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,
Petitioner-Appellant,

and

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.

Multnomah County Circuit Court No. 17CV18006
Court of Appeals No. A168205
Supreme Court No. S066445

APPELLANT MULTNOMAH COUNTY'S OPENING BRIEF

Caption continued on next page

July 2019

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

Jenny M. Madkour, OSB 982980
Katherine Thomas, OSB 124766
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Phone: 503-988-3138
jenny.m.madkour@multco.us
katherine.thomas@multco.us
Attorneys for Multnomah County

Gregory A. Chaimov, OSB 822180
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
Phone: 503-778-5328
gregchaimov@dwt.com
Attorney for Mehrwein et al.

Daniel W. Meek, OSB 791242
Linda K. Williams, OSB 784253
10266 SW Lancaster Road
Portland, OR 97219
Phone: 503-293-9021
dan@meek.net
attorney@lindawilliams.net
Attorneys for Trojan et al.

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I. STATEMENT OF THE CASE

On November 8, 2016, nearly 89 percent of Multnomah County voters approved an amendment to the Multnomah County Home Rule Charter ("Charter") that imposed campaign finance reform in Multnomah County ("County") candidate elections. The Board of County Commissioners ("Board") supports campaign finance reform, but acknowledged that implementation of the voter-approved legislation could bring legal challenges. To carry forward the will of the voters and foreclose future questions about the validity of the Charter amendment, the County adopted an ordinance mirroring the Charter amendment, and subsequently initiated this validation action.

The County initiated this validation action to obtain a ruling on the constitutionality of key provisions of the ordinance. Before this Court, the County seeks a ruling that the contribution limits in the ordinance are constitutional under both Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution, reversing the portion of the trial court's judgment invalidating those limits.

A. Nature of the Proceeding and Relief Sought

This case arose out of a validation proceeding initiated by the County pursuant to ORS 33.710, which provides that "[t]he governing body may commence a proceeding in the circuit court * * * for the purpose of having a judicial examination and judgment of the court as to the regularity and legality

of" various decisions, authorities, and acts of the governing body. In particular, the court may issue a judgment as to the regularity and legality of the following:

- Decisions that raise "novel or important legal issues that would be efficiently and effectively resolved" before the decision becomes effective, including where the decision will require expenditure of public funds or significantly affect the lives or businesses of a significant number of people. ORS 33.710(2)(e).

- The authority of a governing body to enact an ordinance. ORS 33.710(2)(f).

- Any ordinance enacted by the governing body, including the constitutionality of the ordinance. ORS 33.710(2)(g).

The trial court obtained jurisdiction pursuant to ORS 33.720(2). (ER-57.)

The County seeks reversal of the portion of the trial court judgment invalidating the provision of Ordinance No. 1243 ("Ordinance"), now codified in Multnomah County Code ("MCC") sections 5.200 to 5.206, relating to campaign contributions. (ER-70.) In particular, the County seeks a declaration that MCC 5.201, which limits the amount and method of making or receiving campaign contributions, is constitutional under Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution. In addition, the County believes that the limits on expenditures and independent expenditures in MCC 5.202 are constitutional under Article I, section 8, of the Oregon Constitution, but recognizes that U.S. Supreme Court case law – though wrongly decided – currently prohibits such limits under the

First Amendment. As a result, the County believes that resolution of the status of expenditures and independent expenditures under the Oregon Constitution is best left for another case.

B. Nature of the Judgment

The trial court entered a General Judgment declaring MCC 5.201(A), 5.201(B), 5.202(A), 5.202(C), and 5.203 invalid, and declaring MCC 5.201(C) and 5.202(B) valid. (ER-70.)

C. Appellate Jurisdiction

The Court of Appeals had jurisdiction pursuant to ORS 19.205 and 19.270. In addition, the Court of Appeals had jurisdiction under ORS 33.720(4), which allows any party to appeal from a judgment rendered in a validation proceeding. This Court has jurisdiction under ORS 19.405, which grants the Supreme Court jurisdiction in cases that are certified and accepted from the Court of Appeals. This Court accepted the certified appeal on January 23, 2019, and again on February 1, 2019, following a new Order Certifying Appeal from the Court of Appeals.

D. Entry of Judgment and Notice of Appeal

The trial court entered a General Judgment on June 22, 2018. (ER-75.) The County filed and served a Notice of Appeal on July 18, 2018, within 30 days of the entry of judgment. ORS 19.255(1).

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E. Questions Presented

(1) Is the making or receiving of campaign contributions nonexpressive conduct, and therefore not protected under Article I, section 8, of the Oregon Constitution?

(2) Is a law that regulates the amount and method of making or receiving campaign contributions, but allows candidates to raise unlimited amounts of money and does not restrict the use of the contributions, permissible under Article I, section 8, of the Oregon Constitution because it is not inextricably intertwined with a candidate's ability to engage in protected expression?

(3) Is a law that regulates campaign contributions within a well-established historical exception to Article I, section 8, of the Oregon Constitution for laws regulating money in elections?

(4) Is a law that limits contributions to candidates to $500 from an individual or political committee per candidate per election cycle, with larger contributions allowed from small donor committees, closely drawn to serve the government's interest in preventing actual or apparent corruption and therefore valid under the First Amendment to the United States Constitution?

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F. Summary of Arguments

This Court has long recognized that the transfer of money is not expression protected by Article I, section 8, of the Oregon Constitution. That is so even when political expression or communicative intentions surround that transfer. As a result, the transfer of money in the campaign context – in the form of making or receiving campaign contributions – similarly is not expression protected by Article I, section 8. Nonetheless, this Court has recognized that there can be a connection between contributions and a candidate's ability to express a political message. In light of that connection, regulation of campaign contributions can implicate Article I, section 8, if that regulation becomes inextricably intertwined with a candidate's ability to speak. The County's contribution limits are not inextricably intertwined with a candidate's ability to speak because they do not restrict unfunded methods of communicating, such as sending emails and canvassing; candidates can raise an unlimited amount of money, albeit in specified increments and from designated sources; and the regulations do not restrict a candidate's use of that money.

Even if the County's contribution limits do implicate protected expression, there is a historical exception to Article I, section 8, for those limits because laws regulating money in elections were well-established prior to 1859 and continued to be enacted after that time. Indeed, the concurrent enactment of Article II, section 8, of the Oregon Constitution, which expressly

contemplates regulation of money in elections by allowing a prohibition on bribery, confirms that the framers did not intend Article I, section 8, to protect the making or receiving of campaign contributions.

Alternatively, to the extent that contribution limits implicate or regulate protected expression, those limits can serve as a reasonable restriction on the time, place, and manner of that expression. Here, the County's limits are content-neutral, advance the County's legitimate interest in preventing actual or apparent corruption, and leave open ample alternatives to communicate both with unfunded means of communication such as speeches, social media posts, and canvassing, and with the significant amount of money that candidates can raise and spend.

The contribution limits also survive scrutiny under the First Amendment to the United States Constitution. The U.S. Supreme Court repeatedly has upheld contribution limits similar to those enacted by the County, where a candidate can raise unlimited amounts of money, but must raise that money from a greater number of contributors. The County's limits are constitutional because they are closely drawn to avoid unnecessary infringement on First Amendment interests, while serving the important County interest of avoiding apparent and actual corruption.

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Finally, although the County believes that limits on expenditures and independent expenditures are constitutional under Article I, section 8, of the Oregon Constitution, the County recognizes the controlling nature of federal case law restricting such limits. As a result, resolution of the status of expenditures and independent expenditures under the Oregon Constitution is best left for another case.

G. Summary of Facts

Multnomah County is a home rule county formed under Article VI, section 10, of the Oregon Constitution and governed by a Home Rule Charter. (ER-10 to ER-12.) Every six years, the County convenes a Charter Review Committee as part of a democratic, citizen-driven process to review and propose amendments to the Charter. (ER-18 to ER-19.) In 2016, a citizen group presented the Charter Review Committee with an amendment to the Charter that would regulate campaign finance in elections for the Multnomah County elected offices of Board Chair, County Commissioner, Auditor, and Sheriff. The Charter Review Committee voted to recommend referral of that amendment to the voters. (ER-32, ER-35.) The Board approved referral of the amendment to the voters, and it became Ballot Measure 26-184. (ER-22 to ER-30, ER-36.)

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At the November 8, 2016 election, County voters overwhelmingly approved Measure 26-184, which was incorporated into the Charter as Section 11.60. (ER-13 to ER-17, ER-47.) The Charter amendment established (1) campaign contribution limits; (2) expenditure and independent expenditure limits; (3) registration and disclosure requirements; and (4) mechanisms to administer and enforce those provisions in elections for Multnomah County elected offices. The details of those provisions are discussed more fully below as necessary.

Following the election, the Board adopted Ordinance No. 1243, which mirrored the text of Charter Section 11.60, and directed the County Attorney to file a validation proceeding to determine the constitutionality of the Ordinance. (ER-48 to ER-52.) Ordinance No. 1243 has been codified as MCC 5.200 to 5.206. (App-1 to App-4.)

To initiate this proceeding, the County filed a Petition for Commencement of Validation Proceeding in Multnomah County Circuit Court seeking a declaration that the Charter and Ordinance are constitutional under the Oregon Constitution and the United States Constitution and are otherwise valid under state and federal law. (ER-1 to ER-8.) The County subsequently published notice of the proceeding as required by ORS 33.720(2). (ER-53 to

ER-55.) Respondents Mehrwein *et al.* and Appellants Trojan *et al.* appeared within the deadline set forth in ORS 33.720(3).[1] (ER-56 to ER-57.)

In a written order issued after oral argument, the trial court struck down the contribution limits, expenditure and independent expenditure limits, and disclosure requirement as violating Article I, section 8, of the Oregon Constitution, and therefore did not reach issues raised under the United States Constitution. (ER-65 to ER-66.) The trial court upheld the registration and payroll deduction provisions, and did not address the administration and enforcement provisions – therefore, none of those provisions are at issue in this appeal. (ER-66.)

In addition, the County is not seeking review of the trial court's ruling on the County's disclosure provision. In a June 10, 2019, ruling in a validation proceeding relating to a similar City of Portland ordinance regulating campaign finance and disclosure, the same trial court judge reached the same conclusions on all issues except disclosures. (App-20.) Revisiting his prior ruling, Judge Bloch concluded that the City's disclosure requirement, which contained more details than the County's disclosure requirement, was constitutional under a

[1] Taxpayers Association of Oregon and Taxpayers Association of Oregon PAC filed a motion to intervene after the ORS 33.720(3) deadline had passed. The trial court denied that motion, allowing them to appear only as *amici curiae*. (ER-57, ER-67 to ER-69.) Therefore, those entities are not parties to this appeal.

historical exception to Article I, section 8, of the Oregon Constitution, did not present vagueness issues, and survived scrutiny under the First Amendment to the United States Constitution. (App-17 to App-20.) In light of that ruling, the County is not assigning error to the judge's ruling on the disclosure provision of the Ordinance (MCC 5.203) in the County case.

II. STANDARD OF REVIEW

The standard of review is the same for each of the County's assignments of error. Had the Court of Appeals considered this case, that Court's review would have been *de novo*. *See Board of Klamath County Commissioners v. Select County Employees*, 148 Or App 48, 53, 939 P2d 80, *rev den*, 326 Or 57 (1997) (citing statutory provisions for proposition that validation proceedings are reviewed *de novo*); ORS 33.720(1) ("The determination authorized by ORS 33.710 shall be in the nature of a proceeding in rem; and the practice and procedure therein shall follow the practice and procedure of an action not triable by right to a jury[.]"); ORS 19.415 (noting that in an appeal in an equitable proceeding, Court of Appeals in its discretion may "try the cause anew upon the record or make one or more factual findings anew upon the record" and that if the Court of Appeals does so, the Supreme Court may limit its review to questions of law). Because the Court of Appeals certified this case directly to the Supreme Court, this Court's standard of review should mirror the

standard that would have applied in the Court of Appeals, meaning this Court should review the case *de novo*.

In addition, ORS 33.720(4) provides that this Court "shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties" and "may approve or disapprove the proceedings, or may approve the proceedings in part and disapprove the remainder thereof."

III. FIRST ASSIGNMENT OF ERROR

The trial court erred in holding that the contribution limits in MCC 5.201(A) and (B) are unconstitutional under Article I, section 8, of the Oregon Constitution.

In particular, the trial court erred in not recognizing that the County's contribution limits are permissible under Article I, section 8, because they regulate the nonexpressive conduct of giving or receiving money and do not do so in a way that is inextricably intertwined with a candidate's ability to speak. Even if the County's contribution limits did implicate protected speech, they are subject to a historical exception to Article I, section 8, for laws regulating money in elections and also are a permissible regulation of the time, place and manner of expression.

A. Preservation

The County argued in its trial court Petition for Commencement of Validation Proceeding, Opening Brief, and Response Brief that the contribution

limits are constitutional under Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution. (*See* ER-7 to ER-8.) The County also advanced those arguments during oral argument. (Tr 32-33, 35-36.) The trial court held that the contribution limits violate Article I, section 8, of the Oregon Constitution. (ER-65.)

B. The County's Contribution Limits

The Ordinance limits the amount of money an individual or entity can give, and that candidates and candidate committees can receive from each individual or entity, during an election cycle:

> "(A) An Individual or Entity may make Contributions only as specifically allowed to be received in this Section.
>
> "(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 Political Committee other than a Small Donor Committee;
> >
> > "(2) Any amount from a Small Donor Committee; and
> >
> > "(3) No amount from any other Entity."

MCC 5.201(A), (B).[2]

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[2] All of the capitalized terms are defined in MCC 5.200. (*See* App-2 to App-3.) In some cases, the capitalized terms are defined by reference to ORS 260, as it existed on November 8, 2016. The relevant excerpts of ORS 260 are attached at App-5 to App-12. None of the state law definitions at issue in this case were amended after 2015 and prior to November 8, 2016, making the 2015 version of the statute the relevant version.

The focus of the contribution provision is the act of making or receiving a campaign contribution itself. To that end, the contribution limits regulate only the amount and method of contributions made to or received by candidates and candidate committees. As to the amount, the contribution limits address the increments in which candidates can receive contributions, but do not limit the overall amount of money that a candidate can receive. In other words, there are no aggregate contribution limits, meaning a candidate can raise unlimited amounts of money.

As to the method, the contribution limits address the circumstances in which candidates can receive contributions directly, as well as the circumstances in which contributions must come through a political committee. Candidates can directly receive up to $500 from any individual or political committee per election cycle; candidates can directly receive unlimited amounts of money from small donor committees, which are a special kind of political committee. MCC 5.201(B)(1), (2); s*ee also* MCC 5.200 (defining small donor committee as a political committee that "cannot accept Contributions in amounts exceeding one hundred dollars ($100) per Individual contributor per calendar year"). In addition, candidates can receive contributions of up to $500 from both individuals and entities – including corporations, non-profits or other similar entities that cannot contribute *directly* to candidates – through political committees. That is so because MCC 5.201 applies only to contributions

received by candidates, and not to contributions received by political committees. Therefore, a political committee can receive a contribution from any source, in any amount, and then take that money and contribute up to $500 per candidate per election cycle.

C. Making or receiving campaign contributions is nonexpressive conduct that can be regulated under Article I, section 8, unless the regulation is inextricably intertwined with a candidate's ability to speak.

Article I, section 8, of the Oregon Constitution provides, "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." As discussed below, this Court has recognized that the transfer of money or other things of value to public officials is nonexpressive conduct not protected by Article I, section 8, and that laws regulating that conduct therefore survive scrutiny unless there is some other inextricable link to protected expression. *See Vannatta v. Oregon Government Ethics Commission*, 347 Or 449, 462, 464-65, 222 P3d 1077 (2009), *cert den*, 560 US 906 (2010) (*Vannatta II*).

Nonexpressive conduct is not protected under Article I, section 8, even though that conduct can have a "communicative effect, in the sense that most purposive human activity communicates something about the frame of mind of the actor." *Huffman and Wright Logging Co. v. Wade*, 317 Or 445, 449-50, 857

P2d 101 (1993). In addition, nonexpressive conduct is not transformed into protected expression merely because (1) a person has a reason for engaging in that conduct or (2) speech accompanies that conduct. *Id.* at 452 (explaining that "a person's *reason for engaging in punishable conduct* does not transform conduct into expression" and that "*speech accompanying punishable conduct* does not transform conduct into expression" (emphasis in original)).

For example, in *Huffman*, the Oregon Supreme Court concluded that the acts of individuals climbing on logging equipment, chaining themselves to it, and affixing a banner to the equipment was nonexpressive conduct, even though the individuals engaged in that conduct to protest Forest Service policies and made statements, sang songs, and chanted slogans. *Id.* at 447-48, 458. The Court focused on the precise acts being punished – such as climbing on and being chained to the logging equipment – as distinguished from the expression that accompanied those prohibited acts. *Id.*

This Court later applied that same rationale when examining the conduct of transferring money to a public official in a case analyzing the constitutionality of restrictions on the solicitation, offering, and receipt of gifts by public officials. *Vannatta II*, 347 Or at 462-63. Applying *Huffman*, the Court concluded that "[a]s a general matter, the act of delivering property to a public official is nonexpressive conduct." *Id.* at 462; *see also Vannatta v. Keisling*, 324 Or 514, 522 n 10, 931 P2d 770 (1997) (*Vannatta I*) (recognizing

that "there doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content"). The Court reached that conclusion even though "[l]obbyists also may intend their gift-giving to communicate political support or goodwill toward the recipients" and other "political expressions and communicative intentions" might surround that conduct. *Vannatta II*, 347 Or at 462-63.

In light of those conclusions, the Court in *Vannatta II* held that a law restricting public officials' receipt of money and other things of value was not directed at speech. *Id.* at 458-59. In support of that conclusion, the Court explained that a public official receiving a prohibited gift would violate the law "without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold." *Id.* at 459.

Although this Court made those statements in a case involving the constitutionality of state ethics laws regulating the receipt of gifts by public officials, the fundamental principle from *Vannatta II* applies equally to campaign contributions. Both gifts and campaign contributions involve "the act of delivering property to a public official." *Id.* at 462; *see also* ORS 244.020(7)(b) (listing contributions as exception to definition of "gift" because "gift" could otherwise include the conduct of making or receiving a contribution). In addition, restrictions on both gifts and contributions address the same corruption concerns. *See* ORS 244.010 (describing policy behind

ethics laws, including gift restrictions, and noting that "service as a public official is a public trust" and "public officials should expose corruption where discovered"). Perhaps most importantly, neither gifts nor contributions inherently involve protected expression. As was the case with the restriction on the receipt of gifts, a public official can violate campaign contribution limits without engaging in expression and regardless of the official's opinions. Therefore, like the receipt of gifts, the receipt of campaign contributions is nonexpressive conduct not protected by Article I, section 8.

1. *Vannatta II* narrowed the scope of *Vannatta I* by clarifying that the making or receiving of campaign contributions is protected only to the extent that the contributions are inextricably intertwined with a candidate's ability to speak.

Here, the trial court dismissed this Court's statements in *Vannatta II*, noting that, because that case arose in the context of gift restrictions, it could not overcome the breadth of earlier statements in *Vannatta I* about the status of campaign contributions under Article I, section 8. (ER-60 to ER-61.) In particular, in *Vannatta I*, this Court stated that campaign contributions are protected expression of the contributor and cannot be regulated pursuant to any historical exception to Article I, section 8. *Vannatta I*, 324 Or at 522, 538. Viewing *Vannatta I* and *Vannatta II* together, the trial court in this case held that *Vannatta II* did not overcome the holding from *Vannatta I* that campaign contributions are protected expression. *Vannatta I*, 324 Or at 524. However,

the trial court misconstrued *Vannatta II*, ignoring its significant clarification – and narrowing – of the scope of protection for campaign contributions set forth in *Vannatta I*. *See Vannatta II*, 347 Or at 464 (stating that Court would "clarify" its holding from *Vannatta I*).

At the outset, the Court in *Vannatta II* did not simply limit its analysis of *Vannatta I* to the fact that it had addressed campaign contributions while *Vannatta II* addressed gifts, as the trial court decision in this case implies. (ER-60.) Rather, the Court in *Vannatta II* reconciled *Vannatta I* by clarifying and further refining its prior decision in two ways that are significant to this case.

The Court in *Vannatta II* started by quoting the portion of *Vannatta I* that it would ultimately withdraw based on its conclusion that campaign contributions are protected only to the extent that they are inextricably intertwined with a *candidate's* ability to speak:

> "'In our view, a contribution is protected *as an expression by the contributor*, not because the contribution eventually may be used by a candidate to express a particular message. * * * [T]he 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 (quoting *Vannatta I*, 324 Or at 522 (emphasis in original) (alterations added)). The Court in *Vannatta II* went on to clarify and explain two key aspects of that statement from *Vannatta I*.

First, the Court withdrew the statement from *Vannatta I* that campaign contributions are protected expression regardless of the use to which the contribution is put. *Vannatta II*, 347 Or at 465 (explaining that "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[,]" was "too broad," and "must be withdrawn"). In doing so, the Court effectively withdrew its prior statement that campaign contributions are the protected expression of the contributor. *Id.* at 464-65. In light of the Court's holding in *Vannatta II* that the transfer of money to a public official is nonexpressive conduct, the Court clarified that contributions, at most, can implicate the *candidate's* expression, but not that of the contributor. *Id.* (clarifying that *Vannatta I* had been based on an "assumption * * * that campaign contributions are so inextricably intertwined with the *candidate or the campaign's expression* of its message that the two cannot be separated" (emphasis added)).

Second, and relatedly, the Court in *Vannatta II* clarified that *Vannatta I* does not stand for the proposition that campaign contributions are protected speech as a matter of law. *Vannatta II*, 347 Or at 465 ("[T]his 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."). The Court again

emphasized that the holding in *Vannatta I* arose because the Court had "*assumed* a symbiotic relationship between the making of contributions and the *candidate's or campaign's ability to communicate* a political message." *Id.* at 465 (emphasis added). In other words, the Court in *Vannatta II* clarified that campaign contributions are protected under Article I, section 8, only to the extent that they are "so inextricably intertwined with the candidate or the campaign's expression of its message that the two cannot be separated." *Id.* at 464-65. In contrast, the Court in *Vannatta II* noted that gifts are not "inextricably linked" with a public official's ability to carry out their official functions. *Id.* The Court found no inextricable link between gifts and speech because "[p]ublic officials can speak whether or not lobbyists have given them gifts[.]" *Id.* Similarly, there would be no inextricable link between contribution limits and speech unless the candidate could not speak because of the limits, *i.e.*, the limits prevented the candidate from speaking.

In making those two clarifying statements, the Court in *Vannatta II* did not go so far as to expressly overrule the statement from *Vannatta I* that contributions are speech of the contributor that are protected under Article I, section 8. Presumably, the Court did not do so because the constitutionality of contribution limits was not squarely before it there, as it is here. This case presents this Court with the opportunity to carry *Vannatta II* forward in its natural progression and clarify that the effect of *Vannatta II* was to overrule the

statement in *Vannatta I* that contributions are protected expression and constitute speech of the contributor.

Indeed, in clarifying that campaign contributions are not speech of the contributor and are not protected as a matter of law, the Court in *Vannatta II* recognized that some level of restriction on the nonexpressive conduct of making or receiving campaign contributions is permissible. In particular, as noted above, the Court in *Vannatta II* suggested that any protection for campaign contributions must stem from an inextricable link between the contribution and a candidate's ability to engage in political speech. *Id.* at 464-65. An inextricable link exists where the contribution is necessary for the candidate to be able to effectively communicate a political message. *Id.* at 465 (explaining that gifts are not inextricably linked to speech because public officials can speak whether or not they receive gifts).

Given the numerous ways of communicating that do not require contributions – such as emails, social media posts, candidate forums, and door-to-door canvassing – contributions are not inextricably intertwined with a candidate's ability to speak. Even if contributions in some instances are inextricably intertwined with a candidate's ability to communicate a political message, a restriction on contributions would violate Article I, section 8, only if the restriction prevented the candidate from being able to engage effectively in protected expression. For example, an actual or effective prohibition on

campaign contributions, or a prohibition on using contributions for particular purposes like political ads or fliers, would likely qualify as a restriction that is inextricably intertwined with a candidate's ability to speak. As discussed below, the County's contribution limits have no such effect.

2. Cases decided since *Vannatta II* have not offered this Court an opportunity to analyze the impact of *Vannatta II* in the context of contribution limits, as this case does.

Despite the clarifications in *Vannatta II*, the trial court in this case suggested that a subsequent case, *Hazell v. Brown*, 352 Or 455, 287 P3d 1079 (2012), showed the continued "precedential validity" of *Vannatta I*. (ER-61.) In so stating, the trial court suggested that *Hazell* somehow undermines or otherwise speaks to the significant clarification of *Vannatta I* in *Vannatta II*. However, the Court in *Hazell* did not address *Vannatta II* at all because it was not required to do so to resolve the narrow issue presented, and that case therefore offers this Court no assistance in resolving the issues before it here.

In *Hazell*, the Oregon Supreme Court reviewed the state's determination that Measure 47, a 2006 ballot measure imposing campaign finance reform, had not become effective on passage in 2006 and instead was dormant. Section 9(f) of the measure provided that if, "'*on the effective date of this Act*, the Oregon Constitution does not allow limitations on political campaign contributions and expenditures, this Act * * * shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.'"

Hazell, 352 Or at 458 (quoting measure) (emphasis added). Based on that wording, the Court engaged in a narrow inquiry into whether section 9(f) had been triggered, *i.e.*, whether, "on the effective date" of Measure 47 in December 2006, the Oregon Constitution allowed for contribution limits. *Id.* at 464-66.

Relying on statements from *Vannatta I*, the Court in *Hazell* concluded that "*at the time that the voters considered Measure 47* [in 2006], campaign contributions * * * in Oregon were constitutionally protected forms of expression." *Hazell*, 352 Or at 466 (emphasis added); *see also id.* at 467 ("[B]ecause 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."). That statement is accurate as far as it goes – as of 2006, *Vannatta I* had held that contributions were protected expression, at least in some circumstances. However, the Court in *Hazell* expressly declined to address the impact of its 2009 decision in *Vannatta II*, instead limiting its holding to a statement of the law as of 2006. *Id.* at 467-68 ("[A]ny attempted reexamination of this court's decision in *Vannatta I* as it relates to individual provisions of Measure 47 would be only advisory – a function this court cannot undertake."). As a result, *Hazell* has no bearing on the current state of the law on the constitutionality of contributions under Article I, section 8, and it does not alter this Court's significant clarification and narrowing of *Vannatta I* in *Vannatta II*.

The same is true of *Markley v. Rosenblum*, 362 Or 531, 413 P3d 966 (2018). In that case, this Court analyzed a ballot title challenge on an initiative petition proposing to amend the constitution to allow for regulation of contributions and expenditures. In discussing the effect of the proposed initiative, the Court cited *Vannatta I* for the proposition that contributions are protected expression, but also noted that *Vannatta II* had clarified that case. *Id.* at 533. However, the Court was not asked to – and did not – examine in what ways or the extent to which *Vannatta II* clarified *Vannatta I*. The only relevant fact was that campaign contributions may be linked to protected expression in some instances, which both *Vannatta I* and *Vannatta II* recognize. As a result, *Markley* similarly does not squarely address or otherwise alter the state of the law following *Vannatta II*. The ultimate effect of the clarification and narrowing of the scope of *Vannatta I* in *Vannatta II* is now directly before the Court in this case, as explained above.

3. The County's contribution limits do not violate Article I, section 8, because they do not regulate making or receiving contributions in a way that is inextricably intertwined with a candidate's ability to speak.

At their core, the County's contribution limits regulate the nonexpressive conduct of giving or receiving money or other things of value, similar to the gift restrictions in *Vannatta II*. *See* MCC 5.200 (defining "contribution," including incorporating state law definition); ORS 260.005(3) (2016) (defining "contribution," in part, as "[t]he payment, loan, gift, forgiving of indebtedness,

or furnishing without equivalent compensation or consideration of money, services * * * supplies, equipment or any other thing of value"). Therefore, the County's contribution limits do not violate Article I, section 8, unless those limits are inextricably intertwined with a candidate's ability to speak. For the reasons explained below, the County's contribution limits are not inextricably intertwined with a candidate's ability to speak and therefore do not violate Article I, section 8.

At the outset, there are numerous ways that candidates can communicate that do not necessarily involve the use of money at all, such as posting on social media, sending emails to supporters, going door-to-door, and speaking at candidate forums and other events. Therefore, despite any contribution limits, candidates could continue to engage in protected expression with any funding they do have, as well as through unfunded expression.

To the extent that contributions are linked to a candidate's speech, the County's contribution limits are not inextricably intertwined with a candidate's ability to speak because they do not limit the overall amount of money that a candidate can receive. Because the contribution limits address only the amount that a candidate can receive from each individual or political committee, the only barrier to a candidate's ability to raise unlimited amounts of money is the number of individuals and political committees the candidate can get to contribute – and that number is not limited by the Ordinance.

Relatedly, the limits do not restrict, impact or even address the candidate's use of the contributions in any way, including the use of those contributions to express a political message. As was the case with the law at issue in *Vannatta II*, a candidate can violate the Ordinance "without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold." *Vannatta II*, 347 Or at 459. In other words, expressive conduct and expression of opinion are not subject to – and therefore cannot violate – the Ordinance. As a result, the contribution limits are not inextricably intertwined with a candidate's ability to engage in protected expression.

In short, because the contribution limits do not foreclose free methods of communication, allow candidates to raise unlimited amounts of money, and do not restrict the use of campaign contributions, those limits are not inextricably intertwined with a candidate's ability to speak. For those reasons, the County respectfully requests that this Court reverse the trial court and uphold the County's contribution limits as constitutional under Article I, section 8, of the Oregon Constitution.

D. Laws regulating contributions are within a historical exception to the protections of Article I, section 8, for laws regulating money in elections.

Even if this Court determines that contribution limits generally, or the County's contribution limits in particular, are directed at protected expression,

those limits survive scrutiny under a historical exception to Article I, section 8, for laws regulating money in elections.

Under this Court's framework for analyzing laws under Article I, section 8, a law that is written in terms directed at protected expression is unconstitutional unless "the scope of the restraint is wholly confined within some historical exception." *See State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). To determine whether there is a valid historical exception, this Court will examine whether a restriction was well established when the Oregon Constitution was adopted and whether Article I, section 8, was intended to eliminate that restriction. *See State v. Moyer*, 348 Or 220, 232, 230 P3d 7, *cert den*, 562 US 895 (2010). That analysis does not involve searching for a perfect historical analog – "the elements of a modern statute need not be identical or matched perfectly with historical prohibitions to fall within a historical exception." *Id.* at 237. Indeed, this Court has recognized that it is permissible to take historical prohibitions "and extend their principles to contemporary circumstances or sensibilities" in identifying historical exceptions to Article I, section 8. *Robertson*, 293 Or at 433-34 (noting that historical analysis "locks neither the power of lawmakers nor the guarantees of civil liberties into their exact historic forms in the 18th and 19th centuries, as long as the extension remains true to the initial principle").

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In *Vannatta I*, this Court rejected the notion that there was a historical exception for laws regulating campaign contributions. 324 Or at 538. However, in that case, no party had argued that there was such an exception, and the Court therefore undertook a truncated analysis in a single paragraph, without the benefit of briefing. *Id.* In addition, the Court's analysis took a narrow view of the history, stating that "there was no established tradition of enacting laws to limit campaign contributions." *Id.* That approach directly contradicts this Court's repeated statements that the historical inquiry should not be limited only to laws that mirror the current law at issue. *See, e.g.*, *Moyer*, 348 Or at 232; *Robertson*, 293 Or at 433-34. Given the Court's limited and overly narrow review of the issue in *Vannatta I*, this case provides an appropriate opportunity to revisit that analysis with the benefit of additional historical context and information. *See Farmers Insurance Co. v. Mowry*, 350 Or 686, 693-94, 261 P3d 1 (2011) (noting importance of correcting constitutional interpretation errors because Supreme Court is body with ultimate responsibility to construe Constitution).

1. Laws restricting money in elections were well established by 1859 and continued to be enacted after adoption of Article I, section 8.

The first law regulating money in elections in the United States dates back to 1699. In Virginia, it was unlawful for a candidate to provide "money, meat, drink, entertainment, or provision" in order to secure an election. *See*

Robert E. Mutch, *Three Centuries of Campaign Finance Law*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 4 (Gerald C. Lubenow ed., 2001). Although the law restricted candidate spending, rather than contributions made to or received by candidates, the law was directed at the same concern as modern contribution limits: protecting the integrity of elections by regulating the corrupting influence of money. *Id.* at 1.

Later laws did focus on specifically regulating campaign contributions. For example, an 1829 New York law made it unlawful for a candidate or any other person to "contribute money for any other purpose intended to promote an election of any particular person or ticket, except for defraying the expenses of printing, and the circulation of votes, handbills and other papers previous to any such election." *See Jackson v. Walker*, 5 Hill 27, 30 (NY Sup Ct 1843), *aff'd*, 7 Hill 387 (NY 1844) (quoting statute); *see also id.* at 31 ("The Legislature evidently thought that the most effectual way to 'to preserve the purity of elections,' was to keep them free from the contaminating influence of money."). In interpreting that New York statute, a New York court acknowledged that there was "little doubt that large sums of money are expended upon elections for other [not corrupt] purposes." *Id.* at 31. Nonetheless, the court rejected the notion that the statute only prohibited contributions for corrupt purposes, stating that "the statute says nothing about corruption." *Id.* at 31. Indeed, the New

York statute did not merely limit campaign contributions, it flatly banned them, except for limited purposes.

At least one other state had a law like New York's law. In 1857, Texas imposed a fine of up to $200 "[i]f any person shall furnish money to another, to be used for the purpose of promoting the success or defeat of any particular candidate." *The Penal Code of the State of Texas*, Art 262 at 49 (1857), *available at* https://lrl.texas.gov/scanned/statutes_and_codes/Penal_Code.pdf (accessed July 3, 2019).

There were also multiple efforts at the federal level to prohibit political assessments of federal workers' salaries in the 1830s and 1840s. Anthony Corrado *et al.*, *The New Campaign Finance Sourcebook* 8 (2005). At that time, it was common to appoint political supporters to government positions, and then assess fixed portions of those government salaries to be paid to associated political parties. *Id.* Efforts to end assessments were undertaken in the 1830s and 1840s, as critics "claimed that it posed a threat to the 'freedom of elections.'" *Id.* Although Congress ultimately did not adopt the bills introduced, the federal effort to address the influence of money in elections also began well before adoption of the Oregon Constitution. *Id.*

Those examples demonstrate that laws regulating money in elections, including campaign contributions, were well established prior to the adoption of Article I, section 8, of the Oregon Constitution. Those laws were not only well

established, but the framers likely were aware of them – indeed, the framers of the Oregon Constitution "were familiar with developments in other states," including both New York and Texas. Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 – Part II (Frame of Government: Articles III-VII)*, 39 Willamette L Rev 245, 247-48, 248 n 16 (2003) (explaining that framers referred to constitutions from other states, including New York and Texas); *see also* Mirth Tufts Kaplan, *Courts, Counselors and Cases: The Judiciary of Oregon's Provisional Government*, 62 Oregon Historical Quarterly 117, 121, 121 n 11 (June 1961) (explaining that it is unclear whether New York laws other than probate laws were applied in Oregon, but that New York laws likely were available in the Oregon territory).

Moreover, those types of laws continued to be enacted after 1859. Notably, less than ten years after the adoption of Article I, section 8, the Oregon legislature regulated money in elections by enacting the Oregon Crimes Against Public Justice Act of 1864. That law prohibited giving anything of value or any "thing whatever" to a voter with intent to influence or induce the voter to vote in a particular way. William Lair Hill, 1 *The Codes and General Laws of Oregon* §§ 1843-44 at 939 (1887). By 1908, voters had adopted the Corrupt Practices Act, the purpose of which was "to prevent fraud and insure purity of elections by limiting the amount of campaign expenses." *See Nickerson v. Mecklem*, 169 Or 270, 274, 277, 126 P2d 1095 (1942) (describing act). To that

end, that law prohibited certain corporations from contributing to candidates and limited candidate expenditures to 15 percent of the annual salary for the elective office. *See Vannatta I*, 324 Or at 538 n 23 (describing act). Like those laws, the purpose of the County's contribution limits is to protect the integrity of elections by guarding against the corruptive influence of money in elections. *See State v. Ciancanelli*, 339 Or 282, 318, 121 P3d 613 (2005) (explaining that historical exception is focused on "historical crimes that ultimately focus on some underlying nonspeech harm"); (*see* ER-37 to ER-38 (describing in Voters' Pamphlet that County measure was intended to address apparent corruption)).

Those examples demonstrate that laws regulating money in elections were well established at the time the Oregon Constitution was adopted, and the adoption of Article I, section 8, was not intended to invalidate those laws because they continued to be enacted after the constitution's adoption. The County's contribution limits can be viewed as an extension or modern variant of the principle underlying those early laws limiting the corrupting influence of money in elections. As a result, this Court should uphold the County's contribution limits as falling within the historical exception for regulation of money in elections.

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2. The concurrent enactment of Article II, section 8, further demonstrates that the framers did not intend Article I, section 8, to prohibit the regulation of money in elections.

Article II, section 8, of the Oregon Constitution, which was enacted at the same time as Article I, section 8, further demonstrates that the framers did not consider money spent in elections to be protected speech. *See State v. Hirsch/Friend*, 338 Or 622, 634, 114 P3d 1104 (2005), *overruled in part on other grounds by State v. Christian*, 354 Or 22, 40, 307 P3d 429 (2013) (examining other constitutional provisions in textual analysis). On the contrary, Article II, section 8, demonstrates that the framers expressly understood that it was necessary to regulate the flow of money in elections.

Article II, section 8, provides,

> "The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct."

To understand the scope of that provision, this Court must examine the text, case law, and history behind the provision. *See Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (describing methodology for interpreting original constitutional provisions).

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In *Vannatta I*, this Court undertook that analysis of Article II, section 8, and concluded that the provision's use of the term "election" is narrowly confined to "those events immediately associated with the act of selecting a particular candidate," rather than including the campaign leading up to the election. 324 Or at 528, 531. However, in reaching that conclusion, the Court relied primarily on the historical dictionary definition of "election" – and the lack of a historical definition of "campaign" or reference to "campaigns" in the text – and from that limited information drew numerous conclusions. *Id.* at 529-32, 534.

In addition, the Court asserted that the reference to the "manner of regulating" was intended to address issues such as who is eligible to vote and the required qualifications. *Id.* at 532. That interpretation overlooks the fact that other concurrently enacted provisions of the Oregon Constitution already addressed many of those issues. *See, e.g.*, Or Const, Art II, § 2 (addressing qualifications of electors); Or Const, Art II, § 3 (1859) (prohibiting an "idiot, or insane person" or those convicted of certain crimes, from having the "privileges of an elector"). The Court went on to assert that the reference to the manner of conducting elections was intended to address "the mechanics of the elections themselves" such as the number of polling places and how they would be operated. *Vannatta I*, 324 Or at 532. However, some of those mechanics also were addressed in concurrently enacted provisions of the Constitution. *See,*

e.g., Or Const, Art II, § 17 (directing where electors must vote); Or Const, Art II, § 14 (1859) (providing for timing of elections). Based on that narrow analysis, the Court concluded that Article II, section 8, did not override any protections in Article I, section 8, for contributions or expenditures. *Vannatta I*, 324 Or at 536.

The County legislation presents a timely and appropriate context to reexamine this Court's analysis of Article II, section 8, to account for additional information that the Court did not consider in *Vannatta I*. *See Mowry*, 350 Or at 693-94 (noting importance of correcting constitutional interpretation errors).

Article II, section 8, states that the legislature shall enact laws "to support the privilege of free suffrage." That introductory clause then is followed by a list of the type of laws that support that privilege, including laws "prescribing the manner of regulating, and conducting elections," and "prohibiting * ** all undue influence." Nothing in that text warrants limiting regulations contemplated by that provision to the act of voting itself. *See Vannatta I*, 324 Or at 532 (asserting without support that references to power, bribery and tumult were "concerned specifically with the act of voting itself" and, in particular, with "actual interference in the act of voting itself"). Even if the text did focus on the act of voting, nothing in the text limits the regulations envisioned to actions occurring at the time of voting. Actions that occur before the act of voting could nonetheless influence the vote.

Indeed, even in *Vannatta I*, the Court clarified that the legislature's power is not "limited in time," noting that events that occur before election day could be subject to regulation under Article II, section 8. 324 Or at 531. For example, the Court stated that "a bribe to vote a particular way that was given months before an election still would appear to fall within the ambit of Article II, section 8." *Id.* Thus, nothing in the text of Article II, section 8, suggests that laws regulating suffrage and elections could not regulate money transferred to a candidate before an election because such a transfer could nonetheless influence the election.

In fact, one overarching prohibition in Article II, section 8, is on "undue influence * * * from * * * bribery * * * and other improper conduct," that is, influence that is "not proper" or "not suited to the character, time or place." Noah Webster, 2 *An American Dictionary of the English Language* (unpaginated) (1828) (defining "undue"). Coupled with the prohibition on bribery, it is likely that the framers intended the reference to "other improper conduct" to allow the legislature to enact regulations limiting or otherwise restricting money spent in elections to curb the possibility of undue influence. The framers would have understood that bribery is just one form of monetary influence in elections. Using the catchall phrase "and other improper conduct" following the list of sources of undue influence, which includes bribery, captures other types of monetary influence that would not technically qualify as

a bribe. For example, the promise of money without any particular exchange or the threat of withholding money could also constitute undue influence, even if not technically a bribe. That is exactly the type of conduct that the County's Ordinance captures.

Read as a whole, the framers intended to allow for the regulation of money in elections under Article II, section 8, and, as a result, there is no indication that the framers intended Article I, section 8, to prohibit contribution limits like those embodied in the Ordinance.

E. Even if contributions implicate protected expression in some instances, the contribution limits are a reasonable restriction on the time, place, and manner of that expression.

Alternatively, to the extent that campaign contributions implicate protected expression, the County's limits on those contributions are permissible time, place, and manner restrictions. The government generally can impose regulations "that do not foreclose expression entirely but regulate when, where and how it can occur." *City of Hillsboro v. Purcell*, 306 Or 547, 553-54, 761 P2d 510 (1988). For example, where the concern is "with the medium, not the message," it may be permissible to limit the "manner, intensity, or invasive effect of some communicative activity" or to include limits on "number, frequency, density, or duration." *City of Portland v. Tidyman*, 306 Or 174, 182-83, 759 P2d 242 (1988). In particular, a regulation of the time, place, or manner of expression is permissible if it (1) is content-neutral; (2) advances a

legitimate state interest without restricting substantially more speech than necessary; and (3) leaves open ample alternative avenues to communicate. *See State v. Babson*, 355 Or 383, 407, 326 P3d 559 (2014).

In addition, time, place, and manner restrictions are permissible even if they decrease the overall amount of speech or limit the use of a unique means of communicating. For example, this Court upheld most aspects of a permit requirement for "outdoor advertising signs" that regulated the number and location of those signs. *Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275, 279, 132 P3d 5 (2006). The Court determined that the permit scheme and associated fees were permissible content-neutral time, place, and manner regulations to the extent that they applied to all signs, regardless of their subject or content. *Id.* at 287 n 8, 290-92. Notably, the fee requirement did not violate Article I, section 8, even though the Court noted that the fee could "reduce the level of the activity." *Id.* at 290. In addition, the Court noted that a provision that limited the number of signs that are visible from public highways was permissible, even though "[o]utdoor advertising signs, like other forms of expression, may have characteristics that make them uniquely suited to conveying certain messages to certain audiences." *Id.* at 291. In contrast, the Court noted that a complete prohibition on billboards might be viewed differently. *Id.* at 291-92.

As was the case in *Outdoor Media*, the contribution limits in the Ordinance are a permissible time, place and manner restriction. At the outset, because *Vannatta II* held that contributions implicate Article I, section 8, only to the extent that they are linked to a candidate's expression, the time, place and manner analysis must examine the regulation from the perspective of the candidate's speech. On the first factor, as was the case in *Outdoor Media*, the contribution limits are content-neutral – although they limit the amount and method of receiving contributions, there is no restriction on how a candidate can use those contributions. As a result, the contribution limits have no impact on the content of any speech that a contribution might be used to fund. *Cf. Vannatta II*, 347 Or at 458-59 (concluding that restrictions on receipt of gifts were "not written in terms directed to the substance of any opinion or any subject of communication" because public officials could violate those restrictions "without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold"). Moreover, the contribution limits are not inherently linked with any particular speech content of a candidate, in that the limits cannot be avoided by engaging or declining to engage in any particular protected expression. *See Fidanque v. Oregon Government Standards and Practices*, 328 Or 1, 8 n 4, 969 P2d 376 (1998) (striking down lobbying fee because it could "be avoided by the simple expedient of never espousing a preference concerning the content of Oregon

statutory law"). Here, a candidate cannot avoid the contribution limits by, for example, using contributions only for nonexpressive purposes like purchasing office supplies or by using the contributions only for certain expressive purposes. Therefore, the focus of the contribution limits is not the content of a candidate's speech.

On the second factor, the contribution limits advance the County's legitimate interest in preventing actual or apparent corruption by limiting the amount a candidate can receive from a particular donor, while allowing candidates to raise unlimited amounts of money by not imposing any overall cap on contributions. (*See* ER-37 to ER-38 (referencing corruption in Voters' Pamphlet for County measure).) As was the case in *Outdoor Media*, even if the limits have the effect of reducing the amount of individual contributions, there is no overall limit on the contributions a candidate can receive. Therefore, to the extent there is a link between campaign contributions and candidate expression, the contribution limits do not operate as a cap on the amount of expression in which a candidate can engage and therefore do not restrict more speech than necessary.

On the third factor, similar to *Outdoor Media*, there are ample alternative avenues to communicate. As noted, candidates can still raise unlimited amounts of money to use for communications. In addition, there are many

options for communicating that do not require money at all, such as giving speeches, posting on social media, and going door-to-door.

In sum, to the extent the contribution limits regulate protected expression, they are a restriction on the time, place, and manner of that expression and therefore are permissible under Article I, section 8.[3]

Vannatta II is not to the contrary. There, this Court discussed the time, place, and manner analysis in the context of a provision of the gifts law that regulated the "right to communicate an 'offer' of a gift." *Vannatta II*, 347 Or at 466; *see also id.* (distinguishing an implied restriction on "giving" gifts from restriction on "offering" gifts). The Court concluded that the law focused on the content of speech – every *offer* of a gift – "regardless of when, where, and

[3] Even if this Court were to disagree with the County and conclude that contributions implicate speech of the contributor, the contribution limits would still be a permissible time, place, and manner regulation. On the first factor, although a contribution can be an expression of support, it can also have other expressive content. For example, a person might contribute to one candidate because they oppose the other candidate; alternatively, a person might contribute to a candidate in honor of a loved one, but not out of personal support. The contribution limits do not regulate contributions based on any expressive content or communicative intent of the contributor. On the second factor, the County's limits continue to allow for significant contributions and are similar to limits imposed in other jurisdictions across the country, indicating the County is not restricting more speech than necessary to achieve its interest in preventing actual or apparent corruption. (ER-42.) Finally, there are ample alternative avenues to communicate – in addition to money that can be given to a candidate, a person can volunteer, engage in unfunded communication in support of a candidate, and spend unlimited amounts on ads, fliers, and other methods of communicating.

in what manner it is made." *Id.* at 468. In contrast, as noted above, the County contribution limits do not regulate any particular speech content or expressive activity, but rather, specify the mechanics of making or receiving contributions that may later be used to fund communications. The contribution limits do not restrict the candidate's use of the money, and accordingly do not impact the content of any candidate's speech; similarly, candidates can violate the law without engaging in any expressive activity at all. Therefore, unlike the content-based restrictions on all "offers" of gifts in *Vannatta II*, the County's contribution limits regulate, at most, the manner of activity linked to expression and therefore are permissible under Article I, section 8.

F. The County's contribution limits are constitutional under the First Amendment to the United States Constitution.

Because the trial court invalidated the contribution limits under Article I, section 8, of the Oregon Constitution, it did not reach the First Amendment issue. The First Amendment analysis presents a question of law, and in the interests of judicial economy, the County therefore requests that this Court now address that issue. *See State v. Ford*, 310 Or 623, 625, 801 P2d 754 (1990) (reaching state and federal constitutional issues not addressed by the Court of Appeals).

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech." The First

Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Gitlow v. New York*, 268 US 652, 666, 45 S Ct 625, 69 L Ed 1138 (1925). The United States Supreme Court has held that restrictions on campaign contributions amount to restrictions on interests protected by the First Amendment. *See Buckley v. Valeo*, 424 US 1, 23, 96 S Ct 612, 46 L Ed 2d 659 (1976) (explaining that contribution limits "implicate fundamental First Amendment interests").

Federal courts have held that contribution limits do not impose an impermissible restraint on free expression or association under the First Amendment where those limits are closely drawn to serve a sufficiently important government interest. *See Nixon v. Shrink Missouri Government PAC*, 528 US 377, 387, 120 S Ct 897, 145 L Ed 2d 886 (2000) (explaining that "limiting contributions left communication significantly unimpaired" in *Buckley*); *Buckley*, 424 US at 21-22, 25 (stating standard and explaining that where contribution limits "permit associations and candidates to aggregate large sums of money to promote effective advocacy," as well as allow individuals to "become a member of any political association and to assist personally in the association's efforts on behalf of candidates," the rights to speech and association are protected).

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Contributions made directly to candidates create the possibility of an actual or apparent *quid pro quo*. *Buckley*, 424 US at 26-27. Restrictions on contributions address that concern without "undermin[ing] to any material degree the potential for robust and effective discussion" because people can continue to "engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Buckley*, 424 US at 20-21, 26-29. In addition, although the U.S. Supreme Court has recognized that contribution limits could impact speech if they prevented a candidate from "amassing the resources necessary for effective advocacy," the Court has held that a law does not impermissibly impact speech if it merely requires candidates "to raise funds from a greater number of persons." *Id.* at 21-22. Indeed, the U.S. Supreme Court has stated that the government's interest in preventing corruption and the appearance of corruption justifies contribution limits like those upheld in *Buckley* – a $1,000 limit for individual contributions to candidates and a $5,000 limit for political committee contributions to candidates. *Buckley*, 424 US at 35. In fact, there can be "no serious question about the legitimacy" of the interest in preventing corruption as justifying contribution limits. *Nixon*, 528 US at 390. That interest underlies the County's contribution limits. (ER-37 to ER-38.)

In analyzing contribution limits, the Court generally will not second guess the legislatively-determined amount of the limit. *Buckley*, 424 US at 30 (explaining that Court will not use a "scalpel" to determine whether $2,000 ceiling is more appropriate than $1,000 ceiling unless there are "differences in kind"). However, the level of the contribution limit can be a factor in the Court's analysis of whether a law is closely drawn to avoid unnecessary infringement of First Amendment interests. *See Randall v. Sorrell*, 548 US 230, 248-52, 126 S Ct 2479, 165 L Ed 2d 482 (2006) (holding, in plurality decision, that there is a "lower bound" for contribution limits and striking down limits "well below the lowest limit [the] Court ha[d] previously upheld"). For example, in *Randall*, the plurality struck down a contribution limit of $200 per election for candidates for statewide office, noting it was the lowest limit in the nation. *Id.* at 250. However, the Court struck down those restrictions in the full context of the law at issue, based on five different factors: (1) whether the contribution limits would significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether political parties must abide by exactly the same low contribution limits as other contributors; (3) whether volunteer services are contributions that count toward the limit; (4) whether the contribution limits are adjusted for inflation; and (5) whether any

special justification warrants the limit. *Id.* at 253-61 (listing and analyzing factors).[4]

The *Randall* factors weigh differently in this case, and the contribution limits therefore should be upheld. First, there is no indication that the contribution limits would "significantly restrict" the amount of funding available for challengers to run competitive campaigns in Multnomah County candidate elections. In fact, one of the purposes of the County legislation was to allow more challengers to run competitive campaigns. (*See, e.g.*, ER-37 to ER-38 (explaining that contribution limits will lower the cost of running for office and allow people from more diverse backgrounds to be candidates)); *see also* Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?* 9 Election Law Journal 125, 126 (2010) (studying effect of contribution limits at the state level and concluding that lower contribution limits lead to more competitive elections). In addition, the County's

[4] The Court in *Randall* applied the five factors only after it determined that the limits at issue implicated "danger signs" that included (1) limits set per election cycle; (2) limits that applied to contributions from political parties; (3) limits that were the lowest in the nation; and (4) limits that were below those previously upheld. *Randall*, 548 US at 249-51. The County's limits also apply per election cycle and to contributions from political parties (whether from a political committee or small donor committee), though they are not the lowest in the nation or lower than those previously upheld. Because two of the "danger signs" are implicated, the County has analyzed the *Randall* factors here.

contribution limits are similar to limits imposed in many other jurisdictions around the country. (*See* ER-42.)

Second, the County legislation does not target or limit contributions by or to political parties; like other entities, a political party could form a political committee or a small donor committee, which is a political committee that only accepts contributions of $100 or less per individual contributor per year. *See* MCC 5.200 (defining "small donor committee"). If a political party formed a small donor committee, it could make unlimited contributions to candidates. *See* MCC 5.201; *see also Randall*, 548 US at 257-58 (expressing concern that contribution limits would not allow individuals to contribute small amounts to political parties that could in turn make larger contributions to candidates).

Third, volunteer services are not contributions under the County legislation because the definition of "contribution" includes only "services *other than personal services for which no compensation is asked or given*;" unreimbursed travel expenses similarly are excluded from the definition of contributions. ORS 260.005(3)(a) (2016) (defining "contribution); ORS 260.007(4) (2016) (excluding certain travel expenses from "contribution" definition); *Randall*, 548 US at 259 (expressing concern that volunteer travel expenses counted toward contribution limits). As a result, volunteers could continue to provide unlimited support to candidates.

Fourth, the contribution limits are adjusted for inflation on a biennial cycle. *See* MCC 5.205 (requiring adjustment of all dollar amounts on January 1 of each odd numbered year).

Fifth, there are unique reasons for the County's contribution limits, including the fact that Oregon ranks as one of the worst states for deterring corruption in political financing.[5] In addition, the fact that nearly 89 percent of Multnomah County voters supported the County legislation indicates that voters believe that contribution limits are necessary to address apparent or actual corruption in Multnomah County candidate elections. *See Nixon*, 528 US at 394 (citing views of voters relating to contribution limits as support for such limits); *see also Multnomah County Election Results – Update #17 Final Summary November 2018 General Election* 9 (Nov 26, 2018), *available at* https://multco.us/file/76594/download (accessed July 3, 2019) (showing that Portland voters approved similar legislation in Measure 26-200 with over 87 percent of the vote). The *Randall* factors, therefore, weigh in favor of the County's contribution limits because the County legislation is closely drawn to avoid unnecessary infringement on First Amendment interests, while serving

[5] *See* The Center for Public Integrity, *Oregon gets F grade in 2015 State Integrity Investigation*, *available at* https://publicintegrity.org/accountability/oregon-gets-f-grade-in-2015-state-integrity-investigation/ (accessed July 3, 2019) (giving Oregon an "F" grade in political financing and ranking it 49th among the states).

the important government interest of avoiding apparent and actual corruption. The County legislation is constitutional under the First Amendment.

IV. SECOND ASSIGNMENT OF ERROR

The trial court erred in holding that the expenditure and independent expenditure limits in MCC 5.202(A) and (C) are unconstitutional under Article I, section 8, of the Oregon Constitution.

A. Preservation

The County argued in its trial court Petition for Commencement of Validation Proceeding, Opening Brief and Response Brief that the expenditure and independent expenditure provisions are constitutional under Article I, section 8, as well as under the First Amendment. (*See* ER-7 to ER-8.) The County also advanced those arguments during oral argument. (Tr 33-36.) The trial court held that the expenditure and independent expenditure limits violate Article I, section 8, of the Oregon Constitution. (ER-65.)

B. Expenditure and independent expenditure limits are permissible under Article I, section 8, of the Oregon Constitution; however, resolution of the status of expenditures and independent expenditures under the Oregon Constitution, and limits placed on them, is best left for another case in light of controlling federal case law.

In concluding that expenditures and independent expenditures are a form of speech protected under Article I, section 8, of the Oregon Constitution, the trial court cited four separate Oregon Supreme Court cases – *Vannatta I*, *Hazell*

v. Brown, 352 Or 455, 287 P3d 1079 (2012), *Meyer v. Bradbury*, 341 Or 288, 142 P3d 1031 (2006), and *Deras v. Myers*, 272 Or 47, 535 P2d 541 (1975). (ER-61.) However, none of those cases squarely addressed whether expenditures constitute protected expression under Article I, section 8, of the Oregon Constitution under this Court's current jurisprudence – and no Oregon Supreme Court case has. *See Vannatta I*, 324 Or at 520 (explaining that parties conceded that expenditures constitute protected expression and that *Deras* "provides little assistance in conducting an Article I, section 8, inquiry under this court's present jurisprudence"); *Meyer*, 341 Or at 299 (restating expenditure holding based on concession from *Vannatta I*, without new analysis); *Hazell*, 352 Or at 465-66 (same).

Although the County did not concede below that expenditures constitute protected expression, and does not do so here, the County recognizes that the First Amendment to the United States Constitution, as interpreted by the U.S. Supreme Court, limits the County's ability to regulate expenditures and independent expenditures. *See Buckley*, 424 US at 58 (holding independent expenditure ceiling, limits on candidate expenditures, and ceilings on overall expenditures unconstitutional); *Citizens United v. FEC*, 558 US 310, 365, 130 S Ct 876, 175 L Ed 2d 753 (2010) (concluding that restrictions on corporate independent expenditures were unconstitutional). The County believes that the federal cases concluding that restrictions on expenditures and independent

expenditures are unconstitutional under the First Amendment were wrongly decided in that regard. Nonetheless, the County recognizes that, in light of that federal case law, resolution of the status of expenditures – and regulations of those expenditures similar to the County's – under Article I, section 8, of the Oregon Constitution is best left for another case.

V. CONCLUSION

For the foregoing reasons, the County respectfully requests that this Court reverse the trial court's judgment as to MCC 5.201(A) and (B), which impose contribution limits in Multnomah County candidate elections, and declare those provisions constitutional under Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution.

DATED this 11th day of July, 2019.

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

/s/ Jenny M. Madkour

Jenny M. Madkour, OSB No. 982980
Katherine Thomas, OSB No. 124766
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Telephone: (503) 988-3138
jenny.m.madkour@multco.us
katherine.thomas@multco.us
Of Attorneys for Multnomah County

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Daniel W. Meek, OSB 791242
Linda K. Williams, OSB 784253
10266 SW Lancaster Road
Portland, OR 97219
dan@meek.net
attorney@lindawilliams.net
Attorneys for Trojan et al.

Gregory A. Chaimov, OSB 822180
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
gregorychaimov@dwt.com
Attorney for Mehrwein et al.

DATED: July 11, 2019

/s/ Jenny M. Madkour
Jenny M. Madkour, OSB 982980
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
jenny.m.madkour@multco.us
Of Attorneys for Multnomah County