

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

JOAN HORTON and NANCY NEWELL

Plaintiffs,

Civil No. 03-1257-HA

v.

OPINION and ORDER

MULTNOMAH COUNTY, OREGON and  
JOHN KAUFFMAN,

Defendants,

THE STATE OF OREGON and  
MARA WOLOSHIN,

Intervenors.

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HAGGERTY, Chief Judge:

Before the court is plaintiffs' Motion for Preliminary Injunction. The court heard oral argument on the Motion today, October 17, 2003. For the following reasons, plaintiffs' Motion for Preliminary Injunction is granted in part.

### **BACKGROUND**

This action involves Multnomah County Ballot Measure 26-52, which appears on the November 4, 2003, ballot. On September 4, 2003, Judge Janice Wilson of the Multnomah County Circuit Court certified the title of Measure 26-52, which states that the Measure would "finance an engineer's report on revenue bonds for acquisition or construction of the utility system and the cost of an election to authorize revenue bonds, if held." The funds for the engineer's report would be generated from a "one-year special levy of \$.003 per \$1000 assessed" valuation of property. The title certified by Judge Wilson explains that "The levy for a house with assessed value of \$150,000 would be about 45 cents." However, the title also states, "This

measure may cause property taxes to increase more than three percent." This latter statement ("the three percent warning") is the subject of the current constitutional challenge.

Because Measure 26-52 authorizes a one-year local option tax, it is subject to Oregon law requiring any measure authorizing the imposition of a local option tax, no matter how small, to include the three percent warning. O.R.S. § 280.070(4). Thus, even if a measure authorizes a tax that will raise property taxes by far less than one percent, the statute mandates that the three percent warning be added to the title.

Plaintiffs correctly contend that the three percent warning is inaccurate in the context of Measure 26-52. For example, the title notes that a house with an assessed value of \$150,000 would incur a one-time obligation of an additional 45 cents in taxes. That statement is factually correct. However, the three percent warning leads voters to believe that their property taxes might increase more than three percent if Measure 26-52 passed. For a house valued at \$150,000, three percent of the assessed value is \$4,500. Read in this manner, the three percent warning overstates the potential effect of Measure 26-52 by a factor of 10,000 (45 cents is one ten-thousandth of \$4,500).

The three percent warning also overstates the potential effect of Measure 26-52 if the warning is read to mean that Measure 26-52 may increase an owner's current property taxes by three percent. The average property owner in Multnomah County pays \$21 per \$1,000 of assessed valuation per year. At that rate, a house valued at \$150,000 would pay \$3,150 in property taxes annually. A three percent increase of that amount is \$94.50. In this example, although Measure 26-52 would cause only an increase in property taxes of 45 cents for a house valued at \$150,000, the three percent warning misleads voters to believe that the measure may

cause taxes to increase more than \$94.50. Under this reading, the three percent warning overestimates the potential burden a taxpayer might incur by more than 200 times of the Measure's potential impact. Regardless of whether the three percent warning overstates the potential tax consequences of Measure 26-52 by a factor of 200 or 10,000, plaintiffs correctly contend that such language is inherently misleading and hinders the conveyance of accurate information to voters.

### STANDARDS

The court may issue a preliminary injunction under the traditional test used by the Ninth Circuit. A preliminary injunction shall be issued if the moving party can demonstrate "either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in their favor." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991) (citing *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir.1990)). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Hunt v. National Broadcasting Co., Inc.*, 872 F.2d 289, 293 (9th Cir. 1989) (quoting *United States v. Odessa Union Warehouse Co-op*, 833 F. 2d 172, 174 (9th Cir. 1987)).

As to the second formulation of the test, "serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo . . . ." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Serious questions are "substantial, difficult and doubtful" enough to require more considered investigation. *Id.* Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a 'fair chance

of success on the merits.'" *Id.* (quoting *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

"There is one additional factor we must weigh. In cases such as the one before us in which a party seeks mandatory preliminary relief . . . courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984) (citing *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir.1980)).

## DISCUSSION

### A. Jurisdiction and Preclusion

A federal district court lacks jurisdiction to review "a state-court judgment in a particular case." *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983)). Thus, dismissal is required "[i]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding . . . ." *Feldman*, 460 U.S. at 482 n.16.

On October 3, 2003, this court issued an Order finding that it had jurisdiction to consider plaintiffs' constitutional challenges. Subsequent to that ruling, intervenor Woloshin submitted the full transcript of the state court ballot certification hearing before Judge Wilson. After a careful review of the state court hearing, this court finds no reason to deviate from its October 3, 2003, Order and finds that consideration of the constitutional claims here is not "inextricably intertwined" with the state court ballot title certification.

Judge Wilson "dismiss[ed] the [constitutional] challenges as improperly joined with the ballot title challenge." Transcript of September 2, 2003, hearing at 37. Judge Wilson specifically

held, "I'm not dismissing this with prejudice, it is without prejudice." *Id.* at 38. In the course of briefing following the October 3, 2003, Order, defendants stated, "[A]s the record shows, Judge Wilson never reached the [constitutional] question." Defendants' Supplemental Memorandum in Response to Plaintiffs' Motion for Preliminary Injunction at 4 n.2. Accordingly, an evaluation of plaintiffs' constitutional claims cannot be "inextricably intertwined" with the state court's determinations.

As explained below, the findings of this court do not conflict with the state court actions, and plaintiffs are not precluded from bringing the constitutional claims here. Judge Wilson announced that her findings were limited to "a special statutory procedure." Transcript of September 2, 2003, hearing at 36-37. That procedure requires the certifying court to determine whether the proposed ballot measure title is "insufficient, not concise or unfair." O.R.S. § 250.195. In concluding that the language of the title was "poorly drafted" but not "grossly misleading," Judge Wilson performed no more than what the "special statutory procedure" requires of certifying courts. Transcript of September 2, 2003, hearing at 100. This court's function is different; the task before this court is to determine whether inclusion of the three percent warning in the title of Measure 26-52 violates plaintiffs' rights secured under the First and Fourteenth Amendments of the United States Constitution.

#### **B. First Amendment Right to Communicate to Voters**

The First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, prohibits state governments from making laws that abridge "the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const amend I.

State action that constrains the political expression of the citizenry is subject to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1976). Plaintiffs contend that the three percent warning violates their First Amendment right to communicate with voters. In *Buckley v. American Const. Law Found.*, 525 U.S. 182 (1999), the Supreme Court struck down a Colorado statute requiring petition circulators to wear badges that read either "VOLUNTEER" or "PAID." The Court recognized that it must be especially vigilant in protecting "core political speech," and that the First Amendment is "at its zenith" in protecting such speech. *Id.* at 183.

In *Meyer v. Grant*, 486 U.S. 414 (1988), the Supreme Court struck down a state statute banning the payment of petition circulators because the law "necessarily reduce[d] the quality of expression" of political actors. *Id.* at 419 (citing *Buckley*, 424 U.S. at 19).

Defendants argue that the three percent warning is not inaccurate. The Oregon Constitution was amended by voters in 1997 to state, "For tax years beginning after July 1, 1997, the property's maximum assessed value shall not increase by more than three percent from the previous tax year." Oregon Const., Art. XI, § 11(1)(b). However, the three percent limit may be exceeded if taxpayers approve a local option tax. As discussed above, Measure 26-52 authorizes the imposition of a local option tax of 45 cents for properties valued at \$150,000. Conceivably, defendants argue, Multnomah County could raise the assessed valuation of homes by exactly three percent, as permitted by the Oregon Constitution, and the small tax increase authorized by Measure 26-52 would then "raise property taxes more than three percent." This interpretation of the three percent warning is rejected.

As dictated by the cannon of statutory interpretation, the language of ballot measures should be given their plain meaning. *United States v. Ventre*, 338 F.3d 1047 (9th Cir. 2003)

(citing *United States v. Gonzales*, 520 U.S. 1 (1997)). The proposed Ballot Measure title states, "This measure may *cause* property taxes to increase more than three percent."

O.R.S. § 280.070(4)(a); Multnomah County Ballot Measure 26-52. There is only one reasonable interpretation of this language. A voter deciding how to vote on Measure 26-52 would read the above phrase and be led to believe that Measure 26-52 by itself may "cause property taxes to increase more than three percent." The language of the title plainly implies that the Measure, and the Measure alone, may "cause" the increase. As such, the proposed title misleads voters to believe that Measure 26-52 may cause taxes to increase at a level far beyond the Measure's possible reach.

Like a statute that impairs the political speech of petition circulators, Oregon's law requiring the placement of false language directly within the title of Measure 26-52 "impedes the sponsors' opportunity to disseminate their views to the public." *Meyer*, 486 U.S. at 419 (citing with approval *Grant v. Meyer*, 828 F.2d 1446, 1453-1454 (10th Cir. 1987)). Plaintiffs are among a group of citizens who gathered nearly 10,000 signatures of registered voters to place Measure 26-52 on the ballot for the November 4, 2003, election. Plaintiffs' ability to accurately explain the tax consequences associated with Measure 26-52 to voters has been severely impaired by state-mandated language that is profoundly misleading.

As the Supreme Court has warned, "[T]he First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley*, 525 U.S. at 192 (citing *Meyer*, 486 U.S. at 421). Because the state-mandated three percent warning interferes with plaintiffs' core political speech, it will survive constitutional scrutiny only if the language is narrowly tailored to serve a compelling government

interest. *Buckley*, 525 U.S. at 192. Defendants offer no acceptable justification for presenting the distortive three percent warning in the title of Measure 26-52. The use of the three percent warning in this context does not survive strict scrutiny. Plaintiffs have shown a substantial likelihood of success on the merits because their First Amendment speech rights will be harmed by the inclusion of the three percent warning in the title of Measure 26-52.

### **C. First Amendment Right to be Free of Coerced Speech**

The First Amendment prohibits the government from forcing citizens to subscribe to or to be associated with state-sponsored messages. In *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court struck down a New Hampshire law requiring motorists to carry the message "Live Free or Die" on their licence plates. The Court found that requirement interfered with citizens' "individual freedom of mind." *Id.* at 714.

Here, the State of Oregon requires the sponsors of Measure 26-52 to include the three percent warning in the ballot measure title. Because of its inaccuracy in this context, the coerced content of the three percent warning interferes with the "individual freedom of mind" of voters to make informed voting decisions without state interference. Likewise, as the sponsors of Measure 26-52, plaintiffs will be associated with the false warning, thereby crediting to them a state-sponsored message to which they do not subscribe. As such, their First Amendment right to be free of coerced government-sponsored speech is violated by the inclusion of the three percent warning in the title of Measure 26-52.

As discussed above, defendants have offered no rational basis for the inclusion of three percent warning in the title of Measure 26-52. Accordingly, plaintiffs have shown a substantial likelihood of success on the merits on their First Amendment claims.

#### **D. Facial Challenge**

Although generally disfavoring facial statutory challenges, the Supreme Court requires lower courts to strike down overly broad state restrictions that chill protected political expression. *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973). Content-neutral speech regulations are subject to intermediate scrutiny and will be upheld if defendants can show that the restriction: (1) advances an important government interest and (2) does not burden substantially more speech than necessary to further that interest. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

In this case, the Oregon legislature has attempted to advance an important government interest through O.R.S. § 280.070(4). The statute was designed to inform voters of the potential tax consequences associated with the passage of local option taxes. However, O.R.S. § 280.070(4) burdens substantially more speech than is necessary to achieve that end. The statute applies to all "measure[s] authorizing the imposition of local option taxes," regardless of whether the measures have any chance of "causing" a property tax increase of more than three percent. O.R.S. § 280.070(4). The speech of ballot measure proponents is severely chilled when the three percent warning is included in the title of a ballot measure that has no chance of "causing" property taxes to increase more than three percent. Because O.R.S. § 280.070(4) does not limit the applicability of the three percent warning to only those measures that may "cause property taxes to increase more than three percent," the statute is overbroad and, accordingly, unconstitutional.

## E. Due Process

The Due Process Clause of the Fourteenth Amendment requires fundamental fairness in elections. In the context of reviewing past elections, the Ninth Circuit has adopted a strict standard for evaluating due process challenges to language included in ballot measures: "It must be demonstrated that the State's choice of ballot language so upset the evenhandedness of the referendum that it worked a patent and fundamental unfairness on the voters." *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 858 (9th Cir. 2002) (citing *Burton v. State of Georgia*, 953 F.2d 1266, 1279 (11th Cir. 1992)).

Offering an incomplete reading of *National Audubon*, defendants contend that due process is offended only if the ballot language "is so misleading that voters cannot recognize the subject of the amendment at issue." *Id.* However, *National Audubon* followed an Eleventh Circuit decision, *Burton*, 953 F.2d at 1579, which was limited to "the context of a case such as this one" involving an attempt to overturn the results of a previously held election. Here, no election has been held, and no election results need to be overturned. The more fitting test is whether inclusion of the three percent warning in the title of Measure 26-52 "so upset[s] the evenhandedness of the referendum that it work[s] a patent and fundamental unfairness on the voters." *Id.* Voters will suffer such an unfairness because the title of Measure 26-52 contains a "warning" that drastically overstates the potential tax consequence of the Measure.

Even if the constitution required extreme voter confusion, as was required in the particular circumstances presented in *National Audubon*, such a case is presented here where voters will be completely misled by a three percent warning that overstates the potential tax consequences of Measure 26-52 by a factor of at least 200 and at most 10,000. The subject

matter of a ballot measure that is described as potentially raising voters' taxes by a factor 200 times greater than its potential effect is obscured to voters who expect the government to refrain from printing misleading language on ballots within inches from the space where they will mark "yes" or "no." Fundamental fairness in elections—a bedrock of our democracy—would be eroded if the state were allowed to require patently false "warnings" to appear on ballot measure titles. The court finds that plaintiffs have shown a substantial likelihood of success on the merits on their due process claim.

#### **F. Relief**

Plaintiffs have met their burden of showing probable success on the merits and the possibility of irreparable harm. The court holds, as a matter of law, that O.R.S. § 280.070(4) is unconstitutional as applied to Measure 26-52 and as promulgated. The irreparable harm of voter confusion and the loss of a fair election caused by the inclusion of the three percent warning in the title of Measure 26-52 cannot be corrected through legal remedies. Accordingly, injunctive relief is proper.

Unlike the recent California recall election, this is not a situation in which plaintiffs seek injunctive relief cancelling a scheduled election. *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003). In that case, the Ninth Circuit found that "interference with an election after voting has begun is unprecedented." *Id.* at 919. However, the "interference" the court references in *Southwest Voter Registration Education Project* is defined as the cancellation of an impending election. The plaintiffs in that case sought to enjoin the October 7, 2003, gubernatorial election because of alleged discrepancies in vote calculations caused by punch-card ballots. The court noted:

[E]normous resources already [have been] invested in reliance on the election's proceeding *on the announced date*. Time and money have been spent to prepare voter information pamphlets and sample ballots, mail absentee ballots, and hire and train poll workers . . . . Candidates have . . . calibrated their message to the political and social environment *of the time*. They have raised funds under current campaign contribution laws and expended them *in reliance on the election's taking place on October 7*.

*Id.* (emphasis added). Unlike the plaintiffs in *Southwest Voter Registration Education Project*, plaintiffs here do not seek to postpone the regularly scheduled election set for November 4, 2003. The time and money spent in preparation of the election will not go to waste because the election will be held on November 4, 2003, as scheduled.

When crafting remedies in cases involving elections, the Supreme Court has stated, "In awarding or withholding immediate relief, a court . . . should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The court should consider the "timing of relief," and whether the relief would impose "unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." *Id.*

The court takes notice of the fact that prior to the 8 a.m. hearing held today, defendants mailed 345,000 ballots to Multnomah County voters. This number constitutes over ninety-nine percent of the ballots for the election. The ballots contain the constitutionally deficient three percent warning. The court also takes note that at a hearing held on October 15, 2003, defendants informed the court that the mailing was not required until Tuesday, October 21, 2003. Given the unusual timing of defendants' actions under these circumstances, voters will begin receiving their ballots on October 18, 2003. However, there are still opportunities to inform voters of the constitutional infirmity contained in the title of Measure 26-52.

The court finds that by requiring the inclusion of the three percent warning in the titles of ballot measures that have no possibility of "causing" an increase in property taxes of more than three percent, O.R.S. § 280.070(4) is overly broad. Because plaintiffs have succeeded on their facial challenge, defendants are permanently enjoined from enforcing that provision.

Moreover, the court holds that equity requires that the voters of Multnomah County be informed of the misleading nature of the three percent warning contained in the title of Measure 26-52. Accordingly, the following injunctive relief is ordered:

Beginning Sunday, October 19, 2003, through November 4, 2003, defendants shall place notices in the full-run editions of the *Oregonian* newspaper. The size of the notices shall be approximately five column inches. The notices shall run in each of the following sections of the newspaper: the "A" section, metro, business, sports, and living. The start date of the notices as well as their placement shall conform to the publisher's restrictions. If the publisher's restrictions prevent complete compliance with this order, the notices shall comply with this order as fully as is practicable. The notices shall contain the following statement: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

Additionally, defendants shall issue a press release no later than October 21, 2003, which states: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot

cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

Finally, no later than October 21, 2003, the homepage for the Multnomah County Elections Division shall include the following statement: "By Order of the United States District Court for the District of Oregon, the Multnomah County Elections Division advises voters that the passage of Measure 26-52 by itself cannot cause property taxes to increase more than three percent. This clarifies language printed in the November 4, 2003, ballot that was found to be misleading."

IT IS SO ORDERED

DATED this 17 day of October, 2003.

/s/Ancer L.Haggerty

Ancer L. Haggerty  
United States District Judge