MEMORANDUM

To: Latino Network Action Fund
From: Sara Berger, Attorney
Date: April 22, 2019
Re: Constitutional Considerations for Oregon's Proposed Disclosure Law

This memorandum provides a First and Fourteenth Amendment framework for analyzing Oregon's proposed election disclosure law. This memorandum does not address every aspect of the proposed law. Rather, it is intended to establish the constitutional framework. It is my understanding that others will be addressing specific issues, such as the excessive penalty provisions as well as the over-reaching bank account enforcement mechanism.

I. The First Amendment Protects Political Speech

It is axiomatic that government "may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 319 (2010). *See also, Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 994 (9th Cir. 2010). While campaign-related disclosure laws may serve an important governmental interest of providing transparency behind political speech, the courts have repeatedly held that "[t]he First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). As such, "debate on public issues should be uninhibited, robust, and wide-open…It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 14-15.

Following *Buckley,* the Supreme Court reiterated these principles, stating:

> Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010) (internal quotations and citations omitted).

II. Courts Review Disclosure Laws Under the Exacting Scrutiny Standard

To balance the competing governmental interest with the speaker's First Amendment rights, courts apply "exacting scrutiny" to campaign disclosure laws. In other words, courts will "examine whether the law's requirements are substantially related to a sufficiently important governmental interest." *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). "Put differently, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Yamada v. A–1 A–Lectrician, Inc.*, 786 F.3d 1182, 1194 (9th Cir. 2015). The Supreme Court has recognized three important interests behind disclosure laws: ''providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions.'' *Id.* at 1197.

The Ninth Circuit Court of Appeals applied this test to Hawaii's non-candidate committee reporting and disclosure obligations in *Yamada* and noted that Hawaii's law "provide[s] information to the electorate about who is speaking." *Id.* In this context "who" was speaking included the committee and its contributors. It is my opinion that a law requiring disclosure of customers of a for-profit corporation, or donors giving general operating funds to a nonprofit corporation—merely because the corporation engages in political speech on its own—would be subject to constitutional challenge. In other words, Oregon's disclosure law should seek to compel disclosure of the entity (committee, corporation, labor union, company) engaging in political speech as well as donors to that entity who have earmarked donations, or, at the very least, expressed an intent to fund those communications.[1]

Courts will also weigh whether the disclosure obligations are unduly burdensome. The Ninth Circuit Court of Appeals has upheld as not overly burdensome disclosure requirements of filling out a short form and designating a treasurer and bank account. *See Human Life of Wash.*, 624 F.3d at 1012–14. In general, independent expenditure reporting is intended to be less burdensome than political committee registration and reporting. As a result, Oregon should ensure that its proposed law be narrowly tailored to avoid a burdensome challenge.

[1] In addition to an overbreadth challenge, nonprofit corporations could challenge these donor disclosure requirements on other grounds. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367 (2010) (acknowledging the potential for as-applied challenges if a group could show a "reasonable probability" that donor disclosure could subject the donor to "threats, harassment, or reprisals").

III. Oregon's Proposed Law Would Likely be Challenged for Vagueness

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'' *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Ninth Circuit Court of Appeals views vagueness challenges as follows:

> A law is unconstitutionally vague when it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. This doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. Where, as here, First Amendment freedoms are involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

Yamada 786 F.3d at 1187.

Courts, including the Ninth Circuit Court of Appeals, have repeatedly narrowed campaign disclosure laws that were impermissibly vague. In *Yamada*, the court acknowledged that the law's use of the term "influencing" required a narrowing construction to regulate only communication that was "express advocacy or its functional equivalent." *Yamada* at 1189. *See also, Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 832–34 (7th Cir.2014) (limiting ''for the purpose of influencing the election or nomination for election of any individual to state or local office'' to express advocacy and its functional equivalent); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66-67 (1st Cir.2011) (construing ''influencing'' and ''influence'' in Maine campaign finance statutes to include only communications that constitute express advocacy or its functional equivalent). In sum, Oregon should avoid defining regulable committees beyond this well-settled definition.

IV. Oregon's Proposed Law May be Subject to an Equal Protection Challenge

"The First Amendment does not permit [Oregon] to make…categorical distinctions based on the corporate identity of the speaker and the content of the political speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 at 364. The Eighth Circuit Court of Appeals, in *Iowa Right to Life*, 717 F.3d 576 (8th Cir. 2013), found Iowa's campaign disclosure law facially unconstitutional because it did not "advance any interest, compelling or otherwise, to justify singling out corporations" in certain of the law's requirements. *Id.* at 605. In reaching that

decision, the court held that where a classification (such as 501c4 nonprofit corporation versus a committee or labor union) "impinges upon the exercise of a fundamental right, it is presumptively invidious. The burden is then on the State to demonstrate that its classification has been narrowly tailored to serve a compelling governmental interest." *Id.* at 605 (internal quotations and citations omitted).