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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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

Plaintiffs,

v.

BILL BRADBURY, in his official capacity as the Secretary of State of Oregon, *et al.*,

Defendants.

Case No. 07-6195-HO

DEFENDANT BRADBURY'S MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs seek federal court intervention in a state election. The 2007 Oregon Legislative Assembly passed and referred to the people Measure 49. The Assembly also by statute directed the Secretary of State as to the ballot information to accompany that referral. Plaintiffs ask this court to preclude the Secretary of State from complying with that statutory direction.

Although plaintiffs' request is styled a motion for temporary restraining order (TRO) or preliminary injunction, the relief sought would finally and permanently enjoin operation of an Oregon statute. The ballots and voters' pamphlets will be printed shortly, and the special election will be held on November 6, 2007. If the challenged provisions are "restrained" pending this litigation, then they are restrained permanently. That is an extraordinary remedy, and the burden on a plaintiff seeking that remedy is accordingly severe.

Plaintiffs fail to carry that burden. Indeed, they fail to satisfy any of the prerequisites for preliminary relief. Plaintiffs have no chance of success on the merits. First, their claims are barred by laches. Of the less-than-nine weeks between the challenged statute's effective date and the deadline for its implementation, plaintiffs prejudicially delayed six weeks before even filing the present motion. In any event, the ballot title and other materials that plaintiffs challenge are in no way constitutionally suspect. The ballot information adopted by the legislature is pertinent and accurate. It properly apprises voters that Measure 49 would modify and clarify Measure 37 in specified respects. Certainly, the information is not patently and fundamentally unfair, so as to violate principles of substantive due process.

Furthermore, the "balance of harms" sharply disfavors preliminary relief in this case. Serious public harm would result if the requested injunction were granted. Voter confusion inevitably would result if the referred statute were presented to the people without a title, as requested by plaintiffs' motion. Additional harm is caused by plaintiffs' dilatory filing of their motion six weeks after the challenged statute became effective, and two weeks after plaintiffs filed their complaint. The effect, if not the intent, of that timing is to preclude correction of any

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defect in the ballot information and to frustrate any prospect for appellate review. Plaintiffs can show no irreparable harm to balance against that public harm, because whatever "harm" they might suffer from the allegedly misleading information can be corrected by their own speech during the election campaign.

Thus, both plaintiffs' prospects for success on the merits and the balance of harms militate against preliminary relief. Plaintiffs' motion should be denied.

BACKGROUND

I. Measure 37.

In 2004, the people enacted Measure 37, which is codified as Or. Rev. Stat. § 197.352. Under Measure 37, an owner of real property generally may seek compensation for the enforcement or enactment of a land-use regulation that reduces the fair market value of real property. Only land-use regulations enacted after the owner acquired the property give rise to a claim for compensation. Measure 37 also authorizes state and local governments to "waive" a regulation so as to allow a use that was permitted at the time of acquisition, in lieu of paying compensation.

The apparent simplicity of Measure 37, however, masks numerous and fundamental ambiguities and gaps. Among the most contentious of those is the transferability of the "waiver" where a governmental body elects not to apply a regulation. The better view—and the one endorsed by the courts that have considered it—is that Measure 37 waivers are not themselves transferable to a subsequent owner.[1]

A second example of Measure 37's ambiguity relates to the "acquisition date"[2] for a surviving spouse who acquires an interest in the deceased spouse's property only by inheritance.

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[1] The state circuit court opinions in the cases thus far addressing that issue are attached as Exhibit 3, 4, and 5 to the Affidavit of David Leith. The issue has not yet been addressed by the appellate courts.

[2] Because Measure 37 provides a right to just compensation based on regulations that arise after the owner acquired the property, the acquisition date is a significant benchmark.

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Some argue that the acquisition date should be earlier than the date the surviving spouse acquires the property by inheritance, but the stronger legal position under Measure 37 is that the surviving spouse's acquisition date is the date the property transfers by inheritance.[3] Numerous other ambiguities with respect to rights under Measure 37 also are the subject of litigation.

II. Measure 49 (HB 3540).

The 2007 Legislative Assembly referred HB 3540 for a vote of the people. HB 3540, § 25. It will be presented to the people as Measure 49.

Measure 49 proposes to do a number of things. First, it provides definitions for several terms used in, but not defined by, Measure 37. HB 3540, § 2. The ambiguity of leaving such terms undefined in Measure 37 predictably has led to substantial litigation. Also, Measure 37's ambiguous definition of the key concept of an "owner" is clarified by Measure 49.

Furthermore, section 4 of Measure 49 would directly amend the existing codification of Measure 37 to provide that an owner is entitled to just compensation for any reduction in value caused by restrictions on the *residential use* of private real property or by restrictions on *farming or forest practices* adopted after the owner acquired the property. Measure 37 provides relief based on other land-use regulations, including ones limiting commercial or industrial uses of property.

With respect to Measure 37 claims filed before adjournment *sine die* of the 2007 Legislative Assembly, Measure 49 would provide three alternatives among which most claimants (those with claims for property outside of urban areas) would elect. The first alternative would be to complete or continue a use of the property that was authorized by a vested Measure 37 waiver. HB 3540, § 5(3). The second alternative would be to establish up to three home sites on the property on a specified showing. HB 3540, § 6. The claimant's eligibility for this form of

[3] The courts that have considered the issue have held that marriage itself does not create an ownership interest under Measure 37. The circuit court opinions in those cases are attached as Exhibits 7 and 8 to the Affidavit of David Leith.

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relief is not contingent on proof that the post-acquisition regulation reduced the property's value. Finally, the third alternative available for those with pending claims is to establish up to ten home sites upon a further showing, including a showing of loss of value commensurate with the value of the home sites sought. HB 3540, § 7.

Additionally, Measure 49 clarifies—or, more accurately, extends—rights under Measure 37 as to several of the litigated issues discussed above. As to transferability, Measure 49 expressly provides that the authorization for home sites, once granted, is transferable to a subsequent purchaser, provided the waiver is exercised within ten years of the transfer. HB 3540, § 11. Measure 49 would also provide that a surviving spouse who takes an interest in the property by inheritance or devise takes the property with the marriage date as the surviving spouse's "acquisition date." HB 3540, § 21. Those aspects of Measure 49 are discussed in more detail below, in response to plaintiffs' objections to particular ballot title language.

III. HB 2640.

HB 2640 was signed by the Governor and became effective immediately on July 9, 2007. It provides that Measure 49, as well as referred Measure 50 (which is not at issue in this case), will be voted on at a special election to be held on November 6, 2007. HB 2640, § 2. HB 2640 also directs the Secretary of State with respect to the text of the ballot title, explanatory statement, and financial impact statement for those measures.

The power of the Legislative Assembly to refer a measure to the Oregon voters is conferred by the Oregon Constitution. Or. Const., Art. IV, § 1(3)(c), (4). Article IV, § 1(4)(b) specifically provides that "referendum measures shall be submitted to the people as provided in this section and by law not inconsistent therewith." Thus, it is the Legislative Assembly's constitutional prerogative, as a matter of state law, to establish the manner and timing by which a measure will be presented to the people for approval or rejection.

Pursuant to that constitutional authority, the legislature generally has established the use of ballot titles, explanatory statements, and financial impact statements for ballot measures, and

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has established a generally applicable process for preparation of that information. *See* Or. Rev. Stat. §§ 250.035 *et seq.* Those provisions themselves expressly reserve the Legislative Assembly's authority to prepare the ballot title for a measure referred by the Assembly. Or. Rev. Stat. § 250.075. Because ballot-title preparation is purely a statutory process, the legislature is free to amend that process, including in particular cases.

HB 2640 directs that the ballot title for Measure 49 shall be as follows:

> MODIFIES MEASURE 37; CLARIFIES RIGHT TO BUILD HOMES; LIMITS LARGE DEVELOPMENTS; PROTECTS FARMS; FORESTS; GROUNDWATER.
>
> RESULT OF "YES" VOTE: "Yes" vote modifies Measure 37; clarifies private landowners' rights to build homes; extends rights to surviving spouses; limits large developments; protects farmlands, forestlands, groundwater supplies.
>
> RESULT OF "NO" VOTE: "No" vote leaves Measure 37 unchanged; allows claims to develop large subdivisions, commercial, industrial projects on land now reserved for residential, farm and forest uses.
>
> SUMMARY: Modifies Measure 37 (2004) to give landowners with Measure 37 claims the right to build homes as compensation for land use restrictions imposed after they acquired their properties. Claimants may build up to three homes if 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 property or farm, forest practices. Disallows claims for strip malls, mines, other commercial, industrial uses. See Explanatory Statement for more information.

HB 2640, § 3(1). The text for the estimate of financial impact and the explanatory statement for Measure 49 are provided by HB 2640, § 4(1) and § 5(1), respectively.

IV. Legislatively adopted ballot information historically.

Notwithstanding plaintiffs' contrary assertions, the Oregon Legislative Assembly routinely adopts ballot title language for measures it refers to the people. Moreover, because of

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time constraints, the Legislative Assembly routinely exempts its ballot language from the statutes that otherwise would provide for judicial review.

A brief history of recent referrals is set forth in the Affidavit of Ted Reutlinger, which is submitted along with this memorandum. Mr. Reutlinger is Chief Deputy Legislative Counsel and has served with Legislative Counsel's office for more than twenty years. He advises the legislature on bills referring legislation to the people.

Mr. Reutlinger explains that it is common for the legislature to refer measures to be voted on at elections to be held shortly after the legislative session. Reutlinger Aff., ¶¶ 5-6. In those instances, the deadline to send the ballot information for printing—which as a practical matter must occur about two months before the election—follows closely after the session. Because of that time constraint, the legislature routinely enacts the ballot information for such referral measures itself, and routinely exempts that legislatively adopted ballot information from the statutes that otherwise would provide judicial review. Reutlinger Aff., ¶ 6. It does so because there simply would not be enough time before the election to accommodate the judicial process. *Id.* Mr. Reutlinger notes in his affidavit numerous examples of such legislation. Reutlinger Aff., ¶ 8. Thus, while plaintiffs claim Measure 49 is unique in that respect, it is in fact commonplace.

V. The legislative process with respect to HB 3540.

The legislative process that led to the Assembly's adoption and referral of HB 3540 is not properly relevant to any issue before this court. This memorandum nevertheless sets forth that process below, solely to correct plaintiffs' mischaracterizations and misapprehensions of what transpired.

Early in the 2007 session, legislative leadership appointed a special joint committee to consider legislation related to land use fairness issues and Measure 37. During the latter part of January and February, the committee held seven public hearings on Measure 37. The committee considered at four other public hearings proposed legislation from the Governor (SB 505) that would have put Measure 37 claims for larger developments on hold until June of 2007. The

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purpose of that bill was to allow time for the legislature to consider substantive changes to the law. That proposal received little support, however, and was never acted on by the committee.

In late February, once it became clear that SB 505 did not have sufficient support to move through the legislative process, the committee formed a smaller bipartisan work group made up of five members of the eleven-member Joint Land Use Fairness Committee. That work group consisted of the two co-chairs of the committee—Senator Floyd Prozanski and Representative Greg MacPherson—as well as Representatives Patti Smith and Bill Garrard, and Senator Kurt Schrader. The work group met sixteen times in an attempt to reach bipartisan agreement on a conceptual framework for legislative changes to Measure 37, and made substantial progress toward that end. Ultimately, however, that effort failed.

At that point, a number of legislators—including some members of the work group, and some other members of the Joint Land Use Fairness Committee—developed legislation based on the work toward a bipartisan conceptual framework. The result was HB 3540.

On April 12, 2007, HB 3540 was presented to the full committee in the form of a detailed summary. The committee held extensive public hearings and work sessions on April 17, April 19, and April 26th. HB 3540 was passed out of committee with a do-pass recommendation on April 26, 2007 and referred to the Joint Committee on Ways and Means. The bill was heard and approved by the Ways and Means Committee on May 1, 2007. It was approved by the Oregon House on May 4, 2007 after hours of floor debate, and was then referred again to the Ways and Means Committee, which again passed the bill out (with amendments) on June 1, 2007. The bill was approved by the Oregon Senate on June 5, 2007, again after hours of debate. On June 6, 2007, the Oregon House concurred in the Senate amendments. Because it is a referral measure, HB 3540 was not presented to the Governor for his approval. Or. Const., Art. IV, § 1(3)(c).

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VI. The Attorney General's ballot title for initiative petition 98.

Separate from the legislature's referral of HB 3540 and adoption of the ballot language in HB 2640, a citizen initiative (initiative petition number 98) was submitted to the Secretary of State proposing a law identical to that proposed by HB 3540. In accordance with statutory procedures, the Attorney General prepared a draft ballot title for that petition, members of the public commented on that draft, and the Attorney General responded, ultimately issuing a final ballot title.

Plaintiffs claim that the Attorney General's response to comments described the legislatively adopted ballot title for Measure 49 as an "advocacy piece." *See* Plaintiffs' Memo at 4, 13. That is not correct.

As part of the statutory process, one commenter, John Kobbe, requested ballot title language similar to that provided by HB 2640 for Measure 49. Criticizing the draft ballot title, Mr. Kobbe complained that the ballot title "should explain to the voters why a 'yes' vote is warranted," and argued that the ballot title should put the petition "in the most favorable terms possible." Leith Aff., Ex. 6., Kobbe comment letter at 1. Mr. Kobbe explained that "[w]ithout a more positive and biased ballot title," the measure would "stand no chance of ever being adopted." Leith Aff., Ex. 6, Kobbe comment letter at 3. The Attorney General responded to and rejected Mr. Kobbe's explicit (if facetious) request for advocacy, explaining that the ballot title should not be an "advocacy piece."

Plaintiffs present the Attorney General's statement as though it were comment or judgment on the ballot title language suggested by Mr. Kobbe and adopted by HB 2640. It was not. As the context makes clear, the Attorney General was commenting on Mr. Kobbe's request for advocacy as a general proposition, not on any particular formulation of the ballot title.[4]

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[4] Of course, even under the statutory standards, there is no single "correct" formulation for a particular ballot title. Any number of different formulations might equally adhere to the statutory standards.

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VII. Plaintiffs' complaint and motion for preliminary relief.

Plaintiffs' complaint challenges the ballot information adopted by the Legislative Assembly for Measure 49. The complaint alleges that the information is patently and fundamentally unfair, in violation of plaintiffs' substantive and procedural due process rights, in violation of the Equal Protection Clause, and in violation of the First Amendment. The motion for preliminary relief seeks a TRO or a preliminary injunction forbidding the Secretary of State to comply with the statutory direction of HB 2640 as to printing Measure 49's ballot title, estimate of financial impact, and explanatory statement.

VIII. Standards for issuance of preliminary relief.

The standards for obtaining a TRO are the same as those for obtaining a preliminary injunction. *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1388 (9th Cir. 1986) (reviewing denial of TRO under preliminary injunction standards); *United States Cellular Investment Co. of Los Angeles v. Airtouch Cellular*, 2000 U.S. Dist. LEXIS 4731 at *15 (C.D. Cal. 2000) ("[T]he standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction."). The test operates on a sliding scale, balancing the potential for irreparable harm and the likelihood of success on the merits. To obtain such relief, a plaintiff must show either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits combined with a balancing of hardships tipping sharply in favor of the moving party. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003). "[T]he degree of irreparable harm required for a preliminary injunction increases as the probability of success on the merits decreases, and vice-versa." *Id.* at 1300.

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ARGUMENT

I. Plaintiffs have no likelihood of success on the merits of their claim.

A. Plaintiffs' claims are barred by laches.

Plaintiffs challenge HB 2640's direction as to the text of the ballot title, estimate of financial impact, and explanatory statement for Measure 49. That challenge should be rejected, first, because of plaintiffs' unwarranted delay in bringing their motion, and because that delay is prejudicial.

The opinion of Judge King in *Oregonians for Accountability v. Bradbury*, 2004 U.S. Dist. Lexis 18257 (D. Or. 2004) ("*OFA*") is instructive. Plaintiffs in that case challenged the official "estimate of financial impact" for a ballot measure they supported. They contended the estimate was misleading and thereby violated their federal constitutional rights.

The challenged estimate had been filed on August 4, 2004. *Id.* at *3. The Secretary of State was then required to deliver it for printing by the 61st day before the election, September 2, 2004. *Id.* at *5. Although the plaintiffs could have brought their challenge anytime after the estimate was filed on August 4, 2004, they waited almost three weeks, until August 23, 2004. *Id.* at *8.

Judge King found fault with the plaintiffs for the delay in filing. *Id.* at *8-9. He also found prejudice in that the delay left no time for the State to modify the estimate if the court were to find it defective. *Id.* at *9-10. Thus, the court found that the defendants had "articulated a solid laches argument," although the court went on instead to deny the plaintiffs' motion for preliminary injunction on other grounds, specifically their unlikelihood of success on the merits. *Id.* at *10, 15.

This case presents an even more egregious case of delay than *OFA*. In this case, the challenged statute was signed by the Governor and became effective immediately on July 9, 2007. It directed the Secretary of State to move forward with printing the ballot information by September 6, 2007, in preparation for a special election approximately two months later. Thus,

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the window between HB 2640's effective date (July 9) and the deadline for its implementation by the Secretary of State (September 6) is eight weeks and three days.

Nevertheless, plaintiffs waited four weeks before even filing their complaint. They then waited an additional two weeks before filing their motion seeking a TRO or preliminary injunction. All told, plaintiffs expended six weeks—or almost three quarters of the available window of time—before even presenting their purportedly urgent request.

Plaintiffs' delay is particularly troubling in the context of a challenge to an electoral process. The Oregon Supreme Court has aptly suggested this "basic principle: Wherever any court is asked to order a change in the election process, especially a late change in a time-sensitive process, extreme judicial caution should be exercised by the judicial branch." *State ex rel. Keisling v. Norblad*, 317 Or. 615, 625, 860 P.2d 241 (1993). In view of the time-sensitive nature of such processes, Oregon law requires a petition for judicial review of a ballot title to be filed within ten days of its certification, in those cases where judicial review is made available. *See* Or. Rev. Stat. § 250.085(3). That statute provides some guidance as to the reasonable time within which plaintiffs should have filed their request for analogous relief. Plaintiffs, however, took much longer than ten days to bring the present claims.

That delay is prejudicial in at least two respects. First, as in *OFA*, there no longer would be enough time to take remedial steps in the event that the court found some defect in the challenged language. And second, whether or not deliberately, plaintiffs' delays in bringing this motion will, in all likelihood, preclude any appellate review. This court should not exercise its equitable power in such a way so as to reward plaintiffs' dilatory filing.

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Plaintiffs' extraordinary, unexplained, and prejudicial delay in presenting their claims and their demand for equitable relief constitute laches. The requested relief should be denied on that ground alone.[5]

B. Plaintiffs' substantive due process claim is without merit.

Plaintiffs contend that the legislatively adopted ballot title for Measure 49 is unconstitutionally unfair, in violation of the substantive component of the Due Process Clause.[6] Not surprisingly, the bar is exceedingly high to establish that information provided by a state in the course of a state election violates substantive due process. The information provided by the Legislative Assembly for Measure 49 is pertinent and accurate, and does not remotely approach the threshold to establish a violation.

1. Plaintiffs must show that the challenged ballot information is fundamentally and patently unfair.

Substantive due process "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998) (quoting *U.S. v. Salerno,* 481 U.S. 739, 746 (1987)). Substantive due process challenges to the constitutionality of ballot language proceed under the theory that the government is interfering

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[5] The court also might fairly doubt whether plaintiffs even have standing to assert the present claim. By their own admission, they assert a generalized grievance (Compl., ¶ 5), not a particularized one. *See Lujan v. Defenders of Wildlife*, 504 U.S. 551, 560 (1992) (stating requirement of a "concrete and particularized" injury). Moreover, plaintiffs fail to satisfy the prudential standing requirements. In *O'Sullivan v. City of Chicago*, 396 F.3d 843, 854 (7th Cir. 2005), the court explained that prudential standing requirements are particularly important where a party challenges the actions of a state: "In those cases, federal courts have the added responsibility to ensure that their actions do not strain unnecessarily the principles of federalism." In that context, "voters, taxpayers or residents voicing generalized complaints are not sufficient to justify the federal court's intrusion into the workings of the States." *Id.* at 857. Under those principles, plaintiffs fail to allege a sufficiently particularized injury to confer standing.

[6] Plaintiffs also insinuate some constitutional defect in the legislative process itself, or in the exception from judicial review under Or. Rev. Stat. § 250.085. There is no colorable issue in either respect.

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with a person's right to vote, a right implicit in the concept of ordered liberty. *See, e.g., Burton v. Georgia,* 953 F.2d 1266, 1267 (11th Cir. 1992).

The ballot language at issue in *Burton* asked voters, "Shall the Constitution be amended to provide that the General Assembly may authorize lawsuits against the state and its departments, agencies, officers, and employees and to provide how public officers and employees may and may not be held liable in court?" *Id.* The plaintiffs argued that language misled voters by suggesting the measure would make it easier to sue the state, rather than more difficult. *Id.*

The *Burton* court ruled that ballot language passed constitutional muster under the Due Process Clause where the language identified the subject of the measure for the voter. *Id.* at 1269. As long as the voter is not deceived about what subject is at issue, there is no "patent and fundamental unfairness," and the ballot language will thus satisfy the Due Process Clause. *Id.* The *Burton* court identified the applicable standard as follows:

> [I]t 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. Such an exception can arise * * * only when the ballot language is so misleading that voters cannot recognize the subject of the amendment at issue. * * *
>
> As long as the citizens are afforded reasonable opportunity to examine the full text of the proposed amendment, broad-gauged unfairness is avoided if the ballot language identifies for the voter the amendment to be voted upon. Therefore, substantive due process requires no more than that the voter not be deceived about what amendment is at issue.

Id. The *Burton* court held the challenged ballot information did not violate that standard. *Id.* at 1270.

The Ninth Circuit has followed *Burton*. *See Caruso v. Yamhill Co.,* 422 F.3d 848, 863 (9th Cir. 2005); *National Audubon Society, Inc. v. Davis,* 307 F.3d 835, 858 (9th Cir. 2002). In *Caruso*, a statute required that initiatives proposing any local-option tax must include the statement, "This measure may cause property taxes to increase more than three percent." 422

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F.3d at 851. The warning was required regardless of whether the proposal would itself cause taxes to increase by that amount. *Id.* at 863. In holding that the challenged language did not violate substantive due process, the Ninth Circuit emphasized that a voter did not have to rely on the warning alone. *Id.* Instead, voters could consult other materials, including the remainder of the ballot title and the measure itself. *Id.* The court concluded that the challenged language was not patently or fundamentally unfair, so as to violate the pertinent standard. *Id.*; *see also OFA* (similarly applying *Burton* and finding that challenged ballot language would not deceive voters as to the measure at issue).[7]

Moreover, when reviewing ballot language for "patent and fundamental unfairness," courts give deference to the sovereign right of the states to regulate their own elections. *Burton,* 953 F.2d at 1270. Although the right to vote is a right protected by the United States Constitution, "[p]rinciples of federalism limit the power of federal courts to intervene in state elections." *Id.* at 1268. The *Burton* court noted that "[b]ecause the Constitution largely contemplates state regulation of state elections, we have long recognized that not every state election dispute implicates federal constitutional rights." *Id.* at 1268. Unlike allegedly systemic patterns of discrimination, isolated events that may affect voters' rights are not presumed to be a constitutional violation. *Id.* at 1270.

Finally, substantive due process also does not require that ballot language explain the legal effect of a proposed measure. *Id.* So long as voters have an opportunity to read the text of a proposed measure, it is the voters' responsibility to "determine, for themselves, the legal effect of its passage." *Id.* The *Burton* court explicitly held substantive due process does not "impose[] an affirmative obligation on states to explain—some might say speculate—in ballot language [on] the potential legal effect of" a proposed measure. *Id.*

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[7] *Kohler v. Tugwell*, 292 F.Supp. 978, 981 (E.D. La. 1968), a precursor to *Burton*, also is instructive. The *Kohler* court held, "what appeared on the ballot was sufficient to tell voters what the complicated amendment was about. It was up to them to study the exact text." *Id.* at 981 (quoted with approval by *Burton*, 953 F.2d at 1271).

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Thus, to prevail, plaintiffs must establish that the challenged ballot information is fundamentally and patently unfair. In so doing, they must overcome the strong presumption that access to the measure itself will cure any defect in the ballot language, and that—in keeping with principles of comity and federalism—courts hearing such challenges should exercise institutional caution and reluctance to interfere in state election processes.

2. Plaintiffs apply the wrong standard and reach the wrong conclusion.

Plaintiffs erroneously suggest that the statutory standards under which the Oregon Attorney General drafts ballot titles for initiative petitions have some legal relationship to the federal constitutional standards that apply here. That is not correct.

The statutes under which the Attorney General prepares ballot information contain particularized standards that are unrelated to the requirements of substantive due process.[8] As discussed above, the federal constitution prohibits only "patently and fundamentally unfair" ballot information that misleads the voters as to the subject of a measure.

3. The ballot information for Measure 49 is pertinent and accurate.

a. The ballot title for Measure 49 is unobjectionable.

The form of ballot title adopted by the legislature for Measure 49 is similar to what Oregon voters are accustomed to. It includes a concise caption, a short explanation of the effects of a "yes" or "no" vote, and a somewhat more detailed summary of the measure. That is the same form adhered to by the Attorney General when preparing a ballot title for an initiative petition. *See* Or. Rev. Stat. § 250.035. The ballot title for Measure 49 comports even with the specific word limits that would apply under that provision.[9]

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[8] Of course, even if those statutes applied here as a matter of state law—which they do not—a claim to enjoin the State to comply with its own statutes does not lie in federal court. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L.Ed.2d 67 (1984); *see also OFA*, 2004 U.S. Dist. LEXIS at *7-8.

[9] Under Oregon law, the ballot title becomes part of the measure's legislative history.

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Two general observations are salient and will facilitate discussion of plaintiffs' specific objections to particular passages from the ballot title and explanatory statement. First, it is not constitutionally required—nor is it even appropriate—for the ballot information to speculate about how provisions of the measure might be construed by the courts. Second, brevity is essential in drafting ballot information, and that necessarily leads to generalizations. Where plaintiffs say a proposition is "categorically" or "patently" false, it becomes clear on closer scrutiny that their point is not that the proposition is false, but that it is subject to exceptions. The federal constitution, however, does not require that a state's ballot title discretely address exceptional circumstances when stating the general effect of a measure. Those two general responses address many of the specific objections plaintiffs raise.

Turning to plaintiffs' objections, the caption is the most visible and the most accessible part of the ballot information for a measure. If the caption accurately identifies the measure at issue, then it is difficult to conceive a circumstance where the ballot information as a whole might deceive the electorate as to what measure is at issue. The caption in this case accurately identifies the measure.

The caption of Measure 49's ballot title correctly notes that the measure modifies Measure 37. Plaintiffs make the legalistic objection that the measure itself cannot be amended; only the statute that it became can be amended at this stage. But the law that Measure 37 became is commonly known as Measure 37. The purpose of the ballot title is to inform the electorate in accessible terms. The challenged text does that. And plaintiffs' proposed substitute—presumably, "amends ORS 197.352"—would be ill-suited to that task.

The caption next explains that Measure 49 "clarifies [the] right to build homes" and "limits large developments." Plaintiffs do not take issue with either statement.

Finally, the caption states that the measure protects farms, forests and groundwater. Plaintiffs object to that statement. But they acknowledge the measure will limit large developments, including developments on farmland and forestland and in areas where

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groundwater is limited. To that extent, at least, the measure protects farms, forests and groundwater. Moreover, plaintiffs acknowledge that the measure limits development to three homesites in high-value farmland, forestland, or groundwater-restricted lands. *See* Plaintiffs' Memorandum at 41. That constitutes another substantial measure of protection for such areas. The caption's statement is well-founded and not at all misleading.

Thus, the caption as a whole accurately identifies the measure and apprises voters as to what is at issue. Plaintiffs nevertheless argue that specific statements in other aspects of the ballot information render the information constitutionally infirm.

The ballot title's explanation of the result of a "yes" or "no" vote generally tracks the caption. Plaintiffs therefore raise the same objections they assert with respect to the caption. But the explanation is generally appropriate for the same reasons the caption is appropriate.

Plaintiffs next object to several provisions of the ballot title's summary. First, the summary says that Measure 49 modifies Measure 37 to give claimants the right to build homes as compensation for restrictions imposed after they purchased their property. Plaintiffs contend that statement is inaccurate in that a claimant under Measure 37 who is not within the definition of an "owner" under Measure 49 would not be entitled to homesites.[10] The summary, however, reasonably uses "claimant" to denote a person with a qualifying claim under Measure 49. The language reasonably would be so understood by the electorate.[11]

Second, plaintiffs object to the summary's statement that claimants "may build up to three houses if previously allowed when they acquired their property." Plaintiffs' Memorandum

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[10] Plaintiffs' example is plaintiff Olson, who asserted a Measure 37 claim based on his right to remove Christmas trees from certain real property. The circuit court ruled that interest did qualify Mr. Olson as an "owner" under Measure 37 for purposes of establishing his right to build homes on the property. The State disagrees. That issue is now pending before the Oregon Court of Appeals in Mr. Olson's case.

[11] Plaintiffs appear to assert that there are many persons who qualify as an "owner" under Measure 37 who would not qualify under Measure 49. Plaintiffs fail to note that the definition of "owner" in Measure 49 by and large corresponds with the State's application of Measure 37 (an area of substantial controversy and litigation).

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at 29-31. Plaintiffs contend a claimant could not build three homes under Measure 49, in the stated circumstances, if the current regulation "restricts" but does not "prohibit" that use. Plaintiffs' argument ignores the fact that virtually all Measure 37 claims submitted prior to the adjournment of the 97th Legislative Assembly involve allegations that land-use regulations *prohibit* establishing a lot, parcel or dwelling (thus entitling them to relief under section 6(6) of Measure 49). Plaintiffs' argument also improperly speculates on the construction that a court might later give Measure 49 if it becomes law. The one example provided by plaintiffs involves a claim for property within an urban growth boundary (UGB), which involves a different section of Measure 49 (section 9). Claims for properties located within a UGB make up a very small fraction of the statewide total. In short, the example identified by plaintiffs at most involves a narrow exception. The ballot title is not constitutionally required to engage in fly-specking every detail of every possible effect. Moreover, plaintiffs' speculation about the likely construction of Measure 49 is unpersuasive. Courts are unlikely to draw the fine distinction plaintiffs suggest.

As another ground for challenging that same statement, plaintiffs maintain that the statement would not hold true for a hypothetical claimant who seeks to build homes on property that is (1) within a UGB, and (2) zoned for non-residential use. But the ballot title's summary states accurately a general proposition that holds true for the vast majority of claims. Again, only a very small fraction of all claims relate to property within a UGB, and most of those relate to property that is zoned residential. So the hypothetical scenario that plaintiffs imagine would be exceptional. The summary is not misleading—and certainly not patently and fundamentally unfair—where it accurately states a general proposition, even though that proposition may be subject to exceptions at the margins.

The third contested statement in the summary raises the same arguments, but this time with respect to claimants seeking to build four to ten homes. The same responses apply again to those objections.

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Fourth, plaintiffs object to the summary's statement that Measure 49 "[a]llows claimants to transfer homebuilding rights upon sale or transfer of properties[.]" Plaintiffs contend that the statement is accurate only as to those who asserted their claims before adjournment *sine die* of the 2007 Legislative Session. The unstated assumption underlying Plaintiffs' complaint in this regard is that Measure 37 does provide for transfer of authorizations to use private real property. As noted above, the State's position (affirmed by every court that has considered the issue) is that Measure 37 "waivers" are personal to the present owner who obtained the waiver. Measure 49 would not alter whether or not "waivers" are transferable for claims filed after adjournment *sine die*—they would not be transferable, just as they are not transferable under Measure 37. There is no inaccuracy in the ballot title or summary.

Fifth, the summary states that Measure 49 "extends rights to surviving spouses." Plaintiffs object that in some circumstances Measure 49 would not enlarge the rights of a surviving spouse. Be that as it may, it is clear that in some circumstances—specifically, the circumstances that have led to contentious disputes— Measure 49 would extend rights to surviving spouses. Where a surviving spouse was not a joint owner of the property, the surviving spouse's rights under Measure 37 accrue from the date of acquisition by inheritance. Measure 49 provides, instead, that the acquisition date for a surviving spouse receiving property as an inheritance generally is the date of the marriage. HB 3540, § 21. Thus, the ballot title properly states that Measure 49 extends rights to surviving spouses.[12]

Plaintiffs' last objection to the ballot title's summary relates to the statement, "Disallows claims for strip malls, mines, and other commercial, industrial uses." Plaintiffs complain that the summary chooses certain examples of disallowed uses, while omitting other examples, in a non-

[12] Plaintiffs misread the pertinent provision. It states that where the claimant is a surviving spouse, the claimant's acquisition date is either "the date the claimant was married to the deceased spouse or the date the spouse acquired the property, whichever is later." "[T]he spouse" refers in that sentence to the deceased spouse; the surviving spouse is referred to as "the claimant." Plaintiffs' contrary interpretation is erroneous.

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neutral way. Whatever the basis or merits of that assertion, the statement is accurate, not misleading.

Plaintiffs demonstrate, at most, that the ballot title contains statements that, with more space, could more precisely have discussed exceptions to the accurate general propositions asserted. But that is certainly the case with most ballot titles, which by their nature involve generalizations. There is nothing patently or fundamentally unfair about the challenged ballot title for Measure 49.

b. The explanatory statement also is not misleading.

Plaintiffs also seek to nitpick details of the explanatory statement.

First, they object to the opening sentence of the explanatory statement, which provides, "Ballot Measure 37 (2004) requires governments to pay landowners or forgo enforcement when certain land use regulations reduce their property values." Plaintiffs complain that Measure 37 requires not just a reduction in value to trigger a government's obligations, but also a restriction on use. The latter requirement, however, is fairly and necessarily implied: it is the regulatory restriction on use that causes the reduction in value. The statement is not misleading (or in any way consequential).

Second, plaintiffs object again to the suggestion that claimants will be allowed to build homes as compensation, in lieu of the compensation provided by Measure 37. Plaintiffs object that the statement says "all" Measure 37 claimants will have that right. But that is simply false: the statement doesn't say "all" Measure 37 claimants will have that right. And, as discussed above, the statement that claimants will be allowed to build homes would not reasonably be read as including a claimant who does not qualify as an "owner" of the property under Measure 49.

Plaintiffs' third and fourth objections—relating to the circumstances under which a claimant may be entitled to homesites—are similar to their second and third objections to the ballot title's summary. As discussed above, the challenged statements are accurate. At best,

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these are examples of plaintiffs' confusion between a general proposition being false versus the proposition being subject to some limited exceptions.

Plaintiffs' fifth objection disputes the statement that Measure 49 does not allow subdivisions on "high-value farmland, forestland and groundwater-restricted lands." They claim the statement is inaccurate because it overlooks the possibility of a three-unit "subdivision"—with a non-buildable remnant making a fourth unit—on such lands, consistent with Measure 49. Whatever the appropriate application of Measure 49 to that hypothetical scenario, it is accurate to say that the measure generally does not permit subdivisions, as the term is commonly understood, on such lands. The explanatory statement aptly performs its function of informing the electorate in readily understood terms. It is not misleading.

Plaintiffs' sixth objection to the explanatory statement restates their argument about Measure 49's effect on a surviving spouse's acquisition date. As discussed above, that statement is accurate.

Seventh, plaintiffs restate their objection about transferability of waivers under Measure 49. As discussed above, that statement is not objectionable.

Eighth, plaintiffs object to the statement that Measure 49 provides a streamlined process by which claimants may obtain up to three homesites, needing to establish only "the right to build the homes they are requesting when they acquired their property." Plaintiffs say that is wrong, because a claimant must also establish, among other things, ownership of the property. The additional requirements are fairly implied and the language is not likely to mislead voters. In context, the challenged statement merely distinguishes claims for up to three homesites from claims for four to ten homesites: the former requires proof only of the right to build the homes on the acquisition date, and the latter requires additional proof that the limiting regulation also caused a loss of value.

Finally, plaintiffs argue that the formula to prove fair market value under Measure 49 is unworkable, because it depends on a non-existent Treasury bill rate. The formula to prove a

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reduction in value under Measure 49 does include a time adjustment based on "the average interest rate for a one-year United States Government Treasury Bill on December 31 of each year of the period between the date the land use regulation was enacted and the date the claim was filed, compounded annually on January 1 of each year of the period." HB 3540, §§ 7(6) and 12(2). Although the Treasury stopped selling one-year Treasury Bills in 2001, it and the Federal Reserve continue to publish the one-year constant maturity date rate, which is the rate that would be paid on one-year Treasury Bills if they were sold. For purposes of Ballot Measure 49, that rate would apply to time-adjustments for the period after 2001. The formula is not "broken," as plaintiffs argue.

Thus, plaintiffs' objections to the explanatory statement, like their objections to the ballot language, are without merit. The explanatory statement is not inaccurate or misleading in any respect. Plaintiffs have no chance whatsoever of prevailing on their substantive due process claim that the challenged ballot language is patently and fundamentally unfair.

C. Plaintiffs' other claims similarly lack merit.

Plaintiffs' amended complaint alleges the same operative facts as violations also of procedural due process, of the Equal Protection Clause, and of the First Amendment. These claims are presented differently in plaintiffs' complaint and in their memorandum.

The complaint alleges each of those claims as essentially derivative of the substantive due process claim, reliant on the same standard of "patent and fundamental unfairness." Under that standard, for the same reasons discussed above, plaintiffs cannot prevail under any of these derivative theories.

Plaintiffs' memorandum, on the other hand, includes separate rationales for each of those extraneous claims. None, however, colorably warrants relief.

First, plaintiffs argue that they have a procedural due process right to judicial review of ballot titles for state measures, because Oregon law generally provides for such review. Contrary to plaintiffs' argument, the Due Process Clause does not constitutionalize all procedures

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provided by state law. The Oregon Legislative Assembly may provide procedures—and exceptions for procedures—as it sees fit, unconstrained by the actions of previous legislatures.

Plaintiffs also contend that the ballot title somehow infringes their right, under procedural due process, to file a Measure 37 claim. This claim concerns plaintiffs' alleged rights in the event that Measure 49 is adopted. That alleged due process right has no logical or legal connection to the challenged ballot information.

Plaintiffs' argument under the Equal Protection Clause concerns the allegedly unequal treatment of Measure 37 and Measure 49. The State is not constitutionally required, however, to apply the same procedures to initiatives and to referenda, or otherwise to different measures. The Equal Protection Clause guarantees equal treatment of people, not measures.[13]

Finally, plaintiffs claim that the challenged ballot language violates the First Amendment's Petitions Clause. The thrust of the claim again is that after providing by statute for judicial review of ballot titles, the legislature could not exempt a ballot title from those provisions. As discussed above, that is not so. Each of plaintiffs' constitutional claims has no likelihood of success on the merits.

II. The balance of hardships disfavors "preliminary" relief here.

A. The requested injunction would cause substantial public harm.

Although denominated a motion for preliminary relief, the requested injunction would entirely preclude operation of the challenged statutory provisions. The election that those provisions relate to will pass, and further proceedings in this case will be moot, before any further ruling on the merits could occur. If granted, plaintiffs' motion would require Measure 49 to proceed without the challenged ballot information. That inevitably would cause significant voter confusion.

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[13] Plaintiffs argue under this heading that "the people did not give the legislature the power to push its own agendas." Plaintiffs' Memorandum at 49. That argument illustrates the defect in plaintiffs' reasoning. Of course, that is precisely what the people authorized the legislature to do.

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The ballot title and explanatory statement for Measure 49 (like that for the simultaneously referred Measure 50) track the familiar format that voters are accustomed to finding in the voters' pamphlet and (as to the ballot title) on the ballot. A measure lacking that information and that familiar form presumably would be confusing in itself. Moreover, the ballot title serves as a convenient reminder for many voters as to the subject of a given measure. Regardless of the specific content of the information, the title provides trigger words that recall the measure—and anything the voter knows of the measure—to the voter's mind.

Indeed, the irregularity of a measure without a title is not merely a matter for psychological speculation. Attached to the Affidavit of David Leith are two ballot forms. The first is a sample ballot form from the 2006 general election, showing generally how a ballot title appears. Leith Aff., Ex. 1. The second form is a mock ballot for the 2008 special election, prepared without a ballot title for Measure 49, in accordance with the injunction sought by plaintiffs. Leith Aff., Ex. 2. The only information provided for Measure 49 would be the bare number "49" above bubbles for a "yes" or "no" vote. There can be little doubt that the form would confuse voters, likely leading to a significant undervote on the measure, regardless of the position the voter might have taken if a ballot title had been included.

An injunction against the Legislative Assembly's ballot information for its own referred measure also would frustrate the speech rights of the legislature. *Cf. Kidwell v. City of Union*, 462 F.3d 620 (6th Cir. 2006) (sustaining governmental expenditure of funds to support ballot initiative). That cognizable harm weighs heavily against preliminary relief.

The public harm threatened by plaintiffs' motion is further aggravated by plaintiffs delay in filing their motion to enjoin HB 2640. The Ninth Circuit has held that "delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief." *Lydo Enterprises, Inc. v. Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (reversing a preliminary injunction based on delay in bringing the motion). A court may properly consider a plaintiff's delay in seeking an injunction even if the court concludes laches does not apply. *Headwaters,*

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Inc. v. Bureau of Land Management, 665 F. Supp. 873 (D. Or. 1987) (declining to apply laches, but concluding that balance of harms weighs against motion because plaintiff's delay brought about hardship).

In this case, as in those cases, plaintiffs' prejudicial delay in bringing their motion is a significant factor against them in the balance of harms. As discussed above, the challenged statute became effective on July 9, 2007, and must be implemented by September 6, 2007, eight weeks and three days after the effective date. Plaintiffs did not file their motion, however, until six weeks after the effective date, squandering approximately three-quarters of the time between the effective date and the deadline for implementation. By the time the motion is heard and decided, there will be little if any time before the Secretary of State must order printing of the ballot information. As also discussed above, that delay is prejudicial to the State in terms of its ability to remedy any defect the court may find and in terms of its ability to seek appellate review.

B. Plaintiffs fail to demonstrate any irreparable harm if their motion is denied.

Plaintiffs are players in a political fight. To the extent that plaintiffs disagree with any other voices in the market place of ideas, including the voices of the people's elected representatives expressed in legislation, they are free to rebut or correct those opposing voices with their own voices. Indeed, they may do so even by submitting arguments to be printed alongside the challenged ballot information in the voters' pamphlet. In any event, the substance of other messages—even ballot information—is not irreparable harm to plaintiffs.

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CONCLUSION

The present motion for preliminary injunction lacks merit. It is late without explanation, it presents no colorable claim on the alleged constitutional violations, and it threatens to cause far greater harm than it could ever forestall. The motion should be denied.

DATED this 28 day of August, 2007.

Respectfully submitted,

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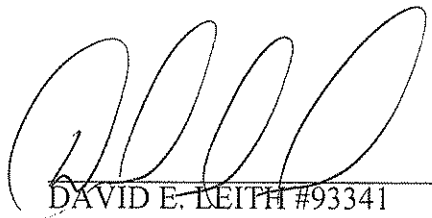
CERTIFICATE OF SERVICE

I certify that on August 28, 2007, I served the foregoing DEFENDANT BRADBURY'S MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION OR TEMPORARY RESTRAINING ORDER upon the parties hereto by the method indicated below, and addressed to the following:

Ross A. Day Oregonians In Action PO Box 230637 Tigard, OR 97281	___ HAND DELIVERY ✓ MAIL DELIVERY ___ OVERNIGHT MAIL ___ TELECOPY (FAX) ___ E-MAIL ✓ E-FILE
Fredrick A. Batson Gleaves Swearingen Potter & Scott LLP P.O. Box 1147 Eugene, OR 97440	___ HAND DELIVERY ✓ MAIL DELIVERY ___ OVERNIGHT MAIL ___ TELECOPY (FAX) ___ E-MAIL ✓ E-FILE
Ralph O. Bloemers Cascade Resources Advocacy Group 917 S.W. Oak Street Suite 417 Portland, OR 97205	___ HAND DELIVERY ✓ MAIL DELIVERY ___ OVERNIGHT MAIL ___ TELECOPY (FAX) ___ E-MAIL ✓ E-FILE



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