HOUSE COMMITTEE ON JUDICIARY CIVIL LAW AND JUDICIAL ADMINISTRATION

April 18, 1991 Hearing Room 357 1:15 to 5:00 p.m. Tapes 93 -96 MEMBERS PRESENT:Rep. Ray Baum, Chair Rep. Marie Bell Rep. Tom Brian Rep. Kelly Clark Rep. Jim Edmunson Rep. Rod Johnson Rep. Kevin Mannix Rep. Randy Miller MEMBER EXCUSED: Rep. Kevin Mannix VISITING MEMBER; Rep. John Minnis STAFF PRESENT: Greg Chaimov, Committee Counsel Mary Walling, Committee Assistant MEASURES HEARD: HB 2828 - Reimbursement to Law Enforcement Agencies HB 2362 - Judicial Review HB 2019 - Charitable Solicitations Act HB 2958 - Employers' Day Care Centers

These minutes contain materials which paraphrase and/or summarize statements made during this session. Onlv text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

. TAPE 93, SIDE A 004 CHAIR BAUM: Opens Subcommittee on Civil Law and Judicial Administrtation at 1:15

HB 2958. Employers' Dav Care Centers. Public Hearing Witnesses: Norma Paulus, Superintendent of Public Instruction Karl Frederick, Associated Oregon Industries Ellen C. Lowe, Ecumenical Ministries House Committee on Judiciary April 18, 1991 - Page ~

Charlie Williamson, Oregon Trial Lawyers' Association

GREG CHAIMOV: Provides a summary of HB 2958. 024NORMA PAULUS, SUPERINTENDENT OF PUBLIC INSTRUCTION: Testifies in support of HB 2958 > Believes there is a critical need for day care centers in this state. It is an issue of state-wide concern and the legislature should give paramount attention to it. > Seeks to have the industry and the plaintiff's lawyers and their representatives resolve the insurance problem surrounding day care centers. >Three types of day care centers. -(1) Center run and staffed by employees of a company -(2) Industry that would contract out for day care center -(3) Center in individual's home or in church > All of these areas have insurance problems. > Suggestion from Child Care Commission to extend the homeowner's policy on the provider of the child care. > 0regon must find a way to make day care more available to all children. All children are not getting proper affordable day care. Asking legislators to recognize this issue of state-wide concern. 154 KARL FREDERICK, VICE PRESIDENT, ASSOCIATED OREGON INDUSTRIES: Submits and reads testimony in support of HB 2958. (EXHIBIT A) 168 ELLEN LOWE, ASSOCIATE DIRECTOR, ECUMENICAL MINISTRIES OF OREGON: Testifies in support of HB 2958. >Ecumenical Ministries is an association of 17 religious denominations in Oregon with over 2,000 congregations. Many of those congregations are actively involved in providing child care. > Many are running their day care center without proper insurance. > 0regon made an important public policy move in terms of allowing employers that provide day care centers tax credits. > The State of Oregon is starting to provide child care in close proximity to state offices, so noon hours and rest breaks can be shared. 225 REP. CLARK: Where does the liability issue fit in with the other obstacles to onsite child care? 256 FREDERICK: The larger employers have no problems both as to the insurance aspect of it and the facilities. . These minutes contain materials which paraphrase and/or summarize

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> Problems are for the smaller and medium size employer. They are having a difficult time and it is a liability problem. 280 PAULUS: Feels confident we can find ways inside executive system and with the Governor's help to minimize the bureaucratic red tape that people face from Childrens Services Division. 296 LOWE: If the responsibilities of the Child Care Commission are broadened, can find a one-stop place that will make it easier to develop child care situations. > Lowest salaried people are those who work taking care of children. Make sure that that work force is compensated so there is not constant turnover. 360 PAULUS: Early childhood development is a number one priority. Will not be able to meet those goals unless can overcome this obstacle. 382 CHARLES WILLIAMSON, ATTORNEY, OREGON TRIAL LAWYERS ASSOCIATION: Submits and summarizes testimony in opposition to HB 2958. (EXHIBIT B) > Is not aware of any case that day care center was held liable warranting doing away with the child's right to recover damages for harm negligently inflicted. > Attached to testimony is reports of two studies showing that national insurance is available for employee day care centers or other day care centers at reasonable cost. Suggest contact Oregon Department of Insurance and Finance. > Believes cost is about $80 per child per year. 425 REP. CLARK: Do you know what it costs to put a child in Montessari, etc.? 450WILLIAMSON: The actual insurance as part of the cost is not a great percentage. >Why should large corporations be treated differently than medium or small corporations in obtaining insurance coverage for on site date care centers?

TAPE 94, SIDE A 032 > If this is an important social goal, then the state should assist in paying for this goal. > An employer can sublease an on site center to an independent operator and avoid liability for injury to the children.

>Employees could setup a nonprofit corporation and a board and hire the providers and be responsible for running the center.

> There are four different tax breaks available to employers and employees for setting up child care centers. House Committee on Judiciary April 18, 1991 - Page 4

> This legislation would set up a structure where the employer can't be sued at all.

>Be willing to work with this committee in drafting a bill requiring the provider to be responsible for the employer. 094 REP. CLARK: If liability is limited for the purposes of some desirable social objective what may really be happening is a cost shift. 136 WILLIAMSON: Thinks the employer would be protected under the law as it is now.

> Under the tort system, employers and everyone else have had a $500,000 limit on noneconomic damages placed on recoveries.

> Could increase the corporate excise tax. Allow employers not to pay it if they establish on site day care centers or comparable benefits.

> Is unconstitutional statute. Child injured in a private day care center would be able to sue for compensation and a child in an employer day care center could not.

193 REP CLARK: Don't have an equal protection clause in the Oregon Constitution. Have a privilege and immunity clause. Don't feel going at interpretation correctly.

198 REP. EDMUNSON: Creates an immunity for one category of day care providers which is not available to other categories of day care providers. Unless can rationally distinguish between categories of day care providers, the equal privileges and immunity clause of the Oregon Constitution might be more applicable here than the federal equal protection clause. 226 CHAIR BAUM: Would have to put a provision in there that would limit the damage against the employer and also limit it to day care on the employer's premises. 240 REP. BELL: What if parents were required to have certain amount of coverage and then they could make own arrangements? 260 WILLIAMSON: If every parent has a separate policy, it would be much more expensive.

> Doesn't feel there should be someone to sue every time someone is injured. Employer only responsible for negligence that caused an injury. 290 REP. BELL: Why would own insurance coverage have to be extended to cover them when the child would be covered at home? Leave with baby sitter at home and child is covered. 370 WILLIAMSON: Chip away at tort system until people do not have to be responsible to the people they injure.

(Tape 94, Side A) HB 2362. Judicial Review of Government Action. Public Hearing Witnesses: Justice Michael Gillette, Oregon Supreme Court Bill Paulus, Salem-Keizer School District House Committee on Judiciary April 18, 1991 - Page 5

Mark Comstock, Salem-Keizer School District Joe Richards, Eugene School District

417 CHAIMOV: Provides summary of bill.

TAPE 93, SIDE B

040 JUSTICE MICHAEL GILLETTE, OREGON SUPREME COURT: Testifies in support of HB 2362. > Committee previously heard testimony and received materials from Professor Bill Funk with respect to the general outline of the bill and its substantive provisions which are the first twenty two provisions of the bill. The rest are conforming amendments. Will not repeat information given by Professor Funk. >This measure has been before previous legislatures. After the last session, the Interim Judiciary Committee asked an ad hoc group of people under the chairmanship of Bill Taylor and with the assistance of Dave Hendricks from Legislative Counsel, to work out some of the major policy differences that existed between those who favored the bill and those who were opposed to it. > The idea behind the bill is if a private citizen wants to have a fight with government, it ought to be possible to go to one place in the statutes and find out how to have the fight. Should be possible to look at how to argue. > Myths about what the bill does: > (1) Bill is too general and broad in its coverage. Why not as long as this system of judicial review provides a full opportunity for individuals to argue both factual claims if there are any and legal claims. What is harm if there is one method, rather than three or four or fifteen. > (2) The bill would allow micromanagement of the affairs and actions of the school district by a person or group of persons who have wholly different interests than the purpose of the school district. Micromanagement argument is wrong. To the extent a school district can

be micromanaged by lawsuits, it can be micrc managed now. This bill would not permit a school district to be sued on different theories than a school district can already be sued on. This bill provides the method by which lawsuits, offering legal theories under other sources of law which have validity now, are to be handled. You will be told over and over again, there will be new kinds of lawsuits, and that is wrong. >There is going to be judicial review and to suggest that the bill ought not to be enacted on account of Measure 5, overstates the proposition. > The potential of litigation in judicial review of the adoption of policies required by federal act and regulation for continued federal funding of programs, for the purpose of gaining a collective bargaining negotiation advantage, are examples of matters which would be reviewable under HB 2362. Those matters are reviewable now and they are reviewable not only in state court but in federal court.

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> The assumption the committee made and the assumption that should be made is that this bill does not change the substantive legal theories by which local and state governments' actions should be measured.

> Those legal theories and standards are established by law outside of this bill, exist already, and lawsuits with respect to those questions and those legal theories are available at the present time. The function of this bill is to put those lawsuits within one form and to be able to look at one place in the statutes to find out how those lawsuits are brought and what the particular process is by which they are brought and what you have to do in order to bring those lawsuits, etc. . >This bill while not simple is singular. The singularity is what makes it attractive and appropriate to take.

> Section 2. Why are certain agencies excluded from the bill? At the time the bill was put together with these exclusions the assumption was that because of the particular politics surrounding the subject matter, some of the agencies which were involved such as LUBA would require complete refocusing of any discussion if LUBA were included. Don't endorse or reject that point of view because don't know if it is right or not. People that worked on this bill assumed those exclusions. Some exclusions might not be appropriate and at some future time, if this bill is passed, it might be worthwhile looking into why each of those exclusions existed and whether the particular method of judicial review for them should be folded in under the bill. Would participate in any discussion of this kind. Exclusion assumptions should be left alone.

> Page 4, Section 5, section on standing. This is the section that describes who is entitled to seek judicial review of government action. What attributes does a particular individual or particular group have to have in order to to be entitled to seek judicial review of a governmental action.

> 0ne section has limited to some sign)ficant degree the number of people who can challenge government action in a way in which they were not heretofore limited.

> Subsection (l) provides any person adversely affected by a government action may file a notice of intent to appeal. The traditional phrasing

has been adversely affected or aggrieved. The concept of aggrievement has been a much broader concept than adversely affected so this bill cuts down on the number of people who can seek judicial review.

>Page 4, line 22, (l) (e). An association or organization, with 25 or more members, has standing if the government action will injure an identifiable interest represented by the association or organization.

> The law in Oregon right now with respect to how an organization gets standing to seek judicial review is absolutely uncertain. Can't tell whether an organization which fits this description would at present by definition always have standing in judicial review proceedings or not. The courts are required to make it up as they go along.

> Idea the committee had was that if there was going to be representational groups permitted to take part at all, the groups ought to be substantial enough so that one could say they were not simply the ad hoc group designed to create trouble. The selection of 25, the selection of the . These minutes contain materials which paraphreae and/or summarize datements made during this session. Only text enclosed in quotation mark report a speaker's exact words. For complete contents of the proceed Iga, please refer to the tapea. House Committee on Judiciary April 18, 1991 - Page 7

description of the group that was involved, was the committee's best effort to find a compromise description of who rises to the level at which it is appropriate to afford them an opportunity to assert a judicial position. 320 > Next policy decision is on page 5, Section 7, time limitations on filing notice of intent to appeal. The notice of intent to appeal is simply the notice which says that I wish to appeal from the particular decision of the government. > Section 7 (3) (a) says a notice of intent to appeal an enactment alleging the government unit failed to follow prescribed procedures in enacting the enactment shall be filed within two years after the date of notice of the enactment. This is the procedural irregularity provision. The particular governmental organization did something wrong that was procedurally incorrect. They didn't give sufficient notice, for example, under the public meetings law. That doesn't affect the validity of the act except if the challenge is mounted within a particular period of time. Right now there is no such limit. > Is this what you want to do or not. It makes a lot of sense and in fact you may want to consider cutting it further.

428 >Next decision package is on page 12, Section 14, nature of review section. Number of concerns that will be raised. Decisons that were made by the committee. Subsection (2) on line 12, find that local governments have granted to them for the first time a harmless error defense to procedural regularity which heretofore has only been available to the state. Seems like a sensible way to approach that problem. Wanted to make it very clear that unless the party can show how they are hurt, then the irregularity doesn't matter.

TAPE 94, SIDE B

028 >Continuing with Section 14, subsection (3) (b). An allegation that an enactment is not supported by facts is a worrisome phrase. What it seems to be saying is an enactment, which is normally speaking an ordinance or a rule that has been passed, such as a school district's rules of procedure or a city or county ordinance, is not supported by facts. The facts that support these kinds of decisions which are

normally made by politically responsible bodies like the legislature, are the facts that the individual legislator or member of the city council or county commissioner or school district member has in own head. > There may have been a hearing which establishes the existence of those facts otherwise or that · other people look at and say yes the facts are established. The key thing is where a politically accountable body is voting on a policy of this kind, normally they don't have to justify it by facts. There is no intention in this particular subsection to expand upon that traditional understanding and to say that from now on, where it wasn't true before, a body which has the authority as a politically accountable body to make rules or regulations or ordinances will have to justify certain factual decisions. > The assumption of subsection (b) is that there exists from time to time statutes and ordinances and rules which authorize particular acts by governmental units in the event the governmental governmental units in the event the governmental units find a certain set of facts to exist. The right to exercise the authority only comes in to units find a certain set of facts to exist. The right to exercise the authority only comes in to being if that set of facts exist. Subsection (b) is aimed at a relatively narrow class of House Committee on Judiciary April 18, 1991 - Page 8

circumstances. There is no trenching in subsection (b) on the traditional right of any elected and responsible decision making body to make its own choices with respect to the existence or nonexistence of facts which justify the enactment of ordinances. That is not the case. There is no more review for it under subsection (b) than there would be at present. If a law specifically requires that particular facts exist, those facts have to exist before an inferior tribunal of any kind or a tribunal governed by general law is entitled to enact an ordinance or a rule.

> 0ne example might be that a city is authorized in the event that there is rainfall in the city in excess of 40 inches, the city is authorized to take certain steps which it is not otherwise authorized to take. The city council says that in the opinion of three members there has been rainfall in excess of 40 inches. That is a factual predicate that either exists or it doesn't. If it turns out there has only been 28 inches of rain, the city had no right to take the particular action in question. It is that narrow class of situations where a statute or rule prescribes a requirement which must exist as a predicate to further acts that kicks in subsection (b).

140 MIKE REYNOLDS, ATTORNEY GENERAL'S OFFICE: This does not create any kind of a new cause of action. All it tries to do is clarify that this is a type of challenge that can be made and here is exactly how the court is to proceed in reviewing it. The court doesn't have the discretion to just do what it wants to do.

171 REP. CLARK: Does the bill give any reviewing court the authority to second guess factual determinations made by local governments.

GILLETTE: No. Section 14 describes the way this conduct is to be carried on.

> Subsection (b) says the court shall first determine if a law requires the enactment to be based upon a factual determination. If the law does require that, then the question becomes how is the court to determine whether the factual predicate is found to exist. The answer is if the particular body that was responsible for the enactment held any kind of

hearing at which it accepted evidence to support the existence of those facts and it acted accordingly that is the end of the discussion. The local government gets to decide whether it believes a particular set of facts or not.

> If there was no hearing then the reviewing court is authorized to do the following: -the reviewing court tells the local government this has to be based upon facts and there is no record here of facts to support it. -now hold a hearing to establish those facts. If local government doesn't want to then the reviewing court will hold one. -if the court goes ahead and holds a factual hearing, the court's function is still only to find the facts. If there is any range of discretion left to the local body after the facts are found, the court still has to defer to that exercise of discretion.

206 REP. CLARK: Meaning of the word record in Section 17, (5) (a). No description of how extensive a record or any of the phrases that usually are used in administrative law.

212 GILLETTE: No. That was intentional. The reason was that different kinds of decisions call for different kinds of records. A contested case where a person is going to lose a license, takes one kind of hearing. A quasi legislative hearing where the only decision to be made is if there

is a factual basis for now exercising ordinance enacting authority, takes less. Need to have people come in and describe the facts that are involved. The idea was to leave this flexible enough so wouldn't be stuck with sworn testimony of only one kind with only one kind of proceeding being adequate. This is intended to permit a much wider range of record depending upon the Icind of decision that has been made.

227 >Page 12, Section 14, (4) to determine if a government action other than an enactment unlawfully deviated from past practice. The problem is that a government which has made a policy of doing things in a particular way suddenly chooses to deviate from that practice. For example, the local department of public works made it a practice to always fill in potholes that were six inches across or more. It suddenly decided after years of doing this, and in fact based upon published statements to the effect that this is what it will do, it decides it is not going to do it anymore unless they are 18 inches across. >The idea involved in (4) was to require a governmental unit which wishes to change a long standing policy like this to explain why it is changing its policy. There is a parallel provision in the state administrative procedures. It has had very little litigation. Would be happy if this was taken out. > It is important that government be responsible and consistent. However there are kinds of consistency one could insist upon that are just so picky that it is better to permit these things to be done and positions changed without making some sort of written record with respect to why we are doing it or without being called upon later to explain why we are doing it. > Subsection (4) is something not sure that it is public policy so important that it is worthwhile.
275 REYNOLDS: Subsection (4) is expendable. It does involve a change in policy for state agencies. Under the APA right now in judicial review, if a state agency makes a decision in a specific contested case proceeding that differs from the decision it made yesterday or the day before and the facts are almost identical, the agency has a responsibility to explain why it did something different today. The court can review that. It is sort of a good government provision, but it is such a minor provision of the APA that it just doesn't come into play

that often. >Its been opposed by people who think it is going to impose an extensive record keeping requirement for them to be able to go back and prove that in fact they didn't do this differently this time than on previous occasions. > There is probably two constitutional provisions that come into play when that kind of action takes place. That is already subject to judicial review under the bill anyway.
303 GILLETTE: Next decision point is on page 13, line 17, subsection (7). The choice that was made here by the committee changes existing law slightly. As the law now stands if a governmental unit, whether it is a state unit or a local unit, is interpreting state statutes, courts give no deference at all to that interpretation. Courts claim that it is our line of work to interpret the law and agencies, either state or local, do not deserve any deference. > The scope of discretion which is given to units of government under this new provision is House Committee on Judiciary April 18, 1991 - Page 10

slightly more extensive. As long as the particular government unit's interpretation of a term or terms contained within a provision of law that it is empowered to appply or interpret is consistent with the purpose, policy and express language of the provision of law. More than one interpretation frequently could be, as long as it is consistent, the court is to leave it alone. This places a limitation on the courts that has not heretofore existed. > Within the same subsection there is a provision of law, and in this case it would obviously be an ordinance or a rule or regulation, was actually created by the government unit itself. There, in order for the court to overturn the interpretation, they would have to be able to affirmatively find that it is not consistent with any purpose that was to be servod.

> There has been a struggle with respect to state agencies over what kind of deference to give state agencies interpretations of their own rules and the answer has been a mixed bag. Courts have been unwilling to either give it away to the state or exactly take it back and so the decisions have been up in the air.

393 REYNOLDS: The state makes that argument lots of times when agencies are given broad discretion to interpret and apply the law, adopt regulations, etc. Sometimes they do it in rule making form, sometimes they do it in a real contested case proceeding. A lot of agencies and local governments interpret and apply the law on a daily basis not in either a contested case format or in a rule making format. > 0ne of the examples in which that occurs is in the Secretary of State's office. During the last fall election, there was a big dispute about the question of the need for fiscal impact estimates and whether they had to be prepared by a certain date and if not what the effect of that was, whether the initiative would stay on or off the ballot. > The Secretary of State has taken that law and interpreted that the fiscal impact estimates as not being required in order for the initiatives to appear on the ballot. Also has interpreted the law as the time lines for preparing those not meaning that if they are not complied with, the estimates stay out of the voters' pamphlet. This was argued very strenuously because this is a person who is charged by the legislature with the responsibility to interpret and apply the law, not only on a daily basis but with statewide implications and statewide impact. > It would have been helpful in that argument if there had been a statute much like this one that explained to the court what its role is in reviewing an allegation that an offficial has interpreted the law and that that interpretation is entitled to some deference.

TAPE 95, SIDE A

011 GILLETTE: Section 15, pages 13 and 14. This is the raise it or waive it provision. One of the things that has driven local government people particularly crazy in the past is that once the case gets into court is the first time they can even find out what the fight is about, much less have any opportunity to deal with the issues involved. ~ The procedure that is involved here requires that a party raise particular issues at the earliest possible moment or they have deemed to have waived them, except under relatively narrow circumstances. This is an important focusing provision which is new law and which is an . These minutes contain materials which paraphrase and/or summerizc statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. House Committee on Judiciary April 18, 1991 - Page 11

extremely desirable way of doing business. In many instances a governmental unit could solve the problem if they knew they were going to be involved in a fight and they knew exactly what the fight was about. A party ought not to be able to shift their arguments and shift their theories and shift the game after they get into court with impunity. Something that they now seem to be able to do under existing law.

030 REP. EDMUNSON: In administrative law the courts have held that in issues of claim preclusion and issue preclusion in administrative context are not as rigorous as they might be in a judicial context. That the administrative agency should have flexibility in dealing with problems that it has to deal with as opposed to the rigidity of the judicial system. Does this section change those principles of issue and claim preclusion?

036 GILLETTE: No, don't think so. They don't dictate affirmatively what decisions in particular governmental units have to make, they only describe what on review of a governmental unit's action can be examined by the court that is conducting the review. If a particular agency chooses to decide a question which is thereafter reviewed, or if the party chooses not to have it reviewed, if the usual reasons for claim or issue preclusion apply, it applies; if they don't, they don't. This doesn't change that.

043 > In Section 17 the key point is that at every step of the process the section emphasizes the idea that it is not for the reviewing court to make policy decisions or to exercise discretion. It is for the particular governmental unit to exercise it. Even where it is necessary for the reviewing court to establish what the facts are because the particular governmental unit has chosen not to do so, if there is any range of discretion that could be applied to the facts as found, it is the governmental unit and not the court that has to make the discretionary decision. > The key here is the effort that has been made to clarify how thoroughly courts are to stay out of the business of managing the way government does its work. It is the function of courts to see that the law has been complied with not to make policy choices, not to make decisional choices with respect to the way governmental units operate from day to day. To the extent that is made clear, it helps clarify and limits to a degree the flexibility the courts now claim to have with respect to the degree to which they are liable on occasion to be tempted into micromanaging. This bill makes it clear that courts are not to do that in a way that no other law that I am aware of does. 065 >Section 20, page 16 is the reconsideration provision. This

is something new for local governments. It is something state agencies have been able to do before. The provision here says that even after a case has been taken under advisement by a court that the governmental unit can withdraw the case for reconsideration. > This permits a governmental unit after oral argument in a case before the court of appeals or a situation where the case has been argued before a local trial judge, to go back to the particular unit and ask to reconsider and may withdraw entirely. > Right now the law doesn't allow a local government unit to do that unless the local government unit is going to just surrender and give up judgment. This law specifically authorizes the governmental unit to withdraw the case. They have the affirmative authority to do that, so this he affirmative authority to do that, so this permits correction even if the mistake isn't recognized until the eleventh hour and 59th permits correction even if the mistake isn't recognized until the eleventh hour and 59th minute. House Committee on Judiciary April 18, 1991 - Page 12

>It permits the governmental unit to withdraw no matter what. This has been done for sometime at the state government level and it has been very effective. It has avoided injustice in a number of situations and saved counsel expense and judicial time. It is a new provision in part.

> A number of individuals are going to say this bill ought not to pass either because of Measure 5 or because it is too complicated or because those who represent local governments, school districts, cities, counties, etc. just aren't sure what the bill does. They profess with complete honesty that they don't know how the bill will work in certain circumstances. Accept that representation.

>This bill is readily enactable in the following way. The bill could be made applicable to agencies defined in Chapter 183 as state agencies beginning on January 2nd of next year and applicable to all other governmental units under the bill four years later. The result of this would be to permit the appelette process to shake out those ominous areas about which local government representatives are stewing at the moment.

> This would have the value of letting an organization that is run to a sign)ficant degree by Mr. Reynolds have the lead or the laboring oar in dealing with such appeals as may be generated by the language of the new act. It would give enough time to identify such glitches as may exist within the provisions of the bill so these could be fixed by the time the bill came on line for local government.

> Recommends that the bill be enacted to apply to everybody with the applicability date for local governments being four years hence. It is important that local governments understand they are going to have to face up to the requirements of the bill, but that local governments be given the opportunity during the intervening period to prepare.

> Four years rather than two, because the appelate process can't work quickly enough to inform the next legislative session if glitches develop.

128 REP. CLARK: That delayed implementation date in addition to the courts having the chance to work on it, the academics would have a chance to work on it too in terms of law reviews and commentaries.

156 REYNOLDS: The purposes of this bill are to: - clarify the law - correct mistakes in the law harmonize the judicial review provisions among state and local governments -law reform

> The proposal of a deferred application date to local governments is certainly preferrable to either doing nothing with the bill or substituting something else.

> The theme in this bill is there is no additional judicial encroachment in the review process, if anything there is a retrenchment of that authority. It comes in several different areas. . . House Committee on Judiciary April 18, 1991 - Page 13

>The deference provision is a big one, the business about record making and deference to findings of fact and taking the court out of the role. This is primarily circuit courts and it occurs primarily in declaratory judgment proceedings, taking the circuit court out of the role of having to be the policy maker/ decision maker. Where there is policy to be made where decisions hinge on either what the facts are, or given what the facts are, what is the appropriate course of action if there is discretion. That belongs at the local government or at the state government. It does not belong in the circuit courts. Very important pulling back that does not exist right now.

> Final thing is spelling out in very clear form what the courts review responsibility is. The court has to identify what the issues are and then it has to follow the format that is laid out. It is a real limitation on the court's authority.

> There is some concern that opening this judicial review bill is going to open the door to a flood of lawsuits and new kinds of actions are going to be filed, etc. In the years spent working on this bill, that theme has come up several times. Nobody, not once, has identified a single decision that a state or local government makes that is not now subject to judicial review in some form that would be subject to judicial review under this bill.

250 REYNOLDS: Even if there is an increase in litigation, this much streamlined approach is going to cut down on the cost associated with that litigation both from the attorney's standpoint as well as from the court's standpoint.

(Tape 95, Side A) HB 2828. Reimbursement to Law Enforcement Agencies. Work Session

286 CHAIMOV: Provides a summary of HB 2828.

> Last work session, the subcommittee amended the bill to include some suggestions to preserve the confidentiality of serving subpeonas. It also added some clarifications brought by Rep. Johnson and Mannix. The subcommittee took out the word expert so the bill applied to all police officer witnesses. > Rep. Minnis said would be like the word expert put back in so this would apply only to expert police officer witnesses.

> The amendments you have in front of you (EXHIBIT C) dated 4-18-91 include the Legislative Counsel amendments from last time plus some technical amendments that should have been found earler. They are all aimed at preserving the confidentiality of serving the subpeonas. They include the clarifying amendments by Rep. Johnson and Mannix and they put the word expert back in.

313 REP. JOHN MINNIS, HOUSE DISTRICT 20: Gone over the amendments along with representatives of the City of Portland and agree they are a good compromise.

MOTION: Rep. Johnson moves the amendments to HB 2828 be adopted.

322 BRIAN: Questions the difference between the word expert and any other type of witness. Isn't it possible to have police officers subpeonaed strictly in civil matters as a nonexpert witness? House Committee on Judiciary April 18, 1991 - Page 14

What is the thinking on why the unit of government shouldn't be compensated for that as well.

REP. MINNIS: Personal opinion is that they should be compensated. However, this represents a compromise because of the various opinions on the bill with reference to the expert witness testimony.

> In addition, there is some clarification in terms of issuance of the subpeona in the amendments which would clarify on behalf of the attorney issuing the subpeonas as to whether or not they choose to call the officer an expert witness. It would really be up to the defense attorney to make that determination. 350 BRIAN: Where does the $160 a day come from? It would be possible to have two officers on overtime, especially in smaller jurisdictions, as a result of this type of subpeona. The one being called and the one taking his place could both be on overtime. REP. MINNIS: They would have to issue a subpeona for each officer's presence and the law as amended would apply to each subpeona.

>The $160 came from the figure that was placed in statute last session when we adopted a similar measure for the Oregon State Police.

>Since it is a figure locked into statute, obviously it may need updating at some future legislature.

VOTE: Hearing no objection, amendments adopted.

MOTION: Rep. Johnson moves the bill as amended to the full committee with a do pass recommendation

VOTE: The motion carried with all members present voting aye. Rep. Mannix excused.

TAPE 96, SIDE A

HB 2362 - REOPENS PUBLIC HEARING

014 BILL PAULUS, ATTORNEY, REPRESENTING SALEM SCHOOL DISTRICT AND OTHER SCHOOL DISTRICTS: Submits and summarizes testimony in opposition to HB 2362. (EXHIBIT D) >First read this bill it was submitted by Justice Gillette to the Oregon Council of School Attorneys which held a meeting in conjunction with the Oregon School Board Association. 042 MARK COMSTOCK, ATTORNEY, REPRESENTING SCHOOL DISTRICTS: test)fies in opposition to HB 2362. > This bill would apply to state agencies such as the Public Utility Commission with its month long cases and also would apply to the small school district of 80 students who has a volunteer five-member board that simply cannot comply with the complexities of this type of bill without

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the expense of legal counsel. REP. JOHNSON: If someone brings a civil action against a small school district now, don't they have to hire a lawyer?

COMSTOCK: They are urged to seek legal counsel. What I see from this bill is an easier avenue for getting into court and more review of the various acts that a school district goes through.

> Section 1 (1) and (2) makes virtually every decision that a school district makes subject to review. The words government action means a government unit's performance or failure to perform any discretionary or nondiscretionary act. That covers the gamut of everything a board might do. 075 REP. JOHNSON: Asks if has language that would narrow that suffficiently so would not be expanding the grounds upon which cases can be brought. The bill is to streamline and consolidate the process by which existing rights are now exercised. 084 COMSTOCK: Would certainly work with the proponents of the bill to find some language that would work. >Differs with Justice Gillette on Section 14, pages 12 and 13 in that this doesn't expand the review that a court would have over the acts of a school district. Matters as mundane as certain grades given to students that do come up to school board meetings and at some point require a board action. That would be reviewable under at least Section 14 (3) (b). There would have to be some facts that would be defined and then the court would review whether or not those are reasonable. This type of review is something the courts don't want to get into. 115 > Wants to point out in Section 14, (4) there is a very definite difference between a state agency and what it might do and a local agency. The past practices of a local agency are certainly matters that may not be found in a record and it would require the local entities to create a record. REP. JOHNSON: Put something in bill that says this bill is not intended to expand any substantive rights or enlarge anybody's cause of action that isn't already in existing law. COMSTOCK: That's a fine statement but don't know if court would be bound by that limitation. REP. BELL: Decisions for which there are no facts, subjective decisions such as philosophy of education and trend of thought in teaching, could those also be brought up for review and taken to court? COMSTOCK: Believes they could certainly take those disagreements to court. Not sure whether or not they would get to the merits of those decisions. 162 REP. BELL: Refers to Section 4, page 3, exhaustion of remedies. School districts are different because part of the remedies they have is recall and re-election or not re-election. Not sure if

House Committee on Judiciary April 18, 1991 - Page 16

this bill would consider that exhaustion of remedies if a group were to go through that whole procedure.

182 PAULUS: The system that is in place now works. There are forms for people who have gripes against school districts. (Presents for the record (EXHIBIT E:) Oregon Administrative Rules for the State Department of Education)

>It's on standards for public and elementary and secondary schools and

there is a complaint process in there that is dynamite. The penalty is withholding basic school support.

> It is expensive and time consuming. It is a good process, but it is a process that really catches the district's attention. Writ of review process under ORS 19.230 which was enacted by the legislature in 1987 to clean up some questions about the law. This statute establishes a review decision for municipal corporations.

> Doesn't think the declaratory judgment statutes are all that unclear as to how you can attack a school district.

> All school districts have policies. The State Department of Education requires them to have specific policies on complaint procedures and there is an appeal process through that. There is a Bureau of Labor claims for discrimination.

> Doesn't think this bill serves local school districts any purpose whatsoever. It establishes a new process that is a lot easier for a litigant to file a lawsuit and creates tremendous problems for the school district when there is already a form there.

> Scotts Mills is a small school district with 177 students and 12 teachers handled by a board of local citizens. This bill will require these people to hold their breath every time they take an action and they will have to have legal counsel. School boards turn over so rapidly new members will constantly have to be learning.

> The present bill talks about discretionary rights. Not sure if that is a throw away or what. Wasn't able to determine from Justice Gillette's testimony. Section 14 (4) about unlawful deviation for past practices wipes out that.

> It was interesting to me that this clause provides that government action means government units performance of or failure to perform any discretionary or nondiscretionary acts. Still can't figure out how you can fail to perform a discretionary act.

294 PAULUS: If this bill passes, it should not in anyway direct itself to discretionary matters at local school level and should only direct itself to streamlining what was under the writ of review process originally.

> This beefs it up so much it is difficult to understand.

REP. JOHNSON: Questions statement made that if it is easier to go to court there will be more lawsuits. That ignores the question of whether or not the person trying to get into court has legitimate reason to get into court or not. Is the existing confused state of the law preventing

some substantial portion of people with legitimate gripes from getting into court? That may be the policy question that needs to be decided.

PAULUS: If someone wants to get into court all the person has to do is

have a filing fee and a typewriter. 320 REP. JOHNSON: Would support an amendment or new paragraph that would enlarge the standard they have to meet to bring a law suit in the first place on a substantive basis.

> Would prefer to see some proposal to streamline the idea but without expanding the situation which is objectionable.

PAULUS: These policies control everything, If they are going to be always subject to some quick review in the courts for discretionary rights or past practices, there are people out there with hundreds of reasons that would like to take a school district on and they will do it.

357 > There is a move to try to establish an educational malpractice theory in tort. Am involved in a couple cases like that now. This is another way to back door an educational malpractice case. 382 JOE RICHARDS, LAWYER, EUGENE SCHOOL DISTRICT AND OTHERS: Submits and summarizes testimony (EXHIBIT G) in opposition to HB 2362. > Is not in favor of suggestion that this apply to state agencies now and to local governments in four years. That is the argument of the advocate that didn't make the case. It is not good legislative policy. > This bill exempts the public records law, but not the open meeting law. Mistakes are made, technical mistakes, something is wrong with the notice. No longer is the protection of the current law available that says that voiding the action will not take place if there is any other equitable way to take care of it. That is down the tube. This is pre-emptive over any other law that might have affect unless you can find some clear legislative purpose.

TAPE 95, SIDE B

004 > The past practices is something that really ought to apply in the law of contracts, the collective bargaining, things like that. Past practices ought to be engrafted into what the actual written agreement is because that is what the parties have come to expect. > Don't take too many shots at the writ of review. It is not an unknown remedy. It is almost the exclusive remedy for local government actions. Lawyers know about writs of review and they are pretty clear. A substantial interest must be shown if you are going to file a writ of review. Compare that to the test of this bill and the test of this bill is adversely affected. > Rep. Johnson said put in something that states don't really mean to change existing law or impact the rights of local governments. If that disclaimer is put in this law that there is no substantive law change and do not intend to impose a larger burden on local government, might as well not pass the law. . . These minutes contain materials which paraphrase and/or summarize datements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. House Committee on Judiciary April 18, 1991 - Page 18

> This local government remedy business is not broken and it doesn't need fixing. 030 PAULUS: These policies for Scotts Mills with a student population of 177 students and the administration of them is every bit as important as the administration of the policies in a school district that has 26,000 students. One lawsuit in Scotts Mills is just as tragic and just as emotionally draining as ten lawsuits in the Salem School District.

>Like to have this in the record also (EXHIBIT F) This is the agenda for the Salem School District for November 27, 1990. It is representative of

the Salem School District's business that they carry on twice a month. The actions that they take, policy matters that they establish, the decisions they have to make relating to personnel, and then they have special meetings during the month at which they take other action.

> People who work for the school district are making decisions within the parameters of those policies on a daily basis and everyone of those people would be subject to the rigors of this bill.

055 REP. BELL: Not excited about the idea of separating state and local government and enacting this bill and waiting four years. What if it was enacted for state government and never for local government?

RICHARDS: If it is a clarification of the administrative procedures act which now covers state agencies and does not cover local government, and it can be just)fied as a clarification, then it is a good law. Not truly clear about every one of the effects of some of the changes. > The local government is very close to the people. All those people have been elected. Those are the people who make the decisions. It doesn't work that way in state agencies. It is a little further removed and it might need more judicial review.

Additional Testimony submitted by ROBERT OLIVER, POLK COUNTY COUNSEL. (EXHIBIT II)

(Tape 95, Side B) HB 2019, Charitable Solicitations Act, Public Hearing Witnesses: Terry Witt, Executive Director, Oregonians for Food and Shelter Ross Laybourn, Oregon Department of Justice

083 CHAIMOV: Provides summary of HB 2019.

>HB 2019 is the Dept. of Justice's bill revising the Charitable Solicitations Act.

> Divides solicitors into two types: (l) Those who sell goods and services and (2) those who ask for money only.

> There is different regulatory scheme based on what the solicitors are doing.

>The key to the bill is on page 2, lines 24 to 30. There it describes when political solicitations are covered by this bill.

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135 TERRY WITT, EXECUTIVE DIRECTOR, OREGONIANS FOR FOOD AND SHELTER: Submits testimony on HB 2019. (EXHIBIT 1) > Concerned with potential ramifications on the Charitable Contributions Act by eliminating some of the charitable language in this bill. > Concern is specifically with the elimination of some of the language from statutes which define charitable purpose, charitable organization. >Need to continue to have a differentiation between what is considered to be a nonprofit organization and what is considered to be truly a charitable organization. Both in our solicitation laws and in our regulations which impact those. >Look at the rules that were promulagated in 1988 relative to combined federal campaign contributions from a standpoint of

charitable contributions. They very clearly state that one needs to differentiate between what is considered to be nonprofit organizations and those which are truly charities. > Keep that in mind so that we do not further erode programs of the state by eliminating the intent in some of the definitions which do indeed differentiate charitable contributions from nonprofit or not for profit solicitations.
179 ROSS LAYBOURN, ASSITANT ATTORNEY JOURNAL, DEPARTMENT OF JUSTICE: Submits and summarizes testimony in support of HB 2019. (EXHIBIT J) >In regard to Mr. Witt's concern. The philosophy of this act is that to some extent it is a misnomer because the legislature made a decision in 1985 that in terms at least to the respect of the professional fund raisers that the solicitations that it would regulate would be those on behalf of not just charitable organizations but nonprofit baneficiaries. If have a law enforcement association that hires a professional, even though that organization may not be a 501 C.3 tax exempt charitabale organization, that transaction or that activity would be covered. > The term charitable organization would not completely go out of Oregon Revised Statutes as we have the Charitable Trust and Corporation act which has the definition of one or both of those terms. The reason for the proposed deletion was the fact that in the rest of the amendments it seemed that with respect to this particular act that all of those terms over the course of the years had been deleted so therefore there was no need to define a term that was not used otherwise in the statute. > In Section 1 on page 2 of the bill, additional language beginning on line 27, notice that at the end of line 28 there is reference to charitable purpose. Concurs that if the committee is prepared to act favorably on the bill, including that particular provision, there is an obvious need to at least keep the definition of charitable purpose in the bill.
219 WITT: That helps. My major concern is not with cleaning up specifically this law as much as it is to not set precedent that would indeed continue to erode ability to differentiate in the other charitable solicitation programs of the state. . . These minutes contain materials which paraphrase and/or summarize rtatements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes. . . . House Committee on Judiciary April 18, 1991 - Page 20

226 LAYBOURN: View this as a clarification act. Currently regulate professional fund raising firms. Due to some things about how they operate as well as some of the constitutional decisions since 1985, believe that splitting professionals into these two categories and regulating them on parallel but slightly different tracks makes sense both in terms of the practical workings of the law as well as being able to defend it constitutionally.

> With respect to the particular issue that was pointed out by Counsel, comment briefly on that and why it is in there. The department when this bill was considered in 1985 took the position that it was regulating charitable solicitations or those which have a quasi charitable contact, even though the organization may not be charitable in nature. Having defined a solicitation on behalf of any nonprofit baneficiary the question was raised what happens when we get around to something such as a Political Action Committee (PAC) that otherwise might be organized as a nonprofit organization. There was a clear legislative decision that the legislature did not want to pull in under this act quasi political solicitations; those on behalf of candidates, political measures, and PAC. The department continues to support that decision made by the legislature.

>What has happened in a limited number of circumstances since 1985 is

that a nonprofit organization, that had a contract with a professional fund raising firrn, forms a PAC, and enters into the same contract with that professional fund raising firm.

> Typically the professional fund raiser calls, tries to sell tickets to a particular cause, and says that if don't want the tickets go ahead and pay for them and they will be donated back for use by disadvantaged individuals. That is the kind of classic fundraising activity that was meant to be regulated by this bill as passed in 1985.

> In some of these instances these organizations have formed PACS and continue on with that exact same type of activity, including both the option of donating the tickets back as well as pitching a charitable cause. In other words this money is not going to be used for lobbying, but some or all of the proceeds will be given to a charitable or quasi charitable cause. Get a lot of inquiries and a certain amount of complaints on these types of activities. Tried to carve out a very limited exception to this exemption to try and take care of that particular situation.

> Last point is some draft amendments proposed by the Department of Justice. (EXHIBIT K) These amendments are in response to conversations over the last week with members of the national associations of professional fundraisers who have taken an interest in this bill.

> Are intended to address their concerns. They make only minor changes in the proposed bill. At least one of the associations had a labeling problem and they felt that in creating these two categories of organizations, commercial fundraising firms and professional fundraising counsel, they would prefer that second category be labeled professional fundraising firm. The definition for that term is more consistent with the way they are characterized in other states. around the country. As far as I am concerned with what the label is, it is the substance of the regulation.

318 WITT: Do not have a problem with the proposed amendments. Concerned about whether there is any impact on other charitable contribution programs that the state currently operates such as the combined charitable contribution program. There is obviously not a direct tie since those are handled under a different statute.

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> Leaving the charitable purpose definition in the statute would alleviate concerns.

LAYBOURN: That would be a good addition to put charitable purpose back into the legislation.

(Tape 95, Side B) HB 2019. Charitable Solicitations Act, Work Session
352 MOTION: Rep. Edmunson moves the amendments be adopted.

VOTE: Hearing no objections, the amendments are adopted.

MOTION: Rep. Johnson moves lines 12 to 16 on page 1 be reinserted.

VOTE: Hearing no objections, the amendment is adopted.

MOTION: Rep. Miller moves that on page 2, line 36, restore the bracketed amount of $250.

CHAIMOV: Based on the fiscal impact statement, that amendment will likely cause some fiscal impact, probably under $20,000.

427 LAYBOURN: Refers to Section 17. Keep in mind that one category, professional fund raising firms was split it in two. The philosophy was that some new would be pulled into the second category. People that are not in the first but otherwise have some of the first, that being those engaged in direct solicitations, straight solicitations, straight donations, not sale of goods and services would move from category one that is now defined as commercial into this second category. The regulation is less stringent on this second category and so most of efforts would remain on category number one.

> Now have one category at $250 and split it into two categories and went up $50 on category one to $300, and went down $50 on category two to $200, thinking that was a better respresentation of how much work would go into regulating these two categories. Also pick up some additional registrants under category two.

TAPE 96, SIDE B 025 MOTION: Rep. Miller amends motion to include on lines 36 and 37, reinstate $250 and on Section 17, page 6, line 38, increase the amount to $250. VOTE: Hearing no objection, amendment adopted. MOTION: Rep. Edmunson moves that HB 2019 as amended be sent to the full committee with a do pass recommendation. VOTE: In a roll call vote, the motion carried with all members present voting aye. Reps. Brian, Clark, and Mannix excused. 060 CHAIR BAUM: Adjourns meeting at 4:55 p.m.

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Submitted by: Reviewed by: Mary Walling Greg Chaimov
Assistant Committee Counsel

EXHIBIT LOG:

A - Testimony on HB 2958 - K. Frederick - 1 page B - Testimony on HB 2958 - C. Williamson - 23 pages C - Amendments to HB 2828 - staff- 2 pages D - Testimony on HB 2362 - M. Comstock & W. Paulus - 3 pages E - Testtimony on HB 2362 - W. Paulus - 10 pages F -Testimony on HB 2362 - W. Paulus - 113 pages G - Testimony on HB 2362 - J. Richards - 3 pages H - Testimony on HB 2362 - R. Oliver - 6 pages I - Testimony on HB 2019 - T. Witt - 7 pages J - Testimony on HB 2019 - R. Laybourn - 9 pages K - Amendments to HB 2019 - R. Laybourn - 4 pages

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