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14 Property Political Action Committee

15

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF OREGON

18 DEAN GRUDZINSKI, O. KEITH CYRUS,
19 DAVID OLSON and STOP TAKING OUR
20 PROPERTY POLITICAL ACTION
21 COMMITTEE, an Oregon non-profit political
22 action committee,

23 Plaintiffs,
24 v.

Case No. CV-6195-HO

25 BILL BRADBURY, in his official capacity as
26 the Secretary of State of Oregon, TAMARA J.
GREEN, in her official capacity as Baker
County Clerk, JAMES MORALES, in his
official capacity as Manager of
Records/Elections, Benton County, SHELLY
CLARK, in her official capacity as Clackamas
County Clerk, Elections Division, NICOLE
WILLIAMS, in her official capacity as
Clatsop County Clerk, ELIZABETH HUSER,
in her official capacity as Columbia County
Clerk, TERRI TURI, in her official capacity as
Coos County Clerk, DEANNA BERMAN, in
her official capacity as Crook County Clerk,
RENEE KOLEN, in her official capacity as
Curry County Clerk, NANCY
BLANKENSHIP, in her official capacity as
Deschutes County Clerk, BARBARA
NIELSEN, in her official capacity as Douglas
County Clerk, RENA KENNEDY, in her

**MEMORANDUM OF LAW IN
SUPPORT OF APPLICATION
FOR TEMPORARY
RESTRAINING ORDER AND
MOTION FOR PRELIMINARY
INJUNCTION**

1 official capacity as Gilliam County Clerk,
KATHY MCKINNON, in her official capacity
2 as Grant County Clerk, MARIA ITURRIAGA,
in her official capacity as Harney County
3 Clerk, SANDRA BERRY, in her official
capacity as Director, Resords/Assessment,
4 Hood River County, KATHY BECKET, in
her official capacity as Jackson County Clerk,
5 KATHY MARSTON, in her official capacity
as Jefferson County Clerk, GEORGETTE
6 BROWN, in her official capacity as Josephine
County Clerk, LINDA SMITH, in her official
7 capacity as Klamath County Clerk, STACIE
GEANEY, in her official capacity as Lake
8 County Clerk, ANNETTE NEWINGHAM, in
her official capacity as Chief Deputy County
9 Clerk for Lane County, DANA JENKINS, in
her official capacity as Lincoln County Clerk,
10 STEVEN DRUCKENMILLER, in his official
capacity as Linn County Clerk, DEBORAH R.
11 DELONG, in her official capacity as Malheur
County Clerk, BILL BURGESS, in his official
12 capacity as Marion County Clerk, BOBBI
CHILDERS, in her official capacity as
13 Morrow County Clerk, JOHN
KAUFFMANN, in his official capacity as
14 Director of Elections for Multnomah County,
VALERIE UNGER, in her official capacity as
15 Polk County Clerk, LINDA CORNIE, in her
official capacity as Sherman County Clerk,
16 TASSI O'NEIL, in her official capacity as
Tillamook County Clerk, PATTI CHAPMAN,
17 in her official capacity as Director of
Elections, Umatilla County, ROBIN
18 CHURCH, in her official capacity as Union
County Clerk, DANA ROBERTS, in her
19 official capacity as Wallowa County Clerk,
KAREN LEBRETON COATS, in her official
20 capacity as Wasco County Clerk, MICKIE
KAWAI, in her official capacity as Manager
21 of the Elections Division of Washington
County, BARBARA S. SITTON, in her
22 official capacity as Wheeler County Clerk,
JAN COLEMAN, in her official capacity as
23 Yamhill County Clerk

24 Defendants.

25

26

Case No. CV-6195-HO

**MEMORANDUM OF LAW IN
SUPPORT OF APPLICATION
FOR TEMPORARY
RESTRAINING ORDER AND
MOTION FOR PRELIMINARY
INJUNCTION**

(Caption continued from previous
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1 **I. INTRODUCTION**

2 **A. The Case**

3 This is an action to strike down the State of Oregon’s extraordinary and virtually
4 unprecedented effort to avoid the very laws put in place to ensure a fair election by guaranteeing
5 that ballot titles and explanatory statements are fair, unbiased and presented in a way that the
6 voters know what they are actually voting on.

7 The root of this action is an unusual piece of legislation, House Bill 2640 (2007) (herein
8 “HB 2640”). The Oregon Legislature (herein “Legislature”) adopted HB 2640 intending: (1) to
9 prevent, foreclose and eliminate public input on the ballot title, explanatory statement and
10 financial impact statement for Ballot Measure 49 (2007) (herein “Measure 49”); (2) to avoid
11 judicial review of the ballot title, explanatory statement and financial impact statement for
12 Measure 49 that will be submitted to the electors, (3) to allow the Defendants to publish ballots
13 and voter’s pamphlets with a ballot title, explanatory statement and financial impact statement
14 that does not accurately describe Measure 49 but is instead a description of Measure 49 based on
15 polling results; and (4) to persuade voters to vote for Measure 49 based upon the inaccurate and
16 misleading ballot title, explanatory statement and financial impact statement.

17 The Court’s involvement at this stage of the process is appropriate because elections are
18 fundamental to our constitutional form of government. It is vital to that process that voters know
19 what they are voting on. The presentation of a misleading ballot title, explanatory statement and
20 financial impact statement at the crucial moment when a voter is making her decision on how to
21 vote, using an extraordinary process by which the State of Oregon blocked all the usual avenues
22 of public input on the ballot title, explanatory statement and financial impact statement in order
23 to gut a prior ballot measure the State doesn’t like, undermines the rights of Oregon citizens to
24 have fair and accurate ballot titles, explanatory statements and financial impact statements

1 (herein “Ballot Language” for Measure 49 specifically, “ballot language” generally) for ballot
2 measures they are asked to vote upon.¹

3 The misleading Ballot Language specifically impacts the voters’ right to know what they
4 are voting on; the voters deserve to know that the measure they are voting on does not “give”
5 rights, but is instead an attempt to diminish rights restored by a previous ballot measure approved
6 by 61% of the voters. As former Oregon Governor John A. Kitzhaber stated when he vetoed a
7 similar effort by the Legislature to do what HB 2640 does here:

8 Oregon voters deserve a fair and objective description of the effects of proposed
9 ballot measures. Anything less undermines our rights as citizens. The proper
10 place to make this determination is in a court of law, removed from the influences
of the political process.

11 See Veto Message of Governor John A. Kitzhaber for Senate Bill 1120 (1995), *Oregon Senate*
12 *Journal*, p. SJ-198 (1995) (attached as Exhibit A to the Affidavit of Timothy Beau Ellis).

13 When extraordinary steps are taken, like the steps mandated by HB 2640, to avoid the
14 customary avenues for drafting ballot language and squelch all the usual channels for public and
15 court input into the drafting of ballot language for a ballot measure intended to eviscerate a
16 previous measure overwhelmingly supported by the voters (but detested by the government),
17 close scrutiny by the courts is warranted to insure that the law granting, adopting and using such
18 a misleading and unusual process meets constitutional requirements meant to insure the
19 fundamental right of a fair election process. *See Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S.
20 533 (2001) (invalidating a statute that limited arguments an attorney could make on behalf of
21 indigent welfare clients). In that case, the Court stated that

22 We must be vigilant when Congress imposes rules and conditions which in effect
23 insulate its own laws from legitimate judicial challenge. Where private speech is
24 involved, [regulations] cannot be aimed at the suppression of ideas thought
inimical to the Government’s own interest.

25 ¹ It should be noted that the two page Measure 37 that the 24 page Measure 49 “modifies” or guts, was put on the ballot
26 only after public input and processes were followed to insure it had a fair ballot title, question and summary. While 61%
of the voters approved Measure 37, governmental entities strongly dislike it. HB 2640 is an example of the lengths to
which the State will go to stack the cards in favor of a measure that guts Measure 37.

1 *Id.* at 548-549.

2 **B. The Extraordinary Lengths the State of Oregon Has Gone to Mislead the**
3 **Public about Measure 49**

4 The Legislature created procedures for electors to petition the Oregon Supreme Court to
5 insure that Ballot Language printed in voter’s pamphlets and on ballots are simple and impartial.²

6 In the last legislative session, the Legislature adopted House Bill 3540 (enrolled) (herein
7 “Measure 49”), a highly controversial statutory scheme designed to displace Ballot Measure 37
8 (2004)(herein “Measure 37”). Measure 37 restored the rights Oregon property owners had at the
9 time they acquired their property. Measure 37 requires a property owner to file a claim with state
10 and local governments for just compensation when land use restrictions lower the fair market
11 value of their property. After filing a Measure 37 claim, the government then has the option of
12 either compensating the property owner for the lost market value, or restoring the rights that gave
13 rise to the compensation claim in the first place.

14 During the very last days of the 2007 legislative session, the Legislature took the
15 extraordinary step of passing HB 2640, which circumvented the usual process for drafting the
16 Ballot Language for Measure 49, and commanded the Secretary of State to use ballot titles and
17 other statements written based on polling results, not based upon the actual text of HB 3540.

18 Under HB 2640, the Legislature specifically exempted Measure 49’s Ballot Language
19 from the normal procedures the Legislature created that allow electors to challenge the
20 impartiality of those elements of a measure’s ballot language.³ Plaintiffs were prohibited from
21 challenging Measure 49’s Ballot Language under Oregon’s customary review procedures because
22 the Legislature knows and understands the Ballot Language for Measure 49 is unduly biased and
23 does not attempt to present an evenhanded, accurate and impartial assessment of the effect

24 _____
25 ² See Or. Rev. Stat. § 250.085 (2005) (procedure for elector dissatisfied with title of state measure); Or. Rev. Stat. §
25 250.131 (court review of procedures under which estimates and statements of financial impact of state measure were
prepared); Or. Rev. Stat. § 251.235 (Supreme Court review of explanatory statement).

26 ³ It is worthy to note that the ballot language for Measure 37 (Or. Rev. Stat. § 197.352) was subject to the review
procedures in Or. Rev. Stat. §§ 250 and 251.

1 Measure 49 will have if passed. In exempting Measure 49's Ballot Language, the Legislature left
2 Oregon citizens without a means to challenge the impartiality or accuracy of Measure 49's Ballot
3 Language.

4 What the Court has before it in this case is the powers-that-be using their authority to
5 silence the usual avenues open to challenging and opposing ballot language that will be presented
6 to the voters. The Legislature did not provide an impartial reason for exempting Measure 49's
7 Ballot Language from the review procedures in the Senate Staff Summary for HB 2640. See
8 Affidavit of Senator Larry George, ¶13.

9 From these facts, the only conclusion that can be drawn is that HB 2640 keeps Plaintiffs
10 out of court because the Legislature does not want the Plaintiffs to challenge the sufficiency of
11 Measure 49's Ballot Language because the Legislature knows the Ballot Language will never
12 pass muster. In fact, as will be described more fully below, a prospective petition was submitted
13 to the Secretary of State on a measure identical to Measure 49. When a commenter suggested the
14 Oregon Attorney General use the ballot title drafted by the Legislature for Measure 49, the
15 Attorney General stated:

16 A ballot title is not intended as an advocacy piece for or against a ballot measure,
17 nor is it intended to tell a voter why he or she should vote for a measure. Rather,
the ballot title must describe the proposal in neutral terms.

18 See Affidavit of Ross Day, ¶9, Ex. F.

19 The offending provisions of HB 2640 implicate Plaintiffs' fundamental rights under the
20 Due Process Clause and Equal Protection Clause of the 14th Amendment, and the Petition Clause
21 of the First Amendment because the Legislature's Ballot Language is patently unfair and
22 misleading and forecloses an avenue in the courts prevents the Plaintiffs from being able to
23 petition the government for redress of their grievances. All ballot language must comply with the
24 standards in Or. Rev. Stat. §§ 250 and 251, that is, except Measure 49's Ballot Language. The
25 citizens of Oregon have come to rely upon the accuracy and fairness of Ballot Language, and
26 they expect Ballot Language to go through a thorough review. Excepting Measure 49's Ballot

1 Language from this review violates the people’s command to the Legislature to submit laws to
2 the people in a manner not inconsistent with the Oregon Constitution. Or. Const. Art. IV,
3 §1.(4)(c). The Legislature has not been granted the power by the people to entertain such an
4 extraordinary proposition as to prevent thorough review of Measure 49’s Ballot Language.

5 HB 2640 silences Measure 49’s opponents opportunity to insure that fair ballot language
6 appear at the crucial moment of voting. HB 2640 prohibits the Oregon Supreme Court from
7 playing its usual role to review such ballot language. It can only be concluded that the
8 Legislature passed HB 2640 to place biased ballot language in front of the people to sway the
9 voters into replacing Measure 37 HB 2640 affects Plaintiffs’ right to redress its grievances; it
10 silences them on a political issue; it gives unequal treatment to Measure 49 proponents; it’s an
11 improper use of legislative power; and it results in an unfair election. To voice their objections
12 and at least try to secure an evenhanded election, Plaintiffs must have access to the process
13 created to challenge the fairness of Measure 49’s Ballot Language.

14 **C. The Remedy**

15 Pursuant to FRCP 65, Plaintiffs ask this Court for a Temporary Restraining Order and an
16 Order to Show Cause Why Preliminary Injunction Should Not Issue against Defendant Bill
17 Bradbury and Defendants Green, Morales, Clark, Williams, Huser, Turi, Berman, Kolen,
18 Blankenship, Nielsen, Kennedy, McKinnon, Iturriaga, Berry, Becket, Marston, Brown, Smith,
19 Geaney, Newingham, Jenkins, Druckenmiller, Delong, Burgess, Childers, Kaufmann, Unger,
20 Cornie, O’Neil, Chapman, Church, Roberts, Lebreton-Coats, Kawai, Sitton, Coleman (herein
21 collectively “County Clerks”).

22 Specifically, Plaintiffs seek the following remedies: (1) to strike down as unconstitutional
23 HB 2640 §§ 3(3), 4(3) and 5(3); (2) enjoin Defendants from causing to be printed in the Oregon
24 Voter’s Pamphlet the ballot title, explanatory statement and financial impact statement for
25 Measure 49; (3) to prohibit Defendants from sending a certified statement to the elections official
26 in charge of elections for each of the 36 counties in Oregon notifying each official of the ballot

1 title for Measure 49; and (4) to enjoin Defendants from causing to be printed on any ballot for the
2 November 6, 2007 special election the ballot title for Measure 49 as found in HB 2640.

3 **II. Background Facts**

4 **A. Measure 37**

5 Oregon voters enacted Measure 37 (Or. Rev. Stat. § 197.352) into law through the
6 exercise of their initiative power under Article IV, Section 1 in November 2004. The proponents
7 of Measure 37 followed the procedures set forth in Or. Rev. Stat. § 250, *et seq.* to initiate a state
8 measure under Article IV, section 1 of the Oregon Constitution. The people passed Measure 37
9 with approximately 61% voting yes on its passage, despite opposition by virtually every
10 governmental entity, the Governor and several state legislators.

11 Under Measure 37, Oregon property owners can demand just compensation “equal to the
12 reduction in the fair market value of the affected property interest resulting from enactment or
13 enforcement of a state or local land use regulation enacted or enforced after they purchased their
14 property “that restricts the use of private real property or any interest therein” that “has the effect
15 of reducing the fair market value of the property, or any interest therein.” *See* Or. Rev. Stat. §
16 197.352(1) and (2) (2005).

17 At its option, the state and/or local government can choose to either pay compensation to
18 the property owner, or modify, remove or not apply the land use restrictions giving rise to the
19 claim for compensation.

20 **B. Measure 37 Found to Be Constitutional**

21 Almost as soon as the people voted Measure 37 into law, Measure 37’s opponents began
22 their assault on the property rights Measure 37 restored. Most notably, several Oregon citizens
23 and 1000 Friends of Oregon (an Oregon political organization) challenged the constitutionality of
24 Measure 37 in Marion County, Oregon Circuit Court. *See MacPherson v. Dep’t of Admin. Servs.*,
25 No. 05C10444 (Marion County, Or. Cir. Ct. Oct. 14, 2005). In that case, the trial judge declared
26

1 Measure 37 unconstitutional. The court reasoned, *inter alia*, that Measure 37 impaired the
2 Oregon Legislative Assembly's "plenary power" to regulate land use in Oregon.

3 On appeal by the State and the Intervenors, the Oregon Supreme Court reversed the trial
4 court's judgment, declaring Measure 37 constitutional. *See MacPherson v. Dep't of Admin.*
5 *Servs.*, 340 Or. 117, 130 P.3d 308 (2006). After losing that legal battle, it became clear to
6 Measure 37's opponents that they would not be able to neuter Measure 37 through the courts
7 (their usual avenue), Measure 37's opponents had to focus their attention on a legislative "fix."

8 **C. Almost 7,000 State Claims**

9 In 1973, the Legislature enacted SB 100, thereby creating the comprehensive centralized
10 statewide land use planning system. For the next 31 years, property owners would become
11 subject to several layers of State and local (county and city) land use regulations. Property
12 owners who had invested their life savings in their property with the expectation they would be
13 allowed to develop the property for their retirement saw everything they worked for taken away
14 from them by bureaucrats in Salem.

15 Under Measure 37, property owners whose property had been affected by restrictive land
16 use regulations before December 2, 2004 had until December 4, 2006 to make a written demand
17 for just compensation. *See* Or. Rev. Stat. § 197.352(5) ("For claims arising from land use
18 regulations enacted prior to December 2, 2004, written demand for compensation under
19 subsection (4) shall be made within two years of December 2, 2004...."). Thousands of property
20 owners availed themselves of Measure 37's protections before the December 2006 deadline.

21 According to the Department of Land Conservation and Development ("DLCD"),
22 approximately 6,605 Measure 37 claims were filed with the State before the December 4, 2006
23 deadline. More than half of those claims were filed between November 14, 2006 and December
24 4, 2006.⁴ For every State Measure 37 claim, there is at least one local (city or county) claim

25

26 ⁴See http://www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of_Claims_Filed_in_the_State (last visited August 11, 2007).

1 waiting on the disposition of the State claim. Property owners must file demands for
2 compensation at both State and local levels because the majority of local land use regulations
3 derive from State statutes and regulations.

4 Pursuant to Measure 37, State and local governments had 180 days from the date that
5 property owners made demand to pay just compensation to the owner or modify, remove, or not
6 apply the land use regulation. *See* Or. Rev. Stat. § 197.352(4) (“Just compensation under
7 subsection (1) of this section shall be due the owner of the property if the land use regulation
8 continues to be enforced against the property 180 days after the owner of the property makes
9 written demand for compensation...”). Due to the number of claims between November and
10 December 2006, state government and a couple local governments strained to formulate plans to
11 process all of the claims before the 180 day period expired to avoid having to pay just
12 compensation. All of this Measure 37 activity set the stage for the 74th Regular Session of the
13 Oregon Legislative Assembly that began January 2007.

14 **D. 2007 Legislative Session**

15 When the Oregon Legislative Assembly went into session in January 2007, Measure 37
16 was one of the main issues on its agenda. Almost immediately, legislative leaders created the
17 Joint Special Committee on Land Use Fairness (“Committee”) to work on land use issues. *See*
18 *Aff. Of Sen. George*, ¶2. Although the Committee was supposed to focus on all the issues
19 concerning Oregon’s unique system of statewide centralized land use planning, it quickly became
20 clear that the Committee’s chairmen had only one target – Measure 37. *Aff. of Sen. George*, ¶3.

21 The Committee was co-chaired by Senator Floyd Prozanski and Representative Greg
22 MacPherson, both opponents of Measure 37. *Aff. of Sen. George*, ¶4. The Committee held a
23 handful of public hearings and heard testimony about the perceived positives and negatives of
24 Measure 37. *Aff. of Sen. George*, ¶5.

25
26

1 After several hearings, and without any policy proposals from the Committee, Governor
2 Kulongoski created a secret working group (“Working Group”) to prepare legislation to replace
3 Measure 37. Aff. of Sen. George, ¶6.

4 The Working Group met while the Committee continued to hold scheduled public
5 hearings. The Working Group consisted of eight people: Senator Floyd Prozanski, Senator Kurt
6 Schrader, Representative Greg MacPherson, Representative Bill Garrard, Representative Patti
7 Smith, Lane Shetterly (Director of the Department of Land Conservation and Development), Tim
8 Nesbit (Chief Political Advisor for Ted Kulongoski) and Richard Whitman (Assistant Attorney
9 General). The Working Group worked behind closed doors and denied the public access to their
10 discussions. Aff. of Sen. George, ¶6. In fact, the Working Group was so secretive that even
11 members of the Committee were excluded from its deliberations. Aff. of Sen George, ¶7.

12 After several attempts failed to work out a compromise on legislation, four members of
13 the Working Group unilaterally presented amendments to House Bill 3540 (“HB 3540”) for
14 consideration by the Committee. Aff. of Sen. George, ¶8. The Committee adopted the
15 amendments to HB 3540 that replaced the entire bill with what is now known as Measure 49.
16 Aff. of Sen George, ¶8. The public (other than Mr. Shetterly and Mr. Whitman, both members
17 of the Working Group) was never allowed to testify on the amendments that would become
18 Measure 49. Aff. of Sen. George, ¶9; Aff. of Ross Day, Ex. D.

19 After further consultation with those groups aligned against Measure 37, Measure 49 was
20 amended in the Ways and Means Committee, and again the public (other than Mr. Shetterly and
21 Mr. Whitman and one other witness) was not allowed to testify on Measure 49. Aff. of Sen.
22 George, ¶10. The process for drafting and adopting Measure 49 was so secretive that legislators
23 from the minority party were not allowed to review the specific language of Measure 49 until
24 immediately before the Measure 49 amendments were submitted to the Committee for a vote.
25 Aff. of Sen. George, ¶¶11-12.

26

1 For reasons that will be explained later, it is important to note that Measure 37 has
2 already been changed by the Legislature. First, the Legislature enacted and Governor Kulongoski
3 signed into law HB 3546, which granted State and local governments 360 additional days beyond
4 the 180 provided by Measure 37 to process all of the claims pending at the time. *See Or Laws*
5 2007, Chapter 133. Second, the Legislature enacted and Governor signed into law Senate Bill
6 239, which created exceptions to Measure 37’s protections for certain farming regulations related
7 to pest control. *See Or Laws 2007, Chapter 490.*

8 **E. Measure 49**

9 Measure 49 passed both houses of the Legislature but was not subject to presentment to
10 Governor Kulongoski because the Legislature referred Measure 49 to the voters. *See Article IV,*
11 *Section 1(3)(c) of the Oregon Constitution (“A referendum on an Act may be ordered by the*
12 *Legislative Assembly by law.... [B]ills ordering a referendum and bills on which a referendum*
13 *is ordered are not subject to veto by the Governor.”).* A copy of Measure 49 is attached as
14 Exhibit A to the Affidavit of Ross Day.

15 As stated above, the Legislature designed Measure 49 to replace Measure 37. Measure 49
16 is significantly longer than Measure 37 and is as complex as it is long. Here are just a few of the
17 changes Measure 49 makes to Measure 37:

- 18 ● Measure 49 redefines the term “owner” to decrease the interests which are
19 entitled to just compensation.⁵
- 20 ● Property owners who filed Measure 37 claims must have a common law
21 vested right to develop their land before the effective date of Measure 49
22 to avoid losing their existing claims. Otherwise, current Measure 37
23 claimants will have to re-file claims under Measure 49.
- 24 ● Property owners may only file claims for just compensation based on
residential uses. Measure 49 eliminates all commercial and industrial
claims allowed under Measure 37.

25 ⁵ The owner of fee title to the property as shown in the deed records of the county where the property is located; (b) The
26 purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or (c) If the
property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes
irrevocable only the trustee is the owner.

- 1 ● Property owners will not be able to create more than 10 parcels on a piece
2 of property even if they could have done so when they originally acquired
3 their interest in the property.
- 4 ● Property owners will only receive the ability to develop their property in
5 an amount equal to the amount of fair market value lost. The formula for
6 calculating fair market value doesn't work, which means property owners
7 will never be able to prove exactly how much market value they lost,
8 which means property owners will never be able to develop their property.

9 The changes that Measure 49 will make to Measure 37 are dramatic and in practicality
10 extinguish the property rights restored by Measure 37. Plaintiffs do not object to the voters
11 deciding whether to support such a measure; rather, they object to how the Legislature is going
12 about securing Measure 49's passage during the November 6, 2007 special election by
13 manipulating the process of drafting misleading and biased Ballot Language for Measure 49.

14 **F. House Bill 2640**

15 As a counterpart to Measure 49, the Legislature passed HB 2640 at the very end of the
16 legislative session. Again, the public was never allowed to provide testimony on HB 2640. Aff.
17 of Day, Ex. D. Governor Kulongoski signed HB 2640 into law on July 9, 2007. HB 2640
18 accomplishes three tasks which are relevant to this case: (1) it established a special election on
19 November 6, 2007 for Measure 49; (2) it created an unduly biased ballot title for Measure 49, an
20 inaccurate estimate of financial impact and an unduly biased explanatory statement to be printed
21 in the voter's pamphlet for the special election; and (3) it exempted Measure 49 from the
22 procedures found in ORS 250, 251 and 254 that ensure the ballot language for a measure is fair,
23 accurate and unbiased and guarantee review of ballot language by the Oregon Supreme Court.

24 A copy of HB 2640 is attached as Ex. B to the Affidavit of Ross Day.

25 **G. The Attorney General Rejected a Substantially Similar Ballot Title Because 26 it Was Not Impartial as Required by Statute**

After HB 3540C (Measure 49) was approved by the Legislature, House Bill 3540C was
submitted to Defendant Bradbury as a prospective initiative petition. See Aff. of Day, Ex. M.

1 The Oregon Secretary of State numbered the prospective initiative petition as Petition #98. See
2 Aff. of Day, Ex. M..

3 Oregon law provides the process for drafting a ballot title for a prospective petition.
4 Accordingly, on June 19, 2007, pursuant to Or. Rev. Stat. § 250.065, the Oregon Attorney
5 General submitted a draft ballot title for Petition #98 to the Secretary of State for public
6 comment. See Aff. of Day, Ex. N..

7 The Oregon Secretary of State published notice of the draft ballot title for Petition #98
8 received from the Oregon Attorney General, and on July 2, 2007, John Kobbe submitted
9 comments in opposition to the draft ballot title prepared by the Oregon Attorney General. See
10 Aff. of Day, Ex. G.

11 In his comments, Mr. Kobbe suggested the following ballot title caption, results
12 statements, and summary be certified by the Oregon Attorney General pursuant to Or. Rev. Stat.
13 §250.067(2):

14 **MODIFIES MEASURE 37; CLARIFIES RIGHT TO BUILD HOMES;
15 LIMITS LARGE DEVELOPMENTS; PROTECTS FARMS, FORESTS,
16 GROUNDWATER.**

17 **RESULT OF A “YES” VOTE:** “Yes” vote modifies Measure 37; clarifies
18 private landowners rights to build homes; extends rights to surviving spouses;
19 limits large developments; protects farmlands, forestlands, groundwater supplies.

20 **RESULT OF A “NO” VOTE:** “No” vote leaves Measure 37 unchanged; allows
21 claims to develop large subdivisions, commercial, industrial projects on lands
22 now reserved for residential, farm and forest uses.

23 **SUMMARY:** Modifies Measure 37 (2004) to give landowners with Measure 37
24 claims the right to build homes as compensation for land use restrictions imposed
25 after they acquired their properties. Claimants may build up to three homes if
26 previously allowed when they acquired their properties, four to 10 homes if they
can document reductions in property values that justify additional homes, but may
not build more than three homes on high-value farmlands, forestlands and
groundwater-restricted lands. Allows claimants to transfer homebuilding rights
upon sale or transfer of properties; extends rights to surviving spouses.
Authorizes future claims based on regulations that restrict residential uses of

1 property or farm, forest practices. Disallows claims for strip malls, mines, other
2 commercial, industrial uses.

3 See Aff. of Day, Ex. G.

4 The ballot title proposed by Mr. Kobbe is nearly identical to the ballot title mandated by HB
5 2640. However, on July 19, the Oregon Attorney General rejected the comments and suggested
6 ballot title presented by Mr. Kobbe. See Aff. of Day, Ex. F. In rejecting what turned out to be the
7 ballot title that is the subject of this litigation, the Attorney General said:

8 A ballot title is not intended as an advocacy piece for or against a ballot measure, nor
9 is it intended to tell a voter why he or she should vote for a measure. Rather, the
10 ballot title must describe the proposal in neutral terms.

11 See Aff. of Day, Ex. F.

12 The Attorney General made it clear that “[I]t is not the role of a ballot title to advocate for
13 or against any measure.” See Aff. of Day, Ex. F, page . The Attorney General then certified a
14 ballot title for Petition #98 that is substantially different – and considerably more accurate and
15 unbiased – than the Ballot Title drafted by the Legislature. A copy of the ballot title certified by
16 the Attorney General is attached to the Affidavit of Ross Day. as Exhibit E.

17 **H. The Parties**

18 Plaintiff Dean Grudzinski (“Grudzinski”) owns property located in Multnomah County,
19 Oregon. Declaration of Dean Grudzinski, ¶2. Pursuant to Or. Rev. Stat. § 197.352 (2005),
20 Grudzinski made a demand for compensation on the City of Portland for the loss of the fair
21 market value of his property as a result of land use restrictions imposed after he first acquired an
22 interest in his property. Dec. of Grudzinski, ¶6. The City of Portland approved Grudzinski’s
23 claim for compensation in part and denied in part, and issued an order not applying certain land
24 use regulations to his property. Dec. of Grudzinski, ¶4.

25 Plaintiff O. Keith Cyrus (“Cyrus”) owns property located in rural Deschutes County,
26 Oregon. Declaration of O. Keith Cyrus, ¶2. Pursuant to Or. Rev. Stat. § 197.352, Cyrus made a

1 demand for compensation on Deschutes County and the State of Oregon for the loss of the fair
2 market value of his property due to enactment of land use restrictions after Cyrus first acquired
3 an interest in his property. Dec. of Cyrus, ¶2.

4 On July 30, 2007, in lieu of compensation, Deschutes County approved an order restoring
5 property rights to Cyrus that were restricted by Deschutes County Comprehensive Plan and
6 corresponding zoning ordinances. Dec. of Cyrus, ¶10. Cyrus' demand for compensation
7 involved approximately 10 parcels, which he acquired an interest in at various times between
8 1961 and 1976. Dec. of Cyrus, ¶4. On at least one parcel, Cyrus acquired the property solely in
9 his own name, but subsequently added his wife, Conida Cyrus, to the deed, establishing Conida
10 Cyrus' interest in Cyrus' property. Dec. of Cyrus, ¶¶5-7.

11 Plaintiff David Olson ("Olson") filed a demand for compensation pursuant to Or. Rev.
12 Stat. § 197.352 with both Marion County, Oregon and the State of Oregon. Declaration of David
13 Olson, ¶3. Marion County's final order found that Olson was the owner of an approximately five
14 acre piece of property located in rural Marion County. Dec. of Olson, ¶4. Olson's demand for
15 compensation alleged \$23,480 in lost property value. Dec. of Olson, ¶3. In the alternative to just
16 compensation, Olson sought the right to build one home on his property. Dec. of Olson, ¶3.

17 The State of Oregon's final order determined that Olson was not an owner of the property
18 as the term "owner" is defined in Or. Rev. Stat. § 197.352(11)(C). Dec. of Olson, ¶5. Olson
19 appealed the State's decision to the Marion County Circuit Court, and the Court ruled against the
20 State and found Olson was an owner of the property. Affidavit of Ross Day, ¶11, Exhibit I, page
21 2. All Olson seeks to do is build one home on his five acre parcel. Dec. of Olson, ¶6. Olson
22 currently cultivates and harvests Christmas trees on his farm. Dec. of Olson, ¶6. Because he
23 cannot live on his farm, Olson is forced to rely upon others to drive Olson to his farm so he can
24 take care of his trees. Dec. of Olson, ¶6.

25 Plaintiff Stop Taking Our Property Political Action Committee ("STOP PAC") is an
26 Oregon political action committee organized and operated under the election laws of the State of

1 Oregon for the sole purpose of advocating against Measure 49. Affidavit of David J. Hunnicutt,
2 ¶2. STOP PAC is supported by contributions from a wide spectrum of Oregonians who are
3 concerned that if Measure 49 passes, they will lose the rights that Ballot Measure 37 (2004)
4 (herein “Measure 37”, now codified at ORS 197.352) entitled them too when the voters
5 overwhelmingly passed it in 2004. Aff. of Hunnicutt, ¶3.

6 STOP PAC’s ability to achieve its stated organizational purpose is severely hampered by
7 the fact that HB 2640 prohibited it from seeking judicial review of Measure 49’s ballot title, and
8 because its ballot title and explanatory statement for are so biased and inaccurate that it will
9 mislead the voters. Aff. of Hunnicutt, ¶4. Measure 49’s ballot title and explanatory statement
10 were not drafted in the same manner as every other ballot measure ballot title and explanatory
11 statement. If the Legislature had followed the procedural requirements for Measure 49, both the
12 ballot title and the explanatory statement would have been unbiased and factually correct,
13 allowing STOP PAC to focus its campaign efforts on arguing the merits of the policy changes
14 contained in Measure 49. Aff. of Hunnicutt, ¶4.

15 Instead, because the ballot title and explanatory statement are so biased and inaccurate,
16 STOP PAC now must expend all of its time and effort explaining to the public what Measure 49
17 actually does so the voters are not misled. Aff. of Hunnicutt, ¶5.

18 Defendant Bill Bradbury (“Bradbury”) is the Oregon Secretary of State, and the State’s
19 chief elections officer. First Amended Complaint, ¶ 10. Bradbury is responsible for
20 administering the election laws of the State of Oregon, including, but not limited to, preparing
21 and publishing the Oregon Voter’s Pamphlet. *Id.*

22 Defendants Green, Morales, Clark, Williams, Huser, Turi, Berman, Kolen, Blankenship,
23 Nielsen, Kennedy, McKinnon, Iturriaga, Berry, Becket, Marston, Brown, Smith, Geaney,
24 Newingham, Jenkins, Druckenmiller, Delong, Burgess, Childers, Kaufmann, Unger, Cornie,
25 O’Neil, Chapman, Church, Roberts, Lebreton-Coats, Kawai, Sitton, Coleman are all county
26 clerks and the chief elections officers for their respective Oregon counties, which puts them in

1 charge of elections for each respective county. First Amended Complaint, ¶¶ 11-46. The County
2 Clerks are responsible for printing and distributing ballots to registered electors in each
3 respective county. First Amended Complaint, ¶ 77.

4 **III. Argument**

5 **A. Temporary Restraining Order Standard**

6 An injunction is an equitable remedy that compels a party to perform certain acts. The
7 court issues a preliminary injunction to protect the applicant from irreparable injury while
8 litigation is pending. The Ninth Circuit uses two standards, the "traditional" and the "alternative"
9 tests, to determine whether a preliminary injunction is appropriate. *Cassim v. Bowen*, 824 F.2d
10 791, 795 (9th Cir. 1987) (preliminary injunction denied because plaintiff could not show
11 irreparable harm or a substantial likelihood of success). Under the traditional approach, the Court
12 may grant preliminary relief if it finds that 1) the moving party will suffer irreparable injury if the
13 relief is denied, 2) the moving party probably will prevail on the merits, 3) the balance of
14 potential harm favors the moving party, and 4) the public interest favors granting injunctive
15 relief. *Cassim v. Bowen*, supra; *Burlington Northern v. Department of Revenue*, 934 F.2d 1064,
16 1074 n.6 (9th Cir. 1991); *Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th
17 Cir. 1995) (preliminary injunction denied after finding that plaintiff was not likely to succeed on
18 the claim).

19 Under the alternative approach, the moving party may meet its burden by showing either
20 1) a combination of possibility of success on the merits and the possibility of irreparable injury,
21 or 2) that serious questions are raised and the balance of hardships tips sharply in its favor. *Hunt*
22 *v. National Broadcasting Co.*, 872 F.2d 289, 293 (9th Cir. 1989) (preliminary injunction denied
23 because plaintiff could not satisfy required showing of success on the merits or satisfy hardship
24 requirement); *Associated General Contractors of California v. Coalition*, 950 F.2d 1410 (9th Cir.
25 1991), cert. den., 112 S.Ct. 1670 (1992) (preliminary injunction denied because moving party
26 could not satisfy success on the merits requirement); *Clear Channel Outdoor Inc. v. City of Los*

1 *Angeles*, 340 F.3d 810, 813 (9th Cir. 2003) (preliminary injunction denied because the moving
2 party failed to state a colorable claim).

3 Both the irreparable harm the Plaintiffs will suffer if the Ballot Language for Measure 49
4 is published, and the Plaintiffs' likelihood of success on the merits of their claim, is discussed
5 more fully below. Applying either standard used in the Ninth Circuit must result in a secision
6 protecting the Plaintiffs' rights.

7 1. Irreparable Harm

8 To establish irreparable injury in the context of the Fourteenth Amendment, a plaintiff
9 need only allege a constitutional claim. See *Associated Gen. Contrs., Inc. v. Coalition for*
10 *Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991) (denial of preliminary injunction on the
11 basis of an Fourteenth Amendment claim), citing, *Goldie's Bookstore v. Superior Ct.*, 739 F.2d
12 466, 472 (9th Cir. 1984) (where the court stated, "An alleged constitutional infringement will
13 often alone constitute irreparable harm," citing, Wright & Miller, 11 Federal Practice and
14 Procedure § 2948 at 440 (1973)). The caveat to this rule comes in the context of what type of
15 damage plaintiffs will incur. In *Northeastern Fla. Chapter of Ass'n of Gen. Contractors v.*
16 *Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (cited to explain the rule by the
17 *Associated Gen. Contrs.* fn 9), the court found that even though a constitutional claim had been
18 made, the parties could be put back in status quo, with a monetary award. "An injury is
19 'irreparable' only if it cannot be undone through monetary remedies." Id.

20 In the present case, no amount of money will remedy the harm that will be done to the
21 Plaintiffs if the Ballot Language is presented to the voters. No amount of money will magically
22 transform the Ballot Language for Measure 49 into fair and accurate language that presents the
23 Plaintiffs, and the rest of the citizens of Oregon, with an evenhanded analysis of Measure 49.
24 Accordingly, because the Plaintiffs have alleged a constitutional claim, where only an injunction
25 will maintain the status quo and avoid further violation of the Plaintiffs' civil rights, the Plaintiffs
26 have demonstrated they will suffer irreparable harm. Plaintiffs are entitled to a presumption of

1 irreparable harm if the Plaintiffs can demonstrate a strong possibility of success on the merits.

2 As discussed below, the Plaintiffs can make such a showing.

3 2. Likelihood of Success on the Merits

4 To establish this element for preliminary relief, Plaintiffs must show at a minimum that
5 there is a “fair chance of success on the merits.” See *Johnson v. California State Bd. of*
6 *Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). Plaintiffs can easily satisfy this element
7 because HB 2640 implicates several fundamental rights protected by the 1st and 14th Amendment
8 to the United States Constitution each of which create presumptions of invalidity that Defendants
9 must overcome. The presumption can only be overcome if the State can prove that HB 2640 is
10 narrowly tailored to meet a compelling government interest.

11 The remainder of this memorandum discusses, in detail, why Measure 49's Ballot
12 Language violates the Plaintiffs' constitutional rights.

13 **C. 14th Amendment to the United States Constitution**

14 Plaintiffs filed this action under 42 U.S.C. § 1983.⁶ The Supreme Court has explained
15 that actions under § 1983 are “intended not only to ‘override’ discriminatory or otherwise
16 unconstitutional state laws,” that statute is also intended “to provide a remedy for violations of
17 civil rights ‘where state law was inadequate,’ but also to provide a federal remedy ‘where the
18 state remedy, though adequate in theory, was not available in practice.’ *Zinerman v. Burch*, 494
19 U.S. 113, (1990).

20 In this case, there is no state law remedy for the constitutional violations committed by
21 HB 2640, because the Legislature took the only remedy available to the Plaintiffs – review of the
22 Ballot Language under Or. Rev. Stat. 250.085, 250.155 and 250.255 in the Oregon Supreme

23 _____
24 ⁶ Section 1983 provides in relevant part that

25 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or
26 Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United
States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or
immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,
suit in equity, or other proper proceeding for redress.

1 Court – which leaves the only chance for a remedy for these constitutional violations with this
2 Court.

3 Each constitutional violation is discussed below.

4 1. Substantive Due Process

5 In determining whether a preliminary injunction is proper, the moving party must show at
6 a minimum that there is "a fair chance of success on the merits." *Johnson v. California State Bd.*
7 *of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995) (citing *Martin v. International Olympic*
8 *Committee*, 740 F.2d 670, 675 (9th Cir. 1984)) (statute made plaintiff's chance of success on the
9 merits minimal therefore court was correct in denying motion for preliminary injunction); *Hunt v.*
10 *National Broadcasting Co.*, supra, 872 F.2d at 293.

11 In a similar case, *Caruso v. Yamhill County*, 422 F.3d 848 (2005)(a case challenging the
12 mandatory inclusion of a tax statement on an initiative petition), the court stated, "Several
13 appellate courts, including our own, have held that an election is a denial of substantive due
14 process if it is conducted in a manner that is fundamentally unfair." To prevail on his substantive
15 due process claim, then, Caruso must demonstrate that 'the state's choice of ballot language so
16 upset[s] the evenhandedness of the [election] that it work[s] a 'patent and fundamental unfairness'
17 on the voters.'" *Oregonians for Accountability v. Bradbury*, infra. (denial of a preliminary
18 injunction regarding a financial impact statement, where time considerations worked heavily
19 against the Plaintiffs).

20 The Due Process Clause of the 14th Amendment "embodies a system of rights based on
21 moral principles so deeply embedded in the traditions and feelings of our people as to be deemed
22 fundamental to a civilized society as conceived by our whole history. Due process is that which
23 comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339
24 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., Dissenting).

25 The Ballot Language itself is neither fair, or just, or right. As the Supreme Court said in
26 *Solesbee*, the Due Process Clause is intended to protect citizens from arbitrary, unfair, and unjust

1 action by the government. This protection extends to the rights of citizens to vote in state
2 elections. *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). And the right
3 to vote can be denied by the debasement or dilution of the weight of a citizen’s vote just as
4 effectively as by wholly prohibiting the free exercise of the franchise. *Id.*

5 This case presents the unique circumstance where the Legislature has acted so unfairly, so
6 unjustly, and so arbitrarily as to intentionally deprive the Plaintiffs of the most basic rights to due
7 process. To be sure, the remedy the Plaintiffs seek is extraordinary, but extraordinary action by
8 the government requires an extraordinary remedy.

9 For the reasons discussed below, Bradbury and the County Clerks must be enjoined from
10 causing the Ballot Language from being printed in the Oregon Voters’ Pamphlet and on the
11 November 2007 ballot.

12 (a) Standard for Ballot Language under the 14th Amendment

13 The leading case on the standard a court uses when evaluating ballot language for
14 compliance with basic due process protections is *Burton v. Georgia*, 953 F.2d 1266 (11th Cir.
15 1992). The *Burton* court held that ballot language violates the 14th Amendment when the
16 language so upsets the evenhandedness of the referendum that the ballot language works a
17 “patent and fundamental unfairness” on the voters. *Burton*, 953 F.2d at 1269. Such a case arises,
18 the court declared, when the ballot language is so misleading that voters cannot recognize the
19 subject of the amendment at issue. *Id.* In such a case, the court concluded, the voters would
20 have been deceived in a concrete and fundamental way about what they were voting for or
21 against. *Id.*

22 The Ninth Circuit Court of Appeals adopted the legal standard for ballot language
23 articulated by the 11th Circuit in *Burton* in *National Audubon Society, Inc. v. Davis*, 307 F.3d 835
24 (9th Cir. 2002). In *National Audubon Society*, the issue raised was whether allegedly misleading
25 statements contained in the “arguments for” section of the state of California’s Ballot Materials
26 violated substantive due process protections. The Ninth Circuit adopted the 11th Circuit’s test

1 from *Burton* and held that the allegedly misleading statements in the ballot materials did not give
2 rise to a violation of substantive due process because the statements were contained in the
3 “avowedly partisan” portion of the state’s ballot materials, not in the neutral legislative analysis
4 of the measure. *National Audubon Society*, 307 F.3d at 858. Also, the fact that the allegedly
5 misleading statements were not entirely inaccurate, and the fact that arguments against the
6 measure were also included in the state’s ballot materials weighed against finding a constitutional
7 violation had occurred. *Id.*

8 In *Caruso v. Yamhill County* 422 F.3d 848 (9th Cir. 2005), the Ninth Circuit Court of
9 Appeals was again asked to determine if ballot language was so misleading as to trigger
10 substantive and procedural due process protections. The Ninth Circuit Court of Appeals, in
11 reversing the district court, held that the statutory warning did not “upset the evenhandedness of
12 the election to the point the language works a patent and fundamental unfairness on the voters.”
13 *Caruso*, 422 F.3d at 863. The Ninth Circuit said that a voter could read and understand the
14 warning as a signal that sometime in the future property taxes could be raised an additional 3%,
15 and such an interpretation would not necessarily be entirely incorrect.

16 In addition, important to the Ninth Circuit in *Caruso*, was the fact that additional ballot
17 materials such as an explanatory statement, financial impact statement, and arguments for and
18 against the local initiative – as well as the language of the initiative itself – was available to the
19 voter such that the ballot title, with the statutorily required warning, was not the voters only
20 source of information regarding the subject of the initiative. *Id.*

21 In *Oregonians for Accountability v. Bradbury*, 2004 U.S. Dist LEXUS 18257 (2004), a
22 challenge was brought against a financial impact statement for Ballot Measure 38 (2004), the
23 measure that would have “privatized” SAIF. Proponents of Measure 38 claimed the financial
24 impact statement was so erroneous that it violated the constitutional standards set forth in
25 *National Audubon Society*. The district court disagreed, noting that the summary of the measure,
26

1 the explanatory statement and the full text of the measure made it abundantly clear to the voters
2 Measure 38's impacts.

3 From *National Audubon Society, Caruso*, and to a lesser extent, *Oregonians for*
4 *Accountability*, the test used in the Ninth Circuit to determine whether ballot language is so
5 unfair that it violates due process is whether the ballot language chosen by the legislature upsets
6 the evenhandedness of the election to the point that a patent and fundamental unfairness on the
7 voters occurs because the ballot language is so misleading that voters cannot recognize the
8 subject of the measure at issue. See also *Burger v. Judge*, 364 F.Supp 504 (Mont. D.C.) affirmed
9 414 U.S. 1058, 94 S.Ct. 563, 38 L.Ed.2d 465 (1973).

10 In *Citizens for Legislative Choice v. Miller*, 993 F.Supp 1041 (Mich. E.D. 1998), the
11 district court applied the *Burton* principles in a case challenging ballot language describing the
12 effect of an amendment to the Michigan Constitution imposing term limits on legislators. The
13 district court in *Citizens for Legislative Choice* held the language constitutionally permissible.

14 The district court reached its decision, in large part, on the fact that the ballot language
15 was drafted via a public process, at which proponents and opponents of the ballot measure had an
16 opportunity to propose ballot language. That process, the district court held, was designed to
17 ensure fairness of the ballot language. *Id.* at 1051. Accordingly, at least one federal court has
18 held that whether or not ballot language was drafted in an open process should be considered in
19 determining whether ballot language is so unfair as to give rise to a due process violation.

20 The manner in which the ballot language in *Citizens for Legislative Choice* was drafted is
21 in stark contrast to the manner in which the ballot language for Measure 49 was drafted. While
22 the ballot language drafted in *Citizens for Legislative Choice* was written in the public's view,
23 with the welcome addition of public input, using a process as transparent as possible, the ballot
24 language for Measure 49 was drafted in a far more nefarious manner.

25 The ballot language for Measure 49 was drafted behind closed doors, guided by political
26 polling rather than public testimony. Aff. of Day, ¶14, Ex. L, pgs. 16, 31-37, 39-61. The public

1 was never allowed to testify in favor or against the ballot language for Measure 49. Aff. of Day,
2 Ex. D, page 1. Instead, the only people or groups who were allowed any input on the ballot
3 language for Measure 49 were groups that strongly support Measure 49. Aff. of Day, ¶14, Ex. L,
4 pgs. 31-37.

5 The test used by the federal courts in the cases cited above asks whether or not the ballot
6 language is inaccurate, misleading or biased to the point the ballot language creates a
7 fundamentally unfair election. Each part of the Ballot Language (ballot title, explanatory
8 statement, financial impact statement) is analyzed in light of the applicable principles of law
9 discussed above.

10 (b) The Ballot Title for Measure 49 - Section 3 of House Bill 2640

11 Section 3 of HB 2640 contains the ballot title for Measure 49. Aff. of Day, Ex. B, pgs. 1-
12 2. In the ordinary course of Oregon’s initiative and referendum process, a ballot title is prepared
13 by the Oregon Attorney General and the public is allowed to comment on the Attorney General’s
14 draft ballot title. Or. Rev. Stat. § 250.067. In the case of a ballot title prepared by the Oregon
15 Legislature, any elector dissatisfied with a ballot title prepared by the Oregon Legislature may
16 challenge that ballot title by filing a petition for review with the Oregon Supreme Court. ORS
17 250.085. However, the Oregon Legislature chose to prohibit any Oregonian from challenging the
18 accuracy or fairness of the ballot title prepared for Measure 49 in the Oregon Supreme Court.
19 Aff. of Day, Ex. B, page 2 (HB 2640, §3.(3)).

20 It is because of this fact that Plaintiffs are in federal court today. There is no other avenue
21 for review of a ballot title the Plaintiffs believe is intentionally misleading, omits facts that are
22 important to an elector, and fails to explain the entire effect of Measure 49 if approved by the
23 voters. The right to appeal a ballot title to Oregon’s highest court has been described as a “right
24 we hold dear” in Oregon. See Aff. of Ellis, Ex. A (Veto Message of Governor John A. Kitzhaber
25 for Senate Bill 1120 (1995), *Oregon Senate Journal*, page SJ-198 (1995)).

26

1 To make matters worse, the ballot title for Measure 49 was drafted behind closed doors,
2 in the waning days of the 2007 session of the Oregon Legislature. See Aff. of Day, Ex. L, pgs.
3 16, 31-37, 39-61. Most importantly, in adopting the amendments to HB 2640 that created the
4 ballot title for Measure 49, the public was never allowed any input into the drafting of the ballot
5 title. See Aff. of Day, Ex. D, page 1. The fact that the ballot title for Measure 49 was drafted
6 outside the traditional public process warrants stricter scrutiny of the ballot title. *Citizens for*
7 *Legislative Choice v. Miller*, supra.

8 Traditionally, there are three parts to a ballot title. First is the ballot title’s “caption”.
9 Second is the ballot title’s “results statements”. And third is the ballot title’s “summary”.
10 Oregon law has standards each ballot title component to which the people of Oregon have
11 become accustomed.

12 The following discusses the traditional standards applicable to the three components of a
13 ballot title in Oregon. Even though the Oregon Legislature excepted the Ballot Title for Measure
14 49 from these standards. The standards are nevertheless important because they give this Court
15 an idea of what Oregon voters traditionally read and in expect in a ballot title. Comparing the
16 standards that all other ballot title components must measure up to against the Ballot Title for
17 Measure 49 only further magnifies the significant constitutional deficiencies in the Ballot Title
18 for Measure 49.

19 (1) *The Caption Drafted by the Oregon Legislature*

20 ORS 250.035(2)(a) requires that a ballot title contain a “caption of not more than fifteen
21 words which reasonably identify the subject matter of the state measure.” A caption need only
22 reflect the actual subject matter of the proposed measure. *Peppers v. Myers*, 325 Or. 611, 942
23 P.2d 273 (1997). Further, a caption is not a substitute for the title of a measure, but a way to
24 identify the measure and a way to attract the voters’ attention. *Davis v. Van Winkle*, 130 Or. 304,
25 278 P. 91, (1929) overruled in part by *Ferry v. Paulus*, 297 Or. 70, 682 P.2d 262 (1984). In other
26 words, a caption cannot focus on only one thread of a petition, but instead must focus on the

1 entire blanket, so as to encompass all the subjects covered by the measure. See *Witt v. Myers*,
2 325 Or. 221, 936 P.2d 964 (1997). Finally, a caption’s terms must not understate or overstate the
3 scope of the legal changes that the proposed measure would enact. *Kain/Waller v. Myers*, 337
4 Or. 36, 93 P.3d 62 (2004).

5 The Caption drafted by the Oregon Legislature for Measure 49 reads:

6 **MODIFIES MEASURE 37; CLARIFIES RIGHT TO BUILD HOMES;**
7 **LIMITS LARGE DEVELOPMENTS; PROTECTS FARMS, FORESTS,**
8 **GROUNDWATER.**

9 The Caption drafted by the Oregon Legislature does not stand up to constitutional
10 scrutiny.

11 As a matter of law, Measure 37 can no longer be modified. A ballot measure can only be
12 modified if (a) the Attorney General says the change will not substantially change the substance
13 of the measure, and (b) the deadline for submitting written comments on the draft ballot title has
14 not passed. See ORS 250.045(2)(a)-(b).

15 Oregon case law is clear “A ballot title should never misstate existing law, even by
16 implication.” *Dale v. Kulongoski*, 321 Or. 108, 113, 894 P.2d 462 (1995). Accordingly,
17 Oregonians have come to rely upon the fact that ballot title captions are an accurate recitation of
18 the law. Measure 49’s Ballot Title Caption is clearly wrong, and the consequence of the
19 Caption’s inaccuracy is magnified by the fact that Oregonians have come to rely upon the legal
20 accuracy of the caption. An inaccurate caption, such as this one, immediately hampers the
21 voter’s desire and perhaps the voters’ ability to figure out on their own what Measure 49 actually
22 does.

23 And even if Measure 37 (2004) could be modified, the Caption for Measure 49 still fails
24 because Measure 49 makes amendments to ORS 197.352. Measure 49 does not, in any way,
25 purport to amend or modify Measure 37 (2004). Measure 49 cannot modify Measure 37, because
26 Measure 37 no longer exists in the form it presented to the voters in 2004.

1 As discussed above, exceptions to Measure 37 have already been passed by the 2007
2 Oregon Legislature. See Or Laws 2007, Chapter 490 (SB 239); Or Laws 2007, Chapter 133 (HB
3 3546). Finally, Measure 49 does far more than just “Modify Measure 37”. Measure 49 also adds
4 approximately 18 pages of new law to the Oregon Revised Statutes. In fact, the overwhelming
5 majority of Measure 49 deals with the creation of new law, not the “modification” of existing
6 law. Using the phrase “Modifies Measure 37” is inaccurate and misrepresents to the voter what
7 Measure 49 actually does. The Caption misleads the voter into thinking Measure 49 merely
8 makes changes to existing law, when in fact, Measure 49 does far, far more.

9 Just as the beginning of the Caption is inaccurate, so to is the end of the Caption. The last
10 four words of the Caption state “protects farms, forest, groundwater.” Whether Measure 49
11 “protects” anything is in the eye of the beholder. But in the colloquial sense, something is
12 “protected” when that something is free from harm. If Measure 49 actually “protects” farms,
13 forests and groundwater, it must mean that Measure 49 will not allow harm – in this case
14 development – to occur on farmland or forestland, or where harm may come to groundwater
15 supplies.

16 Yet, the Ballot Title Summary drafted by the Oregon Legislature tells the voter that
17 Measure 49 will allow development on farmland, forestland and in groundwater-restricted areas.
18 How does a measure both protect farms and forests and allow development on the same? The
19 caption misleads the voter into thinking she is voting to “protect” farmland and forestland.

20 As the court in *Alan v. Wayne County*, 388 Mich. 210, 200 N.W. 2d 628 (1972)
21 admonishes, drafters of ballot language should be mindful of the legal sophistication of the voter
22 when drafting ballot titles and such. Webster’s Dictionary defines “protect” to mean “to shield
23 from injury”. *Merriam-Webster Dictionary*, New Edition, 2004. How does Measure 49 “shield
24 from injury” farmland and forestland when, later on in the summary, the ballot title admits that
25 Measure 49 will actually allow injury to occur?

26

1 The caption is misleading and inaccurate. A voter voting on Measure 49 is misled into
2 thinking that Measure 49 “protects” farmland, forestland and groundwater restricted areas.
3 Measure 49 allows development on farmland and forestland and in groundwater restricted areas,
4 it does not protect these areas from development, as the caption states, which means the caption
5 is patently false and violates the fundamentals of due process.

6 _____(2) The Results Statement Drafted by the Oregon Legislature

7 ORS 250.035(2)(b) and (c) require the Results Statements for a certified ballot measure
8 be certified in simple and understandable language. ORS 250.035(3) requires these statements
9 be certified, to the extent practicable, so that the language between the two statements is parallel.
10 The resulting statements must identify the chief purpose of the measure. *Adams v. Kulongoski*,
11 322 Or 122, 128, 902 P.2d 1191 (1995). In other words, the results statements should build on
12 and be consistent with the caption. *Baker v. Keisling*, 312 Or. 385, 392, 822 P.2d 1162 (1991).

13 The Results Statements drafted by the Oregon Legislature read:

14 **RESULT OF A “YES” VOTE:** “Yes” vote modifies Measure 37; clarifies
15 private landowners rights to build homes; extends rights to surviving spouses;
16 limits large developments; protects farmlands, forestlands, groundwater supplies.

17 **RESULT OF A “NO” VOTE:** “No” vote leaves Measure 37 unchanged; allows
18 claims to develop large subdivisions, commercial, industrial projects on lands
19 now reserved for residential, farm and forest uses.

20 The “Yes” Results Statement suffers from the same factual inaccuracies as the caption, as
21 discussed in subsection (a), above. The blind reference to “Measure 37” does not inform the
22 voter what it is the voter is being asked to decide on. And the fact that the text of Measure 49
23 may be available in other materials is not helpful either, because nowhere in the text of Measure
24 49 can one find the law designated as “Measure 37”.

25 Also, Measure 49's ballot title continues its internal inconsistencies in the “Yes” Results
26 Statements by claiming that Measure 49 both protects farmland and forestland **and** allows
development on farmlands and forestlands.

_____ (3) The Summary Drafted by the Oregon Legislature

1 ORS 250.035(2)(d) requires the Ballot Title Summary to be a “concise statement of not
2 more than 125 words summarizing the state measure and its major effect.” The “major effect” of
3 a measure, for purposes of a ballot title summary, includes additional important consequences or
4 details that the result statement does not convey and helpful contextual information about the
5 impact of the proposed law. *Carley v. Myers*, 340 Or. 222, 132 P.3d 651 (2006) citing
6 *Novick/Crew v. Myers*, 337 Or. 568, 100 P.3d 1064 (2004).

7 The Ballot Title Summary drafted by the Oregon Legislature reads:

8 **SUMMARY:** Modifies Measure 37 (2004) to give landowners with Measure 37
9 claims the right to build homes as compensation for land use restrictions imposed
10 after they acquired their properties. Claimants may build up to three homes if
11 previously allowed when they acquired their properties, four to 10 homes if they
12 can document reductions in property values that justify additional homes, but may
13 not build more than three homes on high-value farmlands, forestlands and
14 groundwater-restricted lands. Allows claimants to transfer homebuilding rights
upon sale or transfer of properties; extends rights to surviving spouses. Authorizes
future claims based on regulations that restrict residential uses of property or farm,
forest practices. Disallows claims for strip malls, mines, other commercial,
industrial uses. See Explanatory Statement for more information.

15 The Ballot Title Summary (herein “Summary”) is the most misleading and biased of all
16 the components of Measure 49’s ballot title drafted by the Oregon Legislature. The inaccurate
17 and misleading statements in the Summary are analyzed individually, below.

18 **MISLEADING STATEMENT #1**

19 The Summary states that Measure 49 “Modifies Measure 37 (2004) to give landowners
20 with Measure 37 claims the right to build homes as compensation for land use restrictions
21 imposed after they acquired their properties.” This first sentence states that landowners with
22 Measure 37 claims will receive the right to build homes if Measure 49 becomes law. This is
23 categorically false. In fact, some Measure 37 claimants will not get any rights to build homes
24 under Measure 49.

25 For instance, Plaintiff David Olson stands to lose his entire Measure 37 claim if Measure
26 49 is approved. Dec. of Olson, ¶10. Olson’s Measure 37 claim is based upon his status as an

1 “owner” of the property that is the subject of his Measure 37 claim. Plaintiff Olson’s interest as
2 an “owner” is based upon a possessory right to enter the land and harvest trees. The Marion
3 County Circuit Court held that, for purposes of Measure 37, Olson is an “owner” of the property
4 and therefore has a valid Measure 37 claim. See Aff. of Day, ¶11, Ex. I (*Olson v. State*, Marion
5 County Circuit Court Case No. 06-C-10222 (2007)).

6 However, under Measure 49’s definition of “owner”, Plaintiff Olson would not qualify for
7 relief, despite the fact that Plaintiff Olson is currently a Measure 37 claimant. See Measure 49,
8 Section 2.(16). Measure 49 has a much narrower definition of “owner”. Under Measure 37, any
9 interest in property is sufficient to establish a person as an “owner”. Under Measure 49, a person
10 is an “owner” only if the person is a fee owner of property, the person is a purchaser of property
11 under a land sale contract, or the settlor of a revocable trust.

12 Therefore, if Measure 49 becomes law, Measure 37 claimants like Olson will not have
13 “[T]he right to build homes as compensation for land use restrictions imposed after they acquired
14 their properties,” as the first sentence of the Summary declares. The very first sentence of the
15 Summary is false.

16 **MISLEADING STATEMENT #2**

17 The second sentence of the Summary states that “Claimants may build up to three homes
18 if previously allowed when they acquired their properties...” This statement is factually
19 incorrect. At the time Plaintiff Grudzinski acquired his property, he could have built three homes
20 on his property, but now, because of a variety of restrictions placed on his property, he cannot.
21 Dec. of Grudzinski, ¶6. Nor will he be able to build three homes on his property under Measure
22 49. Dec. of Grudzinski, ¶9.

23 There are two reasons why property owners like Grudzinski, under the plain language of
24 Measure 49, would not be entitled to the relief advertised by Measure 49’s ballot language.

25 First, Plaintiff Grudzinski’s property is zoned for single-family dwellings. In fact, his
26 property is zoned to allow Grudzinski to build three homes on his property. Dec. of Grudzinski,

1 ¶6. However, there are environmental overlay zones upon Grudzinski’s property that restrict
2 where the additional homes may be built. Dec. of Grudzinski, ¶7. There is nothing that prohibits
3 Grudzinski from building three homes on his property, so long as Grudzinski builds his three
4 homes within the restrictions of the environmental overlay zones.

5 And that is the hook. According to Measure 49, in order for Grudzinski to be eligible for
6 any relief under Measure 49, Grudzinski must demonstrate that there is a law that prohibits him
7 from building three homes. See Measure 49, § 9.(5)(f). Measure 37, on the other hand, merely
8 required Grudzinski to demonstrate that there is a law that restricts (not prohibits) him from
9 building three homes. Even though Grudzinski is a Measure 37 claimant, and under Measure 37
10 he would be allowed to build his three homes, because there is no law that prohibits Grudzinski
11 from building his three homes, Grudzinski would not be entitled to any relief under Measure 49.

12 The ballot language for Measure 49 tells the voter that Measure 37 claimants like
13 Grudzinski would not lose a thing under Measure 49. The ballot language is completely false.

14 Second, the Summary boasts that “Claimants may build up to three homes if previously
15 allowed when they acquired their property.” This statement is factually incorrect. Assume
16 Owner A purchases property in 1980 and the zoning allowed Owner A to build three homes on
17 his property. Owner A’s property is located within City’s urban growth boundary. In 1990, City
18 rezones Owner A’s property to Open Space/Park. Finally, assume in 2008 Owner A files a claim
19 under Measure 49 to get back his right to build three homes.

20 Imagine Owner A’s shock when she finds out that even though the ballot language
21 promised Owner A that she could build up to three homes on her property if she was previously
22 allowed to when she acquired his property, Owner A still cannot build three homes on her
23 property.

24 Why? Because under Measure 49, in order for Owner A to be able to develop three
25 homes on his property, the current zoning of the property must be for residential use. Measure
26

1 49, §8.(5)(e). Because Owner A’s property is now zoned Open Space/Park, Owner A cannot
2 build her three homes, despite a Summary that promises otherwise.

3 **MISLEADING STATEMENT #3**

4 The second clause of the second sentence of the Summary is equally misleading. It states
5 “[F]our to 10 homes if they can document reductions in property values that justify additional
6 homes.” This statement is inaccurate for the same two reasons Misleading Statement #2 is
7 inaccurate. The general arguments in the preceding section are incorporated as arguments as to
8 why Misleading Statement #3 is inaccurate and therefore unconstitutional.

9 **MISLEADING STATEMENT #4**

10 The third sentence of the Summary begins: “Allows claimants to transfer homebuilding
11 rights upon sale or transfer of properties.” This sentence does not say “certain” claimants or
12 “some” claimants can transfer homebuilding rights. The sentence says that all claimants can
13 transfer homebuilding rights.

14 This statement is absolutely false. A claimant who makes a claim after the date the
15 Oregon Legislature adjourned *sine die* in 2007 is not able to transfer homebuilding rights. Aff. of
16 Day, Ex. A, page 15 (HB 3540, §12).

17 The ballot language misleads the voter to believe that all Measure 49 claimants will be
18 able to transfer whatever rights are eventually received through the convoluted Measure 49
19 process. In fact, not all Measure 49 claimants will be able to transfer their rights. The Ballot
20 Language misleads the voter to believe the voter is voting on one change in the law, when in fact
21 the change the voter thinks she is voting on is not contained anywhere in the proposed measure.
22 This is the height of inaccuracy and deception, and is another reason why the Ballot Language for
23 Measure 49 fails to withstand constitutional muster.

24 **MISLEADING STATEMENT #5**

25 The second clause of the third sentence of the Ballot Title Summary states “[E]xtends
26 rights to surviving spouses.” In fact, Measure 49 does anything but extend rights to surviving

1 spouses. Considering Plaintiff Cyrus' Measure 37 claim reveals the inaccurate nature of this
2 sentence.

3 Cyrus acquired his ownership interest in one of his parcels in January of 1961. Dec. of
4 Cyrus, ¶5. Cyrus and his wife were married later in 1961. Dec. of Cyrus, ¶6. Cyrus added his
5 wife's name to the deed to the property after they were married. Dec. of Cyrus, ¶7. Opponents
6 of Measure 37 claim that when Cyrus dies, his wife's date of ownership would be the date Cyrus'
7 wife was added to the deed to the property, not the date that Cyrus acquired the property himself.

8 By claiming that Measure 49 "extends rights to surviving spouses", presumably the
9 "rights" to which this statement refers are the rights Cyrus would have had if Cyrus filed a
10 Measure 49 claim. In other words, the Summary misleads the voter into thinking that Measure
11 49 will allow Cyrus' wife to receive the rights that Cyrus had to develop his property in January
12 of 1961, when Cyrus first acquired an interest in the property.

13 That is not what Measure 49 says. In the case of the Cyrus family, if Cyrus were to die,
14 the date of acquisition for Cyrus' wife is after July of 1961. Section 21(2) of Measure 49 makes
15 this perfectly clear:

16 If the claimant is a surviving spouse of a person who was an owner of the
17 property in fee title, the claimant's acquisition date is the date the claimant was
18 married to the deceased spouse or the date the spouse acquired the property,
whichever is later.

19 Aff. of Day, Ex. A, page 19 (HB 3540C, §21.(2))(emphasis added)

20 The dictionary definition of "extend" is "to make greater or broader". *Merriam-Webster*
21 *Dictionary*, New Edition, 2004. The Ballot Language misleads the voter into thinking that
22 Measure 49 makes the rights for surviving spouses better or greater, when in fact Measure 49
23 does exactly the opposite.

24 What is worse is the consequence under Measure 49 to Cyrus if Cyrus' wife dies before
25 Cyrus passes on. The Cyruses were married in July of 1961. Dec. of Cyrus, ¶6. Cyrus acquired
26 his parcel in January of 1961, and then added his wife to the deed after they were married. Dec.

1 of Cyrus, ¶7. According to the express language of Measure 49, if Mrs. Cyrus dies before Cyrus,
2 the rights that Cyrus is entitled to are not the rights he had at the time he and Mrs. Cyrus were
3 married in 1961, nor are they the rights that came with the property when Mr. Cyrus bought the
4 property in 1961. The rights that Mr. Cyrus gets are the rights that were available at the time
5 Mrs. Cyrus' name was added to the deed. Measure 49 penalizes Cyrus for adding his wife to the
6 deed!

7 Measure 49 says that if a claimant (Mr. Cyrus) is a surviving spouse of a person who was
8 an owner of the property in fee title (Mrs. Cyrus is an owner of the property in fee title) the
9 claimant's (again, Mr. Cyrus) acquisition date is the date the claimant was married to the
10 deceased spouse (1961), or the date the spouse acquired the property , whichever is later.
11 Therefore, Mr. Cyrus would not get to use the property as he could have when he acquired the
12 property in January of 1961. Instead, Mr. Cyrus would get to use the property as he could have
13 when Mrs. Cyrus became an owner of the property after they were married.

14 How in the world does this scenario constitute an “extension” of rights to Mr. Cyrus?

15 It doesn't.

16 The Summary tells voters like Cyrus a different story. The Summary tells the voters that
17 property owners like the Cyruses will actually benefit from Measure 49 because the Cyrus'
18 property rights will be “extended”. In fact, Measure 49 will decrease Cyrus' property rights.
19 Which is why this sentence of the Summary is inaccurate and violates the Plaintiffs' due process
20 rights.

21 **MISLEADING STATEMENT #6**

22 The fifth sentence in the Summary states “Disallows claims for strip malls, mines, other
23 commercial, industrial uses.”

24 The fifth sentence is so biased that it works a patent and fundamental unfairness. While it
25 may be true that Measure 49 will disallow strip malls, mines and other commercial and industrial
26 uses, the focus on such disfavored uses in the Ballot Title Summary is clearly intended to

1 persuade the voter to vote for Measure 49. In other words, this sentence is nothing more than a
2 campaign slogan being portrayed to the voter as a statement of objective fact.

3 Measure 49 disallows uses such as churches, schools, rehabilitation centers for disabled
4 veterans, soup kitchens for the homeless, parks, open spaces, wildlife refuges, communes, farms,
5 hospitals for poor, helpless disabled children, rescue centers for animals who are victims of
6 animal abuse, and Starbucks coffee stores. But the Ballot Title Summary makes no mention of
7 these uses prohibited by Measure 49.

8 Why? The answer should be self-explanatory. Because highlighting the fact that
9 presumably “popular” uses are not allowed by Measure 49, voters are less likely to vote for
10 Measure 49. Including any of the admittedly biased language in the foregoing paragraph
11 (churches, schools, rehabilitation centers for disabled veterans) would be just as wrong, just as
12 biased, and just as unconstitutional as the language contained in the fifth sentence of the
13 Summary.

14 And there is no need to specifically call “strip malls” or “mines” to the attention of the
15 voter unless there are specific provisions in Measure 49 that relate exclusively to “strip malls”
16 and “mines”. Which, of course, there are not. Which in turn begs the question, why did the
17 Legislature feel the need to call out “strip malls” and “mines”?

18 The answer should be obvious. The reason why the terms “strip malls” and “mines” were
19 included in the Summary is because those terms polled well for purposes of getting a voter to
20 vote in favor of Measure 49. Aff. of Day, Ex. L, pgs 70, 75, 108-109,

21 There are hundreds of uses of property that would be prohibited by Measure 49. The
22 focus on strip malls and mines is a transparent attempt to bias the voter into voting for Measure
23 49. It would be one thing if the Ballot Title Summary said “disallows commercial and industrial
24 uses”, that would presumably be constitutionally permissible. But the Oregon Legislature
25 crossed the line when the words “strip malls” and “mines” were added to the Ballot Title
26 Summary.

1 (c) The Explanatory Statement for Measure 49 - Section 3(4) of House
2 Bill 2640

3 In addition to the ballot title, the Oregon Voters' Pamphlet also contains an explanatory
4 statement for every measure the voters are asked to vote upon. Or. Rev. Stat. §251.185. The
5 process of drafting an explanatory statement is designed to ensure a fair and accurate explanation
6 of the measure the voters are being asked to vote upon.

7 Typically, the explanatory statement is drafted by a committee of five people – two
8 proponents of the measure, two opponents, and a neutral fifth member – through a series of
9 public hearings. Or. Rev. Stat. §251.205 - .215. The explanatory statement is supposed to be a
10 simple, understandable statement, not exceeding 500 words, explaining the measure. ORS
11 251.215. The statement is also supposed to be impartial and not misleading. *Homuth v.*
12 *Keisling*, 314 Or. 214, 837, P.2d 532 (1992). Any person who commented on the explanatory
13 statement is free to seek review of the explanatory statement by the Oregon Supreme Court. Or.
14 Rev. Stat. §251.235.

15 The explanatory statement, and the process employed to draft the explanatory statement,
16 are examples of Oregon's citizen initiative and referendum working at its best. Oregonians have
17 come to rely upon explanatory statements as sources of simple to understand, unbiased
18 information regarding the measure the voter is asked to vote on.

19 Which explains why the Explanatory Statement drafted by the Legislature for Measure 49
20 is so egregious. Aside from the fact that the Explanatory Statement is inaccurate and misleading
21 in substance (as discussed below), the fact that the Legislature is taking advantage of the
22 goodwill Oregonians have towards explanatory statements in general threatens the integrity and
23 credibility of future explanatory statements, and only magnifies the obvious flaws in the
24 Explanatory Statement for Measure 49.

25 **MISLEADING STATEMENT #1**

26 The very first sentence of the Explanatory Statement is incorrect. It states:

1 Ballot Measure 37 (2004) requires governments to pay landowners or forgo
2 enforcement when certain land use regulations reduce their property values.

3 This is factually incorrect. Under Or. Rev. Stat. §197.352, a government is required to
4 provide just compensation to a property owner when the government enacts or enforces a land
5 use regulation that restricts the use of the property and reduces the fair market value of the
6 property.

7 Although the difference between the description of Measure 37 in the explanatory
8 statement and the actual language of Or. Rev. Stat. §197.352 may seem trivial, in fact it is not.
9 By misstating the current law, the Explanatory Statement misleads the voter into thinking that the
10 only criteria that triggers Or. Rev. Stat. §197.352 is whether a property owner has lost property
11 value.

12 Measure 49 is being sold to the public as the measure that is more in line with what the
13 voters thought they were voting for when they approved Measure 37. By completely misstating
14 the current law in the Explanatory Statement, it allows Measure 49's proponents to claim
15 Measure 49 is somehow different from Measure 37 and in line with what the voters intended: a
16 property must lose property value and have the use of her property taken from her. That is
17 exactly what triggers Or. Rev. Stat. §197.352, although one would not know that from reading
18 the Explanatory Statement.

19 In fact, Measure 49 is supposedly triggered the same way Or. Rev. Stat. §197.352 is
20 triggered – a showing that a regulation restricts the use of property and that regulation reduce the
21 value of property. The Explanatory Statement omits this important fact, why is one of many
22 reasons why the Explanatory Statement is inaccurate and therefore unconstitutional.

23
24 **MISLEADING STATEMENT #2**

25 The second sentence of the Explanatory Statement reads:
26

1 This measure modifies Measure 37 to give landowners who have filed Measure 37
2 claims the right to build homes as compensation for land use regulations imposed
after they acquired their properties.

3 Not surprisingly, this statement is factually incorrect. The statement tells the reader that
4 all Measure 37 claimants will have the right to build homes under Measure 49. The Explanatory
5 Statement tells the voters that “landowners who have filed Measure 37 claims” will get the right
6 to build homes.

7 Only Measure 37 claimants who can demonstrate a regulation that prohibits the
8 landowner from building a home on their property is entitled to relief under Measure 49. A
9 Measure 37 claimant who seeks relief from the \$80,000 farm income test (which, as explained
10 above, is a restriction, not a prohibition, on the right to build a home) would not be able to “build
11 homes” under Measure 49.

12 For example, if Measure 49 passes, Plaintiff Olson will lose his right to build a home on
13 his property. Olson is an owner of property for purposes of Measure 37. Dec. Of Olson, ¶4.
14 Olson does not hold fee title to his property, Olson is not a contract vendee of his property, and
15 Olson is not a trust beneficiary of his property. Under Measure 37, Olson will be allowed to
16 build the one home on his 5-acre parcel. Dec. Of Olson, ¶6. Under Measure 49, however,
17 because Olson is not an “owner” as the term is defined in Measure 49, Olson will not be able to
18 “build homes”. Dec. Of Olson, ¶10. Therefore, Measure 49 would not give Olson (a Measure
19 37 claimant who has filed a Measure 37 claim) the right to build homes as the Explanatory
20 Statement promises.

21 Without question, there are landowners who have filed Measure 37 claims who will not
22 get the right to “build homes” under Measure 49. The Explanatory Statement tells voters
23 otherwise. The Explanatory Statement is false.

24 MISLEADING STATEMENT #3

25 The third sentence of the Explanatory Statement says:
26

1 Claimants may build up to three homes if allowed when they acquired their
2 properties.

3 Not all Measure 37 claimants will be allowed to build up to three homes on their property
4 if allowed when the claimant acquired the property.

5 First, for claims on property located outside an urban growth boundary, only property that
6 is prohibited from building three homes on the property qualify for relief under Measure 49. Not
7 all claimants will be able to build “up to three homes”, as the Explanatory Statement promises.

8 Second, for properties located inside an urban growth boundary, not only must there be a
9 land use regulation that prohibits building three homes, but the property upon which the three
10 homes will be built must be currently zoned for residential use. Therefore, a property owner who
11 could have built three homes on the property when she acquired the property, still cannot build
12 homes on the property if the property is nevertheless zoned for something other than residential
13 use.

14 A hypothetical best explains why the third sentence is patently false. Suppose Property
15 Owner A acquires an ownership interest in her property in 1950, at which time Property Owner A
16 could have built three homes on her property. Property Owner A’s property is located entirely
17 within the urban growth boundary for City P. Now, suppose City P re-zones A’s property to
18 open space/park in 2000, a zone that is not a residential zone and therefore does not allow
19 residential development.

20 According to Section 9.(5)(e) of Measure 49, Property Owner A is not entitled to build up
21 to three homes – even though she could have done so at the time she acquired her property –
22 because her property is not currently zoned for residential use. Property Owner A’s property is
23 zoned open space/park.

24 The same holds true for a property owner whose property was zoned from residential to a
25 commercial or industrial zone. Even though such property owners could have built “up to three
26

1 homes” at the time they acquired their property, they cannot do so now, because their property is
2 no longer zoned for residential use.

3 As the hypothetical above explains, not all claimants will be able to build three homes if
4 they could have done so when they acquired their properties. The statement that “Claimants may
5 build up to three homes if allowed when they acquired their properties,” is false. Some claimants
6 will not be able to build anything.

7 **MISLEADING STATEMENT #4**

8 The Explanatory Statement’s fourth sentence states:

9 Claimants may build up to 10 homes if allowed when they acquired their
10 properties and they have suffered reductions in property values that justify the
additional home sites.

11 This remedy is illusory because a property owner is never going to be able to prove
12 exactly how much her property value has been reduced. Before a property owner is entitled to
13 “up to 10 homes”, the property owner, under Measure 49, must establish the exact amount of the
14 loss the property owner suffered. Aff. of Day, Ex. A, page 8 (HB 3540C, §7.(6)). Because the
15 formula for calculating the amount of reduced property value is broken, there is no possible way
16 for a property owner to be able to meet her burden of proof, which means there is no possible
17 way for a property owner to ever avail herself of the “up to 10 homes” option. The sentence is
18 inaccurate.

19 Further, a claimant under Measure 49 is not entitled to “up to 10 homes” unless there is a
20 law that prohibits establishing the home, an important point the Explanatory Statement fails to
21 mention. As is the case with Misleading Statement #3, laws like the \$80,000 farm income test
22 do not prohibit development, they are restrictions. The explanatory statement leads the voter to
23 believe that if a claimant could have built “up to 10 homes” on her property, she will be able to
24 build “up to 10 homes” as long as she can prove the decrease in the fair market value of her
25 property is equal to the value of up to 10 new home sites.

26

1 In fact, a property owner could meet both of those criteria and still not be allowed to build
2 “up to 10 homes” under Measure 49. But the Explanatory Statement tells the voter that every
3 claimant under Measure 49 will be entitled to such relief. This is simply inaccurate.

4 Also, this sentence tells the voter that only two criteria need to be satisfied in order to
5 qualify for “up to 10 homes”: (1) the property owner was allowed to build up to 10 homes when
6 the property owner acquired the property, and (2) the reduction in fair market value of the
7 property justifies the number of homes to be built on the property. The Explanatory Statement
8 tells the voter there are only two criteria a property owner must satisfy in order to get “4 to 10”
9 relief under Measure 49.

10 This is completely false. What the explanatory statement conveniently leaves out is the
11 fact that a person is entitled to the “4 to 10” option only if the property is not on something called
12 “high-value farmland” or “high-value forestland” or “a groundwater restricted area”. Aff. of
13 Day, Ex. A, page 7 (HB 3540C, §7.(1)). The point is, there are many more criteria a property
14 owner must satisfy in order to qualify for the “4 to 10” option. The Explanatory Statement on
15 this point is once again factually incorrect.

16 Finally, for properties located inside an urban growth boundary, not only must there be a
17 land use regulation that prohibits building “up to 10 homes”, but the property upon which the 10
18 homes will be built must be currently zoned for residential use. Therefore, a property owner who
19 could have built “up to 10 homes” on the property when she acquired the property, still cannot
20 build homes on the property if the property is nevertheless zoned for something other than
21 residential use.

22 Again, the Explanatory Statement tells the voter that every claimant under Measure 49
23 will be able to build “up to 10 homes” if the property owner could have done so at the time the
24 property owner acquired her property. This is simply false.

25 **MISLEADING STATEMENT #5**

26 The sixth sentence of the Explanatory Statement reads:

1 First, subdivisions are not allowed on high-value farmlands, forestlands and
2 groundwater-restricted lands.

3 Section 6.(2)(b) of Measure 49 allows a property owner to create up to three parcels on a
4 property that is high-value farmland, forestland or groundwater-restricted lands. See Aff. of Day,
5 Ex. A, page 6. Section 11.(3)(a)(A) requires parcels authorized by Section 6.(2)(b) of Measure
6 49 to be no larger than 2 acres in size.

7 Assume Property Owner A has a parcel that is 10 acres in size, located on high-value
8 farmland. Property Owner A is able to jump through all the hoops required by Measure 49 and
9 she creates three 2-acre parcels, with a 4-acre remnant.

10 Oregon law defines “Subdivision” as an act of subdividing land or an area or a tract of
11 land subdivided. Or. Rev. Stat. §92.010(16). To “subdivide land” means to divide land into four
12 or more lots within a calendar year. Or. Rev. Stat. §92.010 (15).⁹

13 In the hypothetical, Property Owner A has divided her property into four lots. Oregon
14 law calls that a subdivision, which would constitute a subdivision on high-value farmland.
15 Which means, according to the express language and operation of Measure 49, subdivisions are
16 allowed on high-value farmlands, forestlands and groundwater-restricted areas.

17 The conflict comes from the fact that Measure 49 requires lots or parcels be no greater
18 than 2-acres in size. Anticipating the state will argue that Property Owner A would then only be
19 eligible for two lots or parcels, instead of three, under Measure 49, that argument only supports
20 the argument against Misleading Statement #3, which says that Property Owner A can build up to
21 three homes if she could have done so when she acquired her property.

22 Either way, the Explanatory Statement is fatally wrong.

23 **MISLEADING STATEMENT #6**

24 The tenth sentence of the Explanatory Statement reads as follows:
25

26 _____
⁹ “Lot” is a single unit of land that is created by a subdivision of land. ORS 92.010(3).

1 First, it extends homebuilding rights to surviving spouses who claims are not
2 eligible for compensation under Measure 37

3 Measure 49 does anything but extend homebuilding rights to surviving spouses. In fact,
4 Measure 49, as written, penalizes a surviving spouse upon the death of their spouse.

5 This statement is misleading for yet another more fundamental reason. The statement
6 promises that Measure 49 will give surviving spouses, who would not otherwise be eligible for
7 compensation under Measure 37, the right to build one or more homes. This is patently false.

8 Under Measure 37, in order to be eligible for compensation, there must be a regulation
9 that restricts the use of private real property **and** that regulation must cause a reduction in the fair
10 market value of the property. If one of those two elements is not present, a property owner is not
11 eligible for compensation under Measure 37. If a property owner is not eligible for compensation
12 under Measure 37, the property owner is not likewise eligible for a “waiver”, either.

13 Measure 49 does not magically grant homebuilding rights to surviving spouses who
14 would not get homebuilding rights under Measure 37, as the Explanatory Statement mistakenly
15 leads a voter to believe.

16 For instance, under Measure 37, a property owner is not entitled to compensation (and
17 therefore not entitled to a “waiver”) for land use restrictions that restrict the use of the owner’s
18 property and reduce the fair market value of the property, if the land use restriction was enacted
19 *before* the property owner acquired the property.

20 Under Measure 49, a property owner is not eligible to receive “homebuilding rights” if
21 the land use regulation that prohibits “homebuilding” was enacted *before* the property owner
22 acquired the property, either. Aff. of Day, Ex. A, page 7 (HB 3540C, §6.(6)(d)). And what’s
23 more, under Measure 37, all a property owner must show is that a land use regulation *restricts*
24 the use of her property in order to be eligible for compensation or other relief. Under Measure
25 49, the property owner must prove the land use regulation *prohibits* residential development of
26 her property before the property owner gets her “homebuilding rights”.

1 And according to Measure 49, a surviving spouse steps in the shoes of the deceased
2 spouse, for purposes of determining what land use rights the surviving spouse will receive.
3 Which means, according to the express language of Measure 49, the surviving spouse receives no
4 greater rights than the deceased spouse would have had.

5 The rights the deceased spouse is, or was, entitled to under Measure 49 is no different
6 than the rights the deceased spouse was entitled to under Measure 37. The Explanatory
7 Statement’s claim that surviving spouses will receive homebuilding rights under Measure 49
8 even if the surviving spouse is not eligible for relief under Measure 37 is a false promise meant
9 to sell Measure 49 to the voters.

10 **MISLEADING STATEMENT #7**

11 The eleventh sentence in the Explanatory Statement tells the voters:

12 Second, it allows claimants to transfer their homebuilding rights to new owners, a
13 right not clearly provided by Measure 37.

14 At best this statement is a half-truth, if the statement is not wholly inaccurate. As
15 explained on page , above, the right to transfer “homebuilding rights” does not apply to claimants
16 who make a claim under Measure 49 after the date the Oregon Legislature adjourned the 74th
17 legislative session *sine die*. The arguments in that section are incorporated herein by reference.

18 **MISLEADING STATEMENT #8**

19 The 15th sentence in the Explanatory Statement claims:

20 To streamline the approval process for small claims, this measure provides that
21 those who choose to apply for up to three homes need only show they had the
right to build the homes they are requesting when they acquired their property.

22 This statement is categorically, without question, false. All it takes is the ability to read
23 to understand exactly how incorrect this statement is.

24 In fact, Section 6.(6) of Measure 49 states that a person who wants to build three homes
25 must establish that:

26 (a) The claimant is an owner of the property;

- (b) All owners of the property have consented in writing to the claim ;
- (c) The property is located entirely outside any urban growth boundary and entirely outside the boundaries of any city;
- (d) One or more land use regulations prohibit establishing the lot, parcel or dwelling;
- (e) The establishment of the lot, parcel or dwelling is not prohibited by a land use regulation described in ORS 197.352; and
- (f) On the claimant's acquisition date, the claimant lawfully was permitted to establish at least the number of lots, parcels or dwellings on the property that are authorized under this section.

Aff. of Day, Ex. A, page 7.

The plain language of Measure 49 makes it clear that a property owner who wants to take the “three home option” must do more than merely show they had the right to build the three homes they are requesting at the time the property owner acquired her property.

The language of the Explanatory Statement misleads the voter into thinking that all she has to do is show that she had the right to build three homes when she acquired her property. Imagine the property owner's surprise when she finds out that she also must show that one or more land use laws actually prohibit her from building those three homes. As explained above, the \$80,000 farm income test is a restriction, not a prohibition, on development. A property owner who is prevented from building three homes on her property because of the \$80,000 farm income test will still be prevented from building three homes under Measure 49 because the property owner has not shown there is a law that prohibits the construction of those three homes.

So even though the property owner could have built three homes on her property when she acquired the property, and she can prove this fact, a property owner restricted by the \$80,000 farm income test - for example - would not be allowed to build her three homes.

Even though she proved everything the Explanatory Statement said she had to prove.

The Explanatory Statement is utterly inaccurate on this point. A voter thinks she is voting on a relatively simple process for smaller Measure 37 claimants, when in fact what the voter is voting on is a complicated, convoluted process that requires far more than the explanatory statement informs the voter of.

1 The Explanatory Statement operates as nothing more than an extension of the campaign
2 in favor of Measure 49, despite the actual language of Measure 49. In the Explanatory
3 Statement, voters are being told that Measure 49 does something that, in fact, Measure 49 does
4 not do. Such erroneous statements may be par for the course for a campaign desperate to pass a
5 ballot measure, but statements such as this are intolerable when made by the government, and
6 represented to the voters as an accurate description of the measure to be voted on.

7 **MISLEADING STATEMENT #9**

8 The 21st sentence of the Explanatory Statement states:

9 It authorizes such claims based on regulations that limit residential uses of
10 property or farm and forest practices, requires documentation of reduced values,
11 and provides for proportionate compensation when such reductions in value
occur.

12 The Explanatory Statement is inaccurate because it erroneously tells the voter that
13 property owners will receive “proportionate compensation” when reductions in the fair market
14 value of property occur. Measure 49 makes no such provision for “proportionate compensation”
15 for future claims.

16 In order to understand how this statement is false, it is necessary to understand how
17 Measure 49 treats claims made after the date the 74th Oregon Legislature adjourned *sine die*
18 (herein “future claims”). According to Measure 49, a reduction in fair market value is calculated
19 by taking the value of a piece of property one year prior to a land use restriction being passed and
20 subtracting it from the value of the same piece of property one year after the land use restriction
21 became law, plus interest compounded every year from the date the land use restriction was
22 enacted until the date the Measure 49 claim is made. Aff. of Day, Ex. A, page 15 (HB 3540C,
23 §12.(2)).

24 The interest rate for each year for future claims is equal to the average interest rate for a
25 one-year United States Government Treasury Bill.

26

1 Once the amount of the reduction in fair market value is determined, using the formula
2 prescribed in Measure 49, the government has the opportunity to either compensate the property
3 owner or authorize the property owner to use the property to the extent necessary to offset the
4 reduction in the fair market value of the property.

5 The problem is that a property owner making a future claim is never going to receive
6 “proportionate compensation” because the United States Government stopped selling one-year
7 Treasury Bills on March 1, 2001. Aff. Of Day, Ex.J. A property owner is never going to be able
8 to prove her “reduction in fair market value” because the “reduction in fair market value” is equal
9 to the value of the subject property one year after the regulation became law minus the value of
10 the property one year prior to the date the regulation became law, plus interest.

11 Without the “plus interest” component of the “reduction in fair market value” formula in
12 Measure 49, a property owner is never going to be able to establish exactly how much his
13 “reduction in fair market value” is equal to. And, according to the express terms of Measure 49,
14 before the government can either (a) compensate a property owner, or (b) allow a property owner
15 to use his property in a manner that offsets the “reduction in fair market value” of the property,
16 the property owner must establish how much of a “reduction in fair market value” she has
17 suffered.

18 Because the formula for determining the “reduction in fair market value” in Measure 49
19 is broken, a property owner will never be provided “proportionate compensation”, as the
20 Explanatory Statement advertises.

21 2. Procedural Due Process

22 The 14th Amendment provides that “[n]o State shall make or enforce any law which shall
23 abridge the privileges or immunities of citizens of the United States; nor shall any State deprive
24 any person of life, liberty, or property, without due process of law” The protections afforded
25 under the Due Process Clause of the 14th Amendment are directly applicable to the circumstances
26 in this case.

1 “A cause of action is a species of property protected by the Fourteenth Amendment’s Due
2 Process Clause.” *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). Two causes of
3 action are at stake in this case: (1) Plaintiffs’ statutory right to petition the Supreme Court to
4 challenge the validity of a ballot measure ballot title, financial impact statement and explanatory
5 statement, and (2) Plaintiffs’ right to file a claim with the State and county governments for just
6 compensation under Measure 37. HB 2640 implicates each cause of action.

7 First, to avoid repetition Plaintiffs will not lay out the statutory scheme provided under
8 Or. Rev. Stat. §§ 250 and 251 to petition the Supreme Court for review of a measure’s ballot
9 language. The fact that there is a fair procedure in place and that the Legislature has departed
10 from it without any explanation as to why Measure 49’s ballot title should be treated differently
11 than all other ballot measures is enough to warrant this Court’s strict scrutiny.

12 Second, Measure 37 created a cause of action for Oregon property owners whose property
13 value decreased due to land use regulation enacted after they acquired their land. Thousands of
14 property owners with property in Oregon have filed Measure 37 claims. Plaintiffs fall within that
15 group and have an entitlement to just compensation or a waiver of land use regulations that
16 decrease the value of their land. Measure 49 has the effect of extinguishing claims that are
17 already in process. Plaintiffs have an acute interest in the outcome of any election that seeks to
18 scale back the rights that were created under Measure 37. Plaintiffs have a due process right to
19 their day in court to ensure the election is evenhanded and HB 2640 deprives them of that right.

20 3. Equal Protection and the Fundamental Right to Vote

21 The 14th Amendment provides that “[n]o State ... shall deny to any person within its
22 jurisdiction the equal protection of the laws.” The Supreme Court has opined that

23 The Fourteenth Amendment’s promise that no person shall be denied the equal
24 protection of the laws must coexist with the practical necessity that most
25 legislation classifies for one purpose or another, with resulting disadvantage to
26 various groups or persons. We have attempted to reconcile the principle with the
reality by stating that, if a law neither burdens a fundamental right nor targets a

1 suspect class, we will uphold the legislative classification so long as it bears a
2 rational relation to some legitimate end.

3 *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted).

4 The U.S. Supreme Court has recognized that the 14th Amendment protects the
5 fundamental right to vote. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)
6 (“Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent
7 with the Equal Protection Clause of the Fourteenth Amendment.”). The Court recently stated
8 that

9 The right to vote is protected in more than the initial allocation of the franchise.
10 Equal protection applies as well to the manner of its exercise. Having once
11 granted the right to vote on equal terms, the State may not, by later arbitrary and
12 disparate treatment, value one person’s vote over that of another.

13 *Bush v. Gore*, 531 U.S. 98, 105 (2000).

14 That is exactly what is happening in this case. By passing HB 2640, the Legislature treats
15 Measure 49 far differently than how Measure 37 was treated, and how other ballot measures are
16 treated. Measure 49 is favored in a significant manner, one hurdle that all other ballot measures
17 must pass over is removed: review to ensure the impartiality of the Ballot Language. The
18 Legislature’s actions under HB 2640 arbitrarily remove from the vote on Measure 49 the
19 evenhandedness and neutrality that courts have required time after time in elections in this
20 country.

21 Chief Justice William Rehnquist most aptly hit the heart of the voting problem created by
22 HB 2640 when he said,

23 The result is that the State injects itself into the election process at an absolutely
24 critical point – the composition of the ballot, which is the last thing the voter sees
25 before he makes his choice – and does so in a way that is not neutral as to [the]
26 issues....

27 *Cook v. Harman*, 531 U.S. 530 (2001) (Rehnquist, C.J., concurring) (regarding an analogous
28 ballot challenge in Missouri).

1 In other words, it can be inferred from Chief Justice Rehnquist’s observation that the
2 people did not give the Legislature the power to push its own agendas. As a corollary, Plaintiffs
3 argue here that the Legislature cannot use its authority to dictate the outcome of the vote on
4 Measure 49 by shielding misleading, inaccurate ballot language from review by the Oregon
5 Supreme Court. This Court has a duty to strictly scrutinize HB 2640. *See Bush v. Gore*, 531
6 U.S. 98 at 532 (“there must be at least some assurances that the rudimentary requirements of
7 equal protection and fundamental fairness are satisfied.”).

8 **C. First Amendment - Right to Petition**

9 The First Amendment provides that “Congress shall make no law ... prohibiting the right
10 of the people ... to petition the government for a redress of grievances.” “The constitutional
11 right to petition the Government for redress of their grievances ... includes a reasonable right of
12 access to the courts.” *Hudson v. Palmer*, 468 U.S. 517, 523 (1983). The Supreme Court has
13 invalidated regulations that deny access to a judicial proceeding that is the only effective means
14 of resolving the dispute at hand.” *See Boddie v. Connecticut*, 401 U.S. 371 (1973) (the Court
15 struck down Connecticut procedures, including the payment of court fees and costs, that
16 allegedly restricted welfare recipients access to the courts for divorce).

17 Where there is a legal injury, our legal system affords a remedy. *See Marbury v.*
18 *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists
19 in the right of every individual to claim the protection of the laws, whenever he receives an
20 injury. One of the first duties of government is to afford that protection.”). Courts throughout
21 our nation’s history continuously affirm that fundamental truism. *See Poindexter v. Greenhow*,
22 114 U.S. 270, 303 (1884) (“No one would contend that a law of a State, forbidding all redress by
23 actions at law for injuries to property, would be upheld in the courts of the United States, for that
24 would be to **deprive** one of his property without **due process** of law.”). Plaintiffs have alleged a
25 legal injury due to the enactment of HB 2640 – the Legislature has arbitrarily shielded Measure
26

1 49's Ballot Language from review under Or. Rev. Stat. §§ 250 and 251. Plaintiffs have lost their
2 exclusive forum to petition the Supreme Court for a remedy for that injury.

3 HB 2640 prohibits Plaintiffs from petitioning the Oregon Supreme Court to test whether
4 Measure 49's Ballot Language is impartial. As stated above, the Oregon Supreme Court
5 determined that the procedures under Or. Rev. Stat. § 250.085 are the exclusive procedure to
6 challenge ballot measure ballot titles. *See Ecumenical Ministries of Oregon v. Paulus*, 298 Or. at
7 67. Thus, Plaintiffs have no other forum or avenue to enter Oregon courts to challenge Measure
8 49's ballot title. Such a deprivation must violate the Petition Clause of the First Amendment.

9 At their inception, the Legislature intended Or. Rev. Stat. §§ 250 and 251 to apply to all
10 ballot measures. Ballot measures come in three forms: (1) measures referred to the people by the
11 Legislature, (2) measures referred by the people themselves, and (3) measures initiated by the
12 people. Or. Const. Art. IV, Sec. 1. Ballot measures may be used to enact state, county or city
13 laws. *See Or. Rev. Stat. §§250.045, 250.155 and 250.255*. A State measure is at issue here,
14 which is controlled by Or. Rev. Stat. § 250.045. No provision in the Oregon Constitution
15 provides authority for the Legislature to exempt a single measure (Measure 49) from the
16 requirements for referring or initiating a ballot measure. Thus, Plaintiffs should not be
17 foreclosed from petitioning the Oregon Supreme Court to review Measure 49's ballot title.

18 **IV. Conclusion**

19 Plaintiffs realize that their motion asks this Court to take an important step, but it is not a
20 step this Court will take alone. Other courts in other jurisdictions have actually invalidated entire
21 elections because of ballot language that was not nearly as misleading than the ballot language
22 proposed by the Oregon Legislature for Measure 49. *Bd. Of Educ. Of the City of El Dorado v.*
23 *Powers*, 142 Kan. 664, 51 P.2d 421 (1935); *West Shore Community College v. Manistee County*
24 *Board of Commissioners*, 389 Mich. 287, 297, 205 N.W.2d 441, 447 (1973); *Montana Citizens*
25 *for the Preservation of Citizen's Rights v. Waltermire*, 227 Mont. 85, 738 P.2d 1255 (1987).

26

1 Here Plaintiffs are not asking the Court to invalidate or prevent an election on Measure
2 49. Plaintiffs only ask that the misleading ballot title caption and summary mandated by HB
3 2640 be struck down prior to appearing on the ballot.

4 To be frank, Plaintiffs would rather be in front of the Oregon Supreme Court, the court
5 that normally reviews ballot language against the statutory requirements. However, the
6 Legislature chose not to allow the Oregon Supreme Court the opportunity to review the Ballot
7 Language for Measure 49. The reason the Oregon Legislature prohibited review by the Oregon
8 Supreme Court should be plainly obvious to this Court - the Ballot Language drafted by the
9 Oregon Legislature for Measure 49 is so biased and so misleading that it would not have
10 survived scrutiny by the Oregon Supreme Court.

11 Rather than be fair to those who may have an alternate point of view, the Legislature
12 instead chose the option of avoiding fairness and scrutiny of its Ballot Language, which is why
13 the Plaintiffs are here today. As Governor Kitzhaber said, “[i]t is never appropriate to avoid the
14 appeals procedure in an effort to thwart court scrutiny and bypass citizens who may have an
15 alternate point of view on the objectivity of the proposed ballot title.” *See* Veto Message of
16 Governor John A. Kitzhaber for Senate Bill 1120 (1995), *Oregon Senate Journal*, p. SJ-198
17 (1995) Aff. of Ellis, Ex. A. Nonetheless, that is exactly what the Legislature is attempting to do.

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