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RE: Constitutionality of HB 2702

The Campaign Legal Center (CLC) has reviewed the proposed disclaimer legislation, HB 2702, in light of U.S. Supreme Court and Ninth Circuit precedent addressing comparable disclaimer requirements. We conclude that HB 2702's disclaimer requirements are constitutional under the First Amendment of the United States Constitution.

HB 2702 generally requires that communications "in support of or in opposition to a clearly identified candidate or measure" indicate whether any candidate, petition committee, or political committee authorized the communication. Further, if a person makes an independent expenditure to fund a communication in support of or in opposition to a candidate or measure, the communication has to state "whether any candidate, petition committee or political committee has authorized the communication." These disclaimer requirements apply to communications made through most media, including print, telephone, radio, television, and Internet communications.

This legislation would add disclaimers—a common form of campaign finance disclosure that provides on-ad information about who funded or authorized political messages—to Oregon law. The federal government and most states have enacted disclaimer laws for campaign advertising, although specific requirements vary by jurisdiction.[1] The Supreme Court has explained that disclaimers, as a subset of disclosure, represent a less restrictive method of campaign finance regulation than political spending or contribution restrictions.[2] Accordingly,

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[1] *See* 52 U.S.C. §30120(a); MONT. LEGISLATIVE SERVICES, BRIEFING ON LAWS RELATED TO CAMPAIGN ADVERTISING DISCLAIMERS IN OTHER STATES FOR THE STATE ADMINISTRATION AND VETERANS' AFFAIRS INTERIM COMMITTEE (2012).

[2] *See Citizens United v. FEC*, 558 U.S. 310, 366, 369 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)) (explaining that that disclosure laws "impose no ceiling on campaign-related activities," and constitute "a less restrictive alternative to more comprehensive regulations of speech.").

the Supreme Court has maintained that disclaimer laws are assessed with a less rigorous standard of review than limits on contributions or expenditures.[3] In the great majority of cases considering constitutional challenges to disclaimer requirements, courts have upheld these laws because they advance a governmental interest in informing voters about the sources behind political advertising.[4]

The Supreme Court and the Ninth Circuit have both reviewed and upheld disclaimer provisions. In *Citizens United v. FEC*, the Supreme Court upheld the constitutionality of the federal disclaimer statute's application to electioneering communications.[5] Similarly, the Ninth Circuit has upheld state disclaimer laws with a broader reach than HB 2702.[6] Thus, it is very likely that a federal court would find that HB 2702 was constitutional under the First Amendment.

I. Courts Require Disclaimer Laws to Have a Substantial Relation to a Sufficiently Important State Interest

Within its campaign finance jurisprudence, the Supreme Court has emphasized that disclosure requirements, such as disclaimers, are less onerous than other forms of campaign finance regulation. This is because disclaimers, unlike expenditure limits, "impose no ceiling on campaign-related activities" and do not inhibit political speech.[7] Courts thereby review disclaimer laws with a less rigorous standard of review than the scrutiny applied to spending restrictions,[8] requiring a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[9]

The Supreme Court has recognized that disclosure advances an important state interest in "provid[ing] the electorate with information, and insur[ing] that the voters are fully informed" about the sources behind political messages.[10] With regard to on-ad disclosure, identification and authorization disclaimers help to "avoid confusion" as to whether candidates or parties are responsible for political advertisements.[11] The Court has identified two additional interests

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[3] *See infra* notes 8-9 and accompanying text.

[4] *See generally Citizens United*, 558 U.S. 310; *McConnell v. FEC*, 540 U.S. 193 (2003); *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), *cert denied*, 136 S. Ct. 569 (2015); *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *Del. Strong Families v. Attn'y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015), *cert. denied sub. nom. Del. Strong Families v. Dunn*, 136 S. Ct. 2376 (2016) (upholding application of Delaware's disclosure laws to organization's voter guide); *Vt. Right to Life Comm. Inc. v. Sorrell*, 758 F. 3d 118 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015)(upholding Vermont's disclaimer requirement for electioneering communications); *Worley v. Fla. Sec'y of State*, 717 F. 3d 1238 (11th Cir. 2013) (upholding Florida's disclaimer requirements); *Nat'l Org. for Marriage v. McKee*, 649 F. 3d 34 (1st Cir. 2011) (upholding Maine's disclaimer law).

[5] 558 U.S. 310 at 370-71. The federal definition of "electioneering communication" covers broadcast, cable, or satellite communications that (1) refer to a clearly identified federal candidate; (2) are made within sixty days of a general election or thirty days of a primary; and (3) are "targeted to the relevant electorate." 52 U.S.C. § 30104 (f)(3)(A).

[6] *See Yamada*, 786 F.3d 1182 (9th Cir. 2015); *Brumsickle*, 624 F.3d 990.

[7] *Citizens United*, 558 U.S. at 366, 369 (quoting *Buckley*, 424 U.S. at 64).

[8] *Citizens United*, 558 U.S. at 366-67; *Buckley*, 424 U.S. at 68.

[9] *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64); *see also Doe v. Reed*, 561 U.S. 186, 196 (2010).

[10] *Citizens United*, 558 U.S. at 368 (quoting *McConnell*, 540 U.S. at 196; *Buckley*, 424 U.S. at 76).

[11] *Id.*; *see also Buckley*, 424 U.S at 66 (stating that disclosure works to supply the electorate with information "as to where political campaign money comes from and how it is spent by the candidate…[which] allows voters to place

served by disclosure generally. First, disclosure prevents corruption and its appearance "by exposing large contributions and expenditures to the light of publicity."[12] Second, disclosure aids in the enforcement of other campaign finance laws, such as contribution limits and source restrictions, by providing documentation of political receipts and expenditures.[13] Courts have consistently held that these interests are sufficiently important to justify any burden on First Amendment rights stemming from disclosure.

The Supreme Court has acknowledged the availability of an as-applied challenge to disclosure laws if a group can demonstrate a "reasonable probability" that compelled disclosure would subject its supporters to "threats, harassment, or reprisals from either Government officials or private parties."[14] While plaintiff organizations often assert that disclosure would subject their members to public backlash, courts have limited this narrow exception to groups facing a genuine risk of "threats, harassment, or reprisals."[15]

II. HB 2702 Has a Substantial Relation to Oregon's Sufficiently Important Interest in Informing Voters About the Sources of Political Communications

U.S. Supreme Court and Ninth Circuit precedent support the conclusion that HB 2702 is constitutional under the First Amendment. The legislation advances a "sufficiently important" governmental interest in providing Oregon voters with immediate information about whether candidates or committees have authorized political communications. Further, HB 2702 bears a "substantial relation" to this informational interest since it applies only to communications "in support of or in opposition to a clearly identified candidate or measure," as narrowly defined by Oregon law, and includes a number of exceptions that refine its coverage to "unambiguously campaign related" speech.[16]

A. HB 2702 Advances a Sufficiently Important Interest in Providing Oregon Voters with Information about Political Communications

The disclaimers in HB 2702 directly advance a "sufficiently important" interest in informing Oregon's electorate about whether a candidate or committee has authorized a political communication. HB 2702 provides that a communication supporting or opposing a "clearly identified" candidate or ballot measure must indicate whether the communication was authorized by a candidate or committee. If a person makes an independent expenditure for a communication in support of or in opposition to a candidate or measure, the communication has to state "whether any candidate, petition committee or political committee has authorized the communication."

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each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.").

[12] *Buckley*, 424 U.S. at 67; *McConnell*, 540 U.S. at 196; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) (quoting *Buckley*, 424 U.S. at 67) (noting that "'disclosure laws deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.").

[13] *Buckley*, 424 U.S. at 67-68; *McConnell*, 540 U.S at 196.

[14] *Buckley*, 424 U.S. at 74; *Citizens United*, 558 U.S. at 370; *Doe v. Reed*, 561 U.S. 186, 201-02 (2010).

[15] *Citizens United*, 558 U.S. at 370-71 (rejecting plaintiff organization's argument that disclosure was subjecting its members to "threats, harassment, or reprisals" since group had not presented any direct evidence of such retaliation despite years of public disclosure by the group); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) (holding Ohio's campaign disclosure laws could not be constitutionally applied to state communist party due to "substantial evidence of past and present hostility" against the party).

[16] *Buckley*, 424 U.S. at 81.

Both the Supreme Court and the Ninth Circuit have recognized that disclaimers advance a sufficiently important governmental interest in "provid[ing] the electorate with information about the sources of election-related spending" and "help[ing] citizens make informed choices in the political marketplace."[17] In *Citizens United*, the Court recognized that the federal disclaimer provision, which also requires political advertisements to indicate whether they are authorized by a candidate, advanced this informational interest as-applied to *Hillary: The Movie*, a documentary, and commercial advertising for the film.[18]

Similarly, the Ninth Circuit has accepted that disclaimers "advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas."[19] In *Yamada v. Snipes*, the court recognized this interest was served where the challenged disclaimer statute mandated that political advertisements include a notice stating either that the ad "has the approval and authority of the candidate" or "has not been approved by the candidate."[20] HB 2702 likewise promotes the interest in the "dissemination of information regarding the financing of political messages,"[21] similar to the statute at issue in *Yamada*, by providing information to voters about whether political ads are authorized by a candidate.

B. HB 2702 Has A Substantial Relation to Oregon's Interest in Providing Information to Voters

Due to HB 2702's targeted application, the legislation's disclaimers have a "substantial relation" to Oregon's interest in informing voters about the sources behind political communications advocating the election or defeat of state candidates and measures. HB 2702 requires statements of authorization for "communication[s] in support of or in opposition to a clearly identified candidate or measure." Oregon's code defines "[a] communication *in support of or in opposition to* a clearly identified candidate or measure," to mean: (1) "[t]he communication, taken in its context, clearly and unambiguously urges the election or defeat of a clearly identified candidate…or the passage or defeat of a clearly identified measure;" (2) "[t]he communication, as a whole, seeks action rather than simply conveying information;" and (3) "[i]t is clear what action the communication advocates."[22]

HB 2702 contains a number of exemptions that tailor the breadth of its application. The legislation exempts candidates and committees that are not subject to Oregon's electronic filing requirement, ORS § 260.057, because they do not anticipate raising or spending significant campaign funds. Correspondingly, a person making independent expenditures that does not have to file a statement under ORS § 260.044 is exempt. HB 2702 also excludes from coverage printed advertisements with a fair market value of less than $500.

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[17] *Citizens United*, 310 U.S. at 367 (internal citations and quotations omitted).
[18] *Id*. at 370-71.
[19] *Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010); *see also Yamada*, 786 F.3d 1182, 1203 (9th Cir. 2015) (explaining that disclaimers serve an interest in the "dissemination of information regarding the financing of political messages.").
[20] 786 F.3d 1182, 1202 (9th Cir. 2015), *cert. denied*, 136 S.Ct. 569 (2015); HAW. REV. STAT. §11-391.
[21] 786 F.3d 1182, 1203 (internal citations omitted).
[22] O.R.S. § 260.005(10)(c) (emphasis added).

Although the scope of HB 2702 is rather narrow, the Supreme Court has endorsed the constitutionality of broadly applicable disclaimer laws. In *Citizens United v. FEC*, the Court held that the application of federal disclaimer requirements to a political documentary and advertising for the film had a "substantial relation" to the federal government's interest in "insur[ing] that the voters are fully informed about the person or group who is speaking" about a presidential candidate shortly before an election.[23] Though *Citizens United* is often criticized for its invalidation of the federal ban on corporate and union independent expenditures, the decision is resolutely pro-disclosure. Eight of the Court's nine justices joined the portion of the decision upholding comprehensive application of federal disclaimer requirements to electioneering communications.[24] *Citizens United* subsequently has become a constitutional baseline for assessing disclaimer laws, and courts have widely upheld the constitutionality of state disclaimer laws comparable to the federal provision.[25]

Only once has the Supreme Court held that a disclaimer requirement was not substantially related to the objective of informing the electorate, and the decision's unique factual backdrop largely accounts for its incongruity with other cases. In *McIntyre v. Ohio Elections Commission,* the Court ruled that Ohio's prohibition on the distribution of anonymous campaign literature violated the First Amendment after the state fined a woman for distributing homemade leaflets related to a referendum on a school tax levy.[26]

Notably, the *McIntyre* Court distinguished the law at issue in *Buckley* as concerning "disclosure of campaign-related expenditures," in contrast to the Ohio law's blanket "prohibition on anonymous campaign literature."[27] Under *McIntyre*'s unusual circumstances, the state's interest in informing the electorate about the source of political messaging was attenuated since "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message."[28] Furthermore, the disclosure of campaign expenditures was "less specific, less personal, and less provocative" than compelled self-identification on "a personally crafted statement of a political viewpoint…[that] reveals unmistakably the content of [the author's] thoughts on a controversial issue."[29]

In the twenty-plus years since it was decided, *McIntyre*'s influence has proved minimal as courts have not introduced principles from the decision into the disclosure jurisprudence at-large. As the Eleventh Circuit observed, "*Citizens United* upheld [a] disclaimer requirement

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[23] 558 U.S. 310, 368 (2010).
[24] *Id*. at 371.
[25] *See, e.g*., *Yamada*, 786 F.3d at 1202 (comparing Hawaii's disclaimer law to federal equivalent upheld in *Citizens United*); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 61 (1st Cir. 2011) (explaining that "Citizens United has effectively disposed of any attack on Maine's attribution and disclaimer requirements.").
[26] 514 U.S. 334 (1995).
[27] *Id*. at 353. In concurrence, Justice Ginsburg explained *McIntyre* was not holding that "the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id*.at 358 (Ginsburg, J., concurring).
[28] *Id*. at 348-49.
[29] *Id*. at 355.

without any mention of *McIntyre*."[30] *McIntyre*'s constitutional outgrowth seems limited to the proposition that "[t]he burden of public identification may foreclose application of disclosure laws to individual pamphleteers…for in these cases the state's interest in disseminating information to voters is at a low ebb."[31]

Since *Citizens United*, the Ninth Circuit has followed the Supreme Court in upholding comprehensive disclaimer laws. In *Human Life of Washington Inc. v. Brumsickle*, the Ninth Circuit upheld Washington state's broad definition of "political advertising," which encompassed both express advocacy and issue advocacy communications, as "substantially related" to the state's interest in informing voters.[32] The court emphasized that *Citizens United* foreclosed any assertion that disclaimers could only be applied to express advocacy and its functional equivalent.[33] In *Yamada v. Snipes*, the Ninth Circuit rejected the argument that Hawaii's disclaimer statute, which required political advertisements to include a "notice in a prominent location" stating whether or not the ad had the approval of a candidate, represented an unconstitutional regulation of the content of speech.[34] The court proceeded to uphold Hawaii's disclaimer law as "closely related" to the state's important interest in "dissemination of information regarding the financing of political messages."[35]

HB 2702 disclaimer requirements are less sweeping than those upheld by the Supreme Court and the Ninth Circuit. HB 2702 only requires authorization statements for "communication[s] in support of or in opposition to a clearly identified candidate or measure." This phrase, by definition, is limited to communications that "clearly and unambiguously urge[] the election or defeat of a clearly identified candidate…or the passage or defeat of a clearly identified measure."[36] Consequently, HB 2702's coverage only embraces communications that constitute express advocacy or its functional equivalent.[37] The legislation's application is more narrow than the federal disclaimer provision upheld in *Citizens United*, which covers electioneering communications in addition to express advocacy and its functional equivalent.[38] Similarly, HB 2702 is more modest in scope than the disclaimer laws that the Ninth Circuit upheld in *Brumsickle* and *Yamada*.

Additionally, HB 2702's exemption for printed advertisements with a fair market value under $500 precludes a constitutional challenge rooted in *McIntyre*'s holding that a state cannot impose a blanket prohibition on anonymous campaign literature. This exception permits

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[30] *Worley*, 717 F.3d 1238, 1254 (11th Cir. 2013). *See also Yamada*, 786 F.3d 1182, 1203 n.14 (9th Cir. 2015), *cert. denied* 136 S.Ct. 569 (2015) ("*Citizens United*'s post-*McIntyre*…discussion makes clear that disclaimer laws such as Hawaii's may be imposed on political advertisements that discuss a candidate shortly before an election.").

[31] *Ctr. for Ind. Freedom v. Madigan*, 697 F.3d 464, 482 (7th Cir. 2012).

[32] 649 F.3d 990, 1019 (9th Cir. 2010).

[33] *Id*. at 1016.

[34] *Yamada*, 786 F.3d at 1202.

[35] *Id*. at 1202-03.

[36] O.R.S. §260.005(10) (c).

[37] The Supreme Court has explained that "express advocacy" means "communications that include explicit words of advocacy of election or defeat," such as "vote for, elect, support, vote against, reject, defeat." *Buckley v. Valeo*, 424 U.S. 1, 43-44 n. 52 (1976). Similarly, the Court has defined the "functional equivalent of express advocacy" as communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449, 469-70 (2007).

[38] Electioneering communications do not include explicit words of electoral advocacy. *See supra* note 5.

McIntyre-like homemade political literature, but imposes disclaimer obligations once significant funds are expended and the voters' interest in knowing the material's origin is heightened.

The Supreme Court and the Ninth Circuit have upheld disclaimer laws with broader application than HB 2702 as "substantially related" to the governmental interest in informing voters. Other federal appeals courts also have endorsed the constitutionality of extensive disclaimer obligations.[39] HB 2702, meanwhile, imposes only the modest requirement that communications "clearly and unambiguously urg[ing]" election or defeat of a candidate or measure indicate whether a candidate or committee authorized the message. The legislation thus bears a "substantial relation" to Oregon's interest in providing information about the sources behind messages directly asking voters to vote for or against state candidates and ballot measures.

III. Conclusion

HB 2702 plainly advances Oregon's interest in informing voters about the sources behind political communications. The Supreme Court and numerous federal circuits have upheld more expansive disclaimer laws as substantially related to the government's interest in informing the electorate. Precedent and the legislation's limited scope thereby strongly support that HB 2702 is constitutional under the First Amendment.

[39] *See Del. Strong Families v. Attn'y Gen. of Del.*, 793 F.3d 304 (3d Cir. 2015), *cert. denied sub. nom. Del. Strong Families v. Dunn*, 136 S. Ct. 2376 (2016) (upholding application of Delaware's disclosure laws to organization's voter guide); *Vt. Right to Life Comm. Inc. v. Sorrell*, 758 F. 3d 118 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015) (upholding Vermont's disclaimer requirement for electioneering communications); *Worley v. Fla. Sec'y of State*, 717 F. 3d 1238 (11th Cir. 2013) (upholding Florida's disclaimer requirements); *Nat'l Org. for Marriage v. McKee*, 649 F. 3d 34 (1st Cir. 2011) (upholding Maine's disclaimer law).