarify what "at the same time" means, would the Secretary of State find a violation of ORS 250.048(9) in any of these circumstances, assuming for each example that (1) the circulator is and remains registered as a paid circulator for one petition at all time intervals mentioned and (2) she circulates one only petition (as described) during each time interval ("circulate" means having the petition on her person in the sense of "carrying" the petition).
>
> * * *

> 4. The person circulates only the paid petition for an hour and then only the unpaid petition for the next hour.
>
> * * *
>
> Obviously, a line must be drawn somewhere, and circulators are wondering where the line is.

Trout Decl. Ex. 4. Defendant responded by declining to answer any further inquiries, including the foregoing questions about how close in time volunteer petitioning could occur before or after paid work.

> I can only reiterate that circulators are prohibited from circulating a petition for which they are receiving compensation at the same time as they are circulating a petition for which they are volunteering their services.
>
> If the circulators you represent encounter specific situations that they believe may violate the law, they are welcome to contact me directly for guidance on how the specific situation that they are in should be handled.

Id. Director Trout then insisted everyone with questions first describe to a staff person in greater (but undefined) detail what his planned volunteer petitioning activities would be each time he hoped to circulate a petition as a volunteer. He did not instruct Ms Davis what more "specific" information to request of those seeking guidance. Davis Depo. 30:21-24; Ex. 3, Williams Decl. Ms Davis testified about the questions for which she would demand answers but could not explain the relevance of any of them.

> A. [Davis] I would need to know that the circulator is being paid, number one, who is the circulator, who are they working for, what kind of background information do they have, how many petitions are they being circulated for. I would try to get as much information as I can about this -- the person and the situation that they're in before answering.
>
> Q. * * * How would that influence what they could do as a volunteer, in your mind?
>
> A. [Davis] It wouldn't. It would just provide me more information because we don't typically answer questions blindly without trying to get as much information as possible.

* * *

Q. * * * Are you saying in order to answer a question about whether a circulator can circulate a petition as an unpaid volunteer, you have to know who the circulator is working for and how many hours they work as a paid circulator?

A. [Davis] No, that's not what I'm saying. I'm saying I would ask those questions.

Davis Depo. 28 15-15, 29:1-25, 30:1-10; Ex. 3, Williams Decl.

Director Trout instructed staff to stop answering questions about ORS 250.048(9).

Q. -- at some point you told Ms. Davis to stop answering questions. Correct?

A. [Trout] I told her that when we got down to the point of, you know, what if they did it every minute, what if they did it every 30 seconds, whatever those scenarios were, that -- that we weren't going to -- we weren't going to go down that road, and that we would -- you know, it was clear that we were going to need to come up with some direct communication with you.

Q. Well, would the rulemaking have been the most efficient way of informing everyone in the public about what the positions were on the scenarios?

A. [Trout] We discussed whether we should do it at that time; and that's when we decided that because of all the circulation going on, that we would not want to change the rules midstream, and that we would -- we would wait until the completion of the -- of the petition cycle.

Trout Depo. 60:5-25; Ex. 2, Williams Decl. Thus, Defendant decided not to adopt any clarifying rules until after the end of the 2010 petitioning cycle.

Director Trout could not explain what additional information was needed from those inquiring about ORS 250.048(9).

Q. And how much more specific were you desiring that the questions be?

A. Well, just as has happened today: Depending on the circumstances of the scenarios can dictate whether the -- whether the answer is yes or no. A lot of it's definitional, and what you would, you know, define as maybe a different word that I would define, just as we discussed, with respect to obtaining and presenting. And so, you know, once we get into that level of detail, my counsel to staff is that we need to

> actually talk about a real scenario, a real fact pattern, in order to be able to give a -- and be able -- in order to give an answer.

Trout Depo. 62:7-20; *Id.*

> Q. You've referenced the questions that were posed by Mr. Meek or by myself, to Ms. Davis, and your advice to her to stop answering the questions. What, in your opinion, was not real enough about the questions and scenarios that were presented?
>
> A. Well, as I said before, it was clear that we were not going to get to a position that satisfied your answers, because it just kept getting, you know, 'Well, if it's not to the hour, is it to the half a day? Is it to the half hour? Is it to the minute?' And so, you know, at that point, it looked like pre-discovery to me and it was more of legal trolling rather than actually trying to help someone. And so since I sensed that there was potential litigation, that's when I asked her to stop.

Trout Depo. 66:23-25, 67:1-16; *Id.* Thus, Director Trout failed to state what about the previous questions had been "unreal" or what factors a question would need to address in order to be considered "real." Defendant's failure to adopt a rule or to answer the questions posed arbitrarily chilled Plaintiff.

The rule that Defendant adopted in November 2010 provides very little more "specificity" than existed in early March 2010, when Director Trout instructed staff to not answer any questions.

> 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.

OAR 165-014-0285. Plaintiff has reviewed the rule. While he does not agree that the rule is constitutional, if Defendant had told him he could collect signatures as a volunteer on days or weeks he was not paid at all for his paid petition (as those questions were presented in February), Plaintiff would have obtained signatures on IP 42 on those days for which he was not working at all and had submitted no time records for his paid petitioning.

> them down, unless the historical record demonstrated clearly that the framers meant something other than what they said. * * *. [T]he protection extends to the kinds of expression that a majority of citizens in many communities would dislike--profanity, blasphemy, pornography--and even to physical acts, such as nude dancing or other explicit sexual conduct, that have an expressive component. Thus, we have little trouble in concluding that the people who framed and adopted Article I, section 8, as part of the original Oregon Constitution intended to prohibit broadly any laws directed at restraining verbal or nonverbal expression of ideas of any kind.

Obtaining a valid signature of a registered voter requires face-to-face communication of ideas in word and deed. No one can lawfully obtain signatures on an initiative petition in Oregon without communicating the terms of the measure and receiving information required by law from the potential signor. The actual petition sheet itself communicates that predicate official acts have already taken place: (1) the Secretary of State has determined that the subject and text has had an initial showing of sufficient support from at least 1000 other electors, and (2) the ballot title has been prepared and reviewed by elected officials. The circulator has state-imposed duties to inquire whether a person is registered to vote. ORS 250.045(10)(b); 250.042. "Obtaining a signature" requires a personal expressive act by the voter also protected under Article I, § 8, and directed to the circulator (expressed through writing a signature). The circulator must then attest in writing on each petition sheet that she has in fact ascertained through some interaction that the signer is a registered voter elector, and communicates to the government that the voter signed in her presence.

Director Trout testified that a petitioner "presenting" a petition for "obtaining" a signature on a petition requires verbal or nonverbal "invitation" by the petitioner to the voter. That <u>invitation</u> would violate the statute, according to Director Trout:

> Q. * * * Suppose you have a person who is a registered paid circulator, they're sitting at a table; and on the table, at different ends of the table but within the line of sight, there are two different clipboards so that she can observe the voter signing in her presence. On one clipboard, there's exclusively the petition for which she is registered and being paid; and on the other clipboard, there's only the petition for which

she volunteers. If someone asks a question about either, she'll answer them, but she doesn't have them in her physical possession and they're not next to each other. Is that in violation -- Is that conduct in violation of ORS 250.048(9)?

A. [Trout] Yes.

Q. And why is that?

A. [Trout] Because they had both been presented -- They are both being presented, inviting people to sign them.

Trout Depo. 30:19-25, 31:1-15; Ex. 2, Williams Decl.

Q. How about a scenario where a person * * * keeps one clipboard, which contains only the volunteer petition, in her backpack, while she carries in her hand the paid petition for which she is registered. A voter asks her if she knows anyone who is circulating the volunteer petition, because they'd like to sign. She reaches into her backpack and pulls out the volunteer petition for the voter to sign. Is that circulator, volunteer circulator, in violation of ORS 250.048(9)?

A. [Trout] Yes. She is trying to obtain signatures. Even-- Even though it was in her backpack, she is now presenting it to the voter.

Q. But she's not presenting it at the same time as she's presenting anything else. The voter asked her about it.

Trout Depo. 33:11-25, 34:1-5; *Id.*

[colloquy by attorneys]

A. [Trout] So they've seen the first one, and now they're seeing the second one come out of the backpack. That's two at the same time, which is prohibited.

Trout Depo. 34:18-22; *Id.*

Q. Okay. And, in your experience, would that attempt involve verbal communication by the petitioner to the elector?

A. [Trout] Oftentimes. But it could also be done, you know, by showing the volunteer or the paid petition, whichever one was in question.

* * *.

Q. * * * Without words?

> A. [Trout] To show the petition there that says -- you know, to me, "present," that you put it up there in front of them, pointing to where to sign.

Trout Depo. 25:2-15; *Id.*

Plaintiff described his approach to obtaining signatures as a series of interactions, sometimes with large groups at "a festival, Saturday Market," or with individual voters. Couey Depo. 61:10-11; Ex. 1, Williams Decl.

> Q. Can you describe how you engage voters when you approach them?
>
> Q. * * * I'll immediately, you know, yell out to a crowd of people, "Hello, everybody. I'm collecting -- I have Initiative 28 here." I'll describe it to them. And or the first thing I'll ask is if they're registered to vote. If I approach the situation before, or if I approach the whole thing, I guess the situation, addressing what initiative I have, and they say they want to sign it, then I ask them if they're registered to vote before they make a signature.
>
> So I either ask "hello," you know, "are you a registered voter in Oregon," and they might say "yes," and I'll tell them I have this initiative. Or I'll go like, "Hello, sir, I have this initiative here. Would you like to sign?" And if they say yes or no, then I ask them if they're a registered voter before they sign.
>
> Q. And when you're circulating I-28, do you mention specific issues when you approach people?
>
> * * *
>
> A. Yeah. Well, I'll be like, "I have Initiative 28. This allows another license allowing medical marijuana dispensaries here in Oregon. Also allowing for medical clients to apply for research."
>
> * * *
>
> A. And then if they ask me questions, then I'll get really, really into detail, so --

Couey Depo. 58:15-25, 59:1-18; Ex. 2, Williams Decl.

A law which stops anyone from soliciting expressions of political support or responding to solicitations violates Article I, § 8. ***Leppanen***, *supra*. For example, Gulf War protestors

CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP 5.05

Length of Opening Brief on Merits

I certify that (1) the foregoing Opening Brief on Merits complies with the word-count limitation of ORAP 5.05(2)(b)(i) and (2) the word count of this Opening Brief on Merits for elements of text described in ORAP 5.05(2)(a) is 13,992 words as determined by the word-counting function of Wordperfect 5.1.

Type Size

I certify that the size of the type in this Opening Brief on Merits is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: March 21, 2014

/s/ Linda K. Williams

Linda K. Williams

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing OPENING BRIEF ON MERITS BY PLAINTIFF-APPELLANT, PETITIONER ON REVIEW MARQUIS COUEY by Efile on the other parties listed in No. S061650, as listed below. I also SERVED it by emailing a true copy to each email address listed below.

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