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 AMICUS BRIEF ON REMAND OF TAXPAYERS ASSOCIATION OF OREGON AND TAXPAYERS ASSOCIATION OF OREGON PAC

The Oregon Supreme Court remanded for determination whether the candidate campaign contribution limits at Multnomah County Code ("MCC") § 5.201 ("the Measure") are unconstitutional under the First Amendment. The Measure restricts speech in an area where "the First Amendment has its fullest and most urgent application," *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted) (collecting cases), and it violates the First Amendment in two ways: by limiting the contributions that candidates may make to their own campaigns and by imposing unconstitutionally low general limits that are not justified by a sufficient governmental interest.

A. The Measure's Self-Funding Restrictions Are Unconstitutional

The United States Supreme Court has "emphasi[zed] . . . the fundamental nature of [a candidate's] right to spend personal funds for campaign speech." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 738 (2008). Nevertheless, the Measure infringes on that fundamental right by limiting a candidate's right to contribute to her own campaign. With no exceptions, "[a] Candidate or Candidate Committee may receive only the following contributions . . . (1) Not more than five

hundred dollars ($500) from an Individual or Political Committee other than a Small Donor Committee; (2) Any amount from a Small Donor Committee; and (3) No amount from any other Entity." MCC § 5.201(B). Thus, the ordinance's language prohibits a candidate from contributing more than $500 to her campaign or campaign committee.

The County has argued that giving money to one's campaign committee is not a contribution because the candidate gets equivalent compensation by supporting her candidacy. Cty. Resp. at 6-7 (July 21, 2017); Cty. Reply at 15-17, *Multnomah Cty. v. Mehrwein*, No. S066445 (Or. Oct. 29, 2019). This view is not intuitive, and was popularly lampooned as far back as the 1985 movie *Brewster's Millions.*[1] It is hard to see, for example, what Michael Bloomberg gained from the $200 million he poured into his presidential campaign in just five weeks.[2] One may worry that the County's litigation position here will give way to the plain language of the Measure in future enforcement actions. *See* Or. Rev. Stat. § 260.005(a) (requiring "equivalent compensation or consideration"); Or. Rev. Stat. § 260.005(3)(b) (requiring "equivalent value"); *cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) (rejecting reliance on the government's "*noblesse oblige*" and "prosecutorial restraint").

Both Oregon and the County define a contribution as a "payment [or] loan . . . of money, services . . . supplies, equipment or any other thing of value . . . [f]or the purpose of influencing an election for public office." Or. Rev. Stat. § 260.005(3)(a); MCC § 5.200. This definition mimics that in the Federal Election Campaign Act ("FECA"): "any gift, subscription, loan, advance, or

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[1] *See* Review of *Brewster's Millions*, IMDB, https://www.imdb.com/title/tt0088850/plotsummary (last visited Aug. 14, 2020) (discussing character who, in an effort to spend an inheritance without gaining anything of value in return, engages in a political campaign that "involves a large amount of advertising, staffing and televised ads and [quickly] drains much of the $30 million").

[2] Tarini Parti and Chad Day, *Michael Bloomberg Put $200 Million Into Presidential Bid in First Five Weeks*, Wall Street Journal (Jan. 31, 2020, 5:36 pm), https://www.wsj.com/articles/michael-bloomberg-put-200-million-into-presidential-bid-in-first-five-weeks-11580504924.

deposit of money or anything of value . . . for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(8)(A). Under such a definition, "[w]hen candidates use their personal funds for campaign purposes, they are making contributions to their campaigns." Fed. Election Comm'n, *Using the personal funds of the candidate*, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/using-personal-funds-candidate/ (last visited Aug. 14, 2020); *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 751 (2011) (noting another provision of FECA that treated "a candidate's expenditures . . . as contributions").

That a candidate's own donations are included as contributions under Oregon law is underscored, for example, by Governor Brown's reporting of her donations to her own campaign.[3] Or by the contributions and loans to her own campaigns made by one of the Intervenors' Declarants, Sharon Meieran.[4] The County must bear the consequences of its decision to adopt the definition of "Contribution" at Or. Rev. Stat. § 260.005(3).[5]

Multnomah County's attempt to limit candidates' contributions to their own campaigns is unconstitutional. The United States Supreme Court has repeatedly held that the interest in fighting

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[3] *See, e.g.*, Transaction ID Nos. 2443737 and 3064611 at ORESTAR, the Oregon Secretary of State's Campaign Finance repository at https://secure.sos.state.or.us/orestar/gotoPublicTransactionSearch.do?OWASP_CSRFTOKEN=KRVN-MYVJ-CDUP-3HZK-PMZI-WWDH-PDGA-RB4B. Of particular note is the Address Book Type created by the Oregon Secretary of State for the "Candidate's Immediate Family." This "[i]ncludes the candidate." *See* Oregon Secretary of State, *ORESTAR User's Manual: Transaction Filing* at 22 (Rev. Jan. 2017), https://sos.oregon.gov/elections/Documents/orestarTransFiling.pdf.

[4] *See* Transaction ID Nos. 3264895, 2324873, 2290283, 2123662, 2113306, 1051305, at https://secure.sos.state.or.us/orestar/gotoPublicTransactionSearch.do?OWASP_CSRFTOKEN=KN5K-UA7H-ZWDU-XUMG-51OQ-LL1M-G2JS-JOVB.

[5] Furthermore, contrary to the County's earlier argument before this Court, Cty. Resp. at 7, the legislative history shows that Measure 26-184 intended from the beginning to control candidate self-funding, although it began with more generous provisions. *See* Amendment 5, *Prospective Petition, A Fair Elections and Clean Governance Charter Amendment* at 11 (received Apr. 23, 2015), https://multco.us/file/41001/download (allowing contributions greater than Amendment 2).

actual or apparent corruption is "the *only* legitimate and compelling government interest[] . . . for restricting campaign finances." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (emphasis added); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014) (noting interest limited to *quid pro quo* corruption). And for over forty years, 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." *Buckley v. Valeo*, 424 U.S. 1, 53 (1976) (per curiam). Furthermore, any attempted restriction ignores "the fundamental nature of the right to spend personal funds for campaign speech." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 738 (2008); *see also id*. at 729, 738-40 (invalidating provision that penalized candidates who spent their own funds). As in *Buckley*, "the First Amendment simply cannot tolerate [the County's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley*, 424 U.S. at 54.

B. The Measure Violates the Constitution's Lower Bound on Contribution Limits

1. The *Randall/Thompson* Danger Signs Appear under the Measure's Regime

In vacating one of the decisions relied on by the Intervenors, *see* Intervenors Remand Br. at 10, 18, 20-21, 23, 27, 32-33, 35,[6] the Supreme Court emphasized that the standard in *Randall v. Sorrell*, 548 U.S. 230 (2006), governs challenges to unconstitutionally low contribution limits. *Thompson v. Hebdon*, 140 S. Ct. 348, 350 & n.* (2019). The Ninth Circuit in *Thompson* held to its prior precedent, which ignored *Randall* and required only a minimal governmental interest to sustain low contribution limits. *Id*. at 349-50. Despite the tension between its precedent and the Supreme Court's decisions in *Randall*, *McCutcheon*, and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Ninth Circuit persisted in applying its own precedent. *Id*.

[6] Citing to *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018), or the law it upheld.

The Ninth Circuit's errors required vacatur and a remand to reconsider under *Randall*. *Id*. at 351.

"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.*, 529 U.S. 803, 816 (2000)). Any attempt to restrict campaign finances must meet heightened scrutiny. *See id*. at 218 (imposing closely drawn scrutiny). One way to do so is by meeting the standard laid out in *Buckley* and later clarified in *McCutcheon*, by closely drawing a regulation to an interest in combatting actual or apparent quid pro quo corruption. *Id*.; *see also Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-497 (noting that the interest in fighting actual or apparent corruption is "the *only* legitimate and compelling government interest[] . . . for restricting campaign finances" (emphasis added)). Alternatively, if the law is sufficiently similar to that upheld in *Buckley* or another case, the government may rely on the evidence and studies used there. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391, 393 & n.6 (2000).[7]

Once the government has thus demonstrated that it may impose contribution limits, courts generally "have no scalpel to probe" the particular thresholds chosen, except that there must be "some lower bound" at which legislative decisions become suspect. *Randall*, 548 U.S. at 248 (internal quotation marks omitted). *Randall* noted "several 'danger signs'" that indicate this lower bound has been hit: whether the limit (1) "is substantially lower than . . . the limits [the Supreme Court has] previously upheld"; (2) is lower than comparable limits; (3) is not adjusted for inflation; and (4) is not supported by "any special justification." *Thompson*, 140 S. Ct. at 350-51 (ellipsis in original) (internal quotation marks omitted). In the presence of those danger signs, a court "must examine the record independently and carefully to determine whether [the] contribution limits are

[7] As discussed below, the Measure's provision allowing unlimited contributions by favored groups takes the Measure out of the safe harbor of prior Supreme Court decisions. The alternative method to pass scrutiny therefore does not apply here.

'closely drawn' to match the State's interests" in combatting actual or apparent quid pro quo corruption. *Randall*, 548 U.S. at 253. After finding the danger signs, the *Randall* Court saw five reasons why the law there was not properly tailored. *Id*. at 253-62.

Multnomah County's limits are unquestionably lower than any that the Supreme Court has upheld, the first danger sign under *Randall/Thompson*. Adjusting for inflation, the $1,000 limit upheld in *Buckley*, *Randall*, 548 U.S. at 250, amounts to approximately $4,636 per election.[8] The limit at issue here is $500 per election cycle, or $250 per election. Thus, as with the unconstitutional limit in *Randall*, the limit here is almost "one-twentieth of the limit" upheld in *Buckley*. *Id*. And the population for the districts for some of the offices at issue here—the countywide offices of County Chair, Sheriff, and Auditor—is larger than that at issue in both *Buckley* and *Randall*. *See id*. (noting districts of 465,000 and 621,000); Cty. Remand Br. at 16 (noting county population of 812,855). And the costs for broadcast ads that may be used in competitive races for the other commissioner seats will likely be the same, since there are not separate markets for broadcast advertisements in each of those districts.

Indeed, the limit at issue here is one-third the "lowest campaign contribution limit [the Supreme] Court has upheld": "the limit of $1,075 per two-year election cycle" at issue in *Shrink Missouri*. *Thompson*, 140 S. Ct. at 350-51. That adjusts to approximately $1,715, or over three times the election cycle limit at issue here.[9]

Of all the limits the Supreme Court has addressed, the most applicable is that in *Thompson*. And the Supreme Court held that the limit there, while allowing twice as much as Multnomah

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[8] *See* https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1%2C000.00&year1=197601&year2=202006, adjusted to June 2020, the most recent date available.

[9] Comparing $1,075 in January 1998 to June 2020: https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=1075&year1=199801&year2=202006.

County for an election district with a smaller population, was constitutionally suspect. *See id.* (noting $1,000 limit for entire election cycle).[10]

Applying the second *Randall/Thompson* danger sign, whether Multnomah County's "limit is substantially lower than . . . comparable limits in other States," is more difficult. *Thompson*, 140 S. Ct. at 351 (ellipsis in original) (internal quotation marks omitted). The Supreme Court sees it as a danger sign if the County's limits are among the lowest in the nation, for which complete data is only available for Congressional and state races. There is no question that it is far below the limits for comparably sized Congressional districts. The districts in Oregon, for example, range in size from 814,998 to 858,910 people,[11] compared to 812,855 people in Multnomah County. The limit for those Congressional districts is $2,800 per election,[12] compared to the $250 per election in Multnomah County. Moreover, in competitive races where radio and television advertisements might be required, several of those Congressional and county-wide races would be using the same media and be paying the same costs for broadcast ads.

Given Multnomah County's population—greater than or comparable to five states—its limits may also be examined to see if they are among the lowest state limits.[13] Alaska's limit was

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[10] For the period of the 116th Congress, 2018-2020, Alaska's estimate population was 737,438. *See* My Congressional District, 116th Congress, for Alaska, https://www.census.gov/mycd/?st=02.

[11] *Compare* District 4 *with* District 1 at My Congressional District, 116th Congress, for Oregon, https://www.census.gov/mycd/?st=41&cd=0.

[12] *See* Fed. Election Comm'n, *Understanding ways to support federal candidates*, https://www.fec.gov/introduction-campaign-finance/understanding-ways-support-federal-candidates/ (last visited Aug. 14, 2020) (noting $2,800 limit for individual contributions to candidate committees, as indexed for inflation).

[13] As of July 2019, five states had populations comparable to or smaller than Multnomah County: Wyoming (578,759), Vermont (623,989), Alaska (731,545), North Dakota (762,062), and South Dakota (884,659). *See* Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2019*, https://www2.census.gov/programs-surveys/popest/tables/2010-2019/state/totals/nst-est2019-01.xlsx (last downloaded Aug. 14, 2020).

suspect for being among the six lowest in the country, and Multnomah County's is half Alaska's limit of $500 per year. *See Thompson*, 140 S. Ct. at 350-51; Alaska Stat. § 15.13.070(b)(1). And, of the four other states with comparable populations, Wyoming permits up to $2,500 per election for statewide races like governor, Wyo. Stat. Ann. § 22-25-102(c)(i)(A); Vermont permits up to $4,000 per election cycle, Vt. Stat. Ann. tit. 17, § 2941(a)(3); North Dakota allows unlimited contributions, *cf.* N.D. Cent. Code § 16.1-08.1-01 to -08;[14] and South Dakota permits up to $4,000 per year, S.D. Codified Laws § 12-27-7.[15] Thus, compared to states with similar populations, Multnomah County's limit "is substantially lower." *Thompson*, 140 S. Ct. at 351.

Comparison to similar counties is difficult for two reasons: First, the Supreme Court has not examined or upheld county limits "in the past." *Randall*, 548 U.S. at 249. The Court's analysis of state limits in *Randall* emphasized how those limits compared to limits already examined, even though the comparison was to federal races. *See id*. at 249-250. Second, perhaps because this is not an adversarial proceeding with a live case or controversy, the parties have not provided comprehensive data of the type necessary for comparison to counties under the second *Randall/Thompson* danger sign: to examine whether Multnomah County's limits were among the lowest in the nation, the parties would need to show the limits imposed by every county in the country, not the small-sample, anecdotal evidence so far presented, with the attendant risks of selection bias.[16] The Supreme Court's concern is whether the limits are among "the lowest in the

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[14] *See Campaign finance requirements in North Dakota*, Ballotpedia, https://ballotpedia.org/Campaign_finance_requirements_in_North_Dakota (last visited Aug. 14, 2020); Institute for Free Speech, *Free Speech Index* at 65 (2018), https://www.ifs.org/wp-content/uploads/2018/03/IFS-Free-Speech-Index-Grading-the-50-States-on-Political-Giving-Freedom.pdf.

[15] South Dakota permits up to $1,000 for legislative and county candidates. S.D. Codified Laws § 12-27-8.

[16] When the entire population is not used in an analysis, or when the sample analyzed is not representative of the entire population, the results of the analysis may be dubious because of

Nation," *Randall*, 548 U.S. at 250, not whether there are comparable limits.

The third danger sign focuses on whether a failure to index limits to inflation may cause even satisfactory limits to become too low over time. Multnomah County's limits are already too low, and indexing them to inflation will not change that.

Finally, the fourth danger sign asks whether there is "any special justification that might warrant a contribution limit so low." *Thompson*, 140 S. Ct. at 351. This consideration—to justify extremely low limits—demands more than the danger of actual or apparent corruption that justifies contribution limits in general, more than "the basic justifications . . . in support of such limits [as] those present in *Buckley*." *See Randall*, 548 U.S. at 261 (noting no evidence that corruption in Vermont was "significantly more serious a matter than elsewhere"). There must be some special risk specific to the particular jurisdiction.

Because of the Measure's extreme underinclusiveness—discussed below—and the parties' failure to address their evidence to the permitted meaning of corruption under the First Amendment, the parties' evidence struggles (and fails) to sustain contribution limits in general. It certainly fails to demonstrate the special justification required for very low limits. That is, the sources advanced by the parties may show the existence of large contributions to legislatures, additional access to decisionmakers, and even responsiveness to concerns raised by contributors, but that does not meet the high bar required to prove actual or apparent quid pro quo corruption.

In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court reined in the government's runaway use of the term "corruption." Contribution limits must be aimed at "*quid*

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selection bias. *See, e.g.*, Institute for Work & Health, *Selection Bias* (May 2014), https://www.iwh.on.ca/what-researchers-mean-by/selection-bias; Wayne LaMorfe, *Selection Bias* (last modified June 19, 2020), https://sphweb.bumc.bu.edu/otlt/MPH-Modules/EP/EP713_Bias/EP713_Bias2.html#headingtaglink_1. For very small samples, this may degenerate into cherry-picking one's data.

pro quo corruption or its appearance," the actual or apparent exchange of "dollars for political favors." *McCutcheon*, 572 U.S. at 192 (internal quotation marks omitted); *see also id*. at 227 (noting interest "must be limited to" quid pro quo corruption to prevent the government from "restricting the First Amendment right of citizens to choose who shall govern them"). That definition excludes a theory of actual or apparent "favoritism or influence," which would be "at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Citizens United*, 558 U.S. at 359 (internal quotation marks omitted). Indeed, it excludes the concern that an "elected representative" will "favor certain policies" because of "contributors who support those policies." *Id*. (block quotation omitted).[17] Or that contributors will cease giving if candidates do not respond. That is because "[i]t is well understood that a substantial and legitimate reason, if not the only reason, . . . to make a contribution to[] one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors." *Id*. (block quotation omitted). Quid pro quo corruption requires an agreement "to perform an 'official act'" in exchange for loans, money, or other gifts, made at the time of the "alleged *quid pro quo*," but it cannot mean that officials have to question "whether they could respond to even the most commonplace requests for assistance" if "a campaign contribution [was given] in the past." *McDonnell*, 136 S. Ct. at 2371, 2372.

The evidence assembled by the parties fails to meet this high standard. They have alleged contributions and influence. *But see Citizens United*, 558 U.S. at 359 (noting that "influence over and access to elected officials" is not corruption). They have alleged that contributors stop

[17] And it certainly excludes any interest in leveling influence. *See Buckley*, 424 U.S. at 48-49 (noting "wholly foreign to the First Amendment"); *Davis*, 554 U.S. at 741, 742 (holding not "legitimate" to "level" opportunities, and that "antithetical to the First Amendment" (citation omitted) (internal quotation marks omitted)).

supporting a candidate who does not support their interests. *But see id*. (noting that it is not corruption or its appearance if contributors stop supporting a candidate if she does not produce a desired outcome (block quotation omitted)). They have even alleged actual and apparent responsiveness.[18] *But see McDonnell*, 136 S. Ct. at 2371-72 (noting that actions like "[s]etting up a meeting, talking to another official, or organizing an event" are not sufficient acts to constitute quid pro quo corruption); *id*. at 2372 (noting "basic compact," that an official will act on constituents' concerns even if they have given contributions). Such allegations do not meet the standard necessary to sustain contribution limits in general, much less demonstrate a special consideration justifying very low limits.[19]

Thus, while the second, third, and fourth *Randall/Thompson* factors are ambivalent or

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[18] The reports grading Oregon's system are irrelevant. Their measures of corruption are circular: alleging corruption merely because Oregon allowed unlimited contributions, and then calling for limited contributions based upon that alleged corruption. *See* Intervenors Remand Br. at 32-33.

[19] Furthermore, while the parties place great emphasis on the risk of apparent corruption, that perception, standing alone, is insufficient. The Supreme Court has emphasized that the right to make political contributions cannot fall based upon "mere conjecture," *Shrink Mo.*, 528 U.S. at 392, and that the perceived fear must target "quid pro quo" corruption, *McCutcheon*, 572 U.S. at 192. To the extent the parties rely upon a perception of "ingratiation and access," *Citizens United*, 558 U.S. at 360, and much of their evidence is of this type, it is legally insufficient. And where the perceived corruption is simply the making of substantial political contributions, it is an invitation to bootstrap: label the contributions themselves "corrupt," and impose limits based upon that label.

The danger is heightened to the extent popular views of "apparent corruption" are driven, not by discovered instances of actual corruption, but rather by popular political argument by the Measure's proponents or others. The Framers were concerned precisely with the risk that passionate orators and others commanding the public debate would be able to stir the populace into measures that would harm minorities and even the majority's long-term interests. *See The Federalist No. 63* (James Madison) (noting "particular moments in public affairs when the people, stimulated by some irregular passion, . . . or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn"). No matter how sincere and well-intentioned, it is dangerous to sacrifice constitutional protection to popular perceptions, which are notoriously uninformed and difficult to measure. More fundamentally, to allow apparent concerns on their own to override constitutional protections, without evidence that those concerns are firmly grounded in reality, would be to throw out the Bill of Rights altogether.

irrelevant here, the effect of the first factor is quite clear. Multnomah County's "contribution limit is substantially lower than . . . the limits [the Supreme Court has] previously upheld." *Thompson*, 140 S. Ct. at 350 (ellipsis in original) (internal quotation marks omitted). Indeed, it is substantially smaller than the limit just addressed by the Supreme Court in *Thompson*, and, as in that case, the limit here must be examined for proper tailoring.

2. The Measure Fails Tailoring

"In the First Amendment context, fit matters." *McCutcheon*, 572 U.S. at 218. Under "closely drawn" scrutiny, this requires a law "whose scope is in proportion to the interest served" and "that employs . . . a means narrowly tailored to achieve the desired objective." *Id*. (internal quotation marks omitted). The contribution limits here are not closely drawn because they are "wildly underinclusive." *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2375 (2018) (quoting *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011)).[20]

The interest in protecting against actual or apparent corruption is one directed against the "corrupting influence of large contributions." *Buckley*, 424 U.S. at 55. But the Measure limits certain individuals and groups to contributions far less than those at issue in *Buckley*, while allowing other groups to make—not just large contributions—but *unlimited* contributions.

The parties have submitted no evidence proving that unlimited contributions by Small Donor Committees ("SDC") carry no risk of corruption while contributions greater than $500 from

[20] And this is under the intermediate scrutiny applied in *NIFLA*, which is a lower standard than the strict, closely drawn, or exacting scrutiny applied in campaign finance matters. *See Buckley*, 424 U.S. at 16 (applying exacting scrutiny generally to expenditures and contributions), 44-45 (exacting scrutiny for expenditures), 64 (exacting scrutiny for disclosure); *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 289 n.14 (D. Md. 2019) (noting confusion in *Buckley*'s exacting scrutiny standards for expenditures, contributions (later called closely drawn), and disclosure, where exacting scrutiny is sometimes treated as synonymous with strict scrutiny and sometimes as slightly below it).

individuals and other PACs would. They do not provide such evidence because they cannot. The parties concede that "any individual" may simply make contributions to an unlimited number of SDCs, and thus contribute "unlimited amounts of money." Intervenors Remand Br. at 6.

Moreover, the parties simply fail to demonstrate how an unlimited donation from an SDC would carry no risk of corruption. The parties presumably assume that there is a risk of corruption from a regular PAC because a candidate is indebted to the presiding officer who directs the PAC's contributions. But a candidate would be equally indebted to the SDC's presiding officer, who is directing *unlimited* contributions to the candidate. The Measure creates a novel contribution limits scheme, which requires a higher "quantum of empirical evidence" to justify its restrictions, *Shrink Mo.*, 528 U.S. at 391, not just "mere conjecture," *id*. at 392. The parties have not met this burden.

Furthermore, the scheme's underinclusiveness creates "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*, 564 U.S. at 802). Indeed, the Intervenors have explained that the interest pursued here is not combatting actual or apparent corruption, but a desire to "amplif[y] the voice of ordinary voters," to stop what they considered the "undue" influence of others. 2d Decl. of Daniel Meek, ER-5. But, as noted above, this is an impermissible objective under the First Amendment. *See Buckley*, 424 U.S. at 48-49; *Davis*, 554 U.S. at 741-42.

While sufficient to demonstrate a lack of tailoring on its own, the underinclusiveness of the Measure is only compounded by the Measure's lack of fit under *Randall*. The Measure fails as to the second fit factor. At best, assuming that political parties are not among the entities banned from making contributions altogether under MCC § 5.201(B)(3), but are merely limited to $500 under § 5.201(B)(1), the Measure errs in treating political parties exactly the same as other groups. *Randall*, 548 U.S. at 256-59. Contrary to Intervenors, Intervenors Remand Br. at 28-29, it does not

save the Measure that political parties can simply form an SDC. As the Supreme Court noted in *Citizens United*, an organization's speech is still restricted if it must create a separate organization to speak. 558 U.S. at 337 (noting that the statute was "a ban on corporate speech notwithstanding the fact that a PAC created by a corporation [could] still speak"). And there is no indication under the fifth consideration that "corruption (or its appearance) in [Multnomah County] is significantly more serious a matter than elsewhere." *Randall*, 548 U.S. at 261.

Randall's third and fourth fit considerations do not weigh against the law here, as the Measure appears to exclude much of the volunteer activity that was found problematic in *Randall* and the Measure is indexed to inflation. *See Randall*, 548 U.S. at 259-61. Nevertheless, these provisions do not save the Measure: they do nothing to ameliorate the lack of fit already identified.

Finally, the first *Randall* consideration, whether the "contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns," 548 U.S. at 253, cannot be determined, at least under the evidence the parties have provided. The lack of evidence perhaps results from the County's request for an advisory opinion, albeit one that will cut off the rights of Oregonians to use the state courts to challenge the law when an actual case and controversy arises. *See* Or. Rev. Stat. § 33.720(6).[21] Regardless, there is a dearth of data relevant to the Supreme Court's concerns. The *Randall* Court relied on data showing how much

[21] The decision to seek a final judicial determination of core constitutional rights without the benefit of a true adversarial presentation violates American practice and raises grave due process concerns. These concerns are magnified where the pro-Measure argument is being made by four separate parties, each taking the right to separate briefing. While this situation puts this Court in an unenviable position, it also demonstrates the wisdom of a parallel federal judicial system that will allow Oregonians to make future constitutional arguments, including as-applied arguments, despite the supposed finality of these proceedings. *See McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963) (section 1983 exists "to provide a remedy where state law was inadequate, [and] to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (citation omitted) (internal quotation marks omitted)).

the law reduced funding and by how much previous campaigns exceeded the new limits. *Randall*, 548 U.S. at 253-55. And, while the Court looked at statistics about average campaigns, the statistics about competitive races against strong incumbents were "critical," because that is where money is most likely to be a factor. *Id*. at 255-56. Furthermore, it rejected anecdotal evidence. *Id*. at 256. The evidence provided by the parties is insufficient for the factors the Supreme Court found compelling: it is largely anecdotal and fails to address truly competitive races.

While one remedy to underinclusive laws is to sever the offending provisions, simply severing the SDC exemption—leaving SDCs subject to the same limits as other PACs—would not be proper here. The contribution limits regime is wildly underinclusive in permitting unlimited contributions from favored groups. Crafted at the same time as the rest of the regime, this exemption undermines any claim that the County is concerned about actual or apparent corruption. Rather, as noted in the literature advancing the Measure, the concern was to equalize influence, and this is not an interest permitted under the First Amendment. Combined with the Measure's failure to respect the special associational rights attached to political parties and the lack of any evidence of special corruption in Multnomah County, Multnomah County's especially low limits are not closely drawn to its interests. If the County is in fact concerned about corruption, it can enact limits comparable to those already approved by the Supreme Court.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing on counsel for the other parties admitted in the case, by electronic service, as defined in UTCR 21.000, and by emailing a copy thereof to each attorney at their last-known email address as set forth below:

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