IN THE SUPREME COURT 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

OPENING BRIEF OF INTERVENORS-APPELLANTS MOSES ROSS, JUAN CARLOS ORDONEZ, JAMES OFSINK, SETH ALAN WOOLLEY, and JIM ROBISON

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

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This brief is filed on behalf of Intervenor-Appellants Moses Ross, Juan Carlos Ordonez, James Ofsink, Seth Alan Woolley and Jim Robison ("Ross Intervenors").

I. STATEMENT OF THE CASE

We accept the statements of the case in the Opening Briefs of Multnomah County and of the Trojan Intervenors, except that we offer different questions presented and a summary of the issues addressed in this brief.

A. QUESTIONS PRESENTED.

1. Does the Measure 26-184 requirement that political advertisements identify their largest funders violate Article I, § 8, of the Oregon Constitution?
    a. Is the Measure 26-184 requirement that political advertisements identify their largest funders within an historical exception to Article I, § 8, of the Oregon Constitution?
    b. Is the Measure 26-184 requirement that political advertisements identify their largest funders impermissibly vague?
    c. If so, should the Court issue a limiting construction so that Measure 26-184's requirements can be validly applied?

2. Does the Measure 26-184 requirement that political advertisements identify their largest funders violate the First Amendment of the United States Constitution?
3. Is determining the validity of the provisions of a Multnomah County charter amendment within the jurisdiction of the Circuit Court under ORS 33.710?

B. SUMMARY OF ARGUMENTS.

The "disclaimer" or "tagline" requirements of Measure 26-184 are valid under the Oregon Constitution and United States Constitution.

The requirement that political advertisements identify their largest funders is consistent with Article I, § 8, of the Oregon Constitution. The required disclaimers do not restrict speech but instead expand it by providing additional information to voters, highly useful for judging the credibility of the paid political messages they receive.

Today, 49 states require that ads promoting or opposing candidates for public office at least identify who placed the ad. 34 states have laws requiring political ads to state who paid for them, often requiring the term "paid for by" followed by the name and address of the individual or entity paying for the ad. Nine states additionally require that each ad include a list of the largest funders of the ad campaign.

37 states have "free speech" clauses in their constitutions that are effectively identical to Oregon's clause. Each of them declares that every person has the right "to speak, write, or print freely on any subject." Some of

them use the word "publish" instead of "print," but they are otherwise the same as Oregon's Article I, § 8. Of the 9 states that require political ads to list the largest funders, 6 of them have "free speech" clauses in their constitutions that are effectively identical to Oregon's clause. We have located no court decisions in any of those states that has interpreted the state's "free speech" clause to preclude these mandatory disclaimers.

Requiring political ads to identify their largest funders also qualifies for an historical exception to Article I, § 8, pursuant to the holding in ***State v. Moyer***, 348 Or 220, 230 P3d 7 (2009), and the historical research showing that secrecy surrounding legislative and political matters has been strongly disfavored for centuries.

The requirement that political advertisements identify their largest funders is also consistent with the First Amendment of the United States Constitution. Both the United States Supreme Court and the federal Circuit Courts have consistently upheld such requirements,

II. STANDARDS OF REVIEW APPLICABLE TO ALL ASSIGNMENTS OF ERROR.

A. GRANTS OF SUMMARY JUDGMENT BASED ON CONSTITUTIONAL CONSTRUCTION ARE REVIEWED FOR LEGAL ERROR.

> We review the trial court's grant of summary judgment for legal error. ***Johnson v. State Board of Higher Education***, 272 OrApp 710, 714, 358 P3d 307, *review denied*, 358 Or 527, 366 P3d 1168 (2015).

Huntsinger v. BNSF Ry. Co., 286 OrApp 84, 85, 398 P3d 403 (2017). Issues of constitutional construction are matters of law, reviewed for error of law. ***Filipetti v. Dep't of Fish & Wildlife***, 224 OrApp 122, 197 P3d 535 (2008).

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

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

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

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

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

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

There is a strong presumption that a duly-enacted statute is constitutional. ***Greist v. Phillips***, 322 Or 281, 298, 906 P2d 789 (1995). A successful ballot measure is a legislative act of the voters of this state. As such, it "is clothed with a presumption in its favor." ***Milwaukie Co. of Jehovah's Witnesses v. Mullen***, *supra*, 214 Or at 292.

C. CONSTITUTIONAL AND STATUTORY PROVISIONS REQUIRE LIBERAL INTERPRETATION.

Whether a statute, rule, or government practice violates the Oregon or United States Constitution are questions of law reviewed for legal error.

Oregon Educ. Ass'n v. Phillips, 302 Or 87, 95, 727 P2d 602 (1986), ruled that the Oregon Constitution "should be liberally construed to uphold legislation."

III. FIRST ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN CONCLUDING THAT MEASURE 26-184'S REQUIRED IDENTIFICATION OF FUNDERS IN POLITICAL ADVERTISEMENTS VIOLATES THE OREGON CONSTITUTION.

PRESERVATION OF ERROR.

The Ross Intervenors and Trojan Intervenors (known below as the Citizen Parties) argued this point in their Opening Brief and Reply Brief and at the Circuit Court hearing. The Circuit Court's Order on Petitioner Multnomah County's Motion for Declaration of Validity (March 6, 2018) (MC ER-56-66) ("MC Validation Order") ruled against them (MC ER-63).

Measure 26-184 requires:

> **(3) Timely Disclosure of Large Contributions and Expenditures.**
>
> Each Communication to voters related to a Multnomah County Candidate Election shall prominently disclose Individuals and Entities that are the five largest true original sources, in excess of $500 each, of the Contributions and/or Independent Expenditures used to fund the Communication.

A. THE CHALLENGE TO SECTION (3) OF MEASURE 26-184 MAY BE MOOT.

The Circuit Court's Order on Petitioner Multnomah County's Motion for Declaration of Validity (March 6, 2018) (MC ER-56-66[1]) ("MC Validation Order") (pp. 7-8) concluded that Section (3) of Measure 26-184 violates Article

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1. We refer to pages in the Excerpt of Record filed by Multnomah County as "MC ER." We refer to pages in the Excerpt of Record filed by the parties Trojan, et al., as "ER."

I, § 8, for reasons stated in a 1999 Oregon Attorney General Opinion ("*1999 AG Opinion*") regarding the constitutionality of ORS 260.522 and because its vagueness "will inevitably lead to arbitrary enforcement which, while never acceptable, in the elections context is perilous."

On June 10, 2019, the same Judge Eric Bloch issued an Opinion and Order in the Portland Measure Validation Proceeding (No. 19CV06544) ("Portland Validation Opinion") (Trojan App-52-59)[2] that concluded (Trojan App-55-56) that the similar (but more detailed) provisions in Portland Measure 26-200 are constitutional.

> The disclosure provisions at issue here differ from those found unconstitutional by this court in the County Validation Order, the primary difference being increased specificity in the City's disclosure mandate. * * *
>
> In the County Validation Order, this court also expressed genuine concern that the disclosure provision there at issue was unconstitutionally vague. However, based on the additional specifics in the City's enactments regarding how and when the disclosures must be made, that vagueness concern has been cured.

Judge Bloch also reconsidered and rejected his earlier reliance upon the *1999 AG Opinion*.

> The City and Citizen Parties assert that this court erroneously relied on the AG Opinion, arguing the holdings in ***State v. Moyer***, 348 Or 220 (2010), and ***Citizens United v. Federal Election Com 'n***, 558 US 310 (2010), undercut the validity of the Attorney General's analysis. Upon further analysis of the briefing, oral argument, and the state and federal case law, this court is no longer persuaded by the AG Opinion. Instead, ***State v. Moyer*** is found to be controlling here as to the Oregon Constitution.

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2. We refer to pages in the Appendix filed by Multnomah County as "MC App". We refer to pages in the Appendix filed by the parties Trojan, et al., as "Trojan App".

> * * *
>
> * * * As such, under the analyses and holdings of ***Robertson*** and ***Moyer***, the City's disclosure provisions are held to be valid under the Oregon Constitution.

We are informed that the Multnomah County Commission on July 18, 2019, intends to adopt an ordinance to implement Section (3) of Measure 26-184. The proposed ordinance, we understand, is essentially identical to the language of Portland Measure 26-200 upheld by Judge Bloch. Adoption of such an implementing ordinance is called for by Section (4)(a) of Measure 26-184.

Since such ordinance would cure any infirmity in Section (3) identified by Judge Bloch, it may render moot the challenge to Section (3) of Measure 26-184.

> Under Oregon law, when changed circumstances render an appeal moot, it will be dismissed. ***State v. Hemenway***, 353 Or 498, 501, 302 P3d 413 (2013).

Brownstone Homes Condo. Ass'n v. Brownstone Forest Heights, LLC, 358 Or 26, 30, 361 P3d 1 (2015). Here, only the validity of Section (3) may be moot. If so, the appropriate action by this Court would be to vacate that portion of the Circuit Court's order.

Despite mootness, this Court could proceed to decide this issue pursuant to ORS 14.175. ***Couey v. Atkins***, 357 Or 460, 520, 355 P3d 866 (2015). But the validity of the Portland charter provisions (thought to be nearly identical to the new Multnomah County ordinance) are at issue in the Portland Measure Validation Proceeding (No. 19CV06544), for which notice of appeal was filed

June 17, 2019. So those provisions will be receiving judicial review in any event.

B. REQUIRING SUCH "DISCLAIMERS" OR "TAGLINES" ON POLITICAL ADVERTISEMENTS IU.S. ConsTITUTIONAL IN OREGON.

California, Washington, Hawaii, Maine, Vermont, Massachusetts, Colorado, Minnesota, and Virginia have "disclaimer" laws requiring that political ads involving candidate races identify their actual top significant funders (not merely the names of the political committees placing the ads). None has been struck down. Laws requiring that political advertisements identify at least their source (such as committee names) are in place at the state level in 46 states (but not Oregon).

Before 2001, Oregon had a statute (ORS 260.522) requiring that every political advertisement identify its source. No court ever struck down that statute. The Oregon Legislature repealed it in 2001 but in 2019 enacted HB 2716, which requires that all candidate ads identify their sources and that some political advertisements placed by non-candidates also identify their 5 largest funders. Trojan App-60-63. This 2019 statute is a direct repudiation of the *1999 AG Opinion*. The Legislature was well aware of the *1999 AG Opinion*, as it was noted in every Staff Measure Summary on HB 2716. Trojan App-64-65. But the Legislature concluded that it was wrong.

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

An argument that any tagline requirement violates Article I, § 8, because it is applies only to political speech (and is thus content-based) proves too much. Under that rationale, Oregon could not require that those responsible for placing political ads identify their sources of funds at all. **If any restriction that applies only when political speech happens is a violation of Article I, § 8** (which we dispute), then the entire political contribution and expenditure reporting system in Oregon (known as ORESTAR on the state level) also violates Article I, § 8 (see pages 25-25, *post*).

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

The Attorney General assumed that such a tagline law would "restrict speech within the meaning of Article I, section 8." First, the Measure 26-184 tagline requirement does not proscribe any speech; it simply in some cases requires that certain additional information (identities of the 5 largest major funders) be included in advertisements funded by campaign contributions or independent expenditures.[3] As ***Citizens United v. Federal Election Comm'n***, 558 US 310, 130 SCt 876 (2010) ("***Citizens United***"), stated:

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3. If the campaign contribution limits of Measure 26-184 are respected, then most all advertisements paid for by a candidate's campaign will not be required to disclose any funders. Since Measure 26-184 limits contributions by any individual or any political committee (other than a Small Donor Committee) to $500, respecting those limits would result in no individuals or political committees being disclosed in the advertisement.

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

558 US at 366.

Second, the Attorney General letter assumes that the tagline requirement would be a content-based restriction on speech, since it would apply only to "political speech." But implementing the tagline requirement does not require examining the content of the speech. It applies to all advertisements paid for with campaign contributions or independent expenditures, regardless of the content of the advertisements.

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

State v. Moyer, 348 Or 220, 231, 230 P3d 7, 13 (2010).[4]

Requiring taglines on political advertisements is not a regulation of the content of political speech by the funder of the advertisement. That person or entity can continue to say anything he or it wants about candidates. They can

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4. ***Vannatta I*** is ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997).

speak anonymously about candidates on a radio call-in show or insert flyers about Portland candidates under car windshields without disclosing her identity or adding a tagline. The tagline regulates the transfer of property (usually money) to support or oppose the election of a candidate, some of which may be used for conveying political advertisements. If the amount of money transferred for that purpose exceeds the thresholds in Measure 26-184, then the advertisements must disclose the largest sources of that money.

The categorization of an advertisement as an ad about candidates does not amount to suppression of the content of the political message, because that identification does not trigger any violation of Measure 26-184; the actual political expression is not the target of the regulation. The tagline requirement does impose a new obligation on certain deep-pocketed speakers to provide contextual facts to accompany each viewing of the ad about the candidate(s)--whether those who placed or paid for the ad did so using large amounts of money from identified donors. These are reasonable time, place, and manner requirements on the presentation of the ad's message. They assure that truthful information about the funding sources appears at the same time and in the same manner as the ad's main message. The content of the message is of no further inquiry.

The tagline requirement is similar to requesting a permit for a large parade on a city street. That regulation does not depend on the actual message or theme of the gathering but assists in providing information so the public can travel safely near the location. In much the same manner, the tagline provides

contextual facts to accompany the ad about the candidate, information which assists in public: Once the identities of the funders are disclosed in the ad, voters can assess the credibility of the message, just as they can decide to avoid congested streets. If the message denounces a candidate because of past statements in favor of restricting youth access to tobacco products, many voters may well decide not to believe the message, if it was paid for by tobacco companies.

One simple way to identify the target of a statute is to see when a violation occurs. Here, no violation rests on the speaker's message in the political ad. No violation occurs from making or accepting an otherwise lawful contribution that may pay for an ad. The violation occurs when the speaker uses the funds to produce an ad and fails to include important factual information about the conduct of the 5 largest donors (each in excess of $500) required by the reasonable time, place and manner regulations in Measure 26-184 § (3). The conduct at issue is whether any funder of the ad spent more than $500 on the effort; § (3) requires that conduct is disclosed in the ad. This time, place, and manner restriction assures that voters receive important context about the ad at the most salient time (when the voter actually sees or hears it), in the same place and manner as the ad appears.

Article I, § 8, does not apply to non-expressive conduct. Thus, the real question is: Do large independent spenders (or large contributors to entities

which place independent expenditure ads) enjoy a constitutional right not to disclose their conduct of transferring property (money).[5]

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

> Oregon already prohibits anonymous political contributions.
>
> However, ORS 260.083 requires that committees disclose the names and addresses of all individuals and entities that contribute more than the threshold reporting amount. Accordingly, the Secretary of State's administrative rules require campaigns to refuse or to disgorge contributions for which campaigns cannot provide that information--those funds that are donated anonymously. See 2010 Campaign Finance Manual at 29 ("No committee shall accept an anonymous contribution. If a committee cannot identify a contributor, the contribution must be donated to an organization that can accept anonymous contributions.")* * * .

State v. Moyer, *supra*, 348 Or at 241, 230 P3d at 19.

The Oregon Supreme Court has held that laws focused on particular mechanisms of communication, such as outdoor advertising signs, are not "content based" so long as the laws do not depend on what the signs say. As explained in ***State v. Babson***, 355 Or 383, 326 P3d 559 (2014), in upholding a law barring use of the Capitol steps from 11:00 pm to 7:00 am for any purpose,

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

including political speech, "Our cases teach that the fact expression is protected does not mean that it is exempt from content-neutral, speech-neutral laws and regulation." *Accord*, ***Outdoor Media Dimensions, Inc., v. Dep't of Transp.***, 340 Or 275, 287 n8, 132 P3d 5 (2006). Such non-content based laws are upheld as reasonable time, place, and manner restrictions.

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

State v. Babson, 355 Or at 406-07, 326 P3d at 574-75.

2. REQUIRING IDENTIFICATION OF THOSE PAYING FOR POLITICAL ADVERTISEMENTS IS WITHIN AN HISTORICAL EXCEPTION TO ARTICLE I, § 8.

The Portland Validation Opinion correctly concluded that the tagline requirements of Portland Measure 26-200 qualify under an historical exception to Article I, § 8, relying upon ***State v. Moyer***, 348 Or 220, 237-38, 230 P3d 7 (2009):

> As our cases establish, the elements of a modern statute need not be identical or matched perfectly with historical prohibitions to fall within

> a historical exception. Prohibiting the concealment of the identity of the true provider of a political contribution from either the recipient of the contribution, the public, or both, is, we conclude, an extension or modern variant of the initial principle that underlies the historic legal prohibition against deceptive or misleading expression. Thus, in our view, ORS 260.402 falls within a "historical exception," whether the exception is described as one related to misleading the electorate, as identified in ***Vannatta I***, or simply is described as a contemporary variant of the exception for common-law fraud.

Among the provisions of the "Corrupt Practices Act Governing Elections," adopted by initiative in 1908, were limits on political campaign contributions and expenditures and requirement that political ads disclose who was responsible for placing them.[6] While not in effect as of 1857, this law shows that, when anonymity of political speech was first considered by the people, acting as the Legislature, they required full disclosure instead.

There is a long history in England, the United States, and Oregon of prohibiting secrecy in election matters. In fact, the modern notion of a "secret ballot" itself is a recent invention (in the 1890s) and was expressly rejected by the 1857 Oregon Constitutional Convention and rejected several times thereafter.

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6. Section 33 of the Corrupt Practices Act provided:

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

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

"Expression" has never included a right to conceal one's monetary support for legislation or candidates. Covert political action was abhorred. A Joint Resolution of the Territorial Legislature, December 1, 1854, stated what it claimed to be the hidden agenda of the "Knownothings"[7] and resolved that:

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

Special Laws of the Territory of Oregon (1854) p. 54 (all forms of emphasis in original).[8]

Nor was there a right to secrecy in political support for a candidate. While the right of a citizen to openly and freely petition the government, including legislators [***Sweeny v. McLoed***, 15 Or 320, 15 P 275 (1887)], in public fora was protected in the organizing documents of the colonies, the UU.S. Constitution, and the various states' bills of rights did not provide a constitutional right to have another *secretly* advance one's political agenda. Oregon did not even provide voters with secret ballots until the 1890s.

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

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

Nondisclosure of an interest in legislation was widely condemned in the United States prior to the adoption of the Oregon Constitution. For example, a New York jury in 1837 refused to enforce a contract for lobbying. ***Hillyer v. John Travers***, American Law Reports, July 1837 (New York Court of Common Pleas). This result was widely reported and attracted much commentary.[9] Other cases followed: ***Clippinger v. Hepbaugh***, *supra*; ***Marshall v. Baltimore & Ohio Railroad Company***, 16 How 314, 57 US 314, 14 LEd 953 (1843)

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

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

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

(applying Virginia law); compiled as statement of the law at RESTATEMENT (FIRST) OF CONTRACTS § 559, *Bargain To Influence Legislation*.[10]

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

b. SECRECY HAS HISTORICALLY BEEN BANNED IN ELECTION MATTERS.

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

> The concurrence recounts other pre- and post-Revolution examples of defense of anonymity in the name of "freedom of the press," but not a single one involves the context of restrictions imposed in connection

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10. § 559. Bargain To Influence Legislation

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

> with a free, democratic election, which is all that is at issue here. For many of them, moreover, such as the 1735 Zenger trial, ante, at 1526, the 1779 "Leonidas" controversy in the Continental Congress, ante, at 1526, and the 1779 action by the New Jersey Legislative Council against Isaac Collins, *ibid.*, the issue of anonymity was incidental to the (unquestionably free-speech) issue of whether criticism of the government could be punished by the state.
>
> Thus, the sum total of the historical evidence marshaled by the concurrence for the principle of constitutional entitlement to anonymous electioneering is partisan claims in the debate on ratification (which was almost like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech. This absence of historical testimony concerning the point before us is hardly remarkable. The issue of a governmental prohibition upon anonymous electioneering in particular (as opposed to a government prohibition upon anonymous publication in general) simply never arose. Indeed, there probably never arose even the abstract question whether electoral openness and regularity was worth such a governmental restriction upon the normal right to anonymous speech. The idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's. See ***Burson v. Freeman***, *supra*, 504 US, at 203-205, 112 SCt, at 1852-1854.

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

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

> advertising relating to candidates for federal office is concerned, see 2 USC 441d(a). Such a universal and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.

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

So the correct history is that, when the subject of anonymous political communication arose, the federal government and nearly all states adopted laws banning it.[11]

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

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

(continued...)

The modern respect for the secrecy of one's expression of choice by vote in elections, which we take for granted today, is not Constitutionally required. After debate,[12] the drafters of Oregon Constitution provided for "open" voting: "in all elections by the people, votes shall be given openly, or by *viva voce*, until the Legislative Assembly shall otherwise direct."[13] Oregon Constitution, Article II, 15. Voters' preferences were stated to the elections judges and were tallied in the poll book for each voter.[14] Public disclosure of votes remained the practice for years. In 1860 and 1864 there were attempts to allow voting by secret ballot, each defeated after vigorous public debate.[15] Oregon did not allow private balloting (the modern secret ballot system with standardized ballots and the act of voting conducted in private polling booths) until 1891. Oregon

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11.(...continued)

McIntyre, 514 US at 377.

12. Charles Henry Carey, THE OREGON CONSTITUTION PROCEEDINGS AND DEBATE OF THE CONSTITUTIONAL CONVENTION OF 1857 (Western Imprint 1984 facsimile edition of 1926 edition) [Hereinafter "Carey, CONSTITUTION"], pp. 325-26, 329, 331, 337-38, 340-41, 346-47.

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

14. Oregon Constitution, Article XVIII, § 2.

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

Laws, "Election Law of 1891," p. 23, § 47; 2 CODES AND STATUTES OF OREGON, T XXIII (Bellinger and Cotton 1902); ORS 250.080. In 1872, Oregon law allowed voters to use handwritten paper or submit printed party "tickets," but no privacy for filling out such ballots was provided. Oregon Laws (1872), C XIV. T I, § 10.

The absence of "secret balloting" made it even more important that bribery, whether direct or indirect, be combatted. With the *viva voce* system, a scheme of voter bribery was a serious threat, because it could indeed be enforced (as the voter's actual votes were publicly announced and recorded in the poll book and not a secret). Under the secret ballot, however, the briber could not be sure that the vote he had purchased was actually delivered in the privacy of the voting booth.

Oregon has now again abandoned the secret ballot filled out in the privacy of the official polling booth, so once again a scheme of bribery could be enforced (since a briber could require the voter to deliver her properly completed ballot to the briber before insertion into the "secrecy envelope" and mailing to the elections office).[16]

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

c. SECRECY HAS HISTORICALLY BEEN BANNED IN LEGISLATIVE MATTERS.

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

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

Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, C V, § 638, later codified at Hill's Code Or, T II, c 5, § 1855. This was a specific prohibition on misleading silence and withholding information in order to create a false impression of non-involvement. This Oregon restriction is an early example of the public's "right to know" (***Nickerson v. Mecklem et al.***, 169 Or 270, 126 P2d 1095 (1942) and is a prohibition on omission of information quite similar in intent to Measure 26-184's prohibition on the funding of political ads without disclosing their largest major funders. This is consistent with the understanding from early case law that hidden influence was a form of indirect bribery, because the real beneficiaries and proponents of legislation and candidacies were hidden from scrutiny and secrecy tended to corrupt representative government.

Secret dealings with state legislators had long been denounced:

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

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

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

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

This longstanding antipathy to lobbying eventually led to early "publicity" statutes that required the registration of lobbyists, publicity of committee hearings, and the recording of all votes in committee hearings.[17] Oregon had been an early leader in adopting some of these reforms, first by incorporating an early legislative "publicity" mandate into the original Constitution in Article II, § 15, and then by the continuing efforts outlined above, culminating in the 1908

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

Corrupt Practices Act initiative. Far older is the underlying principle that the public's business should be conducted in the open, free of private and undisclosed interests that were thought to inherently taint elections and legislation.

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

If a regulation is deemed *per se* content-based merely because it regulates political advertising, as the *1999 AG Opinion* assumes, virtually all regulations pertaining to political advertising would be *per se* unconstitutional, including the requirements that:

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

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

3. Campaign communications must not include false statements (ORS 260.532)[18]

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

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

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

As noted earlier, ***State v. Moyer***, *supra*, upheld the statute forbidding false statements pertaining to the source of campaign contributions, because a law forbidding false statements is similar to historical laws forbidding fraud. If Article I, § 8, requires the opportunity for anyone to communicate political messages anonymously, as the Attorney General argues, then laws against false statements could not be enforced. As Justice Scalia noted in ***McIntyre*** 514 US 334, 382, 115 SCt 1511, 1536 (1995):[19]

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

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

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

> We should not repeat and extend the mistake of ***McIntyre v. Ohio Elections Comm'n***, 514 US 334, 115 SCt 1511, 131 LEd2d 426 (1995). There, with neither textual support nor precedents requiring the result, the Court invalidated a form of election regulation that had been widely used by the States since the end of the 19th century. *Id.*, at 371, 115 SCt 1511 (Scalia, J., dissenting).

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

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

Further, the statute in ***State v. Moyer*** would have found a violation, if a contribution had been made in the name of anonymous (or no name), because such would not have been the true name of the contributor. ***State v. Moyer*** upheld the statute as within historical exception for misrepresentation and fraud. An independent expenditure ad that does not identify its funders is similar to a contribution that does not truthfully identify its funders.

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

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

> Second, we have difficulty accepting the proposition, in the context of political campaigns, that the neutral reporting of this kind of objective

truth--and that is all that the Secretary of State is authorized to do--somehow impermissibly burdens expression.

C. THE DISCLAIMER REQUIREMENTS ARE NOT IMPERMISSIBLY VAGUE.

Even if the probably forthcoming July 18, 2019, Multnomah County implementing ordinance is disregarded, the provisions of Section (3) of Measure 26-184 are understandable.

1. THE LANGUAGE OF THE MEASURE IS NOT VAGUE.

The term "Communication to voters related to a City of Portland Candidate Election" is not vague. Measure 26-184 defines Communication.

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

Section (7) of Measure 26-184 adopts all of the definitions "at Chapter 260 of Oregon Revised Statutes, as of November 9, 2016," for terms not specifically defined in Measure 26-184. Section (7)(f) defines "Expenditure":

> (j) "Expenditure" has the meaning set forth at ORS 260.005(8) and ORS 260.007, as of November 8, 2016, except that it does not include a Communication to its members, and not to the public, by a Membership Organization not organized primarily for the purpose of influencing the outcome of contests.

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

Section (7) of Measure 26-184 does not define "independent expenditure," but ORS 260.005(10) does:

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

It is clear that the intent of Measure 26-184 is to impose the disclaimer requirement only when "expenditures" or "independent expenditures" fund the communication.

2. THE LEGISLATIVE HISTORY PROVIDES FURTHER CLARITY.

Perhaps the vagueness concern stems from the phrase "related to a City of Portland Candidate Election." The intent of the phrase is clear from Measure 26-184's legislative history, which includes its ballot title and statements in the Voters' Pamphlet. The ballot title caption states:

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

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

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

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

The Voters' Pamphlet statements (MC ER-36-44) provide additional clarity. These excerpts from those statements make it clear that the disclaimer provisions are meant to require that the top 5 funders of a political advertisement in a campaigns for City of Multnomah County public office be identified in the political advertisement.

> Alliance for Democracy urges YES on 26-184 for limits on campaign contributions/expenditures and disclosure of true funders of city-level political campaigns.
>
> Further, it requires political advertisements disclose the real identity of the top 5 funders of the ads on the ads.
>
> Opponents of limits on campaign contributions often say that all the public needs is disclosure of the funders of the political advertisements. But such disclosure does not work well in Oregon.
>
> In Oregon it is easy to pay for political ads through a 501(c)(4) "dark money" nonprofit corporation with a nice name. The corporation never has to identify where its money came from, making it impossible to identify the true source. * * *
>
> Even if the ad is purchased by the candidate's PAC, Oregon does not require that the ad identify the PAC or any of its sources of money. If the ad identifies the PAC, it is usually "Friends of Mary Jones [candidate name]."
>
> Yes, you can look up on ORESTAR the contributions to the candidate's PAC, but those often come from other PACs, which in turn are funded by yet other PACs. Unlike most states, Oregon allows unlimited PAC-to-PAC transfers, which can be used to hide the true sources of the money.
>
> Requiring the voter to spend hours on Internet research to find out the funding sources is not at all the same as revealing them directly in the political ad itself.
>
> MEASURE 26-184 REQUIRES THAT POLITICAL ADVERTISEMENTS DISCLOSE THEIR BIG FUNDERS

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

Measure 26-184 requires that every political ad in a Portland candidate race state, **in the ad itself**, the **5 largest true, original sources of money** used to fund it.

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

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

Federal law requires that ads on broadcast TV and radio at least identify their source, but even that can be the name of a nice-sounding committee or nonprofit corporation that tells you nothing about the real sources of the money.

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

Let’s shut down the loopholes that big donors are using to secretly funnel huge amounts of money to influence public policy in Oregon, and let’s force every campaign to disclose its major donors right in their ads. Don’t let big money drown out your voice. Vote YES on Measure 26-184.

Ban SUPERPACS and Dark Money groups by voting YES on Measure 26-184

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

> Let's make local politics honest by making SuperPACS and other campaign organizations play by the same rules that individuals have to play by, with limited contributions promptly disclosed. Measure 26-184 would do that and require every political ad to identify its top 5 sources of funding.
>
> Measure 26-184 would decrease the cost of the public funding system by reducing the amounts of added funding provided when non-participating candidates raise large amounts in private donations. It would also require that advertising paid for by large private donations prominently disclose its top five funders.
>
> Chris Dudley, the Republican candidate for Governor in 2010, collected over $2.5 million from the "Republican Governors Association," a private group that does not disclose its donors. **Oregon allows such contributions to remain cloaked in secrecy.**

The intent of the disclaimer provisions in Measure 26-184 are clear: To require that each political advertisement for or against a candidate for Multnomah County public office identify its top 5 funders. This provides ample "fair warning" to those who might violate this requirement.

The courts are to discern the intent of the legislature. Here, the legislature is the voters of Multnomah County. The information provided to voters during the campaigns for and against Measure 26-184 constitute legislative history.

> The history of a referred constitutional provision includes "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure," such as the ballot title, arguments included in the voters' pamphlet, and contemporaneous news reports and editorials. ***Ecumenical Ministries v. Oregon State Lottery Comm.***, 318 Or 551, 559 n8, 871 P2d 106 (1994); *see generally* ***State v. Pipkin***, 354 Or 513, 526, 316 P3d 255 (2013) (legislative history is examined where it appears useful to the court's analysis).

State v. Sagdal, 356 Or 639, 642-43, 343 P3d 226 (2015).

D. MEASURE 26-184'S DISCLAIMER REQUIREMENTS ARE WARRANTED BY LEGISLATIVE FINDINGS, ALTHOUGH THAT IS NOT REQUIRED.

The MC Validation Order (p. 8) states:

> This mandate clearly encompasses a very wide array of communications and communicators: far more communications than can be justified under the legislative findings offered by the Petitioner in support of the charter and ordinance, and more communicators than reasonably can be expected to be "fairly warned" that their chosen exercise of free speech may carry with it a disclosure obligation.

The legislative findings cited by the Citizen Parties include those adopted by Oregon voters in Measure 47 (2006). Measure 47, in its introduction and Section (1), placed into Oregon law extensive legislative findings of fact setting forth the harms resulting from the absence of disclaimers on campaign advertisements and a rationale for the each of the requirements contained in Measure 47 (similar to those in Measure 26-184) and why each serves compelling state interests.

> The purpose of this Act is to restore democracy in Oregon and reduce corruption and the appearance of corruption by limiting political campaign contributions and independent expenditures on candidate races and by increasing timely public disclosure of the sources of those contributions and expenditures.

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

Measure 47 and in making its determinations, so the findings are considered in effect and operational.

The findings include:

(w) The effective exercise of the right to vote requires timely access to understandable information about contributions and expenditures to influence the outcome of elections. Therefore, this Act requires:

(1) More effective reporting of campaign contributions and expenditures, including so-called "independent expenditure" campaigns, which is particularly necessary in light of Oregon's distribution of vote-by-mail ballots weeks prior to election day; and

(2) Effective and prompt disclosure of the identities of large donors in communications to voters by independent expenditure campaigns (including the businesses of those donors).

These findings quite specifically justify the disclaimer requirements of Measure 26-184, which are virtually the same as those in Measure 47 (2006). Further, there is no requirement under the Oregon Constitution that such limitations be justified by legislative findings.

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

The Ninth Circuit recently rejected a vagueness challenge to campaign finance reporting requirements in Montana, because a "person of average intelligence * * * can read the statutes and regulations to determine which

reporting rules apply." ***Montanans for Cmty. Development v. Mangan***, 735 Fed Appx 280, 283 (9th Cir 2018), *cert denied*, 139 SCt 1165 (2019). Also surviving a vagueness challenge is the Alaska law (Alaska Stat. § 15.13.090) that "requires that most campaign communications be accompanied by a statement indicating who financed the communication." Specifically, it provides:

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

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

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

Id., 441 F3d at 792-93.

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

Id., 441 F3d at 793.

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

Finally, if the Court believes that the disclaimer provisions of Measure 26-184 are too vague, it can provide clarity and additional "fair warning" by issuing a limiting interpretation of those provisions.

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

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

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

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

> The Supreme Court has said that there is a presumption that legislators intend to except from an ordinance's proscription "all actions the prohibition of which would be absurd." ***City of Portland v. Goodwin***, 187 Or 409, 418, 210 P2d 577 (1949). Furthermore, the Supreme Court stated in Robertson that it was the legislature's responsibility
>
> > "to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." 293 Or at 437, 649 P2d 569. That has recently been clarified by the court to mean
> >
> > > "that a statute which reaches constitutionally protected behavior only rarely when compared with legitimate

> applications of the law need not succumb to an overbreadth attack. Such a statute may be interpreted as impliedly excluding the protected activity from coverage." ***State v. Garcias***, 296 Or 688, 699 n10, 679 P2d 1354 (1984).
>
> It is our duty to interpret a constitutionally challenged statute in a manner such that, if at all possible, its validity can be upheld. ***State v. Jackson***, 224 Or 337, 356 P2d 495 (1960); ***City of Portland v. White***, 9 OrApp 239, 241, 495 P2d 778 (1972). We accomplish that result by holding that the ordinance is intended to reach only non-protected public nudity and is to be interpreted and enforced accordingly. So narrowed, the ordinance does "eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." ***State v. Robertson***, *supra*, 293 Or at 437, 649 P2d 569.

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

An appropriate limiting construction would be that the communications subject to the disclaimer requirements are those stemming from "expenditures" or "independent expenditures" as defined in Measure 26-184--although that is already clear from the language of Measure 26-184.

IV. SECOND ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN FAILING TO RULE THAT MEASURE 26-184'S TAGLINE REQUIREMENTS ARE CONSISTENT WITH THE UNITED STATEU.S. ConsTITUTION.

PRESERVATION OF ERROR.

The Citizen Parties argued in their Opening Brief (pp. 79-81) and Reply Brief (pp. 44-55) and at the Circuit Court hearing that Measure 26-184's tagline requirements are consistent with the United States Constitution. The MC Validation Order did not address that matter and thus failed to perform the assurance function intended by ORS 33.710.

The Portland Validation Opinion, however, concluded that the similar tagline provisions in Portland Measure 26-200 are constitutional, citing ***Citizens United***, *supra*. Trojan App-58-59.

The Campaign Disclosure Law Database[20] (maintained by UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation) states:

1. These states have laws requiring political ads disclosure the names of the major contributors: Arizona, Illinois, Missouri, Montana, New Hampshire, South Carolina, and Washington.[21] App-1.

2. 34 states have laws requiring political ads state who paid for them, often requiring the term "paid for by" followed by the name and address of the individual or entity paying for the ad. App-4.

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

The Campaign Disclosure Law Database is somewhat out of date. Laws requiring that political ads identify their top funders (often 3-5 of them) are also in place in Maine (App-14) and California (App-18, one of a series of tables

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20. https://campaigndisc.calvoter.org/resources.html.

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

illustrating the California requirements of its Political Reform Act, as amended AB 249: Chapter 546, Statutes of 2017). Washington in 2019 also modified its disclaimer requirements so that, if one of the top 5 funders of an ad is a political committee, then the ad must also state the top 3 donors to that committee. App-20.

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

There is no serious question about the constitutionality of these laws. As the United States Supreme Court stated in ***Citizens United***, *supra*:

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

Citizens United, 558 US at 366.

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

Citizens United, 558 US at 367.

Subsequent cases upholding such requirements include ***Yamada v. Snipes***, 786 F3d 1182 (9th Cir), *cert denied*, 136 SCt 569 (2015) (Hawaii's disclaimer requirements); ***Vermont Right to Life Comm., Inc. v. Sorrell***, 758 F3d 118 (2d Cir 2014), *cert denied*, 135 SCt 949 (2015) (Vermont's attribution and disclosure requirements); ***Nat'l Org. for Marriage v. McKee***, 649 F3d 34 (1st Cir 2011) (Maine); ***Human Life of Washington Inc. v. Brumsickle***, 624 F3d 990 (9th Cir 2010), *cert denied*, 562 US 1217, 131 SCt 1477 (2011)

(Washington) ("***Human Life***"). An earlier case, ***Majors v. Abell***, 361 F3d 349 (7th Cir 2004) upheld the Indiana law requiring that political literature regarding candidates disclose their sponsors.

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

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

Later federal cases have rejected the notion that ***McIntyre*** invalidates political advertisement tagline requirements, including ***Citizens United***, *supra*; ***Yamada v. Snipes***, *supra*; ***Vermont Right to Life Comm., Inc. v. Sorrell***, 758 F3d 118 (2d Cir 2014), *cert denied*, ___ US ___, 135 SCt 949 (2015) (Vermont's attribution and disclosure requirements); ***Nat'l Org. for Marriage v. McKee***, *supra*; ***Human Life***, *supra*; These cases are discussed at pages 41-51, *post*.

ACLU v. Heller, 378 F3d 979 (9th Cir 2004), is a decision that struck down a Nevada statute requiring taglines on all political ads that included "the names and addresses of contributors." The Measure 26-184 tagline requirement does not include addresses. Further, as explained in ***Majors v. Abell***, 361 F3d 349 (7th Cir 2004), the Nevada statute in ***Heller*** applied not only to candidate

races but also to ballot measures, where First Amendment considerations are heightened.[22] Measure 26-184 does not apply to ballot measures.

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

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

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

Jason M. Shepard & Genelle Belmas, *Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright,*

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

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

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

and Election Speech, 15 YALE J.L. & TECH. 92, 124-25 (2013) ("Shepard & Belmas"). The US Supreme Court sustained this position.

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

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

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

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

Citizens United and many other cases discussed below apply to disclaimers in advertisements, not merely disclosure or reporting to government entities. Justice Scalia has noted the need for disclosures in order to prevent political

dirty tricks that fool voters into blaming an innocent candidate for "a really tasteless attack."

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

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

C. FEDERAL CIRCUIT COURT CASES UPHOLD TAGLINES AND DISCLAIMERS.

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

> We agree with the district court that the disclaimer requirement survives exacting scrutiny as applied to A1's newspaper advertisements. Like the noncandidate committee requirements, the disclaimer serves an important governmental interest by informing the public about who is speaking in favor or against a candidate before the election and imposes only a modest burden on First Amendment

> rights. A1's arguments to the contrary are all but foreclosed by ***Citizens United***, 558 US at 366-69, 130 SCt 876.

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

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

Yamada v. Snipes, 786 F3d at 1202.

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

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

> We reject A1's comparison to the disclaimer invalidated by the Supreme Court in ***McIntyre v. Ohio Elections Commission***, 514 US 334, 340, 115 SCt 1511, 131 LEd2d 426 (1995), which prohibited the distribution of pamphlets without the name and address of the person

> responsible for the materials, or to the disclosure provision invalidated by this court in ***ACLU of Nev. v. Heller***, 378 F3d 979, 981-82 (9th Cir 2004), which required persons paying for publication of any material "relating to an election" to include their names and addresses. ***Citizens United***'s post-***McIntyre***, post-***Heller*** discussion makes clear that disclaimer laws such as Hawaii's may be imposed on political advertisements that discuss a candidate shortly before an election. See 558 US at 36869, 130 SCt 876; see also ***Worley***, 717 F3d at 1254 (rejecting the argument that ***McIntyre*** dictated the demise of Florida's analogous disclaimer requirement). An individual pamphleteer may have an interest in maintaining anonymity, but "[l]eaving aside ***McIntyre***-type communications ... there is a compelling state interest in informing voters who or what entity is trying to persuade them to vote in a certain way." ***Alaska Right to Life***, 441 F3d at 793.

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

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

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

The Ninth Circuit upheld the statute.

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

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

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

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

Human Life, 624 F3d at 1005.

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

Human Life, 624 F3d at 1005.

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

Human Life, 624 F3d at 1008.

> In ***Citizens United***, the Supreme Court unreservedly affirmed the public's interest "in knowing who is speaking about a candidate shortly before an election," and it concluded that "the informational interest alone" was sufficient to support federal campaign finance disclosure requirements. ***Citizens United***, 130 SCt at 91516. Upholding the line of cases that recognize the importance of the government's informational interest, the Court reasoned:The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages. *Id.* at 916.

Human Life, 624 F3d at 1017.

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

> Washington's interest in informing the electorate through the Disclosure Law is sufficiently important.

Human Life, 624 F3d at 1017-18.

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

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

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

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

Nat'l Org. for Marriage v. McKee, 649 F3d 34, 43-44, (1st Cir 2011), *cert denied*, 565 US 1234, 132 SCt 1635 (2012), described Maine's disclaimer law.[23]

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

1014. Publication or distribution of political communications

(continued...)

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

The First Circuit then upheld it.

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

23.(...continued)

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

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

> As ***Citizens United*** recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages. In an age characterized by the rapid multiplication of media outlets and the rise of internet reporting, the "marketplace of ideas" has become flooded with a profusion of information and political messages. Citizens rely ever more on a message's source as a proxy for reliability and a barometer of political spin. Disclosing the identity and constituency of a speaker engaged in political speech thus "enables the electorate to make informed decisions and give proper weight to different speakers and messages." ***Citizens United***, 130 SCt at 916; see also ***Cal. ProLife Council, Inc. v. Getman***, 328 F3d 1088, 1105 (9th Cir 2003) (recognizing that, in the "cacophony of political communications through which ... voters must pick out meaningful and accurate messages [,] ... being able to evaluate who is doing the talking is of great importance").

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

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

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

> disclosure requirements are narrowly drawn and the least restrictive way to further the State's substantial informational interest.

Bailey, 900 FSupp2d at 86.

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

> ***National Org. for Marriage, Inc. v. Sec'y***, 477 FedAppx 584, 585 (11th Cir 2012) (rejecting facial and as-applied challenge to Florida disclosure laws);
>
> ***The Real Truth About Abortion, Inc. v. FEC***, 681 F3d 544, 546 (4th Cir 2012) (rejecting facial and as-applied challenge to FEC disclosure regulations);
>
> ***Family PAC v. McKenna***, 685 F3d 800, 811 (9th Cir 2012) (rejecting facial challenge to Washington disclosure laws).

V. THIRD ASSIGNMENT OF ERROR: THE CIRCUIT COURT ERRED IN RULING ON THE CONSTITUTIONALITY OF THE PROVISIONS OF THE MULTNOMAH COUNTY CHARTER AMENDMENT, MEASURE 26-184.

PRESERVATION OF ERROR.

The Citizen Parties argued this point in their Reply Brief (pp. 57-58) in response to arguments that the constitutionality of the charter amendment was at issue. The MC Validation Order did not address this contention.

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

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

The Multnomah County Commission adopted an ordinance, which contains almost the same language as the Charter Amendment adopted by the voters by means of Measure 26-184.

While this Court has authority to examine the validity of the ordinance, it does not have authority under ORS 33.710 to examine the validity of the Charter Amendment. The provisions of the Charter Amendment are self-implementing, including its limits on receipt of campaign contributions, its limits on independent expenditures, its requirement that campaign advertisements identify their top 5 major funders, its specification of minimum and maximum penalties for violations, and its provisions for implementation and enforcement. No ordinance is necessary for the provisions of the Charter Amendment to become effective and operative.

Regardless of any ordinance, the provisions of the Charter Amendment govern the receipt of campaign contributions, the making of independent expenditures, and the required taglines on advertisements, all applicable to contests for public office of Portland.

Dated: July 11, 2019

Respectfully Submitted,

/s/ *Daniel Meek*

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS AND TYPE SIZE REQUIREMENTS ORAP 5.05

Length of Opening Brief on Merits

I certify that (1) the foregoing Opening Brief complies with the word limitations of ORAP 5.05 and (2) the word count of this Opening Brief for elements of text described in ORAP 5.05(1)(a) is 13,638 words as determined by the word-counting function of Wordperfect 5.1.

Type Size

I certify that the size of the type in this Opening Brief on Merits is not smaller than 14 point for both the text and footnotes, as required by ORAP 5.05(2)(d)(ii).

Dated: July 11, 2019

/s/ *Daniel W. Meek*

Daniel W. Meek

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I FILED this date by Efile the original of the foregoing OPENING BRIEF OF INTERVENORS-APPELLANTS MOSES ROSS, JUAN CARLOS ORDONEZ, JAMES OFSINK, SETH ALAN WOOLLEY, and JIM ROBISON by Efile this date on the State Court Administrator and served it by Efile this date upon:

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