



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

February 17, 2020

Representative Cedric Hayden  
900 Court Street NE H492  
Salem OR 97301

Re: House Joint Resolution 202

Dear Representative Hayden:

House Joint Resolution 202 amends the Oregon Constitution to establish a state obligation to ensure access to cost-effective, clinically appropriate and affordable health care as a fundamental right for every resident of Oregon. You asked three questions about HJR 202 if it is adopted by the voters. First, you asked what legal responsibility the Legislative Assembly would have to implement further health care policy. Second, you asked if the state would be subject to a private cause of action if it fails to satisfactorily implement the fundamental right to access health care. Finally, you asked about the maximum potential liability the state could face if it fails to satisfactorily implement the fundamental right to access health care. At the outset, we caution that because a court has never addressed your questions, our conclusions are subject to uncertainty. Nevertheless, each of your questions is answered below.

**Background**

House Joint Resolution 202 provides:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section 47 to be added to and made a part of Article I, such section to read:

SECTION 47. (1) It is the obligation of the state to ensure that every resident of Oregon has access to cost-effective, clinically appropriate and affordable health care as a fundamental right.

(2) The obligation of the state described in subsection (1) of this section must be balanced against the public interest in funding public schools and other essential public services, and any remedy arising from an action brought against the state to enforce the provisions of this section may not interfere with the balance described in this subsection.

PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or

From the Desk of  
Representative  
Cedric Hayden  
*Cedric R. Hayden*  
2/17/2020

rejection at the next regular general election held throughout this state.

In interpreting a provision of the Oregon Constitution that was adopted by the voters by legislative referral, the primary objective is to discern the voters' intent.<sup>1</sup> To do so, courts employ a three-step analysis. Under step one, a court considers the text and context of the constitutional provision, because "[t]he best evidence of the voters' intent is the text and context of the provision itself."<sup>2</sup> Context includes "other relevant constitutional provisions, case law from [the Oregon Supreme Court], and any relevant statutory framework in effect at the time when the voters adopted the provision."<sup>3</sup> If the voters' intent is clear from the text and context, the analysis is finished, and a court does not continue to step two.<sup>4</sup>

However, if the voters' intent remains unclear after step one, a court under step two considers the history of the referred constitutional provision, including "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure, such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials." (Internal quotations omitted.)<sup>5</sup> Notably, even if the voters' intent is clear after step one, the Oregon Supreme Court has cautioned courts to consider history anyway if doing so appears useful to the analysis.<sup>6</sup>

Finally, under step three, if the voters' intent is not clear after analyzing the text, context and history, a court should employ general canons of statutory construction.<sup>7</sup>

Here, we cannot analyze step two because HJR 202 has not yet appeared on the ballot before the voters. In other words, we do not know what the evidence in the public record will demonstrate about the voters' intent in adopting HJR 202. Accordingly, our analysis must exclude that significant step of the interpretive methodology and our conclusions are thus subject to greater uncertainty.

#### **I. If HJR 202 is adopted by the voters, what legal responsibility will the Legislative Assembly have to implement further health care policy?**

The text of section 47 (1) does two things. First, it expressly creates an affirmative state obligation to ensure that each resident of Oregon has access to cost-effective, clinically appropriate and affordable health care. Second, it also recognizes in each resident of Oregon a fundamental right to access cost-effective, clinically appropriate and affordable health care. In short, a state obligation and corresponding individual right are created under section 47 (1). On its face, the text of HJR 202 does not require the state to implement any further policies if current state policies satisfactorily ensure access to cost-effective, clinically appropriate and affordable health care for every resident of Oregon. However, if current policies do not satisfy

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<sup>1</sup> *Couey v. Atkins*, 357 Or. 460, 490-491 (2015) (explaining voters' intent as "the meaning of the provision at issue most likely understood by those who adopted it"); *State v. Sagdal*, 356 Or. 639, 642 (2015) (outlining interpretation of constitutional amendments); see also *Ecumenical Ministries v. Or. State Lottery Comm'n*, 318 Or. 551, 559-560 (1994). In interpreting a constitutional amendment, the Oregon Supreme Court applies the same methodology to interpret constitutional provisions adopted through the initiative process and by legislative referral. *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 57 (2000).

<sup>2</sup> *Sagdal*, 356 Or. at 642, quoting *State v. Harrell*, 353 Or. 247 (2013).

<sup>3</sup> *Martin v. City of Tigard*, 335 Or. 444, 451 (2003).

<sup>4</sup> *Ecumenical Ministries*, 318 Or. at 559.

<sup>5</sup> *Sagdal*, 356 Or. at 642-643.

<sup>6</sup> *Ecumenical Ministries*, 318 Or. at 559 n.7; *Sagdal*, 356 Or. at 642, citing *State v. Algeo*, 354 Or. 236, 246 (2013).

<sup>7</sup> *Ecumenical Ministries*, 318 Or. at 560; see also *Kerr v. Bradbury*, 193 Or. App. 304, 324 (2004).

the state's obligation, the state—presumably the Legislative Assembly and executive branch—would be required to take steps to fulfill each resident of Oregon's fundamental right to access health care.

In doing so, we believe a court would more likely than not give the state substantial deference to choose the means for ensuring access to health care. For instance, the Legislative Assembly could pass substantive legislation or appropriate moneys. One could imagine mechanisms that would have minimal, if any, financial impact on the state, such as requiring health care providers to provide a certain level of charity care as a condition of licensing or limiting cost-sharing requirements imposed by insurers. By contrast, the chosen mechanisms could have enormous financial consequences for the state, such as creating a government-run health care program or opening government-run health care clinics. In addition to the Legislative Assembly, the executive branch also could take steps, including the promulgation of regulations, to ensure access to health care.

Although section 47 (1) creates a state obligation to ensure access to health care, section 47 (2) requires the state to balance that obligation against the public interest in funding public education and other essential public services. We believe the balancing language of section 47 (2) would more likely than not afford the Legislative Assembly significant discretion to choose how to appropriate funds for essential public services such as health care, public education and law enforcement. That conclusion is supported by the fact that the Oregon Constitution vests in the Legislative Assembly the state's taxing and spending powers.<sup>8</sup> In *Smith v. Cooper*, the Oregon Supreme Court described the relationship between the judiciary and the exercise of discretion by the legislative or executive branches, saying:

The most decisive factor but one most difficult to articulate is that it is essential for efficient government that certain decisions of the executive or legislative branches of the government should not be reviewed by a court or jury. The reason behind such factor is that the bases for the legislative or executive decision can cover the whole spectrum of the ingredients for governmental decisions such as the availability of funds, public acceptance, order of priority, etc.<sup>9</sup>

Accordingly, we believe a court would more likely than not be reluctant to second-guess the Legislative Assembly's balancing decision as expressed through the exercise of its constitutionally vested spending powers. Oregon courts have done just that in other contexts. For example, Oregon courts will not second-guess the veracity of the legislature's determination that an emergency exists for purposes of an emergency clause in legislation.<sup>10</sup> There, the Oregon Supreme Court explained that because the Oregon Constitution vests the power to declare an emergency in the Legislative Assembly, the determination is not subject to judicial review.<sup>11</sup>

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<sup>8</sup> Article IV, section 17, of the Oregon Constitution (vesting all traditional legislative powers in each chamber of the Legislative Assembly); see *Moro v. State*, 357 Or. 167, 229 (2015) (referencing the state's spending power and taxing power).

<sup>9</sup> See *Smith v. Cooper*, 256 Or. 485, 506 (1970).

<sup>10</sup> *Biggs v. McBride*, 17 Or. 640, 647 (1889).

<sup>11</sup> *Id.*

Finally, we note that HJR 202 does not require the state to *provide* cost-effective, clinically appropriate and affordable health care to every Oregon resident, but rather requires that the state provide access to such health care.

## **II. If HJR 202 is adopted by the voters, would the state be subject to a private cause of action if it fails to satisfactorily implement the fundamental right to access health care?**

If HJR 202 is adopted by the voters, the state would likely be subject to lawsuit if it fails to satisfactorily implement each resident of Oregon's fundamental right to access health care. As discussed above in Question I, the text of HJR 202 establishes a state obligation and a corresponding individual right. Further, section 47 (2) expressly mentions "any remedy arising from an action brought against the state to enforce the provisions of this section." We believe a court would more likely than not conclude that, read together, subsections (1) and (2) of section 47 create impliedly, if not expressly, a fundamental right to access health care for every resident of Oregon that is judicially enforceable against the state through an individual private cause of action.<sup>12</sup> Additionally, we believe a court would conclude that adoption of HJR 202 by the people constitutes a waiver of sovereign immunity.<sup>13</sup>

Contextually, the phrase "fundamental right" does not currently appear anywhere in the Oregon Constitution. Consequently, we believe a court may feel pressure to give unique legal significance to the phrase "fundamental right" when analyzing the provision. In the federal judiciary, the phrase "fundamental right" is a legal term of art that appears in the substantive due process and equal protection context. It applies to a small subset of rights afforded the most protective judicial scrutiny. In such cases, government action that infringes on a fundamental right will survive a challenge only if the government demonstrates its action is narrowly tailored to serve a compelling government interest.<sup>14</sup> We cannot predict the extent to which, if at all, the federal case law using the term "fundamental right" will influence a court's analysis of HJR 202. However, at the very least, we believe use of the phrase "fundamental right" increases the likelihood that a court holds that each resident of Oregon has an individual right that may be remedied against the state in court if the state does not meet its obligation to ensure access to health care.

Given the novelty and gravity of such a judicial decision, however, we cannot foreclose the possibility that a court reaches the opposite conclusion, i.e., that HJR 202 does not create a

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<sup>12</sup> The Legislative Assembly has employed more express language to create a private cause of action. See, e.g., ORS 30.265 (1) ("Subject to the limitations of ORS 30.260 to 30.300, every public body is subject to civil action for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598."); ORS 646.641 (1) ("Any person injured as a result of willful use or employment by another person of an unlawful collection practice may bring an action in an appropriate court to enjoin the practice or to recover actual damages or \$200, whichever is greater."); ORS 659A.885 (1) ("Any person claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court.").

<sup>13</sup> *Macpherson v. Department of Administrative Services*, 340 Or. 117, 137-138 (2006) (explaining that the Legislative Assembly or the people—"Oregon's legislative bodies"—may waive sovereign immunity). Put differently, we believe the state would not be able to rely upon the doctrine of sovereign immunity to stop lawsuits against it for failure to ensure every resident of Oregon has access to health care as a fundamental right.

<sup>14</sup> *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265, 357 (1978) ("Unquestionably we have held that a government practice or statute which restricts 'fundamental rights' or which contains 'suspect classifications' is to be subjected to 'strict scrutiny' and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (discussing whether the right to education is a fundamental right requiring application of strict scrutiny); *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992) (explaining that government regulation of a woman's right to abortion is subject to strict scrutiny and thus "sustained only if drawn in narrow terms to further a compelling state interest.").

judicially enforceable fundamental right against the state. In so concluding, the court could rely upon the language in section 47 (2) that says a remedy may not interfere with the state's balance of competing public interests. In doing so, the court could reason that any monetary remedy that a successful plaintiff receives would necessarily interfere with the state's balancing decision because that money would have or may have otherwise been appropriated by the Legislative Assembly to advance an essential public service within the scope of the state's balancing decision. Although theoretically possible, we believe this outcome is less likely.

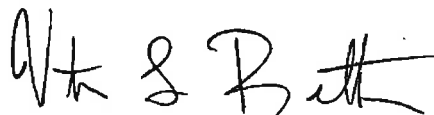
**III. If HJR 202 is adopted by the voters, what is the maximum potential liability the state could face if it fails to satisfactorily implement the fundamental right to access health care?**

We cannot meaningfully answer this question. We can, however, provide the following observation. Where an individual is successful in bringing a private cause of action against the state for failing to ensure access to health care, the remedy a court awards the individual—whether monetary damages, injunctive relief or otherwise—cannot interfere with the state's balance under section 47 (2). It is impossible to predict where a court will place the precise threshold between a remedy that does interfere with the state's chosen balance and a remedy that does not interfere with the state's chosen balance.

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Very truly yours,

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By  
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