IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Validation Proceeding to Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure.	Multnomah County Circuit Court No. 17CV18006
MULTNOMAH COUNTY, Petitioner-Appellant,	CA A168205
and	**SC S066445**
ELIZABETH TROJAN, MOSES ROSS, JUAN CARLOS ORDONEZ, DAVID DELK, JAMES OFSINK, RON BUEL, SETH ALAN WOOLLEY, and JIM ROBISON, Intervenors-Appellants,	
and	
JASON KAFOURY, Intervenor,	
v.	
ALAN MEHRWEIN, PORTLAND BUSINESS ALLIANCE, PORTLAND METROPOLITAN ASSOCIATION OF REALTORS, and ASSOCIATED OREGON INDUSTRIES, Intervenors-Respondents.	

BRIEF OF *AMICUS CURIAE* KYLE MARKLEY

Caption continued on next page

October 2019

On Certified Appeal from a Judgment of the Multnomah County Circuit Court, the Honorable Eric J. Bloch, Judge

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I. INTEREST OF AMICUS CURIAE

I am a political activist in Oregon with a significant personal interest in freedom of political expression.

I was the Libertarian nominee for House District 30 in the Oregon House of Representatives for election years 2012, 2014, 2016, and 2018, in each instance running a self-funded campaign that would have been rendered illegal if covered by contribution and expenditure limits similar to those in the County and City legislation. Although not elected, I believe that my strong political campaigns have been instrumental in making my district the most Libertarian in the state, recently 44% more Libertarian than the statewide average of active voters registered with a political party. I fear that if the constitutional protections for political contributions are lost, my ability to self-fund future campaigns may be severely limited.

I have been a director of the Libertarian Party of Oregon since 2013 and have made financial contributions averaging about $5,000 per year to that organization. I fear that if the constitutional protections for political contributions are lost, my ability to support the political party of my choice may be severely limited.

I founded a political action committee, Statements for Liberty, the mission of which is to help Libertarian candidates place statements in the Voters' Pamphlet. I have been the largest financial contributor to this

organization. I fear that if the constitutional protections for political contributions are lost, my ability to support my own political organization may be severely limited.

I was the lead petitioner in *Markley v. Rosenblum*,[1] a successful challenge to the ballot title of a proposed constitutional amendment which was intended to remove the constitutional protections for political expression. I fear that if the constitutional protections for political contributions are lost, my ability to support or oppose ballot measures may be severely limited.

I was a member of the Joint Interim Task Force on Campaign Finance Reform from 2015–2017 and dedicated significant time and effort on behalf of freedom of political expression.

I assert that I am not corrupt and that my political expression is not corrupting. My political expression is well-reasoned, non-violent, and ought to remain fully protected against government censorship.

II. EXPRESSION OF POLITICAL ORGANIZATIONS

A. The Nature of Political Organizations

Like all other forms of voluntary association, a political organization is a group of individuals acting together in the pursuit of shared interests.

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[1] 362 Or 531, 413 P3d 966 (2018) (addressing certified ballot title) and 362 Or 855, 418 P3d 13 (2018) (addressing modified ballot title).

Individuals form and support organizations because they believe that, by working together, they will achieve more than by working separately.

The primary purpose of political organizations is to influence the exercise of government power. This attempt to influence may take many forms, for example:

- Lobbying public officials or agencies,
- Supporting or opposing candidates for public office,
- Supporting or opposing the recall of elected officials,
- Supporting or opposing ballot measures,
- Protesting government action or inaction, and
- Engaging in issue advocacy to change public opinion.

Each of these activities is a form of protected political expression. Persuasive political speech on matters of public interest is the essential purpose of political organizations.

B. Money is Inextricably Entwined with Expression

Article I, section 8 of the Oregon Constitution protects "the right to speak, write, or print freely on any subject whatever." This freedom necessarily includes the right to spend money to produce and promulgate speech, as the average individual does not produce his own ink or paper or build and operate

his own printing press or media distribution network.[2] Without the right to spend money on creating, printing, publishing, marketing, and other forms of distributing speech, the right to speech alone would be meaningless to most Oregonians.

Although some forms of political expression are free—speaking with friends, family, and neighbors—many of our most common and cherished forms of political expression require varying degrees of expenditure. It is a fact of modern American life that meaningfully engaging in political expression without spending any money is nearly impossible. Even speaking is not free, if one wants to hire a speechwriter to make one's speech more persuasive or if one must cover travel expenses to deliver it. Handbills cost money for printing and, often, distribution. Radio, television, and online messages can be effective but expensive. Lawn signs and political mailers—perennial and traditional forms of expression—are often among campaigns' most regular expenses. Professional assistance in copyediting, graphic design, recording, and audience targeting cost money. Even "free" or "earned" media is often the product of significant, behind-the-scenes investment. In each of these instances of political expression—and many others—money is an essential ingredient.

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[2] *See generally* LEONARD E. READ, I, PENCIL (1958), *available at* https://fee.org/media/33856/i-pencil-final-proof-for-website-pdf.pdf.

C. Expression in Association with Others

The right to free expression extends even to large productions requiring the coordinated efforts of many contributors. Here, motion pictures provide an illustrative example. When making a motion picture, the expression of the actors is combined with that of the production designers, art and photography directors, costume designers, musical composers, screenwriters, editors, visual and auditory effects artists, and too many others to mention. Expression is protected no matter how many individuals contribute to the final product.

The cooperation of all these individuals toward the same expressive end is only possible because the motion picture has been financed by someone. Employees and contractors are paid long before the motion picture yields any revenue. This is true regardless of the subject matter. Whether the film is a summer blockbuster or a political documentary like *Hillary: The Movie* (the political speech at the center of the *Citizens' United*[3] decision), it cannot be created without money and cooperation—something that can be said of all large endeavors.

An individual may choose to exercise his right to political expression in association with others in order to benefit from pooled resources and the division and specialization of labor. For example, talented writers may have the

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[3] *Citizens United v. Federal Election Com'n*, 558 US 310, 130 S Ct 876 (2010)

promulgation of their speech financed by other individuals with similar political values but with talents other than persuasive writing. This occurs with issue advocacy organizations every day. The organization is the vehicle through which the writers and financiers cooperate to jointly exercise their individual rights to political expression. *See, e.g., National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 US 449, 460, 78 S Ct 1163, 2 L Ed 2d 1488 (1958) (the organization "is but the medium through which its individual members seek to make more effective the expression of their own views"). The financing is inextricably entwined with the expression; without the organization as a vehicle for the cooperation of the writers and the financiers, the political expression could not occur.

D. Contributions to Political Organizations Are Expression

Contributing to a political organization is an inherently expressive act: contributions are deliberately made for the purpose of creating or spreading political expression, the act of contributing sends a message to the political organization receiving the contribution, and the act of contributing may itself be public political expression.

Because political organizations generally exist to amplify political expression, the average contribution to a political organization can be assumed to be made for the specific purpose of furthering political expression—namely, the political expression of that organization. A political contribution almost

always represents an individual's choice to amplify his or her expression through that organization rather than to speak directly to the public as an individual. This is a sensible choice: political organizations are specialists in what they do, they can aggregate resources to take advantage of economies of scale, and they are presumed (rightly) to be more effective in broadcasting political expression than non-specialist individuals.

It is important to emphasize that the contributing individual is choosing to speak *through* the receiving organization, so although the organization's direct expression may be that of, for example, a single political candidate, the organization's expression is also indirectly that of all of the organization's contributors. Just as a motion picture actor's expression is not his alone—it is joined and mixed with the efforts of screenwriters, editors, financiers, etc.—the expression of a political organization is the product of all the individuals who helped finance, create, and distribute it.

The freedom to engage in political expression as an individual includes the freedom to engage in political expression with and through others.

Because of the value—and, often, the necessity—of relying on money and organizations to effectively communicate political expressions, limits on contributions to political organizations necessarily burden individuals' rights of expression and association. Limits put a ceiling on an individual's ability to work jointly with others in pursuit of political change and advancement.

Contributing to an organization is also, in and of itself, an expressive act. Contributing communicates support for the organization, its goals, and/or its activities. This is true whether or not the contribution is known to the public. It is a message to the organization itself. A contribution—or an increase or decrease thereof—is a statement: a statement of support and encouragement or of censure and admonition. It is easy to see that the message is entwined with the contribution itself: every organization is going to treat a letter stating, "You are doing great work and deserve a million dollars!" differently than an actual check for a million dollars. These messages affect the behavior of the receiving organization (as fundraising is often a measure of performance), and their transmission to that organization is essential, protected political expression.

The expressive quality of a contribution is magnified when it is a matter of public record due to mandatory campaign finance disclosure laws. In such an instance, the act of making a contribution becomes political expression with the public as well as the organization receiving the contribution. This is a well-worn tradition in American politics; campaigns at all levels make strategic use of reporting requirements to show who and how many donated to their cause. Contributing to a political organization is an inherently expressive act in that respect as well. It is also an act enshrined in decades of American tradition and practice and one which countless courts have deemed entitled to the highest tier of constitutional protection.

III. CONSTITUTIONAL PROTECTIONS FOR EXPRESSION

A. Generally

The text of Article I, section 8 of the Oregon Constitution reads:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Laws may not restrain "the free expression of opinion * * * on any subject whatever." Central to this right is the protection of expression about politics: elections, candidates, public officials, and other subjects of public concern. Article I, section 8 is a blanket prohibition made in the strongest possible terms. All opinions on all subjects are protected. Expression must remain free—that is, unencumbered by government and left entirely in the hands of the speaker. This constitutional provision is a firm bulwark against censorship. It is a guard against new and seductive arguments undermining the value of free expression and promoting the government's discretion to determine what individuals in a free society can and cannot say.

Thus, under the *Robertson* framework, laws written in terms directed at the substance of expression must be rejected "unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and

that the guarantees then or in 1859 demonstrably were not intended to reach." *State v. Robertson*, 293 Or 402, 412, 649 P2d 569, 576 (1982).

B. Historical Exceptions

The classical categories of exceptions to the right of free expression—imminent incitement or true threats, false statements of fact, obscenity, and using the work of others without permission—do not apply to political expression. Rather, political expression—commentary and opinion about the rules of an ordered society, the systems that should and that do produce those rules, the roles for people in these systems, and which people should occupy those roles—deserves the highest level of constitutional protection. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 US 377, 422, 112 S Ct 2538, 2564, 120 L Ed 2d 305 (1992) (Stevens, J. concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position[.]"). Although political expression may often be accused of containing false statements, the expression of political ideas is so essential to our well-functioning democracy that our protections for political speech include even this political "spin." In fact, even truly false political speech, such as the defamation of a candidate, does not warrant the chilling penalty of prior restraint but instead only results in consequences after publication. *See State v. Ciancanelli*, 339 Or 282, 295, 121 P3d 613, 620 (2005) (Oregon Supreme Court

tended to view "the abuse clause of Article I, section 8, as permitting laws aimed at punishing (as opposed to imposing prior restraints on) expression itself"). Thus, political expression does not generally fall into the traditional, historical exceptions to the right to free expression.

Moreover, the mere existence of past or current laws regulating campaign contributions is not relevant to the historical exception analysis because we cannot know whether any particular law is or was constitutional unless and until it has survived a constitutional challenge. The enactment of a law is not evidence of its constitutionality any more than a law's repeal is evidence of its unconstitutionality.[4] The Sedition Act of 1798, which by present-day consensus was patently unconstitutional, was enacted less than a decade after the adoption of the Bill of Rights. Individuals were convicted and punished for political expression under that Act, but it never faced a Supreme Court challenge. Instead, it expired by its own terms. *See New York Times Co. v. Sullivan*, 376 US 254, 276, 84 S Ct 710, 723 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

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[4] Although it is worth noting that political campaign contribution limits have been repealed, and that this was because they were thought to be unconstitutional. *See, e.g.*, *Deras v. Myers*, 272 Or 47, 535 P2d 541 (1975); *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997).

C. Other States

The argument that other states with similarly-written free speech provisions in their constitutions have permitted contribution limits, and therefore so should Oregon[5] commits the *ad populum* and *ad verecundiam* fallacies simultaneously. Simply put, Oregon has a rich history of protecting free speech, even when other state supreme courts and the United States Supreme Court, have not. *See Vannatta*, 324 Or at 521 ("[u]nder Oregon's Article I, section 8, jurisprudence, however, there is no basis for distinguishing between closely related forms of expression in the way that the United States Supreme Court does"). These state court decisions are not controlling authority, are unpersuasive in the face of Oregon's unique freedom of speech jurisprudence, and they should not be a part of this court's Article I, section 8 analysis. When the Oregon Constitution guarantees "free expression of opinion * * * on any subject whatever[,]" it means exactly what it says. Expression that is cabined by government limitations is not free.

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[5] *See, e.g.*, Amicus Brief of League of Women Voters of Oregon and League of Women Voters of Portland, *In the Matter of Validation Proceeding to Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure*, Case No. S066445 (Or Sup Ct July 18, 2019).

D. Compelled Speech

Another aspect of freedom of expression is that the content must be freely chosen by the speaker and not altered, suppressed, or manipulated by the government. The County and City legislation would appropriate a portion of each communication to force disclosure of the speaker's identity and the identities of the speaker's largest contributors. These provisions simultaneously prohibit anonymous expression and compel the inclusion of specific, government-approved content. Expression directed by the government is not free expression. Freedom requires that the content of the expression be wholly at the speaker's choice. The historical exceptions to free expression for false or deceptive speech do not apply: to speak anonymously is not to make a false statement nor is the choice to leave some true statements unsaid.

E. Value of Anonymity

The Federalist Papers—a collection of 85 essays written by Alexander Hamilton, James Madison, and John Jay and published anonymously under the pseudonym "Publius"—were essential to the ratification of the U.S. Constitution and in fact the very establishment of our nation. They remain essential sources of interpretive meaning for that most famous founding charter. *See, e.g., Printz v. U.S.*, 521 US 898, 117 S Ct 2365, 138 L Ed 2d 914 (1997). And they were written anonymously. The pamphlet "Common Sense," written by Thomas Paine and widely considered among the most powerful and

consequential missives of the revolutionary era, was also published anonymously. Anonymous political speech has a proud place in the American tradition. Without anonymous speech there might not even be an American tradition. Anonymity enables members of an open and plural society to express their frank opinions without suffering social, economic, or punitive repercussions for advocating ideas unpopular with their communities or with those at the top of social, economic, or governmental hierarchies.

Anonymous expression also has the merit of enabling its audience to focus more on the content of the expression than on the identity of the one expressing it—or on those whose financial support permits the individual or organization to express it. Truth should speak for itself. The persuasive content of the message is what is important. Forcibly shifting the focus of political speech from the content of the speech to the qualities of the speaker amounts to an *ad hominem* distraction and an exercise of power both beneath the government and, indeed, prevented by the Oregon Constitution.

Justice Thomas's concurring and dissenting opinion in *Citizens United* states that "[d]isclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United*, 558 US at 483 (Thomas, J., concurring in part and dissenting in part). Justice Thomas's opinion observes

that opponents of a 2008 ballot measure in California used personal information gathered from required campaign finance disclosures to publicize the names and locations of people in favor of that measure, many of whom "suffered property damage, or threats of physical violence or death, as a result." *Id*. at 481.

Justice Thomas's opinion also provides an example of public disclosure operating to protect an incumbent:

> "a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, 'I go to so many people and hear the same thing: 'I sure hope you beat [the incumbent], but I can't afford to have my name on your records. He might come after me next.'"'

Id. at 483.

F. Independent Expenditures

The County and City legislation limit independent expenditures, both from individuals and organizations, to support or oppose candidates in elections. Multnomah County Charter § 11.60(2); Portland City Charter § 3-302. They are "restraining the free expression of opinion" on their face and are "restricting the right to speak, write, or print freely" on the subject of elections. Independent expenditure limits are plainly censorship and are prohibited by Article I, section 8.

IV. BRIBERY AND CORRUPTION

A. Generally

Article II of the Oregon Constitution contains two sections related to bribery. The text of Article II, section 7, reads:

> Every person shall be disqualified from holding office, during the term for which he may have been elected, who shall have given, or offered a bribe, threat, or reward to procure his election.

The text of Article II, section 8, reads:

> 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.

1. Bribery at Elections

Bribery at elections is

> "[t]he offense committed by one who gives or promises or offers money or any valuable Inducement to an elector, in order to corruptly induce the latter to vote in a particular way or to abstain from voting, or as a reward to the voter for having voted in a particular way or abstained from voting."

Bribery at Elections, Black's Law Dictionary (9th ed. 2009). Article II, section 7 specifies disqualification from holding office as a punishment for bribery. Section 7 is written narrowly to address bribery *by* candidates, not bribery *of* candidates. It describes a "person * * * who shall have given, or offered a bribe

* * * to procure his election". This refers to vote-buying in the election, and not to bribery in the general sense.

Article II, section 8 charges the Legislative Assembly with the responsibility of addressing several things, bribery among them. Section 8 grants the Legislative Assembly the power to enact laws against bribery, but this authority is limited by the immediately preceding section. Article II, section 8 grants the Legislative Assembly the power to address vote-buying schemes in elections, certainly those conducted by a candidate, and arguably such schemes conducted by third parties. The phrase "undue influence" refers to influence over the electorate and is described by the examples of power, bribery, tumult, and improper conduct. Thus, the power granted the legislature is to prohibit attempts to sway the electorate by force, threat of force, financial inducement, rioting—that is, means *other than* the nonviolent expression of political opinion. The application of reasoned persuasive expression is the exemplar of *proper* conduct in influencing the electorate and therefore cannot be considered undue influence or bribery under Article II, section 8.

2. Contributions and Expression Are Not Bribes

Political expression does not include threats to or attempts to purchase votes. Rather, political expression seeks to earn the votes of open-minded electors through persuasion. Contributions to political organizations for the purpose of producing and promulgating persuasive political expression

therefore are not bribes. Contributions to political organizations are not inducements to electors to vote a particular way, and the organizations themselves cannot vote, so there is no vote to be bribed. Political organizations are vehicles for informing and persuading electors, which is the very nature of an election and the object of every political campaign.

Nor can contributions to a candidate be considered a bribe, not in the technical, legal sense of Article II nor in the general, common understanding of the term. Absent evidence of a clear *quid pro quo* exchange, the purpose of such contributions is to promulgate that candidate's political expression with the intent of persuading electors to support that candidate. The goal is to bring about that candidate's election, not to influence that candidate's behavior.

B. Corruption

The fear described by proponents of the contribution limits at issue here is that, once elected, the officials in receipt of contributions will feel indebted to their contributors and try to inappropriately exploit their position for their contributors' benefit. Put another way, this fear of "corruption" is the fear that contributors will benefit from undue influence[6] over the officials to whose campaigns they contributed.

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[6] Use of the term "undue influence" here is different than how that term is used in Article II, section 8, which refers exclusively to influence over the electorate and not over an elected official.

That fear is entirely unrealistic. The elected official owes no debt to contributors in fact, and contributors have no real or apparent authority over the elected official. Concerns about pleasing campaign contributors are relevant only to elected officials considering reelection because only those officials are in a position to use government power while possessing the financial incentive to seek future contributions. Thus, the following scenarios are beyond the ambit of proponents' idea of "corruption":

- Support or opposition of candidates for public office who would be ineligible to run for reelection (e.g. due to term limits) or for a similar office;
- support of recalls when the recall action does not select a successor;
- support or opposition of ballot measures;
- support of issue advocacy organizations.

To justify such a sweeping invasion of constitutional liberties with a concern irrelevant to a vast swath of public elections is folly.

However, when reelection is possible, "corruption," as proponents understand it, is a plausible fear. Yet to better analyze this fear, it is helpful here to examine a hypothetical instance of corruption:

1. A legislative candidate enters the race and announces her platform;
2. A special interest identifies the candidate as a likely ally;

3. The special interest makes a large contribution to the candidate's campaign;
4. The candidate spends the contribution on political expression;
5. The political expression succeeds at persuading a majority of voters to support the candidate;
6. The candidate wins the election;
7. Legislation creating a targeted tax credit for the special interest is introduced;
8. The legislator supports the targeted tax credit specifically because of the contribution she received from the special interest;
9. The elected official votes in favor of the targeted tax credit;
10. The targeted tax credit is passed into law;
11. The special interest benefits from the targeted tax credit.

Assuming for the sake of argument that the outcome in step 11 is undesirable, the locus of corruption is in step 8. Step 3, which would be impacted by contribution limits, is far removed both in time and in sequence from the actual corruption. There are two issues at play in step 8. First, the candidate must consider the special interest's support critical to her reelection or the potential loss of that support would not influence her. Second, the candidate must have supported the legislation because of the campaign

contribution, and not due to ideological reasons—otherwise there would be no influence and thus no corruption.

Accordingly, the undesirable outcome of step 11 is possible regardless of whether there was corruption. There may have been enough ideological votes in the legislature to pass the law even if all the "corrupt" legislators had instead voted against it. Thus, the existence of bad laws is not evidence of corruption.

1. Contribution Limits are an Improper Means to Prevent Corruption

Campaign contribution limits attempt to prevent the undesirable outcome of step 11 by prohibiting the contribution in step 3. But the power of contribution limits to achieve that goal is itself limited and relies on a series of improbable hypotheticals: that the additional political speech funded by large campaign contributions *might* persuade enough people to determine the outcome of an election, and that the elected official's legislative votes *might* be determined by those contributions. In the name of fighting corruption, campaign contribution limits necessarily suppress free expression over the hypothetical tertiary effects of other peoples' actions. Such an approach holds the innocent responsible for the acts of the guilty. The fault for improper uses of government power lies with government actors, not with those who wish to freely express their political opinions—indeed, often for the purpose of criticizing government actors who have used their power improperly.

Moreover, there are better, more effective, and less invasive means of combatting corruption. For example, the legislature could impose conflict of interest rules requiring legislators to disclose when a vote might impact a contributor over a certain threshold, or a constitutional amendment could bar legislators from voting when they have a substantial conflict of interest. The people of Oregon could impose requirements on certain categories of laws particularly subject to abuse—such as targeted tax incentives—through a constitutional amendment making them more difficult to enact or automatically subject to sunset. These approaches to combating corruption would not burden the freedom of political expression at all.

2. County and City Legislation Do Not Combat Corruption

The County and City legislation fail even to prohibit the contributions at issue in step 3 of the above hypothetical. Through their exclusive power to make unlimited contributions to candidate committees, and unlimited independent expenditures, small donor committees will in fact become the exclusive vehicle for corruption of the sort proponents fear. Candidates will surely seek to curry favor with them, and they will be given a near-monopoly of political influence. A system that truly sought to prevent corruption stemming from large contributions would not permit large contributions at all; it would instead direct individual donors to contribute directly to the candidates and causes of their choice. Rather than take this straightforward and equitable

approach, the system that the County and City legislation creates would establish small donor committees as kingmakers. This would cement the very "corruption" proponents purport to fight.

C. Money Does Not Cause Election Victory

It is true that the candidates who spend the most money win their elections about 90% of the time. But the common assumption that they win because they spend more money does not follow. It is always important to distinguish correlation from causation. It is much more plausible that causation runs the other way: the candidate with broader support, who is more likely to win the election anyway, will tend to be more successful at raising money. If political alignments and willingness to donate were randomly distributed, then we should expect a high correlation between fundraising and winning even with no impropriety anywhere.

There are many examples of well-funded candidates losing badly to underdogs, making the case that the candidate matters much more than the money. President Donald Trump was outspent by four of his 2016 primary

opponents[7] and outspent almost 2:1 in the general election.[8] Representative Alexandria Ocasio-Cortez won her general election despite being outspent[9] more than 4:1, and former Mayor Andrew Gillum won his primary election despite being outspent[10] nearly 15:1, spending the least of all five candidates in that race.

The anti-corruption argument for contribution and expenditure limits relies on the premise that large contributions sway elections, because only that fact would make them potentially influential to elected officials seeking re-election. That has not been shown. What has been shown is that underdogs can and do win, even with dramatically less money.

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[7] *2016 Republican Party presidential primaries*, WIKIPEDIA, https://en.wikipedia.org/wiki/2016_Republican_Party_presidential_primaries (last visited Sept. 27, 2019). President Trump ($76.4M) was outspent by Secretary Carson ($77.7M), Senator Rubio ($111.8M), Senator Cruz ($127.1M), and Governor Bush ($138.1M), all of whom spent cumulatively $454.7M—almost 6 times what President Trump spent.

[8] *2016 Presidential Race*, OPENSECRETS.ORG, https://www.opensecrets.org/pres16 (last visited Sept. 27, 2019) (Secretary Clinton spent $794.9M against President Trump's $408.4M).

[9] *Alexandria Ocasio-Cortez*, BALLOTPEDIA, https://ballotpedia.org/Alexandria_Ocasio-Cortez (last visited Sept. 27, 2019).

[10] *Florida gubernatorial and lieutenant gubernatorial election, 2018 (August 28 Democratic primary)*, BALLOTPEDIA, https://ballotpedia.org/Florida_gubernatorial_and_lieutenant_gubernatorial_election,_2018_(August_28_Democratic_primary) (last visited Sept. 27, 2019).

D. Do Donations Influence Elected Officials?

The anti-corruption argument for contribution and expenditure limits also relies on the premise that large contributions cause elected officials to use their power to benefit their donors. The Oregonian's "Polluted by Money"[11] series admits that "Lawmakers from both parties said money had no impact on their votes, citing examples where they went against donors."

It is difficult to discern the motivations of others. The simplest answer is to assume their intentions are sincere and genuine; that they believe they are doing the right thing. Both sides in a controversial political debate can be honest: for example, the recent controversy over HB 2020 can be understood as one side wanting to take strong action to reduce greenhouse gas emissions, and the other side objecting that the unintended consequences of the specific policy are too severe. It does not need to be about who gave how much money to whom.

Did one side or the other receive donations because they were ideologically aligned with their donors' positions? Sure, but in that circumstance there is no influence and therefore no corruption. The anti-corruption argument is that legislators received donations because they held positions in *opposition* to those donors—that the purpose of the donations was

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[11] Rob Davis, *Polluted by Money: Part One of Four*, THE OREGONIAN (Feb. 22, 2019), https://projects.oregonlive.com/polluted-by-money/part-1.

to *change* the legislators' positions. Are we to believe that donors will take the risk of funding people opposed to their interests on the mere chance that it will change their minds? That seems more likely to backfire than to work.

V. TIME, PLACE, AND MANNER REGULATION

A. Background

The County and City legislation on political expression are not valid time, place, and manner regulations. They plainly do not regulate the time, place, or manner of political expression but, instead, the quantity (through limits) and content (through disclosures) of that expression in a manner that privileges certain speakers (Small Donor Committees) over others. The legislation fails all three prongs of the standard test for these types of regulations. *See Clark v. Community for Creative Non-Violence*, 468 US 288, 293, 104 S Ct 3065, 82 L Ed 2d 221 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

B. Limits Are Not Content-Neutral

Limits on political contributions and expenditures are plainly not content-neutral. They are applied specifically to suppress political expression,

especially expression related to elections, and not to other subjects of expression.

Contribution limits are also not content-neutral when they advantage certain viewpoints and disadvantage others. Small donor committees can only be funded by individuals, and only in small amounts, so effective fundraising requires a large number of individual contributors. This creates a communication advantage for political opinions which are already popular and a commensurate disadvantage for those opinions which are not popular. Consequently, it becomes more difficult for unpopular ideas to *become* popular. This suppression of ideas which are initially unpopular and then sapped of their ultimate potential results in a lack of long-term social progress. If the electorate is never exposed to new, uncomfortable, potentially radical ideas, it will be deprived of the many great ideas that could be so described. Restraining the free competition of ideas affects society long after the single election at which those ideas were initially snuffed out. Favoritism to popular ideas is therefore bad policy—and it is certainly not content-neutral.

C. Limits Are Not Narrowly Tailored

Contribution limits are not narrowly tailored because they limit an enormous amount of non-corrupting political expression. For example, a candidate whose campaign slogan is “a chicken in every pot” and whose platform extols the virtues of eating chicken is not influenced by a large

contribution from the National Chicken Council. The candidate was already ideologically predisposed to favor government policies that support the chicken industry. A campaign contribution made in support of a candidate with shared interests, for the purpose of helping that candidate win an election, but without influence upon that elected official's behavior if elected, is not objectionable. Yet such speech would be limited by the City and County regulations. In elections where a candidate is highly favored to win, candidates will not attach much importance to the desires of their donors and may not be influenced by the contributions. Yet such speech would also fall within the City and County regulations. In addition, candidates who have little realistic chance of winning and who likely will not have the opportunity to wield government power for the benefit of their donors will also have their speech and the speech of their supporters restrained by the City and County contribution and expenditure limits. But limits on these sorts of political expression serve no anti-corruption purpose and thus they cannot be considered narrowly tailored.

An oft overlooked aspect of the lack of narrow tailoring in contribution limits is that those limits necessarily assume that political organizations engage in no important activity other than political expression. That is not so. Political organizations may also, for example, engage in litigation concerning ballot access, civil rights, or internal governance. The Libertarian Party of Oregon recently concluded eight years of litigation over internal governance, *see Reeves*

v. Wagner, 295 Or App 295, 434 P3d 429 (2018), which was entirely unrelated to corruption yet which would have been impossible to fund under a system of contribution limits similar to the County and City legislation. While courts have excluded forgiveness of ballot access litigation debts[12] and pro bono representation in civil rights litigation[13] from contribution limits, the principle of narrow tailoring should instead require that contribution limits be related to electioneering activity.

A further example of how campaign finance limits are not narrowly tailored can be seen in settling legal disputes. Imagine a small business engaged in a civil lawsuit that has not yet resolved. The business owner decides to run for public office and does not want the lawsuit to be a distraction for the campaign, so becomes motivated to settle it. Assume the settlement would include a payment to the other party. Because the settlement is made with an eye toward benefiting the optics of the business owner's campaign, it may be considered spending to support a candidate. A limit on the size of in-kind contributions would make it impossible for the business to pay the settlement. The settlement could not be considered an independent expenditure (even if those are not limited) because the candidate is also the business owner. The

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[12] *See O'Connor v. City of Philadelphia Bd. of Ethics*, 629 Pa 505, 105 A3d 1217 (2014).

[13] *See* Order Granting Plaintiffs' Motion for Summary Judgment, *Institute for Justice v. State of Washington,* No. 13-2-10152-7 (Wash Sup Ct Feb 20, 2015).

settlement could not be paid from campaign funds because that would be an improper personal use, *see* ORS 260.407, and even if it were allowed, the campaign's donors would disapprove of their donations being used to pay for things that predated the campaign. Campaign finance limits would accidentally make it impossible to settle such civil lawsuits.

Finally, there is a category of contributions and expenditures which have no possible potential for corruption, but which would still be prohibited under the contribution and expenditure limitations in the County and City legislation: contributions and expenditures from the candidate's own personal funds to support her own candidacy.

D. Limits Fail to Permit Ample Communication

The County and City legislation create advantages for small donor committees which become the exclusive vehicle for making large independent expenditures or making large contributions to candidate committees. Multnomah County Charter § 11.60(1)(B); Portland City Charter § 3-301(b)(2). Small donor committees can only be funded by individuals, and only in small amounts, so effective fundraising requires a large number of individual contributors. But some interests are concentrated among few individuals, who, under this system, would be entirely foreclosed from effective political expression. Low-cost methods of communication like giving speeches or hosting a webpage may remain available, but they are of no practical value

without the ability hire and pay a speechwriter or webmaster, or to advertise the existence of a speech or a webpage. Entire categories of media—especially print, radio, and television—would simply be unavailable to advocates of concentrated interests. Neither could those advocates make significant contributions to candidate committees. This legislation is "restricting the right to speak, write, or print freely" in plain violation of Article I, section 8.

VI. CONCLUSION

Contribution limits stand for the principle that individuals may not speak freely in association with others. Compelled disclosures stand for the principle that individuals may not speak freely because they may not speak anonymously. Independent expenditure limits stand for the principle that individuals may not speak at all. Any limits on contributions or expenditures are threats to our very polity because they are threats to that most cherished and central means of democratic engagement: honest and unencumbered political expression. Freedom of expression is no threat to democracy; censorship is.

DATED this 1st day of October 2019.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,733 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF FILING AND SERVICE

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