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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF CLACKAMAS

TIM REEVES, ERIC SAUB, GREG  
BURNETT, CARLA PEALER as the  
LIBERTARIAN PARTY OF OREGON, and  
DAVID TERRY, M CARLING and  
RICHARD BURKE as members of the  
LIBERTARIAN PARTY OF OREGON,

Plaintiffs,

v.

WES WAGNER, HARRY JOE TABOR,  
MARK VETANEN, BRUCE KNIGHT,  
JEFF WESTON, JIM KARLOCK,  
RICHARD SKYBA, individuals, and  
LIBERTARIAN PARTY OF OREGON,

Defendants.

Case No. CV 12010345

RESPONSE IN OPPOSITION TO  
DEFENDANTS KNIGHT, TABOR,  
VETANEN, WESTON, SKYBA AND  
KARLOCK'S RULE 21 MOTIONS

POINTS AND AUTHORITIES

Defendants' motion attempts to convince this court to turn this case into something it is not. This case is not a dispute with the Secretary of State. All of the pleadings have made that perfectly clear. Defendants' entire argument rests on the fatally flawed premise that Plaintiffs are challenging some government action. That premise is wrong. This case is solely and exclusively a dispute about whether the 2009 Bylaws of the Libertarian Party were ever validly changed by Defendants; whether the 2009 Bylaws were violated by Defendants; and based upon the outcome of those questions, who are the legitimate officers of the Libettarian Party of Oregon. Defendants claim they changed the 2009 Bylaws. Plaintiffs claim the bylaws were not

changed. Plaintiffs claim they are the rightful officers, Defendants claim they are not. The  
2 claims made in the complaint, and the prayers for relief are what dictate the nature of this case  
3 and any potential remedies. There is no claim against the Secretary of State, or any other  
4 government actor or agency, and no relief is requested against the Secretary of State or any other  
5 government actor. Defendants' arguments about the Oregon APA are completely inapplicable  
6 here. All of the cases Defendants cite were disputes between a private party and a government  
7 actor, thus making the Oregon APA apply in those cases. Here, there is no government actor, all  
8 parties are private parties- specifically there is only the two groups claiming title to leadership.  
9 In fact, Oregon law expressly prohibits the Secretary of State from adjudicating disputes about  
10 bylaws. For these reasons more fully explained below, Defendants' motion must be denied.

11 **1. Defendants' Motion attacks only Plaintiff's First Claim for Relief.**

12 First, as an initial matter, it must be pointed out that Defendants' motion only attacks  
13 Plaintiffs' First Claim for Relief. It does not even address Plaintiffs' Second or Third Claim for  
14 Relief. Plaintiffs' First Claim for Relief is under the Declaratory Judgment Act, ORS 28.010.  
15 This court has already been through two rounds of rule 21 arguments on jurisdiction and decided  
16 that it has jurisdiction to determine the rights, status and legal relations under ORS 28.010.  
17 Furthermore, it has already been adjudicated because the claims arise as disputes under ORS  
18 65.084(2)(a); ORS 65.084(2)(b); ORS 65.357; ORS 65.374, these are disputes for a court of law  
19 to decide. This court rejected Defendants' arguments, and denied their previous motions that this  
20 court did not have jurisdiction on these matters. All three of Defendants' attorneys already made  
21 that argument in their briefs and at oral argument. Nonetheless, this new motion by Defendants  
22 tries again, but only attacks Plaintiffs' First Claim for relief, and therefore could have no effect  
23 on the Second Claim for Relief or Third Claim for Relief under any of the arguments presented

by Defendants. Defendants' motion to dismiss the entire complaint must be denied on that ground alone.

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3  
4 **2. The Secretary of State is statutorily prohibited from adjudicating or otherwise enforcing rules or bylaws adopted by a political party.**

5 Defendants erroneously argue that the Secretary of State should be the adjudicative body  
6 of these disputes between the parties. First, the Secretary of State has absolutely no authority to  
7 adjudicate a breach of fiduciary duty case, or preside over a challenge to corporate authority  
8 case. Also, ORS 248.011 specifically and expressly prohibits the Secretary of State from  
9 enforcing rules adopted by a political party. The Secretary of State clearly cannot be the  
10 adjudicative body in this case.

11 "Except as expressly required by law, the Secretary of State, a county clerk or any  
12 other elections official shall not enforce the provisions of ORS 248.005 or any  
other rule adopted by a political party". ORS 248.011

13 Bylaws are rules that are adopted by a political party. Therefore the Secretary of State literally  
14 may not enforce or otherwise adjudicate disputes about the bylaws adopted by a political party.  
15 Plaintiffs could not have even lawfully requested some sort of Oregon APA hearing on their  
16 complaints against Defendant Wagner and the other Defendants. The Secretary of State would  
17 have been barred from hearing it, and the Secretary of State would have been directly violating  
18 ORS 248.011 to wade into this dispute and determine whether the bylaws were validly changed  
19 or not, and whether the bylaws themselves were violated. Defendants' arguments about the  
20 Oregon APA are simply inapplicable here.

21 Moreover, none of the actions which Plaintiffs complain about were performed by the  
22 Secretary of State therefore there is no grounds for or reason to challenge the Secretary of State  
23 with an APA hearing. All the wrongdoing and misdeeds that Plaintiffs complain about was done

by Defendants: the bylaw violations; the wrongful (void) bylaw amendments; holding un-noticed meetings; asserting and holding themselves out as officers. All of these internal disputes about the parties' actions are what is at stake in this lawsuit.

3. **Plaintiffs' complaint and requested remedy are exclusively internal disputes.**

Plaintiffs have been absolutely crystal clear that our complaint is with Mr. Wagner and the organization that Mr. Wagner heads. Plaintiffs initially sought injunctive relief against Mr. Wagner and the organization itself. Defendants sought to have their entire board of directors added. As with any court order against a corporate body, the order would apply to anyone acting on behalf of the organization. Nonetheless Defendants' board of directors was added.

The addition of parties did not change the three claims for relief, the allegations, or the prayer relief requested in any material way.

**A. The disputes are between private parties not government actors.**

Plaintiffs' First Claim for Relief clearly defines who did wrong and what they did wrong and the allegations are all about private actors, not government actors. A sampling of the allegations in the Second Amended Complaint shows this very clearly.

"Defendant *is* operating in violation of the LPO bylaws". Second Amended Comp 35.  
"The 2009 Bylaws are the valid and currently governing set of bylaws". *Id.*

"Plaintiffs Tim Reeves and Greg Burnett are duly elected officers of the Libertarian Party of Oregon ("LPO" hereafter) under the duly adopted and ratified bylaws that pre-existed the Wes Wagner group's attempted changes to the bylaws." *Id.*

"David Terry ... objected to the unauthorized and improper changes to the bylaws". *Id.*

"Defendant is preventing the LPO from following its proper bylaws and from being directed by the duly elected officers". *Id.*

"Defendant Wes Wagner resides in Clackamas County and wrongfully asserts that he is now the Chairperson of the Libertarian Party of Oregon, and has been taking, and

2 attempting to take, official actions in that capacity including but not limited to, the use of  
party funds and filing of an entirely new set of corporate bylaws that are invalid and were  
never properly approved or adopted." Id7.

3 "Defendant Wes Wagner and the current purported leadership, both the "officers" and the  
4 "Board of Directors", (collectively "Defendants" as the organization itself) of the  
Libertarian Patty of Oregon under him are operating from an invalid set of bylaws that  
5 **as** not properly adopted, and is therefore null and invalid and correspondingly they have  
no authority to act on behalf of the organization. Defendants were not elected or  
6 appointed in accordance with state law or the party's bylaws and are therefore not  
executive directors or officers of the organization at all". Id8 .

7 "The March 31, 2011 event was not a properly noticed convention, as would have been  
required by the 2009 LPO bylaws for any amendment or change to the 2009 LPO  
8 bylaws". Id16.

9 "Defendant Wagner, the Wagner Officers, and any other offices or officers under Wagner  
are all operating in violation of the corporate bylaws, and in breach of their duty to the  
10 membership and have no legitimate right to the offices they claim they hold". Id16.

11 "The March 31, 2011 meeting could not have changed the 2009 Bylaws, and did not have  
any legal effect on the 2009 Bylaws. The 2009 Bylaws remain in place". Id1 8.

12  
13 These excerpts from the Second Amended Complaint are just a small sampling but clearly  
14 demonstrate that the full force and effect of this lawsuit is against the actions of Defendants who  
15 are private patties, to whom the Oregon APA is completely inapplicable and does not serve as a  
16 venue for adjudicating private party disputes.

17  
18 B. The relief requested is clearly applicable only to the parties.

19 Plaintiffs' prayers for relief expound upon this point and NO action is requested of this  
20 court that requires any action by the Secretary of State or asks for any review of any action by  
21 the Secretary of State. For instance, on Plaintiffs' First Claim for Relief the relief requested is  
22 "Plaintiffs are entitled to a declaratory judgment declaring that the 2009 Bylaws are still in force  
23 and effect and that the officers elected on May 21, 2011 are the current and rightful officers of

the organization." Second Amended Complaint36.

2 On Plaintiffs' Second Claim for Relief, "Challenge of Corporate Authority", this court  
3 has the power to set aside corporate acts done without authority. ORS 65.084. Plaintiffs only  
4 request that "corporate" acts be set aside, not government acts.

5 "Defendant Wagner, the Board of Directors created on March 31, 2011, and the Wagner  
6 Officers allegedly empowered by that group, lack legitimate authority or power to act on  
7 behalf of the LPO. Defendants should be enjoined from taking any further actions on  
8 behalf of the LPO. The set of bylaws from March 31, 2011 and filed with the Secretary  
of State should be set aside, and Defendants ordered to recognize the officers elected on  
May 21, 2011, and they should be ordered to inform the Secretary of State Elections  
Division of said succession of officers". Second Amended Complaint38.

9 Again, there is no request to order the Secretary of State to do anything. Only private corporate  
10 actions are challenged and relief is only requested against the private party bad actors whom  
11 acted without corporate authority. Defendants' argument is amiss.

12 Plaintiffs' Third Claim for Relief is again only against a private pmly, Defendant  
13 Wagner, asserting that he breached his corporate fiduciary duty to follow the bylaws and act  
14 consistent with the direction of the membership. Second Amended Complaint40. In the  
15 formal "Prayer for Relief" at the end of the Second Amended Complaint, there is literally not  
16 even a mention of any state actor. The Secretary of State is not even mentioned. (For  
17 convenience the eleven prayer requests from page 12-14 ofthe Second Amended Complaint are  
18 included below in a footnote 1.)<sup>1</sup>

- 19 \_\_\_\_\_
- 20 1. I. Setting aside and declaring null and void the bylaws created by Defendants on March 31, 2011 ;
  - 21 2. Declaring that the 2009 Bylaws remain in full force and effect as governing documents of the  
Libertarian Party of Oregon;
  - 22 3. Declaring that Tim Reeves be recognized as Chairperson of the Libertarian Party of Oregon, and all  
the officers elected at the May 21, 2011 state committee meeting be recognized as the existing officers  
for the remainder of the term of office as set by the 2009 Bylaws;
  - 23 4. Ordering Defendants to assist in completing a full and accurate accounting of all funds expended  
between March 12, 2011 and the date of this judgment, and to provide that accounting to Plaintiffs  
within 30 days of this judgment, and authorizing Plaintiffs to request the documents and records they  
desire under ORCP 36 and 43;

1 For these reasons, it is clear that Plaintiffs' dispute is with private parties, not a state  
2 actor, and the Secretary of State is not involved in the dispute, is not the source of the  
3 wrongdoing, and does not have an "action" which is on appeal here. Literally which bylaws  
4 govern, the interpretation of the bylaws, breaches of corporate fiduciary duties, and challenges to  
5 corporate powers, are the substantive issues in dispute and the Secretary of State has no  
6 jurisdiction of those types of matters. This motion must be dismissed because this is a private  
7 party dispute.

8

9 4. Defendants' arguments about jurisdiction have already been adjudicated and  
10 rejected.

10

11 Defendants again erroneously move pursuant to ORCP 21 A (1) that this court does not  
12 have subject matter jurisdiction. The basis of this argument, although now argued fi-om another  
13 direction, has already been adjudicated and rejected because this court acknowledged that it does  
14 have jurisdiction. The same law as was previously briefed and argued explains why this court

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- 16 5. Ordering Defendants to turn over possession and control of all LPO property, tangible and intangible,  
including websites and passwords to the officers elected on May 21,2011.
  - 17 6. Ordering that the record on this case remain open, granting Plaintiffs leave to convene a meeting of the  
LPO state committee to allow the rightfully re-constituted corporate body to decide vvhether it will file  
18 an application for supplemental relief, petition for attorney fees, or to seek to enforce the claim for  
monetary damages against Defendants personally;
  - 19 7. Granting Plaintiffs, as the LPO may deem appropriate, leave to file for supplementary relief under  
ORS 28.080 against Defendants in their individual capacity for misuse of corporate assets if they  
20 contest this matter or continue to use corporate assets, in their personal capacities for damages in an  
amount to be proven at trial;
  - 21 8. Authorizing the LPO to reinstate any and all members of the organization whose membership may  
have lapsed between March 31, 2011 and the date of this judgment due to the invalid bylaws, non-  
22 payment of dues, or any other reason the LPO deems adequate to restore members to valid status as if  
the Defendants' invalid actions had not taken place;
  - 23 9. Issuing a permanent injunction on Wes Wagner, and Defendants from falsely asserting that they are  
office holders of the LPO, and from asserting that the 2009 Bylaws were changed on March 31, 2011;
  10. Ordering Wes Wagner barred from seeking elected or appointed office inside the LPO for a period of 3  
years; and
  11. For any other such relief as this court should deem just and equitable.

has jurisdiction over the three claims made by Plaintiffs in the Second Amended Complaint.

2           '[J]urisdiction over the subject matter exists when the constitution or the legislature or the  
3           unwritten law has told *this court* to do *something* about *this kind of dispute*.' (Emphasis in  
4           original.); *Garner v. Alexander*, 167 Or 670,675, 120 P2d 238 (1941), *cert. den.*, 316 US 690,  
5           62 S Ct 1281, 86 LEd 1761 (1942) (Jurisdiction of the subject-matter is the power to deal with  
6           the general subject involved. In other words, the court must have cognizance of the class of cases  
7           to which the one to be adjudicated belongs). *Black v. Arizala*, 337 Or 250, 263, 95 P 3d 1109,  
8           1115 (2004). It exists when the constitution, the legislature or the law has told a specific court to  
9           do something about the specific kind of dispute in issue. *School Dist. No. 1, Mult. Co. v. Nilsen*,  
10          262 Or 559, 566, 499 P 2d 1309 (1972). In Oregon, circuit courts have subject matter jurisdiction  
11          over all actions unless a statute or rule of law divests them of jurisdiction. Or Const., Art VII, §  
12          9; Or Const., Art VII (amended), § 2; *Greeninger v. Cromwell* 127 Or App 435, 873 P2d 377  
13          (1994). In this case, this court is expressly given jurisdiction under ORS Chapter 28, and the  
14          venue Defendants suggest (Secretary of State) is expressly deprived of, and precluded from  
15          having, any jurisdiction in this type of case.

16          5. **Plaintiffs have cited specific statutory authority giving this court subject matter**  
17          **jurisdiction over all three of the Claims for Relief.**

18          Courts of record within their respective jurisdictions have power to declare rights, status,  
19          and other legal relations, whether or not further relief is or could be claimed. ORS 28.010. No  
20          action or proceeding shall be open to objection on the ground that a declaratory judgment is  
21          prayed for. *Id.* The declaration may be either affirmative or negative in form and effect, and  
22          such declarations shall have the force and effect of a judgment. *Id.* It is clear that Clackamas  
23          County Circuit court has the power to declare the rights, status and other legal relations of the

Plaintiffs and Defendants in this case under ORS 28.010 because the following need resolved:

2 which bylaws are in effect and controlling the Libertarian Pruty of Oregon; and who are the duly  
3 elected officers of the Libertarian Pruty of Oregon. Specific Oregon statutes resolve those types  
4 of questions, for example pursuant to ORS 65.084 (2)(a) (proceeding by members to enjoin  
5 corporations power to act- will stop the wrongful Wagner LPO from attempting to further act on  
6 behalf of the LPO and set aside the actions of the wrongful LPO); ORS 65.084(2)(b) (proceeding  
7 by a corporation against incumbent or former director or officer – will enjoin Wes Wagner as a  
8 former officer from acting or attempting to act as an agent or officer, and set aside actions taken  
9 by Wagner); ORS 65.357 (Breach of duty of a non-profit director – will adjudicate whether the  
10 bylaws were violated and determine what is the remedy); ORS 65.374 (breach of duty of a non-  
11 profit officer – will adjudicate whether the bylaws were violated and determine what is the  
12 remedy). This court has specific jurisdiction over all three claims.

13 Moreover, Plaintiffs' First Claim for Relief is not open to objection – i.e. cannot be  
14 challenged – on the ground that a declaratory judgment is prayed for. ORS 28.010. A  
15 declaratory judgment and the powers vested in this court therein, can be based on the rights and  
16 legal relations or status found in other parts of the law. ORS 28.010. Adjudication of NONE of  
17 the above questions of fact and law involves decisions by or actions of the Secretary of State.  
18 The questions in this case relate wholly to the terms of the bylaws whether there was compliance  
19 with the bylaws; legitimacy of actions of the organization; legitimacy of actions of the members  
20 and officers of the organization; and a determination of the rights, liabilities within the  
21 organization based upon the actions of the parties.

22 This court has the right to review the facts and apply the law with regard to the parties'  
23 dispute. Oregon law requires that non-profit corporations make and amend bylaws that are

1 consistent with their articles of incorporation and the laws of Oregon. ORS 65.077. ORS 65.077  
2 specifically and expressly applies to political parties. ORS 248.004.

3 A corporation's bylaws create a judicially enforceable contract right between its officers  
4 and shareholders. *Dentel v. Fidelity Sav. And Loan Ass'n*, 273 Or 31, 32, 539 P2d 649 (1975)  
5 ("The bylaws of the corporation have been termed a contract between the members of the  
6 corporation, and between the corporation and its members."); *Delaney v. Georgia-Pacific Corp.*,  
7 278 Or 305, 564 P2d 277 (1977) (corporate bylaws control over any earlier contractual  
8 agreement between the corporate members.); *State ex ref. Brewster v. Ostrander*, 212 Or 177,  
9 318 P2d 284 (1957) (corporate bylaws create an enforceable contract right between the  
10 corporation and its members.); *Burgin v. Pendleton County Club, Inc.*, 208 Or 241, 300 P2d 444  
11 (1956) (members of a corporation are bound by its bylaws). Bylaws, constitutions, and party  
12 rules do in fact grant legal rights, as well as dictate statuses between parties so it is a perfectly  
13 legitimate subject of a declaratory judgment action. These are the exact same disputes that exist  
14 between the members, officers, and organization in this dispute. They should be, and under  
15 Plaintiffs' Complaint are to be, resolved in this case.

16 Defendants cannot argue that they are not to be treated as non-profit corporation. That  
17 argument has been had and decided in this case. It is clear under Oregon law that political  
18 parties are to be treated as non-profit corporations. ORS 248.004 specifically states that, "(1) A  
19 minor political party or a major political party shall have all the powers granted to a nonprofit  
20 corporation under ORS 65.077; and (2) A major or minor political party shall be treated for  
21 purposes of contractual, tort or other liability as a nonprofit corporation". The statute goes much  
22 further than this by analogizing members to directors of a corporation, and officers and  
23 employees to officers and employees of a corporation. Application of that law explains that a

1 political party may make and amend bylaws not inconsistent with its articles of incorporation and  
2 state law. ORS 65.077(3). This lawsuit deals with contractual and other liabilities, therefore  
3 ORS Chapter 65 certainly applies here and accordingly the Second and Third Claim for Relief  
4 indisputably present disputes the Secretary of State could have no jurisdiction over.

5 Plaintiffs have asserted they are the Libertarian Party of Oregon. Complaint, ¶ I, 25.  
6 Plaintiffs have asserted that Defendant Wagner is refusing to follow the bylaws he is bound by.  
7 Complaint ¶¶ 4, 7, 8, 19. The Oregon Secretary of State Elections Division has stated that ORS  
8 248.011 bars elections officials from enforcing the rules of a political party against itself,  
9 therefore Plaintiff LPO needs a court order determining which bylaws are valid and which  
10 officers govern the Libertarian Party of Oregon. As explained above, the Secretary of State  
11 cannot, and did not make a determination about the validity of Defendants' actions, nor the  
12 arguments presented in Plaintiffs' three claims for relief. They have said that they cannot.  
13 These and other facts alleged in the complaint, clearly bring this dispute into this court's  
14 jurisdiction under the various statutes cited above. This court has the power to declare the rights,  
15 status and other legal relations of the Plaintiffs and Defendants and must dismiss this motion to  
16 that the case can move forward..

17 This court is the only forum where Defendants' wrongs can be rectified. The causes of  
18 actions chosen by Plaintiffs and are the proper legal remedies to obtain the remedies Plaintiffs  
19 request in resolution of this dispute. Bylaws are enforceable under ORS 28.010, ORS 65.084,  
20 and ORS 65.077 and those statutes apply to political parties under ORS 248.004. As briefed  
21 previously, and adjudicated, bylaws of any organization create judicially enforceable contract  
22 rights for which this court has jurisdiction and can adjudicate. *Dente! v. Fidelity Sav. And Loan*  
23 *Ass'n*, 273 Or 231 (1975); *Delaney v. Georgia-Pacific Corp.*, 278 Or 305, 564 P2d 277 (1977)

1 (corporate bylaws control over any earlier contractual agreement between the corporate  
2 members.); *State ex rel. Brewster v. Ostrander*, 212 Or 177, 318 P2d 284 (1957) (corporate  
3 bylaws create an enforceable contract right between the corporation and its members.); *Burgin v.*  
4 *Pendleton County Club, Inc.*, 208 Or 241, 300 P2d 444 (1956) (members of a corporation are  
5 bound by its bylaws). All of these arguments already prevailed on the prior Rule 21 motion, but  
6 most importantly for this motion is the fact that the Secretary of State cannot determine these  
7 disputes, neither in the first instance, nor under the Oregon APA. This case must move forward  
8 to adjudication on the merits in this court.

### 9 CONCLUSION

10 Defendants' motion must be denied. Defendants' attack on Plaintiffs' First Claim for  
11 Relief fails because there is no state actor in this case, and the Oregon APA is inapplicable to the  
12 parties and causes of action in this lawsuit. Plaintiffs are not challenging or seeking to overturn a  
13 government action or a government decision so by definition the Oregon APA does not apply.  
14 The Secretary of State is barred and precluded from enforcing political party rules and would be  
15 precluded from doing so, even if the Oregon APA applied. Defendants have already made their  
16 jurisdiction arguments and this court has ruled that it does have jurisdiction over all three claims  
17 for relief. Defendants did not attack Plaintiffs' Second or Third Claim for relief at all, but  
18 Defendants' new argument does not change the fact that this court does have jurisdiction. This  
19 motion must be denied and Defendants should be ordered to answer without further delay.  
20 DATED this 20 day of August, 2012.

21 Tyler Smith & Associates, P.C.

22 By 

23 Tyler Smith, OSB# 075287

Or Attorneys for Plaintiffs

181 N. Grant St. STE 212

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Canby, OR 97013  
Phone: 503-266-5590; Fax: 503-877-6652

**CERTIFICATE OF SERVICE**

2 I HERBY CERTIFY that on the 20 day of August, 2012, I caused a true copy of Plaintiffs'  
3 Response in Opposition to Defendants Knight, Tabor, Vetanen, Weston, Skyba, and Karlock's  
4 Rule 21 Motions to be served upon the following named parties or their attorney as indicated  
5 below and addressed to the following:

6 Robert Steringer  
7 1001 SW Fifth Ave, 16<sup>th</sup> Fl.  
8 Portland, OR 97204

9 James Leuenberger  
10 PO Box 1684  
11 Lake Oswego, OR 97035

12 Colin Andries  
13 1001 SW 5<sup>th</sup> Ave STE 1100  
14 Portland, OR 97204

15 Delivery was done by hand, X first class mail, certified or  
16 registered mail, return receipt requested with restricted delivery, **express mail**, -e-mail,  
17 facsimile.

18 DATED this 20 day of August, 2012.

19 Tyler Smith & Associates, P.C.

20 By   
21 Tyler Smith, OSB# 075287  
22 Nathan Goin, OSB# 114011  
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