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**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JACKSON**

JANE DOE (a fictitious name for a real
Jackson County resident),

Plaintiff,

vs.

MEDFORD SCHOOL DISTRICT 549C,

Defendant.

Case No. 073765E2

PLAINTIFF’S RESPONSE TO
DEFENDANT’S REPLY TO
PLAINTIFF’S RESPONSE TO
DEFENDANT’S MOTION TO
STRIKE AND DISMISS PURSUANT
TO ORCP 21

Plaintiff, by and through counsel responds to Defendant’s Reply to Plaintiff’s Response to Defendant’s Motions to Strike and Dismiss Pursuant to ORCP 21 as follows.

Justiciable Controversy

Defendant is incorrect. A justiciable controversy exists. An aggrieved person does not have to wait until she is prosecuted to challenge a criminal law. *Gaffey v. Babb*, 50 Or App 617 (1981) *pet rev den* 291 Or 117.

“A controversy is justiciable if the parties are adversaries in their views of the ordinance's constitutionality, if they are not friendly litigants who merely seek a construction of an ordinance and if a judgment as to the facial validity of the ordinance will settle the controversy. [*Gaffey v. Babb*], 50 Or App at 623. Plaintiffs have standing if their "rights, status or other legal relations" are affected by the ordinance, *ORS 28.020*, and if they have a "direct, substantial interest in the controversy." [*Gaffey v. Babb*], 50 Or App at 623.”

Marks v. Roseburg, 65 Or App 102, 105 (1984) *pet rev den* 296 Or 536.

This is true in the employment context too. The Court of Appeals rejected a justiciability challenge similar to defendant’s challenge here in the case of *Oregon State Police Officers*

1 Association, Inc. v. State Of Oregon, 94 Or App 478 (1988) affirmed 308 Or 531 (1989). The
2 Court of Appeals said:

3 “The controversy which plaintiffs present has little if anything to do with discipline or the risk
4 of discipline. Their contention is that they and the association's members wish to engage in
5 enumerated activities which, they assert, the statute and the guidelines prohibit them from
6 doing. Stated otherwise, plaintiffs seek a determination of the meaning or validity of a statute
7 which affects their rights by its very terms. See ORS 28.020. It is difficult to visualize a
8 controversy which comes more squarely within the statutes governing declaratory relief than
9 this one.” *Id.*, 94 Or App at 481.

7 Plaintiff submits that the Court of Appeals’ observation about the controversy in *Oregon*
8 *State Police Officers Association, Inc. v. State Of Oregon* is equally applicable here. It is difficult
9 to visualize a controversy which comes more squarely within the statutes governing declaratory
10 relief than this one.

11 **Text and Context of ORS 166.170 Make Defendant’s Policy Void**

12 Defendant now asks this court to insert the word, “special” before the word, “district” into
13 ORS 166.170 so as to make ORS 166.170 inapplicable to school districts. This Court can no more
14 add the word, “special” to ORS 166.170 than it can add the word, “employment” to ORS
15 166.170. ORS 42.230¹.

16 Defendant ask this court to rely on the definition of the word, “ordinance” found in Black’s
17 Law Dictionary rather than the definition found in Webster’s Third New International Dictionary
18 of the English Language Unabridged (2002). That definition does not aid defendant. Defendant is

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24 ¹ “Office of judge in construing instruments. In the construction of an instrument, the office of the
25 judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to
26 insert what has been omitted, or to omit what has been inserted; and where there are several
provisions or particulars, such construction is, if possible, to be adopted as will give effect to all.”

1 a municipality. Its rule is exactly the kind of rule the fits the Black's Law Dictionary definition
2 for "ordinance" quoted by defendant.

3 DATED: October 11, 2007.

JAMES E. LEUENBERGER PC

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5 James E. Leuenberger OSB 89154
6 Attorney for plaintiff

7 **Certificate of Delivery**

8 I certify that I will hand deliver a true copy of this document to Timothy C. Gerking or
9 Thaddeus G. Pauck, Brophy, Mills, Schmor, Gerking, Brophy & Paradis, LLP, PO Box 128,
10 Medford, OR 97501 in open court if I have not done so before today's 2:00 p.m. hearing. I also
11 emailed a true copy of this documents to tgerking@brophymills.com and
12 tpauck@brophymills.com.

13 _____
14 James E. Leuenberger