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4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MULTNOMAH

In the Matter of: Validation Proceeding to Determine the Legality of City of Portland Charter Chapter 3, Article 3 and Portland City Code Chapter 2.10 Regulating Campaign Finance and Disclosure.	Case No. 19CV06544 PETITIONER CITY OF PORTLAND'S MOTION FOR SUMMARY JUDGMENT ORAL ARGUMENT REQUESTED JUDGE: Erich J. Bloch Hearing Date: May 8, 2019, 3:30 pm

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13 ORAL ARGUMENT REQUESTED

14 Pursuant to UTCR 5.050, Petitioner City of Portland ("City") respectfully requests oral
15 argument on its Motion for Summary Judgment. The City estimates one hour for its motion. The
16 City requests that the hearing be recorded.

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MOTION

Pursuant to ORCP 47, the City moves for an order granting summary judgment in its favor. There is no dispute as to the material facts recited below.

MEMORANDUM OF LAW

I. Introduction

Money is not speech. Money is a means of buying and selling goods and services. The City's voters have significant interest in regulating money in City elections to prevent the appearance of unlimited cash being used to buy and sell local elections. Further, even if money is a form of expression, that expression through dollars can be constitutionally regulated by the City's voters to prevent the appearance of *quid pro quo* corruption. The City asks this Court to affirm the voters' interest in maintaining the integrity of their local elections.

Unlimited political contributions and campaign spending in support of candidates have created a political system wrought with concerns of corruption or the appearance thereof. Individuals, corporations, and other entities can give unlimited amounts of money to candidates for local office—and spend unlimited amounts more in support of those candidates—which has created concern in the minds of the public about whose interests their public officials serve. Indeed, eighty-seven percent of voters in the City had concerns about the negative outcomes resulting from unlimited money in politics and voted in support of Measure 26-200. They voted to advance the government interest in addressing corruption and the appearance of corruption.

By limiting contributions to candidates and independent expenditures on behalf of candidates Portland City Charter, Chapter 3, Article 3 and Portland City Code 2.10 (collectively the "Honest Elections Law") protects the integrity of local elections and public faith in local government officials. The Honest Election Law does this not by limiting speech, but by limiting money. Voters were not concerned that too much speech led to corruption, but voters were concerned that unlimited campaign money can lead to the appearance of corruption. The disclosure provisions of the Honest Elections Law further advances the public and government's

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interest in increasing transparency and reducing confusion and deception in connection with communications. These interests—in curbing corruption or its appearance and preventing confusing and misleading candidate communications—are significant government interests that protect the integrity of our local democracy. These significant interests provide a sufficient foundation upon which to uphold the constitutionality of the Honest Elections Law.

II. Undisputed Facts

Initiative petition PDX 03 became Measure 26-200 after qualifying for the November 6, 2018 ballot. (*See* City of Portland's Petition for Commencement of Validation Proceeding, dated February 7, 2019 ("Petition"), Ex. 4). Measure 26-200 presented the question "Should Portland Charter limit campaign contributions, expenditures for elected offices; require certain disclosures for campaign communications; allow payroll deductions?" (*Id.*). On November 6, 2018, Measure 26-200 passed with 87.4% of voters voting "yes." (Petition, Ex. 5). Measure 26-200 was incorporated into the City Charter as Chapter 3, Article 3. (Petition, Ex. 1). On January 16, 2019, the City Council adopted Ordinance No. 189348 (Petition, Ex. 2), which enacted an amendment to the City Code substantially similar to the City Charter Chapter 3, Article 3. Portland City Code Ch. 2.10 (Petition, Ex. 3).

The voters' pamphlet, editorials, news reports, and studies presented to voters all establish that Measure 26-200 was designed to promote multiple government interests. *Ecumenical Ministries of Or. v. Or. State Lottery Comm'n*, 318 Or 551, 559 n. 8 (1994) (explaining that the "legislative facts" examined for constitutional provisions adopted by initiative included "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure"). An overriding interest advanced by Measure 26-200 was the prevention of apparent or actual undue influence and corruption. (Petition, Ex. 4, Declaration of Naomi Sheffield in Support of Petitioner's Motion for Summary Judgment ("Sheffield Decl.") Decl., Exs. 7, 8). The contribution and expenditure limitations also sought to bring down the costs of running for

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elected office and to allow more people, including members of historically underrepresented and disenfranchised communities, a role in elections by equalizing the opportunities of individuals to participate in campaigns. (Petition, Ex. 4 at 3-4 , Sheffield Decl., 6-7; 9; 10). Finally, the disclosure and registration provisions were designed to prevent these communications from being misleading or deceptive and ensuring that voters have adequate knowledge with which to evaluate these communications and make decisions. (Petition, Ex. 4 at 5; Sheffield Decl., Ex. 7).

III. Argument

The Honest Elections Law imposes regulations on City of Portland candidate elections as follows:

(1) Campaign contribution limits (PCC 2.10.010, Charter 3-301);

(2) Expenditure and independent expenditure limits (PCC 2.10.020; Charter 3-302);

(3) Disclosure requirements (PCC 2.10.030; Charter 3-303);

(4) Registration requirements (PCC 2.10.020; Charter 3-302); and

(5) Payroll Deduction requirements (PCC 2.10.001; Charter 3-301).

Each of these regulations are supported by both Article I, Section 8 of the Oregon Constitution and the First Amendment of the United States Constitution.[1]

State v. Robertson, 293 Or 402 (1982) provides the framework for analyzing laws under Article I, Section 8 of the Oregon Constitution. As an initial matter, Article I, Section 8 "forecloses the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412. However, *Robertson* distinguished law that focuses on forbidden results. *Id*. at 416. These laws "can be divided further into two categories. The first

[1] In addition to these regulatory requirements, the Honest Elections Law includes provisions for administration, implementation, and enforcement of these regulations. (PCC 2.10.040-080; Charter 3-304-308).

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category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. . . . Such laws are analyzed for overbreadth. . . . The second kind of law also focuses on forbidden effects, but without referring to expression at all." *State v. Plowman*, 314 Or 157, 164 (1992).

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has found that campaign spending limitations restrict interests protected by the First Amendment, *Buckley v. Valeo*, 424 US 1, 23 (1976), *superseded by statute on other grounds, as discussed in McConnell v. Federal Election Comm'n*, 540 US 93 (2003), but allows even a "significant interference" with speech if the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see also McCutcheon v. Fed. Election. Comm'n*, 572 US 185, 197 (2014).

The contribution limits, independent expenditure limits, and disclosure requirements in the Honest Election Law are each consistent with these tenants of Article I, Section 8 and the First Amendment.

A. Contribution Limits

The Honest Elections Law's campaign contribution limits restrict the giving and receipt of contributions in City of Portland candidate elections to those outlined in the law. The law allows a candidate[2] or candidate committee[3] to receive the following contributions each election cycle[4]:

> (1) Not more than five hundred dollars ($500) from an Individual or a Political Committee other than a Small Donor Committee;

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[2] Candidate is defined by Oregon statute to include individuals who have declared a candidacy for public office, individuals who have solicited or accepted contributions or made expenditures (or authorized others to do so on their behalf) for public office, and a public office holder subject to a recall petition. ORS 260.005(1).

[3] A candidate committee is the principal political committee designated by a candidate as their principal campaign committee. ORS 260.041.

[4] An election cycle is generally the period between an election at which a candidate is elected and the next election for the same office. Portland City Charter 3-308(h).

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(2) Any amount from a qualified Small Donor Committee;

(3) A loan balance of not more than five thousand dollars ($5,000) from the candidate;

(4) No amount from any other Entity, except as provided in Section 3-304 below.

(PCC 2.10.010; Charter 3-301).

As this Court previously acknowledged in the validation proceeding related to Multnomah County's campaign finance law (Sheffield Decl, Ex. 6), the Oregon Supreme Court has previously considered an Article I, Section 8 challenge to campaign contribution limitations in *Vannatta v. Keisling*, 324 Or 514 (1997) (*Vannatta I*). There, the secretary of state (who defended the campaign contribution law) conceded that expenditures were expression under Article I, Section 8, but contended that campaign contributions were distinguishable and did not constitute expression. *Vannatta I*, 324 Or at 520. The Court nonetheless held that campaign contributions constituted a form of expression by the contributor, found no historical exception, and struck down Oregon's law. *Vannatta I*, 324 Or at 522, 535. However, as this Court acknowledged, *Vannatta v. Or. Ethics Comm'n*, 347 Or 449 (2009) (*Vannatta II*) sought to limit some of the broadest interpretations and applications of *Vannatta I*. (Sheffield Decl., Ex. 6). In fact, *Vannatta II* suggests that at least some of the analysis in *Vannatta I*, was flawed. *Vannatta II*, 347 Or at 465 (noting that the Court's assertion that "campaign contributions were constitutionally protected forms of expression regardless of the 'ultimate use to which the contribution is put' was unnecessary . . . was too broad and must be withdrawn.").

Given the available legislative history, campaign contribution limitations are valid under Article I, Section 8 for four independent reasons. First, campaign contributions are not expression, and the limitations are not directed at the opinion or subject of communication, but rather the monetary transaction itself. Second, even if the contributions limits were directed at the substance of an opinion or subject of a communication, the historical exceptions at the time of enactment of Article I, Section 8, would allow campaign contribution limits. Third, the contribution limitations, even if they incidentally impact expression, are directed at an

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underlying forbidden activity—corrupt activity by elected officials. The corrupting influence of unlimited campaign contributions is incompatible with elected officials performing their responsibilities in the general public interest. Finally, the contribution limits are reasonable time, place, and manner restrictions on contributions of money to candidate campaigns.

1. The contribution limits are constitutional under Article I, Section 8, because they are not directed at the opinion or subject of any communications.

As the Supreme Court clarified in *Vannatta II*, statutory restrictions on the receipt of money,

> are not written in terms directed to the substance of any opinion or any subject of communication, as *Robertson* explained that analytical principle. A [candidate] who is subject to restrictions on the receipt of [contributions] can violate the restrictions without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold.

Vannatta II, 347 Or. at 458–59.

The Court in *Vannatta I* concluded that a campaign contribution "is *the contributor's expression of support for the candidate or cause*." *Vannatta I*, 324 Or at 522 (emphasis in original). But this understanding was upended in *Vannatta II*. There, the Court explained,

> [T]he court's rationale for the holding in *Vannatta I* that "campaign contributions" are protected speech is based on the assumption by the *Vannatta I* court that campaign contributions are so inextricably intertwined with the candidate or the campaign's expression of its message that the two cannot be separated. In other words, the *Vannatta I* court assumed that restricting campaign contributions restricts a candidate's or a campaign's ability to communicate a political message. It is that assumption that underlies the court's determination that the statutory campaign contribution limitations at issue in *Vannatta I* violated Article I, section 8.

347 Or. at 464–65. And the Court expressly rejected *Vannatta I*'s previous conclusion that "that campaign contributions were constitutionally protected forms of expression regardless of the 'ultimate use to which the contribution is put.'" *Id.* at 465. It went further to assert that *Vannatta I*, "did not squarely decide" that "in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a

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matter of law." *Id.* Having concluded that the *Vannatta I* Court did not universally strike down campaign contribution limits, the *Vannatta II* Court demonstrated that such limits were constitutional in at least some instances.

For example, *Vannatta II* found that "*Vannatta I* assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message." *Id*. This symbiotic relationship, even if it exists, certainly does not rely on large dollar donations. As the legislative history of the Honest Elections Law makes clear, candidates are able to communicate their political message relying wholly on low dollar funding. The voter's pamphlet notes that "Seattle typically spends less than half as much in their Mayoral races." (Petition, Ex. 4 at 6). It explains that 44 other states have had contribution limits in place for decades. (*Id*. at 4). And it notes the significant fundraising by Bernie Sanders—$231 million-—with an average of $86 per donor. (*Id*.). As the legislative history notes, and voters understood, contribution limits, which are common at the federal, state and local level across the country, do not prevent candidates from communicating their message.

In *Vannatta II*, the Court recognized that *Fidanque v. State ex rel Or Gov't Standards and Practices Comm'n*, 328 Or 1 (1998), struck down a lobbying registration fee because it limited the right of lobbyists to express free speech. *Id.* at 9. However, the Court went on to explain that "this court did not express or imply that public officials or others are entitled to take delivery of property or other largess, free of regulation, simply because lobbyists proffer it in connection with a political communication." *Vannatta II*, 347 Or. at 460. The Court recognized the difference between interfering with or inhibiting a person's ability to express themselves and limiting the transfer of money to candidates and public officials. The same principle applies here. The contribution limits restrict the amount donors can give and the amount a candidate can accept and spend. This, like the gift limitation in *Vannatta II*, prevents candidates from being or appearing to be unduly influenced or corrupted by large contributions. The contribution limits do not limit the ability of individual constituents (or non-constituents) to speak to candidates,

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express their views, or otherwise try to persuade the candidate or others to support their policies. It similarly does not stop individuals or entities from publicly supporting, endorsing, advocating on behalf of, or volunteering for candidates.

The Court in *Huffman & Wright Logging Co. v Wade*, 317 Or 445 (1993) made clear "that a person's *reason for engaging in punishable conduct* does not transform conduct into expression under Article I, section 8." *Id.* at 452. This is true, even if that conduct is accompanied by speech. *Id*. Here, the unlawful conduct is a candidate accepting excessive contributions from individual sources. Charter 3-301. The fact that a candidate may be accepting such contributions in order to engage in speech or a person giving such a contribution may accompany that contribution with speech or expression does not transform the underlying conduct to expression.

"As a general matter, the act of delivering property to a public official is nonexpressive conduct." *Vannatta II*, 347 Or at 462-63. Contributions to political candidates, just like "most purposive human activity communicates something about the frame of mind of the actor." *Huffman,* 317 Or at 450. But this is not enough to bring it into the category of protected expression. *See Vannatta II*, 347 Or. at 462–63. Money is money; it is not speech.

2. Even if campaign contributions are protected expression, they are constitutional under Article I, Section 8.

If the Court decides that campaign contributions constitute protected expression in some instances, the *Robertson* analysis requires that it move on to determine whether the restrain is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Plowman*, 314 Or at 164 (quoting *Robertson*, 293 Or at 412). Even if the law does not fall within a historical exception, it may still survive if it is a law that "focuses on forbidden effects, but expressly prohibits expression used to achieve those effects." *Id*. at 164. In the latter instance, the law is analyzed for overbreadth. *Id*.

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Here, the Honest Elections law can survive under either of these exceptions. First, evidence at the time of the enactment of Article I, Section 8, demonstrates that the framers did not intend it to allow for the unrestricted flow of money to politicians. Further, the Honest Elections Law focuses on the forbidden effect of corrupting or creating the appearance of corrupting public officials. Any incidental limitations on expression are solely for furtherance of the anti-corruption goal and are not overbroad. Finally, the contribution limits are a reasonable time, place and manner restriction.

a. Campaign contributions fall within a historic exception to protected expression at the time Article I, Section 8 was adopted.

Historical evidence of restrictions on campaign contributions before the enactment of Article I, Section 8, and the framers' concurrent enactment of Article II, Section 8 both demonstrate that Article I, Section 8 was not intended to protect unlimited campaign contributions.

"Whether a statute that restrains expression is 'wholly confined within some historical exception' requires the following inquiries: (1) was the restriction well established when the early American guarantees of freedom of expression were adopted, and (2) was Article I, section 8, intended to eliminate that restriction." *State v. Moyer*, 348 Or 220, 233 (2010). Here, limitations on campaign contributions were clearly established at the time that the guarantee of freedom of expression was adopted in Article I, Section 8. And, in simultaneously adopting Article II, Section 8, the framers demonstrated their support for such restrictions.

i. Restrictions on campaign contributions existed when the framers adopted Article I, Section 8.

In *Vannatta I*, the Court without much analysis dismissed the possibility of any historical exception, noting that "[t]he Secretary of State does not argue for, nor are we aware of, any historical exception that removes those restrictions on expression from the protection of Article I, section 8." *Vannatta I*, 324 Or at 538. The Court went on to inaccurately state that, at the time, "there was no established tradition of enacting laws to limit campaign contributions." *Id*. It

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looked only to the Corrupt Practices Act, passed in Oregon in the early twentieth century, fifty years after the adoption of Article I, Section 8. In completing its analysis, the Court ignored laws enacted by other states, of which the framers were surely aware.[5]

Laws restricting or prohibiting certain campaign contributions and expenditures were well established by 1859. New York law made it unlawful for a candidate or any other person to "*contribute money for any other purpose intended to promote an election of any particular person or ticket*, except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers previous to any such election." *See Jackson v. Walker*, 5 Hill 27, 30 (1843). That court explained, "The legislature evidently thought that the most effectual way 'to preserve the purity of elections,' was to keep them free from the contaminating influence of money." *Id*. at 31. Not only did restrictions on campaign contributions exist at the time that Article I, Section 8 was adopted, but they existed for the very reasons that the voters of Portland passed the Honest Elections Law over 150 years later.

Similarly, Texas law provided, "If any person shall furnish money to another, to be used for the purpose of promoting the success or defeat of any particular candidate . . . he shall be punished by fine, not exceeding two hundred dollars." *The Penal Code of the State of Texas*, Art 262 at 49 (1857), *available at* https://lrl.texas.gov/scanned/statutes_and_codes/Penal_Code.pdf (last viewed April 11, 2019).

Moreover, concerns regarding the corrupting influence of money certainly pre-dated the adoption of Article I, Section 8. President Andrew Jackson, in his fifth annual message, stated:

> The question is distinctly presented, whether the people of the United States are to govern through representatives chosen by their unbiased suffrage, or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions.

[5] Analysis of the basis for the Oregon Constitution suggests the framers relied on provisions from many other states, including Indiana, Massachusetts, Ohio, Wisconsin, Texas, Michigan, Connecticut, Illinois, Iowa, and Maine. C.W. Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200 (1926). Given the diverse sources for Oregon constitutional law, it would be reasonable for the framers to consider the laws and constitutions of each of the other states.

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1 Perry Belmont, *Publicity of Election Expenditures*, The North American Review, vol. 180, no.
2 579, 170 (1905), *available at* www.jstor.org/stable/25105352. By the early twentieth century,
3 when Oregon was considering the Corrupt Practices Act, "Again the relation of the money of
4 corporations to party organizations and the ballot [had] become an issue, but we [then]
5 approach[ed] it in a more tolerant spirit than that animating the contentions of an earlier period."
6 *Id*. By the time Oregon passed the Corrupt Practice Act Governing Election in 1909, it was not,
7 as the Court suggested in *Vannatta I*, "[t]he earliest indication" of distrust of money in the
8 political process. 324 Or at 538 n.23. Rather, the Corrupt Practices Act expressed a renewed
9 mistrust that existed before 1859.

10 Further, it is well-documented that states were concerned about corruption, and the
11 improper influence of money, long before 1859, as demonstrated by anti-wagering laws. *See*
12 *Rust v. Gott*, 9 Cow 169, 18 Am Dec 497 (NY 1828) (finding wagering on elections against
13 public policy, the court considered "whether, in a free country, a contract which has a *tendency*
14 to destroy freedom of election, and produce corruption, is consistent with sound policy?" and
15 noted a separate decision, which concluded "We choose rather to place the decision of this case
16 upon those great and solid principles of policy which forbid this species of gambling, as tending
17 to debase the character, and impair the value of the right of suffrage."); *Bettis v. Reynolds*, 12
18 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851) (noting that institutions "depend[] on the free
19 and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency,
20 in any way, unduly to influence elections, is against public policy"). While the focus of those
21 laws was on the potential corruption or influence that arises from betting on elections, it
22 demonstrates a willingness to limit or restrict potential expression—the expression of betting—in
23 order to advance the greater interest in fair and free elections.

24 Oregon subsequently enacted laws to limit the corrupting influence of money on politics.
25 The Corrupt Practices Act, adopted in 1908, limited "the amount of money candidates and other
26 persons may contribute or spend in election[s]." *Nickerson v. Mecklem*, 169 Or 270, 274 (1942).

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This historical context demonstrates that prior to adoption of Article I, Section 8, there were real and significant concerns about the corruptive influence of money in elections, which resulted in exceptions to protections on free expression. Article I, Section 8 recognizes these historic exceptions.

ii. Article II, Section 8, demonstrates the framers' intent to embrace, not reject, the protection of elections through restricting campaigns.

This historical context surrounding the adoption of Article II, Section 8, adopted concurrently with Article I, Section 8, further confirms the historic expectation that legislatures could regulate campaigns in order to ensure that elections were conducted without undue or improper influence. *See State v. Hirsch/Friend*, 338 Or 622, 634 (2005) (examining other constitutional provisions for textual analysis), *overruled in part on other grounds by State v. Christian*, 354 Or 22 (2013).

In *Vannatta I*, the Court, for the first time, considered the relationship between Article II, Section 8 and Article I, Section 8. Based on its narrow reading of the term "election" to mean "those events immediately associated with the act of selecting a particular candidate," the Court concluded that Article II, Section 8 did not encompass campaigning or electoral activity leading up to the election itself. *Vannatta I*, 324 Or at 528. However, its analysis was unduly limited to a single definition of "election," which did not reference campaigns. *Id*. at 529-32. Looking more holistically at the text and context of Article II, Section 8, this extremely narrow construction of the term "election" proves inadequate.

Article II, Section 8 provides, "The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct." This requirement for the enactment of laws to support free suffrage, by its plain language, describes at least two types of legislation. First, as the *Vannatta I* Court discussed, it describes laws that regulate the conduct of elections. Second, the legislature is

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1 empowered—in fact, required—to enact laws that "prohibit . . . all undue influence therein, from
2 power, bribery, tumult, and other improper conduct."

3 Neither of these legislative powers is "limited in time." *Vannatta I*, 324 Or at 531.
4 Rather, the legislative authority may be applied to events that occur before the election. As the
5 *Vannatta I* Court noted, "a bribe to vote a particular way that was given months before an
6 election still would appear to fall within the ambit of Article II, section 8." *Id.*

7 The first directive, empowering the legislature with respect to the manner of regulating
8 and conducting elections, while directly relating to voting and the selection of candidates, also
9 includes the conduct leading up to voting. The Court's interpretation of the language "manner of
10 regulating" as limited to such issues as who was eligible to vote and the required qualifications,
11 *Id.* at 532, is unlikely to be consistent with the framers' understanding. This is demonstrated by
12 other, concurrently enacted, provisions of the Oregon Constitution, which already address such
13 issues. *See e.g*, Or Const, Art II, § 2 (addressing qualifications of electors); Or Const, Art II, § 3
14 (prohibiting an "idiot, or insane person" or those convicted of certain crimes, from having the
15 "privileges of an elector"). Similarly, the Court suggested that "conducting elections," related to
16 the mechanics of the elections themselves, such as the number of polling places and how they
17 would operate. *Vannatta I*, 324 Or at 532. But these mechanical requirements for elections were
18 also addressed by other, concurrent, provisions of the Oregon Constitution. Or Const, Art II, § 17
19 (directing where electors must vote); Or Const, Art II, § 14 (providing for timing of elections).
20 The very narrow construction of Article II, Section 8, provided in *Vannatta I*, would make the
21 constitutional provision nearly meaningless. It is therefore likely that the framers intended to
22 grant broader powers to the legislature in regulating elections than those contemplated in
23 *Vannatta I*.

24 Moreover, the *Vannatta I* Court failed to even analyze the very broad direction to prohibit
25 undue influence in elections. Or Const, Art II, Section 8. "Undue" at the time was defined as
26 "improper," which was defined to include as "not proper" or "not suited to the character, time or

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place." Webster*, An American Dictionary of English Language* (unpaginated) (1828) (defining "undue" and "improper"). Article II, Section 8, recognizes that this undue influence can stem from "power, bribery, tumult, or other improper purpose." Or Const, Art II, Section 8. This broad legislative enactment was intended to allow the legislature to protect against those improper influences which the legislature finds are unduly and improperly influencing elections. Here, the legislature (through the voters) has done just that. They identified the undue influence arising from unlimited campaign contributions. The voters enactment of contribution limits to curb actual or perceived corruption falls squarely within the undue influence that Article II, Section 8 empowers the legislature to address.

Even if the contributions limits impact protected expression, they remain valid under the historic exception analysis. As evidenced by existing laws, commentary, and the concurrent enactment of Article II, Section 8, the framers reasonably understood that regulation of political campaigns was an exception to the blanket protection of free expression.

b. The contribution limits address only the forbidden harm and are not overbroad.

Even if the contribution limits are not within a historical exception, they survive Article I, Section 8 scrutiny because they focus on forbidden results. "If the enactment's restraint on speech or communication lies outside an historical exception, then a further inquiry is made—whether the *actual focus* of the enactment is on an *effect* or *harm* that may be proscribed, rather than on the substance of the communication itself. If the actual focus of the enactment is on such a harm, the legislation may survive scrutiny under Article I, section 8." *State v. Stoneman*, 323 Or 536, 543 (1996) (affirming a prohibition on child pornography because it sought to address the harm not of the content of any communication, but because the very existence involves the harmful abuse of a child).

The contribution limits are aimed at money, not expression. They seek to alleviate the significant harm of actual or apparent corruption that results from a political system inundated

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with money, including unlimited donations from individuals and corporations. The intent of addressing this underlying harm is apparent from the legislative history. Arguments in favor of Measure 26-200 in the voter's pamphlet repeatedly discuss the perceived corruption of elected officials arising from significant campaign contributions from individuals and entities with policy goals. There are references to candidates receiving money "from corporations and people with interests which could come before" them if elected. (Petition, Ex. 4 at 2). The arguments in favor of Measure 26-200 state that "Candidates and public officials have become unduly beholden to the special interests." *Id*. Some of the arguments note the connection between environmental regulation and big polluters, (*id.* at 5) and others discuss the connection between "excessive money from corporations and wealthy individuals" and the absence of universal publicly funded healthcare *Id*. In its endorsement of Measure 26-200, the Portland Mercury editorial board quoted a former Federal Election Commission chair saying, "Whether it be education or tax reform or foreign policy, campaign finance is at the heart of all the policy decisions that are being made." (Sheffield Decl., Ex. 7).

Even if the contribution limits have the incidental effect of limiting some expression, the reason for these limits is to address corruption. This is what the voters sought—a campaign finance system that would eliminate the appearance of individuals and entities pouring significant amounts of money into candidate campaigns in order to influence policy decisions. The City does not seek to limit large contributions because of the content of any expression such contributions contain. Rather, the very existence of large contributions to candidates for City offices creates, at a minimum, the appearance of corruption. The *quid pro quo* corruption, or risk thereof, at the heart of voters' concerns in passing Measure 26-200 is a forbidden result that the City can rightly address. *Cf. In re Fadeley*, 310 Or 548, 563 (1990) ("The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. . . . A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the

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public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity.").

The contribution limits in the Honest Election Law are set at a level that correctly addresses amounts likely to create the appearance of corruption, without being overbroad or encompassing unintended expression. Even if a statute is directed at forbidden conduct, not the content of speech, it remains subject to an overbreadth analysis. *Stoneman*, 323 Or at 550.

Just as the child pornography statute in *Stoneman*, was directed at "a very limited pool of communicative materials," so too are the contribution limitations. Article I, Section 8 should not be read to require the City "to tolerate" unlimited campaign contributions designed to improperly influence elected officials. The contribution limitations continue to allow everyone to support political candidates. And they do not limit one's ability to volunteer or express one's support for a candidate. Rather, the limits are designed not to limit anyone's expression of support, but rather to limit the ability to improperly influence elected officials through unlimited campaign contributions. The contribution limits only impact the harm that arises from the impropriety, or appearance of impropriety, associated with high-dollar donations.

c. The contribution limits are reasonable restrictions on the time, place and manner of expression.

The contribution limits, to the extent they limit expression, are a reasonable restriction on the time, place, and manner by which donors express their views through contributions. The government may generally impose regulations "that do not foreclose expression entirely but regulate when, where and how it can occur." *City of Hillsboro v. Purcell*, 306 Or 547, 553-54 (1988). A law regulating the time, place, or manner of expression is permissible if it (1) does not discriminate base on the subject or content of speech; (2) advances a legitimate state interest without restricting substantially more speech than necessary; and (3) leaves open ample alternative avenues to communicate. *See State v. Babson*, 355 Or 383, 407 (2014).

If *Vannatta I*, is correct, a campaign contribution "is *the contributor's expression of support for the candidate or cause*." 324 Or at 522. This expression can be reasonably limited.

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The contribution limitations do just that.

In *Outdoor Media Dimensions v. ODOT*, 340 Or 275, 279 (2006), the Court upheld most aspects of a permit requirement for "outdoor advertising signs" that regulated the location and limited the number of signs. These limitations were allowed, even though these signs "may have characteristics that make them uniquely suited to conveying certain messages to certain audiences." *Id*. at 291. Noting that the law did not completely prohibit billboards, the Court found that the parties had ample alternative avenues to communicate their message. *Id*. at 291-92.

The contribution limits are content neutral. They allow individuals to give, and candidates to receive, limited amounts of money or other things of value. They do not regulate the content of any expression that the contributor intends to make with their contribution. Contributions can still be accompanied by unlimited expression. In *Fidanque*, the Court noted that a lobbyist fee requirement, appeared content-neutral, but it was actually a regulation focused on "political speech." 328 Or at 8 n.4. It explained that the regulation actually "requires payment of a fee that can be avoided by the simple expedient of never espousing a preference concerning the content of Oregon statutory law, except for the purposes of generating good will." *Id.* The contribution limits are distinguishable because they do not similarly impose a burden on some type of speech that would not be imposed by staying silent.[6] At bottom, the contribution limits regulate the manner by which this alleged expression can be performed. But they do not address, in any way, the content of that expression.

Second, the contribution limits will advance the indisputably legitimate interest of preventing corruption or the perception thereof. *See Nixon v. Shrink Missouri Gov't PAC*, 528 US 377, 390 (2000). It also furthers the governmental interest in expanding and promoting

[6] To the extent *Fidanque* would prohibit the contribution limits as directed at content, it should be overturned. A time, place, and manner restriction must be limited to instances where the restriction is necessary to advance the government's legitimate interest. If content-neutrality is read so broadly as to strike down any instance where a regulation attempts to narrow its reach, then it will be impossible to have a restriction that is both content neutral and restrictive of only the speech necessary to advance the government's interest.

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participation in elections. By ensuring that campaign funding will be achieved by low-dollar donations, it invites greater participation in elections by individuals who otherwise were excluded or unable to raise the significant amounts of money to compete in even City-level candidate races. This government interest in widespread participation in political campaigns is fundamental to the City's democratic principles. *See* Betsy Cooper, et al., *The Divide Over America's Future: 1950 or 2050? Findings from the 2016 American Values Survey* (Oct. 25, 2016) ("A majority (57%) of Americans agree politics and elections are controlled by people with money and by big corporations so it doesn't matter if they vote, compared to roughly four in ten (42%) who disagree"); (*see also* Petition, Ex. 4 at 3-4; Sheffield Decl., Exs. 6-7; Exs. 9- 10).

Finally, the contribution limits only restrict, and do not prevent campaign contributions. Individuals and entities can continue to express their views through alternative avenues, including independent expression, volunteering, organizing, and activism.

The contribution limits restrict the transfer of money to political candidates, not expression by either the contributors or the candidates. Moreover, even if the Court believes the transfer of money and expression are inextricably linked, the contribution limits are permissible under Article I, Section 8. They fall within a historical exception to free expression found at the time of Article I, Section 8's adoption. The restrictions address the forbidden result of corruption and its appearance, and only incidentally impacts expression that causes such a result. And the restrictions are appropriate time, place and manner restrictions on expression. For each of these independently sufficient reasons the Court should find the contribution limits valid under Article I, Section 8.

3. The First Amendment of the United States Constitution allows limits on campaign contributions.

The Supreme Court of the United States has held that reasonable limits on campaign contributions, such as those imposed by the Honest Elections Law, are constitutional under the First Amendment.

Contribution limitations are justified by the City's significant interest in limiting actual

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1 and apparent corruption. Contributions to candidates create the possibility of an actual or
2 apparent *quid pro quo*, and limiting these contributions addresses this without "undermin[ing] to
3 any material degree the potential for robust and effective discussion." *Buckley*, 424 US at 20-21.
4 There can be "no serious question about the legitimacy" of the interest in preventing corruption
5 as justifying campaign contribution limits. *Shrink*, 528 US at 390. Moreover, as can be seen from
6 Measure 26-200's legislative history, this desire to limit corruption or the appearance of
7 corruption was fundamental to the decision by voters to enact the contribution limits. (Petition,
8 Ex. 4). This consistent legislative history demonstrates the important interest of the City. *Shrink*,
9 528 US at 390 ("The quantum of empirical evidence needed to satisfy heightened judicial
10 scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the
11 justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the
12 suspicion that large contributions are corrupt are neither novel nor implausible.").
13 Further, the Honest Elections Law's contributions are "closely drawn to avoid
14 unnecessary abridgment" of First Amendment rights. *McCutcheon*, 572 US at 218 (quoting
15 *Buckley*, 424 US at 25). The Supreme Court has struck down a contribution limit of $200 per
16 election for candidates for statewide office, noting it was "well below the lowest limit [the] Court
17 ha[d] previously upheld." *Randall v. Sorrell*, 548 US 230, 248-52 (2006). In addition to the very
18 low level of the limits, the decision was based on five factors: (1) the limits "will significantly
19 restrict the amount of funding available for challengers to run competitive campaigns"; (2)
20 applying the exact same low contribution limits to political parties "threatens harm to . . . the
21 right to associate in a political party"; (3) the inclusion of expenses associated with volunteer
22 services within the limits; (4) the failure to adjust for inflation; and (5) the absence of any special
23 justification for such a low limit. *Randall*, 548 US at 253-61.
24 Here, the contribution limits are higher than the Vermont law considered in *Randall*, and
25 they apply only to local, not state-wide elections. Additionally, the other factors considered
26 weigh in favor, rather than against, upholding the contribution limits. First, the contributions do

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not significantly restrict the amount of funding for challengers to effectively challenge incumbents. In fact, one of the purposes of the Honest Elections Law was to expand the pool of candidates able to run competitive races. (Petition, Ex. 4 at 3 (noting that the existing dynamic of unlimited expenditures "makes it very difficult for low-income communities and historically disenfranchised communities to have their voices heard equally in our political process"); *see also* Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition*, 9 Election Law Journal 125, 126 (2010). Indeed, the Honest Elections Law works in tandem with the City's Open and Accountable Elections Program to promote participation in local elections by a diverse pool of candidates. PCC Ch. 2.16. For example, Portland's Open and Accountable Elections Program, which provides public matching funds to candidates under certain circumstances, was similarly enacted to "increase participation of candidates and constituents from diverse backgrounds" and "allow candidates to engage with individuals from a variety of backgrounds and neighborhoods, which will ensure that the priorities and concerns of all individuals have the opportunity to be heard." (Sheffield Decl., Ex. 10 (Ordinance 188152)).

Second, political parties are not necessarily limited to the same $500 contribution limit as individuals and Political Committees. A political party that constitutes a Small Donor Committee, meaning it only accepts small contributions, can make unlimited contributions to candidates. Charter 3-301(b)(2). This is in stark contrast to the example set forth in *Randall*, of 6,000 citizens giving $1 each to a political party, but the political party being unable to distribute that amount in three, $2,000 payments to particular candidates. *Randall*, 548 US at 258. The Court used this example to show "the Act would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate." *Id*. This example, of distributing funds raised by many low-dollar donations, is permitted under the City's contribution limits.

Third, "contributions" do not include "services other than personal services for which no compensation is asked or given." ORS 260.005(3)(a); 3-308(e). Further, volunteer travel

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1 expenses, which were of particular concern in *Randall*, 548 US at 259, are expressly excluded
2 from the definition of contribution. ORS 260.007(4). In short, volunteers can continue to provide
3 unlimited support, and can even provide rooms, phones and internet access, in addition to travel.
4 Charter 3-308(e)(2).

5 Fourth, the contribution limits are adjusted for inflation. Charter 3-306.

6 Fifth, the legislative history demonstrates the City's unique reasons for needing
7 contribution limits. In particular, Oregon receives one of the worst scores for systems to avoid
8 public corruption. (Petition, Ex. 4 at 2). And the overwhelming approval by voters—87%—even
9 being aware of the potential constitutional challenges (Petition, Ex. 4 at 8), demonstrates that
10 voters believe the contributions limits are uniquely necessary to curtail perceived or actual
11 corruption. *See Shrink*, 528 US at 394.

12 Separately, the complete ban on contributions by entities to candidates, other than
13 political committees and small donor committees advances the City's interest in preventing
14 circumvention of the contribution limits. *See Federal Election Comm'n v. Beaumont*, 539 US
15 146 (2003) (noting "another reason for regulating corporate electoral involvement has emerged
16 with restrictions on individual contribution, and recent cases have recognized that restricting
17 contributions by various organizations hedges against their use as conduits for 'circumvention of
18 [valid] contribution limits."); *Thalheimer v. City of San Diego*, 645 F3d 1109, 1124-25 (9th Cir
19 2011) (noting that the U.S. Supreme Court had recognized anti-circumvention interest in barring
20 direct contributions to candidates by entities, and *Citizens United v. Federal Election Comm'n*,
21 558 US 310 (2010), had not invalidated that interest in the context of direct contributions). This
22 entity ban on contributions applies universally to all entities, and it does not target particular
23 speakers, such as corporations. *Thalheimer*, 645 F3d at 1125-26.

24 The contribution limitations serve the recognized significant governmental interest in
25 preventing corruption and the appearance of corruption. Accordingly, the City's contribution
26 limits are allowed under the First Amendment.

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B. Expenditure Limits

The Honest Election Law's expenditure limits regulate expenditures in two ways. First, they restrict the funds an individual or entity may use to support a Candidate to only those funds obtained within the Contribution Limits.[7] 3-302(a). Second, they cap independent expenditures[8] made to support or oppose a candidate each election cycle as follows:

> (1) An Individual may make aggregate Independent Expenditures of not more than five thousand dollars ($5,000).
> (2) A Small Donor Committee may make Independent Expenditures in any amounts from funds contributed in compliance with Section 3-301 above.
> (3) A Political Committee may make aggregate Independent Expenditures of not more than ten thousand dollars ($10,000), provided that the Independent Expenditures are funded by means of Contributions to the Political Committee by Individuals in amounts not exceeding five hundred dollars ($500) per Individual per year.

These expenditure limits are a companion to the campaign contribution limitations in the Honest Elections Law. They serve the same goals of limiting corruption and undue influence that individuals may have through indirect, rather than direct, support of a particular candidate.

1. Spending money is non-expressive conduct under Article I, Section 8.

The Oregon Supreme Court has not previously addressed whether independent expenditures are expressive conduct under Article I, Section 8. *See Vannatta I*, 324 Or at 520 (explaining that parties conceded that expenditures were protected expression); *Deras v. Myers*, 272 Or 47 (1975) (defendant conceded that statutes limiting expenditures restricted freedom of expression). Expenditures necessarily involve the transfer of money or other things of value to a

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[7] The provision limiting expenditures to money received in compliance with the contribution limits directly back-stops the contribution limits and guarantees that their impact begins immediately. The constitutionality of these general expenditure limits should rise and fall with the contribution limits.

[8] "Independent expenditures" are expenditures by a person for a communication in support of or in opposition to a clearly identified candidate, which are not made with the consent, cooperation or consultation with that candidate. ORS 260.005(10).

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third party in exchange for something of value. *See* ORS 260.005(8) (defining expenditure as "the payment or furnishing of money or anything of value . . . in consideration for any . . . other thing of value performed or furnished for any reason"); ORS 260.005(10) (defining independent expenditure in part as "an expenditure by a person for a communication"). As transfers of money, expenditures are not expression.

In *Vannatta II*, the Supreme Court explained that the transfer of money to a public official or candidate does not constitute protected expression if it is not "inextricably linked" with the official communicating a political message. 347 Or at 465. Here, similarly, the expenditure limits restrict the ability of a person or entity to transfer money in support of a candidate, which is a limitation on conduct that is not inextricably intertwined with expression. There is no limitation on the amount of expression that an individual can engage in. There is no limit on the number of op-eds they can write, the number of Facebook posts they can share, or the number tweets they can send out into the world. They are limited only in the money that they can expend.

2. A historical exception to Article I, Section 8, supports limits on independent expenditures.

As discussed in Section III(A)(2)(a) above, there is a historical exception demonstrating that the expression protected by Article I, Section 8, was never intended to include unlimited financial expenditures in support of a candidate. In fact, from the very founding of the country, legislative bodies recognized the potentially corruptive influence that expenditures of money could have on elections. In 1755, after George Washington purchased $195 of punch and hard cider for friends, the Virginia legislature passed a law that prohibited candidates "or any persons on their behalf" from giving voters "money, meat, drink, entertainment or provision or . . . any present, gift reward or entertainment etc. in order to be elected." *See* Henning, William Waller, *The Statutes at Large Being a Collection of All the Laws of Virginia*, Vol. VIII (1821) at 608, *available at* https://archive.org/details/statutesatlargeb08virg/page/608.

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There is a long history of legislatures addressing how money is expended in connection with elections in order the prevent corruption (both the corruption of candidates and the corruption of voters through bribery). Article I, Section 8 recognizes the historically established right of the legislature to regulate campaigns to prevent corruption.

3. The independent expenditure limits are reasonable time, place, and manner regulations under Article I, Section 8.

The independent expenditure limits, like the contribution limits, if they restrict expression, are reasonable restrictions on time, place, and manner of these forms of candidate communications. In *Vannatta II*, the Court struck down restrictions on the offering of money, noting that "restrictions apply to every offer of a gift that meets the statutory criteria, regardless of when, where, and in what manner it is made," 347 Or at 468. Notably, the expenditure restrictions here specifically restrict the manner of the expression, ensuring that any alleged monetary expression is limited to the amounts identified.

This regulation is content neutral. It limits the amount of money that can be expended for certain candidate communications. These limitations apply and are triggered by a threshold amount spent—they are not triggered by the content of the communications themselves. *But see Fidanque*, 328 Or at 8 n.4. There is no variation in the independent expenditure limitations depending on the content or message communicated.

These limits advance the same legitimate governmental interests of preventing corruption and increasing engagement. "[S]elling access is not qualitatively different from giving special preference to those who spent money on one's behalf." *Citizens United*, 558 US at 447-48 (Stevens, J., dissenting). Unlimited independent expenditures create the same risk of corruption created by unlimited contributions. *Id*. at 453-54 (noting that *Buckley* recognized that independent expenditures may create the same corruption issues as contributions). In addition to addressing corruption, limiting independent expenditures reduces the distortion and dilution of other voices resulting from significant amounts of money magnifying the expression of a limited

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group. The independent expenditure limitations encourages greater participation in the political process, resulting in more information and opinions being shared from more diverse sources.[9]

Further these limits do not limit expression more than necessary, continuing to allow significant amounts of money to be used for independent expenditures, and indexing those amounts to inflation. Charter 3-302; 3-306. The independent expenditure limits leave open ample alternative forms to communicate. There are significant opportunities to engage in and express opinions regarding candidate elections that do not require the expenditure of money. An individual can volunteer, canvass door-to-door, organize, and express and share her views. The expenditure limit does nothing to stop these forms of expression.

In order to advance the legitimate governmental interests in preventing corruption and enhancing participation in candidate elections, the independent expenditure limits are reasonable time, place, and manner restrictions on how money is expended in support of candidates.

4. The First Amendment does not protect independent expenditure limits aimed at addressing corruption in connection with contribution limits.

Restrictions on expenditures and independent expenditures are allowed under the First Amendment if the government can show that the restriction is narrowly tailored to serve a compelling interest. *See McCutcheon*, 572 US at 199. The United States Supreme Court has determined that only *quid pro quo* corruption, or its appearance, constitute a sufficiently important governmental interest to justify limits on expenditures. And it has rejected independent expenditures limitations under the First Amendment, finding that independent expenditures, by their nature, do not involve money flowing directly to a candidate and therefore cannot create a risk of *quid pro quo* corruption. *Buckley*, 424 US at 45-47.

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[9] The City recognizes that the Supreme Court rejected a governmental interest in equalizing the relative resources of candidates by reducing the overall costs of campaigns. *Buckley*, 424 US at 56*; McCutcheon*, 572 US at 207 (noting that the Court had specifically objected to campaign finance regulations to advance goals to "level the playing field," "level electoral opportunities," or "equaliz[e] the financial resources of candidates."). However, while these interests may not be identified as sufficient to support a First Amendment claim, the Oregon courts should not second guess the legislative determination of which government interests are significant.

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1 Existing precedent ignores the plainly obvious concerns that voters in Portland
2 recognized—spending unlimited amounts of money in support of a candidate, even if the money
3 is funneled through independent expenditures, creates the same risk of *quid pro quo* corruption
4 or its appearance, as direct contributions. Independent expenditures are necessarily used to fund
5 communications that clearly identify a candidate. ORS 260.005(10). At bottom, they are no
6 different than contributions—they are indirect contributions. Candidates, with little effort, can
7 identify independent expenditure contributions spent in support of their candidacy and those
8 spent to oppose them. Independent expenditures "can unfairly influence elections" to the same
9 degree as expenditures that "assume[] the guise of political contributions." *Austin v. Mich. State*
10 *Chamber of Commerce*, 494 US 652, 660 (1990), *overruled by Citizens United*, 558 US 310; *but*
11 *see Buckley*, 424 US at 47. By targeting and limiting independent expenditures, which
12 specifically identify a candidate and direct a message with respect to such a candidate, the
13 Honest Elections Law's independent expenditure limitations are narrowly tailored to regulate the
14 expenditures likely to result in corruption or the appearance of corruption.
15 The assumption underlying *Buckley*, that the risk or appearance of *quid pro quo*
16 corruption only exists with respect to direct campaign contributions is belied by the evidence.
17 Recent empirical research has examined whether individuals would indict or convict a
18 congressperson and CEO for *quid pro quo* bribery based on a "very indirect" exchange of the
19 CEO making an independent expenditure to a third party and the congressperson agreeing to
20 promote the company's interest. Robertson, Christopher, *The Appearance and the Reality of*
21 *Quid Pro Quo Corruption: An Empirical Investigation*, 8 Journal of Legal Analysis 2 (May 23,
22 2016) *available at* https://academic.oup.com/jla/article/8/2/375/2502553. The results
23 demonstrate potential jurors "infer *quid pro quo* agreements from the fact-patterns of seemingly-
24 reciprocal behavior that [is] ubiquitous in contemporary politics." In short, "[a]t least in the eyes
25 of the general public, bribery is ubiquitous." It is not necessary to agree with the conclusion
26 reached by the subjects of this study—that today's typical political activity constitutes *quid pro*

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quo bribery. Rather, it is enough that most people perceive it as such, as the study suggests. If the general public, as shown in this study and demonstrated by the overwhelming support for Measure 26-200, see unlimited independent expenditures as likely to result in *quid pro quo* corruption, it does not matter whether it actually does. This appearance of *quid pro quo* corruption from unlimited independent expenditures, as allowed today, gives rise to a significant government interest in regulating the activity.

Moreover, the City's anti-corruption interest applies beyond a narrow description of *quid pro quo* corruption and "encompass[es] the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder." *Citizens United,* 558 US at 452 (Stevens, J., dissenting). In addition to anti-corruption concerns, unlimited independent expenditures have the ability to drown out the voices of those with less wealth, which in itself is a significant government interest that the United States Supreme Court has simply dismissed. *Cf. Id*. at 469-70 (Stevens, J., dissenting).

In addition to the limitations imposed on most independent expenditures, the Honest Elections Law completely prohibits independent expenditures from entities unless they are political committees that receive contributions of no more than $500 per individual each year. The City recognizes that *Citizens United* struck down certain campaign finance laws that distinguished between individuals and corporations. *Id*. at 351-56. *Citizens United* should be overturned. The restriction on expenditures by entities, rather than persons, should not run afoul of the First Amendment.

Prior to the Supreme Court's "dramatic break" past precedent in *Citizens United*, the Court had upheld restrictions on corporate independent expenditures. *See Id.* at 394-95 (Stevens, J., dissenting). The *Citizens United* Court improperly concluded that there was not a "sufficient governmental interest justif[ying] limits on the political speech of nonprofit or for-profit corporations." *Id.* at 365. This overruled the Supreme Court's previous recognition of the unique

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1 forms that corporations present. *See Austin*, 494 US at 660 (describing "the corrosive and
2 distorting effects of immense aggregations of wealth that are accumulated with the help of the
3 corporate form and that have little or no correlation to the public's support for the corporation's
4 political ideas"). The Court's previous recognition of the risks that arise from unlimited spending
5 to advance corporate ideas, grounded in both fact and law, supports the Honest Elections Law's
6 prohibition on such entities making independent expenditures for Portland candidate elections.
7 The reasonable limits on independent expenditures serve the dual interests of preventing
8 what studies show is, at least, an appearance of *quid pro quo* corruption and preventing money
9 from drowning out the diverse voices and interests in elections to distort the publicly available
10 information. By narrowly advancing these significant government interests, the independent
11 expenditure limitations are permissible under the First Amendment.
12 **C. Disclosure Requirements**
13 The disclosure requirement in the Honest Election Law advances the City's interest in
14 preventing confusing, misleading and deceptive communications. It provides transparency to
15 voters regarding the financial sources offering information and holds people accountable for the
16 opinions and information they share with the public. The disclosure requirement mandates that
17 communications to voters prominently disclose the true original sources of the contributions or
18 independent expenditure used to fund a communication. Charter 3-303, PCC 2.10.003. It also
19 provides detailed requirements for identifying these sources. *Id*.
20 This Court previously struck down Multnomah County's similar disclosure requirements,
21 finding that the requirements were directed at speech, not its effects, and did not fall within a
22 historical exception. (Sheffield Decl., Ex. 6). But Article I, Section 8 does not prohibit the
23 government from compelling the "neutral reporting . . . of objective truth." *Vannatta I*, 324 Or at
24 543. Here, the objective disclosure of the true source of funding for communications is
25 permissible under Article I, Section 8.
26 In the Multnomah County case, the Court also concluded that the Multnomah County law

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was vague. The City's disclosure requirement include additional detail directing precisely the disclosure that is required. This additional detail, coupled with the definition of terms within the disclosure provision, cures the vagueness concern previously raised by the Court. Further, under the First Amendment, the Supreme Court has upheld similar disclosure requirements.

1. The disclosure requirements are allowed under Article I, Section 8 because they enhance expression rather than restraining or restricting it.

Article I, Section 8 prohibits laws that "restrain the free expression of opinion" or "restrict the right to speak, write, or print freely." Or Const, Art I, § 8. Article I, Section 8, only applies to laws that limit or otherwise suppress speech. *See* Webster, *An American Dictionary of the English Language* (unpaginated) (1828) (defining "restrain" to mean "[t]o hold back" or "to suppress" and "restrict" to mean "[t]o limit; to confine" (emphasis in original)). The disclosure requirements do not suppress or limit expression. To the contrary, they increase expression, providing additional information about the financial sources of communications.

Even if the disclosure requirements burden expression, a requirement of "neutral reporting . . . of objective truth" does not impermissibly burden expression for purposes of Article I, Section 8. *See Vannatta I*, 324 Or at 543 (requiring the disclosure of financing sources does not necessarily violate Article I, Section 8). The Court of Appeals has similarly explained that "[w]here [a] challenged law regulates the legally compelled display of a message that the government creates for its own regulatory purpose, *Robertson* is inapplicable because the protection of Article I, section 8, does not inure to that speech." *Karuk Tribe*, 241 Or App 537, 546 n. 6 (citing *Higgins v. DMV*, 335 Or 481, 490-91 (2003)).

Moreover, requiring the disclosure of the actual financial sources of the communication, falls within the historical exception to Article I, Section 8 related to misleading the electorate. In *State v. Moyer*, 348 Or 220, 237–38 (2010), the Court explained,

> In our view, there is no important difference between statutes requiring the public identification of candidates who violate expenditure-cap pledges, statutes prohibiting candidates from making material misstatements during campaigns, and the statutory

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> requirement . . . that the identification of political contributors be truthful. . . . Prohibiting the concealment of the identity of the true provider of a political contribution from either the recipient of the contribution, the public, or both, is, we conclude, an extension or modern variant of the initial principle that underlies the historic legal prohibition against deceptive or misleading expression.

Previously, this Court relied on an Attorney General Opinion of March 10, 1999 in finding Multnomah County's disclosure requirement violated Article I, Section 8. (Sheffield Decl., Ex. 6). There, the Attorney General opined that a previous Oregon disclosure requirement violated Article I, Section 8. However, the Attorney General acknowledged that the law may be directed at harms that may legitimately be regulated, such as fraud and misrepresentation. Here, the legislative record makes clear that confusion and deception is the reason for the disclosure requirement. It prevents the spread of confusing or misleading information and allows voters an opportunity to evaluate communications regarding candidates with full knowledge of where the communication comes from. The Attorney General Opinion similarly opined that "in all probability the statute violates the First Amendment to the United States Constitution." But the United States Supreme Court has subsequently reached the opposite conclusion regarding disclosure requirements on political advertising. *See Citizens United*, 558 US at 371.

Finally, this Court found the disclosure requirement in Multnomah County's legislation unconstitutionally vague. In reaching this conclusion, the Court noted that it "requires disclosure of the funders of 'each' communication to voters that is 'related' to an election at which voters will select the County's public officials." (Sheffield Decl., Ex. 6). The Court expressed concern that this "clearly encompasses a very wide array of communications and communicators," including "more communicators than reasonably can be expected to be 'fairly warned' that their chosen exercise of free speech may carry with it a disclosure obligation." *Id*. But "communication" is a term defined by the Honest Election Law. Charter 3-308(d). Moreover, the communication must be related to a "City of Portland Candidate Election," which is also defined. *Id*. at 3-308(c). Constitutional concerns about vagueness do not arise simply because the law may apply to many communications or because knowing when to comply requires knowing the

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existence of particular laws. The disclosure requirement would only be constitutionally vague if the law left unclear to which communications it applies, to whom it applied, or how to comply. The Honest Elections Laws disclosure requirement is not vague—rather it is clear to whom it applies to and how individuals and entities must comply.

2. "Paid for by" disclosures are constitutional under the First Amendment.

In *Buckley,* the United States Supreme Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 US, at 66. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. 540 US at 96, *overruled on other grounds by Citizens United*, 558 US 310. In *McConnell* there was evidence in the congressional record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" *Id.* at 197 (quotations omitted). The United States Supreme Court therefore upheld BCRA §§ 201 and 311 because they would help citizens "'make informed choices in the political marketplace.'" 540 US at 197 (quotations omitted).

As the Supreme Court explained "disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United*, 558 US at 371. Under federal election law, "televised electioneering communications funded by anyone other than a candidate must include a disclaimer" stating the party responsible for the content of the advertising. *Id*. at 366. This was upheld "on the ground that the [the disclosure requirements] would help citizens 'make informed choices in the political marketplace.'" *Id*. (quoting *McConnell*, 540 US at 197).

The Honest Election Law disclosure requirements serve the same purpose as those federal disclosure requirements previously upheld by the United States Supreme Court. Disclosure of the person or persons funding a political communication eliminates the deceptive

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or misleading nature of communications and gives voters information and transparency with respect to communications in support of and opposition to particular candidates.

D. Registration Requirements

The Honest Election law requires entities to register as a Political Committee within three business days of making aggregate independent expenditures in excess of $750. This "neutral reporting . . . of objective truth," like the disclosure requirements, does not *impermissibly* burden expression for purposes of Article I, Section 8. *See Vannatta I*, 324 Or at 543

E. Payroll Requirements

As this Court previously decided, the automatic payroll deduction requirements set forth in the Honest Elections Law are consistent with Oregon law. ORS 652.610 allows an employer to divert wages under certain exceptions, including when "[t]he employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books." ORS 652.610(3)(c). The payroll deduction provision, (Charter 3-301, PCC 2.10.001) mandates that employers who allow payroll deductions, allow employees to voluntarily make political contributions by payroll deductions.

The payroll deduction provisions do not require employees to make political contributions and do not require employers to institute payroll deductions for political contributions if they do not otherwise allow payroll deductions for other purposes. The payroll deduction provisions require employers who allow payroll deductions to allow them for political contributions, but only if voluntarily requested by the employee. This provision is consistent with ORS 652.610.

CONCLUSION

The Court should affirm the validity of the City's Honest Election Law. Each of the substantive provisions—contribution limits, independent expenditure limits, and communication disclosures—are defensible under both Article I, Section 8 of the Oregon Constitution and the

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First Amendment to the United States Constitution. The first two provisions relate solely to the transfer of money or other things of value; not expression. And to the extent any of the three provisions impact expression, they do so narrowly to advance the significant government interests of preventing corruption or the appearance thereof, increasing participation, and preventing misleading and confusing communications. The remaining administrative procedures dictated by the Honest Elections Law are similarly constitutional. For these reasons, the Court should find Portland's Honest Elections Law facially valid.

DATED April 19, 2019.

Respectfully submitted,

/s/ Naomi Sheffield

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITIONER CITY OF PORTLAND'S MOTION FOR SUMMARY JUDGMENT on the following parties by the method indicated:

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☒ Electronic service - UTCR 21.100 (1)(a)

☐ Mail in a sealed envelope, with postage paid, and deposited with the U.S. Postal Service.

☐ Hand delivery

☐ Courtesy copied delivered by emails listed above.

DATED April 19, 2019.

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