IN THE CIRCUIT COURT OF THE STATE OF OREGON
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.	Civil No. 19CV06544 **MOTION FOR SUMMARY JUDGMENT BY THE CITIZEN PARTIES:** **Elizabeth Trojan, Juan Carlos Ordonez, David Delk, Ron Buel, Moses Ross, James Ofsink, Seth Alan Woolley.** ORAL ARGUMENT REQUESTED JUDGE: Erich J. Bloch Hearing Date: May 8, 2019, 3:30 pm

ORAL ARGUMENT REQUESTED

Pursuant to UTCR 5.050, the Citizen Parties respectfully requests one hour of oral argument on their Motion for Summary Judgment and request that the hearing be recorded.

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MOTION

The Citizen Parties[1] move for an order of summary judgment to validate each and all parts of Ordinance No. 189348, which is essentially identical to the amendment to the Portland City Charter enacted by Measure 26-200 (2018).[2] That measure prevailed on the November 2018 ballot by a "yes" vote of 87.4%.

MEMORANDUM OF LAW

I. DULY-ENACTED LAW IS STRONGLY PRESUMED TO BE CONSTITUTIONAL IN OREGON.

A challenge to the constitutionality of a duly-enacted charter amendment carries a heavy burden of proof and persuasion.

> Every statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity. As a corollary, he who assails it has the burden of establishing its invalidity. ***Fox v. Galloway***, 174 Or 339, 347, 148 P2d 922, and cases there cited; ***Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan***, 287 US 295, 297, 53 SCt 137, 77 LEd 314.

Milwaukie Co. of Jehovah's Witnesses v. Mullen, 214 Or 281, 293, 330 P2d 5, 11 (1958), *cert denied*, 359 US 436, 79 SCt 940 (1959); *accord*, ***State v. NRL***, 354 Or 222, 227 n3, 311 P3d 510, 513 n3 (2013).

> Every statute and ordinance is presumed to be constitutional and all doubt will be resolved in favor of its validity. ***Perkins v. Marion County***, 252 Or 313, 448 P2d 374 (1968); ***Jehovah's Witnesses v. Mullen et al.***, 214 Or

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1. Elizabeth Trojan, Juan Carlos Ordonez, David Delk, Ron Buel, Moses Ross, James Ofsink, and Seth Alan Woolley. Ms Trojan is represented separately by attorney Linda K. Williams and joins this motion.

2. The full text of Measure 26-200 (2018) is presented in Exhibit 1. All exhibits referenced in this memorandum are attached to the Declaration of Counsel Daniel Meek filed this day.

281, 293, 330 P2d 5 (1958), *cert denied*, 359 US 436, 79 SCt 940, 3 LEd2d 932 (1959).

Bergford v. Clackamas County, 15 OrApp 362, 365, 515 P2d 1345, 1346-47 (1973).

> A party has a heavy burden when it challenges a statute as being unconstitutional. This court has a strong obligation to attempt to find a way to uphold the questioned statute. The party's burden and this court's duty has been described in different ways: "Every statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity." ***Jehovah's Witnesses v. Mullen***, 214 Or 281, 293, 330 P2d 5, 11 (1958). " * * * every reasonable presumption is in favor of the validity of a statute and the court will not declare a law unconstitutional except in clear cases." ***Bowden v. Davis***, 205 Or 421, 433, 289 P2d 1100, 1105 (1955). " * * * when the life of a statute is at stake it is entitled to the benefit of every reasonable doubt * * * ." ***Sadler v. Oregon State Bar***, 275 Or 279, 289, 550 P2d 1218, 1224 (1976). " * * * every presumption is in favor of its validity and we must seek a construction which will avoid unconstitutionality." ***State v. Collins***, 243 Or 222, 231, 413 P2d 53, 57 (1966).

Salahub v. Montgomery Ward & Co., 41 OrApp 775, 786 (1979).

> Good reason for the legislation is presumed and it should not be deemed unconstitutional unless conflict with the constitution is clear, palpable and free from doubt. ***Horner's Market, Inc. v. Tri-Met***, 2 OrApp 288, 467 P2d 671 (1970).

State v. Robinson, 3 OrApp 200, 212, 473 P2d 152, 158 (1970)

There is a strong presumption that a duly-enacted statute is constitutional. ***Greist v. Phillips***, 322 Or 281, 298, 906 P2d 789 (1995); ***State ex rel. Juv. Dept. v. Orozco***, 129 OrApp 148, 150, 878 P2d 432 (1994), *review denied*, 326 Or 58, 944 P2d 947 (1997). The burden of proof is on anyone who would challenge the validity of the statute, not those who assert its validity. ***Oregon-Nevada-California Fast Freight, Inc. v. Stewart***, 223 Or 314, 326, 353 P2d 541 (1960). A successful initiative is a legislative act of the voters of this state. As such, it "is clothed with a presumption in its favor." ***Milwaukie Co. of Jehovah's Witnesses v. Mullen***, *supra*, 214 Or at 292.

II. PORTLAND VOTERS WERE WELL ADVISED IN ENACTING MEASURE 26-200 BY A "YES" VOTE OF 87.4%.

The legislative history of the measure includes the materials published in the Voters Pamphlets of Multnomah County, Washington County, and Clackamas County, including the ballot title and arguments in support and in opposition. These are included in Exhibit 2. It also includes materials distributed to voters during the campaign for the ballot measure. This includes Exhibits 3, 6-8.

III. THE LIMITS ON RECEIPT OF CONTRIBUTIONS BY CANDIDATES FOR PORTLAND OFFICE ARE CONSTITUTIONAL.

Measure 26-200 limits the receipt of contributions by candidates for Portland public office:

3-301. Contributions in City of Portland Candidate Elections.

A. An Individual or Entity may make Contributions only as specifically allowed to be received in this Article.

B. A Candidate or Candidate Committee may receive only the following Contributions during any Election Cycle:

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

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.

C. Individuals shall have the right to make Contributions by payroll deduction by any private or public employer upon the employer's agreement or if such deduction is available to the employees for any other purpose.

* * *

3-304. Coordination with Public Funding of Campaigns.

> A candidate participating in a government system of public funding of campaigns (including the Public Election Fund established under Portland City Code Chapter 2.16) may receive any amount that such system allows a participating candidate to receive.

Today, 44 states have limits on contributions to candidate campaigns.[3] Of those states, 37 have "free speech" clauses in their state constitutions that are effectively identical to Oregon's clause, because each of them declares that every person has the right "to speak, write, or print freely on any subject." Some of them use the word "publish" instead of "print," but they are otherwise the same as Oregon's Article I, § 8.

Alaska	Iowa	New Mexico
Arizona	Kansas	New York
Arkansas	Kentucky	North Dakota
California	Maine	Ohio
Colorado	Maryland	Oklahoma
Connecticut	Michigan	Pennsylvania
Delaware	Minnesota	South Dakota
Georgia	Missouri	Tennessee
Florida	Montana	Texas
Idaho	Nebraska	Virginia
Illinois	Nevada	Washington
Indiana	New Jersey	Wisconsin
		Wyoming

No court in any of those states has interpreted the state's "free speech" clause to preclude limits on campaign contributions.

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3. National Conference of State Legislatures, State Limits on Contributions to Candidates 2017-2018 Election Cycle (June 27, 2017) (Exhibit 4).

A. THE COURT IN THE MULTNOMAH COUNTY VALIDATION CASE DID NOT CORRECTLY ANALYZE THE LAW AND PRECEDENTS.

We respectfully submit that the Court's order in the Multnomah County validation case (Multnomah County Circuit Court No. 17CV18006) ("Multnomah County Validation Order") did not correctly analyze the applicable law and precedents.

The Order on Petitioner Multnomah County's Motion for Declaration of Validity (March 6, 2018), p. 6, stated:

> Indeed, the continued precedential vitality of ***Vannatta I*** has been affirmed in cases decided since ***Vannatta II***, in both the Oregon Court of Appeals and the Oregon Supreme Court. See eg. ***Hazell vs. Brown*** 352 Or 455, 469 (2012); ***Hazell vs. Brown*** 238 OrApp 497, 510-51 1 (2010) ("***Vanatta I*** remains controlling law").

In fact, neither court addressed any of the arguments presented in ***Hazell v. Brown*** about revisiting ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta I***"). Instead, the case was resolved by their interpretation of Section (9)(f) of Measure 47 (2006), which eliminated the need to address the constitutionality of Measure 47 or to revisit ***Vannatta I***. Further, the Oregon Supreme Court opinion made no statement that ***Vannatta I*** "remains controlling law."

No provision of Measure 47 has been declared invalid by any court. ***Hazell v. Brown***, 352 Or 455, 287 P3d 1079 (2012), did not rule that the Measure 47 limits violated any provision of any constitution; the Court declined to address that issue and instead ruled that the Measure 47 limits on campaign contributions are in a state of suspension, due to § (9)(f) of Measure 47 itself. ***Hazell*** did not suspend the adoption or enforcement of Measure 47 on grounds of Article I, § 8. It did so on the basis of § (9)(f) of Measure 47 itself and the Court's survey of the decisional law **in effect as of**

its effective date (December 6, 2006), which predated the two later Oregon Supreme Court decisions that repudiated ***Vannatta I***: ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***"), and predated ***State v. Moyer***, 348 Or 220, 229, 230 P3d 7 (2009).[4]

> Based on the foregoing, and because the Oregon Constitution did not allow such limitations on the effective date of Measure 47, we conclude that the condition provided by 9(f) for holding Measure 47 in operational abeyance has, indeed, been met here.

Hazell v. Brown, 352 Or at 467.

The Multnomah County Validation Order also stated that the limitations on political contributions at issue in ***Vannatta I*** "were, in many ways, very similar to those at issue here." That conclusion is contradicted by the many differences between Measure 9 of 1994 (at issue in ***Vannatta I***) and the limits at issue in the Multnomah County validation case and the limits at issue here. As just one example, the Measure 26-200 limits prohibit candidates from receiving contributions above certain levels. ***Vannatta II*** concluded that limits on the receipt of money by candidates and public officeholders do not involve speech or expression and are not prohibited by the Oregon Constitution. See pages 10-10, *post*. Conversely, Measure 9 of 1994 expressed its limitations in terms of ceilings on the making of contributions).[5] So, from the point of view of the Oregon Supreme Court, Measure 26-200 is different from Measure 9 of 1994.

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4. Both cases are discussed below.

5. The complete treatment of Measure 9 in the 1994 Voters' Pamphlet, including its full text, is Exhibit R1.

Also, Measure 9 limits on contributions by individuals and by entities (corporations, unions, etc.) were linked together in the definition of "persons" subject to the limits. ***Vannatta I*** addressed only the constitutionality of limits on individuals, never addressing the validity of limits on entities that are not human beings. See pages 50-56, *post*. Measure 26-200, however, contains fully severable limits on individuals and, separately, on entities. The Multnomah County Validation Order did not address the validity of the separate contribution limits on entities.

The Multnomah County Validation Order (p. 5) also stated:

> But the ***Vannatta II*** court employed that clarification to distinguish the gifts at issue there from the political contributions at issue in ***Vannatta I***, and so to reach its holding that a ban on giving gifts to legislators was constitutional. For obvious reasons, that distinction cannot save the charter and ordinance, which indeed restrict political contributions.

We do not perceive any such obvious reasons. We documented that campaign contributions can be spent by candidates and public officeholders in the same manner as gifts. See pages 11-16, *post*. No one has offered any principled basis for treating campaign contributions differently than gifts, under Article I, § 8.

B. THE OREGON SUPREME COURT HAS REPUDIATED ITS EARLIER OPINION STRIKING DOWN CERTAIN POLITICAL CAMPAIGN CONTRIBUTION LIMITS.

The Oregon Supreme Court in 1997 (under Oregon's freedom of speech clause) in ***Vannatta I*** struck down a comprehensive set of limits on political campaign contributions enacted by Measure 9 of 1994. Oregon voters again enacted statewide limits on political campaign contributions in Measure 47 of 2006. The Oregon Supreme Court in 2012 ruled that those limits are currently in limbo. ***Hazell v. Brown***, *supra*, 352 Or 455, 287 P3d 1079 (2012). The Court did not rule that the

2006 limits violate any provision of the Oregon or U.S. Constitutions; it declined to address the issue.

When the Court in 2009 in ***Vannatta II***, *supra*, addressed a 2007 statute that limited "gifts" by lobbyists to public officials and candidates, it repudiated the basis for its 1997 opinion regarding Measure 9 of 1994: that contributions (transfers of money or property) constitute "expression" that receives free speech protection. The Court further upheld limits on the receipt of gifts by public officeholders and candidates, even if the offering of gifts to them would be invalidated under Article I, § 8. The contribution limits in Measure are expressed as restrictions on the receipt of campaign contributions. The Court also concluded that "giving gifts to public officials [or candidates] is nonexpressive conduct," 347 Or at 465, and thus outside the protection of freedom of speech.

1. *VANNATTA II* RECOGNIZED THAT TRANSFERS OF PROPERTY ARE NOT "EXPRESSION."

Vannatta I, 324 Or at 521, stated that a political campaign contribution is necessarily an "expression":

> However, the contribution, in and of itself, is the contributor's expression of support for the candidate or cause--an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.

Vannatta II, 347 Or at 464-65, expressly withdrew the above statement:

> First, the court's statement in ***Vannatta I*** that campaign contributions were constitutionally protected forms of expression regardless of the "ultimate use to which the contribution is put" was unnecessary to the court's holding. On further reflection, we conclude that that observation was too broad and must be withdrawn. Second, because ***Vannatta I*** assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message, this court did not

> squarely decide in ***Vannatta I*** 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 matter of law.

Vannatta II illustrates that ***Vannatta I*** is not immutable and that a statute which prohibits or limits the provision of money to candidates must be itself evaluated for its relationship with Article I, § 8, of the Oregon Constitution.

As Justice Robert Durham stated:

> ***Vannatta II*** makes it clear that this court already has begun the process of reconsidering the absolute position voiced in ***Vannatta I*** and, as a consequence, to focus the free speech analysis under Article I, section 8, on whether a financial contribution in fact constitutes not merely a delivery of property but an act of protected expression by the donor.
>
> Aside from the problems already noted, the court's reasoning in ***Vannatta I*** for its absolute conclusion seems suspect. * * * But an act--giving property to another--that does not constitute free speech in most conceivable contexts is not transformed into protected speech simply because the donee is a candidate or campaign and the donor is a political supporter. The answer cannot consist of categorically pronouncing, as the court did on occasion in ***Vannatta I***, that contributing political money constitutes speech always or even most of the time. * * *
>
> This court has expressed its willingness to reconsider prior interpretations of the state constitution or statutes under the correct circumstances. ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 54, 11 P3d 228 (2000).

Hazell v. Brown, *supra*, 352 Or at 475-77.

Limiting campaign contributions does not limit expression; it is not a content-based limitation on speech. One need not examine the content of a campaign message or advertisement in order to apply the limits on contributions. The ad can say anything. It can be about the candidate or her opponent; it can be about public issues; or it can be about anything. No matter its content, if it is paid for by means of contributions to a candidate for Portland public office, then the candidate must comply with the campaign contribution receipt limitations of Measure 26-200. Those are

limitations on transfers of property, not content-based limitations on what can be said in the advertisements. See discussion of expression at pages 99-103, *post*.

2. *VANNATTA II* RECOGNIZED THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY BY PUBLIC OFFICIALS OR CANDIDATES.

Vannatta II ruled that, while persons subject to the gift limits had a free speech right to offer unlimited gifts to public officeholders and candidates, there was no corresponding right of public officeholders or candidates to accept gifts. 347 Or at 457-67.[6] This Court concluded that, while offering gifts is "expression," receiving gifts is not "expression," and actually "giving gifts to public officials [or candidates] is nonexpressive conduct." 347 Or at 465. Further, "the act of delivering property to a public official [or candidate] is nonexpressive conduct." 347 Or at 462.[7]

> Lobbyists also may intend their gift-giving to communicate political support or goodwill toward the recipients-as this court has observed, "most purposive human activity communicates something about the frame of mind of the actor." ***Huffman and Wright Logging Co.***, 317 Or at 450, 857 P2d 101. But something more is required to elevate mere purposive human activity into protected expression. To the extent that the gift receipt restrictions interfere with gift-*giving* by lobbyists, they impede only nonexpressive conduct. Moreover, the array of political expressions and communicative intentions that may surround the giving of gifts by lobbyists

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6. ***Vannatta II***, 347 Or at 458, stated:

> The statutory restrictions are thus confined to the act of a public official, a candidate, or a relative or member of their household, in taking possession or delivery of a gift valued in excess of statutory limits.

7. Although both of these statements refer only to "public officials," the Court clarified that it used the term "public officials" to refer to anyone covered by the statutory phrase "a public official, candidate for public office or a relative or member of the household of the public official or candidate." ***Vannatta II***, 347 Or at 455 n6.

> does not immunize the nonexpressive conduct of gift-giving from legislative regulation.

347 Or at 462-63.

This description of gifts is fully applicable to campaign contributions. Making a campaign contribution is delivering property (usually money but sometimes in-kind services) to a candidate. Like gift-givers, campaign contributors "may intend their [contributions] to communicate political support or goodwill toward the recipients." Like limiting receipt of gifts, limiting receipt of campaign contributions does not "apply restrictions to [contributors'] particular words or expression." A campaign contribution to a candidate may mean, "I support you" or "I oppose one or more of your opponents" or "I want you to view me favorably, after you are in office" or "I expect you to do what I want while in office" or "My husband wanted me to do this," etc. Measure 26 does not apply its restrictions to any of these particular words or expressions.[8] Moreover, the gift givers and campaign contributors remain free to continue to express their opinions by other means on behalf of the issue or candidate.

Measure 26-200 does not prevent any individual from expressing whatever is being expressed via a campaign contribution (of up to $500 in any race for Portland

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8. ***Vannatta II***, 347 Or at 460, described ***Fidanque v. Oregon Govt. Standards and Practices***, 328 Or 1, 8, 969 P2d 376 (1998):

> [T]his 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. Nor did ***Fidanque*** express or imply that those who listen to and interact with lobbyists--public officials and candidates for office, for example--have a constitutional free expression right to receive gifts of property, free of governmental regulation.

office). Measure 26-200 also allows any individual to make independent expenditures of up to $5,000 per year on each race for Portland office.

Vannatta II, applied to campaign contributions, would (at worst) find that, while persons subject to the contribution limits of Measure 26-200 may have a free speech right to offer unlimited contributions, there is no right of candidates or political committees to accept such contributions. Measure 26-200, § (1), contains in separate subsections:

(1) limits on receipt of political campaign contributions by candidates; and

(2) a ban on the making of political campaign contributions, except "as specifically allowed to be received in this Section."

Thus, like the gift limits, Measure 26-200 would be fully effective, even if only the limits on receiving contributions were upheld, because contributions (or gifts) which cannot lawfully be accepted also cannot, in practice, be made.

3. *VANNATTA II* RECOGNIZED THE VALIDITY OF STATUTES LIMITING RECEIPT OF PROPERTY THAT CAN BE USED FOR NON-EXPRESSIVE PURPOSES.

Vannatta II's withdrawal of ***Vannatta I***'s statement appears to remove, at a minimum, free speech protection for contributions which can be used for purposes other than "to communicate political messages." *Id.*, 347 Or at 465.

Oregon law allows campaign contributions to be used for many non-communicative purposes, including trips to luxury vacation spots and payments to friends or relatives for undocumented office work. More recent examples of use of campaign contributions in Oregon for purposes other than communicating with voters (collected by journalists and not disputed) include:

1. Bar tabs for meetings with lobbyists in Salem;

2. Hotel rooms in Salem for overnight lodging of legislators;

4. $400 per month in paid to the legislator for using a room in his home as his "District Office";[9]

5. Purchase and installation of a $7,400 security system at the home of the Governor's former wife;[10] and

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9. Examples 1-3 are documented in Nigel Jaquiss, *Perfectly Legal: How one lawmaker uses campaign money to subsidize his mortgage, pay his bar tabs and explore Canada*, WILLAMETTE WEEK, May 11, 2011 (http://www.wweek.com/portland/article-17463-perfectly_legal.html):

> Although the 2007 reform made it harder to give pricey gifts to lawmakers, it didn't bar gifts disguised as campaign contributions. * * *
>
> State elections director Steve Trout says those and other expenditures appear to fall within statute, which says [campaign] funds may be used for "any lawful purpose." * * *
>
> State filings show, for instance, that since Jan. 1, 2009, [Rep. Mike] Schaufler has charged his campaign nearly $6,000 for 91 separate visits to Magoo's, a Salem bar. Over the same period, he's charged his campaign $2,434 for 68 visits to another Salem bar called the Brick Bar & Broiler. * * *
>
> Since Jan. 1, 2009, his campaign paid for 58 nights at the Phoenix Grand Hotel, totaling $7,392. Schaufler says long Salem hours make commuting difficult.
>
> When the Legislature is out of session, he "rents" a district office in his home for $400 a month. That put nearly $5,000 in his pocket last year, which is allowed provided he charges himself a fair market rate.

10. Nigel Jaquiss, *Kitzhaber Uses Campaign Funds for Home Security System*, WILLAMETTE WEEK, July 21, 2011, states:

> Oregon's notoriously lax campaign finance laws mean that although candidates and elected officials cannot accept gifts worth more than $50, they are allowed spend campaign funds on virtually anything. But

(continued...)

6. A two-week trip for 17 Oregon legislators (and family members and friends) to and around The People's Republic of China.[11]

7. A salary of $21,000 per year to a public officeholder (majority leader in the Oregon Senate), whose own PAC contributes hundreds of thousands of dollars to the PAC paying that salary.[12]

8. Payments to the candidates' own companies $10,000 for "management services." *Id.*

10.(...continued)

> an expenditure this week by normally frugal Gov. John Kitzhaber was unusual even by Oregon pols' free-spending standards.
>
> On July 15, Kitzhaber reported using nearly $7,400 in leftover campaign funds to purchase a home security system [for the Portland home of his ex-wife].

(http://wweek.com/portland/blog-27411-kitzhaber_uses_campaign_funds_for_home_security_sy.html)

11. Harry Esteve, *Oregon lawmakers, spouses, family members head to China for trade mission*, THE OREGONIAN, August 24, 2011, wrote:

> Rep. Dave Hunt's son is going. Rep. Matt Wingard is bringing his mom.
>
> Watch out China -- here comes Oregon. A total of 17 state legislators, along with their spouses or other family members and a handful of business leaders, are headed to the Fujian province for a two-week trade and goodwill mission.
>
> * * * In all, the delegation totals slightly more than three dozen.
>
> The costs of the trip are being handled differently by each lawmaker, said Angela Wilhelms, chief of staff for Hanna. * * * Some are using money that was donated to their campaign's political action committee.

(http://www.oregonlive.com/politics/index.ssf/2011/08/oregon_lawmakers_spouses_famil.html)

12. Gordon Friedman, *Oregon lawmakers pay their businesses with campaign funds - it's legal, but is it ethical?*, THE OREGONIAN, January 27, 2017 http://www.oregonlive.com/politics/index.ssf/2017/01/oregon_lawmakers_pay_their_businesses.html

Since all contributions to candidates or committees can be used for such non-communicative purposes, ***Vannatta II*** has rendered those contributions clearly beyond the protection of ***Vannatta I*** and subject to limits and/or prohibitions.

Under Oregon law, the distinction between (1) "gifts" to a public official or candidate and (2) "campaign contributions" is illusory:

1. Neither "gifts" nor "campaign contributions" need to be spent on communications. As noted above, campaign contributions can be used for many purposes other than to fund communications with voters about the candidacy.

2. Both "gifts" and "campaign contributions" can be spent on communications, if the candidate so chooses.

There is nothing that prevents a candidate who receives a gift from using it in a communicative manner. No law stops a candidate who receives, say, a $50 gift from a lobbyist (or anyone else) from using that $50 to fund her campaign activities.[13]

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13. A candidate can use a gift of any size to fund her campaign communications, as long as she reports it to the government pursuant to ORS Chapter 260. Note that ORS 260.005 (3) defines "contribution" (emphasis added) as:

> (a) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> > (A) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or
> >
> > (B) To or on behalf of a candidate, political committee or measure;

Thus, "contribution" includes the "gift * * * of money * * * to or on behalf of a candidate." And the candidate can use any "gift" to fund campaign communications.

Thus, if gift-receiving and gift-giving are not expressive, then contribution-giving and contribution-receiving are also not expressive.

Under Oregon law, campaign contributions are the functional equivalent of gifts, so limits on them are just as valid as limits on gifts.[14] Article I, § 8, is a limit on legislative power. It protects expression. Thus, it does not protect the conduct of giving money (or other things of value).

There is no inextricable link between the opportunity to accept unlimited campaign contributions and the candidate's ability to engage in political speech. As stated by ORS 259 § (1)(s):

> When the Measure 9 limits were in effect during the 1996 election cycle, candidates were able to amass sufficient funds to campaign effectively and have their voices rise to the level of public notice, using the contributions allowed by Measure 9. A more recent example shows that the contribution limits in this Act will allow effective campaigns. In 2004, Tom Potter won the election for Mayor of Portland, in a race involving over 350,000 registered voters, while limiting his campaign to contributions from individuals not exceeding $25 per individual in the primary and $100 per individual in the general election campaign. The reasonable limits in this Act will increase competition for public office, foster a greater robustness of political debate in Oregon, and alleviate the adverse effects noted above.

Further, Bernie Sanders recently demonstrated that effective campaigns, even for President of the United States, can be funded almost entirely by means of small

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14. Campaign contributions are not currently restricted by the gift limits, because ORS 244.020(5)(b) excludes "contributions as defined in ORS 260.005" from the definition of "gift." "Contributions" defined in ORS 260.005 are campaign contributions. Note, thus, that the ORS Chapter 244 limits on gifts do not actually apply to "gifts * * * of money * * * to or on behalf of a candidate." That campaign contributions are excluded from the definition of "gift" does not accord campaign contributions greater protection under Article I, § 8.

contributions. His campaign used the internet to raise over $231 million from 7 million donations, an average of $33 per donation.[15]

State v. Moyer, *supra*, 348 Or at 230, explained the Oregon Supreme Court's changing analysis in ***Vannatta I*** and ***Vannatta II***.

> We acknowledge that this court's various statements in ***Vannatta I*** to the effect that campaign contributions are constitutionally protected forms of expression by the political contributors could be understood to mean that, in every instance, the delivery to a candidate or campaign of a contribution is constitutionally protected expression. However, we recently clarified those statements in ***Vannatta v. Oregon Government Ethics Comm.***, 347 Or 449, 465, 222 P3d 1077 (2009) (***Vannatta II***). In ***Vannatta II*** we pointed out that, ***Vannatta I*** had "assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message," for purposes of that case, however, the court had not decided 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 matter of law." 347 Or at 465, 222 P3d 1077.
>
> Second, the Court of Appeals plurality noted this court's statement in ***City of Portland v. Tidyman***, 306 Or 174, 18586, 759 P2d 242 (1988), that, to qualify as a ***Robertson*** category-two statute--a statute that focuses not on speech but on harmful effects--the operative text must "specify adverse effects" targeted by the legislature. ***Moyer***, 225 OrApp at 89, 200 P3d 619. However, in ***Vannatta I***, this court commented that, "[e]ven when the statute does not, by its terms, target a harm, a court may infer the harm from context." 324 Or at 536, 931 P2d 770. That statement in ***Vannatta I*** was based on this court's analysis of the statute at issue in ***State v. Stoneman***, 323 Or 536, 54547, 920 P2d 535 (1996). In ***Stoneman***, this court stated that, in determining the nature of the harmful effect targeted by a statute, the statute cannot be read in a vacuum: "An examination of the *context* of a statute, as well as of its wording, is necessary to an understanding of the policy that the legislative choice embodies." *Id.* at 546, 920 P2d 535 (emphasis in original). * * * In our view, ***Stoneman*** correctly states that a statute should not be read in isolation, and that the legislature's policy choice (the harm that is the target of the criminal prohibition) in some cases may be determined not only from the statute's text, but also from its context.

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15. https://www.opensecrets.org/pres16/candidate?id=N00000528

C. THE MEASURE 26-200 LIMITS ON CONTRIBUTIONS ARE AUTHORIZED BY ARTICLE II, § 8, OF THE OREGON CONSTITUTION.

Article II, § 8, of the Oregon Constitution states:

> 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.

Measure 26-200 fits within this authorization. The defenders of Measure 9 of 1994, including the Secretary of State, also cited Article II, § 8, as authorizing the limits on political campaign contributions in that measure. ***Vannatta I*** rejected that argument, based on insufficient historical research.[16]

1. HISTORICAL MEANING OF ARTICLE II, § 8: REGULATION OF "ELECTIONS."

Vannatta I held that the use of the word "elections" in Article II, § 8, had a contemporaneous meaning in the mid-19th Century of regulation of the events on election day, although conceding that the word "elections" has since come to mean the entire process of seeking election. ***Vannatta I*** at 530.

> It thus appears to us that, in order to keep faith with the ideas imbedded in Article II, section 8, we should construe "elections" to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure.

Vannatta I at 531. This conclusion was critical to the Court's holding that Measure 9 of 1994 was not authorized by Article II, § 8, as an exception to Article I, § 8.

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16. ***Vannatta I*** appeared to accept the contention of the Secretary of State that, <u>if</u> "elections" were interpreted to include the campaign phase, then Article II, § 8, would "remove[] the contribution and expenditure restrictions imposed by Measure 9 from any protection under Article I, § 8." 324 Or at 528.

In reaching this conclusion about Article II, the Court used one source, WEBSTER'S (1828), apparently *sua sponte*.[17] Since ***Priest v. Pearce,*** 314 Or 411, 840 P2d 65, 67-69 (1992), where this Court set out methodology for an "originalist" interpretation of the Oregon Constitution, this Court has relied solely upon WEBSTER'S (1828) for construing the meaning of constitutional words very few times. In each of those other cases, the word(s) under consideration had reached a "modern" meaning long before 1857 so the inclusion in WEBSTER'S (1828) merely confirmed long-understood usage.[18]

While appearance in the 1828 work confirms that meanings were settled before 1857, absence from the 1828 compilation does not assist understanding of rapidly-evolving American usage decades later. In other decisions, this Court has included review of additional sources.[19] The Court of Appeals has cited WEBSTER'S (1828) a

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17. Review of the briefs submitted to the Court in ***Vannatta I*** found no reference to any primary sources of language by any party, intervenor, or amicus. None of the briefs cite WEBSTER'S (1828). None of the historical statutes discussed in this brief was brought to the Court's attention.

18. ***State v. Wheeler***, 343 Or 652, 655, 175 P3d 438, 441 (2007) (opinion refers to WEBSTER'S (1828) for confirmation that "proportion" had long meant a "comparative relation" in construing Oregon Constitution Article I, § 16); ***State v. Ciancanelli,*** 339 Or 282, 293, 121 P3d 613, 619 (2005) (Court relies on this source for the meaning of "expression," which appears to have been widely used by 1828, in construing Article I, § 8); ***Bobo v. Kulongoski***, 338 Or 111, 120, 107 P3d 18, 23 (2005) (Court relies upon WEBSTER'S (1828) for a definition of "raise" and "revenue," which had both acquired "modern" meanings by (1828)); ***State v. Vasquez***, 336 Or 598, 604, 88 P3d 271, 274 (2004), (opinion turns to WEBSTER'S (1828) for the term "justice" in Article I, § 10, concluding that the word "had a meaning similar to that of today"); ***MacPherson***, *supra*, (Court uses WEBSTER'S (1828) for "suspend," which had acquired its current usage).

19. ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211, 215-216 (2006), refers to WEBSTER'S (1828) in construing early meanings of

(continued...)

number of times, but in each decision has consulted additional mid-19th century sources or cases.

Confirming common understanding by reviewing a term as used within other contemporaneous texts is consistent with the growing scholarship of corpus linguistics to determine the meaning of legal phrases. Corpus linguistics is an empirical approach to the study of language that is made possible by the increasingly large digitalized databases, including 18th and 19th Century primary sources. Study of the use of works in multiple contexts allows courts to

> draw inferences about language from data gleaned from real-world language in its natural habitat--in books, magazines, newspapers, and even transcripts of spoken language.[20]

19.(...continued)
"property," a word which appears to have long since reached its current meaning. ***Juarez*** does not rest exclusively on WEBSTER'S but uses historical sources including BLACKSTONE'S COMMENTARIES and BLACK'S DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1891). The following opinions reference both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES: ***Rico-Villalobos v. Giusto***, 339 Or 197, 207, 118 P3d 246, 252 (2005) (context for the meaning of "evident" in Article I, § 14); ***State v. MacNab***, 332 Or 469, 476, 51 P3d 1249 (2002) (interpreting "punishment" in Article I, § 21). WEBSTER'S (1828) is cited with additional sources in the following: ***State v. Caven***, 337 Or 433, 443, 98 P3d 381, 386 (2004) (John Bouvier's law dictionary); ***Coast Range Conifer, LLC v. Or State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005) (other state constitutions); ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463, 468 (1999) (other 19th Century dictionaries); ***Pendleton School Dist. 16R v. State***, 345 Or 596, 613, 200 P3d 133 (2009) ("uniform" coupled with "common schools" in Art VIII, § 3) looks to Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867) and John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (rev 2nd ed 1867); James Kent, COMMENTARIES ON AMERICAN LAW (3rd ed. 1836) and later historical articles.

20. Lee, Thomas R. and Mouritsen, Stephen C., *Judging Ordinary Meaning* (March 19, 2017). 127 YALE LAW JOURNAL, p. 788 (2018).

Empirical evidence from popular novels and publications, journals kept by those engaged in political contests, legal opinions and press accounts suggest that "election" was not a legal term of art at the time of the adoption of the Oregon constitution and that its commonly understood secular public meaning was far more expansive than WEBSTER'S (1828) or ***Vanatta I*** affords it.[21] It encompassed both the campaign and "electioneering" preceding the casting of ballots, as shown at pages 29-42, *post.* The widely accepted public meaning of the word "election" certainly extended to include the conduct of the electioneering period. Moreover, modern usage of the word "election" in the public sphere continues this more expansive meaning.

What did the attendees at Champoeg and the Territorial Legislature and the drafters and voters of 1857-8 understand the power to regulate the conduct of "elections" to include? Primary sources show that "election" has been used in an expanded "modern" meaning (to include campaigning for office) by 18*48.*[22] "Electioneering" became so associated with election campaigns that the need to modify

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21. WEBSTER'S (1828) highlights the meaning of election within 18th Century Calvinist religious tradition which considers salvation a matter being "chosen" or "elected." Obviously this meaning does not encompass any period of campaigning or electioneering since joining the elect was outside human control and unrelated to one's conduct. Nonetheless, the practical secular meaning of the word had expanded to include the pre-election period in which voters could be persuaded to choose a candidate.

22. The historical texts discussed herein are all available in digital form from Google Books: http://books.google.com. Typing the title of the book into the search field will yield a digitalized version of the book, which can be viewed. Entering the words of a quotation into the search field will find that text in the book and in other books. Each of the referenced texts is available in some university collections but were digitalized in 2005 and 2006. These references were not readily available to the litigants in ***Vannatta I***, and none were cited.

"campaign" as an "electioneering" campaign disappeared in printed sources.[23] We provide a number of examples in print by 1848 using "elections" in its expanded sense to include events occurring in the months preceding the casting of votes. It is reasonable to assume that Oregon Convention delegates[24] and voters were familiar with the well-known congressional orators and current events and did not rely exclusively upon an 1828 dictionary for their understanding of the word "elections."

By the time of the adoption of the Oregon Constitution, "election" had expanded in meaning to include the entire campaign and was used in that sense in the state constitutions upon which Oregon's Constitution is modeled and in state legislation adopted before 1857.

2. HISTORICAL MEANING OF ARTICLE I, § 8: FREE SPEECH DID NOT INCLUDE IMPROPER COERCION UPON SUFFRAGE.

As part of the Article I, § 8, analysis for an "historical exception," ***Vannatta I*** finds the parties did not offer examples of restrictions on campaign contributions and (324 Or at 538):

> Neither have we found any indication that, at the time of statehood, the possibility of excessive campaign contributions was considered a threat to the democratic process. No historical exception applies.

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23. As it is no longer necessary to refer to a "touchtone phone," since the noun is understood to incorporate the attribute once used as a modifier.

24. Almost a third of the delegates were lawyers, and two edited newspapers. See George H. Himes, *Constitutional Convention of Oregon*, QUARTERLY OF THE OREGON HISTORICAL SOCIETY, Vol XV (March-December 1914), p. 218 (more legible version from TRANSACTIONS OF THE 40TH ANNUAL REUNION OF THE OREGON PIONEER ASSOCIATION, Portland, June 20, 1912 (Chausee-Prudhomme, Portland 1915) pp. 626-628.

First, we now know that in 1857 there were some laws limiting campaign contributions and pre-election day conduct in states with free speech clauses similar to Article I, § 8. Second, whether there were "laws to limit campaign contributions" is too narrow a focus. Such limits are but one example of laws aimed at protecting suffrage. Other protections of suffrage include prohibiting conduct to induce voters to vote for a candidate ("treating" before the election) or to abstain from voting at all by leaving the jurisdiction before an election (Oregon Frauds in Election Act of 1870, § 3). Pre-election day conduct such as wagering on the outcome of a contest was illegal because, "whatever has a tendency, in any way, unduly to influence elections, is against public policy" and betting creates incentive to "circulate lies" to alter the outcome. ***Bettis v. Reynolds***, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851).

3. THE INTENT OF THE DRAFTERS OF THE OREGON CONSTITUTION IS SHOWN BY THE ADOPTION OF ARTICLE II, § 8.

Article I, § 8 is the product of drafters of the Oregon Constitution who knew of the efforts in other states to limit "improper" or undue influence on voter choice prior to election day balloting, they themselves observed the development of lengthy "campaigns" during their own political careers and understood by 1857 that "elections" required such campaigns.

a. STATUTES IN OTHER STATES LIMITED CONDUCT INIMICAL TO SUFFRAGE PRIOR TO ELECTION DAY.

In addition to the convention delegates who carried copies of other state constitutions, all of the delegates were politically active. It can be presumed they understood how "elections" were regulated in other states. More than 40 of the 60

delegates were affiliated with national parties and were elected as Oregon Constitutional Convention delegates on party tickets.[25] They had observed the changes in election campaigns throughout their careers.

They would have known that, as early as 1801, states enacted laws patterned after 17th century British statutes meant to limit abuses in influencing potential voters before the day of voting. North Carolina enacted a statute which prohibited "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[26] In 1829, New York made it unlawful to try to influence voters "previous to, or during the election" or to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843) found the Harrison "log cabin" campaign headquarters in violation by serving liquor and entertainments before the election.

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25. Address of the Hon. R. McBride, *The Constitutional Convention, 1857*, reprinted in Carey, OREGON CONSTITUTION, p. 483.

26. Rev Stat ch 52 sec 23.

> The preceding section of the act makes it highly penal for any person, who is a candidate for a seat in the legislature, to give, either directly or indirectly, any money, gift, gratuity, or reward, &c. in order to be elected, and embraces all persons who shall do either of the acts "to procure any other person to be elected."--The penalty is a forfeiture of four hundred dollars. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch of an act passed in 1777, and the 23rd was originally passed in 1801.

Duke v. Asbee, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850) (emphasis in original).

By 1852, Maryland had made it an offense (with some exceptions) for any "political agent" ("all persons appointed any candidate before an election or primary election") "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND, (Lucas 1852), p. 90.

The North Carolina courts explained the essential nature of suffrage and the need to curb all undue influences upon it:

> Everything, not merely the proper action, but the very existence, of our institutions, depends on the free and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency, in any way, unduly to influence elections, is against public policy. This position we assume, as self-evident.

Bettis v. Reynolds, *supra*. ***Bettis*** condemns any wagering on elections because it leads to the underlying "self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such activities are certainly "expression" or "speech," yet they were not protected from limits by mid-19th Century lawmakers because of their pernicious impacts on suffrage.

b. CONTEMPORANEOUS CONSTRUCTION OF LAWS REGULATING ELECTIONS BY THE CONSTITUTIONAL DRAFTERS.

Oregon cases have looked to the careers of the Constitutional Convention delegates to discern their understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 103 P 505, 511 (1909).[27] There is a strong relationship between

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27. In upholding the death penalty, the Court (54 Or at 497) stated:

(continued...)

contemporaneous construction and Constitutional originalism. ***State ex rel Gladden v. Lonergan***, 201 Or 163, 177-8, 269 P2d 491, 496 (1954).

Some of the Constitutional Convention delegates had been active in legislating since the Champoeg Convention (1843),[28] which drafted the Oregon Organic Law (1843) which served as the governance document until the Constitution was adopted.[29] These men continued to serve in the Provisional Legislatures (from 1844 until replaced by the Territorial Legislature in 1849), which adopted Iowa elections law.[30] Other delegates to the Oregon Constitutional Convention served in the Territorial Legislatures (which met yearly from 1849-1859), re-adopting the Iowa Law in large part and then adopting the first Oregon Code in 1855.[31]

27.(...continued)

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. * * *. Rousseau well observes that "He who made the law knows best how it ought to be interpreted," and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution ought itself to be sufficient answer to the contention of defendant's counsel.

28. Public meetings at Champoeg, 1843, Oregon History Project, Oregon Historical Society http://www.ohs.org/education/oregonhistory/historical_records/dspDocument.cfm?doc_ID=40889788-92F9-C578-96471494DA12A34C.

29. *Oregon History: The "Oregon Question" and Provisional Government*, OREGON BLUE BOOK at http://bluebook.state.or.us/ cultural/history/history10.htm.

30. Two examples: Jesse Applegate, Asa Lovejoy.

31. Reuben Boise, Matthew Deady, LaFayette Grover, James Kelly, Cyrus Olney, J.C. Peebles, Frederick Waymire, David Logan, for example.

The core group of lawyers who shaped the Territorial codes, participated in the Constitutional Convention, then served in or advised the early statehood legislatures includes 1854 Code Commissioners James Kelly and Reuben Boise and Convention Chair and state code codifier, Matthew Deady, as well as lawyer, Addison Gibbs. Gibbs had served in Territorial Legislature and, as sitting Governor, signed into law limits on lobbying and election campaign misconduct in 1864.[32] As noted, lawyer Lafayette Grover had also been a delegate, and as Governor, signed into law limits on election misconduct in 1870.

This core group lived through and observed the changing dynamics of political campaigns. The governing documents they endorsed show an evolution consistent with trends in society towards long election "campaigns" and use of the language which evolved with the changing practices.

Here's an example of how the evolution in governing documents assists interpretation. As noted in ***Vannatta I***, 324 Or at 533-34, Connecticut adopted a constitutional prohibition against influencing electors at the *viva voce* elections, which became part of its Constitution after joining the union:

> Laws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

Connecticut Const (1818) Article VI, § 6. ***Vannatta I*** concludes:

> The fact that Oregon's provision does not limit its scope expressly to the meeting of electors but, instead, uses the term, "elections," arguably supports either of two different conclusions. On the one hand, it could indicate that

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32. Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, C V, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.

> the Oregon provision was intended to extend further than the Connecticut provision. On the other hand, the framers of the Oregon Constitution may have regarded the terms, "meetings of the electors" and "elections," as synonymous.

But now we can trace the expansion in campaign activity, the meaning of "elections," and attendant regulation upon election campaigns more specifically by comparing the narrow regulatory power in the Territorial laws with the provisions of Article II, § 8.

The earliest Oregon governance documents, borrowed intact from Iowa in the 1830s, provided for regulation of elections in the narrower sense that ***Vannatta I*** posits. For example, the Oregon Organic Act adopted after the Champoeg Convention of 1843 contained then-extant principles of equity and the common law known in Iowa, and § 5 of the Act to Establish the Territorial Government of Oregon, 30 Con Ch 177, 9 Stat 323 (1848), gave the Territorial Legislature only the authority to set the "time, place and manner of holding and conducting all elections of the people * * *."

Even though the Territory adopted its pre-constitution laws from Iowa wholesale, *unlike* Iowans, Oregonians later expanded the scope of election regulation by adopting a Constitution that expressly authorized the Legislature to regulate elections and protect citizens from any sort of "undue influence" or "improper conduct" upon suffrage by using the language of pre-1857 Constitutions of Texas and California (and the other states listed in the table at page 30, *post*). In contrast to the narrow definition of authority in the Territorial laws (where the source of authority was Congress, with Territorial legislation subject to Congressional veto[33]), the Constitution used a the phrase of more recently enacted constitutions, not Iowa's.

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33. See ***Stevens v. Meyers***, 62 Or 372, 126 P 2d (1912).

In ***State v. Moyle***, 299 Or 691, 696, 705 P2d 740 (1985), this Court found that the Territorial Legislature's elimination of certain crimes prior to adoption of the Constitution indicated an intent to not prohibit that conduct under the new Article I, § 8. Here, the converse may be implied; voters granted a new plenary power over elections under Article II, § 8, which the Territorial laws had previously circumscribed to the regulation of election day events only.

c. ARTICLE II, § 8, PROTECTION OF INDIVIDUAL RIGHTS TO BE FREE OF COERCION DURING THE ELECTION CAMPAIGN.

As states in the deep south, along the Mississippi River, and farther west through Texas and California joined the union, they used the word "elections" in the evolving sense, thus acknowledging that the period of time in which "improper" influences might work upon potential voters could occur long before election day.

The ***Vannatta I*** discussion of the Connecticut Constitution (1818) suffers from the erroneous impression that Oregon "adopted" a version of the Connecticut Constitution and might have intended that "elections" have the same meaning as the one-day meeting of electors.[34] In fact, Oregon followed at least seven other states in

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34. Carey, OREGON CONSTITUTION, Appendix (a), summarizes an Oregon Law Review (April 1926) article by W.C. Palmer, on "sources" for the Oregon Constitution. For the "source" of Article II, § 8, Carey/Palmer remark it is "similar" to the Connecticut Constitution, 1818, Article VI, § 6. Carey at 470. Palmer and Carey did not have access to or declined to consider the constitutions within THE AMERICAN'S GUIDE (which delegate Grover carried) of those states which later seceded from the union (or the constitutions therein from Kentucky and California). The only 7 states Carey/Palmer mention as having similarities to the Oregon Constitution were Indiana, Maine, Iowa, Michigan, Connecticut, Massachusetts, and Wisconsin. The 7 nearly *identical* state constitutional provisions in the table below are far more likely direct sources of Article II, § 8, than the somewhat different provision in the Connecticut Constitution.

using the phrase "regulating and conducting *elections*" (as the popular understanding of that word developed) well before 1857 as shown in the following chart.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
Kentucky (1792)	**Article VIII, § 2:** [T]he privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties; all undue influence thereon from power, bribery, tumult, or other improper practices.
Louisiana (1812)	**Article 93:** The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practice.
Mississippi (1817)	**Article VI, § 5:** The privileges of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper conduct.
Alabama (1819)	**Article XI, section 5:** The privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper conduct.
Florida (1838)	**Article VI, § 13:** [T]he privilege of suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon, from power, bribery, tumult, or other improper practices.
Texas (1845)	**Article 16, § 2:** The privilege of free suffrage shall be protected by laws regulating elections, and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult, or other improper practice.

STATE (year adopted)	ELECTION PROTECTION PROVISION IN CONSTITUTION
California (1849)	**Article XX, section 11:** The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice.

Actions under these Constitutions were known to lawyers and judges. In upholding the right to deny the right to vote to someone who participated in a duel before the election, the Louisiana Supreme Court relied upon the power of the legislature to prohibit any "improper practice" (here one that occurred prior to balloting):

> The Convention, however, imposed this injunction on the Legislature: "The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, *all undue influence* thereon, from power, bribery, tumult, *or other improper practice*," which all think requires the Legislature to pass laws to protect all entitled to vote in the enjoyment of the right of suffrage * * *.

Dwight v. Rice, 1850 WL 3859, *2 (La 1850) (emphasis in original.)

Texas provides a particularly relevant example of pre-1857 campaign funding limits which would have been known to the Convention delegates. As the table above shows, the Constitution of Texas (1845) contains sections essentially identical to Article I, § 8, and Article II, § 8, of the Oregon Constitution. A year before the Oregon Constitutional Convention, the Texas Legislature passed the Act of August 28, 1856, codified at Title VIII, "Offenses Affecting the Rights of Suffrage," Chapter I, "Bribery and Undue Influence." Article 262 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, or any

particular question submitted to a vote of the people, he shall be punished by fine, not exceeding two hundred dollars.[35]

The Texas statute provides vital historical context relevant both to understanding intent and evaluating an historical exception to the reach of Article I, § 8, of the Oregon Constitution and what the Oregon Convention delegates and voters intended Article II, § 8, to accomplish. It was adopted after decades of efforts throughout the United States protect suffrage from corruption by inducements or coercion.

Within the next few legislative sessions after statehood, in 1864 and 1870, the Oregon Legislature adopted criminal sanctions for election violations as "Crimes Against Public Justice," thus giving concrete examples to the kinds of "improper conduct" the legislature could control under the recently adopted Constitutional powers of Article II, § 8. The listed offenses (1) could occur long before the "day of" the election and (2) could corrupt the election process without actual *quid pro quo* bribery or force, such as offering any "thing whatever" directly or indirectly "with intent to influence" the voter.[36]

In 1870, the Oregon Legislature made it a crime to "persuade" anyone to change residence or to persuade a legal voter not to vote. Deady Code (1872) Crim Code T II, C V, §§ 632-634. The penalties for "persuasion" were harsh: imprisonment, and/or

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35. Article 263 punished violence or threats of violence to person or property to "endeavor to procure the vote of any elector, or the influence of any persons over other electors," by a fine of up to $500.00.

36. Crimes Against Public Justice Act of 1864, (October 19, 616), Or Gen Laws (Deady 1872), T II, c 5, § 627, later codified at Hill's Code Or, T II, c 5, § 1843. Conduct which could affect an election long before the day of balloting included offering, receiving or soliciting a promise of "any beneficial thing" in exchange for a later vote. Crimes Against Public Justice Act (1864), §§ 616, 617, 619. Also, "changing his habitation" Frauds in Election Act § 632 (1870).

a fine of up to $1,000, and a lifetime ban from holding office. As noted above, Addison Gibbs, lawyer and law partner of Convention delegate George H. Williams, was Governor at the time of the passage of the 1864 act. Convention delegate Grover was Governor at the time of the passage of 1870 legislation. Neither vetoed or objected that these laws regulating campaigning were prohibited by Article I, § 8, or were outside the authority granted by Article II, § 8, to regulate elections.

Concern with corruption of the elections process more subtle than overt *quid pro quo* bribery was expressed in Oregon law in 1870.

> Any person who shall, in the manner provided in the preceding section ["promises of favor or reward, or otherwise"], induce or persuade any legal voter to remain away from the polls, and not vote at any general election in this state, shall, on conviction, be deemed guilty of a felony.

Frauds in Election Act (October 22, 1870, § 3), Or Gen Laws (Deady 1874), T II, c 5, § 634, Hill's Code Or, T II, C 5, § 1850.[37]

4. BY 1858 "ELECTION" HAD EXPANDED BEYOND THE MEANING ATTRIBUTED IN WEBSTER'S (1828).

That many of the same men who participated in the territorial government, served as Constitutional Convention delegates, and later served as elected officials after statehood, passed laws criminalizing some pre-Election Day conduct did not reflect a radical change in their thinking. They lived through changes in electioneering conduct and understood evolving practices and language.

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37. Note that the prohibited conduct was not overt "bribery" but mere persuasion of any kind influencing the voting decision. Nor was any additional *mens rea*, such as "wrongfully" or "corruptly" (although these terms are defined in the criminal statutes); the only mental state required was an intent to "persuade" through the conduct of the prohibited inducement.

Vannatta I makes important assumptions about the process of linguistic change.

> The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* But the two concepts do not necessarily overlap so completely. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." WEBSTER'S THIRD NEW INT'L DICTIONARY at 731 (unabridged 1993). "Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." *Id.* at 322.
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>
> However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]" WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
>
> The dictionary on which we rely has no definition of "campaign" that corresponds to the present-day use of that word as a description of the effort to obtain public office or to obtain the passage of an initiated or referred measure. The concept of that time closest to what we now term "campaigning" was "electioneering," which Noah Webster defined as "[t]he arts or practices used for securing the choice of one to office." WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). It thus appears that, whatever the degree of their overlap today, the ideas of "electioneering" and "elections" were somewhat distinct at the pertinent time, *viz.,* at the time that the Oregon Constitution was created.

Vannatta I, 324 Or at 530-31.

Article II, § 8, was proposed by Oregon Convention delegates who followed the law and read accounts of speeches by leaders such as John Quincy Adams, Henry Clay, and James Buchanan, all using "campaign" to mean an election campaign. It was adopted by voters who read novels, biographies, popular columns and entertainments, all using "election" in its modern sense of including the campaigning phase. We urge this Court to allow the terms of Measure 26-200 to be construed in light of information not available to this Court in ***Vannatta I***.

a. "CAMPAIGN" WAS USED TO REFER TO POLITICAL CAMPAIGNS LONG BEFORE 1857.

The term "campaign" was well-known to educated speakers, political figures and popular writers for American audiences long before WEBSTER'S (1828) was published. Further, the term "campaign" became so closely associated with elections that the need to identify a "campaign" as an "electioneering" or "political" campaign disappeared. Finally, "election" came to be used alone in American vernacular by the 1830s to encompass the "electioneering" and "campaign" components.[38]

Gouverneur Morris (a drafter of sections of the US Constitution) used the phrase "political campaign" in a letter dated 1789.[39] In 1813 Francis Scott Key wrote, "I have not seen nor heard of Ridgley [a Virginia acquaintance] since his political campaign commenced."[40] In 1820 a satirical bi-weekly explained that "Mrs. Busybody" "has been much occupied and harassed during the last spring by the election campaign in New-York."[41]

In 1828 Henry Clay published a refutation of statements made by Andrew Jackson's partisans, arguing that "was the policy with which the political campaign was

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38. This shift in meaning is known as metonymy, as when the word "crown" comes to stand for the larger related concept of monarchy beyond its original meaning as fancy headgear.

39. "Monsieur de Lafayette is since returned from his political campaign in Auvergn, crowned with success." Jared Sparks, LIFE OF GOUVERNEUR MORRIS: WITH SELECTIONS FROM HIS CORRESPONDENCE, VOL II (Grey & Bowen 1832), p. 67.

40. Letter from Francis Scott Key to John Randolph, October 5, 1813: "I have not seen nor heard of Ridgley since his political campaign commenced. It closed yesterday and we have not yet heard how he has fared." Hugh A. Garland, LIFE OF JOHN RANDOLPH (Appleton 1851), p. 24.

41. Cornelius Tuttle, THE MICROSCOPE, No. 1, Vol. 1, Tuesday, March 21, 1820 (Maltby), p. 198.

conducted in the Winter of 1824-25 by the forces of the General." A 1829 biography of Elbridge Gerry (Madison's vice-president in 1812) noted that the "expectation of decrease of the energies of an election campaign was hardly to be justified."[42] Given these diverse examples of "campaign" used in a political sense by the 1820s, the absence of that political definition from WEBSTER'S (1828) is of little weight.

During debate on the House floor, representatives John Quincy Adams and Charles Underwood both referred to an "electioneering campaign" in 1841. At issue was Adams's bill to appropriate $25,000 to President William Henry Harrison's widow. Disputing an allowance for postage for thousands of letters, Underwood asked, "are those but the expenses of the electioneering campaign?" Adams countered that the sum was not for Harrison's "electioneering campaign."[43] Also in 1841, James Buchanan said on the floor of the Senate, "I can truly say that, during the whole election campaign, I never saw one single resolution in favor of a national bank."[44]

In 1839, an essayist used the phrase "election campaign."[45] In 1843 a periodical writer used the phrase "political campaign" repeatedly in its thoroughly modern

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42. James Austin, THE LIFE OF ELBRIDGE GERRY (Wells & Lilly 1829), p. 328.

43. *Speech On the Bill to Appropriate $25,000 to Widow of the Late President of Mr Underwood delivered in the House of representatives, June 18, 1841*, NATIONAL INTELLIGENCER (1841), pp. 6-7.

44. James Buchanan's *Speech on the National Bank, July 7, 1841*, reprinted R.G. Horton, LIFE AND PUBLIC SERVICES OF JAMES BUCHANAN (Derby & Jackson 1856), p. 322.

45. Robert Mayo, POLITICAL SKETCHES OF EIGHT YEARS IN WASHINGTON (multiple publishers 1839), p. 27.

sense.[46] In 1852, a memoir by a newspaperman described "the last electioneering campaign" of Daniel Webster,[47] and the ANNALS OF ALBANY (Musell Albany 1852), p. 355, noted a "penny paper, issued during the election campaign." The ProQuest Historical Newspaper database for the *New York Times* shows numerous references to "political campaigns" as protracted contests by the early 1850s. *See*, the notice dated June 25, 1852, from *The New York Daily Times*, telling readers that "During the political campaign upon which the country has just embarked," it will publish "*The Campaign Times*" "for the whole campaign."[48]

"Campaign" in its political sense entered the language of tradespeople, as reported in judicial decisions. ***Whitaker v. Carter***, 4 Ired 4, 1844 WL 992 *1 (NC 1844), summarizes testimony about provisions for "two sacks of salt, and he intended to make him carry them all over Wake county on his electioneering campaign." In ***Wilson v. Davis***, 1843 WL 5088 *3 (Pa 1843), the court describes defendants as "proprietors of a country newspaper on the eve of a political campaign; and they cast about for an editor * * *." In ***Hurley v. Van Wagner***, 28 Barb 109 (NYSup 1858), the plaintiff sued for money promised for his work assisting the Republican party in 1856. He testified, "I thought, when I hired to him, that the work I was to do was to go with him in the political campaign and assist him in the campaign."

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46. "The Political campaign of 1840 called forth some most powerful and spirited from both political creeds, abounding in bold and stirring eloquence." J.M. Peck, *Traveler's Directory for Illinois*, METHODIST REVIEW QUARTERLY REVIEW (Lane & Sanford 1843), p. 406.

47. J. T. Buckingham, PERSONAL MEMOIRS AND RECOLLECTIONS OF EDITORIAL LIFE, Vol II (Ticknor, Reed, Fields 1852), p. 123.

48. This is Exhibit 5.

During this period before 1857, the modifier "political" or "electioneering" for the word "campaign" was becoming unnecessary. For example, in 1841, the popular essayist Washington Irving commented on recent elections, "[E]very thing remains exactly in the same state it was before the last wordy campaign"[49] In a book published in 1854, Missouri Sen. Thomas Hart Benton refers to Andrew Jackson's (1828) race, noting "the silence of Mr. Calhoun during the campaign * * *."[50] A collection of partisan songs for election rallies in 1856 was titled: FREMONT AND DAYTON CAMPAIGN SONGSTER (Whitten & Twone 1856).

b. LONG BEFORE 1857, THE TERM "ELECTION" INCLUDED THE PERIOD OF CAMPAIGNING BEFORE THE DAY OF VOTING.

"Election" also evolved before 1857 to encompass more than the "act" or the "day" of public choice of officers to the entire process we now call campaigns for election. ***Vannatta I*** implicitly recognizes that common usage is crucial to the eventual merger of meaning in concepts by pointing out that the "behavior" now known as political campaigns was known by 1857. But the Court then finds significant the omission of a word to describe that "behavior" in its 1828 source and no use of a word to describe that "behavior" in Article II, § 8. ***Vannatta I*** at 529 n15. Yet, demonstrably "election" had expanded in meaning to mean "election campaign" by at least 1848.

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49. *Letter XIV*, SALMAGUNDI; OR THE WHIM-WAHMS AND OPINIONS (Daly 1841), p. 239. Irving uses the phrase again in GEORGE WASHINGTON (Putnam 1859), p. 246, referring to Washington's views on "political campaigns" in the heading to *Ch XXIX*.

50. T.H. Benton, THIRTY YEARS' VIEW: OR, A HISTORY OF THE WORKING OF THE AMERICAN GOVERNMENT (Appleton 1854), p. 174.

As the franchise expanded [***Vannatta I,*** 324 Or at 530], the concept of a democratic election came to include rousing those newly enfranchised voters through planned "campaigns." By 1840, the political parties in most states had adopted the primary nominating process, further transforming the idea of an election in local races into a lengthy "process" and not a one-day event. The shift had already long since begun at the Presidential level (***Vannatta I***, 324 Or at n15).

The metonymic shift of "election" to stand for and include both campaigns and electioneering had occurred in American usage by the 1840s. It had occurred earlier in Britain. An 1816 source notes that elections in England were thought of as lasting weeks, allowing for great mischief and laws were passed limiting the "duration of elections,"[51] clearly referring not to the day of the voting but to the period of time when candidates attempted to persuade voters. The same extension of meaning occurred in the United States. In 1835, an American writer, G.K Paulding, used the past continuing tense in describing the "interest excited by" the United States Bank controversy "that there was during the election of a President of the United States * * *."[52] Paulding was not referring to just one day of voting.

The expanded meaning of "elections" to encompass a process in the months before the decision at the polls is traced through popular pieces by one columnist in the American press written between 1830 and 1850. Political satirist Seba Smith

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51. [B]efore the act which limited the duration of elections, (a measure of real reform,) we remember a contest that continued for six weeks * * *.

Robert Southey, *Essay VII On the State of Public Opinion, and the Political Reformers*, 1816, ESSAYS, MORAL AND POLITICAL (Murray 1832), p. 384.

52. LETTERS FROM THE SOUTH (Harper & Brothers 1835), p. 76.

created a character, "Major Jack Dowing," a Maine "downeaster" Democrat who described events "in his own plain language" in "letters" printed in several newspapers between 183O--1859. *Preface*, MY THIRTY YEARS OUT OF THE SENATE, (Oaksmith 1859), p. 5.[53]

In an early "Letter," dated January 18, 1830, "Dowing" noted acrimony at the Maine legislature because "the preceding electioneering campaign had been carried out with a bitterness and personality unprecedented in the State."[54] In July 19, 1830, he quotes a hopeful seeking appointment as writing, "I'm going to start to-morrow morning on an electioneering cruise."[55]

Years later, on June 30, 1848, Dowing used the word "election" in a continuing sense. He comments on the disarray in nominating a Democratic candidate to run against Zachary Taylor, the torchlight parades already underway, and wonders how things are going in "this election," using the word "election" to refer generally to the events occurring months before the *day* of the 1848 election or the casting of ballots.

> [C]all and see Mr. Ritchie * * *; I'm told the dear old gentleman is workin' too hard for his strength--out a nights in the rain, with a lantern in his hand, heading the campaign. * * * And be sure to ask him how the Federals are goin' this election, for we can't find out anything about it down here. I used to know how to keep the run of the Federals, but now there is so many parties--the Democrats, and the Whigs, and Hunker, and Barnburners, and Abolition folks, and Proviso folks--all criss-crossin' one another * * *."

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53. In ***State v. Delgado***, 298 Or 395, 403 n6, 692 P2d 610, 614 n6 (1984), the Oregon Supreme Court observed Dickens' novel, MARTIN CHUZZLEWIT, published in 1842 after a sojourn in America described what might have been "a switchblade knife," and thus this instrument may have been known in Oregon at the time of drafting the criminal statutes.

54. MY THIRTY YEARS OUT OF THE SENATE, p. 36.

55. *Id.*, p. 100.

MY THIRTY YEARS OUT OF THE SENATE, pp. 308-9. Use of the present progressive tense "are going" shows the "election" is in progress at the time of the writing--June 1848, some 5 months before the casting ballots in November. Progressive verb forms indicate action that is happening at the same time the statement is written. Such newspaper columns are good authority for what readers understood. In this case the events described are historically-based, not fanciful.[56] While the writer affects a vernacular dialect in spelling, all the verb tenses are internally consistent and present progressive.

The characters continue to use "this election" in a continuing sense in columns published during the 1852 campaign. In a letter dated July 20, 1852, Dowing's uncle assures him that Van Buren has promised that "he'd stand the platform for this election, anyhow.[57]" On September 18, 1852, Dowing blames the poor outlook for his candidates on the fact that, "the liquor law has played the mischief this election all round, and got things badly messed up.[58]"

There are many additional examples of the word "election" in this sense of "during the campaign prior to casting ballots" in American usage prior to 1857. From biographies of the time:

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56. This passage comments upon actual events. "Barnburners" were a faction of the Democratic Party opposed to slavery who refused to support Democratic presidential nominee Cass in 1848. "Proviso folks" supported the "Wilmot Proviso" which would have outlawed slavery in the territory acquired from Mexico. "Hunkers" were a faction of the Democratic Party in opposition to making slavery a campaign issue.

57. MY THIRTY YEARS OUT OF THE SENATE, p. 387.

58. *Id.*, p. 395.

> But if [Aaron Burr's] name was on the [1800 New York State assembly] ticket as a candidate, his personal exertions during the election would be lost to the party.[59]

> [T]o those who had been his true friends during the election struggle [Andrew Jackson] extended the graceful hand * * *.[60]

As the word election comprehended a long process, efforts to control election (i.e., campaign) spending also entered the popular discussion. For example, influential newspaper editor Horace Greeley wrote in 1856:

> We heartily approve the recent act of Congress requiring the fullest publicity in regard to all campaign contributions, whether made in connection with primaries, conventions or elections.[61]

In context, it is clear that Greeley was not advocating disclosure of contributions made only on the day of elections or conventions but during the process of "elections," including primary elections. We offer other examples at App 8-9.

5. CONCLUSION.

The Oregon Constitution, Article II, § 8, is the product of drafters and voters responding to changes in the democratic process which fast evolved in the early 1800s--longer "campaigns," masses of organized partisans, prolonged efforts and opportunity to influence voters, some pernicious. They understood "elections" to be the months-long process of persuading voters, not just a day for voting. They understood free suffrage to be at risk for the duration of such campaigns. They read, contributed to,

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59. M.L. Davis, MEMOIRS OF AARON BURR, (Harper & Brothers 1855), p. 435.

60. B.J. Lossing, A HISTORY OF THE UNITED STATES (Mason Bros 1857), p. 461.

61. Horace Greeley, *et al.*, THE TRIBUNE ALMANAC AND POLITICAL REGISTER (Tribune Association 1858), p. 350.

and used the changing vernacular of their times. We urge the Court to be similarly receptive to new research.

D. OREGON HAS LONG ENFORCED CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITATIONS.

The voters of Oregon have enacted campaign contribution limits at least six times: 1908, 1994 (twice), 2006, Measure 26-184 (Multnomah County 2016), and Measure 26-200 (Portland 2018).

In June 1908 Oregon voters through initiative overwhelmingly passed the Corrupt Practices Act, which the 1907 Legislature had declined to enact.[62] The 1908 Oregon Corrupt Practices Act reforms included:

1. contribution and expenditure limits upon candidates;
2. requiring candidates to report to government on their contributions and expenditures;
3. improvements to the Voters Pamphlet;
4. prohibitions on "treating" voters to favors;
5. requiring political ads to disclose who was responsible for placing them;
6. banning newspapers from accepting money to take editorial positions.

We have not located any instance in which any provision of the 1908 measure was challenged as unconstitutional, despite the fact that its terms were enforced. The cases reveal several instances of enforcement or attempted enforcement of

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62. The vote was over 63% voting in favor, as reported by James Duff Bennet, THE OPERATION OF THE INITIATIVE, REFERENDUM AND RECALL IN OREGON (MacMillan 1915), p. 244-45; Paul S. Reinsch, READINGS ON AMERICAN STATE GOVERNMENT (Ginn 1911), p. 103.

the campaign contribution or expenditure limitations, with no constitutional infirmity identified. ***Thornton v. Johnson***, 253 Or 342, 453 P2d 178 (1969); ***Nickerson v. Mecklem et al.***, 169 Or 270, 126 P2d 1095 (1942). Others were accused of exceeding the expenditure limits. ***In re Tom McCall***, 33 Opinions Attorney General 75 (1996). Other cases show that the provisions limiting contributions and expenditures were considered valid and provided the basis for jury verdicts involving related issues. ***Printing Industry of Portland v. Banks***, 150 Or 554, 46 P2d 596 (1935). These contribution and expenditure limits were repealed by the Oregon Legislature in 1973 and replaced with a set of aggregate expenditure limits on candidates and complete bans on independent expenditures. Those limits were invalidated in ***Deras v. Myers***, 272 Or 47, 535 P2d 541 (1975).[63] They were then repealed in the Oregon Legislature's 1975 session.

E. MEASURE 26-200 AVOIDS THE PITFALLS OF *VANNATTA I.*

1. UNLIKE MEASURE 26-200, MEASURE 9 OF 1994 WAS NOT SUPPORTED BY LEGISLATIVE FINDINGS OF FACT.

Vannatta I found Measure 9's limits invalid, in part due to the absence of legislative findings of fact setting forth the purposes of the limits. ***Vannatta I***, 324 Or at 539. In contrast, Measure 26-200 is supported by its own legislative findings of fact and those adopted by Oregon voters in Measure 47 of 2006,[64] which contains extensive legislative findings of fact setting forth the harms resulting from the absence

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63. In essence, this was a complete ban in independent expenditures, since expenditures approved by the candidate would not qualify as "independent" under today's nomenclature.

64. The full text of Measure 47 (2006) is available at https://www.oregonlegislature.gov/bills_laws/ors/ors259.html.

of limits on political contributions and expenditures and a complete rationale for each of the limits and why compelling state interests are served.[65] Measure 26-200 includes these findings:

> Whereas, the people of City of Portland find that limiting large contributions and expenditures in political campaigns would avoid the reality and appearance of corruption, including *quid pro quo* corruption, a new Article 3 to Chapter 3 of the City of Portland Charter, shall read as follows:

All of these findings are entitled to near complete deference by the courts. ***State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan***, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778, 82 LEd 1234 (1938), instructing courts to give great weight to legislative findings in considering the constitutionality of an Oregon law.

Absent legislative findings, ***Vannatta I*** disregarded the rationales proffered by the proponents for Measure 9's limits in legal arguments and instead concluded only "that there is a debate in society over whether and to what extent such contributions indeed cause such a harm."

> [T]he "harm" that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions. Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

Vannatta I, 324 Or at 539.

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65. While the substantive provisions of Measure 47 of 2006 are not currently operational, its legislative findings of fact remain in Oregon law as ORS Chapter 259, § (1). Further, the opinion in ***Hazell v. Brown***, 352 Or 455, 462, 463, 466, 287 P3d 1079 (2012), expressly relied upon the words of those findings in interpreting the rest of Measure 47 and in making its determinations, so the findings are considered in effect and operational.

In contrast, Measure 26-200 contains pertinent legislative findings of fact:

> Whereas, the people of Multnomah County find that limiting large contributions and expenditures in political campaigns would strengthen democratic institutions, enhance public confidence in government, and reduce the cost of running for office, thereby enabling a greater diversity of persons to seek public office.

And Measure 47, in its introduction and Section (1), placed into Oregon law extensive legislative findings of fact setting forth the harms resulting from the absence of limits on political contributions and expenditures and a complete rationale for the each of the limits contained in Measure 47 (similar to those in Measure 26-200) and why each serves compelling state interests.

State ex rel. Van Winkle v. Farmers Union Co-op Creamery of Sheridan, 160 Or 205, 219-220, 84 P2d 471, 476-77 (1938), adopted the reasoning of ***United States v. Carolene Products Co.***, 304 US 144, 58 SCt 778 (1938), for defining the scope of the judicial role in determining the weight to give legislative findings in considering the constitutionality of an Oregon law. The ***Carolene*** standard of review remains robust, as summarized in ***U.S. v. Calegro De Lutro,*** 309 FSupp 462, 465 (DCNY 1970):

> Although these [Congressional] findings do not preclude further examination by the court, ***Katzenbach v. McClung***, 379 US 294, 85 SCt 377, 13 LEd2d 290 (1964), they are entitled to considerable weight, ***United States v. Gainey***, 380 US 63, 66, 85 SCt 754, 13 LEd2d 658 (1965); ***Leary v. United States***, 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969), provided it appears that a rational basis underlay them. In determining the latter issue we are 'not concerned with the manner in which Congress reached its factual conclusions,' ***Maryland v. Wirtz***, 392 US 183, 190 n 13, 88 SCt 2017, 2021, 20 LEd2d 1020 (1968), and it is sufficient if Congress acted on the basis of 'common experience * * * (and) the circumstances of life as we know them.' ***Tot v. United States***, 319 US 463, 468, 63 SCt 1241, 1245, 87 L.Ed. 1519 (1943). Regarding "judicial inquiry into the validity of legislation," the Oregon Supreme Court adopted the highly deferential ***Carolene*** standard. "[B]y their very nature such inquiries, where the legislative judgment is

> drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed afford support for it."

***Van Winkle**, supra*, quoting with approval, ***Carolene**, supra*.

Savage v. Martin, 161 Or 660, 682, 91 P2d 273, 281 (1939), while reviewing legislative findings, held:

> Whether this be true or not, we need not inquire. It is sufficient that it conceivably may be true; if so it furnishes a rational basis for the regulation.

Even if "the inferences supported by evidence are fairly debatable, judicial review will not disturb the legislative action." ***Smith v. Washington County***, 241 Or 380, 387, 406 P2d 545, 549 (1965).

This Oregon view is the majority view:

> "[T]he strong presumption in favor of the validity of an act of the legislature is well established, as is the tradition of judicial reluctance to look behind the statement of purpose and findings of fact set forth unless they are palpably without reasonable foundation." ***Akari House, Inc. v. Irizzary***, 81 Misc2d 543, 552, 366 NYS2d 955, 965 (1975).
>
> "We must apply our analysis to the existing situation in the light of legislative findings which 'are entitled to great weight and the legislative remedy will not be stricken down unless its invalidity is clearly established.'" ***East New York Savings Bank v. Hahn***, 293 NY 622, 627, 59 NE2d 625, 626 (1944).
>
> "'A legislative declaration of purpose is ordinarily accepted as a part of the act * * *'. ***Opinion of the Justices***, 88 NH 484, 490, 190 A 425, 429 (1937) unless incompatible with its meaning and effect." ***Opinion of The Justices***, 113 NH 201, 203, 304 A2d 89, 91 (NH 1973).
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> "[L]egislative findings of fact are entitled to a *prima facie* acceptance of their correctness." ***Basehore v. Basehore v. Hampden Indus. Development Authority***, 433 Pa 40, 48, 248 A2d 212, 217 (1968). "Such a rule is salutary for courts are not in a position to assemble and evaluate the necessary empirical data which forms the basis for the legislature's findings." *Id.*
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> "Though not binding on the courts, legislative findings are given great weight and will be upheld unless they are found to be unreasonable and arbitrary." ***Amwest***

> ***Surety Ins. Co. v. Wilson***, 11 Cal4th 1243, 1252, 48 CalRptr2d 12, 906 P2d 111 (1995).
>
> To successfully challenge a legislative judgment, a plaintiff "must convince the court that the legislative facts on which the [decision] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." ***FM Properties Operating Co. v. City of Austin***, 93 F3d 167, 175 (5th Cir 1996).
>
> "Absent a claim that legislative findings are irrational or have no bearing on a legitimate State purpose, they are not subject to judicial investigation." ***State ex rel. Ohio Cty. Comm'n v. Samol,*** 165 WVa 714, 275 SE2d 2 (1980).
>
> ***Moore v. Thompson,*** 126 So2d 543, 549 (Fla 1960) (courts will abide by legislative findings and declarations of policy unless they are clearly erroneous, arbitrary or wholly unwarranted).
>
> "[L]egislative findings to which we accord great weight because of the high regard we hold for a coordinate branch of the government are confirmed by surveys and public documents, of which this Court takes cognizance by agreement and consent of counsel." ***Benjamin v. Housing Authority of Darlington County***, 15 SE2d 737, 738 (SC 1941).

In federal cases, legislative findings are entitled to great weight, provided it appears that there is any rational basis for them. ***United States v. Gainey***, 380 US 63, 66, 85 SCt 754, 13 LEd2d 658 (1965); ***Leary v. United States***, 395 US 6, 89 SCt 1532, 23 LEd2d 57 (1969).

In the absence of such findings as were adopted by Oregon voters in Measure 26-200 and Measure 47 (2006), the ***Vannatta I*** opinion felt unconstrained in making its own conclusions of fact, without citing a source of evidence.

> Shorn of its reliance on ***Fadeley***, the Secretary of State's argument is a reiteration of the idea that money necessarily and inherently corrupts candidates. It is natural that support-financial and otherwise-will respond to a candidate's positions on the issues. Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves

> and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions. This argument is not well taken.

This series of factual findings (without evidence) is now comprehensively contradicted by the specific findings of fact adopted by the voters of Oregon in Section (1) of Measure 47. These findings are entitled to near complete judicial deference. ***State ex rel. Van Winkle***, *supra*, 160 Or at 219-220, 84 P2d at 476-77. The courts can no longer legitimately rely upon the ***Vannatta I*** judicial findings of fact, which were key to the invalidation of Measure 9 of 1994.

Vannatta I specifically noted the lack of anything in Measure 9 to "identify a harm in the face of which Article I, Section 8, rights must give way." ***In re Fadeley***, 310 Or 548, 802 P2d 31 (1990), for example, a case decided in the ***Robertson***[66] era of free speech analysis, upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest. "[T]he interest in judicial integrity and the appearance of judicial integrity is an offsetting societal interest of that kind." *Id.*, 310 Or at 564. Actual and perceived integrity of the legitimacy of candidate election is another "offsetting" public good. The important societal interests in limiting political campaign contributions and expenditures are set forth in the beginning of Measure 26-200 and in Section (1) of ORS Chapter 259 (Measure 47 of 2006).

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66. ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982).

2. UNLIKE MEASURE 9 OF 1994, MEASURE 26-200 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR SPENDING BY CORPORATIONS AND UNIONS.

Unlike Measure 9 of 1994, Measure 26-200 in separate, severable sections contains limits on the political campaign contributions and expenditures of non-individuals--any "other Entity." ***Vannatta I*** did not address limits on political contributions or spending by corporations and unions.

> [T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; **a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected**; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression.

Vannatta I, 324 Or at 522 n10.

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta I, 324 Or at 524.

It is not surprising that ***Vannatta I*** would recognize the validity of limits on campaign contributions by corporations. After all, Oregon for decades had and enforced a statutory ban on political campaign contributions by certain corporations,

with no known constitutional challenges. See 260.415 (formerly 260.472, formerly 260.280; repealed Oregon 1983 Session Laws, c. 71, section 12.[67]

Measure 26-200 § 3-301 contains a severable limitation on political contributions and expenditures by any "Entity," which includes all corporations and unions. And § 3-307, its severability section, demands that severable limitations be preserved.

Further, ***Vannatta I*** always referred to the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or at 522-23. Corporations and unions are not people or voters or citizens. ***Vannatta I*** does not even once refer to any rights of unions or corporations.[68]

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67. The statute read:

> No corporation, and no person, trustee or trustees owning or holding the majority of the stock of a corporation, carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, telegraph, telephone, gas. electric light, heat, power, canal, aqueduct, water, cemetery or crematory company, or (a) any company engaged in business as a common carrier of freight or passengers by railroad, motor truck, motor bus, airplane or watercraft or (b) any company having the right to take or condemn land or to exercise franchises in public ways granted by the state, county, city or town, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or holders of a majority of such stock.

68. Why, then, did the Measure 9 of 1994 limits on corporate and union contributions not survive ***Vannatta I***? Because Measure 9 contained no separate or severable limits on union and corporate contributions. Instead, it defined "person" as "an individual or a corporation, association, firm, partnership, joint stock company, club, organization or other combination of individuals having collective capacity." ORS 260.005(15) [then ORS 260.005(11)]. It then expressed its substantive limitations on contributions (its Section 3) as applicable to "a person." Thus, Measure 9 afforded no way, by means of severance at any level, to preserve

(continued...)

Vannatta I stated that political contributions by non-individuals may be subject to state limitations. There is no Oregon case holding that corporations or unions have the right to make unlimited political campaign contributions in Oregon candidate races. Further, ***State v. Ciancanelli***, 339 Or 282, 121 P3d 613 (2005), concluded that the framers of the Oregon Constitution were probably either influenced by the Blackstone restrictive approach to free speech or were influenced by the "natural rights" approach. In either approach, the rights adhere to individuals, not to entities such as corporations or unions.

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 121 (1765).

68.(...continued)

> limits on contributions that would be applicable only to corporations and unions. Striking down Measure 9, Section 3's contribution limits applicable to any "person" thus necessarily struck down its contribution limits applicable to any corporation or union. The construction of Measure 9 in that manner indicated the intent of the drafters that the individual and non-individual limits would stand or fall together.

3. UNLIKE MEASURE 9 OF 1994, MEASURE 26-200 CONTAINS SEVERABLE LIMITATIONS ON CAMPAIGN CONTRIBUTIONS AND/OR INDEPENDENT EXPENDITURES BY CORPORATIONS AND UNIONS AUTHORIZED BY ARTICLE II, § 22, OF THE OREGON CONSTITUTION.

Vannatta I discusses Article II, § 22, of the Oregon Constitution and concludes that it may well remove Article I, § 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. This section of the Oregon Constitution was enacted by Measure 6 of 1994. Here is its entire text:

> **Section 22. Political campaign contribution limitations.**
>
> **Section (1)** For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.
>
> **Section (2)** Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.
>
> **Section (3)** A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.
>
> **Section (4)** A violation of Section (3) shall be an unclassified felony.

The reason that ***Vannatta I*** found that Article II, § 22, did not validate the limits in Measure 9 of 1994 was:

> No party has separately argued for any partial application of Article II, section 22, to corporations, unions, or PACs. Article II, section 22, has been presented to us only in the form of an "all or nothing" pre-emption. As we have explained, that argument is not well taken.

324 Or at 527 n13.

Unlike the litigants in ***Vannatta I***, the Citizen Parties here do argue for partial application of Article II, § 22, to validate all of the limitations in Measure 26-200 that do not apply to individuals residing inside the voting district of the candidate receiving the contributions.

a. THE FEDERAL COURT LITIGATION INVOLVING DIRECT ENFORCEMENT OF MEASURE 6 DOES NOT REMOVE IT FROM THE OREGON CONSTITUTION.

The litigation in federal courts about Measure 6 (1994), discussed later in this brief, is immaterial to the effect of Article II, § 22 in this case. The fact is that Article II, § 22, is part of the Oregon Constitution. While direct enforcement of <u>all</u> of the provisions of Measure 6 of 1994 may violate the U.S. Constitution, because of the discrimination based on location of the residence of the contributor, the federal courts did not, and could not, <u>remove</u> Article II, § 22, from the Oregon Constitution, where it today remains. The other provisions of the Oregon Constitution, including Article I, § 8, are subject to the terms of the later-enacted Article II, § 22, whether or not all of the provisions of Article II, § 22 are directly enforceable.

The existence of Article II, § 22, in the Oregon Constitution <u>negates</u> the contention that Article I, § 8, <u>prohibits</u> limitations on political campaign contributions

by corporations or unions. The power to prohibit corporate and union contributions does not offend the U.S. Constitution in any way, since (as the federal courts noted above), there is nothing in the U.S. Constitution that establishes any right by corporations or unions to make political campaign contributions in the first place. Corporations and unions are banned from making contributions to federal candidates and from making contributions to state and local candidates in most states. Exhibit 4. Thus, corporations and unions (and other non-individuals) cannot use Article I, § 8, as a defense to the application of a statute, such as Measure 26-200, that bans their campaign contributions.

Stated another way, the limitation on contributions in Measure 26-200 is not contrary to the U.S. Constitution.[69] So the question is whether Measure 26-200's limitations are authorized by the continuing presence of Article II, § 22, in the Oregon Constitution. Article II, § 22, expressly forbids all contributions that do not "originate from individuals." This provides constitutional authority for Measure 26-200's ban on corporation and union ("Entity") contributions, as those entities are not "individuals."

Even if we assume that corporations and unions have the same Article I, § 8, free speech rights as individuals (a proposition never adopted by the Oregon Supreme Court), those rights would then be in conflict with the authority provided by Article II, § 22 (and implemented by Measure 26-200) to ban political contributions by those entities (if transfers of money are still considered "speech," after ***Vannatta II***). When provisions of the Oregon Constitution are in conflict, the later-enacted provision prevails.

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69. Missouri's limits similar to Measure 26-184 were upheld against such challenges in ***Nixon v. Shrink Missouri Government PAC***, 528 US 377 (2000).

> We have no difficulty in holding that, in this context, it is Article I, section 8, that is modified. When the people, in the face of a pre-existing right to speak, write, or print freely on any subject whatever, adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due. See ***Hoag v. Washington-Oregon Corp.***, 75 Or 588, 612, 144 P 574, 147 P 756 (1915) (It is a familiar rule of construction that, where two provisions of a written [c]onstitution are repugnant to each other, that which is last in order of time and in local position is to be preferred * * *.). To hold otherwise would be to deny to later-enacted provisions of the constitution equal dignity as portions of the same fundamental document.

In re Fadeley, *supra*, 310 Or 548 at 560. Thus, Article II, § 22, prevails over Article I, § 8, to the extent of (1) authorizing limits on political contributions by non-individuals or (2) negating the asserted Article I, § 8, prohibition on campaign contribution limits applicable to non-individuals.

F. *VANNATTA I* RELIED UPON INCOMPLETE HISTORICAL ANALYSIS OF ARTICLE I, § 8, OF THE OREGON CONSTITUTION.

The Court in ***Vannatta I*** did not have extensive historical research at its disposal. It did not even address the existence of an "historical exception" for limits on campaign contributions or expenditures, because those defending Measure 9 of 1994 did "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 then incorrectly concluded that the earliest laws about "the role that money plays in the political process is the 1909 'Corrupt Practices Act Governing Elections.'" ***Vannatta I***, 324 Or at 538 n23.

The historical discussion in ***Vannatta I*** was not about any historical exception to Article I, § 8. Instead, it was about the meaning of the words of Article II, § 8, as they continue to exist today. Even that discussion was limited to WEBSTER'S

AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("WEBSTER'S (1828)") and a reference to the 1818 Constitution of Connecticut]. ***Vannatta I***, 324 Or at 528-36.[70] The prior nonexistent examination of history does not enshrine the resulting incorrect historical findings with the cloak of precedent.

In fact, legislation regulating campaign contributions and spending had been in place in Oregon for decades before that and in the colonies from 1699.[71] There is a

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70. In considering a word with legal connotation, the Oregon Supreme Court has discussed, but never relied upon WEBSTER'S (1828) alone *except* in ***Vannatta I***. ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211, 215-216 (2006), refers to WEBSTER'S (1828) in construing early meanings of "property," a word which appears to have long ago reached its current meaning. ***Juarez*** does not rest exclusively on WEBSTER'S but uses historical sources, including BLACKSTONE'S COMMENTARIES and BLACK'S DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1891). The following opinions reference both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES: ***Rico-Villalobos v. Giusto***, 339 Or 197, 207, 118 P3d 246, 252 (2005) (context for the meaning of "evident" in Article I, § 14); ***State v. MacNab***, 332 Or 469, 476, 51 P3d 1249 (2002) (interpreting "punishment" in Article I, § 21). WEBSTER'S (1828) is cited with additional sources in the following: ***State v. Caven***, 337 Or 433, 443, 98 P3d 381, 386 (2004) (Bouvier's LAW DICTIONARY); ***Coast Range Conifer, LLC v. Or State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005) (other state constitutions); ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463, 468 (1999) (other 19th Century dictionaries); ***Pendleton School Dist. 16R v. State***, 345 Or 596, 613, 200 P3d 133 (2009) ("uniform" coupled with "common schools" in Art VIII, § 3). This last case looked also to Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867); John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (rev 2nd ed 1867); James Kent, COMMENTARIES ON AMERICAN LAW (3rd ed. 1836); and later historical articles.

71. In 1699, members of the Virginia House of Burgesses asked themselves the same questions that define today's campaign finance debates: How should we regulate campaign money? * * *. What we do know is that they enacted what may have been the first campaign finance law on this side of the Atlantic * * *.

(continued...)

history in America of laws targeting any conduct which tends to harm the popular will expressed by suffrage that extends for more than 200 years.[72]

Early American statutes targeted harmful conduct and effects by regulating election campaign conduct, curbing direct and "indirect" bribery of both voters and candidates, limiting or prohibiting conduct of classes of contributors (such as corporations and lobbyists), limiting amounts donated or spent for proscribed activities, and criminalizing conduct aimed at potential voters in the run-up to balloting. Such statutes were in place for decades before the Oregon Constitutional Convention of 1857. These American statutes adopted the models of the British reform acts which targeted indirect bribery. These laws first restricted certain campaign conduct and financial transactions by candidates, such as campaign expenditures to influence voters by "treating" or serving liquor.[73] They were closely followed by restrictions on the

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71.(...continued)

Robert E. Mutch, essay, *Three Centuries of Campaign Finance Law,* A USERS GUIDE TO CAMPAIGN FINANCE LAW, (Lubenow ed., Rowman & Littlefield 2001).

72. We request judicial notice of the facts for which we provide references in this brief pursuant to Rule 201(b)(2), Oregon Rules of Evidence. The citations in this brief should satisfy Rule 201(c)(d)(2).

73. According to contemporary early 19th century British writers, statutes based on "ancient usage" forbid campaign contributions.

> The Act of 49th Geo III, c 118, proceeds on a preamble, that giving or promising money to procure a seat in Parliament is not bribery, if the money is not given or promised to a voter or returning officer; but that such gift or promise is contrary to the ancient usage, right, and freedom of election, and laws and constitution of the realm; and, therefore, if any person give, directly or indirectly, any sum, &c., on an engagement, &c., to procure, or endeavour to procure, the return of any person to serve in Parliament for any county, &c., the

(continued...)

conduct of political supporters and others. Wagering on elections was prohibited for similar reasons--because it gave third parties an incentive to influence election results.

These laws regulating campaigns were not seen as weakening the freedom of speech guaranteed in many early American state constitutions but as serving to strengthen free government envisioned by the Constitutional Convention delegates in 1789. This concern for protecting the American experiment in extended suffrage was the historical backdrop for both Article I, § 8, and Article II, § 8, of the Oregon Constitution. That the Oregon Constitution allows limits on campaigns is further evidenced by the statutes adopted by the Oregon Provisional Legislature (1844-1849), the Oregon Territorial Legislature (1849-1859), and early sessions of the state legislature. Many members of these legislatures were delegates to the 1857 Oregon Constitutional Convention. With the new Oregon Constitution fresh in their minds, they promptly (in 1864 and 1870) adopted limits on money and "influence" in election campaigns. Many of these statutes, in various forms, have remained on the books in Oregon ever since.

73.(...continued)

> consequences shall be, 1. Forfeiture of ££1000 by the person so offending; 2. If returned, incapacity to serve in that Parliament; 3. Forfeiture to the Crown of the gift, &c., by the receiver, besides a penalty of ££500. No action is maintainable at common law on bonds of this description; and this principle, combined with the fair protection is oppressive, and, in the eye of the law, unreasonable. Whatever injures the public interest is void, on the ground of public policy.

Patrick Shaw, A TREATISE ON THE LAW OF OBLIGATIONS AND CONTRACTS (T. & T. Clark 1847), p. 78.

Thanks to months of research and the availability of GOOGLE BOOKS, an historical record far superior to any considered in ***Vannatta I*** is available. That record shows that limits on political campaign contributions and expenditures were a recognized way of limiting undue influence in elections and campaigns, well before 1858.

1. LIMITS ON EXPRESSIONS IN FURTHERANCE OF PROTECTING THE RIGHTS OF SUFFRAGE HAVE BEEN IMPOSED SINCE THE 1600S.

The regulation of expressive conduct in the form of contributions during election campaigns is firmly within an historical exception to the scope of Article I, § 8.

In ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982), the Oregon Supreme Court explained that Article I, § 8, contains a broad prohibition on restraints on expression together with an historical exception.[74] ***State v. Ciancanelli***, *supra*, 339 Or at 290-291, elaborated:

> [A]mong the various historical crimes that are "written in terms" directed at speech, those whose *real* focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not.
>
> * * * Although the laws making those acts criminal may be "written in terms" directed at speech, all those crimes have at their core the accomplishment of present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society.

The party seeking to prove existence of an historical exception has the burden of more than a "mere showing of some legal restraints on one or another form of speech or

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74. The Court specifically identified, as examples of historical exceptions, the crimes of “perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.*

writing" and that Article I, § 8, was not intended to override such early legal restraints. ***State v. Henry***, 302 Or 510, 521, 732 P2d 9 (1987); ***Ciancanelli***, *supra,* 339 Or at 321-21.

First, the best evidence that Article I, § 8, was not intended to prohibit laws which protected free suffrage from all undue influence is the simultaneous adoption of Article II, § 8, in the original Oregon Constitution, as we now more clearly understand the original intention of the drafters and voters to protect "elections" in the expanded meaning of the election process, discussed at pages 18, 81-43, *ante*. We also here supply evidence of restrictions upon campaign expression which would bring such limits within the historical exception to the reach of Article I, § 8.

Second, using the ***Ciancanelli*** framework, while some provisions of Measure 26-200 may be written in terms limiting what some might consider expression (size of monetary contributions), the "real focus is on the underlying harm" of corruption of the participants and the outcome which taints the governance of the people for years. Americans did consider suffrage a fundamental right necessary to assure the health of the body politic. Corruption of the American experiment in democracy is both distinct from, and far "above and beyond," the harm caused by hearing "words" or seeing the effects of money during a campaign, satisfying the test set out in ***Ciancanelli***, 339 Or at 318.

Such dangers were real to Americans. The watchword for all the founders was "the public," which they understood to mean the collective interest of the citizenry, more enduring than the popular opinion of fleeting majorities. They all agreed that "faction" was improper, by which they meant interest groups that abandoned the public

good in favor of sectarian agendas or played demagogue politics with issues in order to confuse the electorate. Thus the founders condemned gaining votes by force, false statements, intrigue, corruption, "or by other means."[75]

Representative democracy and laws to assure free and fair suffrage were the solution, deemed essential by later writers.

> [T]he right of suffrage is at the foundation of our government * * *. If this right * * is improperly exercised, it so far tends to endanger the government-- * * * It will corrupt the people, because it will bring corrupt men and corrupt principles into action in the elections; and corrupt measures will be resorted to, as the means of gaining success. And it will corrupt the rulers, because they must resort to corrupt means to obtain and to keep their offices.

Samuel Jones, TREATISE ON THE RIGHT OF SUFFRAGE, (Otis, Broaders & Co. Boston 1842), p. 53.

Echoing Washington and Madison, courts upheld restrictions upon conduct and expression that had a merely "might" or had only a "tendency" to unduly influence even a single vote. An early New York case stated that wagering (a form of expression) on elections was against public policy because of the underlying harm it caused to voters: a tendency "to produce clamor, misrepresentation, abuse, discord; the

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75. James Madison warns in FEDERALIST NO. 10 that:

> Men of factious tempers, or local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people.

Madison begins FEDERALIST NO. 10: "Among the numerous advantages promised by a well-constructed union, none deserves to be more accurately developed than its tendency to break and control faction," which he goes on to describe as "this dangerous vice." George Washington criticized both false statements and physical intimidation arising from "faction" in his *Farewell Address*. Faction "agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foments occasionally riot and insurrection."

exertion of improper influence; of intrigue, bargain and corruption * * *." ***Rust v. Gott***, 9 Cow 169, 18 Am Dec 497 (NY 1828).[76] The North Carolina courts agreed on the essential nature of suffrage and need to curb all undue influences:

> Everything, not merely the proper action, but the very existence, of our institutions, depends on the free and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency, in any way, unduly to influence elections, is against public policy. This position we assume, as self-evident.

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). ***Bettis*** then condemns any wagering on elections because it leads to the underlying "self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such activities are certainly form of "expression" or "speech," yet they were not protected.

Kentucky courts (under a 1799 state constitution with terms very similar to Article I, § 8, and Article II, § 8) perceived the danger to the body politic:

> As was said by Lord Holt in a celebrated case, "a right that a man has to give his vote at the election of a person to represent him in parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing." (*Ashley vs. White,* 2 *Raym.,* 950.) Here, it is the fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against.

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76. "[T]he parties interested might be led to exert a corrupt influence upon that board, with a view to produce a fraudulent determination in favor of the candidates bet upon. The result of the state election, closely contested, may depend on a single county canvass, or even that of a single town. Some bearer of votes may, by management, be defeated in his purpose of attending. Thus, even after the poll closed, the evil consequences may be much more extensive than the influence of the single vote of an elector, which is the reason why a bet with him, previous to his vote being given, is void."

Rust v. Gott*, supra.*

Chrisman v. Bruce, 1864 WL 2499, *4 (KyApp 1863).

The manner in which lawmakers attacked the evil of undue influence changed over time. The earliest enactments sought to limit undue influence by restricting candidate expenditures or material inducements aimed at influencing voters at any time leading up to election day, including using money to express an opinion about an election result, which "might" incite corrupt behavior. This kind of regulation was joined well before 1857-58 by laws limiting campaign contributions.

First, a brief history of limits on expenditures during the election process shows that the colonies and states enacted laws patterned after 17th century British statutes adopted in the reign of King William III to limit abusive influence over potential voters during campaigns. Early statutes included restrictions on campaign conduct and financial transactions, such as third-party wagering and indirect efforts to influence voters. In 1695, Virginia limited candidate expenditures deemed improper, distinct from criminal bribery. In 1790 Virginia went further and prohibited legislative candidates from using any "reward" "to promote their election." 1 VA REV CODE 389 (1790). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Supreme Ct NY 1824).

> The legislature, in the act for regulating elections, (24 Sess ch 10 § 17) evince a disposition to guard them from undue influence, by prohibiting bribery, menace, or any other *corrupt means or device, directly or indirectly*, to influence an elector [1 Rev Stat 149]. They intended that the suffrages of the people should be, as far as possible, free and unbiassed [*sic*].

Lewis v. Few, 5 Johns 1, NY Sup (1809) (emphasis supplied). In 1801, North Carolina enacted a statute which forbid "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under

the penalty of two hundred dollars."[77] These early prohibitions target (1) the time period of the campaign, not just election day, and (2) the harm of corruption of potential voters, not miscounting ballots cast at elections.

These early efforts were soon followed by specific limits on campaign contributions. The laws limiting political contributions in place by 1857 were not just "some" restraints on "one or another" form of speech, but specific limits on contributing money to political campaigns, meeting the level of specificity required by ***Ciancanelli***. In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843). Referring to the policy behind New York's campaign contribution limits passed in 1829 (after ***Rust v. Gott***, *supra*, was decided), a court stated in 1858:

> [I]ts provisions were designed to prohibit contributions in money to a common fund to be expended for election purposes, and which might be employed by unscrupulous men to demoralize and corrupt the electors and to defeat the public will.

Hurley v. Van Wagner, *supra.*

By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed any candidate before an election or primary election") "to

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77. The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch of an act passed in 1777, and the 23rd was originally passed in 1801.

Duke v. Asbee, *supra* (emphasis in original).

receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND (Lucas 1852), p. 90. We have previously discussed (page 31, *ante*) the 1856 Texas statute, prohibiting "furnish[ing] money to another, to be used for the purpose of promoting the success or defeat of any particular candidate."

The existence of an historical exception within the meaning of ***Robertson*** to what might otherwise be protected by Article I, § 8, is fully demonstrated by the Texas statute limiting political contributions adopted in 1856; the New York statute of 1829, making it unlawful for "any candidate for an elective office, or for any other person, with intent to promote the election of any such candidate * * * to contribute money for any other purpose intended to promote an election of any particular person or ticket"; and the Maryland statute of 1852, making it unlawful "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate."

Ciancanelli, and ***Stranahan***, *supra*, caution that, even if proponent shows that a precedent was not correctly decided, that proponent must also persuade the Court that overturning the challenged precedent would not be disruptive.

Revisiting the holding in ***Vannatta I*** would not adversely the body of originalist constitutional interpretation which has developed, but instead would set a valuable new standard for historical analysis. Since ***Priest v. Pearce***, *supra*, was decided in 1992, the Oregon Supreme Court has relied solely upon WEBSTER'S (1828) for constitutional interpretation in few cases other than ***Vannatta I***. In each of those other cases, the word(s) under consideration had reached an expanded "modern" meaning long before

1857 and the WEBSTER'S (1828) definition merely confirms that long-understood usage.[78]

In contrast, in ***Vannatta I***, for whatever reasons, Webster ignored a widespread common usage. While appearance in the (1828) work can suggest that meanings had become settled before 1857, absence from the (1828) compilation does not prove much about rapidly-evolving American usage decades later.

In considering a word with legal connotation, the Supreme Court has discussed but not relied upon WEBSTER'S (1828) alone. The other cited sources have included John Bouvier's, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (various editions), terms in other state constitutions, and other historical

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78. ***State v. Wheeler***, 343 Or 652, 655, 175 P3d 438, 441 (2007) (opinion refers to WEBSTER'S (1828) for confirmation that "proportion" had long meant a "comparative relation" in construing Oregon Constitution Article I, § 16); ***State v. Ciancanelli***, 339 Or 282, 293, 121 P3d 613, 619 (2005) (Court relies on this source for the meaning of "expression," which appears to have been used in a wide variety of contexts by (1828), in construing Article I, § 8); ***Bobo v. Kulongoski***, 338 Or 111, 120, 107 P3d 18, 23 (2005) (Court relies upon WEBSTER'S (1828) for a definition of "raise" and "revenue," which had both acquired "modern" meanings by (1828)); ***State v. Vasquez***, 336 Or 598, 604, 88 P3d 271, 274 (2004), (opinion turns to WEBSTER'S (1828) for the term "justice" in Article I, § 10, concluding that the word "had a meaning similar to that of today"); ***MacPherson v. Dept. of Administrative Services***, 340 Or 117, 130 P3d 308 (2006), (Court uses WEBSTER'S (1828) for "suspend," which had acquired its current usage).

texts.[79] The Court of Appeals has cited WEBSTER'S (1828) a number of times, but in each decision it has relied upon additional mid-19th century sources.[80]

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79. ***Juarez v. Windsor Rock Products, Inc***, 341 Or 160, 169-170, 144 P3d 211, 215-216 (2006), refers to WEBSTER'S (1828) in construing early meanings of "property," a word which appears to have long since reached its current meaning. ***Juarez*** does not rest exclusively on WEBSTER'S but uses historical sources including BLACKSTONE'S COMMENTARIES and BLACK'S DICTIONARY OF LAW CONTAINING DEFINITIONS OF THE TERMS AND PHRASES OF AMERICAN AND ENGLISH JURISPRUDENCE, ANCIENT AND MODERN (1891). The following opinions reference both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES: ***Rico-Villalobos v. Giusto***, 339 Or 197, 207, 118 P3d 246, 252 (2005) (context for the meaning of "evident" in Article I, § 14); ***State v. MacNab***, 332 Or 469, 476, 51 P3d 1249 (2002) (interpreting "punishment" in Article I, § 21). WEBSTER'S (1828) is cited with additional sources in the following: ***State v. Caven***, 337 Or 433, 443, 98 P3d 381, 386 (2004) (John Bouvier's law dictionary); ***Coast Range Conifer, LLC v. Or. State Board of Forestry***, 339 Or 136, 117 P3d 990 (2005) (other state constitutions); ***Lakin v. Senco Products, Inc.***, 329 Or 62, 69, 987 P2d 463, 468 (1999) (other 19th Century dictionaries).

80. ***State v. Norris***, 188 OrApp 318, 332, 72 P3d 103, 110-11 (2003), cites WEBSTER'S and relies additionally upon Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY (1867) and John Bouvier, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (rev 6th ed 1856). ***Lahmann v. Grand Aeire of Fraternal Order of Eagles***, 202 OrApp 123, 135, 121 P3d 671, 678 (2005), uses WEBSTER'S (1828) and a number of state constitutions to consider the meaning of "to assemble," as used in Article I, § 26. In ***Allen v. Employment Division***, 184 OrApp 681, 685-6, 57 P3d 903, 904 (2002), the court reviewed both WEBSTER'S (1828) and BLACKSTONE'S COMMENTARIES. ***City of Keizer v. Lake Labish Water Control Dist.***, 185 OrApp 425, 60 P3d 557 (2002), considers WEBSTER'S (1828) definition of "private" in trying to determine "private property" in the takings clause, also considering a number of 19th Century texts on eminent domain. In the following cases seeking historical meaning of a word or phrase, the Court refers to both WEBSTER'S (1828) and an edition of Bouvier: ***American Federation of Teachers-Oregon v. Oregon Taxpayers United PAC***, 208 OrApp 350, 405 n 17, 145 P3d 1111 (2006) (construing constitutional meaning of "people," considering Article IV, § 1); ***Liberty Northwest Ins. Corp. v. Oregon Ins. Guarantee Ass'n***, 206 OrApp 102, 113, 136 P3d 49, 55 (2006) (whether "man" includes artificial entities and definition of a legislative "Act"); ***State v. Watters, Jr.***, 211 OrApp 628, 642, 156 P3d 145, 153, (2007) (meaning of "open" and "unclaimed" in an 1855 Treaty);

(continued...)

Overturning ***Vannatta I*** would not "unduly cloud or complicate the law." ***State v. Ciancanelli***, *supra*, 339 Or at 291. In ***Stranahan*** the reconsidered decision was 10 years old; here, ***Vannatta I*** was rendered 22 years ago (February 1997). No later decision has relied on upon ***Vannatta I***'s reasoning to strike down campaign finance limits.

2. *VANNATTA I*'S CONCLUSIONS BASED ON ORIGINALISM ARE CONTRADICTED BY THE NUMEROUS STATES HAVING THREE FACTORS IN COMMON WITH OREGON.

Vannatta I is unique in American jurisprudence. Westlaw searches produce not a single case in which the courts of another state have cited ***Vannatta I*** for the proposition that a state free expression clause restricts the power of the state to limit political campaign contributions. Westlaw shows ***Vannatta I*** as the only case in which ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976) was "not followed on state law grounds." Legal encyclopediae list the Oregon case as the only example of campaign contribution limits having been invalidated on the basis of a state constitution.[81]

This uniqueness calls into question the accuracy of the ***Vannatta I*** historical analysis, because (1) at least 37 states have free expression clauses essentially identical to Oregon's, (2) each of those states has limits on campaign contributions, and (3)

80.(...continued)
State v. Jackson, 178 OrApp 233, 239, 36 P3d 500, 502-503 (2001) (meaning of "public" trial).

81. See, e.g., *Constitutional Validity of State or Local Regulation of Contributions by or to Political Action Committees*, 24 ALR 6th 179 (2019); *State Regulation of the Giving Or Making of Political Contributions Or Expenditures by Private Individuals*, 94 ALR3d 944 (2019).

many of those states apply originalism or an historical approach to determining the meaning of their state constitutions, similar to that adopted in ***Vannatta I*** and ***Robertson***.

As listed at page 4, *ante*, at least 37 states currently have "free speech" clauses either identical to Oregon's or functionally identical, most of which were adopted in the late 1700s and early 1800s, prior to the Oregon Constitutional Convention of 1857.[82] Each declares that every person has the right "to speak, write, or print freely on any subject." Some use the word "publish" instead of "print," but they are otherwise the same as Oregon's.[83] Other states have adopted a Bill of Rights formulation more closely akin to the U.S. Constitution. Of these 37 states, <u>all</u> have numeric limits on political campaign contributions. Our examination of the decisions of each state's highest court has yet to discern an approach to constitutional interpretation different from the originalism or historical analysis applied in ***Vannatta I*** or ***Robertson***.[84]

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82. For example, Kentucky (admitted 1792, constitution 1799), Louisiana (admitted 1812, constitution with free expression provision 1848), Alabama (admitted 1813, constitution 1819), Florida (constitution 1838, admitted 1845), Indiana (admitted 1816), Illinois (admitted 1818), Missouri (admitted 1820), Ohio (admitted 1803), Michigan (admitted 1837), Texas (constitution 1845), California (constitution 1850), Minnesota (constitution 1858). The constitutions of Connecticut, Delaware, George, Maryland, New York, New Jersey, Pennsylvania, and Virginia were adopted near the time of the 1789 constitutional convention.

83. This list was produced by doing a natural language search in the Westlaw state constitutions database, using the language of Article I, § 8, as the search term.

84. See, e.g., ***Golden Gateway Center v. Golden Gateway Tenants Association***, 26 Cal4th 1013, 29 P3d 797 (2001) (free speech clause); ***Bush v. Holmes***, 886 So2d 340 (Fla 2004); ***Malone v. Shyne***, 936 So2d 1279 (LaApp 2006); ***Archer Daniels Midland Co. v. Seven Up Bottling Co.***, 746 So2d 966 (Ala 1999);

(continued...)

Yet, none of highest courts of those states has struck down limits on political campaign contributions or expenditures as contrary to the state constitution. This would indicate no support for the conclusion that these free expression clauses in state constitutions contemporaneous with adoption of the Oregon Constitution were believed to have banned limitations on political campaign contributions.

Thus, application of the originalist approach to 37 state constitutions with free expression clauses equivalent to Oregon's has yet to produce even a single decision that comes to the same result as ***Vannatta I***.

3. INDIANA, THOUGHT TO BE THE SOURCE OF OREGON'S ARTICLE I, § 8, HAS STRICT LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS AND EXPENDITURES.

Article I, § 8, of the Oregon Constitution is verbatim to a provision in the Indiana Constitution, which has been thought to be its model. Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857-Part I,* 37 WILLAMETTE L REV 469, 526 (2001).

As shown previously, many states had essentially the same free expression clause at the time of the adoption of the Oregon Constitution (along with a close analog to Article II, § 8), including Kentucky, Mississippi, Connecticut, Alabama, Florida, Texas, Louisiana, and California. Additionally, before 1858 Vermont,[85] Michigan,[86]

84.(...continued)
American Bush v. City of South Salt Lake, 140 P3d 1235 (Utah 2006) (free speech clause); ***McIntosh v. Melroe Co.***, 729 NE2d 972 (Ind 2000); ***Golden v. Johnson Memorial Hosp., Inc.***, 66 ConnApp 518, 785 A.2d 234 (2001).

85. (1793 version) Chapter I, § 13: The people have a right to a freedom of speech, and of writing and publishing their sentiments concerning the transactions of government, and therefore the freedoms of the press ought not to be restrained.

Iowa,[87] and New Jersey[88] had in place very close analogs to Oregon's Article I, § 8. All of these states have limits on political campaign contributions. The limits in Indiana are stated by the Federal Election Commission (FEC):

> **Limitations on Amounts of Contributions.** Corporations and labor organizations are limited to total political contributions, in any calendar year, of an aggregate of $5,000 apportioned in any manner among all candidates for state offices (including a judge of the court of appeals whose retention in office is voted on by a district that does not include all of the state) [56]; an aggregate of $5,000 apportioned in any manner for the political party state committees [57]; an aggregate of $2,000 apportioned in any manner for all candidates for state senate [58]; an aggregate of $2,000 apportioned in any manner for all candidates for state house [59]; an aggregate of $2,000 apportioned in any manner among regular party committees organized by a legislative caucus of the state senate [60]; an aggregate of $2,000 apportioned in any manner among regular party committees organized by a legislative caucus of the state house of representatives [61]; and an aggregate of $2,000 apportioned in any manner for all candidates for school board offices and local offices [62]; and an aggregate of $2,000 apportioned in any manner among all central committees other than state committees [63].

FEC, CAMPAIGN FINANCE LAW 2002: SUMMARY OF STATE CAMPAIGN FINANCE LAWS (2004).[89] Thus, Indiana limits every corporation and labor organization to a grand total of only $5,000 per year in political contributions pertaining to all statewide offices.

86.(...continued)

86. (1835) Art I, § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right: and no laws shall be passed to restrain or abridge the liberty of speech or the press.

87. (1844) Art II , § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press.

88. (1844 Constitution) Art I, § 5: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

89. This publication is at http://www.fec.gov/pubrec/cfl/cfl02/cfl02.shtml.

Indiana adopted its constitution in 1851, with the identical free expression clause as Oregon used in 1857. Indiana has also adopted the doctrine of constitutional originalism, requiring that the Indiana Constitution be interpreted in light of the knowledge and intent of its framers.[90] Oregon convention delegates had copies of the Indiana Constitution (and all other extent state constitutions) with them during the Constitutional Convention. Are we to conclude that the Indiana constitutional convention delegates had an entirely different world view and that the Indiana framers must have known more about limits on political contributions and expenditures in 1851 than the Oregon framers knew in 1857, because the limits on campaign contribution and expenditure in Indiana have never been struck down, despite Indiana's exact same free expression clause and its doctrine of constitutional originalism?

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90. Proper interpretation and application of a particular provision of the Indiana Constitution requires a search for the common understanding of both those who framed it and those who ratified it. ***Collins v. Day***, 644 N.E.2d 72, 75-76 (Ind. 1994); ***Bayh v. Sonnenburg***, 573 N.E.2d 398, 412 (Ind.1991). Furthermore, "the intent of the framers of the Constitution is paramount in determining the meaning of a provision." ***Boehm v. Town of St. John***, 675 N.E.2d 318, 321 (Ind. 1996); ***Eakin v. State ex rel. Capital Improvement Bd. of Managers of Marion County***, 474 N.E.2d 62, 64 (Ind. 1985). In order to give life to their intended meaning, we "examin[e] the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions." ***Indiana Gaming Comm'n v. Moseley***, 643 N.E.2d 296, 298 (Ind. 1994). See also ***Price v. State***, 622 N.E.2d 954, 957 (Ind. 1993); ***State Election Bd. v. Bayh***, 521 N.E.2d 1313 (Ind.1988). In construing the constitution, we "look to the history of the times, and examine the state of things existing when the constitution or any part thereof was framed and adopted, to ascertain the old law, the mischief, and the remedy." ***Sonnenburg***, 573 N.E.2d at 412 (citing ***State v. Gibson***, 36 Ind. 389, 391 (1871)).

McIntosh v. Melroe Co., 729 N.E.2d 972, 985 (Ind 2000).

4. THE HISTORICAL ANALYSIS IN *VANNATTA I* PLACED THE BURDEN OF PROOF ON THE WRONG PARTY.

The approach of ***Vannatta I*** was to find unconstitutional any limitation on speech that could not be documented as an historical exception to the protections of Article I, § 8. But this approach itself is contradicted by the contemporaneous understanding of the meaning of the free speech clauses of the state constitutions.

The most respected commentor on state constitutions was Thomas Cooley.

> The standard general work on state constitutional interpretation was Thomas M. Cooley's A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, first published in 1868 and updated in numerous subsequent editions. Many courts relied on this work as authority, referring to it simply as "Cooley's Constitutional Limitations." That work, however, is now very far out of date, but still relied upon by a number of state courts.

R.F. Williams, *Interpreting State Constitutions as Unique Legal Documents*, OKLAHOMA CITY UNIVERSITY LAW REVIEW (Spring 2002), p. 193 (footnotes omitted). Cooley in his original 1868 treatise stated that the free expression clauses of state constitutions were not intended to grant new rights but instead to prevent the erosion of existing free expression rights recognized by the common law.

> It is to be observed of these several provisions, that they recognize certain rights as now existing, and seek to protect and perpetuate them, by declaring that they shall not be abridged, or that they shall remain inviolate. They do not create new rights, but their purpose is to protect the citizen in the enjoyment of those already possessed. We are at once, therefore, turned back from these provisions to the common law, in order that we may ascertain what the rights are which are thus protected, and what is the extent of the privileges they assure.

Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION (Little, Brown 1868), pp. 416-17[91]

Thus, the correct question for historical analysis is whether the residents of Oregon had a common law right to make unlimited political campaign contributions and expenditures, unlimited by statute. Absent proof of such a common law right, Article I, § 8, did not by itself create such a right, as the free expression clauses in state constitutions, as understood by the leading commentator in 1868, did not create new rights.

Vannatta I thus placed the burden of historical proof on the wrong side by requiring proof that limits on CC&Es were a recognized historical exception to free speech protection.[92]

G. LIMITS ON CAMPAIGN CONTRIBUTIONS AND INDEPENDENT EXPENDITURES ARE NOT RESTRICTIONS ON EXPRESSION OR THE CONTENT OF SPEECH.

Nothing in Measure 26-200 prevents individuals or entities from expressing their support or opposition to candidates for public office or from expressing any opinion whatsoever.[93] They are all free to speak, write, and publish on this subject. Measure

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91. http://books.google.com/books?id=vOI9AAAAIAAJ.

92. This issue regarding how state free expression clauses were contemporaneously understood as granting no new rights is not addressed in ***State v. Ciancanelli***, 339 Or 282, 121 P3d 613, 618 (2005).

93. Measure 26-200 on its face does not forbid speech. If a statute "does not on its face forbid speech, it follows that the statute does not on its face violate rights protected by Article I, section 8." ***Slate v. Chakerian***, 325 Or 370, 380, 938 P2d 756 (1997).

26-200 regulates only the conduct or action of making campaign contributions and independent expenditures beyond certain limits.

Measure 26-200 does not proscribe expression. Instead, it proscribes the harm of undue influence of money on candidates and officeholders who depend upon large campaign contributions in order to be elected. See ORS Chapter 259, § (1), which finds that campaign contributions are given in order to obtain (1) special access to the candidate or officeholder by the donor and (2) special treatment by officeholders receiving the contributions.

As shown at pages 8-15, *ante*, ***Vannatta II*** has withdrawn the statement in ***Vannatta I*** that "the contribution, in and of itself, is the contributor's expression of support for the candidate or cause." The Oregon Supreme Court now recognizes that transfers of property (including money) are not expression, so limits on such transfers are not "directed to the *substance* of any opinion or any subject of communication" and "do not refer to expression at all." ***State v. Moyer***, *supra*, 348 Or at 229. Thus, they must be "analyzed for vagueness or for as-applied constitutionality. *Id.* (citing ***State v. Plowman***, 314 Or 157, 164, 838 P2d 558 (1992), *cert denied*, 508 US 974, 113 SCt 2967, 125 LEd2d 666 (1993)). None of Measure 26-200 is vague, and there is no as-applied challenge to any of its limitations.

Further, Measure 26-200 does not prevent any individual from expressing support for a candidate via a campaign contribution (of up to $500 plus contributions made via Small Donor Committees). As noted in ***Buckley v. Valeo***, *supra*, expression of support occurs when a contribution is made, regardless of its size. So, to the extent that a

monetary contribution "expresses" support, that expression is not hampered by a contribution limit.

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 US at 635-36. Measure 26-200 also allows any individual to make independent expenditures of up to $5,000 in each race of Portland public office. Thus, Measure 26-200 does not impair the opportunity for anyone to express support for or opposition to a candidate. It merely establishes that the avenue is not a superhighway with no lines and no speed limits. It is akin to the content-neutral time, place, and manner restrictions upheld in ***Outdoor Media Dimensions, Inc. v. Dept. of Transportation***, 340 Or 275, 132 P3d 5 (2006) (size and placement of billboards), and in ***State v. Rich***, 218 OrApp 642, 180 P3d 744 (2008) (statute prohibiting "unreasonable noise").

Measure 26-200 does not apply to the content of any expression. It does not stop candidates or anyone else from speaking, writing, or printing anything. Under Measure 26-200, all persons are free, in addition to making contributions and expenditures, to use 100% of their volunteer time and effort to support or oppose candidates. Measure 26-200 just stops corporations and unions and others from providing money to obtain access and favors from politicians or even appearing to do so. It is undisputable that money provides an overwhelming megaphone for the speech of those candidates receiving the large contributions. See ORS Chapter 259, § (1)(d)

(documenting that the bigger spenders win over 90% of the legislative races in Oregon).

The Measure 26-200 political campaign contribution limits are not content-based. The act of giving money does not have content. If it did, then Oregon could not lawfully impose its full panoply of laws requiring disclosure and reporting of political campaign contributions and expenditures, as such restrictions would apply only to "political speech" and thus be forbidden content-based restrictions. **If political campaign contributions are expression**, then how can Article I, § 8, forbid numeric limits on contributions but allow all sorts of other limitations, such as requirements that no contributions be accepted and no expenditures be made, except those which are reported to government officials on a specified schedule? Those limitations are no less aimed at the content of "political speech" than are Measure 26-200's contributions limits. The existing reporting requirements apply only to financial transactions involving "political speech." They illustrate that the Oregon Constitution is not offended by restrictions that apply only to "political speech," when in fact those are restrictions on the giving or receiving of money.

H. MEASURE 26-200 FOCUSES ON THE HARMS OF UNLIMITED CONTRIBUTIONS, NOT ON SUPPRESSING CONTENT OF THE SPEECH.

The Oregon Supreme Court has allowed limitations on speech by laws that "focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing." ***State v. Ciancanelli***, *supra*, 339 Or at 296.

> [A]mong the various historical crimes that are "written in terms" directed at speech, those whose *real* focus is on some underlying harm or offense may

> survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not.
>
> * * * Although the laws making those acts criminal [perjury, etc.] may be "written in terms" directed at speech, all those crimes have at their core the accomplishment of present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be presumed to cause to the hearer or to society. * * * Article I, section 8, is concerned with prohibitions that are directed at the content of speech, not with prohibitions that focus on causing palpable harm to individuals or groups.

In addition to the harm to public trust in the judiciary noted in ***Fadeley***, *supra*, an example of harm to a group which is "above and beyond" the message to the hearer is found in ***Stoneman***, *supra*. While the restriction on pornography was a pure restriction on expressive content, the Court found it valid because it was intended to prevent harm to a vulnerable group--children (even though the statute made no explicit reference to such harm). Exploitation of children is a harm entirely distinct from any asserted harm that prurient materials may cause to an observer. Likewise, even if limits on political campaign contributions and expenditures were pure restrictions on speech based on its content, they are justified by preventing the harm that unlimited political spending imposes upon democracy, as expressly set forth in the text of ORS Chapter 259, including its § (1).

I. LIMITS ON RECEIVING CAMPAIGN CONTRIBUTIONS ARE WITHIN THE INCOMPATIBILITY EXCEPTION TO ARTICLE I, SECTION 8.

In re Fadeley, *supra*, upheld a pure limitation on political speech (ban on solicitation of campaign contributions by a candidate for judicial office), because doing so served an important state interest in "the appearance of judicial integrity." 310 Or

at 564. The important societal interests in limiting political campaign contributions and expenditures are set forth in detail in § (1) of ORS Chapter 259.[94]

Vannatta I, however, characterized the ***Fadeley*** decision as hinging on the "incompatibility exception" to Article I, § 8. It rejected that exception, because "it cannot be contended that the expression in question (contributions) actually impairs performance of, e.g., legislative functions in all cases." 324 Or at 542. But the Legislature has now found, as fact, that contributions of unlimited size do generically and universally impair the legislative function. ORS Chapter 259, § (1) (*passim*).

Vannatta I rejected the incompatibility exception, based upon a undocumented recitation of history.

> Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions.

324 Or at 541. These statements were not supported by evidence in the record of the case or by citations to historical documents. In any event, these factual findings are now comprehensively contradicted by the specific legislative findings of fact adopted by the voters of Oregon in Measure 26-200 and in § (1) of ORS Chapter 259, which are entitled to near complete judicial deference. See page 45, *ante*.

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94. The Court in ***Fadeley*** used the balancing approach familiar in First Amendment litigation. Such a test would validate contribution limits, as in Measure 47, as it has in other cases involving contribution limits, such as ***Buckley v. Valeo***, *supra*, and ***Shrink Missouri***, *supra*.

J. MEASURE 26-200 IS WITHIN THE HISTORICAL EXCEPTION FOR COUNTERING BRIBERY.

The Oregon Supreme Court's analysis of Article I, § 8, would validate statutes that address bribery, since bribery was punishable under common law and countering bribery is a longstanding exception to freedom of speech protection. ***Nixon v. Shrink Missouri Gov't PAC***, 528 US 377, 389, 120 SCt 897, 905 (2000); ***Buckley v. Valeo***, *supra*, 424 US at 27, 96 SCt at 639 (1976). Further, combatting bribery is specifically authorized by Article II, § 8, of the Oregon Constitution, which states:

> 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.

Despite this history, in Oregon bribing public officials with campaign contributions in Oregon is deemed to be legal by statutes that allow *quid pro quo* bribery if the *quid* is clothed as a campaign contribution. A person can hand over money to a public official in direct exchange for the public official's official act, including a vote on a bill or approval of a government contract for the person or her business, as long as the money is a political campaign contribution.

The bribery statutes, ORS 162.005, 162.105, and 162.025, all depend upon the bribery offering or the target accepting a "pecuniary benefit."[95]

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95. **162.015 Bribe giving.**

> (1) A person commits the crime of bribe giving if the person offers, confers or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in an official capacity.

(continued...)

> **162.005 Definitions for ORS 162.005 to 162.425.** As used in ORS 162.005 to 162.425, unless the context requires otherwise: (1) "Pecuniary benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, in the form of money, property, commercial interests or economic gain, but does not include a political campaign contribution reported in accordance with ORS chapter 260.

The statutes excludes all campaign contributions from the definition of "pecuniary benefit." So, no matter what the public official agrees to do in exchange for a political contribution, the actions of the donor and of the public official or candidate do not constitute bribery.

And the public official can use campaign contribution money for almost anything, including personal benefit. She can literally put the money into her personal bank account as a salary or for rent on maintaining an office in her spare bedroom, as shown at pages 12-15, *ante*. Any public official in Oregon can maintain campaign

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95.(...continued)

(2) Bribe giving is a Class B felony.

162.025 Bribe receiving.

(1) A public servant commits the crime of bribe receiving if the public servant:

(a) Solicits any pecuniary benefit with the intent that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced; or

(b) Accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that the vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

(2) Bribe receiving is a Class B felony.

committees and accept contributions and make expenditures, whether or not the public official ever runs for office again.

And the Oregon Court of Appeals ruled in 1993 that there is no possibility of "bribe giving" from the making of a campaign contribution, even if the campaign contribution is not reported to the government.

> [W]e should exercise our good sense and read the bribery statute as exempting any campaign contribution that is required to be reported by the donee under ORS chapter 260, even if the donee fails to report it.

State v. Gyenes, 121 OrApp 208, 213, 855 P2d 642, 644 (1993).

Portland cannot solve this problem locally by adopting an ordinance that defines bribery of public officials to include doing official acts in exchange for campaign contributions. But local governments do not have authority to deem certain conduct to be a crime, if a state statute permits that conduct. As the Oregon Court of Appeals stated in ***State v. Robison***, 202 OrApp 237, 241, 120 P3d 1285 (2005):

> Article XI, section 2, of the Oregon Constitution provides that cities and towns of Oregon have the authority generally to enact local ordinances "subject to the Constitution and criminal laws of the State of Oregon." In ***City of Portland v. Dollarhide***, 300 Or 490, 501, 714 P2d 220 (1986), the Supreme Court explained that the foregoing limitation prohibits local governments from enacting ordinances that "conflict" with state criminal laws. A local ordinance is said to "conflict" with state criminal law if it prohibits conduct that the state statute permits or permits conduct that the state statute prohibits. *Id.* at 502, 714 P2d 220.

So the way for Portland to restrict the opportunity for legal actual bribery of public officials by means of campaign contributions is to limit the size of allowable campaign contributions to a level sufficiently low that public officials would not be tempted to take official actions in exchange for such a contribution. That is what Measure 26-200 accomplishes.

IV. THE MEASURE 26-200 LIMITS ON CONTRIBUTIONS ARE NOT INCONSISTENT WITH THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

A. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY UPHELD LIMITS ON CAMPAIGN CONTRIBUTIONS.

> Going back to ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976), restrictions on political contributions have been treated as merely "marginal" speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. See ***Colorado Republican***, *supra*, at 440, 121 SCt 2351. "While contributions may result in political expression if spent by a candidate or an association ..., the transformation of contributions into political debate involves speech by someone other than the contributor." ***Buckley***, *supra*, at 2021, 96 SCt 612. This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involving 'significant interference' with associational rights" passes muster if it satisfies the lesser demand of being " 'closely drawn' to match a 'sufficiently important interest.'" ***Nixon***, *supra*, at 387-388, 120 SCt 897 (quoting ***Buckley***, *supra*, at 25, 96 SCt 612); cf. ***Austin***, *supra*, at 657, 110 SCt 1391; ***Buckley***, *supra*, at 4445, 96 SCt 612.9

Fed. Election Comm'n v. Beaumont, 539 US 146, 161-62, 123 SCt 2200, 2210 (2003).

Exhibit 4 shows that many states have contribution limits similar to those of Measure 26-200. The limits applicable to candidates for local office are typically lower than for statewide candidates and usually lower than for candidates for the state legislature. Exhibit R2 is a brief survey of states with relatively low contribution limits in legislative races, which generally correspond to limit applicable in contests for local office. None of these limits has been invalidated in court.

In addition, many cities and counties have their own limits on campaign contributions that are lower than state-imposed limits. For the sake of brevity, we offer only California and Washington. Exhibit R3 shows the contribution limits

imposed by 109 California cities for their races for city council. The limit in large cities there is typically $250 - $700 (see Berkeley, Long Beach, Los Angeles, Oakland, San Diego, San Francisco, San Jose). Seven cities there have a limit of $100. None of these limits has been invalidated in court.

Exhibit R4 shows the contribution limits in Washington, including those applicable to local offices. The contribution limit applicable to all individuals, PACs, unions, corporations and other entities is $1,000 per election. Some local jurisdictions, including Seattle, have adopted lower limits. Seattle limits contributions to candidates for any public office to $500 per election. None of these limits has been invalidated in court.

The Missouri limits upheld in ***Nixon v. Shrink Missouri Government PAC***, *supra*, ranged to as low as $275 per person per election.

> "[T]he prevention of corruption and the appearance of corruption" was found to be a "constitutionally sufficient justification," [***Buckley***], at 2526, 96 SCt 612: "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions .... Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.*, at 2627, 96 SCt 612 (quoting ***Civil Service Comm'n v. Letter Carriers***, 413 US 548, 565, 93 SCt 2880, 37 LEd2d 796 (1973)).

Nixon v. Shrink Missouri Gov't PAC, 528 US at 388-89.

> In speaking of "improper influence" and "opportunities for abuse" in addition to "quid pro quo arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors. These were the obvious points behind our recognition that the Congress could constitutionally address the power of money "to influence governmental

> action" in ways less "blatant and specific" than bribery. ***Buckley v. Valeo***, 424 U.S., at 28, 96 SCt 612.4

Nixon v. Shrink Missouri Gov't PAC, 528 US at 389.

> In defending its own statute, Missouri espouses those same interests of preventing corruption and the appearance of it that flows from munificent campaign contributions. Even without the authority of ***Buckley***, there would be no serious question about the legitimacy of the interests claimed, which, after all, underlie bribery and antigratuity statutes. While neither law nor morals equate all political contributions, without more, with bribes, we spoke in ***Buckley*** of the perception of corruption "inherent in a regime of large individual financial contributions" to candidates for public office, *id.*, at 27, 96 SCt 612, as a source of concern "almost equal" to quid pro quo improbity, *ibid.* The public interest in countering that perception was, indeed, the entire answer to the overbreadth claim raised in the Buckley case. *Id.*, at 30, 96 SCt 612. This made perfect sense. Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works "only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." ***United States v. Mississippi Valley Generating Co.***, 364 US 520, 562, 81 SCt 294, 5 LEd2d 268 (1961).

Nixon v. Shrink Missouri Gov't PAC, 528 US at 390.

That unlimited campaign contributions in Oregon pose a threat of corruption and appearance of corruption is demonstrated throughout the Voters' Pamphlet statements on Measure 26-200 (Exhibit 2), the literature distributed to most Portland households (Exhibit 3), and the declarations filed with this memorandum.

> And although majority votes do not, as such, defeat First Amendment protections, the statewide vote on Proposition A certainly attested to the perception relied upon here: "[A]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." ***Carver v. Nixon***, 882 FSupp 901, 905 (WD Mo), rev'd, 72 F3d 633 (CA 8 1995); see also 5 FSupp2d, at 738, n7.

Nixon v. Shrink Missouri Gov't PAC, 528 US at 394.

> Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by respondents,

"[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." ***Nixon v. Shrink Missouri Gov't PAC***, 528 US at 394-95.

The only contribution limits struck down by the U.S. Supreme Court were those in ***Randall v. Sorrell***, 548 US 230, 126 SCt 2479, 165 LEd2d 482 (2006). No opinion in that case was supported by a majority of the Justices. The Ninth Circuit has determined that there was no majority, controlling opinion in ***Randall*** and that it does not provide precedent.

> As a result, there was no majority, controlling opinion in ***Randall***: "The only binding aspect of ***Randall*** ... is its judgment, striking down the Vermont contribution limit statute as unconstitutional."

Lair v. Bullock, 798 F3d 736, 744 (9th Cir 2015).

> With no majority opinion, ***Randall*** cannot serve as the requisite "controlling authority" capable of abrogating our precedent.

Lair v. Bullock, 798 F3d at 747. Despite its lack of precedential effect, we discuss ***Randall v. Sorrell***, as the Vermont statute at issue was very different from Measure 26-200.

The plurality opinion evaluated the Vermont limitations on both campaign contributions and overall expenditures by candidates as a package and found these troubling elements, none of which exist in Measure 26-200:

> Act 64, which took effect immediately after the 1998 elections, imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," i.e., the primary plus

> the general election, in approximately the following amounts: governor, $300,000; lieutenant governor, $100,000; other statewide offices, $45,000; state senator, $4,000 (plus an additional $2,500 for each additional seat in the district); state representative (two-member district), $3,000; and state representative (single member district), $2,000. 2805a(a).

Randall v. Sorrell, 548 US at 237. Measure 26-200 has no limits on the amounts that any candidate's campaign can spend.

> Act 64 also imposes strict contribution limits. The amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle" is limited as follows: governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200. 2805(a). Unlike its expenditure limits, Act 64's contribution limits are not indexed for inflation.

Randall v. Sorrell, 548 US at 237. Measure 26-200's contribution limits are more lenient. While it has both limits on the making of contributions and receiving of contributions, expressed from the point of view of a contributor, it allows in any Election Cycle any individual to:

1. contribute up to $500 directly to any candidate for Portland public office; plus

2. contribute up to $100 to any number of Small Donor Committees (each of which can contribute to any candidate(s) and can make unlimited independent expenditures to support or oppose any candidate; plus

3. contribute any amount to any number of other Political Committees (each of which can contribute up to $500 directly to any candidate and also make up to $10,000 in independent expenditures to support or oppose any candidate); plus

4. make independent expenditures of up to $5,000 to support or oppose any candidate.

In effect, Measure 26-200 allows any individual to spend unlimited amounts of money to support or oppose any candidate, as long as a sufficient number of Small Donor Committees and/or other Political Committees exist or are created. There are

no limits on the number of Small Donor Committees or Political Committees. Measure 26-200 does significantly change the way such spending must be disclosed to the public and does significantly limit contributions and independent expenditures by non-humans ("Entities"). And Measure 26-200 § (5) indexes all of its limits for inflation.

The Vermont package had other troubling elements pertaining to limits on political parties, since the statute applied to all candidate contests. Measure 26-200 applies only to nonpartisan candidate races, because all Portland offices are elected on a nonpartisan basis.

> Thus, for example, the statute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate's campaign for governor (during the primary and the general election together) to $400. The Act also imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle. 2805(a).

Randall v. Sorrell, 548 US at 238-39.

> We are aware of no State that imposes a limit on contributions from political parties to candidates for statewide office lower than Act 64's $200 per candidate per election limit.

Randall v. Sorrell, 548 US at 251.

> The Act applies its $200 to $400 limits--precisely the same limits it applies to an individual-- to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, § 2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives. The Act includes within these limits not only direct monetary contributions but also expenditures in kind: stamps, stationery, coffee, doughnuts, gasoline, campaign buttons, and so forth. See § 2801(2).

Randall v. Sorrell, 548 US at 257.

> We consequently agree with the District Court that the Act's contribution limits "would reduce the voice of political parties" in Vermont to a "whisper." 118 FSupp2d, at 487. And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

Randall v. Sorrell, 548 US at 259. Measure 26-200 does not limit what political parties can contribute to those parties' candidates. Nor does it impose a limit on what an individual can contribute to a political party.

B. THE NINTH CIRCUIT COURT OF APPEALS HAS CONSISTENTLY UPHELD LIMITS ON CAMPAIGN CONTRIBUTIONS.

In ***Lair v. Motl***, 873 F3d 1170 (9th Cir 2017), *cert den sub nom* ***Lair v. Mangan***, 139 S Ct 916, 202 L Ed 2d 644 (2019), the Ninth Circuit validated Montana's contribution limits, which are lower than those adopted in Measure 26-200. Montana's statute limits a candidate for city or county office to receiving $340 per election cycle from any individual or political committee. The corresponding limit in Measure 26-200 is $500.

In ***Thompson v. Hebdon***, 909 F3d 1027, 1036-37 (9th Cir 2018), the Ninth Circuit upheld Alaska's contribution limits, concluding:

> Thompson argues that the individual-to-candidate limit lacks a narrow focus because, he asserts, Alaska fails to show that reducing the limit from $1,000 to $500 was necessary, and because the limit is among the lowest in the nation. We have already explained that Alaska need not show that it was necessary to reduce the contribution limit to $500, only that the new limit targets *quid pro quo* corruption or its appearance. See ***Buckley***, 424 U.S. at 30, 96 S.Ct. 612. On the question of whether the $500 limit is "narrowly focused" on that interest, we must uphold the dollar amount unless it is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." ***Shrink Mo.***, 528 U.S. at 397, 120 S.Ct. 897. * * *

> Moreover, although the $500 limit is on the low-end of the range of limits adopted by various states, it is not an outlier. At least four other states (Colorado, Kansas, Maine, and Montana) have the same or lower limit for state house candidates, as do at least five comparably sized cities (Austin, Portland, San Francisco, Santa Cruz, and Seattle). We recently upheld a comparable limit. ***Lair III***, 873 F3d at 1174 tbls. 2 & 3.

In ***Thalheimer v. City of San Diego***, 2012 WL 177414 (SD Cal 2012), the federal district court upheld San Diego's $500 limit on contributions to candidates in city races. It applied ***Randall v. Sorrell***, as the Ninth Circuit did not indicate its lack of precedential value until 2015 in ***Lair v. Bullock***, *supra*, 798 F3d at 747.

Thalheimer concluded:

> As such, "[t]aken together," the ***Randall*** factors do not suggest that the $500 individual contribution limit in this case "threaten[s] to inhibit effective advocacy" by challengers, "mute[s] the voice of political parties," or otherwise imposes disproportional burdens on First Amendment interests.

Thalheimer, 2012 WL 177414, at *10.

> [T]he $500 contribution limit * * * appears to be comparable with the contribution limits in Los Angeles ($500/$1,000), Phoenix ($488), San Antonio ($500/$1,000), San Jose ($200/$500), Jacksonville ($500/$500), and San Francisco ($500/$500). The fact that the challenged limit is lower than similar limits in several other cities is a factor to consider, but does not necessarily mean it is unconstitutionally low. See ***Montana Right to Life Ass'n v. Eddleman***, 43 F3d 1085, 1095 (9th Cir 2003) ("As long as the limits are otherwise constitutional, it is not the prerogative of the courts to fine-tune the dollar amounts of those limits."). Rather, the Court should also consider the limits previously upheld by the courts. See ***Randall***, 548 US at 250-51. In this case, the $500 limit ($1,000 per election cycle) is comparable to other contribution limits previously upheld. See, e.g., ***Shrink***, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 ($275 to $1,075 for statewide office); ***Buckley***, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 ($1,000 for federal office); ***Eddleman***, 343 F.3d 1085 ($100, $200, and $400 for statewide office).

Thalheimer, 2012 WL 177414, at *8.

> The City has articulated an anti-corruption interest that is not novel or implausible, so it is not required to meet a heightened evidentiary burden.

Thalheimer v. City of San Diego, 645 F3d 1109, 1123 (9th Cir 2011).

> The anti-corruption rationale for Measure 26-200 is stated in its whereas clause:
>
> Whereas, the people of City of Portland find that limiting large contributions and expenditures in political campaigns would avoid the reality and appearance of corruption, including *quid pro quo* corruption, a new Article 3 to Chapter 3 of the City of Portland Charter, shall read as follows: * * *

That the existing campaign finance system in Oregon, applicable to candidate contests in Portland, presents both the appearance and reality of corruption is shown in the declarations filed in Multnomah County Circuit Court No. 17CV18006 (the validation action for the 2016 Multnomah County campaign finance reform charter amendment) and also by Exhibits 2 and 6-14, which include the Voters' Pamphlet statements for Measure 26-200, literature distributed in the campaign for Measure 26-200, and articles in THE OREGONIAN and by Oregon Public Broadcasting showing that Oregon's government and campaign system is "*Polluted by Money*."

V. THE LIMITS ON INDEPENDENT EXPENDITURES ARE CONSTITUTIONAL.

Measure 26-200 limits independent expenditures to support or oppose candidates for Portland public office:

> **3-302. Expenditures in City of Portland Candidate Elections.**
>
> A. No Individual or Entity shall expend funds to support or oppose a Candidate, except those collected from the sources and under the Contribution limits set forth in this Article.
>
> B. An Entity shall register as a Political Committee under Oregon law within three (3) business days of making aggregate Independent Expenditures exceeding $750 in any Election Cycle to support or oppose one or more Candidates in any City of Portland Candidate Election.

C. Only the following Independent Expenditures are allowed per Election Cycle to support or oppose one or more Candidates in any particular City of Portland Candidate Election:

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.

Apart from the Multnomah County Validation Order, no court has found that any Oregon statute limiting independent expenditures violates the Oregon or U.S. Constitutions.

That order contends that ***Vannatta I*** and ***Hazell*** and ***Meyer v. Bradbury***, 341 Or 288, 142 P3d 1031 (2006), "have uniformly considered campaign expenditures to be a form of speech fully within the protections afforded by Article I, Section 8 of the Oregon Constitution." In ***Vannatta I***, all parties "concede that campaign expenditures constitute expression for Article I, section 8, purposes." 324 Or at 521. It was not a judicial determination. Here, the parties do not so concede. ***Hazell*** did not address the constitutionality of limits on expenditures at all. Nor did ***Meyer v. Bradbury***, where the current validity of laws restricting contributions or expenditures was not at issue. Instead, intervenor-defendant David Delk (here one of the Citizen Parties) prevailed in a lawsuit brought by employees of the Oregon Chapter of American Civil Liberties Union to remove Measure 46 from the 2006 ballot for constituting more than one

unrelated amendment to the Oregon Constitution. The Court of Appeals ruled against Delk, but the Oregon Supreme Court reversed and kept Measure 46 on the ballot. The passage about the constitutionality of limits was the Oregon Supreme Court commenting upon its decision in ***Vannatta I***, 324 Or 514, 931 P2d 770 (1997). The comment was not a holding; it was *dicta* at most, as no party in ***Meyer v. Bradbury*** argued that the ***Vannatta I*** analysis did or did not render unconstitutional any part of any statute.

Also, note that the passage in ***Meyer v. Bradbury***, 341 Or at 299, *dicta* for the conclusion that Article I, § 8, makes "legislatively imposed limitations on individual political campaign contributions and expenditures impermissible," applies only to limits on individuals. Unlike Measure 9 of 1994, Measure 26-200 in separate, severable sections contains limits on the political campaign contributions and expenditures of non-individuals--corporations, unions, and other entities. Above (pages 50-56, *ante*) we show how those limits are both valid and severable under ***Vannatta I*** (not to mention subsequent developments, including ***Vannatta II*** and ***State v. Moyer***, *supra*. This illustrates the need for the Court to examine the specific provisions of the statute at issue and not to rely on sweeping generalities derived from past cases dealing with different statutes.

It is true that expenditure limits were addressed in ***Deras v. Meyer***, *supra*. Those limits were very different than the expenditure limits in Measure 26-200. First, the statutes examined in ***Deras*** entirely banned all independent expenditures by everyone. The only spending allowed in campaigns had to be approved by the candidate and

were deemed to be expenditures by the candidate.[96] Second, the statutes limited total spending by any candidate (including the independent expenditures approved by the candidate) to a certain number of cents per eligible voter in the district (25 cents in races for the Legislature, 10 cents in statewide races).[97] Measure 26-200 has no ceiling on candidate spending and allows substantial independent expenditures.[98]

> Stated in condensed form, ORS 260.027 imposes a monetary limit upon the total expenditures that can be made in support of or in opposition to a candidate for public office. ORS 260.154 prohibits Any expenditure in support of or in opposition to a candidate unless the person making the expenditure is a candidate or is acting with the prior consent of the candidate.

Deras v. Myers, 272 Or at 52. The opinion was based on the "weighing of interests," despite the facts that (1) there was no evidence presented in the case and (2) the statutes were not accompanied by legislative findings of fact.

Conversely, Section 3-302 of Measure 26-200 allows substantial independent expenditures, without consent of the candidate.

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96. In essence, this was a complete ban in independent expenditures, since expenditures approved by the candidate would not qualify as "independent" under today's nomenclature.

97. There were about 1.3 million registered voters in Oregon in 1975. The average House district contained about 22,000 voters. So the statutes limited every House candidate to total spending of $5,500. To put this in perspective, individual candidates for the Oregon House of Representatives have been spending upwards of $1 million in their campaigns. In 2016, the average spent by the top 10 candidates was $825,000 each. The average number of registered voters in a House district at that election was 36,274. So those candidates spent $23 per eligible voter--100 times more than was allowed by the statutes examined in ***Deras***.

98. It allows in each candidate race independent expenditures of $5,000 by any individual plus $10,000 by any political committee plus unlimited amounts by any Small Donor Committee; see pages 88-89, *post*.

(c) Only the following Independent Expenditures are allowed per Election Cycle to support or oppose one or more Candidates in any particular City of Portland Candidate Election:

(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.

Measure 26-200 allows anyone to form a Small Donor Committee (SDC), which can make unlimited independent expenditures from amounts contributed to the SDC (limited to $100 per individual per year). This is a contribution limit, not an expenditure limit.

And Measure 26-200 imposes no limit on overall spending in any candidate race, either by the candidate or by independent spenders in the aggregate. So Measure 26-200 is very different from the statutes examined in ***Deras***.

VI. THE REQUIRED IDENTIFICATION OF CAMPAIGN FUNDERS IN POLITICAL ADVERTISEMENTS IS CONSTITUTIONAL.

Measure 26-200 requires:

3-304. Timely Disclosure of Large Contributions and Expenditures.

(a) Each Communication to voters related to a City of Portland Candidate Election shall Prominently Disclose the true original sources of the Contributions and/or Independent Expenditures used to fund the Communication, including:

(1) The names of any Political Committees and other Entities that have paid to provide or present it; and

(2) For each of the five Dominant Contributors providing the largest amounts of funding to each such Political Committee or Entity in the current Election Cycle:

(a) The name of the Individual or Entity providing the Contribution.

(b) The types of businesses from which the maker of the Contribution has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).

(3) For each of the largest five Dominant Independent Spenders paying to provide or present it:

(a) The name of the Individual or Entity providing the Independent Expenditure.

(b) The types of businesses from which the maker of the Independent Expenditure has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).

(b) If any of the five largest Dominant Contributors or Dominant Independent Spenders is a Political Committee (other than a Small Donor Committee) or nonprofit organization, the prominent disclosure shall include its top three funders during the current Election Cycle.

(c) The disclosure shall be current to within ten (10) days of the printing of printed material or within five (5) days of the transmitting of a video or audio communication.

Requiring such "disclaimers" or "taglines" on political advertisements is constitutional in Oregon.

California, Washington, Hawaii, Maine, Vermont, Massachusetts, Colorado, Minnesota, and Virginia have "disclaimer" laws requiring that political ads involving

candidate races identify their actual top significant funders (not merely the names of the political committees placing the ads). None has been struck down. Laws requiring that political advertisements identify at least their source (such as committee names) are in place at the state level in 46 states (but not Oregon).[99]

A. UNDER THE OREGON CONSTITUTION.

1. THE 1999 ATTORNEY GENERAL OPINION.

The *Multnomah Validation Opinion* (pp. 7-8) relies entirely upon the 1999 Opinion of Attorney General Hardy Meyers regarding the constitutionality of ORS 260.522. That Opinion is flat out wrong and does not comprise legal authority for invalidation of any part of Measure 26-200.

Opinions of the Attorney General are not binding on state agencies or on the courts. ***Paulus v. Dept. of Rev.***, 7 Or Tax 181, 187 (1977); ***State ex rel. v. Mott***, 163 Or 631, 640, 97 P2d 950, 954 (1940).

An argument that any tagline requirement violates Article I, § 8, because it is applied only to political speech (and is thus content-based) proves too much. Under that rationale, Oregon could not require that those responsible for placing political ads identify their sources of funds at all. **If any restriction that applies only when political speech happens is a violation of Article I, § 8** (which we dispute), then the entire political contribution and expenditure reporting system in Oregon (known as ORESTAR on the state level) also violates Article I, § 8 (see pages 113-114, *post*).

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99. Before 2001, Oregon had a statute requiring that every political advertisement identify its source. No court ever struck down that statute. The Oregon Legislature repealed it in 2001.

2. THE ATTORNEY GENERAL'S ANALYSIS IS OUTDATED AND FUNDAMENTALLY FLAWED.

a. THE ATTORNEY GENERAL LETTER INCORRECTLY CONCLUDED THAT A TAGLINE LAW WOULD BE A CATEGORY 1 LAW UNDER THE *ROBERTSON* FRAMEWORK.

Attorney General assumed that such a tagline law would "restrict speech within the meaning of Article I, section 8." First, the Measure 26-200 tagline requirement does not proscribe any speech; it simply in some cases requires that certain additional information (identities of the 5 largest major funders) be included in advertisements funded by campaign contributions or independent expenditures.[100] As ***Citizens United v. Federal Election Comm'n***, 558 US 310, 130 SCt 876 (2010) ("***Citizens United***"), stated:

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," ***Buckley***, 424 US, at 64, 96 SCt 612, and "do not prevent anyone from speaking," ***McConnell***, *supra*, at 201, 124 SCt 619.

558 US at 366.

Second, the Attorney General letter assumes that the tagline requirement would somehow be a content-based restriction on speech, since it would apply only to

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100. If the campaign contribution limits of Measure 26-184 are respected, then most all advertisements paid for by a candidate's campaign will not be required to disclose any funders. Measure 26-184 requires such disclosure only of "the Individuals and Entities that are the five largest true original sources, in excess of $500 each, of the Contributions and/or Independent Expenditures used to fund the Communication." Since Measure 26-184 limits contributions by any individual to $500, respecting that limit would result in no individuals being disclosed in the advertisement. Since Measure 26-184 limits contributions by any Political Committee (except a Small Donor Committee) to $500, respecting that limit would result in no such Political Committees being disclosed in the advertisement.

"political speech." But implementing the tagline requirement does not require examining the content of the speech. It applies to all advertisements paid for with campaign contributions or independent expenditures, regardless of the content of the advertisements.

> In ***Vannatta I***, this court observed that not every law related to the regulation of political campaign contributions and expenditures runs afoul of Article I, section 8: "*[L]awmakers [may] choose to impose requirements distinct from contribution or expenditure limitations (e.g., requirements of disclosure of financing sources and the extent of any gift)* as well as various sanctions (e.g., civil or criminal penalties, disqualification from the ballot or Voters' Pamphlet, and the like) and their choice may not *necessarily* offend the constitutional requirement." ***Vannatta I***, 324 Or at 523, 931 P2d 770 (first emphasis added; second emphasis in original). On its face, ORS 260.402 seems more akin to the kind of statutes described in ***Vannatta I*** that do not offend the Article I, section 8, expression guarantee. The statute imposes no restriction on what any person may say, whether contributor, campaign agent, or candidate. Moreover, as we explained in ***Vannatta II***, defendants' argument that the delivery of gifts, money, or services is expression in every case is incorrect.

State v. Moyer, 348 Or 220, 231, 230 P3d 7, 13 (2010).

Requiring taglines on political advertisements is not a regulation of the content of political speech by the funder of the advertisement. That person or entity can continue to say anything he or it wants about candidates. They can speak anonymously about candidates on a radio call-in show or insert flyers about Portland candidates under car windshields without disclosing her identity or adding a tagline. The tagline regulates the transfer of property (usually money) to support or oppose the election of a candidate, some of which may be used for conveying political advertisements. If the amount of money transferred for that purpose exceeds the thresholds in Measure 26-200, then the advertisements must disclose the largest sources of that money.

The categorization of an advertisement as an ad about candidates does not amount to suppression of the content of the political message, because that identification does not trigger any violation of Measure 26-200; the actual political expression is not the target of the regulation. The tagline requirement does impose a new obligation on certain deep-pocketed speakers to provide contextual facts to accompany each viewing of the ad about the candidate(s)--whether those who placed or paid for the ad did so using large amounts of money from identified donors. These are reasonable time, place, and manner requirements on the presentation of the ad's message. They assure that truthful information about the funding sources appears at the same time and in the same manner as the ad's main message. The content of the message is of no further inquiry.

The tagline requirement is similar to requesting a permit for a large parade on a city street. That regulation does not depend on the actual message or theme of the gathering but assists in providing information so the public can travel safely near the location. In much the same manner, the tagline provides contextual facts to accompany the ad about the candidate, information which assists in public: Once the identities of the funders are disclosed in the ad, voters can assess the credibility of the message, just as they can decide to avoid congested streets. If the message denounces a candidate for Portland City Council because of past statements in favor of restricting youth access to tobacco products, many voters may well decide not to believe the message, <u>if</u> it was paid for by tobacco companies.

One simple way to identify the target of a statute is to see when a violation occurs. Here, no violation rests on the speaker's message in the political ad. No

violation occurs from making or accepting an otherwise lawful contribution that may pay for an ad. The violation occurs when the speaker uses the funds to produce an ad and fails to include important factual information about the conduct of the 5 largest donors (each in excess of $500) required by the reasonable time, place and manner regulations in Measure 26-200 § (3). The conduct at issue is whether any funder of the ad spent more than $500 on the effort; § (3) requires that conduct is disclosed in the ad. This time, place, and manner restriction assures that voters receive important context about the ad at the most salient time (when the voter actually sees or hears it), in the same place and manner as the ad appears.

As shown at pages 99-103, *post*, Article I, § 8, does not apply to non-expressive conduct. Thus, the real question is, do large independent spenders (or large contributors to entities which place independent expenditure ads) enjoy a constitutional right not to disclose their conduct of transferring property (money).[101]

Further, under existing Oregon law, persons providing such funds for political advertisements are required to be identified in ORESTAR filings, so they already have lost their anonymity. What ORESTAR and the tagline requirement reveal is not the political speech of the person; they reveal the transfers of money.

Oregon already prohibits anonymous political contributions.

> However, ORS 260.083 requires that committees disclose the names and addresses of all individuals and entities that contribute more than the threshold reporting amount. Accordingly, the Secretary of State's administrative rules require campaigns to refuse or to disgorge contributions

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101. While, hypothetically, a particular "Big-5" contributor might mount an as-applied challenge that some of its specific donative conduct was somehow expressive under some unusual facts, such individualized alleged injury to expression is not before this Court, nor would it invalidate the ordinance in its application to others. An as-applied constitutional challenge is not a facial challenge.

> for which campaigns cannot provide that information--those funds that are donated anonymously. See 2010 Campaign Finance Manual at 29 ("No committee shall accept an anonymous contribution. If a committee cannot identify a contributor, the contribution must be donated to an organization that can accept anonymous contributions.")* * * .

State v. Moyer, *supra*, 348 Or 220, 241, 230 P3d 7, 19 (2010).

The Oregon Supreme Court has held that laws focused on particular mechanisms of communication, such as outdoor advertising signs, are not "content based" so long as the laws do not depend on what the signs say. As explained in ***State v. Babson***, 355 Or 383, 326 P3d 559 (2014), in upholding a law barring use of the Capitol steps from 11:00 pm to 7:00 am for any purpose, including political speech, "Our cases teach that the fact expression is protected does not mean that it is exempt from content-neutral, speech-neutral laws and regulation." *Accord*, ***Outdoor Media Dimensions, Inc., v. Dep't of Transp.***, 340 Or 275, 287 n8, 132 P3d 5 (2006). Such non-content based laws are upheld as reasonable time, place, and manner restrictions.

> This court, however, has acknowledged that some burdens on expressive activities are permissible, such as time, place, and manner restrictions. See, e.g., ***Outdoor Media Dimensions v. Dept. of Transportation***, 340 Or 275, 28990, 132 P3d 5 (2006) (noting that "Article I, section 8, does not bar every content-neutral regulation of the time, place, and manner of speech"); see also ***State v. Henry***, 302 Or 510, 525, 732 P2d 9 (1987) (noting that the court would "not rule out * * * reasonable time, place and manner regulations of the nuisance aspect of [sexually explicit material]"); ***Tidyman***, 306 Or at 182, 759 P2d 242 (noting that "structures and activities unquestionably devoted to constitutionally privileged purposes such as religion or free expression are not 15 immune from regulations imposed for reasons other than the substance of their particular message"). Accordingly, the inquiry is not simply whether defendants' expression was burdened, but whether the burden on defendants' **575 expression was impermissible. See ***Ausmus***, 336 Or at 505, 85 P3d 864 (recognizing that the protection of speech under the Oregon Constitution "is not absolute").

State v. Babson, 355 Or 383, 406-07, 326 P3d 559, 574-75 (2014).

b. THE ATTORNEY GENERAL LETTER REFLECTED ZERO HISTORICAL RESEARCH, BUT HISTORY SHOWS THAT REQUIRING IDENTIFICATION OF THOSE PAYING FOR POLITICAL ADVERTISEMENTS IS WITHIN AN HISTORICAL EXCEPTION TO ARTICLE I, § 8.

The voters of Oregon in 1908 adopted by initiative the "Corrupt Practices Act Governing Elections," which took effect in 1909.[102] Among its provisions were limits on political campaign contributions and expenditures and requirement that political ads disclose who was responsible for placing them.[103] While not in effect as of 1857 or 1859, this law shows that, when anonymity of political speech was first considered by the people, acting as the Legislature, they required full disclosure instead.

There is a long history in England, the United States, and Oregon of prohibiting secrecy in election matters. In fact, the modern notion of a "secret ballot" itself is a

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102. Note that such limits were enacted under the title, "Corrupt Practices Act," indicating that voters believed that the limits and disclosure requirements in the initiative were aimed at preventing, avoiding, and/or fighting corruption. It's official preamble noted it is "a law to * * * define, prevent, and punish corrupt and illegal practices in nominations and elections." The ballot title noted that the initiative declared "what shall constitute corrupting use of money and undue influence in elections."

103. Section 33 of the Corrupt Practices Act provided:

> No publisher of a newspaper or other periodical shall insert, either in its advertising or reading columns, any paid matter which is designed or tends to aid, injure or defeat any candidate or political party or organization, or measure before the people, unless it is stated therein that it is a paid advertisement, the name of the chairman or secretary, or the names of the other officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in such advertisement in the nature of a signature.

recent invention (in the 1890s) and was expressly rejected by the 1857 Oregon Constitutional Convention and rejected several times thereafter.

(1) SINCE BEFORE OREGON STATEHOOD, IT HAS BEEN CONTRARY TO PUBLIC POLICY TO CONCEAL ONE'S SUPPORT FOR A CANDIDATE OR FOR LEGISLATION.

"Expression" has never included a right to conceal one's monetary support for legislation or candidates. In fact, covert political action was abhorred. A Joint Resolution of the Territorial Legislature, December 1, 1854, stated what it claimed to be the hidden agenda of the "Knownothings"[104] and resolved that:

> [I]n a country like ours, all secret *political* organizations "*choose darkness rather than light, because their deeds are evil*"--because they dare not suffer TRUTH to have a free and fair grapple with the error in the broad light of day!

Special Laws of the Territory of Oregon (1854) p. 54 (all forms of emphasis in original).[105]

Nor was there a right to secrecy in political support for a candidate. While the right of a citizen to openly and freely petition the government, including legislators [***Sweeny v. McLoed***, 15 Or 320, 15 P 275 (1887)], in public fora was protected in the organizing documents of the colonies, the U.S. Constitution, and the various states' bills of rights did not provide a constitutional right to have another *secretly* advance

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104. This group was formally organized as the "New American" or "American Party," which ran many state and local candidates in the 1850s and nominated Millard Fillmore for President in 1856.

105. The internal quotation is from John 3:19-21, as translated in King James version of the BIBLE and commentary of the ANGLICAN BOOK OF COMMON PRAYER.

one's political agenda. Oregon did not even provide voters with secret ballots until the 1890s.

Nondisclosure of an interest in legislation was widely condemned in the United States prior to the adoption of the Oregon Constitution. For example, a New York jury in 1837 refused to enforce a contract for lobbying. ***Hillyer v. John Travers***, American Law Reports, July 1837 (New York Court of Common Pleas). This result was widely reported and attracted much commentary.[106] Other cases followed: ***Clippinger v. Hepbaugh***, *supra*; ***Marshall v. Baltimore & Ohio Railroad Company***, 16 How 314, 57 US 314, 14 LEd 953 (1843) (applying Virginia law); compiled as

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106. Any agreement to use the influence of relations or others, or to use private influence of any sort, would be corrupt, and all agreements of such a kind are consequently void.

> The reason for this distinction is manifest. If it was not so, the legislature would be surrounded by men seeking for private objects, which concerned not the public good, but their own private interests only. And members of the legislature would be harassed into giving their votes, on the grounds of personal obligations or private friendship.
>
> A legislator selected by the people to discharge a public trust, ought to discharge it independently and honestly: but the legislator who votes from private influence, acts dishonestly and corruptly. And every effort to obtain votes through private influence, is adverse to public policy and legislative purity, and at variance with every sense of propriety.
>
> It is therefore scarcely necessary to observe, that to procure votes by means of suppers, or harassing legislators by making applications to them, is dishonest in the extreme, and that no person can recover compensation for it.

James Silk Buckingham, AMERICA, HISTORICAL, STATISTIC, AND DESCRIPTIVE: BY J. S. BUCKINGHAM, Appendix, pp. 559-62 Vol II (Fisher, Son & Co., 1841).

statement of the law at RESTATEMENT (FIRST) OF CONTRACTS § 559, *Bargain To Influence Legislation*.[107]

While Oregon did not forbid such contracts *per se*, Oregon statutes forced disclosure of such arrangements and made *secrecy* a crime. Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, c 5, § 638, later codified at Hill's Code Or, T II, c 5, § 1855. This Oregon restriction is an early example of the public's "right to know" years before the 1908 initiative measure.

(2) SECRECY HAS HISTORICALLY BEEN BANNED IN ELECTION MATTERS.

The notion that persons or entities have a constitutional right to place political advertisements anonymously is itself a new development in American history. The long-standing historical practice has been for laws to require disclosure of such persons or entities. As Justice Scalia stated in ***McIntyre v. Ohio Elections Comm'n***, 514 US 334, 115 SCt 1511 (1995) ("***McIntyre***"):

> The concurrence recounts other pre- and post-Revolution examples of defense of anonymity in the name of "freedom of the press," but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here. For many of them, moreover, such as the 1735 Zenger trial, ante, at 1526, the 1779

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107. § 559. Bargain To Influence Legislation

> (1) A bargain to influence or to attempt to influence a legislative body or members thereof, otherwise than by presenting facts and arguments to show that the desired action is of public advantage, is illegal; and if a method is provided by law for presenting such facts and arguments, a bargain that involves presenting them in any other way is illegal.
>
> (2) A bargain to conceal the identity of a person on whose behalf arguments to influence legislation are made, is illegal.

> "Leonidas" controversy in the Continental Congress, ante, at 1526, and the 1779 action by the New Jersey Legislative Council against Isaac Collins, *ibid*., the issue of anonymity was incidental to the (unquestionably free-speech) issue of whether criticism of the government could be punished by the state.
>
> Thus, the sum total of the historical evidence marshaled by the concurrence for the principle of constitutional entitlement to anonymous electioneering is partisan claims in the debate on ratification (which was almost like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech. This absence of historical testimony concerning the point before us is hardly remarkable. The issue of a governmental prohibition upon anonymous electioneering in particular (as opposed to a government prohibition upon anonymous publication in general) simply never arose. Indeed, there probably never arose even the abstract question whether electoral openness and regularity was worth such a governmental restriction upon the normal right to anonymous speech. The idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's. See ***Burson v. Freeman***, *supra*, 504 US, at 203-205, 112 SCt, at 1852-1854.

McIntyre, 514 US at 374, 115 SCt at 1532 (J. Scalia dissent). Justice Scalia continued:

> But there is other indication, of the most weighty sort: the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here. Ohio Rev. Code Ann. § 3599.09(A) (1988) was enacted by the General Assembly of the State of Ohio almost 80 years ago. See Act of May 27, 1915, 1915 Ohio Leg. Acts 350. Even at the time of its adoption, there was nothing unique or extraordinary about it. The earliest statute of this sort was adopted by Massachusetts in 1890, little more than 20 years after the Fourteenth Amendment was ratified. No less than 24 States had similar laws by the end of World War I, and today every State of the Union except California has one, as does the District of Columbia, see D.C.Code Ann. 11420 (1992), and as does the Federal Government where advertising relating to candidates for federal office is concerned, see 2 USC 441d(a). Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.

McIntyre, 514 US at 375-77, 115 SCt at 1532-33.

So the correct history is that, when the subject of anonymous political communication arose, the federal government and nearly all states adopted laws banning it.[108]

The modern respect for the secrecy of one's expression of choice by vote in elections, which we take for granted today, is not Constitutionally required. After debate,[109] the drafters of Oregon Constitution provided for "open" voting: "in all

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108. These state laws forbidding anonymous political speech were adopted before 1918:

> See Act of June 19, 1915, No. 171, 9, 1915 Ala.Acts 250, 254255; Act of Mar. 12, 1917, ch. 47, 1, 1917 Ariz.Sess.Laws 62, 6263; Act of Apr. 2, 1913, No. 308, 6, 1913 Ark.Gen.Acts 1252, 1255; Act of Mar. 15, 1901, ch. 138, 1, 1901 Cal.Stats. 297; Act of June 6, 1913, ch. 6470, 9, 1913 Fla.Laws 268, 272273; Act of June 26, 1917, 1, 1917 Ill.Laws 456, 456457; Act of Mar. 14, 1911, ch. 137, 1, 1911 Kan.Sess.Laws 221; Act of July 11, 1912, No. 213, 14, 1912 La.Acts 447, 454; Act of June 3, 1890, ch. 381, 1890 Mass.Acts 342; Act of June 20, 1912, Ex.Sess. ch. 3, 7, 1912 Minn.Laws 23, 26; Act of Apr. 21, 1906, S.B. No. 191, 1906 Miss.Gen.Laws 295 (enacting Miss.Code Ann. 3728 (1906)); Act of Apr. 9, 1917, 1, 1917 Mo.Laws 272, 273; Act of Nov. 1912, 35, 1912 Mont.Laws 593, 608; Act of Mar. 31, 1913, ch. 282, 34, 1913 Nev.Stats. 476, 486487; Act of Apr. 21, 1915, ch. 169, 7, 1915 N.H.Laws 234, 236; Act of Apr. 20, 1911, ch. 188, 9, 1911 N.J.Laws 329, 334; Act of Mar. 12, 1913, ch. 164, 1(k), 1913 N.C.Sess.Laws 259, 261; Act of May 27, 1915, 1915 Ohio Leg. Acts 350; Act of June 23, 1908, ch. 3, 35, 1909 Ore.Laws 15, 30; Act of June 26, 1895, No. 275, 1895 Pa.Laws 389; Act of Mar. 13, 1917, ch. 92, 23, 1917 Utah Laws 258, 267; Act of Mar. 12, 1909, ch. 82, 8, 1909 Wash.Laws 169, 177178; Act of Feb. 20, 1915, ch. 27, 13, 1915 W.Va.Acts 246, 255; Act of July 11, 1911, ch. 650, 9414 to 9416, 1911 Wis.Laws 883, 890.

McIntyre, 514 US at 377.

109. Charles Henry Carey, THE OREGON CONSTITUTION PROCEEDINGS AND DEBATE (continued...)

elections by the people, votes shall be given openly, or by *viva voce*, until the Legislative Assembly shall otherwise direct."[110] Oregon Constitution, Article II, 15. Voters' preferences were stated to the elections judges and were tallied in the poll book for each voter.[111] Public disclosure of votes remained the practice for years. In 1860 and 1864 there were attempts to allow voting by secret ballot, each defeated after vigorous public debate.[112] Oregon did not allow private balloting (the modern secret ballot system with standardized ballots and the act of voting conducted in private polling booths) until 1891. Oregon Laws, "Election Law of 1891," p. 23, § 47; 2 Codes and Statutes of Oregon, T XXIII (Bellinger and Cotton 1902); ORS 250.080. In 1872, Oregon law allowed voters to use handwritten paper or submit printed party "tickets," but no privacy for filling out such ballots was provided. Oregon Laws (1872), C XIV. T I, § 10.

The absence of "secret balloting" made it even more important that bribery, whether direct or indirect, be combatted. With the *viva voce* system, a scheme of voter bribery was a serious threat, because it could indeed be enforced (as the voter's

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109.(...continued)
OF THE CONSTITUTIONAL CONVENTION OF 1857 (Western Imprint 1984 facsimile edition of 1926 edition) [Hereinafter "Carey, CONSTITUTION"], pp. 325-26, 329, 331, 337-38, 340-41, 346-47.

110. Judge Deady, in his commentary to Oregon Laws 1845-1864, n1, p. 699, notes that the 1857 Constitution uses the word "openly" but that "[t]he legal effect was probably the same" as the 1854 Act on viva voce voting quoted in the text above.

111. See, Oregon Constitution, Article XVIII, § 2.

112. W.C. Woodward, *Political Parties in Oregon*, QUARTERLY OF THE OREGON HISTORICAL SOCIETY, XII:1 (March 1911), pp. 320-3, describes the 1860 effort. C.H. Carey, HISTORY OF OREGON (Pioneer Historical Publishing Co. Portland, 1922), discusses the 1864 attempt at p. 535.

actual votes were publicly announced and recorded in the poll book and not a secret). Under the secret ballot, however, the briber could not be sure that the vote he had purchased was actually delivered in the privacy of the voting booth.

Oregon has now again abandoned the secret ballot filled out in the privacy of the official polling booth, so once again a scheme of bribery could be enforced (since a briber could require the voter to deliver her properly completed ballot to the briber before insertion into the "secrecy envelope" and mailing to the elections office).[113]

(3) SECRECY HAS HISTORICALLY BEEN BANNED IN LEGISLATIVE MATTERS.

Despite Article I, § 8, of the recently adopted Oregon Constitution, the Crimes Against Public Justice Act of 1864, § 622, included criminal penalties for lobbying and "explaining" a measure to an elected representative without disclosing an interest or the interest of one's principal.

> If any person, having any interest in the passage or defeat of any measure before, or which shall come before, either house of the legislative assembly of this state, or if any person being the agent of another so interested, shall converse with, explain to, or in any manner attempt to influence any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, or that of the person whom he represents, and his own agency therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail, not less than three months, nor more than one year, or by fine not less than fifty, nor more than 500 hundred dollars.

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113. Once that ballot is mailed in, the voter is not allowed either to obtain a second ballot or, if a second ballot is somehow obtained, to cast votes with the second ballot. If the county elections office receive more than one ballot from a voter, only the first one is counted, and the office is directed to refer the voter to the Secretary of State's office as a potential election law violator. VOTE BY MAIL PROCEDURES MANUAL (2015), p. 43 (adopted as an agency rule by OAR 165-007-0030).

Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, C V, § 638, later codified at Hill's Code Or, T II, c 5, § 1855. This was a specific prohibition on misleading silence and withholding information in order to create a false impression of non-involvement. This Oregon restriction is an early example of the public's "right to know" (***Nickerson v. Mecklem et al.*** *supra*) and is a prohibition on omission of information quite similar in intent to Measure 26-200's prohibition on the funding of political ads without disclosing their largest major funders. This is consistent with the understanding from early case law that hidden influence was a form of indirect bribery, because the real beneficiaries and proponents of legislation and candidacies were hidden from scrutiny and secrecy tended to corrupt representative government.

Secret dealings with state legislators had long been denounced:

> A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive pay for, his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but he cannot, with propriety, be employed to exert his personal influence, whether it be great or little, with individual members, **or to labor privately in any form with them out of the legislative halls**, in favor of, or against any act or subject of, legislation.

Sweeny v. McLeod, *supra*, 15 Or at 337 (emphasis added).

> [P]ublic policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws or ordinances. This principle applies to common councils or other lawmaking bodies of municipal corporations to the same extent that it does to Congress or the Legislature of a state.

Hyland v. Oregon Hassam Paving Co., 74 Or 1, 11, 144 P 1160, 1163 (1914).

This longstanding antipathy to lobbying eventually led to early "publicity" statutes that required the registration of lobbyists, publicity of committee hearings, and the recording of all votes in committee hearings.[114] Oregon had been an early leader in adopting some of these reforms, first by incorporating an early legislative "publicity" mandate into the original Constitution in Article II, § 15, and then by the continuing efforts outlined above, culminating in the 1908 Corrupt Practices Act initiative. Far older is the underlying principle that the public's business should be conducted in the open, free of private and undisclosed interests that were thought to inherently taint elections and legislation.

c. THE ATTORNEY GENERAL'S INTERPRETATION WOULD ALSO LEAD TO ABSURD RESULTS AND REQUIRE INVALIDATION OF DOZENS OF OREGON STATUTES.

(1) LAWS PERTAINING TO ELECTIONS, CAMPAIGNS, AND VOTING.

If a regulation is deemed *per se* content-based merely because it regulates political advertising, as the Attorney General assumes, virtually all regulations pertaining to political advertising would be *per se* unconstitutional, including the requirements that:

1. The sources and amounts of the funds used for political advertisements must be promptly reported to the government (ORESTAR system, ORS 260.057 *et seq.*).

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114. The National Publicity Law organization was formed at that time. By the turn of the 20th century, 19 states had some publicity laws. Louise Overacker, POLITICS AND PEOPLE, THE ORDEAL OF SELF-GOVERNMENT IN AMERICA (1932), p. 294.

2. Candidate statements in the Voters' Pamphlet must "begin with a summary of the following: Occupation, educational and occupational background, and prior governmental experience." (ORS 251.085, ORS 251.087(5)(b)).

3. Campaign communications must not include false statements (ORS 260.532)[115]

d. THE ATTORNEY GENERAL'S INTERPRETATION WOULD MAKE IT IMPOSSIBLE TO ENFORCE LAWS AGAINST FALSE STATEMENTS PERTAINING TO ELECTIONS.

As noted earlier, ***State v. Moyer***, *supra*, upheld the statute forbidding false statements pertaining to the source of campaign contributions, because a law forbidding false statements is similar to historical laws forbidding fraud. If Article I, § 8, requires the opportunity for anyone to communicate political messages anonymously, as the Attorney General argues, then laws against false statements could not be enforced. As Justice Scalia noted in ***McIntyre*** 514 US 334, 382, 115 SCt 1511, 1536 (1995):[116]

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115. This statute continues to be applied in the courts.

> After the election, which plaintiff lost, plaintiff brought suit under ORS 260.532, alleging that defendants had violated that statute by making seven factually false statements in election materials in support of plaintiff's recall.

Bryant v. Recall for Lowell's Future Comm., 286 OrApp 691 (July 12, 2017) (reversing trial court's dismissal of the complaint). Also, ***Yes On 24-367 Comm. v. Deaton***, 276 OrApp 347, 367 P3d 937 (2016).

116. Justice Scalia managed to effectively reverse ***McIntyre*** in ***John Doe No. 1 v. Reed***, 561 US 186, 130 SCt 2811 (2010), which refused to invalidate a Washington law requiring that initiative signers be publicly identified.

> We should not repeat and extend the mistake of ***McIntyre v. Ohio Elections Comm'n***, 514 US 334, 115 SCt 1511, 131 LEd2d 426 (1995). There, with neither textual support nor precedents requiring the result, the Court invalidated a form of election regulation that had

(continued...)

> I am sure, however, that (1) a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously, and (2) the distributor of a leaflet which is unlawful because it is anonymous runs much more risk of immediate detection and punishment than the distributor of a leaflet which is unlawful because it is false. Thus, people will be more likely to observe a signing requirement than a naked "no falsity" requirement; and, having observed that requirement, will then be significantly less likely to lie in what they have signed. But the usefulness of a signing requirement lies not only in promoting observance of the law against campaign falsehoods (though that alone is enough to sustain it).

In its pre-***Vannatta II*** discussion, ***State v. Moyer*** stated

> Moreover (and more important to this case), the court noted that, even if a particular form of political contributions constitutes expression, it does not necessarily mean that Article I, section 8, protects it. *Id.* at 522 n10, 931 P2d 770. * * * But lawmakers might choose to impose requirements distinct from contribution or expenditure limitations (e.g., requirements of disclosure of financing sources and the extent of any gift) as well as various sanctions (e.g., civil or criminal penalties, disqualification from the ballot or Voters' Pamphlet, and the like) and their choice may not necessarily offend the constitutional requirement." *Id.* at 523, 931 P2d 770 (internal quotation marks omitted; first emphasis added, second emphasis in original). In other words, regulations of the contributions or expenditures themselves--limitations on their amounts, for example--are ***Robertson*** first-category regulations and are unconstitutional unless wholly contained within a well-established historical exception. But regulations that impose requirements "distinct from contribution or expenditure limitations," ***Vannatta I***, 324 Or at 523, 931 P2d 770--such as disclosure requirements--are treated differently; they are ***Robertson*** second-category regulations, which do not necessarily offend the constitution, unless they are overbroad.

No one has argued that the Measure 26-200 tagline requirements are overbroad.

Further, the statute in ***State v. Moyer*** would have found a violation, if a contribution had been made in the name of anonymous (or no name), because such

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116.(...continued)

> been widely used by the States since the end of the 19th century. *Id.*, at 371, 115 SCt 1511 (Scalia, J., dissenting).

> ***John Doe No. 1 v. Reed***, 561 US at 219-20, 130 SCt at 2832 (Scalia, J., concurring).

would not have been the true name of the contributor. ***State v. Moyer*** upheld the statute as within historical exception for misrepresentation and fraud. An independent expenditure ad that does not identify its funders is similar to a contributions that does not truthfully identify its funders.

e. THE ATTORNEY GENERAL DISREGARDED THE APPLICABLE DISCUSSION IN *VANNATTA I.*

Vannatta I, 324 Or at 543, upheld the statute providing benefits to candidate who voluntary limits expenditures and punishes other candidates by nothing their refusal in the Voters' Pamphlet.

> Second, we have difficulty accepting the proposition, in the context of political campaigns, that the neutral reporting of this kind of objective truth--and that is all that the Secretary of State is authorized to do--somehow impermissibly burdens expression.

3. THE DISCLAIMER REQUIREMENTS ARE NOT IMPERMISSIBLY VAGUE.

a. MEASURE 26-200'S DISCLAIMER REQUIREMENTS ARE MUCH MORE SPECIFIC THAN THOSE IN THE MULTNOMAH COUNTY MEASURE 26-184.

The *Multnomah Validation Opinion* (p. 8) expresses "concern that the ordinance is vague and potentially overly broad." The drafters of Measure 26-200 took this into account and made the disclaimer provisions in Measure 26-200 much more specific than in Measure 26-184.

b. MEASURE 26-200'S DISCLAIMER REQUIREMENTS ARE SUFFICIENTLY SPECIFIC AND UNDERSTANDABLE.

The term "Communication to voters related to a City of Portland Candidate Election" is not vague. Measure 26-200 defines Communication.

> "Communication" means any written, printed, digital, electronic or broadcast communications but does not include communication by means of small items worn or carried by Individuals, bumper stickers, Small Signs, or a distribution of five hundred (500) or fewer substantially similar pieces of literature within any 10-day period.

Perhaps the vagueness concern stems from the phrase "related to a City of Portland Candidate Election." The intent of the phrase, if not clear from its text, is clear from Measure 26-200's legislative history, which includes its ballot title and statements in the Voters' Pamphlet. The ballot title caption states:

> Amends Charter: Limits candidate contributions, expenditures; campaign communications identify funders.

It states that the identification of funders applies to "campaign communications." The ballot title question states:

> Question: Should Portland Charter limit campaign contributions, expenditures for elected offices; require certain funding disclosures for campaign communications; allow payroll deductions?

It states that the funding disclosures apply to "campaign communications." It is clear that the communications at issue are those stemming from a campaign for public office.

The Voters' Pamphlet statements (Exhibit 2) provide additional clarity. These excerpts from those statements make it clear that the disclaimer provisions are meant to require that the top 5 funders of a political advertisement in a campaigns for City of Portland public office be identified in the political advertisement.

> Alliance for Democracy urges YES on 26-200 for limits on campaign contributions/expenditures and disclosure of true funders of city-level political campaigns.
>
> Further, it requires political advertisements disclose the real identity of the top 5 funders of the ads on the ads.

Opponents of limits on campaign contributions often say that all the public needs is disclosure of the funders of the political advertisements. But such disclosure does not work well in Oregon.

In Oregon it is easy to pay for political ads through a 501(c)(4) "dark money" nonprofit corporation with a nice name. The corporation never has to identify where its money came from, making it impossible to identify the true source. * * *

Even if the ad is purchased by the candidate's PAC, Oregon does not require that the ad identify the PAC or any of its sources of money. If the ad identifies the PAC, it is usually "Friends of Mary Jones [candidate name]."

Yes, you can look up on ORESTAR the contributions to the candidate's PAC, but those often come from other PACs, which in turn are funded by yet other PACs. Unlike most states, Oregon allows unlimited PAC-to-PAC transfers, which can be used to hide the true sources of the money.

Requiring the voter to spend hours on Internet research to find out the funding sources is not at all the same as revealing them directly in the political ad itself.

MEASURE 26-200 REQUIRES THAT POLITICAL ADVERTISEMENTS DISCLOSE THEIR BIG FUNDERS

Voters should know who are paying for political ads in order to judge credibility of the messages and so stop electing politicians beholden to corporate polluters.

Measure 26-200 requires that every political ad in a Portland candidate race state, **in the ad itself**, the **5 largest true, original sources of money** used to fund it.

Opponents of limits on campaign contributions often say that all the public needs is disclosure of the funders of the political advertisements. But such disclosure does not work well in Oregon.

Laws requiring that political advertisements identify their source are in place in 46 states. The Oregon Legislature repealed the law so requiring in 2001. **Here it is legal to do political ads and never identify their source or who paid for them.**

Federal law requires that ads on broadcast TV and radio at least identify their source, but even that can be the name of a nice-sounding committee or

nonprofit corporation that tells you nothing about the real sources of the money.

The Corporate Reform Coalition (75 prominent organizations) in 2012 concluded that only 6 states have worse systems than Oregon for disclosing "independent expenditures" that pay for political ads. Oregon earned an F, while Washington got an A. Oregon has not improved since 2012. Several states have adopted more stringent "tagline requirement" laws that mandate that political advertisements identify their true, original major sources of funding, including California, Washington, Connecticut and Maine. Voters deserve to know who is providing the Big Bucks behind political ads.

Let's shut down the loopholes that big donors are using to secretly funnel huge amounts of money to influence public policy in Oregon, and let's force every campaign to disclose its major donors right in their ads. Don't let big money drown out your voice. Vote YES on Measure 26-200.

Ban SUPERPACS and Dark Money groups by voting YES on Measure 26-200

Under current law, wealthy interests can give unlimited amounts of money to so-called "independent" campaigns or secretive "non-profit" organizations that don't even have to disclose their donors. Those groups then fund attack ads and mailers that clog your mailbox, television and computer screen with slander and mudslinging.

Let's make local politics honest by making SuperPACS and other campaign organizations play by the same rules that individuals have to play by, with limited contributions promptly disclosed. Measure 26-200 would do that and require every political ad to identify its top 5 sources of funding.

Measure 26-200 would decrease the cost of the public funding system by reducing the amounts of added funding provided when non-participating candidates raise large amounts in private donations. It would also require that advertising paid for by large private donations prominently disclose its top five funders.

Chris Dudley, the Republican candidate for Governor in 2010, collected over $2.5 million from the "Republican Governors Association," a private group that does not disclose its donors. **Oregon allows such contributions to remain cloaked in secrecy.**

The intent of the disclaimer provisions in Measure 26-200 seems quite clear: To require that each political advertisement for or against a candidate for City of Portland

public office identify its top 5 funders. This provides ample "fair warning" to those who might violate this requirement.

The courts are to discern the intent of the legislature. Here, the legislature is the voters of the City of Portland.

c. MEASURE 26-200'S DISCLAIMER REQUIREMENTS ARE WARRANTED BY LEGISLATIVE FINDINGS, ALTHOUGH THAT IS NOT REQUIRED.

The *Multnomah Validation Opinion* (p. 8) states:

> This mandate clearly encompasses a very wide array of communications and communicators: far more communications than can be justified under the legislative findings offered by the Petitioner in support of the charter and ordinance, and 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.

The legislative findings cited by the Citizen Parties include those adopted by Oregon voters in Measure 47 (2006). Those findings are indeed operational and were relied upon by the Oregon Supreme Court in its 2012 ***Hazell v. Brown*** opinion. See footnote 65, *ante*. The findings state:

> (w) The effective exercise of the right to vote requires timely access to understandable information about contributions and expenditures to influence the outcome of elections. Therefore, this Act requires:
>
> (1) More effective reporting of campaign contributions and expenditures, including so-called "independent expenditure" campaigns, which is particularly necessary in light of Oregon's distribution of vote-by-mail ballots weeks prior to election day; and
>
> (2) Effective and prompt disclosure of the identities of large donors in communications to voters by independent expenditure campaigns (including the businesses of those donors).

These findings quite specifically justify the disclaimer requirements of Measure 26-200, which are virtually the same as those in Measure 47 (2006). Further, there is no

requirement under the Oregon Constitution that such limitations be justified by legislative findings.

The Ninth Circuit recently rejected a vagueness challenge to campaign finance reporting requirements in Montana, because a "person of average intelligence * * * can read the statutes and regulations to determine which reporting rules apply." ***Montanans for Cmty. Development v. Mangan***, 735 Fed Appx 280, 283 (9th Cir 2018), *cert denied*, 139 S Ct 1165 (2019). Also surviving a vagueness challenge is the Alaska law (Alaska Stat. § 15.13.090) that "requires that most campaign communications be accompanied by a statement indicating who financed the communication. Specifically, it provides:

> (a) All communications shall be clearly identified by the words "paid for by" followed by the name and address of the candidate, group, nongroup entity, or individual paying for the communication."

Alaska Right To Life Comm. v. Miles, 441 F3d 773, 792 (9th Cir 2006).

> In effect, both provisions require that voters be informed of the source and nature of funding for campaign communications. Section 15.13.090 requires, with certain specified exceptions, that communications be accompanied by such information. Section 15.13.135(b) requires that, in addition to complying with 15.13.090, communications supporting a candidate paid for by independent expenditures must notify voters that the candidate did not authorize or pay for the communication.

Id., 441 F3d at 792-93.

> We therefore conclude that the compelling state interests of "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions," ***McConnell***, 540 U.S. at 196, 124 S.Ct. 619, justify the application of Alaska Stat. § 15.13.090 and 15.13.135(b) to nongroup entities.

Id., 441 F3d at 793.

d. THE COURT CAN ISSUE A LIMITING CONSTRUCTION, IF NECESSARY.

Finally, if the Court believes that the disclaimer provisions of Measure 26-200 are too vague, it can provide clarity and additional "fair warning" by issuing a limiting interpretation of those provisions.

> As has been observed before, "[w]e have the responsibility to interpret enactments, if possible, to avoid overbreadth." ***Lamrow***, 233 OrApp at 39, 225 P3d 51 (citing ***Robertson***, 293 Or at 417-18, 436-37, 649 P2d 569).

Clear Channel Outdoor, Inc. v. City of Portland, 243 OrApp 133, 161, 262 P3d 782, 799 (2011).

> A statute that is attacked as overbroad may be saved by a narrowing construction that, in the majority of situations, prevents its application to protected speech. ***Robertson***, 293 Or at 418, 649 P2d 569; ***State v. Moyle***, 299 Or 691, 70102, 705 P2d 740 (1985). Here, such a construction is available. Unlike fraud, deceit has no well-settled common-law pedigree. Nonetheless, we believe that, as used by the legislature in the context of identity theft, the term denotes an attempt to obtain some benefit to which the deceiver is not lawfully entitled. Thus narrowed, the statute does not reach a significant amount of privileged expression.

State v. Porter, 198 OrApp 274, 280, 108 P3d 107, 111 (2005).

> The Supreme Court has said that there is a presumption that legislators intend to except from an ordinance's proscription "all actions the prohibition of which would be absurd." ***City of Portland v. Goodwin***, 187 Or 409, 418, 210 P2d 577 (1949). Furthermore, the Supreme Court stated in Robertson that it was the legislature's responsibility
>
> > "to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." 293 Or at 437, 649 P2d 569. That has recently been clarified by the court to mean
> >
> > > "that a statute which reaches constitutionally protected behavior only rarely when compared with legitimate applications of the law need not succumb to an overbreadth attack. Such a statute may be interpreted as impliedly

> excluding the protected activity from coverage." ***State v. Garcias***, 296 Or 688, 699 n10, 679 P2d 1354 (1984).
>
> It is our duty to interpret a constitutionally challenged statute in a manner such that, if at all possible, its validity can be upheld. ***State v. Jackson***, 224 Or 337, 356 P2d 495 (1960); ***City of Portland v. White***, 9 OrApp 239, 241, 495 P2d 778 (1972). We accomplish that result by holding that the ordinance is intended to reach only non-protected public nudity and is to be interpreted and enforced accordingly. So narrowed, the ordinance does "eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." ***State v. Robertson***, *supra*, 293 Or at 437, 649 P2d 569.

City of Portland v. Gatewood, 76 OrApp 74, 81-83, 708 P2d 615, 619-620 (1985), pet *rev den*ied, 300 Or 477 (1986).

An appropriate limiting construction would be that the communications subject to the disclaimer requirements are those stemming from "expenditures" or "independent expenditures" as defined in Measure 26-200. Section 3-308 of Measure 26-200 adopts all of the definitions "at Chapter 260 of Oregon Revised Statutes, as of January 1, 2018, for terms not specifically defined in" Section 3-308. Section 3-308(j) defines "Expenditure":

> (j) "Expenditure" has the meaning set forth at ORS 260.005(8) and ORS 260.007, as of January 1, 2018, except that:
>
> (1) It does not include a Communication to its members, and not to the public, by a Membership Organization not organized primarily for the purpose of influencing an election.
>
> (2) The exception in ORS 260.007(7) does not apply.

ORS 260.005(8) defines "expenditure" as furnishing money or anything of value involving "support of or opposition to a candidate, political committee or measure."

Section 3-308 does not itself define "independent expenditure," but ORS 260.005(10) does:

> (10) "Independent expenditure" means an expenditure by a person for a communication in support of or in opposition to a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate, or any political committee or agent of a political committee supporting or opposing a measure. * * *

It is clear that the intent of Measure 26-200 is to impose the disclaimer requirement only when "expenditures" or "independent expenditures" fund the communication.

B. UNDER THE UNITED STATES CONSTITUTION.

The Campaign Disclosure Law Database[117] (maintained by UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation) states:

1. These states have laws requiring political advertisements disclosure the names of the major contributors: Arizona, Illinois, Missouri, Montana, New Hampshire, South Carolina, and Washington.[118]

2. 35 states have laws requiring that disclosure of the source of political advertisements take place on the face of the advertisements:

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117. http://disclosure.law.ucla.edu

118. This list appears a bit out of date. As noted in the Opening Brief of the Citizen Parties (p. 79), California, Hawaii, Maine, Vermont, Massachusetts, Colorado, Minnesota, and Virginia have "disclaimer" laws requiring that political ads involving candidate races identify their actual top significant funders (not merely the names of the political committees placing the ads).

Alabama	Iowa	North Carolina
Alaska	Kansas	Ohio
Arizona	Kentucky	Pennsylvania
California	Maine	South Carolina
Connecticut	Maryland	South Dakota
Delaware	Michigan	United States
D.C.	Missouri	Utah
Florida	Montana	Vermont
Hawaii	Nebraska	Virginia
Idaho	Nevada	Washington
Illinois	New Hampshire	Wisconsin
Indiana	New Jersey	

3. A similar set of 39 states require that printed political advertisements identify their sources.

4. A similar set of 32 states require that TV and radio political advertisements identify their sources.

We are aware of no cases striking down these requirements in any of these states.

There is no serious question about the constitutionality of these laws. As the United States Supreme Court stated in ***Citizens United v. Federal Election Comm'n***, 558 US 310, 130 SCt 876 (2010):

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," ***Buckley***, 424 US, at 64, 96 SCt 612, and "do not prevent anyone from speaking," ***McConnell***, *supra*, at 201, 124 SCt 619.

558 US at 366.

> There was evidence in the record that independent groups were running election-related advertisements "while hiding behind dubious and misleading names." ***McConnell***, at 197, 124 SCt 619. The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "make informed choices in the political marketplace."

558 US 310 at 367.

Subsequent cases upholding such requirements include ***Yamada v. Snipes***, 786 F3d 1182 (9th Cir), cert denied, 136 SCt 569 (2015) (Hawaii's disclaimer

requirements); ***Vermont Right to Life Comm., Inc. v. Sorrell***, 758 F3d 118 (2d Cir 2014), *cert denied*, 135 SCt 949 (2015) (Vermont's attribution and disclosure requirements); ***Nat'l Org. for Marriage v. McKee***, 649 F3d 34 (1st Cir 2011) (Maine); ***Human Life of Washington Inc. v. Brumsickle***, 624 F3d 990 (9th Cir 2010), *cert denied*, 562 US 1217, 131 SCt 1477 (2011) (Washington). An earlier case, ***Majors v. Abell***, 361 F3d 349 (7th Cir 2004) upheld the Indiana law requiring that political literature regarding candidates disclose their sponsors.

1. THE ATTORNEY GENERAL'S ANALYSIS IS OUTDATED AND FUNDAMENTALLY FLAWED.

The Attorney General Opinion relied upon ***McIntyre***, *supra*, which concluded that Mrs. McIntyre could place a few flyers about a school bond measure under windshield wipers in the school parking lot, without putting her name on them. That is a far cry from purchasing thousands or millions of dollars of advertising and refusing to identify either the source of the message or who paid for it.

Later federal cases have rejected the notion that ***McIntyre*** invalidates political advertisement tagline requirements, including ***Citizens United v. Federal Election Comm'n***, 558 US 310, 130 SCt 876 (2010) ("***Citizens United***"), ***Yamada v. Snipes***, 786 F3d 1182 (9th Cir), *cert denied*, ___ US ___, 136 SCt 569 (2015) (Hawaii's disclaimer requirements); ***Vermont Right to Life Comm., Inc. v. Sorrell***, 758 F3d 118 (2d Cir 2014), *cert denied*, ___ US ___, 135 SCt 949 (2015) (Vermont's attribution and disclosure requirements); ***Nat'l Org. for Marriage v. McKee***, 649 F3d 34 (1st Cir 2011) (Maine); ***Human Life of Washington, Inc. v. Brumsickle***, 624 F3d 990 (9th Cir 2010), *cert denied*, 562 US 1217, 131 SCt 1477 (2011) ("***Human Life***"). An earlier

case, ***Majors v. Abell***, 361 F3d 349 (7th Cir 2004) upheld the Indiana law requiring that political literature regarding candidates disclose their sponsors. These cases are discussed at pages 127-137, *post*.

ACLU v. Heller, 378 F3d 979 (9th Cir 2004), is a decision that struck down a Nevada statute requiring taglines on all political ads that included "the names and addresses of contributors." The Measure 26-200 tagline requirement does not include addresses. Further, as explained in ***Majors v. Abell***, 361 F3d 349 (7th Cir 2004), the Nevada statute in ***Heller*** applied not only to candidate races but also to ballot measures, where First Amendment considerations are heightened.[119] Measure 26-200 does not apply to ballot measures.

2. U.S. SUPREME COURT CASES UPHOLD TAGLINES AND DISCLAIMERS.

The U.S. Supreme Court has consistently upheld mandatory taglines and disclaimers on political advertising, limiting ***McIntyre*** to its facts (one person putting flyers pertaining to a bond measure on car windshields).

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119. For example, while the U.S. Supreme Court has consistently upheld complete bans on contributions by corporations or unions to candidate campaigns, it has struck down such bans on contributions to ballot measure campaigns. ***Fed. Election Comm'n v. Beaumont***, 539 US 146, 123 SCt 2200 (2003), upheld the complete federal ban on campaign contributions by corporations, while the Court has struck down bans on corporation contributions to ballot measure campaigns.

> The risk of corruption perceived in cases involving candidate elections, e. g., ***United States v. United Automobile Workers***, *supra*; ***United States v. CIO***, *supra*, simply is not present in a popular vote on a public issue.29

First Nat. Bank of Boston v. Bellotti, 435 US 765, 790, 98 SCt 1407, 1423, 55 LEd2d 707 (1978).

> In ***Buckley***, the Court upheld the disclosure laws in the FECA after applying an "exacting scrutiny" analysis. The Court found that disclosure laws appropriately advanced three government interests: an "informational interest" of providing the electorate with information about the sources of campaign money; an "anti-corruption interest" in deterring actual corruption and avoiding the appearance of corruption; and the "enforcement interest" that is served by the necessity of reporting and disclosure rules to detect violations of campaign-finance laws more generally.

Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech*, 15 YALE J.L. & TECH. 92, 124-25 (2013) ("Shepard & Belmas"). The U.S. Supreme Court sustained this position.

> Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.[32]
>
> 32. Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See ***Buckley***, 424 US, at 6667, 96 SCt, at 657-58; ***United States v. Harriss***, 347 US 612, 625-26, 74 SCt 808, 815-17, 98 LEd 989 (1954). In addition, we emphasized in ***Buckley*** the prophylactic effect of requiring that the source of communication be disclosed. 424 US, at 67, 96 SCt, at 657.

First Nat. Bank of Boston v. Bellotti, 435 US 765, 791-92, 98 SCt 1407, 1423-24 (1978) (citations omitted). In ***Citizens United***, *supra*, the Court upheld the federal disclosure and disclaimer laws by an 8-1 vote.

> The Justices' contrasting views were on display again in the 2010 case Doe v. Reed, in which the Court in an 8-1 vote ruled that disclosure of names and addresses of individuals who signed petitions for ballot initiatives did not on its face violate their rights of anonymity under the First Amendment. * * * In applying "exacting scrutiny" to the law, the Court found a "substantial relation" between the disclosure requirement and the "sufficiently important" government interest." The Court focused on the

> state's interest in the integrity of the electoral process, indicating that disclosure helps prevent corruption and fraud, as well as foster government transparency and accountability.

Shepard & Belmas, 15 YALE J.L. & TECH. at 128 (citations omitted).

Citizens United and many other cases discussed below apply to disclaimers in advertisements, not merely disclosure or reporting to government entities. Justice Scalia has noted the need for disclosures in order to prevent political dirty tricks that fool voters into blaming an innocent candidate for "a really tasteless attack."

> Observers of the past few national elections have expressed concern about the increase of character assassination--"mudslinging" is the colloquial term--engaged in by political candidates and their supporters to the detriment of the democratic process. Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office. Imagine how much all of this would increase if it could be done anonymously. The principal impediment against it is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression. Consider, moreover, the increased potential for "dirty tricks." It is not unheard-of for campaign operatives to circulate material over the name of their opponents or their opponents' supporters (a violation of election laws) in order to attract or alienate certain interest groups. See, e.g., B. Felknor, POLITICAL MISCHIEF: SMEAR, SABOTAGE, AND REFORM IN U.S. ELECTIONS 111-112 (1992) (fake United Mine Workers' newspaper assembled by the National Republican Congressional Committee); ***New York v. Duryea***, 76 Misc2d 948, 351 NYS2d 978 (Sup. 1974) (letters purporting to be from the "Action Committee for the Liberal Party" sent by Republicans). How much easier--and sanction free!--it would be to circulate anonymous material (for example, a really tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side.

McIntyre, 514 US at 382-83 (J. Scalia, dissent).

3. FEDERAL CIRCUIT COURT CASES UPHOLD TAGLINES AND DISCLAIMERS.

The federal Circuit Courts have consistently upheld tagline requirements applicable in candidate races.

> We agree with the district court that the disclaimer requirement survives exacting scrutiny as applied to A1's newspaper advertisements. Like the noncandidate committee requirements, the disclaimer serves an important governmental interest by informing the public about who is speaking in favor or against a candidate before the election and imposes only a modest burden on First Amendment rights. A1's arguments to the contrary are all but foreclosed by ***Citizens United***, 558 US at 366-69, 130 SCt 876.

Yamada v. Snipes, *supra*, 786 F3d at 1202.

> First, the disclaimer requirement imposes only a modest burden on A1's First Amendment rights. Like disclosure requirements, "[d]isclaimer ... requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking." [***Citizens United***] *Id.* at 366, 130 SCt 876 (citation and internal quotation marks omitted). Hawaii's disclaimer requirement is no more burdensome than the one for televised electioneering communications upheld in ***Citizens United***. See *id.* at 366-69, 130 SCt 876. That rule required a statement as to who was responsible for the content of the advertisement "be made in a 'clearly spoken manner,' and displayed on the screen in a 'clearly readable manner' for at least four seconds," along with a further statement that "the communication 'is not authorized by any candidate or candidate's committee.' " *Id.* at 366, 130 SCt 876 (quoting 2 USC § 441d(d)(2), (a)(3)).

Yamada v. Snipes, 786 F3d at 1202.

> Second, requiring a disclaimer is closely related to Hawaii's important governmental interest in "dissemination of information regarding the financing of political messages." ***McKee***, 649 F3d at 61. A1's past advertisements ran shortly before an election and criticized candidates by name as persons who did not, for example, "listen to the people." As the district court found, these advertisements--published on or shortly before election day--are not susceptible to any reasonable interpretation other than as an appeal to vote against a candidate. ***Yamada III***, 872 FSupp2d at 1055. Such ads are the very kind for which "the public has an interest in knowing who is speaking," ***Citizens United***, 558 US at 369, 130 SCt 876, and where disclaimers can "avoid confusion by making clear that the ads are not funded by a candidate or political party," *id.*, at 368, 130 SCt 876. See also ***Worley***, 717 F3d at 1253-55 (rejecting a challenge to an analogous disclaimer requirement); ***McKee***, 649 F3d at 61 (same); ***Alaska Right to Life***, 441 F3d at 79293 (same).

Yamada v. Snipes, 786 F3d at 1202-03.

> We reject A1's comparison to the disclaimer invalidated by the Supreme Court in ***McIntyre v. Ohio Elections Commission***, 514 US 334, 340, 115 SCt 1511, 131 LEd2d 426 (1995), which prohibited the distribution of pamphlets without the name and address of the person responsible for the materials, or to the disclosure provision invalidated by this court in ***ACLU of Nev. v. Heller***, 378 F3d 979, 981-82 (9th Cir 2004), which required persons paying for publication of any material "relating to an election" to include their names and addresses. ***Citizens United***'s post-***McIntyre***, post-***Heller*** discussion makes clear that disclaimer laws such as Hawaii's may be imposed on political advertisements that discuss a candidate shortly before an election. See 558 US at 36869, 130 SCt 876; see also ***Worley***, 717 F3d at 1254 (rejecting the argument that ***McIntyre*** dictated the demise of Florida's analogous disclaimer requirement). An individual pamphleteer may have an interest in maintaining anonymity, but "[l]eaving aside ***McIntyre***-type communications ... there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way." ***Alaska Right to Life***, 441 F3d at 793.

Yamada v. Snipes, 786 F3d 1182, 1203 n14.

Earlier Ninth Circuit decisions agree. ***Human Life of Washington Inc. v. Brumsickle***, 624 F3d 990, 999 (9th Cir 2010), *cert denied*, 562 US 1217 (2011) ("***Human Life***"), described the Washington statute:

> In addition to disclosures for independent expenditures, the Disclosure Law sets forth requirements for "political advertising," defined as "any advertising displays, newspaper ads, billboards, signs, brochures, articles, tabloids, flyers, letters, radio or television presentations, or other means of mass communication, used for the purpose of appealing, directly or indirectly, for votes or for financial or other support or opposition in any election campaign." *Id.* 42.17.020(38). An advertisement must identify its sponsor: written political advertising must include the sponsor's name and address; radio and television ads must state the sponsor's name; and advertising undertaken as an independent expenditure must state that the advertisement was not approved by any candidate. See *id.* 42.17.510(1)-(4).

The Ninth Circuit upheld the statute.

> Recent Supreme Court decisions have eliminated the apparent confusion as to the standard of review applicable in disclosure cases. The Court has clarified that a campaign finance disclosure requirement is constitutional if it survives exacting scrutiny, meaning that it is substantially related to a sufficiently important governmental interest. In ***Doe v. Reed***, 561 US 186, 130 SCt 2811, 177 LEd2d 493 (2010), the Supreme Court examined a

statute authorizing public disclosure of the signatories to a ballot initiative. In explaining why disclosure requirements were subject to the less demanding standard of review of exacting scrutiny, the Reed Court emphasized that the statute at issue was "not a prohibition on speech, but instead a disclosure requirement." *Id.* at 2818. As the Court held in ***Citizens United***, "disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking.'" ***Citizens United***, 130 SCt at 914 (quoting ***Buckley***, 424 US at 64, 96 SCt 612; ***McConnell***, 540 US at 201, 124 SCt 619). The Reed Court continued:

> We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.

Reed, 130 SCt at 2818 (citations and internal quotation marks omitted). As the latest in a trilogy of recent Supreme Court cases, ***Reed*** confirmed that exacting scrutiny applies in the campaign finance disclosure context. See ***Citizens United***, 130 SCt at 914; ***Davis***, 128 SCt at 2765-66. We therefore apply exacting scrutiny to Human Life's facial challenges to the Disclosure Law and examine whether the law's requirements are substantially related to a sufficiently important governmental interest.

Human Life, 624 F3d at 1005.

Providing information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment. As the Supreme Court explained in ***Buckley***, "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." ***Buckley***, 424 US at 1415, 96 SCt 612; see also ***McConnell***, 540 US at 197, 124 SCt 619 (recognizing the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" (quoting ***McConnell v. FEC***, 251 FSupp2d 176, 237 (DDC 2003))). Thus, by revealing information about the contributors to and participants in public discourse and debate, disclosure laws help ensure that voters have the facts they need to evaluate the various messages competing for their attention.

Human Life, 624 F3d at 1005.

Campaign finance disclosure requirements thus 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. An appeal to cast one's vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another. The increased "transparency" engendered by disclosure laws "enables the electorate to make informed decisions and give proper weight to different speakers and messages." ***Citizens United***, 130 SCt at 916. As the Supreme Court has stated: "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." ***Bellotti***, 435 US at 791-92, 98 SCt 1407. Disclosure requirements, like those in Washington's Disclosure Law, allow the people in our democracy to do just that.

Human Life, 624 F3d at 1008.

> In ***Citizens United***, the Supreme Court unreservedly affirmed the public's interest "in knowing who is speaking about a candidate shortly before an election," and it concluded that "the informational interest alone" was sufficient to support federal campaign finance disclosure requirements. ***Citizens United***, 130 SCt at 91516. Upholding the line of cases that recognize the importance of the government's informational interest, the Court reasoned:The First Amendment protects political speech; and 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. *Id.* at 916.

Human Life, 624 F3d at 1017.

> Thus, to prevent the public from being misled by special interest groups "masquerading as proponents of the public weal," the voters who passed Washington's Disclosure Law "merely provided for a modicum of information from those" who wish to influence the public's vote. *Id*; see also ***McConnell***, 540 US at 19697, 124 SCt 619 (noting that groups sometimes use "dubious and misleading names," like "Citizens for Better Medicare," a group funded by the pharmaceutical industry); *Editorial, The Secret Election*, N.Y. TIMES, Sept. 18, 2010 (noting the ability of 501(c)(4) organizations "with disingenuously innocuous names like American Crossroads and the American Action Network" to serve as "a funnel for anonymous campaign donations"). We have no trouble concluding that Washington's interest in informing the electorate through the Disclosure Law is sufficiently important.

Human Life, 624 F3d at 1017-18.

> The other federal circuits agree.

> ***Citizens United*** removed any lingering uncertainty concerning the reach of constitutional limitations in this context. In ***Citizens United***, the Supreme Court expressly rejected the "contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy," because disclosure is a less restrictive strategy for deterring corruption and informing the electorate. 558 US at 369, 130 SCt 876; *accord* ***Buckley***, 424 US at 66-68, 96 SCt 612. The Court explained that even if Citizens United's "ads only pertain to a commercial transaction," the government could constitutionally require identification and disclosure with respect to the advertisements because "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.*

Vermont Right to Life Comm., Inc. v. Sorrell, 758 F3d 118, 132 (2d Cir 2014).

> Transparency in campaign finance allows the public to weigh the "credib[ility]" of the speaker and thus the "persuas[iveness]" of the message, and that is so "generally whatever the question is." Aristotle, Rhetoric, in 2 THE COMPLETE WORKS OF ARISTOTLE 2152, 2155 (Jonathan Barnes ed. 1984), quoted in ***Majors v. Abell***, 361 F3d 349, 352 (7th Cir 2004) (upholding state statute requiring political ads to identify sponsors). Such transparency helps the public hold political speakers accountable for making false, manipulative, or otherwise unseemly ads that they might otherwise run with impunity.

Ctr. for Individual Freedom v. Madigan, 697 F3d 464, 490-91 (7th Cir 2012).

Nat'l Org. for Marriage v. McKee, 649 F3d 34, 43-44, (1st Cir 2011), *cert denied*, 565 US 1234, 132 SCt 1635 (2012), described Maine's disclaimer law.[120]

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120. Maine voters in 2015 adopted a law requiring that political advertisements identify their top 3 funders.

1014. Publication or distribution of political communications

> **2-B. Top 3 funders; independent expenditures.** A communication that is funded by an entity making an independent expenditure as defined in section 1019-B, subsection 1 must conspicuously include the following statement:
>
> > "The top 3 funders of (name of entity that made the independent expenditure) are (names of top 3 funders)."

(continued...)

> Finally, Maine law also requires that political advertisements and certain other political messages contain statements of attribution and disclaimer. The governing statute provides that any "communication expressly advocating the election or defeat of a clearly identified candidate ... clearly and conspicuously state" whether it has been authorized by the candidate (the disclaimer) and state the name and address of the person who financed the communication (the statement of attribution). *Id.* § 1014(1)(2).

The First Circuit then upheld it.

> Since ***Buckley***, the Supreme Court has distinguished in its First Amendment jurisprudence between laws that restrict "the amount of money a person or group can spend on political communication" and laws that simply require disclosure of information by those engaging in political speech. 424 US at 19, 64, 96 SCt 612. The Court has recognized that disclosure laws, unlike contribution and expenditure limits, "impose no ceiling on campaign-related activities," id. at 64, 96 SCt 612, and thus are a "less restrictive alternative to more comprehensive regulations of speech." ***Citizens United***, 130 SCt at 915; see also ***Buckley***, 424 US at 68, 96 SCt 612 ("[D]isclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist."). For that reason, disclosure requirements have not been subjected to strict scrutiny, but rather to " 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." ***Citizens United***, 130 SCt at 914 (quoting ***Buckley***, 424 US at 64, 66, 96 SCt 612); see also ***Doe v. Reed***, 561 US 186, 130 SCt 2811, 2818, 177 LEd2d 493 (2010).

Nat'l Org. for Marriage v. McKee, 649 F3d 34, 55, 2011 WL 3505544 (1st Cir 2011).

> As ***Citizens United*** recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages. In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the "marketplace of ideas" has become flooded with a

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120.(...continued)

> The information required by this subsection may appear simultaneously with any statement required by subsection 2 or 2-A. A communication that contains a visual aspect must include the statement in written text. A communication that does not contain a visual aspect must include an audible statement. This statement is required only for communications made through broadcast or cable television, broadcast radio, Internet audio programming, direct mail or newspaper or other periodical publications. * * *

> profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus "enables the electorate to make informed decisions and give proper weight to different speakers and messages." ***Citizens United***, 130 SCt at 916; see also ***Cal. ProLife Council, Inc. v. Getman***, 328 F3d 1088, 1105 (9th Cir 2003) (recognizing that, in the "cacophony of political communications through which ... voters must pick out meaningful and accurate messages [,] ... being able to evaluate who is doing the talking is of great importance").

Nat'l Org. for Marriage v. McKee, 649 F3d 34, 57, 2011 WL 3505544 (1st Cir 2011).

Bailey v. Maine Comm'n on Governmental Ethics & Election Practices, 900 FSupp2d 75 (D Me 2012) "***Bailey***"), upheld Maine's statute requiring that election advocacy communications state the name and address of the person financing the communication:

> The Court concludes that ***Citizens United*** and ***Buckley***, rather than ***McIntyre***, are the appropriate precedents to follow in this case. For election advocacy, the balance between the state's informational interest in attribution and a speaker's right to remain anonymous tips in the speaker's favor when a speaker can show that remaining anonymous is necessary to protect him from threats, harassment and reprisals. The balance does not tip in favor of a high-profile political actor who wishes, on the eve of an election, to criticize a gubernatorial candidate anonymously.
>
> Allowing voters to know the person responsible for political communications so that they can judge a communication's reliability is exactly why the Maine legislature passed section 1014 and why the law was upheld in ***National Organization for Marriage***. Maine's disclosure requirements are narrowly drawn and the least restrictive way to further the State's substantial informational interest.

Bailey, 900 FSupp2d at 86.

We hesitate to provide additional quotations from similar cases and instead provide this additional list:

> ***National Org. for Marriage, Inc. v. Sec'y***, 477 FedAppx 584, 585 (11th Cir 2012) (rejecting facial and as-applied challenge to Florida disclosure laws);

> ***The Real Truth About Abortion, Inc. v. FEC***, 681 F3d 544, 546 (4th Cir 2012) (rejecting facial and as-applied challenge to FEC disclosure regulations);
>
> ***Family PAC v. McKenna***, 685 F3d 800, 811 (9th Cir 2012) (rejecting facial challenge to Washington disclosure laws).

VII. OREGON LAW PERMITS PAYROLL DEDUCTIONS PURSUANT TO LOCAL LAWS.

The answer is as simple as reading ORS 652.610(3). ORS 652.610(3)(a) negates preemption regarding payroll deductions if "The employer is required to do so [allow payroll deduction] by law." Portland Charter § 3-301(c) is indeed law, as is the identical Portland ordinance. Both provide to individuals the right to make campaign contributions by payroll deduction by any private or public employer, "if such deduction is available to the employees for any other purpose." Both the Charter provision and the ordinance are "laws." Both require the employer to allow payroll deduction under these circumstances.

State law does not prohibit an employee from authorizing campaign contribution payroll deductions in writing. ORS 652.610(3)(c) negates preemption regarding payroll deductions if

> The 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.

This negation of preemption applies to the campaign contributions addressed in the charter amendment and Portland ordinance.

VIII. THE VALIDITY OF THE CHARTER AMENDMENT IS NOT AT ISSUE IN THIS PROCEEDING.

A validation proceeding under ORS 33.710 is authorized to examine the validity of:

> (f) The authority of the governing body to enact any ordinance, resolution or regulation.
>
> (g) Any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation.

The Portland City Council adopted an ordinance, which contains almost the same language as the Charter Amendment adopted by the voters of Portland by means of Measure 26-200.

While this Court has authority to examine the validity of the ordinance, it does not have authority under ORS 33.710 to examine the validity of the Charter Amendment. The provisions of the Charter Amendment are self-implementing, including its limits on receipt of campaign contributions, its limits on independent expenditures, its requirement that campaign advertisements identify their top 5 major funders, its specification of minimum and maximum penalties for violations, and its provisions for implementation and enforcement. No ordinance is necessary for the provisions of the Charter Amendment to become effective and operative. Regardless of any ordinance, the provisions of the Charter Amendment govern the receipt of campaign contributions, the making of independent expenditures, and the required

taglines on advertisements, all applicable to contests for public office of Portland.

Dated: April 22, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION FOR SUMMARY JUDGMENT BY THE CITIZEN PARTIES by following methods:

[X] Electronic service - UTCR 21.100(1)(a)
[ ] hand delivery
[ ] facsimile transmission
[ ] overnight delivery
[ ] USPS first class mail
[X] courtesy email

Naomi Sheffield
Deputy City Attorney
City of Portland
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Portland, OR 97204

Dated: April 22, 2019

/s/ *Daniel W. Meek*

Daniel W. Meek