IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Validation Proceeding to Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure

MULTNOMAH COUNTY,
Petitioner-Appellant,

and

ELIZABETH TROJAN, MOSES ROSS, JUAN CARLOS ORDONEZ, DAVID DELK, JAMES OFSINK, RON BUEL, SETH ALAN WOOLLEY, AND JIM ROBISON,
Intervenors-Appellants,

and

JASON KAFOURY,
Intervenor,

v.

ALAN MEHRWEIN, PORTLAND BUSINESS ALLIANCE, PORTLAND METROPOLITAN ASSOCIATION OF REALTORS, AND ASSOCIATED OREGON INDUSTRIES,
Intervenors-Respondents.

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

BRIEF OF *AMICI CURIAE* TAXPAYERS ASSOCIATION OF OREGON AND TAXPAYERS ASSOCIATION OF OREGON POLITICAL ACTION COMMITTEE

[Caption continued on next page]

September 2019

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

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INTEREST OF AMICI

The Taxpayers Association of Oregon ("Association") is a 501(c)(4) nonprofit public benefit corporation and the Taxpayers Association of Oregon Political Action Committee ("Association PAC") is a political committee, both organized under the laws of Oregon (altogether "Associations").

The Associations act as watchdogs for Oregon taxpayers to ensure that state and local governments efficiently and wisely use the funds entrusted to them. They regularly publish reports on government waste, and those reports are used by legislators, students, taxpayers, activists, and journalists. They fight for issues that lack a large lobby, such as opposing small fee increases and supporting initiative rights. They train volunteers for poll watching and work to prevent taxpayer resources from being used to influence campaigns. And they recruit and support candidates whose beliefs align with those goals.

To the latter end, the Associations contribute to candidates and make independent expenditures regarding candidates and ballot measures throughout Oregon, including in Multnomah County. To fund their missions, the Associations receive contributions from donors, both from individuals and other groups and entities.

The Associations submit this brief to protect their and others' constitutional rights to freedom of speech, assembly, and petition. Measure 26-184 and its implementing ordinance (altogether the "Measure") violate both the

Oregon and United States Constitutions by limiting speech about candidates and public issues, compelling speech, and limiting contributions to individuals and organizations.

The Associations attempted to intervene in the action below and fully participated in briefing and argument before the circuit court as tentative parties. In particular, the Associations briefed the circuit court on the multiple ways in which the Measure violates the First Amendment, and the County and Intervenors-Appellants had the opportunity to respond to those arguments.[1] Nonetheless, on the same day it issued its decision on the merits, the circuit court denied intervention as untimely under Or. Rev. Stat. § 33.720.[2]

While agreeing with the Mehrwein intervenors that the Measure violates the Oregon Constitution, the Associations write to emphasize that the Measure

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[1] *See* Trojan Reply Br. ("Trojan Validation Resp.") at 13-21, 44-55, *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* ("*Validation Proceeding*"), No. 17CV18006 (Multnomah Cty. Circuit Ct. July 24, 2017); Multnomah County Response Br. ("County Validation Resp.") at 4-10, 12-14, 16-18, *Validation Proceeding*, No. 17CV18006 (Multnomah Cty. Circuit Ct. July 21, 2017).

[2] Because the circuit court did not rule on the motion to intervene until it filed its decision on the merits, the Associations were unable to appeal the denial of intervention. *See W. Linn-Wilsonville Sch. Dist. 3 J T v. Seida*, 328 Or 10, 14, (1998) (noting appeal of denial of intervention moot if final judgment rendered in lower court); Order on Motion to Intervene, *Validation Proceeding*, No. 17CV18006 (Multnomah Cty. Circuit Ct. Mar. 6, 2018) (noting date of denial).

cannot survive scrutiny under the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Excluding the additional question whether the Measure fails First Amendment scrutiny and the summary of argument, Amici Associations incorporate Respondents' Alen Mehrwein, *et al*, Response to Statements of the Case.

1. Additional question presented on appeal

Should this Court overrule *Vannatta v. Keisling*, 324 Or 514 (1997), and uphold the Measure under the Oregon Constitution, does the Measure violate the First and Fourteenth Amendments to the United States Constitution?

2. Summary of argument

The Measure's limits on expenditures and contributions, as well as its on-communication disclosure demands, restrict and control speech that "commands the highest level of First Amendment protection," *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (Roberts, C.J.). Indeed, these very regulations have been tried before, with the same arguments made, and both have been repeatedly rejected.

In particular, expenditure limits must meet the most "exacting scrutiny," and the Measure lacks the requisite compelling interest. *See Buckley v. Valeo*, 424 U.S. 1, 16, 44-45 (1976) (*per curiam*). In the four decades since *Buckley*, the

United States Supreme Court has repeatedly affirmed that government cannot control who may speak and what and how much they may say about candidates.

Moreover, while that Court has affirmed laws requiring certain donor reporting to the government, and permitted requirements that speakers announce their identity on their communications, it has never affirmed donor disclosure on the face of the communication. Rather, the Ninth Circuit Court of Appeals in *American Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979 (9th Cir. 2004), explicitly held that such compelled speech is unconstitutional, and subsequent United States Supreme Court decisions have only strengthened the protections against compelled speech, even under lower constitutional scrutiny than ever applied to political speech. *See, e.g., Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 2376-77 (2018) ("*NIFLA*") (holding law unconstitutional even under intermediate scrutiny).

Lastly, laws limiting contributions for independent expenditures and ballot measures, as well as contributions by candidates to their own campaigns, have repeatedly been held unconstitutional. But in attempting to favor certain donors over others, the Measure undermines the only interest that may justify contribution limits—the interest in combatting apparent and actual corruption. *See McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 206-07 (2014). Accordingly, the Measure's entire contribution limits scheme collapses under closely drawn scrutiny.

For these reasons, even if this Court were to affirm the Measure's constitutionality under Article I, Section 8 of the Oregon Constitution, it should nonetheless affirm the circuit court's decision under the First Amendment to the United States Constitution.

ARGUMENT

Although the Ross and Trojan intervenors argue that there is a presumption of constitutionality in favor of the law, Ross Br. at 4, Trojan Br. at 7-8, that is not true here. The Measure applies a multifaceted approach to restricting and discouraging the speech of disfavored parties: through direct limits on expenditures for speech; on-communication disclosure that alters a speaker's message; and limits on the contributions that may be used for speech. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon*, 572 U.S. at 210 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)). The County and the Ross and Trojan intervenors cannot sustain this burden.

The circuit court correctly concluded that the Measure's expenditure limits, on-communication disclosure, and contribution limits violate the Oregon Constitution. But even if the circuit court's conclusions were erroneous under the Oregon Constitution, this Court should nonetheless affirm the circuit court's decision given the Measure's violations of the First and Fourteenth Amendments to the United States Constitution.

And while this Court must first review the Measure for any violations under the Oregon Constitution, *Sterling v. Cupp*, 290 Or 611, 613-14 (1981), it may properly exercise its discretion to affirm the circuit court's decision on this alternative basis, *see Outdoor Media Dimensions v. State*, 331 Or 634, 659-60 (2001). Affirmance on an alternative basis is proper for two reasons: First, the First Amendment issues are purely questions of law. *See State v. Rogers*, 330 Or 282, 295 (2000) (noting courts may "examine legal arguments not relied on by a trial court"). Second, even if the case did not present purely legal issues, "the evidentiary record [is] sufficient to support the . . . alternative basis for affirmance." *Outdoor Media Dimensions*, 331 Or. at 659. In their briefs and at oral argument, the Associations fully argued the First Amendment issues. *See* Hearing Tr. at 4 (noting that the Associations would be permitted to fully participate until the court ruled on the intervention motion). As noted, the County and Ms. Trojan responded to the Associations' First Amendment arguments, in their response briefs and at oral argument. *See*, *e.g.*, Hearing Tr. at 27, 35-43, 45-46, 51-57, 61-67, 76-77; County Validation Resp. at 4-10, 12-14, 16-18; Trojan Validation Resp. at 13-21, 44-55.

Given that the parties fully briefed and argued the First Amendment issues, "the facts of record [are] sufficient to support the alternative basis for affirmance." *Outdoor Media Dimensions*, 331 Or. at 659. And the circuit court's conclusions that the Measure is unconstitutional under the Oregon Constitution

is "consistent with . . . the alternative basis for affirmance." *Id*. at 659-60. Moreover, given that the alternative basis was fully argued below, "the record [is] materially . . . the same one" had the circuit court ruled on the First Amendment issues. *Id*. at 660.

Furthermore, it is the most efficient use of judicial resources to decide the First Amendment issues now, should the Measure survive scrutiny under the Oregon constitution. Given the time and resources it took for the circuit court to make its decision and for the matter to come to argument here, any remand would either substantially delay enforcement of the law or impose unconstitutional burdens on speakers in Multnomah County for a substantial length of time. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (noting that "loss of First Amendment freedoms" for even a short time "constitutes irreparable injury").[3]

And remand without a stay could result in duplicative proceedings and even foreclose any opportunity for this Court to review the First Amendment issues. As Or. Rev. Stat. § 33.720 divests state courts of jurisdiction to hear challenges to the Measure by any other parties, other parties would be free to challenge the Measure in federal court. *See* Or. Rev. Stat. § 33.720(6) (stating that "the judgment entered in [a validation] proceeding is binding upon the parties

[3] Indeed, in opposing Mr. Mehrwein's motion to stay, Ms. Trojan and Mr. Ross argued against a much shorter delay given the upcoming elections. Resp. to Mot. to Suspend at 1-2, 4-5.

and *all other persons*," and that "the courts of this state do not have jurisdiction over an action . . . to seek [further] judicial review" (emphasis added)).

In addition, efficiently using this Court's resources to address the First Amendment issues now will not prejudice the County, Ms. Trojan, or Mr. Ross, who are free to address the First Amendment issues in their reply briefs.[4] Accordingly, given their opportunities to respond before the circuit court and here, they have not been "ambushed or misled or denied an opportunity to meet" the First Amendment arguments. *State v. Hitz*, 307 Or 183, 188-89 (1988).

Finally, this Court should speedily reach the First Amendment questions because of the important interests at stake. The Measure tramples on "expression at the core of our electoral process and of the First Amendment freedoms." *Buckley*, 424 U.S. at 39 (internal quotation marks omitted).

Indeed, the Measure violates over four decades of black letter law. Since our nation's bicentennial, the United States Supreme Court has held that limits on independent expenditures are unconstitutional, that disclosure and disclaimer laws must meet exacting scrutiny, and that contribution limits must be closely drawn to the interest in preventing actual or apparent corruption. *Id.* at 25 (contributions), 39-51 (independent expenditures), 64-65 (disclosure and

[4] Should they fail to do so, this Court could request additional memoranda by the parties. *See Cooper v. Eugene Sch. Dist.*, 301 Or 358, 369 n.12 (1986).

disclaimers).[5] *Buckley* explicitly prohibited limits on expenditures, and the Measure's on-communication disclosure and contribution limits fail the constitutional scrutiny *Buckley* requires.

A. The expenditure limits fail exacting scrutiny

Attempts to restrict independent expenditures have been repeatedly, consistently, and conclusively found unconstitutional under the First and Fourteenth Amendments. Nevertheless, the Measure prohibits independent expenditures exceeding $5,000 or $10,000 from individuals or political committees, respectively, per election cycle. Multnomah Cty. Home Rule Charter ("Charter") § 11.60(2)(c)(A) and (C). And these restrictions operate in the aggregate, capping individuals' and political committees' expenditures at those limits no matter how many candidates they wish to support or oppose. Furthermore, the Measure unconstitutionally prohibits corporations and other groups from making independent expenditures.

Even if well-intended, such restrictions are the playthings of leaders seeking to silence criticism. *See, e.g.*, *Timbs v. Ind.*, 139 S. Ct. 682, 693-95 (2019)

[5] *Buckley* used the term "exacting scrutiny" to describe the standards applicable to both expenditure limits and disclosure regulations. 424 U.S. at 44-45, 64. While the Court required that there be a "substantial relation between the governmental interest and the information required to be disclosed" for disclosure, *id*. at 64, the requirements for expenditure limits are what the court later called most exacting or strict scrutiny: they must "promote[] a compelling interest and [be] the least restrictive means to further the articulated interest," *McCutcheon*, 572 U.S. at 197.

(discussing persecution of critics leading up to the Glorious Revolution). But a system of representative democracy, inasmuch as it remains a government by the people, demands an unfettered right to praise or criticize its leaders. *See, e.g.*, *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 269 (1957) ("Because of the very nature of our democracy [criticism of leaders] must be permitted."). Accordingly, it has long been a fundamental principle of our political tradition that government may not decide who may speak and what they may say about our leaders. *See McCutcheon*, 572 U.S. at 192 ("And those who govern should be the *last* people to help decide who *should* govern." (emphasis in original)); *Republican Party v. White*, 536 U.S. 765, 782 (2002) ("It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." (internal quotation marks omitted)).

In particular, because "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution," "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (alteration in original) (citations omitted) (internal quotation marks omitted) (collecting cases). Expenditure limits "necessarily reduce[ ] [such] expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *McCutcheon*, 572 U.S. at 197 (first alteration in original)

(internal quotation marks omitted). Accordingly, those limits must meet the most "exacting scrutiny"—they must "promote[] a compelling interest and [be] the least restrictive means to further the articulated interest." *Id.*; *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (requiring narrow tailoring).

1. The Measure does not promote a compelling interest

In its briefing below, the County asserted interests in fighting corruption, fighting the circumvention of campaign finance laws, equalizing resources and influence, and reducing campaign costs. *See* County Opening Br. ("County Validation Br.") at 3, 24-25, 27, 29, *Validation Proceeding* (Multnomah Cty. Circuit Ct. July 11, 2017). None of those interests meet the requisite First Amendment scrutiny.

a. The interest in fighting actual or apparent corruption is inapplicable to independent expenditures

The United States Supreme Court has repeatedly held that the interest in fighting actual or apparent corruption is "the *only* legitimate and compelling government interest[] . . . for restricting campaign finances," that is, for restricting either expenditures or contributions. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (emphasis added); *see also McCutcheon*, 558 U.S. at 359 (noting that limited to *quid pro quo* corruption). And, in case after case, it and lower courts have held that the anti-corruption interest cannot sustain expenditure limits because there is "no

tendency in [independent expenditures] to corrupt or give the appearance of corruption." *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497; *see Buckley*, 424 U.S. at 52-54 (invalidating limits on campaign expenditures); *see also Citizens United*, 558 U.S. at 357 (holding "that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 608 (1996) (Breyer, J., plurality op.) (invalidating restrictions on independent expenditures by political parties); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 256-65 (1986) (invalidating restraints on independent expenditures by non-profit groups); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118 (9th Cir. 2011) (noting "the Supreme Court has found the anti-corruption interest unavailing in the context of restrictions on independent expenditures"); *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 694 (2010) (same).

Unlike "large campaign contributions," "independent advocacy" does not "pose dangers of real or apparent corruption" because the expenditures are "made totally independently of the candidate and his campaign." *Buckley*, 424 U.S. at 46-47. That is, there is no *quid pro quo*. *See McCutcheon*, 572 U.S. at 207. In addition, the support of a particular group or the message it shares may "provide little assistance to the candidate's campaign"; may in fact "prove counterproductive." *Buckley*, 424 U.S. at 47. Accordingly, the lack of

coordination both "undermines the value of the expenditure to the candidate" and "alleviates the danger that expenditures will be given as a *quid pro quo*." *Id*.; *see also Citizens United*, 558 U.S. at 357 (noting that independent expenditures by corporations do not give rise to actual or apparent *quid pro quo* corruption).[6]

Thus, under the only legitimate interest for restricting campaign finances, expenditure limits are "unconstitutional under the First Amendment." *Buckley*, 424 U.S. at 51.

b. There can be no anti-circumvention interest in the absence of a risk of actual or apparent corruption

The anti-circumvention interest exists only as a corollary to the anti-corruption interest, to justify restrictions on contributions to other groups that might get into candidates' hands indirectly. *McCutcheon*, 572 U.S. at 200. Consequently, "there can be no freestanding anti-circumvention interest." *Republican Party v. King*, 741 F.3d 1089, 1102 (10th Cir. 2013). For this interest to be legitimately applied, "there must be an underlying risk of corruption that justifies a contribution limit, and there must be a real possibility of evading those valid limits through unlimited contributions." *Id*.

[6] Furthermore, this First Amendment protection continues to apply even when organizations make candidate contributions as well, so long as the expenditures and contributions are made from separate accounts. *See, e.g.*, *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 131-32 (D.D.C. 2011).

Because the anti-corruption interest is inapplicable to independent expenditures, any invocation of the anti-circumvention interest would make it an illegitimate "freestanding" interest. *Id*. Furthermore, by definition, independent expenditures cannot get into candidates' hands or be coordinated with them. The anti-circumvention interest therefore cannot justify restrictions on independent expenditures.[7]

c. The anti-distortion / leveling rationale is always unconstitutional

The anti-distortion rationale is so offensive to the First Amendment that the United States Supreme Court has rejected it as a justification for any restriction on campaign finances, whether expenditure or contribution. The First Amendment was "designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964)). To do so, the government was prohibited from restraining that debate, even with beneficent intent.

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[7] Even assuming that there were a risk of corruption sufficient to create an anti-circumvention interest, there are "more targeted anticircumvention measures" possible—such as disclosure laws for groups making contributions to candidates—than the "prophylaxis-upon-prophylaxis" of restricting independent expenditures. *McCutcheon*, 572 U.S. at 200, 221 (internal quotation marks omitted). Any justification based on the anti-circumvention interest therefore fails scrutiny.

The constitutional limitations contained in the Bill of Rights are predicated on a "distrust of power," inasmuch as laws and their penalties may "become an instrument of tyranny; of zeal for a purpose, either honest or sinister." *Weems v. United States*, 217 U.S. 349, 372-73 (1910). If humans were such that no limits need be set on government power, then in fact "no government would be necessary." *The Federalist* No. 51 (James Madison).

Put simply, liberal societies deny anyone the power to restrain participation in public debate because of the danger that such power will be misused.[8]

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[8] John Locke, whose political philosophy "permeated the 18th-century political scene in America," *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting), explained that truth would be better served "if she were once left to shift for her self," John Locke, *A Letter Concerning Toleration* 46 (Tully ed., Hackett 1983) (1689). Because truth "is but rarely known [by], and more rarely welcome" to those wishing to stay in power, it is error that is generally aided "by the assistance of [government's] forreign and borrowed Succours." *Id*.

Similarly, in his debates with John Cotton about religious liberty in England and the colonies, Roger Williams, the founder of Rhode Island, wrote, "seldom is it seen, that the *nations* of the world have persecuted or punished any for error, but for the *truth*, condemned for error." Roger Williams, *The bloody Tenent yet more bloody* 161 (1652), https://archive.org/details/bloodytenentyetm00will/page/160 (spelling updated).

Or, as J.S. Mill wrote, any power to control speech is "illegitimate" because it is too often used "to root out the best men and the noblest doctrines." John Stuart Mill, *On Liberty* 21, 29 (John Gray, ed., Oxford 1991) (1859). Thus, when they tired of the gadfly filling the Agora with his ideas and ethics, an Athenian assembly found Socrates guilty of "impiety and immorality" and condemned him to death—even though he was "the most virtuous man in" his age and at the "headsprings of ethical as of all other philosophy." *Id*. at 29.

Accordingly, the First Amendment prohibits the government from restraining participation in public debate based on any such anti-distortion interest. As the *Buckley* Court held, "the 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.

Indeed, the United States Supreme Court has repeatedly rejected the anti-distortion interest since *Buckley*. In *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), for example, it rejected asymmetrical contribution limits that had been justified as "level[ing] electoral opportunities for candidates of different personal wealth," stating that there was "no support for the proposition that this is a legitimate government objective." *Id*. at 741.

Thus, as they are based on the anti-distortion or leveling interests—on "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections"—the Measure's limits are "antithetical to the First Amendment." *Id*. at 742 (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting)).[9]

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[9] And while the U.S. Supreme Court fleetingly endorsed the anti-distortion interest in *Austin*, the Court reconsidered the interest's effects and thoroughly rejected it in *Citizens United*. The decision in *Austin* was an "aberration" that "contravened . . . earlier precedents." *Citizens United*, 558 U.S. at 355, 363; *see also id*. at 348 (noting *Austin* conflicted with earlier precedent). Rather, *Austin* "trac[ed] back to [a] . . . flawed historical account of campaign finance laws." *Id*.

d. An interest in restraining campaign costs cannot justify limits.

Finally, the County cannot justify either contribution or expenditure limits based on a desire to "bring[] down the costs of running for office." County Validation Br. at 3; Trojan Br., ER-6. Because "[t]he First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion,'" even "'the skyrocketing cost of political campaigns' could not sustain" restrictions on campaign finances. *Citizens United*, 558 U.S. at 350 (quoting *Buckley*, 424 U.S. at 26, 49).

2. The County cannot justify limits as time, place, and manner requirements

a. The Measure imposes quantity restrictions

Any attempt to justify campaign finance restrictions as time, place, and manner restrictions are doomed to break against foundational First Amendment

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at 363. And, ironically, the efforts to further the interest hit small corporations the hardest, *id*. at 354, and presaged prohibitions even on "the political speech . . . of media corporations." *Id*. at 361; *see also id*. at 351.

On the other hand, the Court noted the benefits that corporations supply to public debate. *Id*. at 354. Thus, as in *Buckley*, the *Citizens United* Court concluded that "[t]his differential treatment cannot be squared with the First Amendment." *Id*. at 353.

doctrine.[10] *But see* Trojan Br. at 88.[11] Because expenditure and contribution limits "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties," the government cannot claim that they are "time, place, and manner" regulations. *Buckley*, 424 U.S. at 18; *see id*. at 19 (noting that a restriction on money spent "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached").

b. The Measure is content-based

The Measure's limits cannot qualify as time, place, and manner restrictions because such restrictions "must not be based on the content of the message."

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[10] The United States Supreme Court has traditionally applied time, place, and manner requirements to individuals' use of *public* property and fora. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (bandstand on public property); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (camping as part of demonstrations on public property); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984) (signs and leaflets placed on public property); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 642 (1981) (distributing literature at a state fair); *but see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (White, J., controlling op.) (without addressing public/private property issue, rejecting application of time, place, and manner restrictions to billboards because adequate alternatives not available). Because of the lower standards of scrutiny applied when the government is regulating the use of public property, applying such requirements outside that context is dubious, at best.

[11] The County and the supporting intervenors also argued below that the limits are time, place, and manner restrictions. County Validation Br. at 24; Trojan Opening Br. ("Trojan Validation Br.") at 71, *Validation Proceeding* (Multnomah Cty. Circuit Ct. July 11, 2017).

Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A law is content-based whether it "regulate[s] speech by particular subject matter" or "defin[es] regulated speech by its function or purpose." *Id*. Furthermore, "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id*. at 2230. For example, if a law were to "ban[] the use of sound trucks for political speech—and only political speech—[it] would be a content-based regulation." *Id*.

Despite the County's and Intervenors' protestations, the Measure's limits are content-based. *See* County Br. at 39; Trojan Br. at 16-17. The Measure does not restrict every attempt to give money or something of value. And it does not restrict all spending. It restricts only political "contributions" and "independent expenditures"—only giving and spending meant to influence an election or to support or oppose a candidate or measure. Charter § 11.60(1) and (2)(c).[12] The

[12] "Contributions" are defined as money or anything of value given "[f]or the purpose of influencing an election." Or. Rev. Stat. § 260.005(3); *see* Charter § 11.60(7)(c) (adopting definition at Or. Rev. Stat. § 260.005). An "independent expenditure" is defined as "an expenditure by a person for a communication in support of or in opposition to a clearly identified candidate or measure." Or. Rev. Stat. § 260.005(10); *see* Charter § 11.60(7) (adopting definitions at Or. Rev. Stat. § 260.005 unless otherwise indicated).

Measure's limits are therefore "based on the content of the message" and cannot be passed off as a "time, place, and manner" scheme. *Forsyth Cty.*, 505 U.S. at 130.

c. The Measure fails to leave ample alternatives

The Measure further fails as a time, place and manner restriction because it does not "leave open ample alternatives for communication." *Id*. Ms. Trojan asserts that "volunteer[ing] time and effort to support or oppose candidates" is a sufficient alternative to contributing to them or speaking for or against them. Trojan Br. at 88.[13] And the County below argued that speakers can instead engage in activity "such as volunteering, door-to-door canvassing, [and] organizing meetings." County Validation Br. at 24.

Alternatives are sufficient only if they permit the same types of messages to the same audience. In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), for example, the Court held that a law prohibiting signs advertising real estate was unconstitutional because there were not "ample alternative channels for communication": real estate sales are "not marketed through leaflets, sound trucks, demonstrations, or the like." *Id*. at 93(citation omitted) (internal quotation marks omitted).

[13] *See also* Trojan Validation Br. at 71.

The same is true here. Because of "[t]he electorate's increasing dependence on television, radio, and other mass media for news and information," volunteering, door-to-door canvassing, and organizing meetings of the like-minded are insufficient to get a message to the voters one wants to sway. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 494; *see also Buckley*, 424 U.S. at 18 ("The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.").

Thus, the Measure's limits do not merely force a change in a message's medium. Rather, they inhibit the "unfettered interchange of ideas" by restricting the speech of those who lack the time or resources to use the alternatives and by "impos[ing] direct quantity restrictions on political communication" altogether. *Id*. at 18-19, 48-49 (internal quotation marks omitted). But "[t]he First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Citizens United*, 558 U.S. at 373 (Roberts, C.J., concurring). Thus, as the *Buckley* Court already held, such restrictions cannot be passed off as time, place, and manner restrictions.

3. The money-as-conduct argument fails

Any attempt to justify the Measure as a restriction on conduct rather than speech fails for the same reason the Measure triggers scrutiny as a content-based regulation of speech—because of the Measure's underinclusiveness. *But see*

County Br. at 14-17; Trojan Br. at 15-23; Ross Br. at 12-13. As discussed above, the Measure does not regulate all types of donations or all ways of spending money—it restricts only contributions and independent expenditures meant to influence an election or to support or oppose a candidate or measure. *Cf. Thomas v. Bright*, No. 17-6238, ___ F.3d ____, 2019 U.S. App. LEXIS 27364, at *19 (6th Cir. Sep. 11, 2019) (rejecting as "specious" the argument that a law did not restrict speech because it also regulated location). The Measure is, therefore, a restriction on speech, not conduct.

Furthermore, as in *Buckley*, the constitutional tests applied to regulations of conduct cannot apply here "because the governmental interests advanced in support of the" Measure illegitimately "involve 'suppressing communication.'" *Buckley*, 424 U.S. at 17. The Measure "is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups . . . because the communication allegedly integral to the conduct is itself thought to be harmful." *Id*. (internal quotation marks omitted); *see* Trojan Br., ER-5 – ER-6; Trojan Validation Br. at 70 (noting desire to equalize influence, reduce the "undue influence" of some speakers and donors); *id*. at 71-72 (noting desire to limit influence of large donors). The Measure must therefore pass the scrutiny applied to restrictions on speech.

But, even if it could pass the "laugh test" to argue that the Measure targets money and not particular speakers and speech," *Reed*, 135 S. Ct. at 2239 (Kagan, J., concurring), the Measure would still demand and fail constitutional scrutiny. The *Buckley* Court held that "the dependence of a communication on the expenditure of money" does not "introduce a nonspeech element or reduce" constitutional scrutiny. 424 U.S. at 16. "[B]ecause virtually every means of communicating ideas in today's mass society requires the expenditure of money," "[a] restriction on the amount of money a person or group can spend . . . necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id*. at 19; *see also Deras v. Myers*, 272 Or 47, 57 (1975) (noting that "normally money must be expended to make [any substantial channel of communication] come about").

As noted, "[t]he First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Citizens United*, 558 U.S. at 372 (Roberts, C.J., concurring); *see also Nat'l Conservative Political Action Comm.*, 470 U.S. at 493-94 (stating that a false solicitude for speech while limiting expenditures "is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"). Accordingly, restrictions on the money used for speech must meet the same "exacting scrutiny required by the First Amendment" as restrictions on speech itself. *Buckley*, 424 U.S. at 16;

First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 n.23 (1978) (noting too late to argue reduces scrutiny). And, as with the expenditure limits in the *Buckley*, the Measure fails that scrutiny. *See Buckley*, 424 U.S. at 39-51.

4. The aggregate limits further violate the First Amendment

The Measure's aggregate limits—limiting independent expenditures *across all candidates* to no more than $5,000 for individuals and $10,000 for political committees—are an unconstitutional "prophylaxis-upon-prophylaxis." *McCutcheon*, 572 U.S. at 221 (internal quotation marks omitted). Like the Measure, the Federal Election Campaign Act imposed aggregate limits on the total contributions that an individual could make across candidates. The United States Supreme Court invalidated such aggregate limits because their relationship to the interest in combatting actual or apparent corruption is unconstitutionally feeble in the face of other alternatives.

The first line of defense against corruption is the honesty of candidates and contributors: "few if any contributions to candidates will involve *quid pro quo* arrangements." *Id*. (quoting *Citizens United*, 558 U.S. at 357); *see also Vannatta*, 324 Or at 541 ("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.").[14] Second, the government already punishes corruption and attempted corruption, both removing from office those who would accept bribes and discouraging future *quid pro quo* corruption. *See*, *e.g.*, Or. Rev. Stat.§§ 162.015 (punishing bribery); 241.525 (prohibiting corrupt practices).

Because of these basic shields against corruption, "few if any contributions to candidates will involve *quid pro quo* arrangements." *McCutcheon*, 572 U.S. at 221 (internal quotation marks omitted). The limits on contributions to individual candidates are therefore "a prophylactic measure." *Id*. And the further addition of aggregate limits creates a "prophylaxis-upon-prophylaxis," a stratification of protection increasingly distant from the core goal of protecting against *quid pro quo* corruption or its appearance. *Id*. (internal quotation marks omitted). Too many layers of protection turn even a dignitary into a prisoner, and that is no less true when the government holds the First Amendment hostage. Thus, when faced

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[14] The County asserts that Oregon ranks among the highest in the country for corruption. County Br. at 48. The source it cites to, however, does not present any evidence of *corruption*. *See id*. at 48 n.5. The study of "corruption" measures only whether there are "safeguards . . . against corruption . . . rather than corruption itself." Center for Public Integrity, "How We Investigated State Integrity" (Nov. 9, 2015, updated Nov. 23, 2015), https://publicintegrity.org/2015/11/09/18316/how-we-investigated-state-integrity. That is, the study does not measure crimes committed or convictions won, but only whether there are laws protecting against corruption. To use a study measuring whether a law exists as evidence the law should exist is circular, at best.

with prophylaxes piled on yet more prophylaxes, courts must "be particularly diligent in scrutinizing the law's fit." *Id*.

With regard to aggregate limits, "there are numerous alternative approaches available to . . . prevent circumvention of" any contribution limits that might be constitutional. *Id*. at 223. Such alternatives include a variety of restrictions on transfers between candidates and political committees and the use of earmarking requirements. *See id*. at 221-23. The state and county could also more strictly control the personal use of campaign funds. Because aggregate limits must be "limited to . . . *quid pro quo* corruption," because there is only a distant relationship between such limits and the anti-corruption interest, and because there are available alternatives to aggregate limits, the aggregate limits "intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'" *Id*. at 227 (quoting *Buckley*, 424 U.S. at 14).

5. The Measure unconstitutionally prohibits corporations from making independent expenditures

The First Amendment prohibits the Measure's restrictions on independent expenditures by corporations. *See Citizens United*, 558 U.S. at 365. The United States Supreme Court has repeatedly held that the "First Amendment protection extends to corporations." *Id*. at 342 (collecting cases). Furthermore, "[t]his protection has been extended by explicit holdings to the context of political

speech." *Id*. This is in part because "[c]orporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." *Id*. at 342-43 (quoting *Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality op.)); *see also id*. at 349-50 (noting that the value of speech does not depend on the identity of the speaker); *id*. at 351-52 (noting that the government's rationales would allow control of media corporations, as "the institutional press" does not have "any constitutional privilege beyond that of other speakers" (internal quotation marks omitted)); *id*. at 354-55 (noting that banning corporate speech distorts the marketplace of ideas and prevents citizens from receiving information they might think important).

Furthermore, the government cannot save a corporate speech ban through a hollow permission to speak through a segregated account—i.e., through a political committee. The requirements of forming a segregated fund impose "substantial" "restriction[s] on speech." *MCFL*, 479 U.S. at 252; *id*. at 253-55 (noting types of burdens); *see also Citizens United*, 558 U.S. at 337 (noting that "PACs are burdensome alternatives"). Indeed, inasmuch as PACs cannot use funds from their corporate parents to speak, but must seek funds from other donors, segregated funds restrict the corporation's right to speak anyway. *See Citizens United*, 558 U.S. at 337 (noting that such a law "is a ban on corporate

speech notwithstanding the fact that a PAC created by a corporation can still speak").

The Measure thus unconstitutionally prohibits a corporation or any other entity from making an independent expenditure unless it has registered as a political committee, with all the attendant burdens. *See* Charter § 11.60(2)(a) and (c) (requiring registration); Or. Rev. Stat. § 260.054(1) and (3)(a) (compelling segregated fund and detailed registration and reporting requirements). Furthermore, it is the PAC, not the entity forming it, that may support the message—the entity forming the PAC may not contribute any money to the message. *See* Charter § 11.60(2)(c)(C) (permitting expenditures only if made using contributions from individuals).

Thus, as with the bans on independent expenditures by corporations in *MCFL* and *Citizens United*, the Measure is unconstitutional.

B. On-communication disclosure fails the scrutiny required for compelled speech

As a form of compelled speech never approved by the United States Supreme Court, the Measure's on-communication disclosure is subject to strict scrutiny. Because less restrictive alternatives exist, the Measure fails strict scrutiny's requirement that the requirements be narrowly tailored to the informational interest. Furthermore, the Measure's underinclusiveness—the

failure to require that the speaker identify herself on the ad—demonstrates that there is no informational interest here.

1. The scrutiny for compelled speech requires narrow tailoring

The Measure's on-communication disclosure requirements violate the First Amendment right to control the content of one's communication, to decide "what to say and what to leave unsaid." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp*., 515 U.S. 557, 573 (1995) (quoting *Pac. Gas & Elec. Co.*, 475 U.S. at 11 (plurality op.)). Even "alte[ring] the content of . . . speech" with additional information is unconstitutional, absent one of the limited exceptions not at issue here. *NIFLA*, 138 S. Ct. at 2371 (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)); *cf. id*. at 2371-72 (refusing to add a new exception).

The Measure's "disclosure" requirements are an amalgamation of two types of campaign regulations—disclosure and disclaimers—that are exceptions in their separate circumstances, but not together. In the jargon of campaign regulation, disclaimer statutes require that a communication state who made it—who "is responsible for the content of th[e] advertising," *Citizens United*, 558 U.S. at 366, while disclosure requires public reporting to the government of expenditures and contributions, *Buckley*, 424 U.S. at 63.

The United States Supreme Court has held that these two types of regulations, separately, pose an acceptable burden on the ability to speak. *Citizens*

United, 558 U.S. at 366. Because true disclosure requires that information be provided directly to the government, it does not interfere with a speaker's message to the public. And the limited nature of true disclaimers—stating the name of the speaker and whether a candidate authorized the ad—similarly avoids putting a "ceiling on campaign-related activities." *Id*. (internal quotation marks omitted).

Combining disclaimers and disclosure, however, does burden campaign speech. By changing and even limiting the message intended, as discussed below, the Measure infringes on First Amendment freedoms. And the touchstone of constitutionality—whether under the strict scrutiny applied to limits on speech, the exacting scrutiny applied to these exceptions, or even intermediate scrutiny—is whether less restricting options are available. *NIFLA*, 138 S. Ct. at 2376 (noting less restrictive means under intermediate scrutiny and stating that "[t]he First Amendment does not permit the State to sacrifice speech for efficiency" (internal quotation marks omitted)); *McCutcheon*, 572 U.S. at 197 (noting limits on expenditures unconstitutional when not "least restrictive means"); *id*. at 199 (holding that laws must "avoid unnecessary abridgement of First Amendment rights" under closely drawn scrutiny (internal quotation marks omitted); *Riley*, 487 U.S. at 800 (noting that "precise[] tailor[ing]" required for compelled speech and that law is unconstitutional if "more benign and narrowly tailored options are available"); *MCFL*, 479 U.S. at 262 (holding disclosure requirements

unconstitutional because the governmental "interest in disclosure [could] be met in a manner less restrictive").

In *Riley*, for example, a law requiring that fundraisers disclose their professional status was unconstitutional because the government could "itself publish" the information. 487 U.S. at 800. And in *Heller*, the Ninth Circuit invalidated similar on-communication disclosure—disclosure "*on the publication* [of] the names and addresses of the publications' financial sponsors"—because "less speech-restrictive reporting and disclosure" to the government was possible. 378 F.3d at 981, 995 (emphasis in original).[15]

2. The Measure is unconstitutional compelled speech given a less restrictive alternative

As noted above, the Measure's requirement that a speaker include the top five contributors (over $750) on the face of every communication, Charter § 11.60(3), is not the same as traditional disclaimers or disclosure to the government. And, in fact, the alternative of disclosure to the government makes this compelled speech unconstitutional.

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[15] While only United States Supreme Court precedent is binding on this Court, it nonetheless "respect[s] the decisions of lower federal courts on issues of federal law." *State v. Moyle*, 299 Or 691, 707 (1985). And in any later federal court challenge to the Measure, the federal district court and the Ninth Circuit would be bound by *Heller*'s decision that on-communication disclosure is unconstitutional, as no intervening decision has held that on-communication disclosure—as opposed to disclosure reporting and disclaimers—is constitutional.

As in *Riley* and *Heller*, a less burdensome alternative exists. Counties may require that speakers submit *to the county clerk* reports of independent expenditures made and contributions received. *See* Or. Rev. Stat. § 260.163(1). The county may then publish the information, informing the electorate "without burdening a speaker with unwanted speech." *See Riley*, 487 U.S. at 800. Given this less burdensome alternative, the Measure is not precisely tailored.

Moreover, the County cannot argue that this compelled speech is constitutional because it only results in more speech. The content of the speaker's message has been altered, *NIFLA*, 138 S. Ct. at 2371, infringing on her right to decide "what to say and what to leave unsaid." *Hurley*, 515 U.S. at 573.

And it is not true that the Measure's compelled speech only results in more speech. In commandeering the speaker's communication for its own message, the government consumes the speaker's resources. Each second spent in a radio ad and each column inch in a newspaper costs money. *See Buckley*, 424 U.S. at 19 (noting effect of money). And even without the separate contribution limits imposed by the Measure, individuals and organizations have limited means with which to get their message out. When forced to use their limited resources to pay for the content demanded by the County, speakers must limit the speech they would make. Thus, the effect of on-communication disclosure is not "*more* expression," County Validation Br. at 30 (emphasis in original), but rather unconstitutional limits on and control over a speaker's message. *See Buckley*, 424

U.S. at 55 ("No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression . . . .")

Indeed, the Measure will not merely alter messages, it will overwhelm them. For a message as short as "Dump Trump: Fight Bigotry," listing the five largest contributors could take up more than half the length of the message and more than double the cost.[16] Similarly, reading off the five largest contributors would have taken more than half the message for the ten-second ads inviting viewers to watch the movie at issue in *Citizens United*.[17] Thus, for a 10 second radio spot or a one-column inch ad in a newspaper, almost the entire communication would be swallowed by the Measure's demanded disclosure.

Finally, even if a court were to apply intermediate scrutiny—which is less than strict scrutiny, closely drawn scrutiny, or exacting scrutiny, that is, less than any standard applied to political speech—to this content-based regulation, the Measure's on-communication disclosure requirement would still be

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[16] *See, e.g.*, photo, Samantha Wilson, "Donald Trump's Muslim Ban: How You Can Fight the Anti-Immigration Order (Jan. 30, 3017), http://hollywoodlife.com/2017/01/30/protest-muslim-ban-immigrants-executive-order-fight-volunteer/.

[17] *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 276 n.3 and 4 (D.D.C. 2008) (three-judge court) ("First, a kind word about Hillary Clinton: . . . She looks good in a pant suit. Now, a movie about the everything else."); *cf. Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1314 (1st Cir. 1997) (noting presumption against message-affecting regulations, such as equal coverage requirements applied to voter guides).

unconstitutional.[18] For example, the *NIFLA* Court held that compelling pregnancy centers to provide notice of certain family planning services would fail even under intermediate scrutiny, because the government could inform pregnant women about those services rather than compelling the centers to do so. 138 S. Ct. at 2376. And the government could not overcome the unconstitutionality of the compelled speech by arguing that it is more efficient: "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." *Id*. at 2376 (alteration in original) (quoting *Riley*, 487 U.S. at 795)).

3. There is no informational interest here

Even if the Measure's on-communication disclosure were "sufficiently drawn to" the informational interest, *id.* at 2375, the Measure's requirements have undermined that interest here.[19] The informational interest is one "in knowing who is speaking about a candidate shortly before an election." *Citizens United*, 558 U.S. at 369. The Measure, however, does not even require that the speakers

[18] In *Buckley*, the Court "explicitly rejected" the application of intermediate scrutiny to political speech. *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377, 386 (2000).

[19] Only three interests may support government compelled disclosure: the informational interest, the anti-corruption interest, and the anti-circumvention interest. *Buckley*, 424 U.S. at 66-68. As discussed above, the anti-corruption and anti-circumvention interests are inapplicable to independent expenditures. Therefore, only the informational interest is possibly applicable to the Measure's on-communication disclosure for independent expenditures.

identify themselves on their communications.[20] And if the Measure has no concern with who is actually speaking about the candidate, then—whatever the Measure's concern—it is not directed to the informational interest.[21] As with the law addressed in *NIFLA*, the Measure is "wildly underinclusive" and unconstitutional. 138 S. Ct. at 2375-76 (internal quotation marks omitted); *see id*. (noting "serious doubts" raised by underinclusiveness (internal quotation marks omitted)).

4. The cases cited in the Ross brief are inapposite or inapplicable

Furthermore, the cases cited by Mr. Ross do not sustain the Measure's on-communication disclosure requirements. They either apply only to disclaimers or true disclosure, or they have been rejected by Ninth Circuit precedent.

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[20] The Measure does not require speaker identification, and, because of the repeal of Or. Rev. Stat. § 260.522, Oregon law did not require it at the time the Measure was passed. *See* Oregon Secretary of State, *Election Law Summary* at 5 (Rev. 3/2016), https://sos.oregon.gov/elections/Documents/elec_law_summary.pdf (noting identification recommended but not required on political material). House Bill 2716, Chapter 636 (2019 Laws), which goes into effect on December 3, 2020, will require speaker identification. But, this new law does not change that the County had no concern that speakers should identify themselves to voters when the Measure passed.

[21] For example, one of the other uses of such disclosure is blacklisting and boycotting to chill disfavored speech. *See Citizens United*, 558 U.S. at 480-83 (Thomas, J., concurring in part) (noting use of disclosure to harass donors); Bradley A. Smith, "Doxing Trump Donors Is Just the Beginning," *National Review* (Aug. 9, 2019), https://www.nationalreview.com/2019/08/doxxing-trump-donors-is-just-the-beginning/.

Contrary to Mr. Ross, *Citizens United* neither rejected *McIntyre* nor upheld the type of on-communication disclosure at issue here. *But see* Ross Br. at 39-40. As discussed above, "the Supreme Court has drawn [a distinction] between 'disclosure' (reporting one's identity [and donors] to a public agency) and 'disclaimer' (placing that identity in the ad itself)." *Majors v. Abell*, 361 F.3d 349, 354 (7th Cir. 2004). And it was only those distinct requirements that the *Citizens United* Court upheld. *See Citizens United*, 558 U.S. at 366-68 (noting BCRA required "a disclaimer" stating who was responsible for the advertising, and a report to the FEC "identify[ing] the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors").

Rather, to the extent *Citizens United* speaks to on-communication disclosure, the opinion says such a restriction is unconstitutional: On-communication disclosure imposes burdens that, as discussed above, will place a "ceiling on campaign-related activities." *Id*. at 366. Furthermore, given the differences between on-communication disclosure on one hand and disclaimers and true disclosure on the other, compelled speech decisions like those in *NIFLA*, *Riley*, *Heller* are the most on-point, and under them the Measure's requirements are unconstitutional. *See Riley*, 487 U.S. at 795 (prohibiting requirement that professional fundraisers include "the percentage of charitable contributions . . . actually turned over to charity" in communications).

Moreover, the Ninth Circuit cases Mr. Ross cites deal only with true disclaimers or true disclosure, and thus those cases do not and cannot contravene the *Heller* Court's decision that on-communication disclosure is unconstitutional. In *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), for example, the Ninth Circuit upheld only a disclaimer "impos[ing the] modest burden" of stating whether "the advertisement is published, broadcast, televised, or circulated with or without the approval and authority of the candidate." *Id*. at 1202. Likewise, in *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), the Ninth Circuit addressed a law that required the speaker's name and address and a statement that "the advertisement was not approved by any candidate." *Id*. at 999; *see also Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2012) (addressing reporting requirements under the former Wash. Rev. Code § 42.17.090).

The out-of-circuit precedent in *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), addressed a true disclaimer requirement: that the communication state whether the candidate authorized the communication and the name and address of the person making the communication. *Id*. at 43-44; *see also id*. at 61 (noting that Maine's requirements were "precisely [those] approved in *Citizens United*"). And the Seventh Circuit in *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012), addressed true disclosure, a requirement that speakers "make regular financial disclosures to the State Board

of Elections." *Id*. at 470; *see also Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 548 (4th Cir. 2012) (addressing real disclosure requirements, reporting to the FEC under the former 2 U.S.C. § 434(c)); *Nat'l Org. for Marriage Inc. v. Cruz-Bustillo*, 477 F. App'x 584, 585 (11th Cir. 2012) (*per curiam*) (addressing real disclosure);[22] *Bailey v. State*, 900 F. Supp. 2d 75, 77 (D. Me. 2012) (addressing true disclaimer requirement, that communication identify speaker and whether communication authorized by a candidate).

The other, out-of-circuit cases, while involving laws that had on-communication disclosure requirements, either did not squarely address those requirements or used reasoning rejected by the Ninth Circuit. For example, *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118 (2d Cir. 2014), dealt with a law requiring that disclaimers in certain instances list contributor information. *Id*. at 129-30. The parties, however, challenged the law for vagueness, not as unconstitutional for controlling the content of their communication, and the court did not rule on the issue. *Id*.

[22] Indeed, the Eleventh Circuit noted that the plaintiff there conceded that it "was not challenging the disclosure requirements." *Nat'l Org. for Marriage Inc.*, 477 F. App'x at 585 n.2. But, even if the plaintiff had challenged the disclosure requirements, only true disclosure was at issue. *See Nat'l Org. for Marriage, Inc. v. Roberts*, 753 F. Supp. 2d 1217, 1219 n.1 (N.D. Fla. 2010) (citing statutory provisions regarding disclosure related to plaintiff's arguments).

And while the Seventh Circuit in *Majors v. Abell* "[r]eluctant[ly]" upheld on-communication disclosure of those paying for the communication, 361 F.3d at 350, 355, the Ninth Circuit in *Heller* specifically rejected the *Majors* Court's reasoning and decision, *Heller*, 378 F.3d at 1001-02. The *Majors* Court failed to note the distinctions the Supreme Court has drawn between disclosure and disclaimers; failed to "discuss the conceptual distinction for First Amendment purposes between a regulation that alters a communication and one that does not"; and failed to "give any weight to the Supreme Court's distinction . . . between a requirement that the identity of the publisher be revealed later and in less detail and a requirement that identifying information be included on the communication itself." *Id*. at 1001.[23] These are precisely the errors and omissions committed by Mr. Ross.

* * *

Given lack of an informational interest here and the available alternative to burdening speakers with on-communication disclosure, the Measure's

[23] Mr. Ross states that several other states "have 'disclaimer' laws requiring that political ads . . . identify their actual top significant funders." Ross Br. at 8. Notably, while stating that "[n]one have been struck down," *id*., Mr. Ross does not say that these unspecified laws have been upheld after challenge. Nor does he explain how those cases overcome the Ninth Circuit's interpretation of the First Amendment.

requirements are insufficiently tailored to the informational interest and are therefore unconstitutional.

C. The Measure's restrictions on contributions are unconstitutional

The Measure imposes specific limits on contributions that are always unconstitutional, while simultaneously undermining the anti-corruption interest upon which the entire contribution limits regime depends.

1. The Measure unconstitutionally applies limits to categories that are always protected

The broad language of Charter § 11.60(1)(a) unconstitutionally limits contributions to groups making independent expenditures, contributions for ballot measures, and self-funding by candidates. It broadly defines "contribution" as *any* money used for "influencing an election for public office or an election on a measure . . . or . . . [t]o or on behalf of a candidate, political committee or measure." Or. Rev. Stat. § 260.005(3).[24] And the Measure then proscribes all but those "Contributions . . . specifically allowed." Charter § 11.60(1)(a). But the only contributions specifically allowed under the Measure are limited contributions to candidates and candidate committees. Thus, the Measure unconstitutionally prohibits any other contributions, including contributions for

[24] The Measure adopts the definition from Or. Rev. Stat. § 260.005(3), with exceptions not at issue here. *See* Charter § 11.60(7)(c).

independent expenditures and ballot measures and contributions by candidates to their own campaigns.[25]

a. Ban on contributions for independent expenditures

The Measure's poor drafting infringes on contributions for independent expenditures in two ways. First, as noted, the poor drafting of the general requirements—banning all but those contributions specifically allowed—bans contributions for independent expenditures altogether.[26] Second, the Measure prohibits contributions for independent expenditures unless made by natural individuals and amounting to $500 or less. Charter § 11.60(2)(c)(C).[27]

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[25] Moreover, the County and the Measure's proponents knew that the term "contribution" had this broad effect. The petition from which the Measure was drafted began with the same requirement, allowing "a Contribution . . . only as specifically allowed in this Amendment." Amendment 2(b), *Prospective Petition, A Fair Elections and Clean Governance Charter Amendment* at 8 (received Apr. 23, 2015), https://multco.us/file/41001/download. The proposed amendment then went on to specifically allow contributions to candidates and candidate committees, political committees, small donor committees, and political parties. *See* Amendment 2(d) – (h), *id*. at 8-9. And a later section of the proposed amendment expressly permitted candidate self-funding. *See* Amendment 5, *id*. at 11. The provisions permitting these other contributions were stripped from the final version of the Measure, substantially broadening the contribution ban.

[26] Charter § 11.60(2)(a) also prohibits any expenditures "except those collected from the sources and under the Contribution limits set forth in" the Measure.

[27] This inherent contradiction in the Measure—between § 11.60(1) and (2)(a), which appear to *ban* contributions to independent expenditure groups, and § 11.60(2)(c)(C), which *limits* them—is an independent indication of the Measure's poor drafting and overreach. This vagueness creates a trap for the unwary and is an independent ground for declaring this portion unconstitutional.

Whether they are prohibited entirely or merely limited, every court to consider limits on contributions for independent expenditures has held that they are facially unconstitutional. *See, e.g.*, *Thalheimer*, 645 F.3d at 1119-21; *SpeechNow.org*, 599 F.3d at 694-96. To sustain such limits, the government must show "a sufficiently important interest and employ[] means closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. And the only justification the U.S. Supreme Court has recognized as sufficient to permit restrictions on contributions is fighting actual or apparent corruption. *See McCutcheon*, 572 U.S. at 206; *Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-97; *see also Thalheimer*, 645 F.3d at 1118; *SpeechNow.org*, 599 F.3d at 692; *cf. Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 644-645 (requiring "a substantial threat of corruption").

There can be no interest in fighting actual or apparent *quid pro quo* corruption for independent expenditures because such contributions cannot, by definition, make their way into candidates' hands. *See Thalheimer*, 645 F.3d at 1121 (noting no anti-corruption interest unless there exists a "direct donor relationship" or "historical interconnection"); *SpeechNow.org*, 599 F.3d at 694-95. The Measure's contribution limits for independent expenditure are therefore

unconstitutional because they cannot be not "closely drawn" to "a sufficiently important interest." *Buckley*, 424 U.S. at 25.[28]

b. Ban on contributions for ballot measures

The Measure's restrictions on contributions for ballot measures similarly fail First Amendment scrutiny for lack of an anti-corruption interest. The United States Supreme Court has held that "[t]he risk of corruption perceived in cases involving candidate elections, simply is not present in a popular vote on a public issue." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353 n.15 (1995) (citations omitted) (internal quotation marks omitted); *see also Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010); *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031 (9th Cir. 2009).

Accordingly, "because [the] anticorruption rationale is inapplicable," the First Amendment "' . . . does not support limitations on contributions to

[28] The County might argue that the Measure did not intend to restrict such non-candidate contributions, and even that it would not enforce any contribution limits beyond those on candidates. Constitutional rights cannot, however, hang on the changeable whims of those who might in the future enforce the Measure. *See United States v. Stevens*, 559 U.S. 460, 480 (2010) (Roberts, C.J.) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). And, even if the government's present promise were enough, the Measure is too easily interpreted as restricting too much other speech. It will therefore unconstitutionally "lead citizens to steer far wider of the unlawful zone," of the speech that the government might constitutionally intend to regulate, "than if the boundaries . . . were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks omitted).

committees formed to favor or oppose ballot measures.'" *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 645 n.10 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 297 (1981) (emphasis removed)). Thus, as applied to groups accepting contributions in support of or in opposition to ballot measures, the Measure is unconstitutional.

c. Limits on candidate self-funding

Limits on self-funding and contributions by family similarly fail First Amendment scrutiny for lack of an anti-corruption interest. The Measure limits candidate contributions from any individual, including the candidate and the candidate's family members, to $500. Charter § 11.60(1)(b); *see also* Charter § 11.60(2)(a) (prohibiting any expenditures except those from approved contributions).

But the United States Supreme Court has held that the interest in combatting actual or apparent corruption "does not support the limitation on the candidate's expenditure of his own personal funds," or on "the personal funds of his immediate family." *Buckley*, 424 U.S. at 51, 53. Furthermore, any attempted restriction under that or any other interest ignores "the fundamental nature of the right to spend personal funds for campaign speech." *Davis*, 554 U.S. at 738-39; *see also id*. at 729, 738-39 (invalidating provision that penalized candidates who spent their own funds—by allowing trebled individual contributions and unlimited coordinated party expenditures to their opponents—as "an

unprecedented penalty" for "robustly exercis[ing their] First Amendment right[s]"). Thus, as in *Buckley*, "the First Amendment simply cannot tolerate [the Measure's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54.

* * *

Thus, the limits on contributions to groups making independent expenditures, on contributions for ballot measures, and on self-funding by candidates are unconstitutional under the First and Fourteenth Amendments.

2. The Measure's contribution limits regime fails generally for lack of a valid governmental interest

The Measure's contribution limits regime in general cannot survive the requirement that it promote "a sufficiently important interest." *Buckley*, 424 U.S. at 25. The County has shown that it has no concern in combatting actual or apparent corruption—the only legitimate interest for limiting contributions. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-97. Rather, its only concern is the equalizing or anti-distortion interest, which is an illegitimate interest under the First Amendment.

The anti-corruption interest is tied to the "concern that *large* contributions could be given 'to secure a political *quid pro quo*,'" *Citizens United*, 558 U.S. at 345 (emphasis added), and to "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large*

individual financial contributions," *Buckley*, 424 U.S. at 27 (emphasis added). The Measure, however, permits not just large contributions, but unlimited contributions—provided they come from favored groups. That is, the County demonstrates a belief that there is no risk of dollars for favors, or even an appearance of it, from unlimited donations as long as donors meet certain characteristics, but that others pose a risk of corruption even at relatively low amounts.[29]

This is a novel view of contribution limits and the anti-corruption interest, and the state therefore has a heightened burden to demonstrate the constitutionality of the First Amendment burdens imposed. *See Shrink Mo.*, 528 U.S. at 391 ("The quantum of empirical evidence" the government must provide "to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification" the government gives).[30] To meet this burden, the County must provide more than "mere

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[29] In particular, the Measure allows *unlimited* contributions from small donor committees, only $500 from individuals and political committees, and nothing from any other entity. Charter § 11.60(1)(b).

[30] The plaintiffs in *Shrink Missouri* did not raise an inherently novel challenge. They challenged whether the state had produced enough evidence to sustain a law like that at issue in *Buckley*. *See Shrink Mo.*, 528 U.S. at 390-91. But the *Buckley* Court had already upheld a similar law against a similar challenge where a government asserted similar justifications. Thus, the state could rely on evidence and studies used in *Buckley* to justify its analogous law. *Id*. at 391-92, 393, 393 n.6. Here, there is no similar congruence with *Buckley* (or any other

conjecture" that one group creates a risk of corruption and the other does not. *Id*. at 392. It must "show a real risk of corruption" under the facts of this case, rather than relying on general statements, facial precedents, or other authority dealing generally with contribution limits in very different circumstances. *Id*.; *see also Buckley*, 424 U.S. at 28 (upholding contribution limit that "focuse[d] precisely on . . . the narrow aspect of political association where the actuality and potential for corruption have been identified"). It has not done so here.

Rather, given that the Measure is "wildly underinclusive" in allowing unlimited contributions from some and very limited contributions from others, there are "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)).

Indeed, as stated by the Measure's proponents, the point of the Measure was to "amplif[y] the voice of ordinary voters," to stop what they considered the "undue" influence of others. Trojan Br., ER-5. But, as discussed above, the United States Supreme Court has wholly rejected any such anti-distortion interest: "the concept that government may restrict the speech of some elements

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authority), and the County must bear the full burden of heightened constitutional scrutiny.

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. And the Court reiterated that point in *Davis*, stating that there "no support for the proposition that [it is even] a *legitimate* government objective" to attempt to "level electoral opportunities." 554 U.S. at 741 (emphasis added) (internal quotation marks omitted).

Thus, based as it is on "'the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections,'" the Measure's contribution limits regime is "'antithetical to the First Amendment.'" *Id*. at 742 (quoting *Austin*, 494 U.S. at 705 (Kennedy, J., dissenting)).

Furthermore, the County cannot justify either contribution or expenditure limits based on a desire to bring down the costs of running for office. Because "[t]he First Amendment's protections do not depend on the speaker's 'financial ability to engage in public discussion,'" even "'the skyrocketing cost of political campaigns' could not sustain" restrictions on campaign finances. *Citizens United*, 558 U.S. at 350 (quoting *Buckley*, 424 U.S. at 26, 49).

Thus, given that the County has demonstrated no legitimate interest in its unique contribution limits regime, it must fail closely drawn scrutiny.

CONCLUSION

For the reasons given above, this Court should affirm the circuit court's decision that the appealed provisions of the Measure are unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

Dated: October 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE-SIZE REQUIREMENTS

I certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b) because, excluding the parts exempted by ORAP 5.05(1)(a), this document contains 11,444 words.

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DATED: October 1, 2019

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Appellate Court Administrator on this date. I further certify that service of a copy of this brief will be accomplished on the following participants in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participants' email address as recorded this date in the appellate eFiling system:

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