IN THE SUPREME COURT FOR THE STATE OF OREGON

Donice Noelle Smith, in propria persona,

Petitioner,

v.

CHRISTINE KOTEK, in her official capacity as Oregon Governor,

Respondent,

S _____

PROCEEDING IN QUO WARRANTO: EXERPT OF RECORD

EXERPT OF RECORD

Donice Noelle Smith
4601 Carnes Rd. Ste 8
#112
Roseburg, Oregon 97471-4600
donice4oregon@proton.me
541-530-4718
Petitioner Pro Se

Christine Kotek, in her official capacity as
Oregon Governor
900 Court Street, Suite 254
Salem, OR 97301-4047
503-378-3111
Governor.Kotek@oregon.gov
Respondent

04/17/2025

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Candidate Name:	Tina Kotek	**Date Filed:**	11/16/2021 1:56:16 PM
Ballot Name:	Tina Kotek	**Qualified for Office:**	Yes
Filing Source:	Web Filing	**Filing Type:**	Original
Election:	2022 Primary Election	**Filing Method:**	Fee
Office sought:	Governor	**Party:**	Democrat
Residence Address:	7930 N Wabash Avenue Portland, OR 97217 Multnomah County	**Work Telephone:** **Home Telephone:** **Cell:** **Fax:**	(971)385-0565
Mailing Address:	P.O. Box 42307 Portland, OR 97242	**Email Address:** **Web Site:**	info@tinafororegon.com www.tinafororegon.com

Occupation Information

Occupation (present employment - paid or unpaid)

State Representative; Speaker of the House

Occupational Background (previous employment - paid or unpaid)

State Representative (2007 to present)
Speaker of the House (2013 to present)
Policy Director, Children First for Oregon
Public Policy Advocate, Oregon Food Bank

Education Information

Educational Background (schools attended)

Complete name of School (no acronyms)	Last grade level completed	Diploma/Degree/ Certificate	Course of Study
University of Washington		Master's degree	International Studies
University of Oregon		Bachelor's degree	Religious Studies

Educational Background (other)

Experience Information

Prior Governmental Experience (elected or appointed)

State Representative (2007 to present)
Speaker of the House (2013 to present)
Medicaid Advisory Committee
Oregon Commission for Child Care

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Elections Division • 255 Capitol St NE, Ste 126 • Salem OR 97310
Phone: 503-986-1518 or 1-866-673-VOTE • Fax: 503-373-7414 • orestar-support.sos@sos.oregon.gov

November 8, 2022, General Election Abstract of Votes

Governor

County	**Kotek Tina (D)	Smith Donice Noelle (C)	Noble R Leon (L)	Johnson Betsy (NAV)	Drazan Christine (R)	Misc.
Baker	1,483	69	31	831	6,328	9
Benton	27,128	149	159	3,183	14,658	42
Clackamas	92,274	606	546	19,195	102,111	157
Clatsop	8,051	85	50	4,624	7,375	16
Columbia	8,036	124	83	5,702	13,420	19
Coos	9,437	230	164	2,924	18,611	63
Crook	2,209	68	50	1,361	10,362	15
Curry	4,143	69	71	1,116	7,272	8
Deschutes	46,879	378	331	11,502	50,513	75
Douglas	12,013	427	283	4,492	37,245	93
Gilliam	147	7	4	204	636	1
Grant	576	37	21	383	3,145	8
Harney	485	34	15	322	2,973	5
Hood River	6,040	55	29	1,035	3,633	13
Jackson	39,611	556	460	7,320	56,362	76
Jefferson	2,376	74	45	1,212	6,251	19
Josephine	11,610	290	178	3,245	27,578	61
Klamath	5,968	241	156	1,863	21,962	27
Lake	430	14	17	237	3,282	28
Lane	95,847	795	795	13,911	72,087	234
Lincoln	12,947	148	126	2,649	10,366	34
Linn	16,959	394	295	5,264	38,505	78
Malheur	1,656	70	64	471	6,921	5
Marion	51,238	630	534	11,533	70,741	174
Morrow	607	41	30	389	3,016	6
Multnomah	265,805	753	834	26,079	72,158	414
Polk	15,570	210	183	3,606	21,898	43
Sherman	122	4	4	108	795	1
Tillamook	5,266	48	50	2,600	6,631	16
Umatilla	5,403	215	146	1,666	17,672	30
Union	2,580	80	51	1,127	8,695	11
Wallowa	1,116	23	23	291	3,138	6
Wasco	4,077	52	51	1,240	5,978	9
Washington	140,946	822	753	22,024	91,068	269
Wheeler	140	12	6	96	576	0
Yamhill	17,899	241	229	4,626	26,385	48
TOTAL	**917,074**	**8,051**	**6,867**	**168,431**	**850,347**	**2,113**

** Elected

Key | (C) Constitution | (D) Democratic | (I) Independent | (L) Libertarian
(NAV) Nonaffiliated | (PG) Pacific Green | (P) Progressive | (R) Republican | (WF) Working Families

366 Or. 295
Supreme Court of Oregon,
En Banc.

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.

(CC 17CV18006) (SC S066445)
|
Argued and submitted November 14, 2019.
|
April 23, 2020

Synopsis
Background: County sought a judgment upholding the legality of its new campaign finance ordinances, adopted after voters approved amendment of home rule charter. Business entities intervened as respondents to contest the ordinances' validity, and individuals intervened in support of the ordinances. The Circuit Court, Multnomah County, Eric J. Bloch, J., ruled that all the ordinances were facially invalid. County and individuals appealed, and the Court of Appeals certified that appeal to the Supreme Court.

Holdings: The Supreme Court, Walters, J., held that:

limitations on campaign contributions are not facially unconstitutional, overruling *Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770, and abrogating *Vannatta v. Oregon Government Ethics Comm.*, 347 Or. 449, 222 P.3d 1077;

ordinance that limited campaign contributions was not subject to facial invalidity challenge;

factual findings were necessary to determine whether campaign contribution limitations violated the First Amendment;

past decision invalidating limitation on independent expenditures would not be reconsidered; and

decision on validity of ordinance's disclosure rules was moot.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Judgment.

****708** On certification from the Court of Appeals under ORS 19.405. * (CA A168205)

* On certified appeal from a judgment of the Multnomah County Circuit Court, Eric J. Bloch, Judge.

Attorneys and Law Firms

Katherine Thomas, Multnomah County Attorney's Office, Portland, argued the cause for appellant Multnomah County. Jenny M. Madkour, Multnomah County Attorney, filed the briefs. Also on the briefs was Katherine Thomas.

Daniel W. Meek, Portland, argued the cause and filed the briefs for Intervenors-Appellants Moses Ross, Juan Carlos Ordonez, James Ofsink, Seth Alan Woolley, and Jim Robison.

Linda K. Williams, Portland, argued the cause and filed the briefs for Intervenors-Appellants Elizabeth Trojan, David Delk, and Ron Buel.

Gregory A. Chaimov, Davis Wright Tremaine LLP, Portland, argued the cause and filed the brief for Intervenors-Respondents.

Adam Kiel, Kafoury McDougal Law Firm, Portland, filed the briefs on behalf of amici curiae Derek Cressman, Sightline Institute, Asian Pacific American Network of Oregon, Bernie PDX, League of Women Voters of Oregon, League of Women Voters of Portland, Portland Forward, Portland Jobs with Justice, Alliance for Democracy, and Unite Oregon.

Carson L. Whitehead, Assistant Attorney General, Salem, filed the brief on behalf of amicus curiae Kate Brown, Governor. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Cody Hoesly, Larkins Vacura Kayser LLP, Portland, filed the brief for amici curiae Independent Party of Oregon, Oregon Progressive Party, Pacific Green Party, and Honest Elections Oregon.

Kelly K. Simon, ACLU Foundation of Oregon, Inc., Portland, filed the brief on behalf of amicus curiae American Civil Liberties Union Foundation of Oregon, Inc. Also on the brief were Katherine McDowell, McDowell Rackner Gibson PC, Portland, and Daniel Belknap Bartz, Eugene.

Denis M. Vannier, Senior Deputy City Attorney, Portland, filed the brief on behalf of amicus curiae City of Portland. Also on the brief was Naomi Sheffield, Deputy City Attorney.

Steven C. Berman, Stoll Stoll Berne Lokting & Shlachter P.C., Portland, filed the brief on behalf of amicus curiae Planned Parenthood of Oregon. Also on the brief were Nadia H. Dahab and Lydia Anderson-Dana.

Kyle Markley, Hillsboro, filed the brief on behalf of amicus curiae Kyle Markley.

Owen Yeates, Institute for Free Speech, Alexandria, Virginia, filed the brief on behalf of amici curiae Taxpayers Association of Oregon and Taxpayers Association of Oregon Political Action Committee. Also on the brief was Allen Dickerson.

Opinion

WALTERS, C. J.

****709** ***298** In the November 2016 election, Multnomah County voters approved Measure 26-184, an amendment to the Multnomah County Home Rule Charter containing campaign finance provisions. Multnomah County then adopted new ordinances, Multnomah County Code (MCC) §§ 5.200-203, mirroring and implementing those charter provisions. The first substantive section, MCC § 5.201, restricts campaign contributions. It limits the amount of money that donors may contribute and the amount that a candidate or campaign organization may receive from a particular donor. The second section, MCC §

5.202, limits what are known as independent expenditures. It sets a cap on the amount that individuals, acting independently of a campaign, can spend on communications supporting a candidate and forbids entities from spending any amount on communications supporting a candidate. The third section, MCC § 5.203, contains disclosure rules, which require that disclaimers about the sources of funding be attached to communications in support of a candidate.

We consider the validity of those ordinances under the free speech provisions of both the Oregon and United States Constitutions—Article I, section 8, and the First Amendment. As we explain, we reach four conclusions: (1) the county's contribution limits do not, on their face, violate Article I, section 8, of the Oregon Constitution; (2) we must remand this case to the trial court for factual findings and to consider, in the first instance, whether the contribution limits violate the First Amendment; (3) the county's expenditure limits are invalid under both constitutional provisions; and (4) the parties' dispute with respect to the disclosure provisions is moot.

I. PROCEDURAL BACKGROUND

In May 2017, Multnomah County initiated this validation action in the circuit court. Under ORS 33.710, the county sought judicial examination of MCC §§ 5.200-203, its new campaign finance ordinances, and a judgment upholding their legality. Two groups of intervenors joined in that court proceeding. *See* ORS 33.720(3) (permitting interested ***299** parties to appear in the validation proceeding). Respondents [1] appeared in the action to contest the validity of the county's ordinances, arguing that they violate Article I, section 8, of the Oregon Constitution and the First Amendment of the United States Constitution. Trojan [2] intervened in the action to support the county's position that the county's ordinances are valid.

1 Alan Mehrwein, Portland Business Alliance, Portland Metropolitan Association of Realtors, and Associated Oregon Industries (respondents).

2 Elizabeth Trojan, Moses Ross, Juan Carlos Ordonez, David Delk, James Ofsink, Ron Buel, Seth Woolley, and Jim Robison. On appeal, Trojan, Delk, and Buel raise assignments of error relating to the contribution and expenditure limits while Ross, Ordonez, Ofsink, Woolley, and Robison principally raise assignments of error relating to the disclosure rules.

Article I, section 8, provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." With respect to that provision, respondents' arguments centered on *Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) (*Vannatta I*), a ****710** decision in which this court struck down limits on campaign contributions and expenditures. The proponents acknowledged that *Vannatta I* was unfavorable precedent but urged the trial court to reject its reasoning in light of this court's decision in *Vannatta v. Oregon Government Ethics Comm.*, 347 Or. 449, 222 P.3d 1077 (2009) (*Vannatta II*), which had distinguished *Vannatta I* and upheld restrictions on the receipt of gifts by public officials.

The trial court ruled that, under Article I, section 8, all three sections of the county ordinances were facially invalid. The trial court considered *Vannatta I* controlling on the contribution and expenditure limit issues. Because the court resolved the case on state constitutional grounds, it did not address the ordinances' validity under the First Amendment. *State v. Copeland*, 353 Or. 816, 821, 306 P.3d 610 (2013) ("[W]e consider state constitutional issues before we consider federal claims."). The county and Trojan appealed, and the Court of Appeals certified the appeal to this court. *See* ORS 19.405. We begin with the question of whether the county's contribution limits violate the Oregon Constitution.

***300** II. CONTRIBUTION LIMITS

A. *Article I, Section 8*

MCC § 5.201 limits the amount of money that donors may contribute in county elections and the amount that a candidate or campaign organization may receive from a particular donor. Much of the briefing in this case, from the parties and the 11 *amici curiae*, focuses on the role of campaign contributions in our political system and the asserted harms that are remediated, or not, by the county's ordinance. Under the First Amendment, it is not unusual for courts to approach campaign finance cases in part by weighing those harms, and the government's interest in abating them, against the importance of campaign contributions and expenditures to political expression. *See Buckley v. Valeo*, 424 U.S. 1, 19-22, 26-27, 96 S. Ct. 612, 46 L. Ed. 2d. 659 (1976) (adopting that approach); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 364, 130 S. Ct. 876, 175 L. Ed. 2d. 753 (2010) (discussing the effects of corporate expenditure limits in light of circumvention and changing technology). We need not wade into that thicket, however, to determine the validity of the contribution limits under the Oregon Constitution. In this validation proceeding, the only question that is before us is whether MCC § 5.201 is unconstitutional on its face. As we will explain, not all laws are subject to a facial challenge under Article I, section 8, and we have an established framework for determining which laws may be so challenged. Using that framework, the question presented is whether the contribution limits are "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982).

In considering that question, we do not write on a clean slate. Respondents rely, as they did in the trial court, on *Vannatta I* and on our determination that the limits that we considered in that case were subject to a facial challenge and our holding that those limits were unconstitutional. We agree that, if the analysis and the holding in *Vannatta I* are controlling, then the contribution limits at issue here also are subject to facial challenge and unconstitutional. To decide whether to adhere to that aspect of *Vannatta I* we ***301** must examine not only *Vannatta I* and *Vannatta II*, but also the *Robertson* framework and the limited category of laws that we have held to be subject to facial challenge under Article I, section 8. That, therefore, is where we begin.

1. *The* Robertson *framework*

Under *Robertson*, a law restricting speech falls into one of three categories. The first *Robertson* category encompasses any law "that is 'written in terms directed to the substance of any "opinion" or any "subject" of communication.' " *State v. Babson*, 355 Or. 383, 393-94, 326 P.3d 559 (2014) (quoting *Robertson*, 293 Or. at 412, 649 P.2d 569). Laws in that category are unconstitutional on their face, "unless the restriction is wholly confined within an historical exception." *Id.* at 394, 326 P.3d 559. In *State v. Moyer*, 348 Or. 220, 230 P.3d 7 (2010), we examined the validity of such a law—a statute that makes ****711** it an offense to make a campaign contribution in a name "other than that of the person who in truth provides the contribution." ORS 260.402 (2003). We reasoned that "the falsity that the statute prohibits can *only* be achieved through expression—through one person's communication of a falsehood to another person," and, for that reason, we concluded that "the statute must be classified as a *Robertson* category one law." *Moyer*, 348 Or. at 232, 230 P.3d 7 (emphasis added). Although we ultimately concluded that the law fell within a recognized historical exception, and upheld it on that basis, *id.* at 237-38, 230 P.3d 7, that case nonetheless provides a good example of a law that is directed at expression and only expression and therefore falls within the first *Robertson* category. The first category is, by design, a limited one, as it includes only laws that *expressly* prohibit speech.

The second category shares that limitation. To fall into the second category, the law also must expressly regulate speech but do so only insofar as that speech is linked to a particular harm—that is, where "the *actual focus* of the enactment is on an *effect* or *harm* that may be proscribed, rather than on the substance of the communication itself." *State v. Stoneman*, 323 Or. 536, 543, 920 P.2d 535 (1996) (emphasis in original). For example, in *State v. Moyle*, 299 Or. 691, 705 P.2d 740 (1985), we considered the constitutionality of a law that forbids making a threat that is expected ***302** to and does cause alarm. We concluded that "[s]peech and writing are merely the means, albeit the only prohibited means, of achieving the forbidden effect—actual and reasonable alarm." *Id.* at 699, 705 P.2d 740. Laws that fall within the second category are analyzed for overbreadth and are held facially invalid if they are overbroad. *Compare Robertson*, 293 Or. at 435-37, 649 P.2d 569 (striking down a second-category law as overbroad), *with Moyle*, 299 Or. at 704-05, 705 P.2d 740 (concluding that the statute under consideration was not overbroad).

Most laws fall into the third *Robertson* category—which includes laws that do not expressly restrict speech but that may have the effect of prohibiting or limiting it. *Robertson* third-category laws are not facially invalid, but they are subject to as-applied

challenges. *Babson*, 355 Or. at 404, 326 P.3d 559. We have considered the difference between laws that expressly restrict speech —those in the first two *Robertson* categories—and those that do not—placing them in the third *Robertson* category—on many occasions. This case, too, requires particular attention to that distinction, and it behooves us to examine it in greater detail, beginning with our 1992 decision in *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992).

In *Plowman*, the defendant was convicted of first-degree intimidation, a crime then defined as "two or more persons, acting together, [who] '[i]ntentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation.' " *Plowman*, 314 Or. at 159, 838 P.2d 558 (quoting ORS 166.165(1)(a)(A) (1991)). The defendant had, during an assault, exclaimed racial slurs at the victims and loudly yelled "white power" or "white pride." *Id.* at 160, 838 P.2d 558. He argued that the law was facially invalid under Article I, section 8, because it provided for an enhanced punishment—relative to the lesser offense of fourth-degree assault—on the basis of his beliefs. *Id.* at 163, 838 P.2d 558.

This court recognized that the relevant question was whether the law was " 'written in terms directed to the substance of any "opinion" or any "subject" of communication' " and concluded that it was not. *Plowman*, 314 Or. at 165, 838 P.2d 558 (quoting *Robertson*, 293 Or. at 412, 649 P.2d 569). We explained that ***303** the law did not proscribe opinion or speech, that "[p]ersons can commit that crime without speaking a word, and holding no opinion other than their perception of the victim's characteristics." *Id.* at 165, 838 P.2d 558. Instead, we explained, the law proscribed a forbidden effect:

> "the effect of acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that that victim belongs to a particular group. The assailants' opinions, if any, are not punishable as such. ****712** ORS 166.165(1)(a)(A) proscribes and punishes committing an act, not holding a belief."

Id. Thus, in *Plowman*, any proscription of speech was not express. Although the law certainly punished conduct that could be expressive in nature—as the defendant's conduct in that case appears to have been—the possibility, or even certainty, that the law would punish some expressive conduct did not bring the law within the first *Robertson* category.

We reached an analogous conclusion in 2014, in *Babson*. That case concerned a challenge to a rule prohibiting overnight use of the steps in front of the state capitol. 355 Or. at 386, 326 P.3d 559. The defendants were protestors who had conducted a vigil on the steps after 11:00 p.m., in violation of the rule. *Id.* They argued that the rule was an express restriction on speech and either facially invalid as a *Robertson* category one law or overbroad as a *Robertson* category two law. *Babson*, 355 Or. at 394, 326 P.3d 559. This court rejected both contentions.

First, this court explained, the rule was not " 'written in terms' directed at expression or the content of expression." *Id.* at 395, 326 P.3d 559. Although the rule had the effect of prohibiting the defendants' vigil, it was not written in those terms; it was written to bar all use, including nonexpressive use, of the capitol steps during certain hours. Because a person could violate the rule without engaging in any expressive activities—by, for instance, using the steps as a shortcut while crossing the capitol grounds at a time when the legislature was not conducting business—the rule was not a *Robertson* category one law. *Id.* at 396-97, 326 P.3d 559.

Second, this court concluded that the rule was not subject to an overbreadth challenge as a *Robertson* category ***304** two law. *Id.* at 398, 326 P.3d 559. Again, the terms of the rule did not include "expression as an element or 'proscribed means' of causing targeted harm."[3] *Id.* We rejected the defendants' argument that apparent applications to speech were sufficient to make the rule one that "directly refer[s] to speech" within the second *Robertson* category:

> "Similarly, here, although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend. A restriction on use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight. That fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson*. The guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other

possible uses of the capitol steps during certain hours. Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not 'obviously' prohibit expression within the meaning of *Moyle*, it is not subject to an overbreadth challenge under the second category of *Robertson*."

Babson, 355 Or. at 403-04, 326 P.3d 559; *see also State v. Illig-Renn*, 341 Or. 228, 236-37, 142 P.3d 62 (2006) ("In summary, the state is correct that only statutes that by their terms proscribe the exercise of the constitutionally protected rights of assembly or expression are susceptible to a facial overbreadth challenge under Article I, sections 8 and 26."). In so holding, we noted only one exception, that where a law used "creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson*." *Babson*, 355 Or. at 403, 326 P.3d 559 (emphasis in original). As a result, laws that restrict conduct that only sometimes has an expressive component—and that do not refer to the expressive component in defining the conduct that is restricted—are not laws directed at speech.

[3] The first two *Robertson* categories require an express restriction on speech. We need not decide, in this case, whether those requirements are identical, because we think it clear that the requirement attendant to the first *Robertson* category is at least as demanding as that applicable to the second.

***305** We now turn to an examination of the *Vannatta* cases, and this court's application of the *Robertson* framework in those cases. ****713** We first analyze whether *Vannatta I* correctly applied the *Robertson* framework, considering both the reasoning of that court and the reasoning of the court in *Vannatta II.* As we explain, we conclude that *Vannatta I* erred in treating the campaign contribution limits at issue there as *Robertson* category one laws. We then apply *stare decisis* principles and conclude that that reasoning must be abandoned and that *Vannatta I*'s holding that those laws were unconstitutional on that basis must be overruled. Finally, we apply *Robertson* to the county's contribution limits at issue here and conclude that the text of the ordinances does not expressly refer to speech and that they are not facially invalid under Article I, section 8.

2. *The* Robertson *framework and the* Vannatta *cases*

In *Vannatta I*, this court considered challenges to several campaign finance laws, including laws limiting both contributions and expenditures. The state conceded that the expenditure limits were express restrictions on expression, but it made no equivalent concession as to contributions. Rather, the state "argued that campaign contributions merely are gifts which in themselves are devoid of political expression and, as such, constitute conduct that permissibly may be regulated." *Vannatta I*, 324 Or. at 521, 931 P.2d 770. *Vannatta I* rejected that argument, concluding that the campaign contribution limits fell into the first *Robertson* category. [4]

[4] *Vannatta I* also considered and rejected several other arguments about the validity of the contribution limits, including arguments resting on constitutional provisions other than Article I, section 8. In this opinion, however, we reconsider *Vannatta I* only to the extent that it placed the contribution limits in the first *Robertson* category, and we therefore do not summarize the portions of *Vannatta I* that do not bear on that issue.

Vannatta I began its analysis without reference to *Robertson*, instead considering, in the abstract, whether contributions to political campaigns and candidates "are a form of expression under Article I, section 8." 324 Or. at 522, 931 P.2d 770. The court concluded "that many—probably most—are." *Id.* In laying out the principal reasoning supporting that conclusion, the court again emphasized that "[w]e think that it ***306** takes little imagination to see how many political contributions constitute expression." *Id.* at 523, 931 P.2d 770.

Vannatta I reached that conclusion in two ways. First, the court explained that a campaign contribution is expression by the contributor, the equivalent of a citizen standing on a street corner and announcing " 'I support candidate X.' " *Id.* at 524, 931 P.2d 770. Second, it reasoned that, just as an individual's purchase of a newspaper ad in favor of a candidate was speech, so was an individual's contribution to a "collective 'pot' " that could be used for such expression. *Id.* at 523-24, 931 P.2d 770:

> "We assume, for example, that no one would deny the right of a citizen to purchase individually a newspaper ad that urges others to support a particular candidate or cause. And, if the individual can persuade enough neighbors and friends to join in the effort, the resulting spending power may produce much larger ads or television or radio commercials. No one, we take it, would gainsay the right of the individual to amplify his or her voice through collective buying power—gaining adherents for one's views is the essential purpose of political advocacy. It then follows ineluctably that the contribution of the collective 'pot' thus collected is expression, just as the individual's ad was. Indeed, it does not even matter if the money goes directly into an ad created by the contributors themselves or, instead, the money goes to professionals who create the ad for a fee. The outcome is the same—'expression,' for the purposes of Article I, section 8.
>
> > "Viewed in the foregoing way, expenditures and contributions can be better seen for what they are—not opposite poles, but closely related activities."

Vannatta I, 324 Or. at 523-24, 931 P.2d 770.

It is significant that, in setting out the two prongs of its reasoning, this court did not assert that campaign contributions are always expressive. With respect to the first prong, the court stated somewhat categorically that a "contribution, in and of itself, is ****714** *the contributor's expression of support for the candidate or cause*—an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put." *Id.* at 522, 931 P.2d 770 (emphasis in original). But the court also qualified its ***307** conclusion, stating only that "many—probably most" contributions are expressive. *Vannatta I*, 324 Or. at 522, 931 P.2d 770. And the court also acknowledged that a contribution may not be intended as speech, as when money is given to a politician without anticipating that it will be put toward a political campaign. *Id.* at 522 n. 10, 931 P.2d 770.

In the second prong of its reasoning, the court made it even more clear that "*many* political contributions constitute expression." *Id.* at 523, 931 P.2d 770 (emphasis added). The court did not say that campaign contributions can only be used to express the views of the contributor. After all, campaign contributions *may* be used to amplify one's voice, but they also may be used for other purposes, such as currying influence with a candidate. [5] Moreover, the court acknowledged that a contribution "may never be used to promote a form of expression by the candidate; instead, it may (for example) be used to pay campaign staff or to meet other needs not tied to a particular message." *Id*. at 522, 931 P.2d 770. Nevertheless, the court concluded, from the fact that "many" campaign contributions are expressive, that "campaign contributions" are expression. *Id.* at 523-24, 931 P.2d 770.

5 The United States Supreme Court has observed that,

> > "in 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology."
>
> *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 148, 124 S. Ct. 619, 157 L. Ed. 2d. 491 (2003), *overruled by Citizens United*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (emphasis in original).

Only after that abstract consideration of the nature of campaign contributions did the court turn to *Robertson*. Although the court could have concluded, as it had in *Plowman*, that a person can make a contribution to a candidate without saying a word and without expressing any opinion, it did not. Instead, without discussing *Plowman*, the court stated its conclusion in two short sentences:

> "All the listed provisions of Measure 9 either expressly limit, or ban outright, campaign contributions that may be given to or that may be accepted by a candidate. By their terms, those provisions are targeted at protected speech."

Id. at 537-38. That is, relying on its prior conclusion that campaign contributions are speech—a conclusion itself ***308** premised on an observation that many or most contributions are expressive—the court concluded that limits on contributions fall into the first *Robertson* category.

That reasoning was erroneous. As was established before *Vannatta I* in *Plowman* and reaffirmed afterward in *Babson*, a law that is directed at conduct that is only sometimes, rather than necessarily, expressive is not subject to a facial challenge as a law "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Robertson*, 293 Or. at 412, 649 P.2d 569. Treating a law as an express restriction of speech because many or even most of its applications restrict expression not only calls into question the specific results in *Plowman* and *Babson*, it also substantially expands the first *Robertson* category.

We have previously observed that "most purposive human activity communicates something about the frame of mind of the actor[.]" *Huffman and Wright Logging Co. v. Wade*, 317 Or. 445, 449-50, 857 P.2d 101 (1993). As the governor's *amicus* brief argues, a rule that laws directed at conduct that is typically expressive fall into the first *Robertson* category—and thus are valid only under narrow circumstances—would reach far beyond campaign contributions:

> "For example, a parent can express affection for a child by giving that child a large inheritance. And yet, under *Vannatta I*'s rationale, an inheritance tax presumably would be a restriction on speech itself because it affects the expression embodied by ****715** that transfer of property—a proposition that cannot be true."

The court's observation that campaign contributions often may be used by a candidate to communicate a message also fails to convert campaign contributions into conduct that is necessarily expressive. *Vannatta I* noted that contributed "money may never be used to promote a form of expression by the candidate; instead, it may (for example) be used to pay campaign staff or to meet other needs not tied to a particular message." *Vannatta I*, 324 Or. at 522, 931 P.2d 770. That statement was correct: Although the personal use restrictions applicable to funds received as contributions eliminate some nonexpressive uses of contributions, they do not winnow down the possible uses such that only expressive uses ***309** remain. *See* ORS 260.407(1) (limiting permissible uses of campaign contributions by candidates and principal campaign committees). Under Oregon law, campaign contributions need not be used for campaign expenses at all; they may be used for expenses incurred as a holder of public office. ORS 260.407(1)(a)(A), (1)(b)(A). Money contributed to a campaign *may* ultimately be used to finance expression, but that does not distinguish money given to a political campaign from money given to a politician as a gift—or from money in general.

Thus, when we now look at *Vannatta I*, it is apparent that the court's reasoning and resulting determination that the campaign contribution limits at issue there were facially invalid as *Robertson* category one laws was erroneous. Our analysis of *Vannatta I* is complicated, however, by that opinion's partial reconsideration in *Vannatta II*. That case, decided more than 10 years after *Vannatta I*, involved what could be seen as a *reductio ad absurdum* of the reasoning employed in *Vannatta I*: an argument that Article I, section 8, protected the right of a lobbyist to give money to politicians. More concretely, the case involved facial challenges to several provisions of Oregon's ethics laws which, among other things, prohibited public officials from receiving gifts above particular amounts and prohibited individuals, including lobbyists, from offering gifts to politicians. *Vannatta II*, 347 Or. at 453-54, 222 P.3d 1077. For example, ORS 244.025(1) prohibited (and prohibits) public officials, candidates, and their relatives from receiving gifts in excess of $50 from a source with a legislative or administrative interest. *See also* ORS 244.025(4)(a); ORS 244.042(1)-(2).

This court's treatment of the gift receipt limits in *Vannatta II* highlighted the tension between *Plowman* and *Vannatta I*.[6] First, *Vannatta II* laid out the elements of the statute limiting gifts and relied on *Plowman* to explain why that statute did not fall into the first *Robertson* category. The court emphasized that, just as in *Plowman*, "[a] public official who is subject to restrictions on the receipt of gifts ***310** can violate the restrictions without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold." *Vannatta II*, 347 Or. at 459, 222 P.3d 1077. The court further emphasized that the receipt restrictions "do not focus on the content of speech or writing, or on the expression of any opinion." *Id.* That is, because the restriction could be violated without engaging in expressive conduct, they were not express restrictions on expressive conduct.

6 *Vannatta II* separately analyzed the restrictions on offering gifts, concluding that those restrictions expressly regulated speech and violated Article I, section 8. 347 Or. at 468, 222 P.3d 1077. That portion of the analysis in *Vannatta II* did not implicate *Vannatta I*.

That reasoning involved a straightforward, and correct, application of *Plowman*. Were it not for *Vannatta I*, the court could have left the matter there. However, the *Vannatta II* plaintiffs resisted that conclusion in several ways, one of which is particularly pertinent here: an argument that "any constitutional protection for political contributions should apply equally to gifts to legislative officials because they are indistinguishable from political contributions." *Vannatta II*, 347 Or. at 459, 222 P.3d 1077. That is, the plaintiffs asked the court to adopt reasoning analogous to that followed in *Vannatta I*. [7]

7 In *Vannatta II*, the state principally argued that the gift receipt statutes were *Robertson* category two laws, that they fell within an exception to the *Robertson* framework, or that they were time, place, and manner restrictions. The argument that the court adopted—that the gift provisions were not an express restriction on speech at all—was advanced by the state primarily as a fallback argument. *See Brief on the Merits of Respondents on Review* at 31, *Vannatta II*. The state embraced the validity of the reasoning in *Vannatta I* and attempted to distinguish gifts from contributions. *Id.* at 36.

****716** This court addressed those arguments and, in the process, attempted to limit and to distinguish *Vannatta I*. Unfortunately, it did so in ways that were less than clear. In brief, it concluded that *Vannatta I* had relied on two premises: first, that contributions are the expression of the contributor, and second, that contributions are inextricably intertwined with the speech of the campaign or candidate. *Vannatta II*, 347 Or. at 464-65, 222 P.3d 1077. *Vannatta II* characterized the first as being primarily a response to *Buckley*, the United States Supreme Court decision that had approved of limits on campaign contributions but disapproved of limits on expenditures and independent expenditures, relying in part on a conclusion that the expression involved in campaign contributions was less significant, 424 U.S. at 21-22, 96 S.Ct. 612. *Vannatta II* ***311** concluded that the first premise on which *Vannatta I* was based was therefore not essential to the holding and withdrew it. 347 Or. at 465, 222 P.3d 1077. *Vannatta II* then explained that the second premise—that contributions are inextricably intertwined with speech—was not applicable to gifts:

> "Giving a gift to a public official is not inextricably linked with a public official's ability to carry out official functions. Public officials can speak whether or not lobbyists have given them gifts, which distinguishes this case from *Vannatta I* and its focus on the connection between the restriction on campaign contributions and the candidate's or campaign's ability to communicate a political message."

VannattaII, 347 Or. at 465, 222 P.3d 1077. *Vannatta II* did not discuss whether *Vannatta I*'s reasoning comported with *Robertson*, nor did it discuss how the distinction that it drew between contributions and gifts mapped onto the *Robertson* framework.

In hindsight, that treatment of *Vannatta I* was unsatisfactory. First, *Vannatta II*'s characterization of *Vannatta I*'s holding was not entirely accurate. It is true that, at one point, *Vannatta I* discussed its view of contributions as an expression of support by the contributor in the context of its disagreement with *Buckley*. But *Vannatta I* returned to that theme without mention of *Buckley* later in its analysis of whether campaign contributions constitute expression. 324 Or. at 524, 931 P.2d 770. *Vannatta II*'s explanation for its withdrawal of the first premise—that it was not part of *Vannatta I*'s holding was therefore strained. And *Vannatta II*'s discussion of the second prong of the reasoning in *Vannatta I* also is unclear. *Vannatta II* stated that *Vannatta I*'s holding "assumed that restricting campaign contributions restricts a candidate's or a campaign's ability to communicate a political message." *Vannatta II*, 347 Or. at 465, 222 P.3d 1077. But *Vannatta I* emphasized that "a contribution is protected *as an expression by the contributor*, not because the contribution eventually may be used by a candidate to express a particular message." *Vannatta I*, 324 Or. at 522, 931 P.2d 770 (emphasis in original). Both of the premises for *Vannatta I*'s reasoning rested on the contribution being the expression of the contributor. *Vannatta I* did not discuss the practical impact of campaign contribution restrictions on political expression by a candidate or campaign.

***312** Second, and more importantly, *Vannatta II* distinguished *Vannatta I* in a way that deepened, rather than resolved, the tension between *Vannatta I* and *Plowman*. *Vannatta II* distinguished the contribution limits at issue in *Vannatta I* from the gift limits at issue in *Vannatta II* based on a claimed difference in their effects on speech. *Vannatta II* stated that *Vannatta I*'s holding

rested on an assumed "symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message." *Vannatta II*, 347 Or. at 465, 222 P.3d 1077. *Vannatta II* explained that the giving of gifts did not create that assumed relationship:

> "[p]ublic officials can speak whether or not lobbyists have given them gifts, which distinguishes this case from *Vannatta I* and its focus on the connection between the ****717** restriction on campaign contributions and the candidate's or campaign's ability to communicate a political message."

347 Or. at 465, 222 P.3d 1077. Thus, *Vannatta II* drew a distinction between campaign contributions and gifts in terms of their effects on the ultimate ability of politicians to speak. But *Vannatta II* did not explain why that distinction was meaningful in the *Robertson* analysis.

In determining that the limits on gifts to public officials did not fall into the first *Robertson* category and holding that those limits are constitutional, *Vannatta II* adhered to the *Robertson* framework. However, in its discussion of *Vannatta I* and the distinction that it drew between gifts to public officials and campaign contributions, *Vannatta II* deviated from that framework by implying that a law that is not an express limit on speech can fall into the first *Robertson* category. That deviation is confusing, and much of the briefing filed in this case reflects that confusion. Trojan and the county ask us to overrule *Vannatta I* in light of *Vannatta II*, by asking that we place further emphasis, as they do, on the distinction that *Vannatta II* drew between contributions and gifts. For example, the county reads *Vannatta II* as holding "that any protection for campaign contributions must stem from an inextricable link between the contribution and a candidate's ability to engage in political speech." The county therefore argues that the key question in this case is whether the county's contribution limits are so low ***313** as to prevent candidates from being able to effectively engage in expression. That is not an unreasonable reading of *Vannatta II*, but it is a reading that takes us far from ordinary applications of *Robertson*. If a law falls into the first *Robertson* category as an express restriction on speech, it cannot be defended based on the availability of alternative modes of expression. Conversely, a law that is not an express restriction on speech is not subject to a facial challenge at all.

We conclude that, just as *Vannatta I*'s reasoning is inconsistent with *Robertson*, so too is *Vannatta II*'s effort to shore up *Vannatta I* in the process of distinguishing it. To the extent that *Vannatta II* can be understood as interpreting *Vannatta I* to place laws within the first *Robertson* category when they are not written in terms directed to the substance of any opinion or subject of communication, but instead may have an "effect" on such expression, that interpretation too would be at odds with *Robertson* and its progeny and would be erroneous. Under the *Robertson* framework, a law that restricts conduct without expressly regulating speech is not a *Robertson* category one law directed toward expression, even if the law may affect a person's ability to speak. And the fact that contributions may enable speech also does not turn the conduct of making a campaign contribution into conduct that is necessarily expressive. Therefore, limitations on campaign contributions that regulate conduct and, in doing so, make it either easier or more difficult for a person to speak also are not properly analyzed as *Robertson* category one limitations.

We conclude that both *Vannatta I* and *Vannatta II* were erroneous in reasoning that the contribution limits at issue in *Vannatta I* are *Robertson* category one laws. As a result, we also conclude that *Vannatta I* erred in holding that those laws are facially invalid on that basis.

3. Stare decisis

That does not mean, however, that we must or should overrule *Vannatta I*. In their defense of *Vannatta I*, respondents place their emphasis on *stare decisis*. They argue, correctly, that "a philosophical disagreement with a conclusion is not grounds for reconsideration" and that this court does, ***314** and should, overrule its constitutional precedents in a very limited set of circumstances.

Our most sustained consideration of when a constitutional precedent may be overturned was in *Couey v. Atkins*, 357 Or. 460, 355 P.3d 866 (2015). In that case, emphasizing that "[*s*]*tare decisis* does not permit this court to revisit a prior decision merely because the court's current members may hold a different view than its predecessors about a particular issue," *id.* at 485, 355

P.3d 866, we distilled from our prior decisions three categories of cases in which a constitutional precedent could warrant reconsideration:

> ****718** "First, there are cases in which a prior pronouncement amounted to *dictum* or was adopted without analysis or explanation. Second, there are cases in which the analysis that does exist was clearly incorrect—that is, it finds no support in the text or the history of the relevant constitutional provision. Third, there are cases that cannot be fairly reconciled with other decisions of this court on the same constitutional provision."

Id. at 485-86, 355 P.3d 866 (internal citations omitted). Respondents argue that those circumstances are not present here. We disagree. This case, like *Couey* itself, falls into the third category. As we noted above, and discuss in more detail below, *Vannatta I* adopted an approach to the *Robertson* analysis that conflicts with our other Article I, section 8, decisions.

In *Couey*, we faced the question of whether to overrule our precedent on the subject of justiciability. We confronted a situation where two applicable cases pointed in opposite directions. *Id.* at 489, 355 P.3d 866. Here we face an analogous situation. Were we to focus on the fact that the law before us is a contribution limit, we might reason that this case is controlled by *Vannatta I* and therefore conclude that the ordinance must be struck down. Conversely, if we focus on the *text* of the county's ordinance and attempt to answer the question of whether it expressly proscribes speech, the holding of *Vannatta II* would be directly applicable, because the limits on financial transfers to candidates here are no more directed to the substance of any opinion or subject of communications than was the prohibition on financial transfers to candidates at issue in *Vannatta II*.

***315** And we are not faced with inconsistency only between those two cases. We have decided many cases under Article I, section 8, and our application of *Robertson* to campaign contributions in *Vannatta I* conflicts not only with our application of *Robertson* to gifts in *Vannatta II* but with several other decisions of this court, before and since *Vannatta I*. Those cases include *Plowman* and *Babson*, but the tension is not confined to those decisions.

State v. Ciancanelli, 339 Or. 282, 121 P.3d 613 (2005), furnishes another example of that tension. In that case, we considered the validity of two statutes. The first was ORS 167.062 (2003), a prohibition on certain "live public sex show[s]." The law prohibited sadomasochistic abuse and sexual conduct, but only when that conduct took place in a live public show, defined as follows:

> "(a) 'Live public show' means a public show in which human beings, animals, or both appear bodily before spectators or customers.
>
> "(b) 'Public show' means any entertainment or exhibition advertised or in some other fashion held out to be accessible to the public or member of a club, whether or not an admission or other charge is levied or collected and whether or not minors are admitted or excluded."

ORS 167.062(5) (2003). The state argued that the law addressed "conduct," rather than expression. We disagreed:

> "In arguing against the suggestion that ORS 167.062 is directed at expression, the state also relies on this court's recognition, in *Huffman and Wright Logging Co. v. Wade*, 317 Or. 445, 857 P.2d 101 (1993), that conduct is not protected expression under Article I, section 8, merely because the actor intends the conduct to convey a message. But, in so arguing, the state loses sight of the fact that the issue here is the overall constitutionality of a statute, not whether defendant can claim that his particular conduct is expressive and therefore immunized from any and all criminal liability. It may or may not be true that the sexual acts that defendant directed were conduct in the most basic sense and, as such, could be punished under some other statute. But the fact remains that the statute at issue here—ORS 167.062—prohibits and criminalizes those acts *only* when they occur in an expressive context, *i.e.*, in a 'live public ***316** show.' Under those circumstances, we cannot avoid the conclusion that the statute is directed primarily, if not solely, toward the expressive aspect of the conduct that it describes. That is, the statute is one restraining free expression."

****719** *Ciancanelli*, 339 Or. at 320-21, 121 P.3d 613 (emphasis in original). By contrast, in the same case, we rejected the defendant's challenge to his conviction for promoting prostitution. We explained:

> "ORS 167.012 prohibits promoting prostitution—owning, controlling, managing, or supervising a prostitution enterprise—*regardless of the presence or absence of any circumstances that might add an expressive element to the conduct*. It is not targeted either at expression itself or at the expressive aspects of certain conduct. It therefore does not, in and of itself, raise an issue of facial unconstitutionality under Article I, section 8. Defendant's contrary argument is not well taken."

Id. at 323, 121 P.3d 613 (emphasis added; footnote omitted). Those contrasting dispositions adhere to the rule discussed above. The first statute restricted nude dancing—conduct that may be but is not necessarily expressive—but did so *only* when it was expressive. That law was expressly directed at speech, fell into the first *Robertson* category, and was invalid. The second law restricted promoting prostitution—conduct that might be linked to or involve expression in some circumstances—regardless of whether any expressive component was present. That law was not expressly directed at speech, did not fall into the first *Robertson* category, and was sustained.

Along similar lines, this court decided *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988), a case involving a challenge to zoning regulations targeted at adult bookstores, which used the content of the publications sold by those establishments as its basis for zoning restrictions. We determined that the ordinance fell within the first *Robertson* category, and we therefore held that it violated Article I, section 8. But we emphasized that that decision was a consequence of the fact that the city's ordinance had expressly based its restrictions on the content of the bookstores' speech, and that zoning regulations that did not depend on content of communicative merchandise could be sustained against a facial challenge:

> ***317** "Thus the city could regulate the location of a business that sells other merchandise, 'adult' or otherwise, even if it purveys communicative materials, as long as selling such other merchandise is not permitted at the location. A grocery store gains no privilege against a zoning regulation by selling The National Enquirer and Globe at its check-out counter. * * * Many regulations are not impermissible laws 'restricting the right to speak, write, or print freely on any subject whatever,' although they can be impermissibly applied in individual cases."

Tidyman, 306 Or. at 182, 759 P.2d 242.

All of those cases point in the same direction: laws that proscribe conduct that is often, but not necessarily, expressive cannot be facially invalid under the *Robertson* framework. We affirmed that principle most clearly in *Plowman*, *Vannatta II*, and *Babson*, all of which involved challenges to laws that proscribed conduct that could, but need not, be expressive. In all three cases we held that those laws did not fall within the first *Robertson* category. By contrast, in *Ciancanelli* we were faced with a law that proscribed conduct only when it occurred in an expressive context. That, therefore, was the type of law that *Robertson* forbade, and we held it unconstitutional.

The distinction between laws that expressly regulate speech and laws that restrict expressive activity in only some of their applications is a significant one. The former laws are those "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever," Article I, section 8—the category of laws that the constitutional provision most explicitly forbids and hence the laws which this court approves most infrequently. The latter category—those that do not expressly restrict speech but that are written to restrict a broader category of conduct that is sometimes but not always expressive—may encompass nearly every law to a greater or lesser degree.

Laws falling into that latter category are subject to only as-applied challenges. "When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them." ****720** ***318** *Babson*, 355 Or. at 400, 326 P.3d 559. The limits on the first *Robertson* category do not make it an empty set, but they do restrict its application, and the accompanying high standard for facial validity, to those laws that, in directly regulating speech, pose the most danger to the expression protected by Article I, section 8.

The above limitation holds, and we have stuck to it, even when the law has readily apparent applications to speech. It may be, and may have been, that many of the assaults prohibited by the law at issue in *Plowman* had some expressive content—that they were intended to convey disapproval of individuals or to communicate hatred of certain groups. Similarly, in *Babson*, it may have been, and likely was, the case that very many foreseeable uses of the Capitol steps bore some connection to expressive activity and that, as a practical matter, certain forms of expression were limited. *Babson*, 355 Or. at 403, 326 P.3d 559 ("although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend"). Nevertheless, we did not place those laws into the first *Robertson* category.

"We do not lightly decide to overrule an earlier constitutional decision." *State v. Savastano*, 354 Or. 64, 95, 309 P.3d 1083 (2013). But the inconsistency that *Vannatta I* has produced is comparable to that which previously has justified our abandonment of an aberrant constitutional decision. In *Savastano*, we overruled our prior decision in *State v. Freeland*, 295 Or. 367, 667 P.2d 509 (1983), which had held that Article I, section 20, of the Oregon Constitution required prosecutors to develop coherent, systematic policies to govern certain charging decisions. In *Savastano*, reviewing our other Article I, section 20, cases, we concluded that *Freeland* could not be reconciled with decisions before and since that set a less stringent standard in similar contexts. 354 Or. at 91, 309 P.3d 1083.

To be sure, in all reconsiderations of precedent, we must take into account the "undeniable importance of stability in legal rules and decisions." *Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 53, 11 P.3d 228 (2000). In *Savastano*, we noted that *Freeland* had been a relative outlier and that "the cases that have followed *Freeland* have eroded its precedential ***319** value and effectively returned to the more limited and historically grounded principle stated in [*State v. Clark*, 291 Or. 231, 630 P.2d 810, *cert. den.*, 454 U.S. 1084, 102 S. Ct. 640, 70 L. Ed. 2d. 619 (1981)]." *Savastano*, 354 Or. at 96, 309 P.3d 1083. By contrast, in *Ciancanelli*, where we were asked to overrule *Robertson* and declined, we emphasized that "[m]any decisions of this court serve as precedent in later decisions. Thus, disavowing one case may undermine the precedential significance of several others," 339 Or. at 290, 121 P.3d 613—an observation that was especially true of *Robertson*, this court's foundational decision on Article I, section 8. As we explained in *Ciancanelli*,

> "The contrast between *Stranahan* and this case illustrates the foregoing principle. In *Stranahan*, the allegedly erroneous decision had been rendered less than 10 years earlier, and few intervening precedents had relied on the earlier case, *Lloyd Corporation v. Whiffen*, 315 Or. 500, 849 P.2d 446 (1993). The *Stranahan* majority simply acted at the earliest possible moment to correct what it perceived to be an analytical mistake made in the immediately preceding case, *Lloyd Corporation*. The present case, by contrast, involves a challenge not only to *Robertson*, but also to the many cases that this court has decided since 1983 that have utilized its methodology."

Id. at 290-91.

In terms of the importance of stability in the law, *Vannatta I* resembles *Lloyd Corporation*. Although more time has passed between *Vannatta I* and this case than elapsed between *Lloyd Corporation* and *Stranahan*, the portion of *Vannatta I*'s holding in question here—its application of *Robertson*'s first category—has not been relied on in any other case. To the contrary, the only case to discuss it in detail, *Vannatta II*, distinguished *Vannatta I* and withdrew a material portion of its reasoning. [8] And, in ****721** *Vannatta II*, no party asked this court to reconsider *Vannatta I*. Our other cases applying *Robertson* since *Vannatta I*, including ***320** *Ciancanelli* and *Babson*, have made no mention of *Vannatta I*, despite reasoning in ways that conflict with *Vannatta I*. And two cases on similar topics, *Vannatta II*, 347 Or. at 464, 222 P.3d 1077, and *Moyer*, 348 Or. at 230, 230 P.3d 7, have attributed confusion by parties and lower courts to *Vannatta I*. *Vannatta I* is the "immediately preceding" case on campaign contributions. Although we have decided cases since *Vannatta I* touching on campaign finance, we have not reached the merits of an Article I, section 8, challenge in any of those cases. [9]

8 In *Moyer* we relied on different portions of *Vannatta I*, relating to the scope of the historical exception to *Robertson*. 348 Or. at 236, 230 P.3d 7. To be clear, *Vannatta I* was an opinion that discussed many issues, only some of which are

contested in this case, and only one of which we reconsider in this opinion. We do not disavow all portions of *Vannatta I*, only those that, as we have explained, conflict with the *Robertson* framework.

9 *See Markley/Lutz v. Rosenblum*, 362 Or. 531, 533, 413 P.3d 966 (2018); *Hazell v. Brown*, 352 Or. 455, 467-68, 287 P.3d 1079 (2012); *Meyer v. Myers*, 343 Or. 399, 404-05, 171 P.3d 937 (2007); *Meyer v. Bradbury*, 341 Or. 288, 293 n. 4, 142 P.3d 1031 (2006).

Respondents note that in those cases we referred to *Vannatta I* as governing precedent. But that is hardly surprising, as *Vannatta I was* governing precedent in each of those cases—a point that we made sure to distinguish, where appropriate, from the question of whether *Vannatta I* was correctly decided. *Vannatta I* derives little additional precedential force from the fact that, primarily in ballot title cases, we acknowledged its existence without endorsing its reasoning.

In assessing the prudential factors that may counsel for or against overruling *Vannatta I*, we also consider the effect of a ballot measure that was submitted to the voters in 2006—Measure 46 (2006)—which "sought to amend the Oregon Constitution to permit the enactment of laws prohibiting or limiting electoral campaign 'contributions and expenditures, of any type or description.' " *Hazell v. Brown*, 352 Or. 455, 458, 287 P.3d 1079 (2012). Voters rejected Measure 46, although they approved Measure 47 (2006), a companion ballot initiative creating new campaign finance measures, conditional on a change in the constitutional limitation, such as the passage of Measure 46 or a judicial overruling of *Vannatta I*. *Hazell*, 352 Or. at 462-63, 469, 287 P.3d 1079. Measure 46 plainly was directed at overruling the key holdings of *Vannatta I*, and it was rejected. Of course, a ballot measure that did not pass cannot change the meaning of the constitution or affect our duty to interpret it. Whether such a measure may affect our *stare decisis* analysis is a more nuanced ***321** issue. But even assuming that, in an appropriate case, an event like the failure of Measure 46 might weigh against overturning a precedent, it has little impact here.

Just as the "legislature may decline to address a judicial decision for any number of reasons, none of which necessarily constitutes an endorsement of the decision's reasoning or result," *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or. 686, 696, 261 P.3d 1 (2011), so too may the people decline to adopt a proposed constitutional amendment for a myriad of reasons. And there are explanations for Measure 46's failure other than the possibility that voters meant to express their approval of *Vannatta I*'s contribution limits holding. Most obviously, *Vannatta I* struck down both contribution limits and expenditure limits, and Measure 46 would have amended Article I, section 8, with respect to both. However, independent expenditures present a different, and potentially more difficult, constitutional problem than campaign contributions. For example, under the First Amendment, the United States Supreme Court has, since *Buckley*, held that expenditure limits place a greater burden on constitutionally-protected expression than contribution limits do. Even some proponents of campaign finance reform view a constitutional amendment permitting expenditure limits as dangerous, in view of the effect that such an amendment might have on other areas of law. *See* Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 Harv. L. & Pol'y Rev. 21, 26-27 (2014). Thus, voters could have rejected Measure 46 because of ****722** its application to expenditure limits, even if they supported the measure to the extent that it applied to contribution limits.

Moreover, parsing the amendment's failure in this case is even more difficult, because of the simultaneous adoption of Measure 47 (2006), which would have created limits on both contributions and expenditures if Measure 46 was adopted or *Vannatta I* was overruled to a sufficient degree. *See Hazell*, 352 Or. at 458, 287 P.3d 1079. One voter could have supported such limits but believed that the constitutional amendment went too far. Another could have preferred to have this court reconcile such limits with the constitution, rather than risking an amendment that could threaten speech. As a result, ***322** the rejection of Measure 46 deserves no real weight in our *stare decisis* analysis.

Ultimately, we do not believe that we can have one Article I, section 8, approach to laws restricting campaign contributions and another for all other laws. *Vannatta I* itself rejected any "distinctions based on the 'centrality' of particular forms of expression" when explaining why, *contra Buckley*, it would not apply a different standard to contribution limits than to expenditure limits. 324 Or. at 521, 931 P.2d 770. And we cannot honor *stare decisis* by expanding *Vannatta I*'s application of the first *Robertson* category to all laws—allowing facial challenges to laws restricting conduct that has an expressive component in many or most applications. That also would require overturning precedent, and more of it. *Vannatta II*, although correct in its own

application of *Robertson*, did not successfully rehabilitate *Vannatta I*, nor did it supply a viable basis on which *Vannatta I* could be distinguished from this court's other Article I, section 8, cases. Rather, it deepened the confusion surrounding *Vannatta I*'s basis and validity. Given the clear conflict between *Vannatta I* and our other cases, it is *Vannatta I* that must give way. We disavow the reasoning in *Vannatta I* that campaign contribution limits necessarily are *Robertson* category one laws. *Vannatta I* erred in holding contribution limits unconstitutional based on that reasoning. The correct inquiry, under *Robertson*, is whether such limits are "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." *Robertson*, 293 Or. at 412, 649 P.2d 569. [10] The remaining question in this case is whether the county's contribution limit ordinance is such an express restriction.

10 *Vannatta I* did not conduct that inquiry, and we need not decide here what result would have obtained if it had.

4. *Application to this case*

We now undertake that inquiry and examine the text of the campaign contribution limits at issue here. MCC § 5.201 provides:

"(A) An Individual or Entity may make Contributions only as specifically allowed to be received in this Section.

"(B) A Candidate or Candidate Committee may receive only the following contributions during any Election Cycle:

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

"(2) Any amount from a Small Donor Committee; and

"(3) No amount from any other Entity."

The county's definition of "contribution," contained in MCC § 5.200, cross-references the definitions in ORS 260.005(3) and ORS 260.007. [11] ORS 260.005(3) provides:

"Except as provided in ORS 260.007, 'contribute' or 'contribution' includes:

"(a) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:

"(A) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or

****723** "(B) To or on behalf of a candidate, political committee or measure; and

"(b) The excess value of a contribution made for compensation or consideration of less than equivalent value."

11 ORS 260.007 contains exceptions to the definitions of "contribution" and "expenditure."

However, the county argues that only a portion of that definition is operative in the context of MCC § 5.201. That contention requires a brief digression into statutory construction. There is no dispute that MCC § 5.201 sets limits on contributions to candidates and candidate committees. The plain text of MCC § 5.201(B) establishes that a candidate can accept a thing of value from an individual or entity only if (1) it falls within the contribution limits or (2) it is excluded from the definition of "contribution" by MCC § 5.200 or ORS 260.007. However, *amicus* Oregon Taxpayers Association (OTA) argues that MCC § 5.201(A) also prohibits contributions to ballot measure campaigns and contributions to be used in independent expenditures. ***324** The county disavows both applications and contends that MCC § 5.201(A) applies only to contributions to candidates and a principal candidate committee.

We agree with the county that the contribution limits imposed by MCC § 5.201 apply only to contributions to candidates in Multnomah County candidate elections and their principal candidate committees. We approach the question using our usual methodology for statutory interpretation. *State v. Gaines*, 346 Or. 160, 206 P.3d 1042 (2009). To begin with, it makes little sense to read the text of MCC § 5.201(A)—"[a]n Individual or Entity may make Contributions only as specifically allowed to be received in this Section"—as a complete prohibition on all contributions in all elections. The title of that provision—which was part of the text submitted to voters—is "CONTRIBUTIONS IN MULTNOMAH COUNTY CANDIDATE ELECTIONS" (capitalization in original). It therefore makes sense to read § 5.201(A), in context, as a prohibition on contributions in Multnomah County candidate elections, not a much more extensive proscription. That reading is confirmed by legislative history. As submitted to voters, the ballot measure explained that it would create a new charter provision limiting "[c]ontributions to political campaigns for candidates running for county elective offices." Multnomah County Voters' Pamphlet, General Election, November 8, 2016, M-28. The fact that the county's ordinance cross-references a state statutory definition of "contribution" that refers to "measures" does not mean that the substantive limits imposed by the county provision apply beyond their intended scope.

Similarly, OTA's argument that MCC § 5.201(A) forbids all contributions to be used in independent expenditures proves unpersuasive in light of its context. Other provisions of the county's ordinance clearly contemplate that such contributions will take place. For example, MCC § 5.202(C)(3) provides that

> "[a] Political Committee may make aggregate Independent Expenditures of not more than ten thousand dollars ($10,000), provided that the Independent Expenditures are funded by means of contributions to the Political Committee ***325** by Individuals in amounts not exceeding five hundred dollars ($500) per Individual per year."

If OTA's reading of MCC § 5.201(A) were correct, MCC § 5.202(C)(3) would be rendered a nullity, because *no* political committee other than a candidate committee could accept contributions of any size. The more plausible reading, and the only reading consistent with the legislative history quoted above, is that MCC § 5.201(A) restricts contributions only to candidates and candidate committees, the two entities to which the limits in MCC § 5.201(B) apply.

Therefore, only a portion of the definition of "contribution" quoted above is operative in the context of MCC § 5.201. The other parts of that definition would have a role to play in a more expansive restriction of contributions—such as the contribution limits at issue in *Vannatta I* or OTA's broad reading of MCC § 5.201(A). But, because the county's contribution limits apply only to contributions to candidates or candidate committees, only a portion of the statutory definition is left with any role to play. With irrelevant or redundant portions omitted, the operative definition reads:

> ****724** "(a) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> "* * * * *
>
> "(B) To or on behalf of a candidate [or] political committee * * *; and
>
> "(b) The excess value of a contribution made for compensation or consideration of less than equivalent value."

No portion of that definition contains an express reference to speech. Nor, as in *Ciancanelli*, does the definition target conduct only insofar as it is expressive. Instead, "contribution" is defined in terms of conduct that is not necessarily expressive. *Vannatta II*'s analysis of the gift limit, which was written in similar terms, controls here:

***326** "A public official who is subject to restrictions on the receipt of gifts can violate the restrictions without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold."

347 Or. at 459, 222 P.3d 1077. [12]

12 We need not, and do not, consider whether a contribution limit in which ORS 260.007(a)(A)—and its reference to "the purpose of influencing an election for public office or an election on a measure"—were operative would be an express restriction of speech. For that reason, we do not consider whether *Vannatta I*'s result—which was to strike down a broader set of contribution limits where contributions were so defined—was incorrect.

Accordingly, we conclude that MCC § 5.201(A) and (B) are not subject to facial challenge under *Robertson*. They are not, therefore, facially invalid under Article I, section 8. The county's limits may be subject to as applied challenges. But, in this case, respondents have raised only a facial challenge to the county's contribution limits, and we reject that challenge.

B. *Contribution Limits and the First Amendment*

Because the trial court concluded that the county's contribution limits violated Article I, section 8, it did not reach the question of whether the limits violate the First Amendment. The First Amendment sets limits on the regulation of campaign contributions. In *Buckley*, the Supreme Court upheld individual contribution limits of $1,000, recognizing that, although contribution limits restricted speech to some extent, the government had a significant interest in preventing corruption or the appearance of corruption. 426 U.S. at 26, 96 S.Ct. 612. Although *Buckley* upheld contribution limits of $1,000, the Supreme Court has since made clear that *Buckley* did not set a floor. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897, 145 L. Ed. 2d. 886 (2000), the Supreme Court rejected a First Amendment challenge to Missouri's $1,075 individual contribution limit in statewide elections. That limit, when adjusted for inflation, was lower than that upheld in *Buckley* in 1968. Nevertheless, emphasizing that *Buckley* did not set a floor, the Court rejected the challenge. *Shrink Missouri Government PAC*, 528 U.S. at 396-97, 120 S.Ct. 897.

Randall v. Sorrell, 548 U.S. 230, 126 S. Ct. 2479, 165 L. Ed. 2d. 482 (2006), was the first Supreme Court decision ***327** to find a contribution limit facially invalid. In that case, six Justices, across three opinions, held that Vermont's contribution limit scheme, which involved contribution limits for statewide races as low as $200, was unconstitutional. Although no rationale commanded a majority of the Court, Justice Breyer's opinion provided the narrowest ground for the judgment and is therefore binding on this court. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d. 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (internal quotations and citation omitted)); *Thompson v. Hebdon*, —— U.S. ——, 140 S. Ct. 348, 350 & n, 205 L.Ed.2d 245 (2019) (per curiam) (recognizing that Justice Breyer's opinion in *Randall* is controlling).

****725** The opinion in *Randall* framed the question as being whether the contribution limits

"prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."

Randall, 548 U.S. at 248, 126 S.Ct. 2479 (opinion of Breyer, J.) (quoting *Buckley* 424 U.S. at 21, 96 S.Ct. 612; alteration in *Randall*; internal citation omitted). The opinion in *Randall* answered that question using a two-staged approach. It explained that

"where there is strong indication in a particular case, *i.e.*, danger signs, that such risks exist (both present in kind and likely serious in degree), courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's 'tailoring,' that is, toward assessing the proportionality of the restrictions."

Id. at 249, 96 S.Ct. 612.

First, the opinion identified "danger signs," principally that Vermont's "contribution limits are substantially lower than both the limits we have previously upheld and ***328** comparable limits in other States." *Id.* at 253, 96 S. Ct. 612. Having reached that conclusion, the opinion turned to a closer examination of Vermont's contribution limits, considering evidence concerning the likely effect of those limits. Ultimately, the opinion noted five characteristics that led it to conclude that Vermont had set its contribution limits too low, including an unusually expansive definition of "contribution" and the fact that the same limits that applied to individuals applied to political parties. *Id.* at 256-61, 96 S. Ct. 612. The opinion concluded that the scheme, as a whole, was facially invalid. *Id.* at 261, 96 S. Ct. 612.

Since *Randall*, and after briefing in this case was completed, the Supreme Court weighed in once again. In *Thompson*, the court held that Alaska's $500 contribution limit for all political candidates had "danger signs" similar to those found in *Randall*. —— U.S. ——, 140 S. Ct. at 350-51.

Some of those "danger signs" are present here. Multnomah County's contribution limits are substantially lower than those upheld by the Supreme Court in the past—adjusted for inflation, $500 is less than a third of the limit upheld in *Shrink Missouri*. *See Thompson*, —— U.S. ——, 140 S. Ct. at 351 (doing similar math). Both *Randall* and *Thompson* treated similar comparisons as "danger signs," although neither viewed that single factor as dispositive. *See Thompson*, —— U.S. ——, 140 S. Ct. at 350-51; *Randall*, 548 U.S. at 251, 126 S.Ct. 2479. And the $500 limit at issue here is effectively lower than the $500 limit found problematic in *Thompson*. Under the county's ordinance, $500 is the maximum individual-to-candidate contribution over a two-year election cycle. MCC §§ 5.200, 5.201(B). By contrast, the $500 Alaska limit analyzed in *Thompson* limits individual-to-candidate contributions "to $500 *per year*," *Thompson*, —— U.S. ——, 140 S. Ct. at 348 (emphasis added), meaning that it "allows a maximum contribution of $1,000 over a comparable two-year period," *id.* at ——, 140 S. Ct. at 350-51.

Yet the county's ordinance differs from the laws considered in *Randall* and *Thompson* in pertinent respects. The county's $500 limits apply only to county elections. While in *Randall* and *Thompson* the Court emphasized that the laws it was considering were out of step with contribution limits set by other states, it is less clear that Multnomah County's ***329** limits are inconsistent with those set by comparable municipalities. *See Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 387 (5th Cir. 2018), *cert. den.*, —— U.S. ——, 139 S. Ct. 639, 202 L. Ed. 2d. 492 (2018) (upholding Austin's $350 city council contribution limits based, in part, on comparisons to contributions limits in other large municipalities). In addition, in both *Randall* and *Thompson*, the Court deemed it particularly problematic that the contribution limits at issue in those cases were not indexed for inflation. Multnomah County's contribution limits are automatically adjusted for inflation in every odd-numbered year. MCC § 5.205.

The controlling Supreme Court precedent makes it difficult to decide whether ****726** the county's contribution limits violate the First Amendment without further proceedings in the trial court. In a First Amendment analysis, the constitutionality of a contribution limit depends not only on whether there are "danger signs," but also on the government's interest in imposing contribution limits and the effect the limits could have on candidates' ability to conduct an effective campaign. *See Randall*, 548 U.S. at 253-56, 126 S.Ct. 2479 (opinion of Breyer, J.) (evaluating the likely effect of Vermont's contribution limits in light of the evidence in the record); *Thompson*, —— U.S. ——, 140 S. Ct. at 351 (remanding for consideration of whether Alaska had shown a special justification for its contribution limit). Here, the parties and *amici* submitted evidence on the problems that the contribution limits addressed and their likely effects, and the county relies in part on that evidence and other empirical support for its argument that its ordinances survive First Amendment scrutiny. Those arguments turn on facts that are not conceded and on particular inferences that may be—but need not be—drawn from that evidence. Because the trial court never reached the First Amendment issue, it did not make the factual findings that are necessary to that analysis. We therefore remand the case to the trial court to address the validity of the county's contribution limits under the First Amendment in the first instance.

III. EXPENDITURE LIMITS

We next consider the validity of the county's expenditure limits under Article I, section 8. The two provisions of ***330** the county's expenditure ordinance that the trial court held invalid state:

> "(A) No Individual or Entity shall expend funds to support or oppose a Candidate, except those collected from the sources and under the Contribution limits set forth in this Section.
>
> "* * * * *
>
> "(C) Only the following Independent Expenditures are allowed per Election Cycle to support or oppose one or more Candidates in any particular Multnomah County Candidate Election:
>
> "(1) An Individual may make aggregate Independent Expenditures of not more than five thousand dollars ($5,000).
>
> "(2) A Small Donor Committee may make Independent Expenditures in any amounts from funds contributed in compliance with Section 5.200.
>
> "(3) A Political Committee may make aggregate Independent Expenditures of not more than ten thousand dollars ($10,000), provided that the Independent Expenditures are funded by means of contributions to the Political Committee by Individuals in amounts not exceeding five hundred dollars ($500) per Individual per year."

The county's expenditure limits cannot be distinguished from those held unconstitutional in *Vannatta I*. The county argues that *Vannatta I* did not fully consider the question of whether expenditures are protected expression and takes the position that its expenditure limits do not violate Article I, section 8. However, the county acknowledges that its expenditure limits violate the First Amendment under existing Supreme Court precedent [13] and for that reason accepts that this is not an appropriate case in which to reconsider the validity of expenditure limits under Article I, section 8. Trojan also argues that the validity of expenditure limits was paid insufficient attention in *Vannatta I* and contends that we should uphold the county's expenditure limits under Article I, section 8.

13 The county argues that the controlling federal cases were wrongly decided, but it acknowledges that this court is not the proper forum for that argument.

***331** We decline to reconsider *Vannatta I*'s expenditures holding for three reasons. First, nothing that we have disavowed regarding *Vannatta I*'s reasoning concerning contribution limits calls into question *Vannatta I*'s conclusion that limits on independent expenditures are an express restriction on speech subject to a facial challenge under *Robertson*. The definition of "independent expenditure" refers expressly to the content of the communications whose funding it restricts, bringing the limits on independent expenditures within the first *Robertson* category. ****727** ORS 260.005(10) (2015), made applicable by MCC § 5.200 ("Unless otherwise indicated by the text or context of this Section, all terms shall have the definitions at Chapter 260 of Oregon Revised Statutes, as of November 8, 2016."), defined an independent expenditure as "an expenditure by a person for a communication in support of or in opposition to a clearly identified candidate or measure" made independently of a candidate or campaign. That phrase is further defined to refer to a communication that "clearly and unambiguously urges the election or defeat of a clearly identified candidate for nomination or election to public office, or the passage or defeat of a clearly identified measure," ORS 260.005(10)(c)(A)(i) (2015), or communications that "refer[ ] to a clearly identified candidate who will appear on the ballot or to a political party," ORS 260.005(10)(c)(B)(ii) (2015). As in *Ciancanelli*, even if expenditures may be viewed as conduct, the county's ordinance restricts them only insofar as they are expressive.

Second, although the county, Trojan, and some *amici* have argued that *Vannatta I* should be overturned as to expenditure limits as well, the briefing that they have filed is more straightforwardly directed to the validity of the contribution limits, and the expenditure limit briefing is not as well developed.

Third, as the county concedes, and we agree, the county's expenditure limits unambiguously violate the First Amendment. *Buckley* held that the government cannot restrict independent expenditures by individuals, 424 U.S. at 47-51, 96 S.Ct. 612. *Citizens United*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753, held that independent restrictions by corporations and unions cannot be restricted either. The county's ordinance restricts both. To be sure, we interpret the Oregon Constitution independently of the ***332** First Amendment, and our free speech jurisprudence does not track the Supreme Court's interpretation of the First Amendment. But, although *Buckley* and *Citizens United* are not relevant to the question of whether *Vannatta I* was correctly decided, the futility of reconsidering *Vannatta I* with respect to this plainly unconstitutional ordinance weighs against doing so in this case. *See State v. Avila-Nava*, 356 Or. 600, 621, 341 P.3d 714 (2014) (Kistler, J., concurring in part and concurring in the judgment) ("There would be little point * * * in announcing a state constitutional rule that permits Oregon courts to consider evidence that the Fifth Amendment precludes them from considering.").

Accordingly, we affirm the trial court's decision that MCC § 5.202(A) and (C) are invalid.

IV. DISCLOSURE PROVISIONS

Some of the intervenors assign error to the trial court's decision on the disclosure provisions, but that issue is now moot: During the pendency of this proceeding, the county amended the disclosure provisions of its ordinance and a decision about the validity of the former provisions will have no practical effect. *See Kerr v. Bradbury*, 340 Or. 241, 244, 131 P.3d 737, *opinion adh'd to on recons.*, 341 Or. 200, 140 P.3d 1131 (2006) (stating that case is moot when a decision will "no longer have some practical effect on the rights of the parties to the controversy" (internal citations and quotations omitted)). Although it is sometimes appropriate for an appellate court to vacate the affected portion of the trial court's judgment, we have not been asked to employ the " 'equitable remedy of vacatur,' " *id.* at 249, 131 P.3d 737 (quoting *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25, 115 S. Ct. 386, 130 L. Ed. 2d. 233 (1994)), and we do not do so.

V. CONCLUSION

The trial court ruled that three provisions of the county's ordinances violated Article I, section 8. We conclude that the contribution limits are not facially invalid under Article I, section 8, and therefore reverse that portion of the trial court's decision and remand the case to the trial court so that it can consider whether the contribution limits are ***333** valid under the First Amendment. We agree with the trial court that the expenditure limits violate Article I, section 8, and we affirm the trial court's judgment as to those provisions. Although the trial court held that the disclosure ****728** rules violated Article I, section 8, that part of its decision became moot on appeal, and we decline to decide the now-theoretical question.

The judgment of the circuit court is affirmed in part and reversed in part, and the case is remanded to the circuit court for further proceedings.

All Citations

366 Or. 295, 462 P.3d 706

End of Document

Citing References (44)

Treatment	Title	Date	Type	Depth	Headnote(s)
Examined by	**1. Buel v. Rosenblum** 468 P.3d 459, 463+ , Or. GOVERNMENT — Elections. Legislature's explanatory statement of ballot title relating to campaign finance laws would be modified to reflect recent change in the law.	July 02, 2020	Case		16 P.3d
Examined by	**2. Couey v. Clarno** 469 P.3d 790, 794+ , Or.App. CIVIL RIGHTS — Free Speech. Statute that prohibited obtaining signatures as a volunteer while being paid as a petition circulator did not unconstitutionally restrict free speech.	June 24, 2020	Case		1 3 4 P.3d
Examined by	**3. Petitioner Buel's Supplemental Brief on Ballot Title Changes Due to Multnomah County V. Mehrwein** Out Of Plan Ronald A. BUEL and Kyle Markley, Petitioners, v. Ellen ROSENBLUM, Attorney General, State of Oregon, Respondent. 2020 WL 5073647, *1+ , Or. (Appellate Brief)	June 04, 2020	Brief		5 14 15 P.3d
Examined by	**4. Brief of Amici Curiae Yes for Fair and Honest Elections and Sonny Mehta** Out Of Plan Ronald A. BUEL, Petitioner, v. Ellen F. ROSENBLUM, Attorney General, Respondent. Kyle MARKLEY, Petitioner, v. Ellen F. ROSENBLUM, Attorney General, Re... 2020 WL 5073648, *1+ , Or. (Appellate Brief)	June 04, 2020	Brief		14 15 16 P.3d
Examined by	**5. Respondent's Supplemental Brief** Out Of Plan Ronald A. BUEL and Kyle Markley, Petitioners, v. Ellen F. ROSENBLUM, Attorney General, State of Oregon, Respondent. 2020 WL 5073650, *1+ , Or. (Appellate Brief)	June 04, 2020	Brief		12 15 16 P.3d
Discussed by	**6. Brief on the Merits of Respondent on Review, State of Oregon** Out Of Plan STATE OF OREGON, Plaintiff-Appellant, Respondent on Review, v. Charles Steven MCCARTHY, Defendant-Respondent, Petitioner on Review. 2020 WL 7669189, *1+ , Or. (Appellate Brief)	Dec. 01, 2020	Brief		6 P.3d
Discussed by	**7. Intervenor-Respondents' Response Brief** Out Of Plan For a Judicial Examination and Judgment of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanct... 2022 WL 16836506, *1+ , Or.App. (Appellate Brief)	Feb. 22, 2022	Brief		18 P.3d

Treatment	Title	Date	Type	Depth	Headnote(s)
Discussed by	**8. Interested Parties-Appellants-Respondents Robert Pile, Shana Cavanaugh, Brandee Dudzic and Joe Lewis's Opening Brief and Excerpt of Record** Out Of Plan BOARD OF COUNTY COMMISSIONERS OF COLUMBIA COUNTY, a Political Subdivision of the State of Oregon, Petitioner-Respondent, v. Ellen ROSENBLUM, Attorney ... 2021 WL 9696214, *1+ , Or.App. (Appellate Brief)	Dec. 21, 2021	Brief		18 P.3d
Discussed by	**9. Defendant-Portland Police Association's Motion for Summary Judgment** Jo Ann HARDESTY, Plaintiff, v. CITY OF PORTLAND, an Oregon municipal corporation, the Portland Police Association, an Oregon domestic non-profit corpo... 2022 WL 20689916, *1+ , Or.Cir. (Trial Motion, Memorandum and Affidavit)	July 17, 2022	Motion		1 2 3 P.3d
Cited by	**10. Woodland v. Department of Revenue** 536 P.3d 985, 987 , Or. TAXATION — Income. Taxpayer's appeal from assessment of interest was rendered moot by Department of Revenue's decision to invalidate assessment.	Sep. 19, 2023	Case		18 P.3d
Cited by	**11. State v. Payne** 468 P.3d 445, 455 , Or. CRIMINAL JUSTICE — Instructions. Court should have given defendant's timely requested “witness-false-in-part” statutory instruction.	July 02, 2020	Case		6 P.3d
Cited by	**12. Matter of H. W.** 476 P.3d 107, 117 , Or.App. FAMILY LAW — Jurisdiction. Juvenile court had subject matter jurisdiction to adjudicate parentage, even if it had not yet adjudicated whether it had dependency jurisdiction.	Oct. 07, 2020	Case		6 P.3d
Cited by	**13. Order and Opinion on Summary Judgment Motions of Defendants Portland Police Association, Hunzeker, and Ottoman** Out Of Plan Hardesty v. City of Portland 2023 WL 6064439, *9 , Or.Cir. (Trial Order) Defendants Portland Police Association (PPA), Brian Hunzeker, and Kerry Ottoman have each moved for summary judgment on plaintiff Jo Ann Hardesty's claims against them. The court...	Sep. 05, 2023	Trial Court Order		1 3 P.3d
Cited by	**14. Amici Curiae Brief of the Institute for Free Speech and the Council on American-Islamic Relations in Support of Petitioners** RENTBERRY, INC. and Delaney Wysingle, Petitioners, v. CITY OF SEATTLE, Respondent. 2020 WL 7029253, *1+ , U.S. (Appellate Petition, Motion and Filing)	Nov. 23, 2020	Petition		16 P.3d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**15. Amicus Curiae Brief of the Institute for Free Speech in Support of Petitioners** Out Of Plan Chike UZUEGBUNAM and Joseph Bradford, Petitioners, v. Stanley C. PRECZEWSKI, et al., Respondents. 2020 WL 5898909, *1+ , U.S. (Appellate Petition, Motion and Filing)	Sep. 29, 2020	Petition		16 P.3d
Cited by	**16. Brief on the Merits of Petitioner on Review, State of Oregon** Out Of Plan STATE OF OREGON ex rel Ellen F. Rosenblum, in her Official Capacity as Attorney General for the State of Oregon, Plaintiff-Appellant Cross-Respondent,... 2022 WL 2196601, *1+ , Or. (Appellate Brief)	Jan. 24, 2022	Brief		1 4 P.3d
Cited by	**17. Brief on the Merits of Respondent on Review, State of Oregon** Out Of Plan STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. Gina Maree MCKINNEY, Defendant-Appellant, Petitioner on Review. 2020 WL 12991900, *1+ , Or. (Appellate Brief)	Dec. 23, 2020	Brief		8 P.3d
Cited by	**18. Brief on the Merits of Respondent on Review, State of Oregon** Out Of Plan STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. Matthew Lee OWEN, Defendant-Appellant, Petitioner on Review. 2020 WL 12991901, *1+ , Or. (Appellate Brief)	Dec. 23, 2020	Brief		8 P.3d
Cited by	**19. Brief on the Merits of Respondent on Review, State of Oregon** Out Of Plan STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. Rocklyn Mitchel SHIFFER aka Rocky Mitchelle Shiffer, Defendant-Appellant, Petitioner o... 2020 WL 12991903, *1+ , Or. (Appellate Brief)	Dec. 23, 2020	Brief		8 P.3d
Cited by	**20. Respondent's Brief on the Merits on Review** Out Of Plan STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. CLIFFORD DARRELL KEYS, Defendant-Appellant, Respondent on Review. 2020 WL 7669191, *1+ , Or. (Appellate Brief)	Dec. 03, 2020	Brief		10 P.3d
Cited by	**21. Petitioner's Brief on the Merits** Out Of Plan STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. Gina Maree MCKINNEY, Defendant-Appellant, Petitioner on Review. 2020 WL 12991899, *1+ , Or. (Appellate Brief)	Oct. 01, 2020	Brief		—
Cited by	**22. Interested Parties-Appellants Robert Pile, Shana Cavanaugh, Brandee Dudzic and Joe Lewis's Reply Brief** Out Of Plan For a Judicial Examination and Judgment of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanct... 2022 WL 16836521, *1+ , Or.App. (Appellate Brief)	Apr. 12, 2022	Brief		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**23. Petitioner-Appellant Board of County Commissioners of Columbia County's Corrected Opening Brief** Out Of Plan For a Judicial Examination and Judgment Of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanct... 2022 WL 16836534, *1+ , Or.App. (Appellate Brief)	Apr. 12, 2022	Brief		—
Cited by	**24. Attorney General's Reply Brief** Out Of Plan For a Judicial Examination and Judgment of the Court as to the Regularity, Legality Validity and Effect of the Columbia County Second Amendment Sanctu... 2022 WL 16836537, *1+ , Or.App. (Appellate Brief)	Apr. 12, 2022	Brief		—
Cited by	**25. Petitioner-Appellant Board of County Commissioners of Columbia County's Corrected Opening Brief** Out Of Plan For a Judicial Examination and Judgment of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanct... 2022 WL 16836481, *1+ , Or.App. (Appellate Brief)	Jan. 11, 2022	Brief		—
Cited by	**26. Reply in Support of Defendants' Motion for Summary Judgment** Out Of Plan NEWBERG EDUCATION ASSOCIATION, Oea/ Nea, Jennifer Schneider, Andrew Gallagher, Katherine Villalobos, and Sara Linnertz, Plaintiffs, v. NEWBERG SCHOOL D... 2022 WL 4131850, *1+ , D.Or. (Trial Motion, Memorandum and Affidavit)	June 24, 2022	Motion		2 P.3d
Cited by	**27. Reply to Plaintiff's Opposition to Defendant PPA, Ottoman and Hunzeker's Motion for Summary Judgment** Out Of Plan Jo Ann HARDESTY, Plaintiff, v. CITY OF PORTLAND, an Oregon municipal corporation, the Portland Police Association, an Oregon domestic non-profit corpo... 2023 WL 6198629, *1 , Or.Cir. (Trial Motion, Memorandum and Affidavit)	Aug. 11, 2023	Motion		—
Cited by	**28. Plaintiff's Opposition to Defendant PPA, Ottoman and Hunzeker's Motion for Summary Judgment** Out Of Plan Jo Ann HARDESTY, an individual, Plaintiff, v. CITY OF PORTLAND, an Oregon municipal corporation, the Portland Police Association, an Oregon domestic n... 2023 WL 6198630, *1 , Or.Cir. (Trial Motion, Memorandum and Affidavit)	Aug. 07, 2023	Motion		14 P.3d

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	**29. Plaintiffs' Reply in Support of Their Motion for Summary Judgment** Out Of Plan Mark FROHNMAYER, Mark Osterloh, Pat Ryan, Robert Selvan, and Erin Rappold, Plaintiffs, v. Beth FORREST, in her official capacity as City of Eugene Rec... 2020 WL 13581187, *1 , Or.Cir. (Trial Motion, Memorandum and Affidavit)	Oct. 12, 2020	Motion		—
Cited by	**30. Plaintiffs' Response to Defendants' Motion for Summary Judgment** Out Of Plan Mark FROHNMAYER, Mark Osterloh, Pat Ryan, Robert Selvan, and Erin Rappold, Plaintiffs, v. Beth FORREST, in her official capacity as City of Eugene Rec... 2020 WL 13581183, *1 , Or.Cir. (Trial Motion, Memorandum and Affidavit)	Oct. 05, 2020	Motion		9 P.3d
Cited by	**31. Plaintiff's Reply Re Motion to Strike Portions of Defendant's Reply Regarding its Motion to Dismiss** Out Of Plan Ronald A. BUEL, an individual, Plaintiff, v. Mary Hull CABALLERO, in her role as Auditor of the City of Portland, Oregon, Defendant. 2020 WL 9257006, *1 , Or.Cir. (Trial Motion, Memorandum and Affidavit)	July 06, 2020	Motion		14 16 P.3d
Cited by	**32. Defendant's Reponse to Motion to Strike and Sur-Reply** Out Of Plan Ronald A. BUEL, an individual, Plaintiff, v. Mary Hull CABALLERO, in her role as Auditor of the City of Portland, Oregon, Defendant. 2020 WL 9257008, *1+ , Or.Cir. (Trial Motion, Memorandum and Affidavit)	June 22, 2020	Motion		14 P.3d
Mentioned by	**33. State ex rel Rosenblum v. Living Essentials, LLC** 529 P.3d 939, 955 , Or. COMMERCIAL LAW — Consumer Protection. To violate provision of Oregon UTPA that prohibits causing likelihood of confusion as to product's source, alleged practice need not be...	May 04, 2023	Case		—
Mentioned by	**34. State v. McCarthy** 501 P.3d 478, 489 , Or. CRIMINAL JUSTICE — Searches and Seizures. State failed to establish that exigent circumstances actually existed at the time of warrantless search of defendant's truck.	Dec. 30, 2021	Case		6 P.3d
Mentioned by	**35. State ex rel Rosenblum v. Nisley** 473 P.3d 46, 53 , Or. GOVERNMENT — Public Officials. County district attorney did not “cease to possess” a qualification for holding office due to 60-day suspension from the practice of law.	Sep. 24, 2020	Case		—

Treatment	Title	Date	Type	Depth	Headnote(s)
Mentioned by	**36. Brief on the Merits of Respondents on Review** Out Of Plan STATE OF OREGON, ex rel. Ellen F. Rosenblum, in her Official Capacity as Attorney General for the State of Oregon, Plaintiff-Appellant, Cross-Responde... 2022 WL 2193050, *1+ , Or. (Appellate Brief)	Mar. 28, 2022	Brief		—
Mentioned by	**37. Defendant City of Portland's FRCP 12(b)(1) and 12(b)(6) Partial Motion to Dismiss** Out Of Plan INDEX NEWSPAPERS LLC, a Washington limited-liability company, dba Portland Mercury; Doug Brown; Brian Conley; Mathieu Lewis-Rolland; Kat Mahoney; Serg... 2022 WL 19836759, *1 , D.Or. (Trial Motion, Memorandum and Affidavit)	Dec. 08, 2022	Motion		—
—	**38. State regulation of the giving or making of political contributions or expenditures by private individuals** 94 A.L.R.3d 944 This annotation collects and analyzes the cases dealing with the validity, construction, or application of those state statutes or regulations pertaining to political contributions...	1979	ALR	—	16 P.3d
—	**39. Sutherland Statutes and Statutory Construction s 49:9, § 49:9. Legislative inaction following contemporaneous and practical interpretation** Courts have found that legislative inaction following a contemporaneous and practical interpretation is evidence of an intent to adopt such interpretation. But legislative inaction...	2023	Other Secondary Source	—	10 P.3d
—	**40. Sutherland Statutes and Statutory Construction s 73:8, § 73:8. Public elections** The United States is a constitutional democracy and its organic law grants citizens the right to choose public officials. Courts recognize election laws are central to the idea of...	2023	Other Secondary Source	—	10 P.3d
—	**41. Am. Jur. 2d Elections s 459, § 459. Solicitation or making of contributions for political purposes; generally** Am. Jur. 2d Elections The solicitation and making of political contributions is heavily regulated under federal law. It is a violation of federal law— to knowingly cause or attempt to cause any person...	2023	Other Secondary Source	—	13 P.3d
—	**42. DANGER SIGNS IN STATE AND LOCAL CAMPAIGN FINANCE** 74 Ala. L. Rev. 415 , 491+ Introduction. 417 I. The Jurisprudence of State & Local Contribution Limits. 421 A. The Buckley Framework. 422 B. Shrink Missouri: A Victory for SLCLs?. 425 C. Randall v....	2022	Law Review	—	13 15 P.3d

Treatment	Title	Date	Type	Depth	Headnote(s)
—	**43. STATE STATUTORY INTERPRETATION AND HORIZONTAL CHOICE OF LAW** 70 U. Kan. L. Rev. 505 , 560 Consider this situation. A brings suit in State X, based on a statute promulgated in State Y. State X is a textualist court that doesn't believe in legislative history. State Y...	2022	Law Review	—	—
—	**44. P 33,791 STATE EX REL ELLEN F. ROSENBLUM, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF OREGON, PETITIONER ON REVIEW V. LIVING ESSENTIALS, LLC, A MICHIGAN LIMITED LIABILITY COMPANY; AND INNOVATION VENTUR** State Unfair Trade Practices Law State ex rel Ellen F. Rosenblum, in her official capacity as Attorney General for the State of Oregon, Petitioner on Review v. Living Essentials, LLC, a Michigan limited liability...	2022	Other Secondary Source	—	—

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

In the Matter of: **Validation Proceeding to Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure**	**Case No. 17CV18006** **OPINION AND ORDER, UPON REMAND, RE:** **Petitioner Multnomah County's Motion for Declaration of Validity under the First Amendment to the United States Constitution**

This matter comes before the court on remand from the Oregon Supreme Court, after reversal of this court's determination the campaign contribution limit governing county elections established by Multnomah County Code (MCC) §§ 5.200–203[1] violated Article I, Section 8 of the Oregon Constitution. *Multnomah County et al v. Mehrwein et al.*, 366 Or. 295, 313, 322 (2020). In reaching the decision in *Mehrwein*, Chief Justice Walters, writing for the Court, expressly rejected the reasoning and result of *Vannatta v. Keisling*, 324 Or. 514 (1997) which was controlling precedent for this court's analysis and decision, thus overruling a case which had guided the application of the framework established in *State v. Robertson*, 293 Or. 402, 412 (1982) for determining which laws are subject to a facial challenge under Article I, Section 8, of the Oregon Constitution. Having thereby concluded the Multnomah County campaign contribution limit was not facially invalid under Article I, Section 8, the *Mehrwein* court

[1] MCC §§ 5.200–203 were adopted by Ordinance No. 1243, implementing amendments to the Multnomah County Home Rule Charter containing campaign finance provisions based upon Multnomah County voters' approval of Measure 26-184 in the November 2016 election.

remanded to this court with instructions to develop a factual record and decide a question this court did not reach in its original decision: whether the Multnomah County campaign contribution limit is valid under the First Amendment to the United States Constitution. *Id.* at 332–33.

I. MCC § 5.201

In November 2016, Multnomah County (County) voters approved Measure 26-184, which incorporated campaign finance regulation into the Multnomah County Home Rule Charter, codified in Section 11.60. The Board of County Commissioners subsequently adopted that section in the same form in Ordinance No. 1243, now codified as MCC 5.200–206.

MCC § 5.201(B) provides that, during an election cycle, candidates can receive $500 from individuals and political committees, unlimited amounts from small donor committees (political committees that accept contributions of only $100 or less per individual per year), and no contributions from other entities. It is this campaign contribution limit that will be the subject of the court's constitutional analysis, *infra*.

II. Constitutional Standard

In the seminal election law case of *Buckley v. Valeo*, 424 U.S. 1, 20 (1976), the U.S. Supreme Court held that, although contribution limits implicate First Amendment rights, "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." Drawing upon *Buckley* and its progeny over the course of some fifty years, the U.S Supreme Court and lower courts reviewing campaign contribution limits for constitutional validity have imposed a less heightened degree of scrutiny, "akin to intermediate scrutiny." *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 385 (5th Cir. 2018).

Under this "intermediate scrutiny" standard, the government does not have to show that in enacting the limits on campaign contributions it has used the least restrictive means available. *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014). Instead, the reviewing court determines whether the government has demonstrated a "sufficiently important interest" in doing as it has, and also that it has used "means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotation omitted).

Additionally, the reviewing court typically affords the enacting government's determinations significant deference:

> [W]e have no scalpel to probe each possible contribution level. We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments, as legislators have particular expertise in matters related to the costs and nature of running for office. Thus, ordinarily we have deferred to the legislature's determination of such matters.

Randall v. Sorrell, 548 U.S. 230, 248 (2006) (internal citations and quotations omitted).

III. Analysis

a. Government interest

The U.S. Supreme Court has recognized one government interest to be "sufficiently important" to justify campaign contribution limits: deterring actual *quid pro quo* corruption or its appearance. *Thompson v. Hebdon*, 140 S.Ct. 348, 349 (2019); *see also McCutcheon v. Federal Election Comm'n*, 572 U.S. 185, 192 (2014). Although the quantum of evidence required to justify that interest is low, the government must offer more than "mere conjecture." *Thompson*, 140 S.Ct. at 349; *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092 (9th Cir. 2003).

Here, Petitioner Multnomah County and the Intervenor citizen parties have offered substantial evidence to support the County's important interest in deterring actual and apparent

quid pro quo corruption.

The U.S. Supreme Court has recognized that, though not dispositive, strong voter support for campaign finance reform "attest[s] to the perception" of corruption held by the voters. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 394 (2000); *see also Zimmerman*, 881 F.3d 378, 386 (5th Cir. 2018). Here, 88.57% of voters cast their ballots in favor of the County measure establishing a contribution limit. This large majority certainly attests to the wide-spread perception of corruption among the residents of Multnomah County engendered by unregulated campaign contributions in county elections

Additionally, the initial County Charter amendment was created and sent to the voters by a citizen-led Charter Review Committee, and the report prepared by that committee for the Board of Commissioners concluded that "[e]xcessive money in politics undermines our democratic institutions and confidence in government" and that "[w]ithout limits on the size of campaign contributions and independent expenditures, the wealthy and corporations have undue power to influence election and policy outcomes." Petition, Ex. 2, at 10–14.

Numerous declarations filed on behalf of the County and Intervenors further support the substantiality of the County's interest to combat actual and apparent corruption through the enactment of contribution limitations. Of particular relevance here is the sworn declaration of Diane Linn, in which she states:

> 1. I was elected to the Multnomah County Commission and served there from 1999 to 2007. I was elected as Multnomah County Chair and served in that position from 2001 to 2007.
>
> 2. When I ran for public office for two Multnomah County Commission positions, there were overtures from potential or actual donors that they expected access to me, if I were elected. Some made it clear that if I took a position on an issue in which they had an interest, they would base future support on my adherence to their position. I lost support from several large donors when I voted against their

> interests or took controversial positions.
>
> 3. When a company or major donor could give unlimited amounts, their expectations of how I should vote were, in some cases, made very clear to me. The larger the donor, in some cases, the more influence they expected to have. When sometimes I did not agree, I lost their future support.

Decl. Linn, at 1.

The evidence provided by the County and Intervenors is precisely the type of evidence found to be sufficient in *Shrink Missouri* and *Zimmerman*, among other cases, and is sufficient here to support Multnomah County's important government interest in deterring actual or apparent *quid pro quo* corruption through the enactment of a campaign contribution limitation.

b. Means Closely Drawn

Having determined, based upon the evidentiary record, that an important government interest exists to support Multnomah County's contribution limit, the remaining question for this court is whether that limit is "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *See Buckley*, 424 U.S. at 25. Aiding in analysis of this question, the U.S Supreme Court has identified four "danger signs" that may indicate contribution limits are not closely drawn and are thus at risk of "preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006). In the situation where the "danger signs" strongly indicate that such a risk exists, "courts, including appellate courts, must review the record independently and carefully with an eye toward assessing the statute's tailoring," by then assessing five factors set out in *Randall*. *Id.* at 249, 253.

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i. Four "Danger Signs"

In *Randall*, the Court reviewed the constitutionality of contribution limits imposed in Vermont. With a population of 621,000 in 2006, Vermont imposed state-wide contribution limits as follows:

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

548 U.S. 230, 238 (2006).

The Court identified four "danger signs" which courts now look to in assessing whether "contribution limits prevent candidates from amassing the resources necessary for effective [campaign] advocacy," such that they "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Id.* at 248. Those danger signs are: (1) contribution limits substantially lower than those previously upheld under U.S. Supreme Court precedent; (2) contribution limits that are substantially lower than comparable limits in other states; (3) contribution limits that do not allow political parties to give greater amounts than other contributors; and (4) contribution limits set per election cycle which do not reset between the primary and general elections. *See id.* at 248–52.

Turning to Multnomah County's contribution limit, the record evidence suggests the first *Randall* "danger sign" may be implicated, because the County's limit is lower than limits upheld by the Supreme Court in the past. As noted by the Oregon Supreme Court in *Mehrwein*, the County's 2-year $500 campaign contribution limit "is less than a third of the limit upheld in *Shrink Missouri*." 366 Or. 295, 328 (citing *Thompson*, 140 S.Ct. at 351). The County's limit is also effectively lower than Alaska's 1-year $500 limit that was of some concern to the U.S.

Supreme Court in *Thompson*. *Id.*

Offsetting this potential "danger sign" is that the County's limit only applies to its own elections, whereas the limits addressed in *Shrink Missouri* and *Thompson* applied state-wide. *See Shrink Missouri*, 528 U.S. 377, 381; *Thompson*, 140 S.Ct. at 349.

Regarding the second "danger sign," the court considers whether Multnomah County's limit is "substantially lower" than limits in other comparable jurisdictions.[2]

Census data provides that Multnomah County had an estimated population size in 2019 of approximately 812,000.[3] Additionally, the population sizes of each of the four Commissioner districts within the County are approximately 200,000.

The Intervenors provided numerous examples of other states, counties, and cities where comparable contribution limits have been established and have not been struck down. The Fifth Circuit Court of Appeals upheld a $350 contribution limit per election in the city of Austin, Texas, which in 2019 had a population of nearly one million. *See Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 387–88 (2018). The city of San Francisco established a contribution limit of $500 per election where the estimated 2019 population was approximately 881,000. *See* Petitioner's Memorandum on Remand, at 17; San Francisco Campaign and Governmental Conduct Code § 1.114(a). The City of San Diego, with an estimated 2019 population of 1,423,000, [4] established individual contribution limit of $500 per election for Council District

[2] Though population size is a relevant factor when comparing jurisdictions, the *Randall* Court noted that population size must also be considered with other factors, such as the positions to which the contribution limit applies. *See Randall*, 548 U.S. at 251–52. For example, state-wide contribution limits, such as those in *Thompson* and *Shrink Missouri*, restrict contributions for positions such as governor, a campaign for which may often be more costly than a campaign for county commissioner, even if the population size for a given state and county are roughly equal.
[3] *See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/multnomahcountyoregon,US/PST045219#PST045219.
[4] *See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/sandiegocitycalifornia,US/PST045219.

office candidates (adjusted for inflation, now $600[5]) and that limit was upheld against constitutional challenge. *See Thalheimer v. City of San Diego*, 2012 WL 177414, at *1 (S.D. Cal. 2012) (". . . the [$500] limit also appears to be comparable with the contribution limits in Los Angeles ($500/$1,000), Phoenix ($488), San Antonio ($500/$1,000), San Jose ($200/$500), Jacksonville ($500/$500), and San Francisco ($500/$500)."). The state of Colorado established an individual contribution limit of $200 per election for both chambers of its state legislature, where the estimated 2019 state population was approximately 5,758,000.[6] *See* Decl. Meek, Ex. 1, at 1. The state of Maine established an individual contribution limit of $400 per election for both chambers of its state legislature, where the estimated 2019 state population was approximately 1,344,000.[7] *See* Decl. Meek, Ex. 1, at 1. Ventura County in California established an individual contribution limit of $750 per election for county office, where the estimated 2019 county population was approximately 846,000.[8] *See* Reply Brief of the Citizen Parties, Ex. R3, at 2.

Additionally, the court considers the Alaska contribution limit reviewed in the *Thompson v. Hebdon* cases to be instructive here.[9] In its initial review, the Ninth Circuit Court of Appeals upheld the U.S. District Court's ruling that Alaska's state-wide $500 individual contribution limit per election—effectively $1,000 per election cycle and applying to candidates at all levels—was constitutional. 909 F.3d 1027, 1039 (2018). There the Ninth Circuit found:

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[5] *See* SAN DIEGO ETHICS COMMISSION, 2020 CANDIDATE MANUAL (2020), available at https://www.sandiego.gov/sites/default/files/candidatemanual_2020.pdf.
[6] *See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/CO,US/PST045219.
[7] *See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/ME,US/PST045219.
[8] *See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/venturacountycalifornia,US/PST045219; *see also* Ventura, Cal., Ordinance 4510, § 1268 (Apr. 25, 2017), available at https://www.fppc.ca.gov//content/dam/fppc/NS-Documents/TAD/Campaign%20Ordinances/Counties/R_Ventura.pdf.
[9] For reference, Alaska's estimated population in 2019 was approximately 731,000.*See* UNITED STATES CENSUS BUREAU, QUICKFACTS (July 1, 2019), https://www.census.gov/quickfacts/fact/table/AK,US/PST045219.

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

909 F.3d at 1037.

On appeal to the United States Supreme Court, the Court vacated the Ninth Circuit's judgement, and remanded for that court to consider the *Randall* factors in its analysis, which the Court of Appeals had declined to do in favor of its circuit precedent. *Thompson v. Hebdon*, 140 S.Ct. 348, 351 (2019). In its decision, the Supreme Court observed that several of the "danger signs" it had identified in *Randall* appeared present in Alaska's contribution limit. *See id.* at 350–51.

The Court noted, for example, that the Alaska limit was lower than limits upheld by the Supreme Court in the past, as well as lower than comparable limits in other States. *Id.* The Court also observed that, in comparison to the five other states with a contribution limit of $500 or less, Alaska's limit applied uniformly to all offices in the state, while the other states set higher limits for certain offices. *Id*. at 351. Additionally, the Court pointed to the lack of adjustment in Alaska's limit for inflation. Justice Ginsburg, while joining in the decision to remand, wrote in a statement her view that "Alaska's law does not exhibit certain features found troublesome in Vermont's law" in *Randall*.

Here, the County's $500 contribution limit is distinguishable from the features of concern to the Court in *Thompson*. The limit applies only at the County level and not to all state offices, it adjusts for inflation, and, as addressed below, it does not raise significant issue regarding restricting contributions by political parties.

Thus, the record evidence demonstrates that the County's $500 contribution limit is not an outlier, in that it is comparable to, rather than "substantially lower" than, comparable jurisdictions. Thus, the second *Randall* "danger sign" is not present regarding the County's limit.

The third *Randall* "danger sign" is a contribution limit that does not allow political parties to give greater amounts than other contributors. *See* 548 U.S. at 252. The *Randall* Court explained this "danger sign" implicated by the Vermont limit as follows:

> The Act applies its $200 to $400 limits—precisely the same limits it applies to an individual—to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, § 2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives.
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> * * *
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> We consequently agree with the District Court that the Act's contribution limits "would reduce the voice of political parties" in Vermont to a "whisper." 118 F.Supp.2d, at 487. And we count the special party-related harms that Act 64 threatens as a further factor weighing against the constitutional validity of the contribution limits.

Id. at 257, 259.

Here, the County's limit does not restrain what political parties can contribute to those parties' candidates. The limit applies only to Multnomah County public offices, which are elected on a nonpartisan basis. Nor does it impose any limit on what any individual or entity can contribute to a political party. The Declaration of Seth Woolley documents that the ORESTAR system does not show that Oregon political parties have contributed to candidates for Multnomah County office.

Additionally, the County's limit applies to a political committee, not a political party. A

party can create any number of political committees under Oregon law. For example, there are separate political committees for county-level parties, including what are labelled "Small Donor Committees" (SDCs), which can contribute an unlimited amount to any Multnomah County candidate provided the SDC does not accept more than $100 per individual contributor per year. *See* MCC §§ 5.201(B)(2), 5.200 (definition of small donor committee).

For those reasons, the court finds the third *Randall* "danger sign" is not implicated by the County's contribution limit.

Turning to the fourth and final *Randall* "danger sign," the record suggests some cause for potential risk attributable to the County's limit. The limit applies to a 2-year election cycle, which, when allocated across both a primary and general election, effectively halves the contribution allowable per election.

However, the record contains evidence that is a mitigating factor for this "danger sign": any County candidate who receives more than 50% of the vote in the primary election is, thereby, elected to office, and the general election for that office does not occur. The record demonstrates that in both 2018 and 2020, that structure resulted in the races for Multnomah County offices all being decided by the primary election.[10]

In *Randall*, addressing a much lower and state-wide contribution limit from Vermont, the Court found all four of the danger signs to be present and, as such, held the limit warranted the further scrutiny of the "five factors" pertaining to the limit's "tailoring" and "proportionality." *See* 548 U.S. at 249–253.

Here, the court finds the possible existence of only two of the Randall "danger signs," but

both are significantly mitigated in the context of the County's specific non-partisan approach to elections. The court therefore concludes, in consideration of all the relevant and binding legal analyses, that the County's contribution limit does not risk "preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 249.

In summary, the evidence presented demonstrates with regard to Multnomah County's contribution limit, there is a "sufficiently important interest" underlying its enactment, and also that the limit represents and appropriate means to accomplish that interest, "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25 (internal quotation omitted). Full consideration of the *Randall* "danger signs" does not support the conclusion that the County's contribution limit is too low to survive First Amendment scrutiny.

ii. Five *Randall* Factors

Based upon the findings and conclusions set out above, this court can render a judgement on the constitutionality of the County's contribution limit without considering the five factors set out by the *Randall* court to assess the limit's "tailoring, that is, toward assessing the proportionality of the restrictions." *Randall*, 548 U.S. at 249 (internal quotations omitted).

But the court recognizes its analysis of the record has identified two "danger signs" potentially implicated by the County's limit. For that reason, as well as to provide whatever guidance may come to these and other interested parties from completing the constitutional analysis, and finally, to provide the transparency important for judicial decisions regarding the legality of important public policies, the court will make an independent examination of the record and address the five *Randall* factors relating to the requisite tailoring and proportionality of campaign contribution limits.

The Court in *Randall* looked to five different factors which, taken together, led the court to declare Vermont's contribution limits violative of the First Amendment. Those considerations included: (1) whether the contribution limits would significantly restrict the amount of funding available for challengers to run competitive campaigns; (2) whether political parties must abide by exactly the same low contribution limits as other contributors; (3) whether volunteer services are contributions that count toward the limit; (4) whether the contribution limits are adjusted for inflation; and (5) whether any special justification warrants the limit.

Turning to the first factor, in *Buckley v. Valeo*, when addressing a federal $1,000 individual contribution limit, the Supreme Court noted:

> Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions. . . And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class.

424 U.S. 1, 31–32 (1976).

No evidence has been presented here to support a conclusion that the County's contribution limitation will limit a challenger's ability to run an effective campaign against an incumbent. That absence of evidence is especially significant where, as referenced in *Buckley* and as is the case here, the limit imposes an evenhanded restriction that applies "to all candidates regardless of their present occupations, ideological views, or party affiliations." *Id*.

Indeed, the County offers evidence of the contribution limit's evenhandedness in the form of the Declaration of Susheela Jayapal, a Multnomah County Commissioner, in which she describes her experience running in a contested election in 2018 against three other candidates. *See* Decl. Thomas, Ex. 8, at 1–2. She addressed the inexpensive or no-cost ways of effectively communicating with local voters, and concludes, "I know that I could raise the resources

necessary to run a competitive campaign for the Multnomah County Commission while complying with the County's contribution limits." *Id.*

The second *Randall* factor mirrors the third "danger sign" the *Randall* Court warned of, relating to entire political parties being limited by the same contribution limit as individuals. Based on this court's analysis above, this factor weighs in favor of the County's limit being tailored appropriately.

The third *Randall* factor relates to whether "volunteer services" are considered contributions and would, therefore, count toward and be restrained by the County's individual contribution limit.

The *Randall* Court explained its concern underlying this factor thusly:

> That combination, low limits and no exceptions, means that a gubernatorial campaign volunteer who makes four or five round trips driving across the State performing volunteer activities coordinated with the campaign can find that he or she is near, or has surpassed, the contribution limit. So too will a volunteer who offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during a campaign. Cf. Vt. Stat. Ann., Tit. 17, § 2809(d) (2002) (excluding expenditures for such activities only up to $100). Such supporters will have to keep careful track of all miles driven, postage supplied (500 stamps equal $200), pencils **2499 and pads used, and so forth. And any carelessness in this respect can prove costly, perhaps generating a headline, "Campaign laws violated," that works serious harm to the candidate.

Randall, 548 U.S. at 260.

Here, the County's "contribution" definition, incorporating by reference Oregon's statutory definition, addresses those precise concerns in two ways. First, Oregon's definition includes only "services other than personal services for which no compensation is asked or given." Second, the definition expressly excludes volunteers' travel costs, the use of their residences, and related food and beverage costs—among other things—and therefore, those are

not counted or restricted by the County's limit. *See* ORS 260.005(3); ORS 260.007.

Regarding the fourth factor, the County's contribution limit is automatically adjusted for inflation in every odd-numbered year. MCC § 5.205. Therefore, the County's limit falls on the constitutional side of the concerns implicated by this factor.

The final *Randall* factor looks at whether there are any special justifications to warrant the contribution limit. The County and Intervenors again point primarily to the record evidence supporting the recognized governmental interest in preventing actual or apparent corruption in Multnomah County: very strong voter support, the Charter Review Committee's reported findings, and the numerous declarations submitted from prior candidates for city, county, and state offices in Oregon, all which attest to the inequitable power of large or unlimited donations in elections.

Additionally, these parties point to two studies which the court gives some consideration and weight to, as they are certainly relevant to this fifth factor, though are not as specifically probative regarding the County's contribution limit.

First, the State Integrity Investigation of the Center for Public Integrity in November 2015 gave Oregon an "F" grade in systems to avoid government corruption, and further ranked Oregon 49th out of 50 states in control of "Political Financing" in order to combat corruption. *See* Lee van der Voo, *Oregon Gets F Grade in 2015 State Integrity Investigation*, The Center for Public Integrity (Nov. 9, 2015), https://publicintegrity.org/politics/state-politics/state-integrity-investigation/oregon-gets-f-grade-in-2015-state-integrity-investigation/#correction.

Second is a 2020 study by the National Institute on Money in State Politics, which found that candidates for the Oregon Legislature and Governor are more dependent upon large contributions than is the case in 46 of the other states. *See* Decl. Meek, Ex. 3, at 1.

In sum, unlike in *Randall*, where the shortcomings regarding all five factors collectively led the Court to conclude that Vermont's contribution limits were not appropriately tailored, nearly all the *Randall* factors weigh in favor of the County limit's appropriate tailoring. The court therefore finds that even if the County's limit was found to be suspect based upon consideration of the *Randall* "danger signs," a follow-on consideration of the *Randall* five factors compels the conclusion the limit is tailored in a way that survives First Amendment scrutiny.

IV. Conclusion

In accordance with the remand order of the Oregon Supreme Court, and having developed a factual record, reviewed the extensive written briefing of the parties and having heard oral argument, and made finding, all with respect to the issue on remand—the constitutionality under the First Amendment to the United States Constitution of the Multnomah County campaign contribution limit established pursuant to MCC §§ 5.200–203—the court hereby concludes the limit is appropriately consistent with the free speech rights guaranteed by First Amendment to the United States Constitution, and that the Multnomah County campaign contribution limit is, therefore, constitutional, lawful and valid.

It is so ordered.

DATED this 23rd day of August, 2021.

Signed: 8/23/2021 04:37 PM

Circuit Court Judge Eric J. Bloch

Authority Check Report

for VanNatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998)

Total	Federal	Bankruptcy	State	District	Bad Law
18	10	0	1	7	0

The Lincoln Club of Orange County v. City of Irvine, 274 F.3d 1262 (9th Cir. 2001)

9th Cir. | Federal Appellate | Case | Dec 20, 2001 | Cited: 12

.... 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending"). We have also construed Buckley as requiring different levels of constitutional scrutiny for expenditure and contribution limitations. See VanNatta v. Keisling, 151 F.3d 1215, 1220 (9th Cir. 1998) (stating...

Thompson v. Hebdon, 7 F.4th 811 (9th Cir. 2021)

9th Cir. | Federal Appellate | Case | Jul 30, 2021 | Cited: 2

.... at 359, 130 S.Ct. 876). Indeed, "[c]ampaign finance restrictions that pursue other objectives ... impermissibly inject the Government 'into the debate over who should govern.' " Id. (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett , 564 U.S. 721, 750, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)); see also VanNatta v. Keisling , 151 F.3d 1215, 1217 (9th Cir...

State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999)

AK | State Supreme | Case | Apr 16, 1999 | Cited: 43

...). 115 See O'Callaghan v. State, 914 P.2d at 1257 (discussing Wisconsin ex rel. LaFollette v. Democratic Party of United States, 93 Wis.2d 473, 287 N.W.2d 519 (1980), rev'd sub nom., Democratic Party of United States v. Wisconsin, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981)). 116 Vote Choice, 4 F.3d at 39. 117 See AS 15.13.070. 118 151 F.3d 1215 (9th Cir.1998...

Montana Right to Life Ass'n v. Eddleman, 306 F.3d 874 (9th Cir. 2002)

9th Cir. | Federal Appellate | Case | Sep 24, 2002 | Cited: 2

..., not to exceed $800; (e) for a candidate for any other public office, not to exceed $500." 2. MRLA's reliance on VanNatta v. Keisling, 151 F.3d 1215 (9th Cir.1998); Service Employees Int'l Union, 955 F.2d at 1312; and other Ninth Circuit cases interpreting Buckley fails to recognize the impact of the Supreme Court's superceding decision in Shrink Missouri...

Montana Right to Life Ass'n v. Eddleman, 343 F.3d 1085 (9th Cir. 2003)

9th Cir. | Federal Appellate | Case | Sep 11, 2003 | Cited: 48

..., not to exceed $2,000; (d) for a candidate for the state senate, not to exceed $800; (e) for a candidate for any other public office, not to exceed $500." 2. MRLA's reliance on VanNatta v. Keisling, 151 F.3d 1215 (9th Cir.1998); Service Employees Int'l Union, 955 F.2d at 1312; and other Ninth Circuit cases interpreting Buckley fails...

Thompson v. Hebdon, 909 F.3d 1027 (9th Cir. 2018)

9th Cir. | Federal Appellate | Case | Nov 27, 2018 | Cited: 7

... the Government 'into the debate over who should govern.' " Id. (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett , 564 U.S. 721, 750, 131 S.Ct. 2806, 180 L.Ed.2d 664 (2011)); see also VanNatta v. Keisling , 151 F.3d 1215, 1217 (9th Cir. 1998) (noting "the lack of support for any claim based on the right to a republican form of government"). That unqualified directive leaves...

Lincoln Club of Orange Cnty v. City of Irvine, Ca, 292 F.3d 934 (9th Cir. 2001)

9th Cir. | Federal Appellate | Case | Dec 20, 2001 | Cited: 8

... that restrictions on contributions require less compelling justification than restrictions on independent spending"). We have also construed Buckley as requiring different levels of constitutional scrutiny for expenditure and contribution limitations. See VanNatta v. Keisling, 151 F.3d 1215, 1220 (9th Cir.1998) (stating that "restrictions on contributions ... are subjected to less exacting...

Negative Treatment

Negative Citing References (3)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Disagreed With by	1. State v. Alaska Civil Liberties Union 978 P.2d 597 , Alaska GOVERNMENT - Elections. Non-group entities' speech could not permissibly be restricted by expenditure prohibition.	Apr. 16, 1999	Case		3 5 6 F.3d
Implied Overruling Recognized by	2. Montana Right to Life Ass'n v. Eddleman MOST NEGATIVE 343 F.3d 1085 , 9th Cir.(Mont.) GOVERNMENT - Elections. Limits on campaign contributions by individuals and PACs furthered important state interests.	Sep. 11, 2003	Case		1 5 6 F.3d

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March 18, 2025

Donice N. Smith
4601 Carnes Rd. Ste 8
#112
Roseburg, Oregon 97471-4600
Via email: donice4oregon@proton.me
Via email: dpbellard21@gmail.com

RE: Complaint for Quo Warranto

Ms. Smith:

I have reviewed the materials you have forwarded regarding a complalint of Quo Warranto in Marion County challenging Christine Kotek's authority to hold the Office of Governor for the State of Oregon. I conclude that there is not sufficient legal basis to file any action regarding your compliant. No further action will be taken by my office at this time.

Sincerely,

Paige E. Clarkson
Marion County District Attorney

is "reasonable."[2] *See* ORS 20.075 (setting forth factors to be considered in awarding attorney fees authorized by statute).

If contracting parties believe that defendants' model for attorney fee awards should control their contractual relationships, they are required, as *Carlson* indicates, to exhibit that intention through express terms in the contract or through other evidence.

I concur.

324 Or. 514

[514] **Fred VANNATTA, Jon A. Chandler, Guardian Ad Litem for David Michael Chandler, a minor, George Boehnke, Center to Protect Free Speech, Inc., an Oregon nonprofit corporation, Public Affairs, Inc., an Oregon corporation, and Greater Salem Area PAC, a political committee, Petitioners,**

v.

Phil KEISLING, in his capacity as Secretary of State, Respondent,

and

League of Women Voters and Oregon State Public Interest Research Group, Intervenors.

SC S42506.

Supreme Court of Oregon.

Argued and Submitted May 8, 1996.

Decided Feb. 6, 1997.

Potential political candidates, political action committee, and others brought challenge to constitutionality of measure providing for mandatory limits on contributions to state political campaigns, voluntary expenditures limits by political candidates during their campaigns and various other provisions relating to political contributions and expenditures. The Supreme Court, Gillette, J., held that: (1) measure's provisions that expressly limited or outright banned campaign contributions that may be given to or accepted by political candidate violated State Constitution's free speech guarantees; but (2) requirement that Secretary of State publish in voters pamphlet statement as to whether candidate agreed to limit his or her expenditures, whether candidate failed to abide by his or her promise to limit expenditures in earlier campaign, and provision that campaign contributions to candidates who do not agree to abide by campaign expenditure limitations were not entitled to tax credit did not violate State Constitution's free speech guarantees; and (3) plaintiffs were not entitled to attorney fees.

Measure voided in part.

1. Jury ⇐14(1)

Inquiry into constitutionality of statute was not one of the kinds of inquiry as to which jury trial was available in 1859, and thus measure relating to political contributions and expenditures in state political campaigns did not violate constitutional right to jury trial by granting Supreme Court original jurisdiction to pass on measure's constitutionality. Laws 1995, c. 1, § 23(1).

2. Constitutional Law ⇐90.1(1.2)

Expenditure by candidate, organization, committee, or individual, when designed to

2. One further drawback of conditioning the contractual right to an attorney fee in part on a trial court's assessment of the reasonableness of the parties' claims and defenses and the magnitude of each party's wins and losses is that the trial court may not find the relevant facts and explain why it reached its conclusion as to those issues. ORCP 68C(4)(c)(ii) provides in part that "[n]o findings of fact or conclusions of law shall be necessary" in denying or awarding an attorney fee. I commend the numerous trial courts that routinely support their fee awards with appropriate findings of fact and conclusions of law despite the policy embodied in that rule. If a trial court chooses to make no findings of fact or conclusions of law to support its award or denial of fees, the order, for many practical purposes, is insulated from appellate review. Defendants' model obviates that drawback by creating a contractual right to a reasonable fee for success on each claim, notwithstanding the potentially differing views of the parties and the court about the reasonableness of claims or defenses or the importance of specific wins and losses.

communicate to others the spender's preferred political choice, is "expression," for purposes of State Constitution's free speech guarantees, in essentially same way that candidate's personal appeal for votes is expression. Const. Art. 1, § 8.

See publication Words and Phrases for other judicial constructions and definitions.

3. Constitutional Law ⇐90.1(1.2)

Both campaign contributions and expenditures are forms of expression, for purposes of State Constitution's free speech guarantees. Const. Art. 1, § 8.

4. Constitutional Law ⇐90.1(1.2)

Bribe offered to political candidate is not expression protected by State Constitution's free speech guarantees. Const. Art. 1, § 8.

5. Constitutional Law ⇐90.1(1.2)

Gift of money to political candidate from corporation or union treasury, if made in violation of neutral laws regulating fiscal operations of corporations or unions, is not protected expressive activity under State Constitution's free speech guarantees. Const. Art. 1, § 8.

6. Constitutional Law ⇐90(1)

Expressions do not fall within or without scope of State Constitution's free speech guarantees based on particularity or intensity of their message. Const. Art. 1, § 8.

7. Constitutional Law ⇐90.1(1.2)
Elections ⇐317.2

Constitutional prohibition against candidates using campaign contributions from individuals who reside outside candidate's voting district did not so "occupy the field" as to eliminate protections afforded to individuals residing within voting district in question by State Constitution's free speech guarantees. Const. Art. 1, § 8; Art. 2, § 22.

8. Constitutional Law ⇐90(3)

Any particular forms of expression that are removed from State Constitution's free speech protections by subsequent constitutional amendment must be construed carefully to give effect to scope of later exception, but no more, lest salutory value of free speech guarantees unintentionally be lost. Const. Art. 1, § 8.

9. Constitutional Law ⇐26
Elections ⇐9

Constitutional provision that "Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections" does not usurp power of the People to make similar laws, and thus both Legislative Assembly and the People share power to make such laws. Const. Art. 2, § 8; Art. 4, § 1.

10. Constitutional Law ⇐14, 16

To interpret provision of State Constitution, Supreme Court considers its specific wording, case law surrounding it, and historical circumstances that led to its creation.

11. Constitutional Law ⇐13

When construing provisions of State Constitution, Supreme Court attempts to understand wording in light of the way that wording would have been understood and used by those who created provision.

12. Elections ⇐9

"Elections" as used in constitutional provision granting Legislative Assembly power to enact laws relating to regulating and conducting elections refers to those events immediately associated with act of selecting particular candidate or deciding whether to adopt or reject initiated or referred measure, however Assembly's power is not limited in time. Const. Art. 2, § 8.

See publication Words and Phrases for other judicial constructions and definitions.

13. Statutes ⇐194

Under doctrine of ejusdem generis, a nonspecific or general phrase appearing at the end of list of items in statute is to be read as referring only to other items of same kind.

14. Constitutional Law ⇐90.1(1.2)
Elections ⇐311

Constitutional provision giving Legislative Assembly power to enact laws to prohibit undue influence in elections did not empower legislature to regulate every kind of alleged undue influence arising out of politi-

cal contributions and expenditures during political campaign and thus did not remove measure relating to contribution and expenditure restrictions from protections afforded such activities by State Constitution's free speech guarantees. Const. Art. 1, § 8; Art. 2, § 8; Laws 1995, c. 1, § 23.

15. Constitutional Law ⇐90(1)

In reviewing statutory provision alleged to violate State Constitution's free speech guarantees, court first determines whether challenged provision is, on its face, written in terms directed to substance of any opinion or any subject of communication, then asks whether provision is directed at harm that may be prosecuted, and then subjects provision to vagueness review. Const. Art. 1, § 8.

16. Constitutional Law ⇐90(3)

Statute violates State Constitution's free speech guarantees if, on its face, it is written in terms directed to substance of any opinion or any subject of communication, unless it fits within historical exception or can be justified under "incompatibility" exception. Const. Art. 1, § 8.

17. Constitutional Law ⇐90.1(1)

Even if statute does not, by its terms, target a harm, court may infer harm from context, for purposes of analyzing whether statute violates State Constitution's free speech guarantees. Const. Art. 1, § 8.

18. Constitutional Law ⇐90.1(1.2)
Elections ⇐311

Measure's provisions that expressly limited or outright banned campaign contributions that may be given to or accepted by political candidate violated State Constitution's free speech guarantees. Const. Art. 1, § 8; Laws 1995, c. 1, §§ 3, 4, 16.

19. Constitutional Law ⇐90(3)

If expressive conduct is involved, legislative target of statute alleged to violate State Constitution's free speech guarantees must be clear and legally permissible subject of regulation or prohibition, and means chosen to deal with it must not spill over into interference with other expression. Const. Art. 1, § 8.

20. Constitutional Law ⇐90(3)

For statute to survive challenge under State Constitution's free speech guarantees, harm that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions proffered by those who support challenged legislation. Const. Art. 1, § 8.

21. Constitutional Law ⇐90.1(1.2)
Elections ⇐311

Requirement that Secretary of State publish in voters' pamphlet a statement as to whether political candidate has voluntarily agreed to limit his or her campaign expenditures did not violate State Constitution's free speech guarantees by impermissibly coercing candidates to agree to campaign spending limits. Const. Art. 1, § 8; Laws 1995, c. 1, § 13(1).

22. Constitutional Law ⇐90.1(1.2)
Elections ⇐311

Measure mandating that Secretary of State publish in voters' pamphlet a boldfaced notice that candidate for political office failed to abide by his or her promise to limit expenditures in earlier election punished candidates, if at all, only for misleading conduct, and thus did not violate State Constitution's free speech guarantees. Const. Art. 1, § 8; Laws 1995, c. 1, § 13(3).

23. Constitutional Law ⇐90.1(1)

Laws targeted at fraud constitute historical exception to State Constitution's free speech guarantees. Const. Art. 1, § 8.

24. Constitutional Law ⇐90.1(1.2)
Elections ⇐311
Taxation ⇐957

No taxpayer was entitled to tax credit for political contributions, and no candidate had constitutional right to receive contributions with tax credits, and thus removing tax credits for campaign contributions to candidates who did not agree to abide by campaign expenditure limitations did not implicate State Constitution's free speech guarantees. Const. Art. 1, § 8; Laws 1995, c. 1, § 19(4).

25. Statutes ⇐64(2)

Measure's provisions, imposing fines for violations of caps on campaign contributions and expenditures, defining various types of contributions, defining candidate's use of personal money and contributions, and prohibiting bundling of contributions to circumvent limitations were incomplete and incapable of being executed after underlying limitations were declared unconstitutional, and thus were void for lack of purpose. Laws 1995, c. 1, §§ 3, 4, 6, 11, 14, 15, 17, 23(2).

26. Constitutional Law ⇐82(8), 91
Elections ⇐311

Measure's section providing for publication in voters' pamphlet of candidate's agreement or refusal to abide by expenditure limitations did not violate constitutional prohibition against laws restraining state inhabitants from assembling together in peaceable manner to consult for their common good nor from instructing their representatives, despite contention that expenditure limitations indirectly limited ability of Oregonians to instruct their representatives by restricting how Oregonians learned of candidates' positions. Const. Art. 1, § 26; Laws 1995, c. 1, § 13.

27. Costs ⇐194.42

Political action committee and potential political candidates had individualized and different interests which they sought to vindicate by bringing challenges to various provisions of measure relating to political contributions and expenditures and thus court would not exercise its equitable power to award them attorney fees, notwithstanding existence of some public interest in preservation of individual liberties guaranteed in constitution. Const. Art. 1, § 8; Laws 1995, c. 1, § 1 et seq.

John DiLorenzo, Jr., of Hagen, Dye, Hirschy & DiLorenzo, P.C., Portland, argued the cause for petitioners. With him on the briefs were Michael E. Farnell and Aaron K. Stuckey and John R. Faust, Jr., of Schwabe, Williamson & Wyatt, Portland.

Robert M. Atkinson, Assistant Attorney General, Salem, argued the cause for respondent. With him on the briefs were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General.

Lawrence Wobbrock, Portland, argued the cause for intervenors. Daniel E. O'Leary and Timothy R. Volpert, of Davis Wright Tremaine, Portland, filed the brief.

Annette E. Talbott, Portland, filed a brief for amicus curiae Common Cause of Oregon.

[515]Leslie M. Roberts and Andrea R. Meyer, Portland, filed a brief for amici curiae The American Civil Liberties Union Foundation of Oregon, Inc. and the American Civil Liberties Union of Oregon, Inc., The Right to Privacy Political Action Committee, The Social Workers Political Action Committee, and the Oregon Faculties Political Action Committee.

Before CARSON, C.J., and GILLETTE, VAN HOOMISSEN, FADELEY, GRABER and DURHAM, JJ.*

[517]GILLETTE, Justice.

This case involves challenges, under various provisions of the Oregon Constitution, to portions of Oregon Laws 1995, chapter 1, ("Measure 9") (a set of statutes adopted by the voters through the initiative process).[1] The measure provides for mandatory limits on contributions to state political campaigns, as well as for voluntary expenditure limits by political candidates during their campaigns, and includes various other provisions relating to political contributions and expenditures. For the reasons set forth below, we hold that several of the constitutional challenges that are made against certain portions of Measure 9 are well taken. Accordingly, we hold that sections 3, 4, and 16 of Measure 9 violate Article I, section 8, of the Oregon Constitution, and are void. We further hold that sections 11, 14, 15, and 17 of Measure 9 are

* Unis, J., retired June 30, 1996, and did not participate in this decision. Fadeley, J., did not participate in the consideration or decision in this case.

1. The full text of Measure 9 is too extensive to be repeated here. It is printed at Oregon Laws 1995, chapter 1.

"incomplete and incapable of being executed" [2] and therefore void.

BACKGROUND

Petitioners [3] filed this petition pursuant to the original jurisdiction conferred on this court by section 23(1) of Measure 9.[4] They seek a declaration that Measure 9 is unconstitutional in its entirety. In the alternative, petitioners seek a declaration that sections 3, 4, 6, 8, 10, 11, 13, 14, 15, 16, 17, 19, and 20 violate various state constitutional protections and that, if the foregoing sections are held to be unconstitutional, sections 5, 7, 9, and 12 are void for lack of a purpose. Respondent is the Secretary of State of the State of Oregon. The League of Woman Voters (the League) and the Oregon |518 State Public Interest Research Group (OSPIRG) have been permitted to intervene in the proceeding. The American Civil Liberties Union (ACLU) and Common Cause of Oregon have filed *amicus curiae* briefs in the case.

[1] As a preliminary matter, the League and OSPIRG ask this court to remand this case to a circuit court for the purpose of developing a factual record through discovery or, in the alternative, to appoint a special master for that purpose. Both petitioners and respondent object, asserting that the issues before this court involve facial challenges to the constitutionality of Measure 9 and, thus, can be decided by this court without taking evidence. We agree with the latter view. Recourse to factfinding is unnecessary. We limit our exercise of the special and original jurisdiction conferred on this court by section 23(1) of Measure 9 to facial challenges asserted by the parties. We deny intervenors' motion to remand or to appoint a special master.[5]

As we turn to the merits, we believe that it is appropriate to insert a general admonition concerning the scope of this opinion. This is a case involving challenges to the constitutionality of a statutory enactment. Those challenges are aimed at the specific wording of various provisions of the enactment. The challenges assert that the wording in question violates one or another principle found in the Oregon Constitution. So understood, the challenges are quite limited.

THE MERITS

A. *Article I, section 8*

Petitioners (and *amicus* ACLU) assert that various sections of Measure 9 violate Article I, section 8, of the Oregon Constitution,[6] in that those sections limit or ban certain political campaign contributions and coerce political candidates to agree to limit their campaign expenditures. Petitioners rely on *Deras v. Myers*, 272 Or. 47, 535 P.2d 541 (1975), |519 as support for their position. In addition, they argue that this court's more recent Article I, section 8, jurisprudence requires the same outcome. The Secretary of State argues that *Deras* is distinguishable and not controlling. He also argues that sections 8 and 26 of Article II, of the Oregon Constitution, have removed campaign contributions and expenditures from the scope of

2. This standard is set out at section 23(2) of Measure 9, and is discussed more fully below, 324 Or. at 546, 931 P.2d at 789.

3. Petitioners variously are residents of the State of Oregon, a political action committee, a nonprofit corporation, and a for-profit corporation. Petitioner-residents include a registered lobbyist, a potential candidate for state office, and the guardian *ad litem* of a minor.

4. Section 23(1) provides:

> "Upon petition of any person, original jurisdiction is vested in the Supreme Court of this state to review and determine the constitutionality of this Act. The Supreme Court shall have sole and exclusive jurisdiction of proceedings initiated under this section."

5. Intervenors also argue derivatively that Article I, section 17, of the Oregon Constitution, ensures the right to a jury trial in civil cases, and that the measure's grant of original jurisdiction to this court violates that constitutional provision. That argument fails because the inquiry in the present case is not one of the kinds of inquiry as to which a jury trial was available in 1859. *See Molodyh v. Truck Insurance Exchange*, 304 Or. 290, 295, 744 P.2d 992 (1987) (stating rule).

6. Article I, section 8, of the Oregon Constitution, provides:

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

the protection provided by Article I, section 8. Because it is asserted by petitioners to be the cure for all of Measure 9's alleged ills, we address *Deras* first.

1. *Deras v. Myers*

In *Deras*, this court considered the constitutionality of two statutes that regulated and restricted campaign expenditures.[7] The then-Secretary of State, Myers, conceded that campaign expenditures are a form of expression and that the statutes restricted this expression. This court implicitly agreed. Starting from that premise, *viz.*, that the statutes restricted protected expression, this court then conducted a balancing analysis to determine whether the Secretary of State's asserted justifications for regulating that expression were sufficient to offset constitutional protections of free expression.[8] 272 Or. at 54–65, 535 P.2d 541. The court concluded that those asserted justifications—the allegedly destructive effects that uncontrolled expenditures of funds in political campaigns had on the legitimacy of the political process—were not sufficiently clear to justify the substantial restrictions that the challenged statutes placed on free expression. 272 Or. at 65, 535 P.2d 541.

|520 *Deras* provides little assistance in conducting an Article I, section 8, inquiry under this court's present jurisprudence. In *Deras*, this court assumed that campaign expenditures were protected expression and that the challenged statutes restricted that expression. Furthermore, *Deras* did not involve statutes that directly restricted campaign *contributions*. In this case, the parties again concede that campaign expenditures are protected expression, but the Secretary of State disputes both whether campaign contributions are protected expression and whether Measure 9 restricts campaign expenditures in any way that implicates constitutional protections. Therefore, we first need to analyze whether campaign contributions are, in fact, protected expression under Article I, section 8. If they are protected expression, we then must determine whether Measure 9 restricts them or campaign expenditures. To the extent (if any) that Measure 9 restricts protected expression, we then must determine whether such restrictions are permissible under Article I, section 8. We turn to that analysis.

2. *Are political contributions and expenditures protected forms of expression under Article I, section 8?*

[2] Both the Secretary of State and Common Cause concede that campaign *expenditures* constitute expression for Article I, section 8, purposes. We accept and agree with that proposition as a general matter. Expenditures by a candidate, an organization, a committee, or an individual, when designed to communicate to others the spender's preferred political choice, is expression in essentially the same way that a candidate's personal appeal for votes is expression. However, both the Secretary of State and Common Cause contend that campaign *contributions* are distinguishable from expenditures and do not constitute expression under Article I, section 8.

The Secretary of State acknowledges that, under the First Amendment, campaign contributions also are recognized as expression. *See Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (so holding under federal constitution). Nonetheless, he argues that the rationale supporting that conclusion is unpersuasive and should not be used by |521 this court in its Article I, section

7. One statute, *former* ORS 260.027, *repealed by* Or Laws 1975, ch 684, § 11, limited the amount of permissible campaign expenditures by political treasurers running political campaigns. The other, *former* ORS 260.154, *repealed by* Or Laws 1975, ch 684, § 11, prohibited any expenditures by either persons or political committees, on behalf of a candidate, without prior approval of the candidate. If approved, such expenditures were deemed to have been made by the candidate.

8. Foreshadowing this court's eventual rejection of a balancing approach to Article I, section 8, in its later jurisprudence, the *Deras* court applied a "balancing" test in that case, but indicated that such a test might not protect freedom of expression adequately under Article I, section 8. 272 Or. at 65, 535 P.2d 541. The court utilized a balancing approach because it determined that the restrictions on expression that were before it were unconstitutional, even under that less protective standard.

8, jurisprudence. In the Secretary of State's view, campaign contributions merely are gifts which in themselves are devoid of political expression and, as such, constitute conduct that permissibly may be regulated. As shall be explained, we agree that the approach taken by the United States Supreme Court in *Buckley* does not translate well into our Article I, section 8, jurisprudence. However, our agreement in that regard does not lead us in the direction espoused by the Secretary of State.

Although *Buckley* determined that both expenditures and contributions were forms of expression under the First Amendment, it also concluded that contributions were less central to the core of First Amendment expression and, therefore, could be subject to governmental restriction through a balancing of interests. 424 U.S. at 28–29, 96 S.Ct. at 639–40.[9] Under Oregon's Article I, section 8, jurisprudence, however, there is no basis for distinguishing between closely related forms of expression in the way that the United States Supreme Court does, solely on the basis of the extent to which a particular form of speech is thought by a court to be more or less "central" to the purposes of Article I, section 8.

Even if such distinctions based on the "centrality" of particular forms of expression could be made under Article I, section 8, we would not be persuaded that the reasoning in *Buckley* applied equally well to the protections provided by Article I, section 8. Two of the bases asserted in *Buckley* for finding that contributions are a less protected form of expression than are expenditures were the following assumptions about contributions: (i) although contributions may result in speech, that speech is by the candidate and not by the contributor; and (ii) contributions express only general support for a candidate and do not communicate the reasons for that support. 424 U.S. at 21, 96 S.Ct. at 635.

[2] Neither of those assumptions appears correct to us. In our view, a contribution is protected *as an expression by the contributor*, not because the contribution eventually may be used by a candidate to express a particular message. The money may never be used to promote a form of expression by the candidate; instead, it may (for example) be used to pay campaign staff or to meet other needs not tied to a particular message. However, the contribution, in and of itself, is *the contributor's expression of support for the candidate or cause*—an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put. Neither do we perceive any useful constitutional purpose to be served by purporting to gauge whether contributions constitute "general," rather than "specific" or "particularized," support for a candidate or measure.

[3–5] Under Oregon law, the sole remaining question is whether contributions to political campaigns and candidates also are a form of expression under Article I, section 8. For the reasons that follow, we conclude that many—probably most—are.[10]

In formulating our answer to the foregoing question, we have constantly kept before us the principle that elections ultimately are for the people, not the candidates. That is, elections are designed to permit the people free-

9. *Buckley* concluded that statutes restricting campaign contributions to as little as $1,000 per contributor did not violate the First Amendment. However, two recent federal circuit court cases have ruled that statutes limiting campaign contributions to as low as $100 did violate the First Amendment. *See Day v. Holahan*, 34 F.3d 1356 (8th Cir.1994), *cert. den.* — U.S. ——, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995); *Carver v. Nixon*, 72 F.3d 633 (8th Cir.1995), *cert. den.* — U.S. ——, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996) (both so holding).

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

ly to select those who temporarily will hold public office, as well as to permit the people to take the legislative power into their own hands to make policy decisions. Candidates and measures exist to seek the approval or permission of the voters, not the other way around. Indeed, because Oregon citizens have the constitutional right to assemble in a peaceable manner and [523]instruct their representatives (Article I, section 26), to "free and equal" elections (Article II, section 1), and to use the initiative and referendum (Article IV, section 1(2)), their rights to political expression would be secure, even if there were no Article I, section 8.

We further note that, where Article I, section 8, is concerned, it is a prohibition against "law[s] be[ing] passed" that have the effect of "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." If it can be shown that financial contributions and expenditures are "the free expression of opinion," laws limiting such activities run afoul of the constitutional protection. 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. This case involves a mixture of laws, some aimed at contributions and expenditures themselves and some aimed at ancillary questions such as disclosing whether a candidate voluntarily has agreed to limit his or her expenditures. As we shall see, those differences make a difference.

We think that it takes little imagination to see how many political contributions constitute expression. We assume, for example, that no one would deny the right of a citizen to purchase individually a newspaper ad that urges others to support a particular candidate or cause. And, if the individual can persuade enough neighbors and friends to join in the effort, the resulting spending power may produce much larger ads or television or radio commercials. No one, we take it, would gainsay the right of the individual to amplify his or her voice through collective buying power—gaining adherents for one's views is the essential purpose of political advocacy. It then follows ineluctably that the contribution of the collective "pot" thus collected is expression, just as the individual's ad was. Indeed, it does not even matter if the money goes directly into an ad created by the contributors themselves or, instead, the money goes to professionals [524]who create the ad for a fee. The outcome is the same—"expression," for the purposes of Article I, section 8.

Viewed in the foregoing way, expenditures and contributions can be better seen for what they are—not opposite poles, but closely related activities. But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar. Similarly, the law may prohibit certain forms of contributions such as giving bribes.

[6] The foregoing notwithstanding, Common Cause argues that expressions of generalized support for a candidate are not tied to any *particular* message and, thus, should not be recognized as expression under Article I, section 8. We disagree. Article I, section 8, does not make such fine distinctions. Expressions do not fall within or without the scope of Article I, section 8, based on the particularity or the intensity of their message.

In any event, the distinction that Common Cause attempts to make is illusory. An expression of generalized support *is* a particular message. If, instead of giving a contribution, a citizen stood on a street corner and announced, "I support candidate X," there would be no doubt that that message constituted an expression of general support for that candidate, as well as a more particular message: "X deserves your vote." From the perspective of the contributor, the contribution is the same kind of message as is the street corner announcement.

From the foregoing discussion, we conclude that both campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8.[11]

[525]The Secretary of State nevertheless argues that expression otherwise protected under Article I, section 8, is not protected in the context of political campaigns, due to what he views to be the countervailing effect of Article II, sections 8 and 22, of the Oregon Constitution. Previously, this court has not addressed the relationship between those sections and Article I, section 8. We turn to that issue.

I. *Article II, section 22*

[7] Article II, section 22, was passed by initiative as Measure 6 at the same election at which Measure 9 was adopted. It provides in part:

> "For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate * * *."

The Secretary of State argues that that constitutional amendment more specifically addresses the right of expression bestowed on individuals who seek to contribute to Oregon political campaigns than does Article I, section 8. Consequently, the Secretary of State asserts that Article II, section 22, "is preemptive" and that " 'it occupies the field' and defines campaign contribution rights under the Oregon Constitution."

Petitioners respond by pointing out that Article II, section 22, has been declared void by a federal district court. *See Vannatta v. Keisling,* 899 F.Supp. 488 (D.Or.1995) (so holding, declaring that Article II, section 22, violates the First Amendment; accompanying injunction bars Oregon's Secretary of State and Attorney General from "enforcing or attempting to enforce" Article II, section 22).[12] Petitioners argue that the effect of that federal court decision is that Article II, section 22, no longer has any legal existence and, therefore, cannot be relied on to define the scope of Article I, section 8. Petitioners' argument raises an interesting question of federalism, *viz.,* whether a federal district court's declaration [526]that a state's constitutional provision violates the United States Constitution and, therefore, is void prevents the state's courts from relying on that provision later to decide a state constitutional matter. However, given the present posture of the federal district court decision, we do not find it necessary to resolve that issue in this case.

Of course, federal district courts are empowered to decide whether a state law violates the United States Constitution. The decision of the federal district court in *Vannatta* is illustrative of that process. However, that decision currently is on appeal to the United States Court of Appeals for the Ninth Circuit. Therefore, no final judgment has been rendered in that case. The question of the constitutionality of Article II, section 22, under the First Amendment, remains unresolved. Therefore, we consider the merits of the Secretary of State's argument.

By its terms, Article II, section 22, prohibits its candidates from using campaign contributions from individuals who reside outside the candidate's voting district. The Secretary of State argues that, by using the term "individuals," the provision prohibits not only the use of contributions from citizens outside a voting district, but also the use of contributions from all corporations, businesses, labor unions, and political action committees (PACs), whether or not those entities reside inside a voting district.

11. Although not analyzing the point in any detail, this court recognized as much in *In re Fadeley,* 310 Or. 548, 564, 802 P.2d 31 (1990), when the court stated: "The lawyer has an absolute constitutional right to support whom he or she pleases, both with money and with a vote." Although speaking in terms of lawyers, the court was asserting the rights of citizens, generally. We also note that we are unaware of any state court that has found campaign contributions *not* to be expression for purposes of its free-speech analysis.

12. Issues concerning the constitutionality of Measure 9 under the First Amendment also were raised in that case. The federal court abstained from deciding those issues until after this court first considered them.

On its face, it is unclear whether the provision prohibits the use of contributions from corporations, businesses, labor unions, and PACs and, if so, whether it restricts use of contributions only from those entities residing outside a candidate's voting district or, instead, flatly prohibits use of contributions from all such entities. We need not resolve those questions for the purposes of this case. *Assuming* that Article II, section 22, prohibits the use of political contributions from anyone except individual citizens residing inside a candidate's voting district, the Secretary of State's argument that the provision preempts *any* protections afforded by Article I, section 8, in this context still is overinclusive, and fails.

The Secretary of State argues that "[t]he general guarantees of the free speech clause cannot be said to confer [527]rights that the specific provisions of Article II, section 22 restrict." Even assuming that premise is correct, the reach of the Secretary of State's theory exceeds its grasp. Article II, section 22, does not restrict candidates from using campaign contributions of individuals who reside *inside* the candidate's voting district *in any way*. Therefore, Article II, section 22, cannot be said to negate whatever protections are afforded to individual citizens who reside inside the relevant district under Article I, section 8.

[8] The Secretary of State appears to argue nonetheless that, although Article II, section 22, does not address expressly all forms of political contributions restricted by Measure 9, it still preempts the entire field of campaign contributions. We disagree. Article I, section 8, has protected expression in the most sweeping terms since its enactment in 1859. *See, e.g., State v. Stoneman*, 323 Or. 536, 541, 920 P.2d 535 (1996) (stating that the sweep of Article I, section 8, is broad and that it "extends not only to written and spoken communications, but also to verbal and nonverbal expressions"). Any particular forms of expression that have been removed from that protection by a subsequent constitutional amendment must be construed carefully to give effect to the scope of the later exception, but no more, lest the salutary value of Article I, section 8, unintentionally be lost. Even construing Article II, section 22, to the broadest extent that its wording will bear, we conclude that it does not eliminate whatever protection Article I, section 8, otherwise may afford to campaign contributions that are made by individuals residing inside the voting district in question.[13] Because Measure 9 limits, *inter alia*, contributions made by individuals residing inside the districts to the candidates who are running in those districts, those restrictions, if they fall within the scope of Article I, section 8, cannot be saved by Article II, section 22. We turn to the other section of Article II on which the Secretary of State relies.

[528]II. *Article II, section 8*

The Secretary of State also argues that Article II, section 8, removes the contribution and expenditure restrictions imposed by Measure 9 from any protection under Article I, section 8. Article II, section 8, provides:

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

The Secretary of State construes the foregoing wording to allow the legislature, or the people acting through the initiative process, to enact laws that restrict campaign contributions and expenditures. Petitioners respond that the provision empowers only the legislature, not the people, to enact laws and that, in any case, it applies only to elections, not to campaigns. We address each of those theories in turn.

[9] Petitioners' argument that the constitution empowers only the Legislative Assembly, and not the people, to enact laws relating to elections is not well taken. The reference in Article II, section 8, to the "Legislative Assembly" must be read *in pari materia*

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

with the later-adopted constitutional provision that created Oregon's initiative and referendum process. Article IV, section 1, of the Oregon Constitution, now provides: "The legislative power of the state, *except for the initiative and referendum powers reserved to the people,* is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives." (Emphasis added.) The emphasized portion of Article IV, section 1, was added to that section by a vote of the people on June 2, 1902.[14] Since its adoption, the people have shared with the Legislative Assembly the power to enact laws. Petitioners' first argument fails.

We turn to petitioners' second argument, *viz.*, that Article II, section 8, is addressed to "elections," not to "political campaigns," and that the two concepts are different. For [529]the reasons that follow, we agree with the thrust of this argument.

[10] To interpret a provision of the Oregon Constitution, this court considers "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce,* 314 Or. 411, 415–16, 840 P.2d 65 (1992). We begin our inquiry with a review of the wording of Article II, section 8.

Unlike the recently created Article II, section 22, Article II, section 8, has been in the Oregon Constitution since statehood. It is directed to the legislature and requires that body to "enact laws" that will "support the privilege of free suffrage" in two ways: (i) by "prescribing the manner of regulating, and conducting elections"; and (ii) by "prohibiting * * * all undue influence therein." The first clause may be broken down further into two parts: The legislature is to (1) prescribe the manner of regulating elections; and (2) prescribe the manner of conducting elections. That is, both parts refer to "elections." As a matter of grammar, the word "therein" in the second clause also refers to the topic mentioned earlier, *viz.*, "elections." Thus, the second clause properly may be restated as referring to "all undue influence [in elections]." There is no specific mention in Article II, section 8, of the word "campaigns." Yet, at the time that Article II, section 8, was adopted in Oregon in 1859, the behavior that we now think of as political campaigns was commonplace.[15]

The Secretary of State would have us construe "elections" to include *all* activities that occur during political *campaigns.* But the two concepts do not necessarily overlap so completely. A present day dictionary defines "election" as "the act or process of choosing a person for office, position, or membership by voting." *Webster's Third New Int'l Dictionary* at 731 (unabridged 1993). "Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." [530]*Id.* at 322. The parties have gone to considerable effort to persuade us either that the two concepts are the same or that they are completely distinct.

If one were to utilize the modern definition of "election" as a "process," there would be room for the Secretary of State's argument for a sweeping interpretation of the word "elections" in Article II, section 8, because the "process" contemplated by the section could be deemed to be the entire electoral adventure, from the announcement of candidacy through the canvassing of election returns. However, the constitutional provision that we construe here was proposed in 1857, not in 1996. A dictionary relevant to that time gives a more limited definition of the word "election": "The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands or viva voce[.]" *Webster's American Dictionary of the English Language* (1828).

The dictionary on which we rely has no definition of "campaign" that corresponds to the present-day use of that word as a de-

14. The quoted text is part of the present wording of Article IV, section 1, and was not part of the original provision. However, similar wording to the same effect was present in the original provision.

15. For instance, at the level of presidential elections, widespread campaigning dates back at least as far as 1824 and the Andrew Jackson era. Roger A. Fischer, *Tippecanoe and Trinkets Too* vii–viii (1988).

scription of the effort to obtain public office or to obtain the passage of an initiated or referred measure. The concept of that time closest to what we now term "campaigning" was "electioneering," which Noah Webster defined as "[t]he arts or practices used for securing the choice of one to office." *Webster's American Dictionary of the English Language* (1828). It thus appears that, whatever the degree of their overlap today, the ideas of "electioneering" and "elections" were somewhat distinct at the pertinent time, *viz.*, at the time that the Oregon Constitution was created.

[11] Our precedents make it clear that, when construing provisions of our constitution, we attempt to understand the wording in the light of the way that wording would have been understood and used by those who created the provision. *See, e.g., State v. Kessler*, 289 Or. 359, 368–69, 614 P.2d 94 (1980) (explicating that the term "arms" in the phrase, "[t]he people shall have the right to bear arms for the defence [*sic*] of themselves" in Article I, section 27, of the Oregon Constitution, must be construed in the light of the kind of weapons carried for personal protection at the time of the creation of the Oregon Constitution). So it is in the present case. To those [531] who created the Oregon Constitution, "elections" were a relatively narrowly defined concept.

[12] It thus appears to us that, in order to keep faith with the ideas imbedded in Article II, section 8, we should construe "elections" to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure. We do not suggest, by our use of the phrase "immediately associated with," that the legislature's power is limited in time—a bribe to vote a particular way that was given months before an election still would appear to fall within the ambit of Article II, section 8. But we do suggest that, given the relevant historical meaning of the word used, the legislature's mandate is a confined one.

This brings us back to our discussion of the wording that actually appears in the constitutional provision. The focus of section 8 is on "free suffrage"—a holdover from the fascination with the idea of an expanding electorate that dominated political discussion in the first half of the nineteenth century. As we have explained, section 8 specifically authorizes laws that support free suffrage in three ways: (1) by prescribing the manner in which elections will be regulated; (2) by prescribing the manner in which elections will be conducted; and (3) by prohibiting "all undue influence therein." As we read them, each of those three different ways of supporting free suffrage has a different scope, and the differences matter.

The direction to enact laws prescribing the manner in which elections will be *regulated* appears to speak to laws that establish what offices will be elective, who will be eligible to run for and serve in them, when and how such persons must make their candidacy official, who will be eligible to vote in elections for those offices, and the like. In addition, the term "regulating" appears to encompass the question of who generally will be eligible to vote, what the qualifications for that privilege will be, how one establishes eligibility, and the like. Finally, the term appears to authorize the legislature to designate public officials to oversee the elections process.

[532] The direction to enact laws prescribing the manner of *conducting* elections, by contrast, appears to be concerned with the mechanics of the elections themselves, *i.e.*, with questions of where and how many polling places there will be, how they shall be operated, who may be present in them to ensure their proper operation, and the like.

The foregoing explication fits readily with the examination of the final provision of Article II, section 8, which calls for laws that "prohibit * * * all undue influence therein, from power, bribery, tumult, and other improper conduct." As we already have explained, "therein" refers to "elections." Thus, the legislature is directed to enact laws prohibiting all "undue influence" in elections from the sources identified in the constitutional text.

Given our reading of the term "elections," together with the scope of the concepts of "regulating" and "conducting" in Article II, section 8, the only way in which the Secre-

tary of State's argument may prevail is if the concepts of "undue influence" and "other improper conduct," as used in Article II, section 8, are more expansive than the other two concepts. We think, however, that, when the phrase, "undue influence * * * from * * * other improper conduct," is read in the context of the other words and phrases of which it is a part, it will not support that reading.

The clause directing the legislature to prohibit all undue influence in elections specifically enumerates the sources of influence that it considers to be "undue": "power, bribery, tumult, and other improper conduct." As we understand them, each of the first three enumerated examples is concerned specifically with the act of voting itself. "Power" appears to be a reference to the possibility that persons might, by a show of force, either attempt to prevent an election from occurring or coerce a particular outcome. *See Webster's American Dictionary of the English Language* (1828) (defining "power" as, *inter alia*, "[v]iolence; force; compulsion"). "Bribery" appears to be a reference to someone actually paying a voter to vote in a particular way. And "tumult" again is a reference to the kind of unruly or riotous conduct at or near the polling place that would have the actual effect of hindering or preventing the voting process. Thus, all three |533 specific examples in the clause speak to actual interference in the act of voting itself. None is as broad in scope as either the concepts of "regulating" or "conducting," and both of those concepts in turn speak to a narrow historical concept of "elections."

[13] Given the scope of the three specific examples in the clause, it becomes clear why the Secretary of State's expansive reading of the last, unspecific phrase, "other improper conduct," probably is not the appropriate one. Under the doctrine of *ejusdem generis*, a nonspecific or general phrase that appears at the end of a list of items in a statute is to be read as referring only to other items of the same kind. *See, e.g., State v. K.P.*, 324 Or. 1, 11 n. 6, 921 P.2d 380 (1996) (illustrating doctrine). Therefore, because the first three listed items in the clause all appear to refer to conduct that interferes with the the act of voting itself, rather than with the far broader concept of political campaigning, the last phrase also should be read as being confined to that more narrow scope. Ordinary campaign contributions and expenditures do not constitute "undue influence" under any one of the specified sources of undue influence. The Secretary of State's contrary argument is not well taken.

In summary, we are of the view that, based solely on the wording of the constitutional provision itself, the reading that the Secretary of State wishes to give to it appears to be incorrect. However, we have, pursuant to the process described in *Priest*, examined the historical circumstances that led to the creation of the constitutional provision, in order to determine whether there is something in the background of the provision that calls for a revision of our preliminary reading of it.

The historical context in which Article II, section 8, was adopted is interesting, but does not alter our tentative view arrived at on the basis of text alone. That provision derives from a similar provision in the Connecticut Constitution of 1818.[16] *See* W.C. Palmer, *The Sources of the Oregon* |534 *Constitution*, 5 Or.L.Rev. 200, 203 (1926) (so asserting); Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 470 (1926) (relying on Palmer).[17] The Connecticut provision empowered its legislature to enact laws "prescribing the manner of regulating and conducting *meetings of the*

16. Article 6, section 6, of Connecticut's 1818 Constitution provided:

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

The identical provision appears as Article 6, section 4, of the present Connecticut Constitution.

17. The majority of Oregon's original constitution derives from the Indiana Constitution. *See* Palmer (tabulating the number of provisions to have derived from other state constitutions). Article II, section 8, is the only provision in Oregon's original constitution that is derived from the Connecticut Constitution.

electors." (Emphasis added.) That provision expressly limited its scope to such meetings.

The fact that Oregon's provision does not limit its scope expressly to the meeting of electors but, instead, uses the term, "elections," arguably supports either of two different conclusions. On the one hand, it could indicate that the Oregon provision was intended to extend further than the Connecticut provision. On the other hand, the framers of the Oregon Constitution may have regarded the terms, "meetings of the electors" and "elections," as synonymous. But, because we already have assumed a broader reading in our initial discussion of the text, the answer to this issue is irrelevant. None of the clauses of the provision may be read so broadly as to sweep within their scope the acts of contributing to or making expenditures in political campaigns. We have found nothing in the available history of the 1818 Connecticut Constitution that explains what its framers may have had in mind by the use of the term "undue influence," followed by the list of examples that Oregon later adopted. It follows that nothing in our review of the history of Article II, section 8, alters our preliminary reading of that provision.

The context of the other sections in Article II of the Oregon Constitution also supports our conclusion. At statehood, the other sections in Article II dealt almost exclusively 535with the rights and qualifications for electors,[18] the qualifications for elected officers,[19] or the time, place, and manner of holding elections.[20] None of those sections spoke to questions of campaigns beyond disqualifying certain *persons* from eligibility to hold office. None spoke to issues of campaign finances at all. When read in context, it is clear that section 8 was not in its focus or scope a radical departure from the sections that surrounded it. Instead, it was—and is—a constitutional directive that laws be enacted to facilitate the other themes established by Article II.

Finally, previous case law does not alter our preliminary conclusion. This court never has attempted to construe the scope and meaning of Article II, section 8, with any precision.[21] Neither are we aware of any Connecticut Supreme Court cases that interpreted that state's analogous provision prior to the adoption of the Oregon provision. *See Priest,* 314 Or. at 418, 840 P.2d 65 (explaining relevance of another state's supreme 536court case law that predated the adoption of the Oregon Constitution).

18. For instance, Article II, section 2, set out age, residence, and registration qualifications for those privileged to vote; section 3 removed the voting privilege from those convicted of certain crimes; sections 4 and 5 prevented seamen, marines, and United States officials from gaining or losing the privilege to vote based on postings in or out of Oregon; and section 13 protected electors from arrest while going to, coming from, or at the polling place or from being required to perform militia duties on the day of an election.

19. For instance, section 7 prohibited persons from holding public office who had offered bribes or threats to procure election—activities analogous to the references to "power [or] bribery" in section 8; section 9 prohibited persons who had fought in a duel from being elected; section 10 prohibited persons who held lucrative office through the federal or state government from being elected to the state legislature; and section 11 prohibited persons from assuming positions of control over public monies until that person had accounted for any existing financial debt.

20. For instance, section 1 required that all elections be free and equal; section 14 regulated the time for holding elections; section 15 provided that voting should be "viva voce, until the Legislative Assembly shall otherwise direct"; and section 17 designated the place for holding elections.

21. This court has alluded to the substantive scope of Article II, section 8, in only three cases. *See In re Fadeley,* 310 Or. 548, 558, 802 P.2d 31 (1990) (concluding that Article II, section 8, did not prevent the judicial branch from regulating elections of judges); *Libertarian Party of Oregon v. Roberts,* 305 Or. 238, 247, 750 P.2d 1147 (1988) (briefly referring to Article II, section 8, in comparing several constitutional provisions); *City of Eugene v. Roberts,* 305 Or. 641, 649 n. 7, 756 P.2d 630 (1988) (mentioning in a footnote that Article II, section 8, "entrusts responsibility for prescribing the manner or regulating and conducting elections to the Legislative Assembly"). *See also White v. Commissioners,* 13 Or. 317, 327, 10 P. 484 (1886) (Thayer, J., dissenting) (discussing the power of the legislature to enact laws in support of free suffrage).

[14] Having considered the text and context of Article II, section 8, the historical circumstances surrounding its adoption, and this court's case law that has interpreted it, we conclude that Article II, section 8, does not empower the legislature to regulate every kind of alleged "undue" influence arising out of political contributions and expenditures during political campaigns. That provision does not remove the contribution and expenditure restrictions in Measure 9 from whatever protections are afforded to such activities by Article I, section 8. We turn now to that provision.

3. *Article I, section 8, analysis*

[15, 16] In considering a challenge under Article I, section 8, we first determine whether the challenged provision is "on its face 'written in terms directed to the substance of any "opinion" or any "subject" of communication.'" *State v. Stoneman*, 323 Or. 536, 543, 920 P.2d 535 (1996) (quoting *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569 (1982)). This is the so-called "first level" of inquiry. If so written, the statute is invalid, unless it fits within an historical exception or can be justified under the "incompatibility" exception to Article I, section 8. *Stoneman*, 323 Or. at 543–44, 920 P.2d 535.

[17] If the statute is not written in terms that are directed to the substance of an opinion or subject of communication, but instead is written in terms that are directed at a harm that may be proscribed, then a second level of inquiry follows. *Id.* at 543, 920 P.2d 535. Even when the statute does not, by its terms, target a harm, a court may infer the harm from context. *Id.* at 546, 920 P.2d 535; *Moser v. Frohnmayer*, 315 Or. 372, 379, 845 P.2d 1284 (1993). If the statute targets that harm, then the statute may survive Article I, section 8, scrutiny, even though the statute expressly prohibits expression used to achieve that harm, provided that the statute survives an overbreadth analysis. *Stoneman*, 323 Or. at 543, 920 P.2d 535; *State v. Plowman*, 314 Or. 157, 164, 838 P.2d 558 (1992).

Finally, if the statute does not prohibit expression, then the statute is subject only to a vagueness challenge. *Stoneman*, 323 Or. at 543, 920 P.2d 535. With the foregoing construct in [537] mind, we turn to the specific provisions of Measure 9 that are at issue in this case.

I. *Contribution Provisions*

[18] Sections 3(1)(a) and (b) of Measure 9 provide that "a person or political committee *shall not contribute an aggregate amount exceeding* [$500 to a candidate or the principal campaign committee of a candidate running for statewide office, and $100 to a candidate or the principal campaign committee of a candidate running for State Senator or Representative]." (Emphasis added.) [22]

Section 4 provides—with certain exceptions—that "[a] candidate or the principal campaign committee of a candidate * * * *shall not make a contribution* to [other candidates, principal campaign committees or other political committees]." (Emphasis added.)

Section 16 provides—with certain exceptions—that "[a] corporation, professional corporation, nonprofit corporation or labor organization *shall not make a contribution* * * * to any candidate or political committee." (Emphasis added.) Section 16 provides that "[a] candidate or the principal campaign committee of a candidate *shall not accept a contribution* prohibited by this section." (Emphasis added.)

Petitioners argue that the contribution provisions in Measure 9 are targeted at the content of speech, *i.e.*, political support for a candidate, and thereby fall under the first level of Article I, section 8, scrutiny. They argue, further, that there is no historical or incompatibility exception to save those provisions. We agree.

22. In addition, section 3(2) limits the amount that minors can contribute to a "single election" to $25; section 3(3) limits—with certain exceptions—the amount that an individual can contribute in any one calendar year to any one political committee to $100; section 3(4) limits the amounts that a political committee of a political party may contribute to various state offices; and section 3(5) prohibits candidates, principal campaign committees, or other political committees from accepting contributions in excess of the limits in section 3.

All the listed provisions of Measure 9 either expressly limit, or ban outright, campaign contributions that may be given to or that may be accepted by a candidate. By
538 their terms, those provisions are targeted at protected speech.

The Secretary of State does not argue for, nor are we aware of, any historical exception that removes those restrictions on expression from the protection of Article I, section 8. At the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions.[23] Neither have we found any indication that, at the time of statehood, the possibility of excessive campaign contributions was considered a threat to the democratic process. No historical exception applies.

It also is clear that the provisions of Measure 9 do not specify in their operative texts any forbidden harms that the restrictions are designed to address. Nonetheless, Common Cause argues that the contribution provisions are targeted at proscribing a particular harm and that the harm can be inferred.

Recently, in *Stoneman*, this court had occasion to infer the harm that a criminal statute was designed to address. The criminal statute at issue in *Stoneman* made it a crime to pay to see actual or simulated reproductions of sexually explicit conduct by a person under the age of 18. We concluded that the statute was directed at the prevention of child abuse and that the restriction of otherwise protected expressive conduct did not violate Article I, section 8, because the statute was targeted not at the content of speech, but rather at the harmful effects necessarily generated by the acts that created that speech. 323 Or. at 546–47, 920 P.2d 535. Of paramount importance to that holding was the fact that child abuse is a harm that properly is subject to government proscription and that such abuse *necessarily* had to occur in order to produce the expressive conduct in question. Neither of those criteria is present in this case.

[19] 539 Common Cause argues that the harm targeted by the contribution limitations is the existence of undue influence in the political process, or at least the appearance thereof. But it is not sufficient to select a phenomenon and label it as a "harm." Under Article I, section 8, the harm must be one that the legislature has a right to restrict or prohibit. *See, e.g., Stoneman*, 323 Or. at 546–47, 920 P.2d 535 (illustrating what is required). We do not say that *all* influence obtained by contributions and expenditures is immune from permissibly being regulated or prohibited as harmful. But, where expressive conduct is involved, the legislative target must be clear and a legally permissible subject of regulation or prohibition, and the means chosen to deal with it must not spill over into interference with other expression. *See, e.g., City of Hillsboro v. Purcell*, 306 Or. 547, 761 P.2d 510 (1988) (invaliding city ordinance that forbade all door-to-door solicitations as overbroad).

[20] Common Cause cites numerous studies as support for its position that large campaign contributions *can* create undue influence over the political process. But those studies, like the arguments in favor of Measure 9 in the Voters' Pamphlet, only establish that there is a debate in society over whether and to what extent such contributions indeed cause such a harm. As *Purcell* and *Stoneman* make clear, apart from the legal question whether Article I, section 8, prohibits enactment of the law as drafted for any purpose, the "harm" that legislation aims to avoid must be identifiable from legislation itself, not from social debate and competing studies and opinions. Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way.

We note, finally, that, if the purpose of the limitation simply is to improve the "tone" of campaigns, as Common Cause seems at bot-

23. The earliest indication that we have found of Oregon's distrust of the role that money plays in the political process is the 1909 "Corrupt Practice Act Governing Elections." That Act prohibited certain corporations (such as banks and public utilities) from contributing to candidates. Title XXVII, ch. XII, § 3510. It also limited candidate expenditures to 15 percent of the annual salary for the elective office. *Id.* at § 3486.

tom to be arguing, the constitutional answer must be even clearer: The right to speak, write, or print freely on any subject whatever cannot be limited whenever it may be said that elimination of a particular form of expression might make the electorate feel more optimistic about the integrity of the political process. A contrary result would make illusory the protections afforded by Article I, section 8.

|540This is not a case like *Stoneman*, where a form of expression could be limited in order to protect those children who necessarily were harmed by the act of creating that expression. Instead, we are asked to hold that legislation may forbid certain expression on the grounds that the intensity with which it is delivered will give it an unfair ability to succeed. Put baldly, Measure 9 proposes to foreclose certain expression because it *works*. We conclude that the contribution limitations imposed by Measure 9 are targeted at protected speech. We further conclude that success, without more, cannot be a proscribable harm. Therefore, those provisions can be saved only if there is an historical precedent for them or if those provisions proscribe a form of expression incompatible with political campaigns.

Both the Secretary of State and Common Cause argue that an "incompatibility" exception applies to laws regulating campaign finance and should remove the provisions of Measure 9 from the protection of Article I, section 8.[24] The Secretary reasons that the laws at issue in this case are analogous to those found constitutional by way of the incompatibility exception in *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990). We disagree.

The Secretary of State asserts that *Fadeley* was based on this court's "profound" concern with "the stake of the public in a judiciary that is both honest in fact and honest in appearance." 310 Or. at 563, 802 P.2d 31. The Secretary of State argues that the same justification should apply to the attempt of Measure 9 to ensure that nonjudicial elected officers are both honest in fact and in appearance. We disagree with the Secretary of State's attempt to treat *Fadeley* as a parallel to the present one.

In both *Fadeley* and the leading incompatibility case, *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983), the |541court stressed that a professional's speech must actually vitiate the proper performance of the particular professional's official function, under the facts of the specific case. *See Fadeley*, 310 Or. at 563–64, 802 P.2d 31; *Lasswell*, 296 Or. at 126, 673 P.2d 855 (both illustrating proposition). Measure 9 does not satisfy the foregoing requirement. It does not address specific cases of official misconduct, and it cannot be contended that the expression in question (contributions) actually impairs performance of, *e.g.*, legislative functions in all cases. The *Fadeley* case thus provides no useful parallel to the case before us.

Shorn of its reliance on *Fadeley*, the Secretary of State's argument is a reiteration of the idea that money necessarily and inherently corrupts candidates. It is natural that support—financial and otherwise—will respond to a candidate's positions on the issues. Yet an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatability between seeking political office and the giving and accepting of campaign contributions. This argument is not well taken.

24. The Secretary of State explicitly raised this argument in the context of expenditure limitations of Measure 9. However, the reasoning extends beyond the expenditure context and applies equally to contribution limitations. For instance, the Secretary of State asserts that "what candidates must do to obtain the enormous amounts of money spent in modern political campaigns has severely damaged the political system and more severely damaged the public's faith in that system." Common Cause argues that the incompatibility exception applies to both contributions and to expenditures.

Having concluded that sections 3, 4, and 16 of Measure 9 are directed at protected expression under Article I, section 8, and that they restrict that expression, we hold that sections 3, 4, and 16 violate Article I, section 8, and are unconstitutional.[25]

[542] II. *Expenditure Provisions*

Again, petitioners argue that the expenditure provisions in Measure 9 are targeted at the content of speech, fall under a first level Article I, section 8, analysis, and are not saved by any historical or incompatibility exceptions. The Secretary of State concedes that campaign expenditures are protected expression under Article I, section 8, but he contends that no provisions in Measure 9 restrict expenditures in any way that offends Article I, section 8. In the alternative, he argues that, if campaign expenditures are restricted in any way, they are restricted only minimally, and that the minimal restriction is warranted by the incompatibility exception.

We first address whether Measure 9 restricts expenditures. Section 6 of Measure 9 provides in part:

> "(1) A candidate for statewide office or the office of state Senator or state Representative *may* file a declaration of limitation on expenditures * * * with the [Secretary of State] stating that the candidate, including the principal campaign committee of the candidate, will not make [expenditures in excess of certain amounts prescribed in the statute]."

(Emphasis added.) Petitioners concede that section 6, in and of itself, is a voluntary provision that does not restrict expenditures. The section gives a candidate the option of agreeing to self-imposed expenditure limits or, in the alternative, of rejecting those expenditure limits. However, petitioners argue that other provisions, which become operative if a candidate chooses not to limit his or her expenditures, have the effect of *coercing* the candidate into agreeing to restrict expenditures and that such coercion is, for constitutional purposes, the functional equivalent of forbidding the expenditures outright.

Petitioners single out parts of sections 13 and 19, asserting that they provide "penalties" for failure to agree to limit expenditures under section 6. Petitioners argue that those provisions, when considered together with section 6, impermissibly coerce candidates to [543] agree to self-imposed campaign expenditure limits. Assuming without deciding that a statute that impermissibly coerces a candidate to agree to self-imposed expenditure limits would amount to an unconstitutional violation of Article I, section 8, we conclude that those sections do not *impermissibly* coerce candidates. We analyze each challenged section in turn.

[21] Section 13(1) requires the Secretary of State to publish in the Voters' Pamphlet a statement as to whether a candidate has agreed to limit his or her expenditures pursuant to section 6. We hold that the provision is non-coercive for two reasons. First, the publication requirement does not by its terms inflict a punishment: No fines are imposed, nor is any other objective punishment directly or indirectly associated with the publication. 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.[26]

Admittedly, a candidate's knowledge that his or her refusal to agree to expenditure limitations will be brought to the attention of the voters might persuade some candidates to agree to expenditure limits when, in the absence of that voter notification, they would

25. Petitioners claim that various parts of sections 3, 4, and 16 also violate Article I, sections 20, 21, and 26, of the Oregon Constitution. Because we conclude that those sections of Measure 9 violate Article I, section 8, we need not address petitioners' alternative theories. In addition, petitioners claim that sections 11, 14, 15, and 17, which operate pursuant to the contribution limits in section 3, also violate Article I, section 8. Because we invalidate those sections on subconstitutional grounds, 324 Or. at 545, 931 P.2d at 788–89, we need not consider those theories.

26. The Secretary of State argues that a truthful publication never can be found to violate Article I, section 8. We need not and do not adopt such a universal rule of law to resolve this case.

not have agreed. Indeed, we assume that such a result was the precise purpose behind section 13(1). But encouraging such an outcome does not amount to impermissible coercion. The candidate's choice to limit or not to limit expenditures will be based on the candidate's estimate whether, in his or her particular campaign, a majority of voters so desire expenditure limitations that they might choose not to vote for a candidate who refuses to limit them. But such a calculation by a candidate, like a hundred other choices on public policy issues, is the essence of the political process.[27] Section 13(1) does not violate Article I, section 8.

[22] |544Section 13(3) provides that, if a candidate has agreed to expenditure limits and then exceeds those limits during an election, then, if that candidate runs in a *later* election, the Secretary is required to publish in the Voters' Pamphlet for the later election a bold-faced notice that the candidate failed to abide by his or her promise to limit expenditures in the earlier election. Unlike section 13(1), this provision singles out a certain group of candidates. However, as is true of section 13(1), the provision only provides for publication of a truthful statement in the Voters' Pamphlet.

[23] Even if there were a basis for holding that the publication by the Secretary of State under section 13(3) were some sort of "punishment"—a proposition that we reject—that publication still would be permissible and not run afoul of Article I, section 8. Oregon laws provide penalties for political candidates who mislead the public or engage in fraud. *See* ORS 260.355 (providing that a candidate may lose a nomination or political office for deliberate and material violation of election laws); ORS 260.532 (making it an offense for a candidate to make, or allow to be made, publication of a false statement of material fact during a campaign). *See also Cook v. Corbett*, 251 Or. 263, 446 P.2d 179 (1968) (overturning a primary nominating election because the winning candidate made false statements in the course of the campaign). Laws that are targeted at fraud do not violate Article I, section 8, because they constitute an historical exception to Article I, section 8. *Robertson*, 293 Or. at 412, 649 P.2d 569.

Section 6 permits a candidate to promise not to exceed a specified amount of campaign expenditures. That promise then is published in the Voters' Pamphlet and may be relied on by voters in deciding for whom to vote. If a candidate reneges on that promise, he or she has misled the electorate.[28] Section 13(3) "punishes" a candidate—if at all—only |545for that misleading conduct and, for that reason, does not violate Article I, section 8.

[24] We turn to section 19(4). That section provides that campaign contributors who contribute to candidates who have not agreed to abide by the campaign expenditure limitations under section 6 may not receive a tax credit for campaign contributions to that candidate. Contributors to candidates who have agreed to the limitation continue to receive a tax credit. Petitioners contend that that disparity has the indirect effect of punishing a candidate for not agreeing to the limitations. They argue that the legislation is premised on the idea that at least some campaign contributors either would not contribute, or would not contribute as much, but for the tax credit that accompanies their contribution, and that, faced with the threat of losing financial support from prospective contribu-

27. Petitioners rely on a recent federal district court case that found a "voluntary" campaign expenditure limitation scheme coercive and in violation of protected free speech. *Shrink Missouri Government PAC v. Maupin*, 892 F.Supp. 1246 (E.D.Mo.), *aff'd* 71 F.3d 1422 (8th Cir. 1995). The statutory scheme in that case required candidates to file affidavits stating whether or not they agreed to limit expenditures. Those candidates who refused the limitations were prohibited from accepting campaign contributions from PACs, corporations, labor unions and the like. It was this punishment—imposed only on those candidates who rejected the expenditure limitations—that the court found to be coercive and in violation of protected speech. No analogous punishment is present in section 13.

28. The fact that a candidate may have intended to abide by expenditure limitations when he or she made the pledge, and only later decided to ignore that promise, does not make the failure to abide by the promise any less a fraud on the voters who have relied on the candidate's Voters' Pamphlet statement to choose their candidate.

tors, it is reasonable to assume that at least some candidates will accept the lesser of two evils—from the candidate's perspective—and agree to the expenditure limitations.

Like many provisions of any tax code, section 19(4) is an attempt to encourage certain practices by rewarding those who follow them. Here, the effort is to encourage limited campaign expenditures. The reward is a tax credit. No less than the tax scheme it replaced, section 19(4) is, in effect, an indirect form of public campaign financing. No taxpayer is *entitled* to a tax credit for political contributions. The legislative choice to allow such a credit, but only under limited circumstances, does not appear to us to implicate Article I, section 8.

What is true with respect to contributors appears to us to apply *a fortiori* to those who receive contributions. The legislative choice to encourage certain behavior by tax policy violates no right of any potential recipient of contributions, because the recipient had no constitutional right to the contributions-with-tax-credits in the first place.

B. *Viability of Remaining Provisions of Measure 9*

[25] Having concluded that sections 3, 4, and 16 violate Article I, section 8, and are unconstitutional, we turn to section 23(2) of Measure 9. That section provides:

546"If any part of this Act is held unconstitutional, the remaining parts shall remain in force unless the court specifically finds that the remaining parts, standing alone, are incomplete and incapable of being executed."

The section is a directive by the people to this court to conduct a "clean-up" function, *i.e.*, to examine the impact of our constitutional rulings on the balance of the provisions of Measure 9 and then to eliminate those additional sections of the measure that become ineffective as a consequence. We turn to that task.

The following provisions in Measure 9 only gain relevance from the contribution limitations imposed by sections 3, 4, or 16. Section 11 imposes fines for violations of sections 3, 4, or 16.[29] Section 14 defines various types of contributions for purposes of section 3. Section 15 defines a candidate's use of personal money as a contribution for purposes of section 3.[30] Finally, section 17 prohibits the "bundling" of contributions to circumvent the limitations established in section 3. We conclude that those sections are "incomplete and incapable of being executed" if—as we hold today—sections 3, 4, and 16 are unconstitutional. Therefore, we declare sections 11, 14, 15, and 17 void for lack of purpose.[31]

C. *Article I, section 26*

Petitioners claim that sections 6, 10, and 13 of Measure 9 also violate Article I, section 26,[32] of the Oregon Constitution.[33]

[26] 547As we already have discussed, section 6 establishes the voluntary expenditure limit for each of the offices governed by the provisions of Measure 9, and section 13 provides for the publication in the Voters' Pamphlet of the candidate's agreement or

29. Section 11 requires the Secretary of State or the Attorney General to impose a civil penalty not to exceed the greater of $1,000 or three times the amount of any contributions that violate sections 3, 4, or 16. It also holds a candidate personally liable for the civil penalty and, under certain conditions, it holds the directors of principal campaign committees jointly and severally liable for the civil penalty.

30. In addition, the section imposes certain filing requirements when candidates receive certain contributions that exceed the limits imposed by section 3.

31. Petitioners claim that several other sections should be declared void once the expenditure provisions have been struck down. Because we uphold the expenditure provisions, petitioners' claims necessarily fail.

32. Article I, section 26, of the Oregon Constitution, provides:

"No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances (sic)."

33. Petitioners also claim that sections 3, 4, 11, 14, 15, 16, 17, and 19(4) violate Article I, section 26. Because we have voided those sections already on other constitutional or statutory grounds, we need not address those claims.

refusal to abide by the expenditure limitations. In addition, section 10 authorizes the Secretary of State to impose civil penalties for violations of the voluntary limitations.

Petitioners assert that expression (under Article I, section 8) and association (under Article I, section 26) are "inseparable components of the same act." Therefore, they incorporate the same arguments that they raised under Article I, section 8, here as well. To the extent that petitioners' arguments do not assert any principled basis on which we could announce a different and more protective (to petitioners) scope to Article I, section 26, than that found in Article I, section 8, we conclude that our previous discussion under Article I, section 8, sufficiently indicates why sections 6, 10, and 13, on their face, do not violate Article I, section 26.

Petitioners also argue that sections 6, 10, and 13 of Measure 9, are unconstitutional for reasons unique to Article I, section 26. Article I, section 26, prohibits laws that restrain Oregonians from assembling together, peaceably, for the common good. Petitioners argue that several of the *contribution* sections limit free assembly. But they do not—and cannot—argue derivatively that the *expenditure*-related provisions—sections 6, 10, and 13—limit free assembly. We do not find petitioners' argument persuasive.

Article I, section 26, also prohibits laws that restrain Oregonians from instructing their representatives. Petitioners argue that contribution limits restrain the ability of Oregonians to instruct their representatives. Petitioners argue further, however, that expenditure limitations *indirectly* limit the ability of Oregonians to instruct their representatives, because meaningful instruction can be made only once Oregonians "learn a candidate's positions." We do not find that argument persuasive, because it is tied so clearly to the interests of both candidate and contributor in the concept of communication that it seems to us not to differ in principle from arguments already discussed under Article I, section 8. [548] Petitioners' arguments under Article I, section 26, are not well taken.

D. *Article I, section 20*

Petitioners claim that sections 3(2), 3(3), 4(1)(a), 15, and 16 of Measure 9 violate Article I, section 20, of the Oregon Constitution.[34] Petitioners assert that those sections unequally immunize certain classes of citizens from restrictions on political speech, while singling out other classes for the restrictions. We decline to address those claims, because each of the challenged sections have been voided already on other constitutional or statutory grounds.

E. *Vagueness Challenge*

Petitioners claim that section 17(2) of Measure 9 is unconstitutionally vague and, thereby, in violation of Article I, sections 20 and 21. We decline to address that claim because section 17(2) has been voided on statutory grounds.[35]

F. *Attorney Fees*

[27] Finally, petitioners request that, if they are successful on any of their claims, they be awarded attorney fees pursuant to this court's equitable powers described in *Deras*. It is true that, to some degree, the same "interest of the public in preservation of the individual liberties guaranteed against governmental infringement of the constitution" on which this court relied in awarding attorney fees in *Deras* is present in this case. 272 Or. at 66, 535 P.2d 541. That, however, is not enough. *Deras* was a case in which the petitioner was attempting only to vindicate interests of the public at large. By contrast, some of the petitioners, both individual and institutional, who have brought the present proceeding are not so disinterest-

34. Article I, section 20, of the Oregon Constitution, provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

35. Petitioners also assert in a footnote that several other sections are unconstitutionally vague. Those challenges appear to have been either an afterthought or not important enough in petitioners' view to raise in text. We decline to address a constitutional challenge raised only by way of a footnote.

ed. Their victory may benefit many members of the public at large, but that is true of virtually any case involving the right [549] to speak, write, or print freely on any subject whatever. The overall benefit to the public is only an ancillary result in this case. Petitioners such as the political action committee and the potential political candidate have individualized and different interests that they seek to vindicate. Under such circumstances, this court ordinarily will decline to exercise its equitable power to award attorney fees. *See Dennehy v. Dept. of Rev.*, 308 Or. 423, 781 P.2d 346 (1989) (explaining the foregoing rationale for denying request for attorney fees in the context of a tax case that affected many taxpayers). The request for an award of attorney fees is denied.

CONCLUSION

Sections 3, 4, 11, 14, 15, 16, and 17 of Measure 9 are declared void. The remainder of Measure 9 is not invalid on any ground urged by the petitioners in this proceeding.

324 Or. 561

[561] **Sonja MADRID, as Personal Representative of the Estate of Kenneth Madrid, Respondent on Review,**

v.

Frank Raymond ROBINSON, Petitioner on Review.

Sonja MADRID, Respondent on Review,

v.

Frank Raymond ROBINSON, Petitioner on Review.

CC 92C–11138, 92C–11696; CA A84207; SC S43277.

Supreme Court of Oregon.

Argued and Submitted Nov. 4, 1996.

Decided Feb. 13, 1997.

Personal injury action was brought in connection with pedestrian-vehicle collision. The Marion County Circuit Court, Leroy Tornquist, J. pro tem., entered judgment on jury verdict for defendant-driver, and plaintiff appealed. The Court of Appeals, 138 Or.App. 130, 906 P.2d 855, reversed, and further review was sought. The Supreme Court, Van Hoomissen, J., held that trial court could have reasonably concluded that police officers' opinion testimony as to what "caused" accident permissibly addressed fact in issue in way that would assist jury.

Decision of Court of Appeals reversed; judgment of Circuit Court affirmed.

1. Appeal and Error ⇐842(5)

Supreme Court would review trial court's ruling allowing defense experts to testify as to what "caused" accident to determine whether court applied correct principle of law.

2. Evidence ⇐506, 508

Evidence Code's basic approach to expert opinion testimony is to admit it when it is helpful to trier of fact; such approach generally applies even when opinion testimony embraces ultimate issue to be decided by trier of fact. Rules of Evid., Rules 702, 704.

3. Evidence ⇐528(1)

Trial court in personal injury action arising out of vehicle-pedestrian collision could have reasonably concluded that police officers' opinion testimony as to what "caused" accident permissibly addressed fact issue regarding point of impact in way that would assist jury rather than merely telling jury to decide case for defendant. Rules of Evid., Rules 702, 704.

4. Evidence ⇐527

Testimony about causation may refer to question of fact that is properly within realm of expert opinion, where expert's evaluation and interpretation of evidence will assist jury to understand it. Rules of Evid., Rules 702, 704.

Samuel R. Blair, Salem, argued the cause for petitioner on review. Rod M. Jones, of

Vannatta v. Keisling, 899 F. Supp. 488 (D. Or. 1995)

US District Court for the District of Oregon - 899 F. Supp. 488 (D. Or. 1995)
July 13, 1995

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899 F. Supp. 488 (1995)

Fred VANNATTA, et al., Plaintiffs,
v.
Phil KEISLING, in his capacity as Secretary of the State of Oregon, et al., Defendants.

Civ. No. 94-1541-JO.

United States District Court, D. Oregon.

July 13, 1995.

***489 *490** John R. Faust, Jr., Schwabe Williamson & Wyatt, Portland, OR, John A. Di Lorenzo, Jr., Michael E. Farnell, Hagen Dye Hirschy & DiLorenzo, Portland, OR, for Plaintiffs.

Eric James Bloch, Katherine Green Georges, Department of Justice, Salem, OR, Daniel E. O'Leary, Davis Wright Tremaine, Portland, OR, D. Lawrence Wobbrock, Portland, OR, for Defendants and Intervenor-Defendants.

ROBERT E. JONES, District Judge:

This lawsuit involves a federal constitutional challenge to Ballot Measures 6 and 9 which amended the Oregon Constitution. This case is before the Court on Plaintiffs' (# 9) and Defendants' (# 25) Cross-Motions for Summary Judgment on the constitutionality of

Measure 6,[1] as well as Plaintiffs' ***491** Motion to Strike (# 60), Motion for Leave to File an Additional Affidavit (# 61), and Motion for Leave to File a Second Amended Complaint (# 57).[2]

FACTUAL BACKGROUND

On November 8, 1994, Oregon voters passed Measure 6 which essentially limits the amount of campaign contributions that candidates may accept from out-of-district donors. The Measure is comprised of four sections:

> (1) Section 1 allows candidates to "use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate * * *;"
>
> (2) where more than ten percent of a candidate's total campaign funding is in violation of Section 1, Section 2 punishes the candidate by either (a) forcing the *elected official* to forfeit the office and to not hold a subsequent elected public office for a period equal to twice the tenure of the office sought, or (b) forbidding the *unelected candidate* from holding an elected public office for a period equal to twice the tenure of the office sought;
>
> (3) Section 3 prohibits "qualified donors" (*i.e.,* in-district residents) from contributing funds to a candidate on behalf of an out-of-district resident;
>
> (4) Section 4 labels a violation of Section 3 as an "unclassified felony."

Defs.' Ex. A at 1. Entitled the "Freedom From Special Interests" initiative, Measure 6 is intended to prevent out-of-district individuals and organizations from buying influence in elections, thus allowing "ordinary people [to] secure their rightful control of their own government." *Id.* at 2.

Several months after Measure 6 amended the Oregon Constitution, Plaintiffs Vannatta, Gill, and CTPFS attest that they attempted to make $100 contributions to an out-of-district candidate but were informed that their contributions could not be accepted as a result of Measure 6. In addition, Plaintiff Boehnke alleges that he wishes to solicit and spend funds from out-of-district contributors, but is forbidden to do so by Measure 6. Lastly, pursuant to Measure 6, Plaintiff Smith rejected an out-of-district contribution from Mr. Gill who sent $100 to help Mr. Smith recoup his 1994 campaign debt.

Plaintiffs argue that Measure 6 violates their rights under the United States Constitution. Therefore, pursuant to the Civil Rights Act, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Plaintiffs seek to enjoin Defendants from enforcing Measure 6, and request the Court to declare the Measure void as unconstitutional, respectively. All parties moved for summary judgment, and Plaintiffs also assert three additional motions.

DISCUSSION

I. Plaintiffs' Preliminary Motions

Plaintiffs move to strike newspaper articles included in Defendants' exhibits because they are inadmissible hearsay which may not be considered by a court on a motion for summary judgment. The articles discuss the amounts and effects of special interest contributions, and were offered by Defendants to show that out-of-district donors in fact pose a real threat to the campaign system. Because the articles are out-of-court statements offered to prove the truth of the facts asserted therein, and were neither made under oath nor subject to cross-examination, they are inadmissible hearsay. *See, e.g., Horta v. Sullivan,* 4 F.3d 2, 8 (1st Cir. 1993) (court refused to consider hearsay newspaper account in exhibit form and asserted that "inadmissible evidence may not be considered"). Accordingly, Plaintiffs' Motion to Strike (# 60) Defendants' Exhibits A, B, and C (attached to Defendants' Reply) is GRANTED.

Plaintiff also moves to supplement the record with an additional affidavit from Plaintiff Boehnke, and to file a Second Amended ***492** Complaint, both of which include allegations that Plaintiff Boehnke has solicited funds from out-of-district donors for his 1996 campaign. Plaintiffs' Motion for Leave to File an Additional Affidavit (# 61) and Plaintiffs' Motion for Leave to File a Second Amended Complaint (# 57) are GRANTED.

II. Cross-Motions for Summary Judgment

A. Standard

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of America v. Phelps Dodge Corp.,* 865 F.2d 1539, 1542 (9th Cir.1989), *cert. denied,* 493 U.S. 809, 110 S. Ct. 51, 107 L. Ed. 2d 20 (1989).

The substantive law governing a claim determines whether a fact is material. *Anderson,* 477 U.S. at 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). Reasonable doubts as to the existence of a material factual issue are resolved against the moving party. *T.W. Elec. Serv.* at 631. Inferences drawn from facts are viewed in the light most favorable to the non-moving party. *Id.* at 630-31.

Plaintiffs challenge Measure 6 under (1) the First Amendment, (2) the Due Process Clause of the Fifth Amendment, (3) the Equal Protection Clause of the Fourteenth Amendment, (4) the Privileges and Immunities Clause of Article IV, and (5) the Commerce Clause of the United States Constitution. Defendants respond by arguing that this Court lacks jurisdiction over Plaintiffs' lawsuit and that Measure 6 is constitutional. As there are no genuine issues of material fact, Defendants' jurisdictional arguments must be addressed before considering the constitutionality of Measure 6.

B. Subject Matter Jurisdiction

Defendants originally advance three related arguments in support of their assertion that this Court lacks jurisdiction over Plaintiffs' lawsuit. First, they claim that there is no justiciable case or controversy because the mere existence of a law is not enough to warrant pre-enforcement judicial review under the Declaratory Judgment Act. Second, Plaintiffs

lack standing because they allege no more than a hypothetical threat of injury which cannot satisfy the concrete injury in fact requirement of Article III of the Constitution. Defendants apparently withdrew the second contention before oral argument on July 13, 1995. Lastly, Defendants argue that Plaintiffs' claims are not ripe because they involve uncertain or contingent future events that may not occur. I will address all issues because the parties cannot invoke the jurisdiction of this court by stipulating to the jurisdictional requirement of standing. *See Whitmore v. Arkansas,* 495 U.S. 149, 155-56, 110 S. Ct. 1717, 1722-24, 109 L. Ed. 2d 135 (1990) ("A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.")

Plaintiffs explain that they may receive judicial review without exposing themselves to criminal prosecution where there exists a credible threat of prosecution. Moreover, Plaintiffs attempted to either confer or accept campaign contributions; therefore, they have suffered concrete injuries which permit this Court to address the merits of Plaintiffs' claims.

1. Standing

Article III of the Constitution limits federal jurisdiction to cases or controversies of which standing is a core component. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). The irreducible constitutional minimum of standing contains three requirements: ***493** plaintiffs must establish that (1) they have suffered an actual or imminent, concrete injury in fact, (2) there is a causal connection between the alleged injury and the conduct complained of, and (3) it is likely that a favorable decision will redress plaintiffs' injury. *Id.; Am.-Arab Anti-Discrimination Comm. v. Thornburgh,* 970 F.2d 501, 506, 510 (9th Cir.1991).

Defendants acknowledge that if one plaintiff has standing, it does not matter whether the others do. *See Bowsher v. Synar,* 478 U.S. 714, 721, 106 S. Ct. 3181, 3185, 92 L. Ed. 2d 583 (1986). In the present action, Plaintiffs have standing to challenge Measure 6 if one of the Plaintiffs can show an actual or imminent injury in fact.

"[T]he nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue." *Lujan,* 504 U.S. at 561, 112 S. Ct. at 2137. Applying this principle, Judge Dwyer held that Congressman Foley had standing to challenge a term limit initiative because (1) he was the

object of the law, (2) he would be prevented from running for another term if the law is enforced, and (3) he intended to run for an additional term. *Thorsted v. Gregoire,* 841 F. Supp. 1068, 1073 (W.D.Wash. 1994).

Sections 1 and 2 of Measure 6 prohibit candidates from accepting out-of-district contributions, whereas Sections 3 and 4 criminalize donations made by in-district residents on behalf of out-of-district contributors. Though Plaintiffs challenge all Sections of Measure 6, their affidavits and allegations encompass conduct relating only to Sections 1 and 2.[3] Because none of the Plaintiffs allege a direct injury resulting from Sections 3 and 4 of Measure 6, I find that Plaintiffs do not have standing to challenge those Sections. Consequently, this Court does not have subject matter jurisdiction to consider the constitutionality of Sections 3 and 4 of Measure 6.

With respect to Section 1 and 2, Plaintiff Boehnke provides the following statements in support of his standing to challenge Measure 6:

> (1) he was the Republican nominee for State Representative in the last election;
>
> (2) he intends to run again for that office in the May 1996 election;
>
> (3) he has registered his own political committee;
>
> (4) he intends to solicit contributions from his children who live outside of his district;
>
> (5) he wishes to use more than ten percent of the funds that he receives from out-of-district contributors.

As a candidate, Mr. Boehnke is undeniably an "object" of Measure 6, like Congressman Foley in *Thorsted*. Moreover, Mr. Boehnke avers more concrete facts than alleged by Congressman Foley in *Thorsted,* which show that he will be imminently injured by Measure 6 if he cannot "use or direct" more than ten percent of the funds he receives from

out-of-district donors. As a candidate in an Oregon election in less than a year, Mr. Boehnke has standing to challenge the contribution limits imposed by Measure 6.

Furthermore, as contributors, Plaintiffs Vannatta, Gill, and CTPFS also have standing to challenge Measure 6. Even assuming that these Plaintiffs are not the "objects" of Measure 6, it is well settled that where candidates are prevented from accepting contributions, contributors are also injured:

> the Supreme Court held in *Buckley v. Valeo* that contributing money is an act of political association that is protected by the First Amendment because the act of contributing serves to associate the contributor with a candidate as well as with like-minded contributors. 424 U.S. 1, 22, ***494** 96 S. Ct. 612, 636, 46 L. Ed. 2d 659 (1976) (per curiam).

Service Emp. Intern v. Fair Political Prac. Com'n, 955 F.2d 1312, 1316 (9th Cir.1992) (contributors had standing to challenge law which, as applied, limited amount of contributions non-incumbents could accept), *cert. den.,* ____ U.S. ____, 112 S. Ct. 3056, 120 L. Ed. 2d 922 (1992); *see also, Renne v. Geary,* 501 U.S. 312, 319, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991) ("Respondents of course have standing to claim that [a law] has been applied in an unconstitutional matter to bar their own speech.")

The contributors in the instant case have been and will continue to be prevented from associating with out-of-district candidates due to Measure 6. Therefore, Plaintiffs Gill, Vannatta, and CTPFS also have standing to challenge Measure 6. [4]

The Court is mindful that a mere subjective chill on protected expression is not adequate to constitute the actual or imminent injury in fact necessary for standing. *Associated Gen. Contractors of Cal. v. Coalition,* 950 F.2d 1401, 1406-07 (9th Cir.1991) (citing *Laird v. Tatum,* 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972) (alleged chilling effect of Army data-gathering and surveillance of civilian political activity was insufficient to confer standing for a First Amendment challenge), *cert. den.,* 503 U.S. 985, 112 S. Ct. 1670, 118 L. Ed. 2d 390 (1992); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947) (no standing to challenge Hatch Act's bar on political activity by government employees where plaintiffs had neither violated the act by participating in political activity nor asserted firm plans to do so in the future)). The Court is also aware that to have standing to seek injunctive relief the plaintiff must allege an imminent threat of future harm. *City of Los Angeles v. Lyons,* 461 U.S. 95, 101-05, 103 S. Ct. 1660, 1664-67, 75 L. Ed.

2d 675 (1983) (no standing to seek an injunction against police where there was no likelihood that plaintiff would be subject to future police brutality).

Plaintiffs Gill, Vannatta, and CTPFS suffer more than a subjective chill on their political expression. They have, in fact, been prevented from associating with out-of-district candidates who returned Plaintiffs' contributions due to Measure 6. This is not only a past injury but rather extends forward as a future chill on their right to associate with certain candidates. Consequently, Plaintiffs Gill, Vannatta, and CTPFS have standing to seek injunctive relief in their challenge to Measure 6.

2. Ripeness

"Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne v. Geary,* 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991). "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L. Ed. 2d 895 (1979). "When a plaintiff seeks to engage in conduct proscribed by statute and a credible threat of prosecution exists, he need not `expose himself to actual arrest and prosecution to be entitled to challenge [the] statute * * *.'" *San Francisco County Democratic Cent. Com. v. Eu,* 826 F.2d 814, 821 (9th Cir.1987) (quoting *Babbitt* at 298, 99 S.Ct. at 2308), *aff'd,* 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). "This is especially true in a First Amendment case because of the sensitive nature of constitutionally protected expression." *Eu* at 821 (internal quotation omitted). Nonetheless, "when plaintiffs `do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." *Babbitt* at 298-99, 99 S. Ct. at 2308-09 (quoting *Younger v. Harris,* 401 U.S. 37, 42, 91 S. Ct. 746, 749, 27 L. Ed. 2d 669 (1971)).

***495** Plaintiffs' affidavits stating that they were, in fact, either unable to make or receive out-of-district contributions show that Sections 1 and 2 of Measure 6 are currently chilling protected expression which meets the requirement that the "`contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Barker v. State of Wis. Ethics Bd.,* 815 F. Supp. 1216, 1219 (W.D.Wis.1993) (chilling effect of law which prohibited lobbyists from volunteering personal services was sufficient to allow pre-enforcement

review of the statute) (quoting *Babbitt,* 442 U.S. at 298, 99 S.Ct. at 2308) (internal quotation omitted); *see also Eu,* 826 F.2d at 822 (challenge to a ban on pre-primary partisan endorsements held justiciable where "plaintiffs' uncontroverted affidavits show that they have consistently, if reluctantly, obeyed the statutes in conducting party affairs.") Accordingly, I find that Plaintiffs have presented a justiciable controversy with regard to the effects of Sections 1 and 2 of Measure 6 on Plaintiffs' First Amendment rights of free expression.

In so holding, I reject Defendants' contention that *Renne v. Geary,* 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991), compels a different conclusion on justiciability. In *Renne,* voters and party central committees challenged the constitutionality of an amendment to the California Constitution which prohibited political parties from endorsing or supporting candidates for judicial, school, county, and city offices. *Id.* at 314, 111 S. Ct. at 2335. However, the Supreme Court determined that the case was not justiciable because (1) plaintiffs did not suffer any adverse impacts during the pendency of the lawsuit, (2) plaintiffs did not allege an imminent injury, and (3) the criminal provision of the amendment did not clearly proscribe the conduct in which plaintiffs seek to engage. *Id.* at 320-22, 111 S. Ct. at 2338-39. Accordingly, the Court postponed judicial review "until a more concrete controversy arises, [which] also has the advantage of permitting the state courts further opportunity to construe [the amendment], and perhaps in the process to `materially alter the question to be decided.'" *Id.* at 323 (quoting *Babbitt v. Farm Workers,* 442 U.S. 289, 306, 99 S. Ct. 2301, 2313, 60 L. Ed. 2d 895 (1979)).

Unlike the amendment in *Renne,* Measure 6 adversely impacted Plaintiffs during the pendency of the lawsuit and unambiguously proscribes the conduct in which Plaintiffs seek to engage. Moreover, Plaintiffs allege sufficient facts regarding the chilling effect of Measure 6 to show the existence of a present and future injury suffered by Plaintiffs. For these reasons, I find that *Renne* is inapplicable to the present action, and that Plaintiffs have presented a justiciable controversy with regard to their claim which incorporates the First and Fourteenth Amendments.[5]

C. Abstention

The only applicable doctrine of abstention in this case was evinced by *Railroad Commission of Texas v. Pullman,* 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). "To abstain Under *Pullman,* a federal court must find all three of the following factors: first, the complaint touches a sensitive area of social policy upon which the federal court ought not

to enter unless no alternative to its adjudication is open; second, a definitive ruling on the state issue would terminate the controversy; and third, the possibly determinative issue of state law is doubtful." *Ripplinger v. Collins,* 868 F.2d 1043, 1048 (9th Cir.1989). However, "[i]n first amendment cases, the first of these factors will almost never be present because the guarantee of free expression is always an area of particular federal concern." *Id.* Moreover, abstention would force a plaintiff who has commenced a federal action to suffer the delay for a state court determination would aggravate the chilling effect of the law. *Id.*

Abstention is not appropriate in the present action because (1) Measure 6 implicates important concerns regarding First Amendment rights, (2) abstention would merely exacerbate Plaintiffs' injuries, and (3) a state ***496** court ruling would not likely terminate the controversy. For these reasons, I reach the merits of Plaintiffs' challenge.

D. First and Fourteenth Amendment

Plaintiffs have pled a facial challenge to Measure 6, and both parties agreed at oral argument that the Court should conduct a facial analysis of the constitutionality of the Measure. Measure 6 primarily impacts campaign donations by out-of-district contributors. "Certainly, the use of funds to support a political candidate is `speech'; independent campaign expenditures constitute `political expression at the core of our electoral process and of the First Amendment freedoms.'" *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 656, 110 S. Ct. 1391, 1395, 108 L. Ed. 2d 652 (1990) (quoting *Buckley v. Valeo,* 424 U.S. 1, 39, 96 S. Ct. 612, 644, 46 L. Ed. 2d 659 (1976) (internal quotation omitted)). Therefore, campaign contributions are political speech protected by the First Amendment.

Measure 6 substantially limits contributors from donating money to out-of-district candidates. Laws which directly burden First Amendment rights are subject to strict scrutiny: the state must show that Measure 6 is "narrowly tailored to serve a compelling state interest." *Austin* at 657, 666, 110 S. Ct. at 1396, 1401.[6]

In *Buckley v. Valeo,* plaintiffs challenged contribution and expenditure limits in the Federal Election Campaign Act (FECA) of 1974.[7] 424 U.S. 1, 8, 96 S. Ct. 612, 629. After applying strict scrutiny to both limitations,[8] the Court sustained the contribution limits because they were supported by a compelling state interest in preventing "improper influence," but the Court invalidated the expenditure restrictions because they failed to serve any substantial governmental interest. 424 U.S. at 54-58, 96 S. Ct. at 651-54.

Similarly, in *Austin,* the Supreme Court upheld restrictions on independent expenditures [9] by corporations under the First Amendment because they were narrowly tailored to serve the state's compelling interest in averting corruption and improper influence. [10] 494 U.S. at 658-661, 110 S. Ct. at 1396-98.

In the present action, Measure 6 burdens a contributor's political speech and right to associate by limiting the amount of the donated funds that may be used by the candidate. Campaign contributions may, in some cases, be restricted because of the greater potential for political "quid pro quo" corruption. *See Buckley,* 424 U.S. at 26-29, 96 S. Ct. at 638-40. Nonetheless, Defendants must still demonstrate in this case that the contribution limitation is narrowly tailored to serve a compelling state interest. At least both parties agree that the state has a compelling interest in preventing "corruption or the appearance of corruption." *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. ***497** 480, 496-97, 105 S. Ct. 1459, 1468-69, 84 L. Ed. 2d 455 (1985) ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.") The issue then is whether the Measure 6 contribution limitation is narrowly tailored to prevent corruption.

I find that Measure 6 campaign limitations are not narrowly tailored to preventing political corruption for several reasons. First, the Measure prohibits non-corrupt, out-of-district contributors from politically associating with candidates running for state offices. Elected officials in state offices impact all state residents, not just the candidate's constituents within his election district. Therefore, the Measure impairs out-of-district residents from associating with a candidate for state office who, if elected, will have a real and direct impact on those persons.

Secondly, the Measure fails to thwart any in-district corruption. The candidate could be wholly funded by one or more wealthy "in-district" individuals who seek to further their own "special interests" by contributing huge amounts of money.

Lastly, the Measure fails to prevent large out-of-district contributions, so long as they do not exceed 10% of the candidate's total campaign expenditures. Therefore, the more money the candidate receives from in-district contributions, the larger the contributions the candidate may accept from out-of-district donors. If the purpose of the Measure is to discourage outside special interests, then the Measure should not be designed to allow out-of-district contributors to increase their donations based upon in-district funding.

In sum, I find that Measure 6 is not narrowly tailored to serve the state's interest in preventing corruption. Because Measure 6 contravenes the First Amendment, I find it unnecessary to address Plaintiffs' challenges under the Fifth Amendment, the Fourteenth Amendment, the Privileges and Immunities Clause, and the Commerce Clause.

Furthermore, I conclude that the unconstitutional portions of Measure are not severable because the Measure's lack of clarity prevents the Court from ascertaining the intentions of the people who enacted it.

My decision not to sever is buttressed by the fact that the state legislature is free to enact legislation which limits campaign contributions by corporations for profit, labor unions, banks, etc. A ban on contributions to federal candidate elections by corporations, labor unions, banks and similar entities has been in existence for almost 90 years and has been found to comport with the First Amendment. *See FEC v. National Right to Work Committee,* 459 U.S. 197, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 788 n. 26, 98 S. Ct. 1407, 1422 n. 26, 55 L. Ed. 2d 707 (1978).

Measure 6 makes no express effort to exempt individuals, non-profit corporations, partnerships and the like. A measure must do so to pass federal constitutional muster.

Lastly, I exercise my discretion under the *Pullman* doctrine to abstain from hearing constitutional challenges to Measure 9 which is an Oregon statute, until after the Oregon state courts have passed upon its constitutional muster. Only if Oregon courts find that Measure 9 is constitutional, will I address the federal constitutionality of Measure 9. Though I am dismissing this case for administrative purposes, if Oregon courts conclude that Measure 9 is constitutional under the Oregon Constitution, Plaintiffs may reopen this case without costs.

CONCLUSION

IT IS ORDERED that Plaintiffs' Motion for Leave to File an Additional Affidavit (# 61), Plaintiffs' Motion for Leave to File a Second Amended Complaint (# 57), and Plaintiffs' Motion to Strike (# 60) are GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (# 9) is GRANTED. Accordingly, Defendants' Motion for Summary Judgment (# 25) is DENIED.

IT IS FURTHER ORDERED that this case be DISMISSED.

NOTES

[1] Measure 6 reads:

Be it enacted by the People of Oregon:

SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by the federal, state, or local government for purposes of campaigning for an elected public office.

SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

SECTION 3. A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.

SECTION 4. A violation of Section (3) shall be an unclassified felony.

[2] "Plaintiffs" include Fred Vannatta, George Boehnke, Charles Gill, Denny Smith, and the Center to Protect Free Speech (CTPFS). "Defendants" include Phil Keisling and Ted Kulongoski. Lastly, the League of Women Voters of Oregon and the Oregon State Public Interest Research Group intervened as Defendants.

[3] As stated earlier, during the pendency of this lawsuit, Plaintiffs Vannatta, Gill, and CTPFS attest that they attempted to make $100 contributions to an out-of-district candidate but were informed by the candidate that their contributions could not be accepted due to Measure 6. Conversely, Plaintiff Boehnke states that he is soliciting funds for his 1996 campaign and intends to use more than ten percent of his campaign funds from out-of-district contributors.

[4] Whether Mr. Smith has standing is uncertain because it is not clear whether Measure 6 applies to campaign debts incurred prior to the enactment of the Measure. Nonetheless, this issue need not be resolved because the other parties have standing.

[5] I express no opinion as to whether Plaintiffs present a justiciable case or controversy under the other cited constitutional provisions.

[6] In *Austin,* the Court stated the following with regard to direct burdens on the First Amendment: "we must ascertain whether [the law] burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest." *Id.* at 657, 110 S. Ct. at 1396.

[7] The contribution limitations included a maximum of $1000 on contributions by individuals and groups to candidates and authorized campaign committees, a $5000 limitation on campaign contributions by political committees, and a $25,000 limitation on total contributions by an individual during a calendar year. Conversely, the expenditure limitations varied considerably.

[8] Though Defendants strenuously argue that *Buckley* applied less than strict scrutiny to contribution limitations, subsequent cases and *Buckley* itself disagrees. In examining the constitutionality of contribution limitations, *Buckley* recognized that contributions are a form of political association, thus burdens on that right are "`subject to the closest scrutiny.'" *Buckley* at 25, 96 S. Ct. at 637 (quoting *NAACP v. Alabama,* 357 U.S. 449, 460-61, 78 S. Ct. 1163, 1170-71, 2 L. Ed. 2d 1488 (1958)).

[9] "Independent expenditures" differ from "campaign contributions" only in that they are not made at the direction or under the control of another person for that person's political campaign.

[10] Notably, however, the law did not limit the amount of independent expenditures by the corporations but merely required corporations to make such expenditures from segregated funds used solely for political purposes. This nonetheless burdened the right of free association and was strictly scrutinized.

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151 F.3d 1215

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Fred VANNATTA; George Boehnke; Center to Protect Free Speech, Inc., Plaintiffs-Appellees,
v.
Phil KEISLING, in his capacity as Secretary of the State of Oregon; Ted Kulongoski, in his capacity as Attorney General of the State of Oregon,
Defendants,
and
Gordon Miller, Defendant-intervenor-Appellant.

Nos. 95-35998, 95-35999.

**United States Court of Appeals,
Ninth Circuit.**

*Argued and Submitted July 11, 1996.
Decided Aug. 11, 1998.*

John R. Faust, Jr., Schwabe, Williamson & Wyatt, Portland, Oregon; John A. DiLorenzo, Jr., Hagen, Dye, Hirschy & DiLorenzo, Portland, Oregon, for plaintiffs-appellees VanNatta, et al.

Rives Kistler, Deputy United States Attorney, Salem, Oregon, for defendants-appellants Keisling, et al.

Donald Craig Mitchell, Anchorage, Alaska, for appellant Gordon Miller.

Jamin B. Raskin, Washington, D.C.; Abigail Turner, and John C. Bonifaz, Boston, Massachusetts, for the amicus.

Appeal from the United States District Court for the District of Oregon; Robert E. Jones, District Judge, Presiding. D.C. No. CV-94-01541-JO.

Before: FERGUSON and BRUNETTI, Circuit Judges, and KING,* District Judge.

Opinion by Judge FERGUSON; Partial Concurrence and Partial Dissent by Judge BRUNETTI.

FERGUSON, Circuit Judge:

I.

1 We adopt as the unanimous opinion of this panel all of Judge Brunetti's concurring opinion set forth in parts I, II, and III. We also adopt Part IV(A), which declares that Measure 6 is not closely drawn to advance the goal of preventing corruption and fails to pass muster under the First Amendment.

II.

2 We reject Judge Brunetti's argument in dissent, Parts IV(B) and V, that Measure 6 is valid because it prevents a distortion of the republican form of government in the State of Oregon. It could be argued that the initiative process itself distorts the republican form of government.

III.

3 Measure 6 was on the Oregon Ballot with Measure 9. That Measure was a set of statutes also adopted by the initiative process. The Oregon Supreme Court in Vannatta v. Keisling, 324 Or. 14, 931 P.2d 770 (1997) held that the statutes in Measure 9 which, like Measure 6, limited or banned campaign contributions, violated the Free Speech provisions of the State Constitution. One matter that is common in both Measures is the limitation upon candidates using campaign contributions from individuals who reside outside the candidate's voting district. In both Measures, the meaning of "individuals", is at issue. The Oregon Supreme Court declared that on its face it is unclear whether the word "individuals," as used in Measure 6, applies to the use of contributions from corporations, businesses, labor unions or PAC's, and therefore was over inclusive and must fail under the Oregon Constitution. In accordance with OR. REV. STAT. § 28.200 (1995), the panel certified to the Oregon Supreme Court three questions:

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4 (1) Is Measure 6 valid under the Constitution of Oregon?

5 (2) How is Article II, section 22 to be interpreted in light of competing provisions of the Oregon Constitution, including Article I, section 8?

6 (3) Does the word "individuals" as used in section 1 of Measure 6 include corporations, PACs and unions?

7 The Oregon Supreme Court has rejected the certification.

IV.

8 The issue, which appellants describe in several different ways, involves protecting the integrity of republican government by assuring that representatives are truly selected by their own constituents.

9 Appellants argue that the state interest in a republican form of government supports Measure 6. They contend that Measure 6 advances that interest by preventing those who are ineligible to vote from influencing the outcome of elections. The right to a republican form of government has never before been recognized as a sufficiently important state interest. In Whitmore v. Federal Election Comm'n, 68 F.3d 1212 (9th Cir.1995), a candidate and a voter sought an injunction to prohibit candidates from accepting out-of-state campaign contributions. The plaintiffs asserted that such contributions violated, inter alia, their right to a republican form of government. This Court stated:

10 Plaintiffs argue that the Constitution entitles them to representation by someone not beholden to any citizen of another state. They present a historian's affidavit that the Founding Fathers would have been "shocked" at out-of-state contributions to a congressional candidate ... Neither the Constitution nor the United States Code affords plaintiffs any support for their political theory.

11 This Court held plaintiffs' claim to be unsupported by precedent and dismissed it as frivolous. Whitmore, 68 F.3d at 1216. Although Whitmore addresses out-of-state rather than out-of-district contributions, its holding underscores the lack of support for any claim based on the right to a republican form of government.

12 Appellants nonetheless present several cases which, they argue, may be taken together to expand the "narrow exception to the rule that limits on political activity [are] contrary to the First Amendment." Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). We now distinguish each case in turn.

13 In Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court upheld a Michigan law preventing corporations from using general treasury funds to support or oppose candidates for state office. The Court reasoned that corporations use state-created advantages to dominate both the economic and the political arena. Austin, 494 U.S. at 659, 110 S.Ct. 1391 (citing Federal Election Comm'n v. Massachusetts Citizens for Life, 479 U.S. 238, 257, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986)). The Court held that the statute "ensures that expenditures reflect actual public support for the political ideas espoused by corporations ... corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." Id. at 660, 110 S.Ct. 1391.

14 The Court did not define "actual public support," but appellants would like us to read it as « up upport for Oregon's limitation of out-ofdistrict contributions. The holding in Austin, however, ddresses the "unique state-conferred corporate structure that facilitates the amassing of large corporate treasuries" and the attendant risk of unfair corporate influence in the electoral process. Id. The Court did not concern itself with a distinction between in-district and out-of-district corporations. Therefore, we conclude that the state interest defined in Austin does not support Measure 6.

15 In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978), the Supreme Court upheld Alabama legislation that extended police and other city powers over non-residents living within three miles of city borders. The Court concluded that the state did not have to provide those non-residents with the right to vote in city elections. Id. at 69, 99 S.Ct. 383.

16 The Holt Court emphasized that it was not enough for the non-residents to show that they were affected by the city's policies because many non-residents are affected by many cities' decisions. Id. Regardless of those extraterritorial effects, non-residents do not have a right to "participate in the political processes bringing it about." Id. "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." Id. at 68-69, 99 S.Ct. 383. It is true that states have wide latitude in determining requirements for voting. However, the political process at issue in Holt was the right to vote and not the right to First Amendment speech. Therefore, Holt does not support the republican form of government argument made here.

17 The Supreme Court has suggested that states have a strong interest in ensuring that elected officials represent those who elect them. See, e.g., Shaw v. Reno, 509 U.S. 630, 650, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (elected officials representing one interest group rather than their entire constituency is a cognizable harm under the Fourteenth Amendment). However, in Shaw, the Court was addressing the inverse situation: representatives ignoring much of their constituency in favor of one group of constituents, rather than out-of-district concerns. Id. Appellants read Holt and Shaw out of context and they do not provide authority for this Court to uphold Measure 6.

V. Conclusion

18 Measure 6 does not survive scrutiny under the First Amendment and is not saved by the argument that it protects the republican form of government.

19 The District Court's Opinion and Order and its Declaratory Judgment and Mandatory Injunction are AFFIRMED.

20 BRUNETTI, Circuit Judge, concurring in part and dissenting:

21 The state of Oregon amended its constitution to prohibit state candidates from using or directing any contributions from out-of-district residents and to penalize candidates when more than 10% of their total "funding" comes from such individuals. The amendment was challenged under several provisions of the constitution and was struck down, in a summary judgment order, by the district court under the First Amendment. Viewing the evidence in a light most favorable to appellants, we review the award of summary judgment de novo, Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.1995).

I.

22 In November of 1994, the voters of Oregon amended their constitution by passing Ballot Measure 6 ("Measure 6"). Measure 6 provided:

Be it enacted by the People of Oregon:

23 SECTION 1. For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donations were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or

funding provided by the federal, state, or local government for purposes of campaigning for an elected public office.

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24 SECTION 2. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.

25 SECTION 3. A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected office.

26 SECTION 4. A violation of Section (3) shall be an unclassified felony.

27 Although Measure 6 does not expressly limit its application to state races, it amends Article II of the state constitution which governs state elections. The parties do not argue Measure 6 applies to federal elections and to the extent it attempted to do so, it would be preempted by the Federal Election Campaign Act.

28 Plaintiffs sought a declaratory judgment that Measure 6 is facially unconstitutional. Plaintiffs VanNatta, Gill, and the Center To Protect Free Speech ("Center") claimed that they wished to contribute to out-of-district candidates, Plaintiff Boehnke claimed that he wished to accept donations from non-residents of his district, Plaintiff Smith claimed that he refused donations from plaintiffs Gill and VanNatta because of Measure 6. Several parties intervened including Gordon Miller, the sponsor of Measure 6, who was allowed to intervene for the purpose of appealing the district court's judgment.

29 Defendants presented considerable evidence demonstrating the prevalence of political action committee money in Oregon state races. As of 1992, candidates spent an average of $38,000 on state house races and $49,000 on state senate races. House candidates received 81% of their money from PACs and corporations, senate candidates received 75% from those sources. Individual contributors accounted for 13% of contributions in house races and 15% in senate races in 1992. Defendants also presented statistical and anecdotal evidence suggesting a strong correlation in Oregon between receiving funds and winning elections.

30 The district court granted summary judgment for the plaintiffs. Applying strict scrutiny, the court rejected the measure as not narrowly tailored to prevent corruption because it prevented non-corrupt out-of-district contributions, failed to thwart in-district corruption, and failed to prevent large out-of-district contributions so long as they do not exceed 10% of the total. Defendants appealed.

II. Applicability of the First Amendment

31 Contributions to political campaigns are protected speech under the First Amendment. Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Appellants, however, argue that Measure 6 does not burden the rights of contributors VanNatta, Gill, and the Center because it does not prevent the acceptance of contributions, but rather the use of certain contributions by the candidate. Under Measure 6, candidates could accept unlimited donations from out-of-district residents so long as they do not "use or direct" them. While Measure 6's sanctions only apply if 10% of a candidates' "total campaign funding" is in violation, it prohibits the use or direction of any non-conforming contributions.

32 Appellants' argument that contributors are not burdened relies on Buckley v. Valeo, 424 U.S. 1, 21, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), in which the Supreme Court upheld limits on contributions, reasoning that the free speech value of contributing lay in the "symbolic expression of support" not the total amount. Based on that rationale, they argue that Measure

6 in no way detracts from the symbolic act of contributing because it does not prevent contributions, but only the use of contributed money.

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33 Appellants' argument only makes sense in the abstract. In reality campaigns will have no incentive to accept money which they cannot legally spend. To do so would invite violations of Measure 6 and a host of potential ethical landmines. In fact, appellees attested that an out-of-district candidate refused to accept their donations because of Measure 6. As the statute has caused campaigns to refuse to accept these unusable contributions, the First Amendment rights of contributors are implicated. See Service Employees Int'l Union, AFL-CIO, CLC v. Fair Political Practices Comm'n, 955 F.2d 1312, 1321 (1992). In Service Employees, this court concluded that time limitations on the amount of contributions a candidate could receive impermissibly discriminated against challengers. Id. It held that contributors had standing to challenge the measure as violating their own First Amendment rights. Id. at 1316. "If Proposition 73 discriminates against challengers by limiting their opportunities to accept contributions, then it necessarily discriminates against contributors who wish to associate themselves with challengers." Id. Cf. Renne v. Geary, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991) ("respondents of course have standing to claim that § 6(b) has been applied in an unconstitutional manner to bar their own speech"). Therefore, Measure 6 does implicate the contributing appellees' First Amendment rights because it limits the ability of candidates to accept their donations. See Service Employees, 955 F.2d at 1321.

III. Level of Scrutiny

34 Restrictions on contributions to campaigns are subjected to less exacting scrutiny than restrictions on independent expenditures in support of a campaign. Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259-60, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("we have consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures"); Service Employees, 955 F.2d at 1322. Thus while contribution limitations are reviewed under a "rigorous" level of scrutiny, they are not reviewed under strict scrutiny. Id. Restrictions on contributions are upheld when the "state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." Service Employees, 955 F.2d at 1322 (quoting freedom of association analysis in Buckley v. Valeo, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976)). While the test is less stringent than strict scrutiny, "the test is still a rigorous one." Id.

35 Appellees argue that the level of scrutiny should be strict because Measure 6 does more than restrict the amount non-residents can contribute in that it flatly prohibits such contributions.[1] Their argument finds support in Buckley in which the Supreme Court reasoned that the Federal Election Campaign Act's restrictions on contributions were less drastic because they only limited the amount, thereby permitting the symbolic act of contributing to a worthy candidate. 424 U.S. at 21, 96 S.Ct. 612. The Court, however, also noted that contribution limits did not prevent contributors from independently discussing candidates and issues. Id.

36 In any event, this court has applied less-than-strict, rigorous scrutiny to total restrictions on contributions. Service Employees, 955 F.2d at 1322. In Service Employees, we reviewed a California Initiative which banned campaigns from contributing to another campaign. Id. at 1315. We struck down the provision under the rigorous scrutiny derived from Buckley. Thus, under the law of this circuit, we apply rigorous, rather than strict, scrutiny to Measure 6. See id. Measure 6 can survive rigorous scrutiny only if it is closely drawn to advance a sufficiently important interest. Id.

37 The National Voting Rights Institute ("Institute") argues in its amicus brief that the statute should be reviewed under the balancing test laid out in Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). In Anderson, the Court considered challenges to candidate filing deadlines. The Court noted that while voters' free speech rights are affected by restrictions on candidates, the process of managing elections necessarily involves extensive state regulation. 460 U.S. at 788, 103 S.Ct. 1564. The Court articulated a framework for weighing the competing interests affected by election laws. Id. at 789, 103 S.Ct. 1564. The Supreme Court has not applied this test to campaign contribution restrictions which more directly infringe on speech rights and which are not necessarily an integral aspect of a state's

management of elections. Thus the rigorous test outlined in Service Employees is the ppropriate level of scrutiny.

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IV. Measure 6

Sufficiently Important State Interest

38 There are essentially two purported interests advanced by Measure 6. One is corruption. As the district court concluded, Measure 6 is both under-inclusive and over-inclusive with respect to curbing corruption and thus corruption is an insufficient state interest to sustain the measure. A second interest, which appellants describe in several different ways, involves protecting the integrity of republican government by assuring that constituents are truly selecting their representatives.

A. Curbing Corruption

39 The district court defined the state's interest in Measure 6 as preventing political corruption. The court then rejected the measure as not being narrowly tailored to prevent corruption because it prevented non-corrupt out-of-district contributions, failed to thwart in-district corruption, and failed to prevent large out-of-district contributions so long as they do not exceed 10% of the total.

40 Even applying the less stringent rigorous test, to the extent one views the state's interest as preventing corruption, Measure 6 still fails to pass scrutiny for the reasons stated by the district court. See Service Employees, 955 F.2d at 1312. The Supreme Court has defined corruption associated with campaign contributions as "financial quid pro quo: dollars for political favors." FEC v. National Conservative PAC, 470 U.S. 480, 497, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). In Service Employees, this court rejected California's asserted interest in preventing corruption as a justification for banning intra-campaign donations. Id. Citing Buckley, the court reasoned that corruption stems from large campaign donations and not small ones. Id. As the California initiative did not distinguish on the basis of size of donation, this court concluded that the measure was not closely drawn. Id.

41 The Service Employees rationale is equally applicable here. Measure 6 bans all out-of-district donations, regardless of size or any other factor that would tend to indicate corruption. Appellants are unable to point to any evidence which demonstrates that all out-of-district contributions lead to the sort of corruption discussed in Buckley. See Harwin v. Goleta Water Dist., 953 F.2d 488, 490 (9th Cir.1991) (government did not show that ordinance's distinction between contributions from applicants and opponents served to prevent either corruption or the appearance of corruption). Carver v. Nixon, 72 F.3d 633, 644 (8th Cir.1995) (holding limits on the size of contributions were not closely drawn to reducing corruption as state made no showing that small contribution limits were necessary to curb corruption). Measure 6 is not closely drawn to advance the goal of preventing corruption and under this analysis fails to pass muster under the First Amendment.

42 Judge Ferguson and Judge King adopt this conclusion. To this point, the panel is unanimous.

B. Republican Form of Government

Judge BRUNETTI, dissenting:

43 At this point I must part with Judge Ferguson and Judge King with regard to the appellant's portrayal of the state's interest not so much as preventing corruption but as presenting a distortion of the state's republican form of government. The majority opinion rejects this argument, however, I conclude that Oregon has a sufficiently important interest in protecting its republican form of government and I dissent from the affirmance of the district court.

44 Appellant argues that Measure 6 advances this interest by preventing those who are ineligible to vote from influencing the outcome of elections. We can consider any interest which Measure 6 serves in assessing the constitutionality of the provision. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983).

45 In several cases the Supreme Court has emphasized the right of states and cities to reserve their political processes and resources for their own residents. In Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978), the Court upheld Alabama legislation that extended police and other city powers over non-residents living within three miles of city borders. The Court concluded that the state did not have to provide those non-residents with the right to vote in city elections. Id. at 70, 99 S.Ct. 383.

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46 The Holt Court emphasized that it was not enough for the non-residents to show that they were affected by the city's policies because many non-residents are affected by many cities' decisions. Id. at 69, 99 S.Ct. 383. Regardless of those extraterritorial effects, non-residents do not have a right to "participate in the political processes bringing it about." Id. "[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." Id. at 68, 99 S.Ct. 383.

47 Similarly, in Martinez v. Bynum, the Court upheld a Texas provision that allowed public schools to deny access to children who live apart from their parents if the child's presence in the district is "for the primary purpose of attending free public schools." 461 U.S. 321, 323 n. 1, 103 S.Ct. 1838, 75 L.Ed.2d 879 (1983). The Court reasoned that the measure furthered "the substantial state interest in assuring that services provided for its residents are enjoyed only by residents." Id. at 328, 103 S.Ct. 1838.

48 In other contexts the Supreme Court has suggested, sometimes strongly, that states have a strong interest in ensuring that elected officials represent those who elect them. See, e.g., Shaw v. Reno, 509 U.S. 630, 113 S.Ct. 2816, 2828, 125 L.Ed.2d 511 (1993) (elected officials representing one interest group rather than their entire constituency is a cognizable harm under the fourteenth amendment). In Shaw, the Court was addressing the inverse situation: representatives ignoring much of their constituency in favor of one group of constituents, rather than out-of-district concerns. Id. The analysis, however, underscores the importance of preserving the ties between elected officials and those who elect them. See id.

49 In Austin v. Michigan Chamber of Commerce, the Court upheld a statute which prohibited all corporations, not just out-of-district, from spending money from their general funds on elections. 494 U.S. 652, 668, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). ("The Act does not attempt to equalize the relative influence of speakers on elections, rather it ensures that expenditures reflect actual public support for the political ideas espoused by corporations ... corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions"). Id. at 660, 110 S.Ct. 1391. While the Court did not discuss what is meant by "actual public support," in the context of protecting elections from unfair influences, the concept is by definition limited to those who are eligible to vote, i.e. district residents. See id.

50 In voting cases, the Court has emphasized both the need for equal representation as well as the latitude states have in determining requirements for voting. Board of Estimate of City of New York v. Morris, 489 U.S. 688, 694, 109 S.Ct. 1433, 103 L.Ed.2d 717 (1989); Carrington v. Rash, 380 U.S. 89, 91, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) ("states have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised"). In Morris, the Court struck down a New City municipal board which afforded each borough of the city equal representation despite substantial differences in population. In doing so, the Court emphasized that equal representation was crucial to assuring that each citizen equally participates in government because voting is the only way in which most residents participate in the political process. Morris, 489 U.S. at 693, 109 S.Ct. 1433. In Carrington, the Court struck down a Texas statute which prevented service personnel from voting so long as they remained active members in the military. 380 U.S. at 97, 85 S.Ct. 775. The Court, however, reaffirmed the wide latitude enjoyed by states in establishing residency requirements, as long as the states do not violate the fourteenth amendment. Id. at 91, 85 S.Ct. 775.

51 While none of the cases discussed above are directly on point, taken together they suggest that a state has a sufficiently strong interest in protecting the integrity of electoral district lines. If states have flexibility in determining who is a resident for voting purposes and in taking steps to make sure non-residents do not have access to some state services, it follows

that states also have a strong interest in making sure that elections are decided by those who vote. The Supreme Court has come very close to saying as much in Shaw, Holt, and Austin. With the increasing importance of fundraising in elections generally, Buckley, 424 U.S. at 19, 22, 96 S.Ct. 612, and in Oregon in particular, elections are for all intents and purposes are often decided well before any resident steps into a voting booth.

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52 Thus the Supreme Court's traditional emphasis of states' interest in managing elections, assuring that only residents vote, and safeguarding resources for bona fide residents supports Measure 6 because appellants have presented considerable evidence that campaign financing strongly influences Oregon elections. As this was a grant of summary judgment for appellees, that evidence must be viewed in the light most favorable to appellants. Warren, 58 F.3d at 441. Furthermore, under rigorous scrutiny the state need only demonstrate a sufficiently important interest. Service Employees, 955 F.2d at 1322. I conclude that Oregon has a sufficiently important interest in protecting republican government by ensuring that elections are truly a measure of the preferences of those eligible to vote.

53 The inquiry thus turns to whether Measure 6 is closely drawn to serve this interest. Id. Legislation is closely drawn when it is not over or under inclusive. See id. Appellees primarily contend that protecting representative government is not a compelling interest. They also maintain, however, that Measure 6 is underinclusive because it permits in-district donations that "far exceed the candidate's 'actual support within the district' " and overinclusive because it prevents small out-of-district contributions "that could not possibly erode or even appear to erode anyone's vote."

54 The underinclusive argument misses the mark. The fact that some in-district residents will donate more than others does not detract from the state's interest in ensuring that elections are truly a forum for constituents to select a representative. The Supreme Court has cautioned against trying to equalize voices based on wealth. Buckley, 424 U.S. at 48-49, 96 S.Ct. 612. Even if a small group of in-district residents who hold a minority viewpoint contribute a majority of a candidates' donations, the decision-making process has remained entirely within the district.

55 The overinclusive argument is stronger. Appellees frequently refer to the hypothetical candidate's out-of-district mother who wants to donate a dollar to her child's campaign. To the extent that one views the state's interest as preventing non-residents from unduly influencing the outcome of an election, Measure 6 is over-inclusive in that it prohibits donations which will have no influence.

56 The state's interest, however, is more appropriately characterized as ensuring that only those who are constituents participate in the electoral process. Toward that end, Measure 6 is not over-inclusive in that it prohibits every non-district resident, but no residents, from participating in the electoral process. See Harwin, 953 F.2d at 490. Unlike the Goleta Water District in Harwin, appellants have presented considerable evidence indicating that out-of-district contributions determine in-district elections and thus have shown that the distinction serves the government's interest. See id.

57 Moreover in Austin, the Court rejected an overinclusiveness argument that not all corporations have vast resources. 494 U.S. at 661, 110 S.Ct. 1391. "We accept Congress' judgment that is it the potential for such influence that demands regulation." Id. Measure 6 is a manifestation of the state of Oregon's judgment that out-of-district donations have the potential for undue influence. Under Austin, there is precedent for according that judgment considerable deference. As the rigorous test requires only that the measure be closely drawn to advance the interest, rather than narrowly tailored, Measure 6 is sufficiently closely drawn to survive rigorous scrutiny.

58 Appellees argue that the measure denies out-of-district residents and out-of-state residents any voice in matters which may strongly affect their interests. In Buckley, however, the Supreme Court emphasized the more limited speech value associated with contributions as opposed to direct expenditures:

59 By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee

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entails only a marginal restriction upon the contributor's ability to engage in free communication ... While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

60 424 U.S. at 20-21, 96 S.Ct. 612. Part of the Buckley court's analysis emphasized that in only limiting the amount of contributions the Act still allowed the symbolic gesture of contributing. Id. In striking down expenditure limitations, however, the Court commented that they "limit political expression at the core of our electoral process and of the First Amendment freedoms." Id. at 39, 96 S.Ct. 612. See also Massachusetts Citizens, 479 U.S. at 259-60, 107 S.Ct. 616 ("we have consistently held that restrictions on contributions require less compelling justification than restrictions on independent expenditures").

61 Nothing in Measure 6 prevents out-of-district and out-of-state residents from making independent expenditures on behalf of candidates and issues. Appellee discusses stockholders and state employees as two groups that will be denied "any voice" in state elections under Measure 6. That argument is plainly false because these groups will be allowed to make independent expenditures in an effort to persuade the voters of Oregon that a particular candidate should be elected or a particular issue warrants closer attention. See Austin, 494 U.S. at 660, 110 S.Ct. 1391 (the act was not an absolute ban because it permitted independent expenditures from segregated funds). Thus while it could be argued that cases like Holt, which allows cities to exercise jurisdiction over non-residents, heighten the need for non-resident participation in elections through contributions, non-residents can always resort to independent expenditures.

62 Appellees also rely heavily on Whitmore v. Federal Election Commission, 68 F.3d 1212, 1216 (9th Cir.1996). In Whitmore, a third party candidate sought an injunction ordering candidates not to accept out-of-state contributions because such contributions violate their right to republican government. Id. The court held that the claim was frivolous noting that neither the constitution nor the federal statutes provide any support. Id. The court went on to note that the district court could not have granted the injunction in view of contributor's First Amendment rights. The amended opinion concluded that "such management of the system of political expression may violate the rights of out-of-state contributors." Id. (emphasis added).

63 The use of the word "may" indicates that the Whitmore court did not intend to resolve the First Amendment rights of the contributors. It was sufficient for them to hold that federal law did not prohibit out-of-state contributions. That holding has no bearing on this case because Measure 6 does prohibit out-of-state contributions and thus, unlike in Whitmore, the question of whether such a prohibition is in violation of the First Amendment is squarely before this court.

64 The Whitmore court was apparently concerned about the Supreme Court's admonition in Buckley against states favoring the speech of certain segments of the population. 68 F.3d at 1216. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley, 424 U.S. at 48-49, 96 S.Ct. 612.

65 Measure 6 clearly favors the voices of in-district residents over those of out-of-district residents but no more so than residency requirements for voting. In Buckley, however, the Court was considering a proposal that attempted to limit the ability of the wealthy to drown out the voices of those with fewer resources. 424 U.S. at 48, 96 S.Ct. 612. Measure 6 discriminates only on the basis of in-district residency and only affects contributions, not independent expenditures.

66 Finally, it is important to note that Measure 6 does not prevent the hypothetical candidate from donating to her child's campaign. Measure 6 does prohibit her child from using the funds but only penalizes a candidate when more than 10% of his "total campaign funding" is in violation of the provision. Thus while the statute inhibits out-of-district donations such that it implicates the First Amendment, it does not require our hypothetical candidate to return his mother's donation. The 10% floor thus essentially functions as a savings clause.

V.

67 States cannot pick and choose among voices in an effort to create an even playing field but they may take steps to ensure the integrity of political structures and processes. While Measure 6 affects protected speech, it more closely resembles the latter category of state actions and therefore survives rigorous scrutiny under the First Amendment, and I would reverse the District Court's Opinion and Order and vacate its Declaratory Judgment and Mandatory Injunction.

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* Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation

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[1] Appellants are in disagreement over the level of scrutiny. The state argues that less than strict scrutiny should be applied. Appellant Miller, however, concedes that strict scrutiny is applicable because he understands Measure 6 to be a contribution limit on candidates. Miller relied on the discussion in Buckley of limits on personal expenditures by candidates. However, nothing in Measure 6 prevents candidates from spending their own money or unlimited amounts of money contributed by in-district residents. Cf. Opinion of the Justices to the House of Representatives, 418 Mass. 1201, 637 N.E.2d 213, 216 (1994) (advisory opinion) (concluding that aggregate limit on total contributions was an expenditure limit). Thus Measure 6 is a restriction on contributions and should be evaluated as such