

TESTIMONY ON HB 2716A

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for
Honest Elections Oregon and Oregon Progressive Party

Senate Committee on Rules

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HB 2716A would require some (probably very few) advertisements supporting or opposing the election of candidates for public office to identify some of those persons or entities providing the most funding for the advertisements. We call these "disclaimer" or "tagline" requirements.

HB 2716A is weaker than similar laws in California, Washington, Maine, Minnesota, and other states. It is weaker than the tagline provisions adopted by voters in Multnomah County and Portland in 2016 and 2018, with "yes" votes of 89% and 87%. The Multnomah County Circuit Court on June 10, 2019, upheld those Portland provisions (Measure 26-200) as consistent with the Oregon Constitution and U.S. Constitution. I have attached both Measure 26-200 and the Court's opinion.

While some aspects of HB 2716 have improved as the result of public comment on the -1, -2, -3, and -4 amendments in the House, other aspects have decayed. Until the -4 amendments, the tagline requirements applied to advertisements funded by any candidate committee. But HB 2716A does not apply to candidate committee-funded ads at all. **Since most ads pertaining to candidate races are funded by candidate committees, HB 2716A will not reach the vast majority of ads and will apply only to those few ads funded by independent expenditures.**

And HB 2716A apparently does not require that any person or entity, other than a political committee or non-profit entity, identify any of the funders of ads it places by means of independent expenditures. A communication "by an individual, a for-profit business entity or a candidate or the principal campaign committee of a candidate must state the name of the individual, for-profit business entity or candidate." There is apparently no requirement that the funders of the advertisement be identified in any advertisement placed by an individual, for-profit business entity, or candidate or candidate committee.

My comments and suggestions below are not new. I made them many times to the manager of HB 2716 on the House side. The manager, Representative Dan Rayfield, did make a dozen or so other changes that I suggested.

Almost Zero Funder Identification Requirement

HB 2716A has no funder identification requirement for ads placed by candidate committees, individuals, or for-profit business entities. Section 2 establishes the funder identification requirement but then exempts all communications by candidates, candidate committees, individuals, and for-profit business entities.

This shows the change made from HB 2716-4 to HB 2716-5:

SECTION 2.

- (1) Except as otherwise provided by a local provision, a communication in support of or in opposition to a clearly identified candidate must state the name of the persons that paid for the communication.
- (2) For the purpose of complying with subsection (1) of this section:
 - (a) Except as provided in paragraph (b) of this subsection, a communication **in support of or in opposition to a clearly identified candidate** by a political committee or petition committee must state:
 - (A) The name of the political committee or petition committee; and
 - (B) The names of the five persons that have made the largest aggregate contributions ~~to the candidate or of~~ **\$10,000 or more to the** committee in the election cycle in which the communication is made.
 - (b) A communication **in support of or in opposition to a clearly identified candidate** by an individual, a for-profit business entity or a candidate or the principal campaign committee of a candidate must state the name of the individual, for-profit business entity or candidate.

Note that all communications in subsection (2)(b) appear to be exempt from any requirement that any **funders** be identified. This renders HB 2716A largely useless. Its funder identification requirement applies only to political committees (other than candidate committees) and petition committees (for

unknown reasons, since HB 2716A does not apply to ballot measure campaigns at all). It also apparently applies to non-profit corporations, associations, or other groups placing advertisements for or against candidates.

The lack of any requirement that a for-profit corporation identify its funders is a large loophole. It takes 5 minutes and \$100 to create a for-profit corporation in Oregon. That corporation could accept money from any and all sources, place ads about candidates, and disclose only its own name, which itself would be meaningless to Oregon voters. It could even be a euphonious name, like the "Oregon Corporation for the Public Good." Or those wishing to place ads could create a corporation in Nevada or elsewhere, where even the principles of the corporation need not be disclosed.

Lack of Any Drill Down Requirement to Show the True Funders

Even for non-candidate political committees, HB 2716A has a very limited provision for determining the true original sources of the funds used to disseminate political advertisements. An ad placed by a political committee is supposed to disclose the top 5 funders of at least \$10,000 each to the campaign. All of those funders could be political committees and/or for-profit or nonprofit corporations with euphonious names, in which case the disclaimer would convey no useful information to voters.

If the communication is placed by an entity that is neither an individual nor a for-profit corporation, then HB 2716A apparently applies to that entity, such as a nonprofit corporation or association or other groups. They must disclose "the names of the five persons that have made the largest aggregate donations of \$10,000 or more to the person [placing the ad] in the election cycle in which the communication is made," except for donations that are restricted from political use by the donors or by law.

But all of the persons making the \$10,000 contributions could be political committees or other for-profit or nonprofit entities with euphonious names, again thwarting the purpose of the disclaimer requirement.

There needs to be some drill down to the true original sources of the funds. The Portland Measure 26-200 (2018) provides:

If any of the five largest Dominant Contributors or Dominant Independent Spenders is a Political Committee (other than a Small Donor Committee) or nonprofit organization, the prominent disclosure shall include its top three funders during the current Election Cycle.

This solves the problem in several ways. First, it makes it more difficult to avoid disclosing the true sources of the funds by requiring at least one level of

drill down. Second, it requires a longer disclaimer by entities that may be serving as cover for the true original sources.

I provided another solution to legislative staff on May 7:

If one of the top 5 contributors is a nonprofit corporation, then in place of the name of the nonprofit corporation the disclaimer would name the single largest donor of funds (that can be used for political purposes, not 501c3 funds or restricted funds) to the nonprofit corporation in the current election cycle; provided, that the donor is itself not a nonprofit corporation or political committee. If it is, then its name would be replaced with its own largest donor of funds, and so on.

In other words, it would be a drill down with a width of one.

This same approach would work for political committees as contributors.

On May 14 I further noted:

Minnesota has a top-3 funder disclaimer law. It has this interesting provision regarding tagline drill-down:

25. [211B.0445] DISCLOSURE CIRCUMVENTION PROHIBITION.

A committee placing a campaign advertisement or persons acting in concert with that committee is prohibited from creating or using another committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, or another committee as a top contributor.

HB 2716A adopts neither of my suggestions.

I have attached the text of Washington Chapter 261, Laws of 2019, which does include a drill down provision similar to the Portland charter amendment, Measure 26-200 (2018). It states:

- (2) If one or more of the top five contributors identified under subsection (1) of this section is a political committee, the top three contributors to each of those political committees during the same period must then be identified, **and so on**, until the individuals or entities **other than political committees** with the largest aggregate contributions to each political committee identified under subsection (1) of this section have also been identified. The sponsor must identify the three individuals or entities, not including political committees, who made

the largest aggregate contributions to any political committee identified under subsection (1) of this section in excess of the threshold aggregate value to be considered an independent expenditure in an election for public office under RCW 42.17A.005(29)(a)(iv) reportable under this chapter during the same period, **and the names of those individuals or entities must be displayed in the advertisement alongside the statement "Top Three Donors to PAC Contributors.**

Without a drill down provision, HB 2716A will not accomplish the purpose of informing voters about who or what is paying for political advertisements.

Donation Threshold is Too High

HB 2716A dramatically raises the threshold (compared with earlier versions) for identifying any donor in an advertisement to a minimum contribution of \$10,000. This is too high. The threshold in the Multnomah County and Portland measures is \$500. The threshold in Washington is \$700.

I suggest setting the threshold at \$1,000 and making the requirements the same: the disclaimer must name the top 5 contributors to the campaign (candidate or independent expenditure) of \$1,000 or more, with political committees and nonprofit organizations subject to the "drill down" provisions of the Portland measure, described above.

Need to Have Nature of Business Disclosed

HB 2716A does not require any disclaimer to identify the business(es) engaged in by the individual or for-profit entity paying for the advertisement. Many individuals have names that are not recognized by the public. Many corporations have names that do not identify their businesses. For both reasons, the Portland charter amendment requires that the disclaimer include:

The types of businesses from which the maker of the Contribution has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).

Every corporation has an NAICS code, as it is required for federal tax filings.

Stating the type of business of the contributor is critical to the effectiveness of the disclaimer requirement.

The Local Provision Reverse Preemption Problem

HB 2716A conditions any disclaimer requirement with this: "Except as otherwise provided by a local provision * * *." This is a "reverse preemption" clause that would allow any local government to preempt and negate any disclaimer requirements in this proposal.

This language probably meant to protect the Portland and Multnomah County disclaimer provisions from preemption, but the wording is wrong. It should be replaced with this provision:

Local governments may enact and enforce provisions requiring that political advertisements state the names and other information about the persons that paid for the advertisements. Those who place political advertisements shall comply with the requirements stated in this 2019 Act and with such local government provisions to the highest possible extent.

Need to Go Backward to Previous Election Cycle

One way to evade HB 2716A would be for a committee to accept large contributions in, say, October 2020 (near the end of the 2020 election cycle) and then use those funds during the 2022 election cycle). As written, HB 2716A would require no disclaimers regarding those funds.

There should be a provision stating:

If the funds used for the political advertisements exceed the amounts contributed to the person during the election cycle in which the communication is made, then the names to be stated in the advertisements shall include the names of the five persons that have made the largest aggregate donations of \$1,000 or more in the current or previous election cycle.

Exempt Sources of Funds

The provision allowing "restricted donations" should be improved to state:

- (ii) A restricted donation received from a foundation or other person that may not be used to make a communication in support of or in opposition to a candidate under federal or state tax law or at the instruction of the donor.

Digital Communication Exemption

HB 2716A allows a digital communication to not disclose the funders but merely present a link to that information. That is insufficient.

If this provision stays, it should at least require that the landing website "prominently display the additional information required by this subsection."

Anonymous Donations

HB 2716A allows any person or entity placing a covered ad to use "anonymous donations" of up to and including \$1,000 each and never disclose the sources of those donations.

This is a large loophole. The person or entity placing the ad could claim that all of the money was provided by anonymous donations. Thus, no disclaimers would need to be provided.

All anonymous donations to the person making the communications should be disqualified from use in paying for the communication.

Specifications are Inadequate

HB 2716A directs the Secretary of State to adopt rules so that the disclaimers are perceptible to average persons. It suggests some elementary specifications for "print or digital" and then "audio" communications, but it does not mention video communications.

The Portland measure is more specific:

- (o) "Prominently Disclose" means that the disclosure shall be readily comprehensible to a person with average reading, vision, and hearing faculties, with:
 - (1) any printed disclosure appearing in a type of contrasting color and in the same or larger font size as used for the majority of text in the printed material;
 - (2) any video disclosure remaining readable on the regular screen (not closed captioning) for a not less than 4 seconds;
 - (3) any auditory disclosure spoken at a maximum rate of five words per second;

- (4) any website or email message in type of a contrasting color in the same or larger font size as used for the majority of text in the message;
- (5) any billboard or sign other than a Small Sign: in type of a contrasting color and not smaller than 10 percent of the height of the billboard or sign.

We suggest using the Portland measure's specifications.

Another loophole allows the Secretary of State to subjectively exempt campaign communications that are "too small to feasibly include the identifying information required by this section." That language should be changed so that the determination is an objective one and applies only to physical items: "Any other physical item that is too small to feasibly include the identifying information required by this section."

\$500 Exemptions Needs Clarification

HB 2716A exempts print ads "with a fair market value of less than \$500." It is not clear whether that means \$500 per ad or \$500 in total spent by the committee or other source of the funds. Exempting all individual ads costing less than \$500 per ad would be a huge loophole, particularly for digital ads. The same ambiguity applies to the exemption for "communications made via telephone that have a fair market value of less than \$500."

The language should be changed to:

- (ii)" Communication in support of or in opposition to a clearly identified candidate" does not include newspaper editorials, one or more printed advertisements with an aggregate fair market value of less than \$500, or one or more communications made via telephone with an aggregate fair market value of less than \$500.

De Minimis Value Exemption

HB 2716A seems to conflate items of de minimis value with items for which the disclaimer requirement would be impractical.

The Portland measure excludes various items in its definition of "communication":

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

"Small Sign" means a sign smaller than six (6) square feet.

This itemization is superior to a generic reference to items of de minimis value. It also helps preserve the validity of the requirement under the U.S. Constitution by exempting "a distribution of five hundred (500) or fewer substantially similar pieces of literature within any 10-day period."

Operative Date

The operative date should be changed to the first day of the 2022 election cycle, which is November 6, 2020.

There is no need to wait for the effective date of SJR 18, because there is no serious question about the constitutionality of the provisions of this proposal.

Need for Severability Clause

The very short severability clause in HB 2714-5 is an improvement. I still recommend the severability clause from Measure 47 (2006):

The provisions of this Act shall supersede any provision of law with which they may conflict. For the purpose of determining constitutionality, every section, subsection, and subdivision thereof of this Act, at any level of subdivision, shall be evaluated separately. If any section, subsection or subdivision at any level is held invalid, the remaining sections, subsections and subdivisions shall not be affected and shall remain in full force and effect. The courts shall sever those sections, subsections, and subdivisions necessary to render this Act consistent with the United States Constitution and with the Oregon Constitution. Each section, subsection, and subdivision thereof, at any level of subdivision, shall be considered severable, individually or in any combination.

Honest Elections City of Portland Charter Amendment

Whereas, the people of City of Portland find that limiting large contributions and expenditures in political campaigns would avoid the reality and appearance of corruption, including *quid pro quo* corruption, a new Article 3 to Chapter 3 of the City of Portland Charter, shall read as follows:

Article 3 Campaign Finance in Candidate Elections

3-301. Contributions in City of Portland Candidate Elections.

- (a) An Individual or Entity may make Contributions only as specifically allowed to be received in this Article.
- (b) A Candidate or Candidate Committee may receive only the following Contributions during any Election Cycle:
 - (1) Not more than five hundred dollars (\$500) from an Individual or a Political Committee other than a Small Donor Committee;
 - (2) Any amount from a qualified Small Donor Committee;
 - (3) A loan balance of not more than five thousand dollars (\$5,000) from the candidate;
 - (4) No amount from any other Entity, except as provided in Section 3-304 below.
- (c) Individuals shall have the right to make Contributions by payroll deduction by any private or public employer upon the employer's agreement or if such deduction is available to the employees for any other purpose.

3-302. Expenditures in City of Portland Candidate Elections.

- (a) No Individual or Entity shall expend funds to support or oppose a Candidate, except those collected from the sources and under the Contribution limits set forth in this Article.
- (b) An Entity shall register as a Political Committee under Oregon law within three (3) business days of making aggregate Independent Expenditures exceeding \$750 in any Election Cycle to support or oppose one or more Candidates in any City of Portland Candidate Election.
- (c) Only the following Independent Expenditures are allowed per Election Cycle to support or oppose one or more Candidates in any particular City of Portland Candidate Election:

- (1) An Individual may make aggregate Independent Expenditures of not more than five thousand dollars (\$5,000).
- (2) A Small Donor Committee may make Independent Expenditures in any amounts from funds contributed in compliance with Section 3-301 above.
- (3) A Political Committee may make aggregate Independent Expenditures of not more than ten thousand dollars (\$10,000), provided that the Independent Expenditures are funded by means of Contributions to the Political Committee by Individuals in amounts not exceeding five hundred dollars (\$500) per Individual per year.

3-303. Timely Disclosure of Large Contributions and Expenditures.

- (a) Each Communication to voters related to a City of Portland Candidate Election shall Prominently Disclose the true original sources of the Contributions and/or Independent Expenditures used to fund the Communication, including:
 - (1) The names of any Political Committees and other Entities that have paid to provide or present it; and
 - (2) For each of the five Dominant Contributors providing the largest amounts of funding to each such Political Committee or Entity in the current Election Cycle:
 - a) The name of the Individual or Entity providing the Contribution.
 - b) The types of businesses from which the maker of the Contribution has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).
 - (3) For each of the largest five Dominant Independent Spenders paying to provide or present it:
 - a) The name of the Individual or Entity providing the Independent Expenditure.
 - b) The types of businesses from which the maker of the Independent Expenditure has obtained a majority of income over the previous 5 years, with each business identified by the name associated with its 6-digit code of the North American Industry Classification System (NAICS).
- (b) If any of the five largest Dominant Contributors or Dominant Independent Spenders is a Political Committee (other than a Small Donor Committee)

or nonprofit organization, the prominent disclosure shall include its top three funders during the current Election Cycle.

- (c) The disclosure shall be current to within ten (10) days of the printing of printed material or within five (5) days of the transmitting of a video or audio communication.

3-304. Coordination with Public Funding of Campaigns.

A candidate participating in a government system of public funding of campaigns (including the Public Election Fund established under Portland City Code Chapter 2.16) may receive any amount that such system allows a participating candidate to receive.

3-305. Implementation and Enforcement.

- (a) The provisions of this Article shall be implemented by ordinance to be operative not later than September 1, 2019.
- (b) Each violation of any provision in this Article shall be punishable by imposition of a civil fine which is not less than two nor more than twenty times the amount of the unlawful Contribution or Expenditure or Independent Expenditure at issue.
- (c) Any person may file a written complaint of a violation of any of the Provisions with the City Auditor.
- (d) The City Auditor, otherwise having reason to believe that a violation of any provision has occurred, shall issue a complaint regarding such violation.
- (e) Upon receipt or issuance of a complaint, the City Auditor:
 - (1) Shall examine the complaint to determine whether a violation has occurred and shall make any investigation necessary.
 - (2) Within two business days of receiving or issuing a complaint, shall issue a notification, including a copy of the complaint, to every person who is the object of the complaint.
 - (3) Shall accept written materials supporting or opposing the complaint for a period of 10 business days following any such notification.
 - (4) Shall render a decision on the complaint within 10 business days of the close of the material submission period.
- (f) If the complaint is received or issued within 30 days of the date of the election involving the object of the complaint, then all time periods stated in subsections (e)(3) and (e)(4) above shall be reduced by one-half.

- (g) The City Auditor may issue subpoenas to compel the production of records, documents, books, papers, memoranda or other information necessary to determine compliance with the provisions of this Article.
- (h) Upon finding a violation of the requirement for timely disclosure set forth in Section 3-303 above, the City Auditor shall determine the true original sources of the Contributions and/or Independent Expenditures used to fund the Communication at issue and shall immediately issue a statement to all interested parties and news organizations containing all of the information about the involved donor(s) required by Section 3-303 above.
- (i) The complainant or any person who is the object of the complaint may, within 30 days of the issuance of the decision, appeal that order to the appropriate Circuit Court as an agency order in other than a contested case.
- (j) The decision in the matter shall be deemed final, following completion of any judicial review. Such decision shall be enforced by the City of Portland. If the decision is not enforced within thirty (30) days of the decision becoming final, the complainant may bring a civil action in a representative capacity for the collection of the applicable civil penalty, payable to the City of Portland, and for any appropriate equitable relief.

3-306. Adjustments.

All dollar amounts shall be adjusted on January 1 of each odd-numbered year to reflect an appropriate measure of price inflation, rounded to the nearest dollar.

3-307. Severability.

For the purpose of determining constitutionality, every section, subsection, and subdivision thereof of this Section, at any level of subdivision, shall be evaluated separately. If any section, subsection or subdivision at any level is held invalid, the remaining sections, subsections and subdivisions shall not be affected and shall remain in full force and effect. The courts shall sever those sections, subsections, and subdivisions necessary to render this Section consistent with the United States Constitution and with the Oregon Constitution. Each section, subsection, and subdivision thereof, at any level of subdivision, shall be considered severable, individually or in any combination.

3-308. Definitions.

Unless otherwise indicated by the text or context of this Article, all terms shall have the definitions at Chapter 260 of Oregon Revised Statutes, as of January 1, 2018. Terms found therein or defined below are capitalized in this Article.

- (a) "Candidate" has the meaning set forth at ORS 260.005(1).

- (b) "Candidate Committee" has the meaning set forth at ORS 260.039 - 260.041, as of November 8, 2016, for the term "principal campaign committee."
- (c) "City of Portland Candidate Election" means an election, including a primary election, to select persons to serve (or cease serving) in public offices of City of Portland.
- (d) "Communication" means any written, printed, digital, electronic or broadcast communications but does not include communication by means of small items worn or carried by Individuals, bumper stickers, Small Signs, or a distribution of five hundred (500) or fewer substantially similar pieces of literature within any 10-day period.
- (e) "Contribution" has the meaning set forth at ORS 260.005(3) and 260.007, as of November 8, 2016, except it does not include (1) funds provided by government systems of public funding of campaigns or (2) providing rooms, phones, and internet access for use by a candidate committee free or at a reduced charge.
- (f) "Dominant Contributor" means any Individual or Entity which contributes more than one thousand dollars (\$1,000) during an Election Cycle to a Candidate Committee or Political Committee.
- (g) "Dominant Independent Spender" means any Individual or Entity which expends more than one thousand dollars (\$1,000) during an Election Cycle to support or oppose a particular Candidate.
- (h) "Election cycle" means:
 - (1) Generally, the period between an election at which a candidate is elected and the next election for that same office, disregarding any intervening primary or nominating election, any recall election, or any special election called to fill a vacancy.
 - (2) For any recall election: the period beginning the day that the recall election is called or declared and ending at midnight of the day of the recall election.
 - (3) For any special election called to fill a vacancy: the period beginning the day that the special election is called or declared and ending at midnight of the day of the election.
- (i) "Entity" means any corporation, partnership, limited liability company, proprietorship, Candidate Committee, Political Committee, or other form of organization which creates an entity which is legally separate from an Individual.
- (j) "Expenditure" has the meaning set forth at ORS 260.005(8) and ORS 260.007, as of January 1, 2018, except that:

- (1) It does not include a Communication to its members, and not to the public, by a Membership Organization not organized primarily for the purpose of influencing an election.
 - (2) The exception in ORS 260.007(7) does not apply.
- (k) "General Election Period" means the period beginning the day after the biennial primary election and ending the day of the biennial general election.
- (l) "Individual" means a citizen or resident alien of the United States entitled to vote in federal elections; however, when this Article expresses a limitation or prohibition, "Individual" means any human being.
- (m) "Membership Organization" means a nonprofit organization, not formed or operated for the purpose of conducting or promoting commercial enterprise, which has Individual members who have taken action to join the organization and have made a payment of money or volunteer time to maintain membership in the organization.
- (1) It cannot have commercial enterprises as members.
 - (2) It can transfer to one and only one small donor committee not more than forty percent (40%) of the amount paid to the organization by each Individual member, with a limit of one hundred dollars (\$100) transferred per Individual member per calendar year.
 - (3) It shall within thirty (30) days of any such transfer notify each paying member of the amount transferred, expressed in dollars or as a percentage of the member's amount paid to the organization. Such notice may be provided by regular mail or electronic mail to each affected member or by posting the information on the organization's main website. If the amount transferred is the same for each member or category of members (in dollars or in percentage of amount paid), the posting may state that amount or percentage without identifying Individual members.
- (n) "Primary Election Period" means the period beginning on the 21st day after the preceding biennial general election and ending the day of the biennial primary election.
- (o) "Prominently Disclose" means that the disclosure shall be readily comprehensible to a person with average reading, vision, and hearing faculties, with:
- (1) any printed disclosure appearing in a type of contrasting color and in the same or larger font size as used for the majority of text in the printed material;

- (2) any video disclosure remaining readable on the regular screen (not closed captioning) for a not less than 4 seconds;
 - (3) any auditory disclosure spoken at a maximum rate of five words per second;
 - (4) any website or email message in type of a contrasting color in the same or larger font size as used for the majority of text in the message;
 - (5) any billboard or sign other than a Small Sign: in type of a contrasting color and not smaller than 10 percent of the height of the billboard or sign.
- (p) "Small Donor Committee" means a Political Committee which has never accepted any Contributions except from Individuals in amounts limited to one hundred dollars (\$100) per Individual contributor per calendar year.
- (q) "Small Sign" means a sign smaller than six (6) square feet.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of:

**Validation Proceeding to Determine the
Legality of City of Portland Charter
Chapter 3, Article 3 and Portland City
Code Chapter 2.10 Regulating
Campaign Finance and Disclosure**

Case No. 19CV06544

OPINION AND ORDER ON

**Petitioner City of Portland's Motion for
Summary Judgment**

I. Introduction

This matter comes before the court as a "Validation Proceeding," brought by the City of Portland pursuant to ORS 31.710. In it, the City asks the court to find valid, under the Constitutions of Oregon and of the United States, enactments relating to the financing of City of Portland elections. Specifically, the City is seeking such constitutional declarations for every subdivision of Charter Chapter 3, Article 3 and Portland City Code Chapter 2.10.

The court has jurisdiction over this proceeding as a consequence of the City's compliance with the provisions of ORS 31.720. Certain electors of the City of Portland (Citizen Parties) have appeared within the statutory timeframe to support the City's request that the subject enactments be found constitutional by the court. These parties have requested, and are hereby granted, intervenor status.

No City of Portland elector has filed to oppose the City's request for validation. Notwithstanding, all electors of the City of Portland will be bound by this court's determination. ORS 31.720.

1 The enactments in question, approved by Portland voters through the exercise of their
2 legislative authority, regulate City of Portland "Candidate Elections" by: 1) limiting campaign
3 contributions (Charter § 3-301 and PCC § 2.10.010); 2) limiting campaign expenditures (Charter
4 § 3-302(a), (c) and PCC § 2.10.020(A), (C)); 3) requiring certain entities making independent
5 expenditures greater than a threshold amount to register (Charter § 3-302(b) and PCC
6 § 2.10.020(B)); 4) requiring that certain disclosure be made revealing the origins of campaign
7 contributions and independent expenditures (Charter § 3-303 and PCC § 2.10.030); and 5)
8 requiring employers to permit contributions by payroll deductions (Charter § 3-301(c) and PCC
9 § 2.10.010(C)).

10 As the City notes, its voters overwhelmingly favored establishing contribution and
11 expenditure limitations to govern the City's elections. While it is the established task of this and
12 any court to strike down a governmental action, regardless of its popularity, when it runs afoul of
13 state and/or federal constitutional protections, Oregon courts have long recognized respect for
14 the other branches' mandates that a statute or similar enactment should be "presumed to be
15 constitutional, and all doubt must be resolved in favor of its validity." *Bergford vs. Clackamas*
16 *County*, 15 Or. App. 362, 365 (1973), quoting from *Milwaukie Co. of Jehovah's Witnesses vs.*
17 *Mullen*, 214 Or. 281, 293 (1958).

18 In 2018, this court addressed similar enactments relating to Multnomah County elections,
19 in a Validation Proceeding initiated by the County, and supported by these same citizen parties.
20 *See In re Validation Proceeding to Determine the Regularity and Legality of Multnomah County*
21 *Home Rule Charter Section 11.60 and Implementing Ordinance No. 12.43 Regulating Campaign*
22 *Finance and Disclosure*, No. 17CV18006 (Multnomah County Circuit Court, Mar. 6, 2018)
23 (Order on Petitioner Multnomah County's Motion for Declaration of Validation) [hereinafter

1 *County Validation Order*]. There, this court found the County's regulations relating to
2 contributions, expenditures and disclosures, to be violations of the Oregon Constitution's Article
3 I, Section 8 guarantees of free speech, and struck them down as invalid. *Id.*

4 Recognizing this court's prior ruling, the City and Citizen Parties here put forward many
5 of the same arguments advanced previously by Multnomah County and these same citizens, but
6 have also specifically addressed the court's prior analysis, and have argued ways in which that
7 analysis misapprehended the controlling case law.

8 The court has carefully considered all the briefing, oral argument, and relevant case law,
9 and has reached similar, but not identical conclusions, regarding the validity of the City
10 enactments.

11 **II. Analysis**

12 Oregon courts will examine state constitutional issues before addressing federal ones.
13 *State vs. Kennedy*, 295 Or. 260, 262 (1983). Only if the charter and ordinance survive the state
14 constitutional analysis will the court perform an analysis of the provisions for consistency with
15 the United States Constitution.

16 The Oregon constitutional analysis here begins with the case of *State vs. Robertson*, 293
17 Or. 402 (1982), in which the Oregon Supreme Court established a framework for assessing
18 whether a law violates Article 1 Section 8 of the Oregon Constitution. *See also State vs.*
19 *Plowman*, 314 Or. 157 (1992). The framework places laws that affect speech into one of three
20 categories: 1) laws that are directed at limiting certain identified speech regardless of the medium
21 of communication or the effects the speech produces; 2) laws that are directed at the pursuit or
22 accomplishment of a harmful result; and 3) laws that, without mentioning speech, might be
23 applied so as to affect it. The *Robertson* court established that laws within the first category must

1 fail when challenged under Article I, Section 8, unless "the scope of the restraint is wholly
2 confined within some historical exception that was well established when the first American
3 guarantees of freedom of expression were adopted." *Robertson*, 293 Or. at 412.

4 **A. Contributions and Expenditures**

5 Based upon the analysis and reasoning set out in the *County Validation Order*, the City's
6 Charter and Code provisions relating to campaign contributions and campaign expenditures are
7 found to be in violation of the Oregon Constitution, Article I, Section 8. Applying the *Robertson*
8 analysis, both campaign contributions and campaign expenditures are protected forms of
9 expression under the Oregon Constitution, and do not fall within a well-established historical
10 exception. *See also Vannatta v. Keisling*, 324 Or. 514, 524 (1997).

11 **B. Registration and Payroll Deductions**

12 Also consistent with my prior rulings regarding the analogous County provisions, I find
13 the City's Charter and Code provisions relating to registration and payroll deductions to be
14 constitutional, both under Article I, Section 8 of the Oregon Constitution, and the First
15 Amendment to the Constitution of the United States.

16 **C. Disclosures**

17 Put simply, the disclosure requirements of the City's Charter and Code amendments
18 require that certain communications to voters relating to Portland candidates prominently
19 disclose the true original sources of the contributions or independent expenditures used to fund
20 those communications. *See* City Charter 3-303; PCC 2.10.030. The disclosure provisions at issue
21 here differ from those found unconstitutional by this court in the *County Validation Order*, the
22 primary difference being increased specificity in the City's disclosure mandate. The City and

1 Citizen Parties argue that the City's disclosure provisions are constitutional under both the
2 Oregon Constitution and the United States Constitution.

3 **1. Oregon Constitution**

4 In the County proceeding, this court based its findings of unconstitutionality, in part, on a
5 1999 opinion from Attorney General Hardy Myers to Secretary of State Phil Keisling regarding
6 the constitutionality of ORS 260.522, which prohibited most anonymous signs, publications, and
7 broadcasts used in political campaigns. OREGON DEPARTMENT OF JUSTICE, OFFICE OF THE
8 ATTORNEY GENERAL, Op. No. 8266 (Mar. 10, 1999) [hereinafter *AG Opinion*]. Under the
9 *Robertson* framework, Attorney General Myers suggested that the statute violated Article I,
10 Section 8 because it was directed at speech, not the effects of speech, and because it fell within
11 no "historical exception that was well established when the first American guarantees of freedom
12 of expression were adopted." *Robertson*, 293 Or. at 412.

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

19 In *Moyer*, the defendants were charged with violating a statute that made it unlawful to
20 provide false information about the source of political campaign contributions. 348 Or. 220, 223.
21 Under the *Robertson* framework, the Oregon Supreme Court found that the statute targeted
22 expression, and thus that it would violate Article I, Section 8 of the Oregon Constitution unless it
23 fell within a well-established historical exception. *Id.* at 232-34. The court then found:

1 Prohibiting the concealment of the identity of the true provider of a political
2 contribution from either the recipient of the contribution, the public, or both, is,
3 we conclude, an extension or modern variant of the initial principle that underlies
4 the historic legal prohibition against deceptive or misleading expression. Thus, in
5 our view, ORS 260.402 falls within a “historical exception,” whether the
6 exception is described as one related to misleading the electorate, as identified in
7 *Vannatta I*, or simply is described as a contemporary variant of the exception for
8 common-law fraud.
9

10 *Id.* at 237–38. Finding such a historical exception, the court held that the statute was valid under
11 Article I, Section 8 of the Oregon Constitution.

12 The relevant issue in *Moyer*, however, differs in some respects from that before us today.
13 There, the statutory provision the defendants were charged with violating merely required that a
14 contribution disclosure not be made under any name other than the true name of the contributor,
15 that is to say, that the disclosure be truthful. *Id.* at 223, 227–28. It was a different provision of the
16 statute that mandated the disclosures at all, and that provision was not challenged in *Moyer*.

17 *See id.*

18 Nevertheless, this court finds the Oregon Supreme Court language above to be
19 controlling as to the disclosure mandate presently at issue. Here, the City enactments provide for
20 the disclosure of the “true original sources of the Contributions.” The court finds that the relevant
21 disclosure provisions in the City’s Charter and Code amendments are targeted to address the
22 historic legal prohibitions against deceptive or misleading expression, and thus fall within the
23 same exception as described in *State v. Moyer*. As such, under the analyses and holdings of
24 *Robertson* and *Moyer*, the City’s disclosure provisions are held to be valid under the Oregon
25 Constitution.

26 In the *County Validation Order*, this court also expressed genuine concern that the
27 disclosure provision there at issue was unconstitutionally vague. However, based on the

1 additional specifics in the City's enactments regarding how and when the disclosures must be
2 made, that vagueness concern has been cured.

3 **2. U.S. Constitution**

4 Having survived scrutiny under the Oregon Constitution, this court looks next to the
5 validity of the City's disclosure provisions under the United States Constitution. The City and
6 Citizen Parties rely on *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010), as the
7 controlling authority on this issue.

8 In *Citizens United*, the petitioner brought as-applied challenges to various provisions of
9 the Bipartisan Campaign Reform Act of 2002. *See* 558 U.S. at 318-22. The challenged
10 "disclosure" provision mandated that televised electioneering communications funded by anyone
11 other than a candidate must include a disclaimer, made in a "clearly spoken manner," displayed
12 on the screen in a "clearly readable manner" for at least four seconds, stating that it "is not
13 authorized by any candidate or candidate's committee," and also required that it display the name
14 and address, or web address, of the person or group that funded the advertisement. *Id.* at 366.

15 Subjecting the provisions to "exacting scrutiny" requiring a "substantial relation"
16 between the disclosure requirement and a "sufficiently important" governmental interest, the
17 United States Supreme Court found that the government had such an important and related
18 interest in providing the electorate with information to ensure that the voters are fully informed
19 as to who is speaking about a candidate shortly before an election. *See id.* at 367-69. The
20 disclosure provisions were thus held to be constitutional. *Id.*

21 Applying the *Citizens United* decision to this case, the court finds that the same important
22 interest exists with respect to informing the City's voters, and therefore the disclosure provisions

1 in the City's Charter and Code amendments are found to be valid under the United States
2 Constitution.

3 **III. Conclusion**

4 The court orders as follows:

5 1) City Charter § 3-301(a)-(b) and Portland City Code § 2.10.010(A)-(B), relating to
6 limitations on campaign contributions are struck down as a violation of Article I, Section 8 of the
7 Oregon Constitution;

8 2) City Charter § 3-302(a), (c) and Portland City Code § 2.10.020(A), (C), relating to
9 limitations on campaign expenditures are struck down as a violation of Article I, Section 8 of the
10 Oregon Constitution;

11 3) City Charter § 3-302(b) and Portland City Code § 2.10.010(B), requiring certain
12 entities making independent expenditures greater than a threshold amount to register as a
13 Political Committee are valid and lawful under all relevant provisions of state and federal law;

14 4) City Charter § 3-303 and Portland City Code § 2.10.030, requiring that certain
15 disclosure be made revealing the origins of campaign contributions and independent
16 expenditures are valid and lawful under all relevant provisions of state and federal law;

17 5) City Charter § 3-301(c) and Portland City Code § 2.10.010(C), requiring employers to
18 permit contributions by payroll deductions are valid and lawful under all relevant provisions of
19 state and federal law.

It is so ordered.

6/10/19
Date


Eric J. Bloch
Circuit Court Judge

ENGROSSED SUBSTITUTE HOUSE BILL 1379

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE HOUSE BILL 1379

Chapter 261, Laws of 2019

66th Legislature
2019 Regular Session

POLITICAL COMMITTEE CONTRIBUTION DISCLOSURES

EFFECTIVE DATE: July 28, 2019

AS AMENDED BY THE SENATE

Passed Legislature - 2019 Regular Session

State of Washington 66th Legislature 2019 Regular Session

By House State Government & Tribal Relations (originally sponsored by Representatives Pellicciotti, Hudgins, Appleton, Gregerson, Pollet, Macri, Valdez, Kloba, Bergquist, Tarleton, Doglio, Frame, Goodman, Reeves, and Fey)

READ FIRST TIME 02/05/19.

Passed by the House April 22, 2019
Yeas 96 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 15, 2019
Yeas 27 Nays 21

CYRUS HABIB

President of the Senate

Approved May 7, 2019 10:24 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 1379** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 13, 2019

Secretary of State
State of Washington

1 AN ACT Relating to disclosure of contributions from political
2 committees to other political committees; amending RCW 42.17A.320;
3 adding a new section to chapter 42.17A RCW; and creating a new
4 section.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** The legislature finds that the public has
7 the right to know who is contributing to election campaigns in
8 Washington state and that campaign finance disclosure deters
9 corruption, increases public confidence in Washington state
10 elections, raises the level of debate, and strengthens our
11 representative democracy.

12 The legislature finds that campaign finance disclosure is
13 overwhelmingly supported by the citizens of Washington state as
14 evidenced by the two initiatives that largely established
15 Washington's current system. Both passed with more than seventy-two
16 percent of the popular vote, as well as winning margins in every
17 county in the state.

18 One of the cornerstones of Washington state's campaign finance
19 disclosure laws is the requirement that political advertisements
20 disclose the sponsor and the sponsor's top five donors. Many
21 political action committees have avoided this important transparency

1 requirement by funneling money from political action committee to
2 political action committee so the top five donors listed are
3 deceptive political action committee names rather than the real
4 donors. The legislature finds that this practice, sometimes called
5 "gray money" or "donor washing," undermines the intent of Washington
6 state's campaign finance laws and impairs the transparency required
7 for fair elections and a healthy democracy.

8 Therefore, the legislature intends to close this disclosure
9 loophole, increase transparency and accountability, raise the level
10 of discourse, deter corruption, and strengthen confidence in the
11 election process by prohibiting political committees from receiving
12 an overwhelming majority of their funds from one or a combination of
13 political committees.

14 NEW SECTION. **Sec. 2.** A new section is added to chapter 42.17A
15 RCW to read as follows:

16 (1) For any requirement to include the top five contributors
17 under RCW 42.17A.320 or any other provision of this chapter, the
18 sponsor must identify the five persons or entities making the largest
19 contributions to the sponsor in excess of the threshold aggregate
20 value to be considered an independent expenditure in an election for
21 public office under RCW 42.17A.005(29)(a)(iv) reportable under this
22 chapter during the twelve-month period preceding the date on which
23 the advertisement is initially to be published or otherwise presented
24 to the public.

25 (2) If one or more of the top five contributors identified under
26 subsection (1) of this section is a political committee, the top
27 three contributors to each of those political committees during the
28 same period must then be identified, and so on, until the individuals
29 or entities other than political committees with the largest
30 aggregate contributions to each political committee identified under
31 subsection (1) of this section have also been identified. The sponsor
32 must identify the three individuals or entities, not including
33 political committees, who made the largest aggregate contributions to
34 any political committee identified under subsection (1) of this
35 section in excess of the threshold aggregate value to be considered
36 an independent expenditure in an election for public office under RCW
37 42.17A.005(29)(a)(iv) reportable under this chapter during the same
38 period, and the names of those individuals or entities must be

1 displayed in the advertisement alongside the statement "Top Three
2 Donors to PAC Contributors."

3 (3) Contributions to the sponsor or a political committee that
4 are earmarked, tracked, and used for purposes other than the
5 advertisement in question should not be counted in identifying the
6 top five contributors under subsection (1) of this section or the top
7 three contributors under subsection (2) of this section.

8 (4) The sponsor shall not be liable for a violation of this
9 section that occurs because a contribution to any political committee
10 identified under subsection (1) of this section has not been reported
11 to the commission.

12 (5) The commission is authorized to adopt rules, as needed, to
13 prevent ways to circumvent the purposes of the required disclosures
14 in this section to inform voters about the individuals and entities
15 sponsoring political advertisements.

16 **Sec. 3.** RCW 42.17A.320 and 2013 c 138 s 1 are each amended to
17 read as follows:

18 (1) All written political advertising, whether relating to
19 candidates or ballot propositions, shall include the sponsor's name
20 and address. All radio and television political advertising, whether
21 relating to candidates or ballot propositions, shall include the
22 sponsor's name. The use of an assumed name for the sponsor of
23 electioneering communications, independent expenditures, or political
24 advertising shall be unlawful. For partisan office, if a candidate
25 has expressed a party or independent preference on the declaration of
26 candidacy, that party or independent designation shall be clearly
27 identified in electioneering communications, independent
28 expenditures, or political advertising.

29 (2) In addition to the information required by subsection (1) of
30 this section, except as specifically addressed in subsections (4) and
31 (5) of this section, all political advertising undertaken as an
32 independent expenditure or an electioneering communication by a
33 person or entity other than a bona fide political party must include
34 as part of the communication:

35 (a) The statement: "No candidate authorized this ad. It is paid
36 for by (name, address, city, state)";

37 (b) If the sponsor is a political committee, the statement: "Top
38 Five Contributors," followed by a listing of the names of the five
39 persons (~~or entities~~) making the largest contributions (~~in excess~~

1 ~~of seven hundred dollars reportable under this chapter during the~~
2 ~~twelve-month period before the date of the advertisement or~~
3 ~~communication)) as determined by section 2(1) of this act; and if~~
4 ~~necessary, the statement "Top Three Donors to PAC Contributors,"~~
5 ~~followed by a listing of the names of the three individuals or~~
6 ~~entities, other than political committees, making the largest~~
7 ~~aggregated contributions as determined by section 2(2) of this act;~~
8 and

9 (c) If the sponsor is a political committee established,
10 maintained, or controlled directly, or indirectly through the
11 formation of one or more political committees, by an individual,
12 corporation, union, association, or other entity, the full name of
13 that individual or entity.

14 (3) The information required by subsections (1) and (2) of this
15 section shall:

16 (a) Appear on the first page or fold of the written advertisement
17 or communication in at least ten-point type, or in type at least ten
18 percent of the largest size type used in a written advertisement or
19 communication directed at more than one voter, such as a billboard or
20 poster, whichever is larger;

21 (b) Not be subject to the half-tone or screening process; and

22 (c) Be set apart from any other printed matter. No text may be
23 before, after, or immediately adjacent to the information required by
24 subsections (1) and (2) of this section.

25 (4) In an independent expenditure or electioneering communication
26 transmitted via television or other medium that includes a visual
27 image, the following statement must either be clearly spoken, or
28 appear in print and be visible for at least four seconds, appear in
29 letters greater than four percent of the visual screen height on a
30 solid black background on the entire bottom one-third of the
31 television or visual display screen, or bottom one-fourth of the
32 screen if the sponsor does not have or is otherwise not required to
33 list its top five contributors, and have a reasonable color contrast
34 with the background: "No candidate authorized this ad. Paid for by
35 (name, city, state)." If the advertisement or communication is
36 undertaken by a nonindividual other than a party organization, then
37 the following notation must also be included: "Top Five Contributors"
38 followed by a listing of the names of the five persons (~~or~~
39 ~~entities)) making the largest aggregate contributions ((~~in excess of~~
40 ~~seven hundred dollars reportable under this chapter during the~~~~

1 ~~twelve-month period preceding the date on which the advertisement is~~
2 ~~initially published or otherwise presented to the public)) as~~
3 ~~determined by section 2(1) of this act; and if necessary, the~~
4 ~~statement "Top Three Donors to PAC Contributors," followed by a~~
5 ~~listing of the names of the three individuals or entities other than~~
6 ~~political committees making the largest aggregate contributions to~~
7 ~~political committees as determined by section 2(2) of this act.~~

8 Abbreviations may be used to describe contributing entities if the
9 full name of the entity has been clearly spoken previously during the
10 broadcast advertisement.

11 (5) The following statement shall be clearly spoken in an
12 independent expenditure or electioneering communication transmitted
13 by a method that does not include a visual image: "No candidate
14 authorized this ad. Paid for by (name, city, state)." If the
15 independent expenditure or electioneering communication is undertaken
16 by a nonindividual other than a party organization, then the
17 following statement must also be included: "Top Five Contributors"
18 followed by a listing of the names of the five persons (~~or~~
19 ~~entities)) making the largest contributions ((~~in excess of seven~~
20 ~~hundred dollars reportable under this chapter during the twelve-month~~
21 ~~period preceding the date on which the advertisement is initially~~
22 ~~published or otherwise presented to the public)) as determined by~~
23 ~~section 2(1) of this act; and if necessary, the statement "Top Three~~
24 ~~Donors to PAC Contributors," followed by a listing of the names of~~
25 ~~the three individuals or entities, other than political committees,~~
26 ~~making the largest aggregate contributions to political committees as~~
27 ~~determined by section 2(2) of this act.~~ Abbreviations may be used to
28 describe contributing entities if the full name of the entity has
29 been clearly spoken previously during the broadcast advertisement.~~

30 (6) Political advertising costing one thousand dollars or more
31 supporting or opposing ballot measures sponsored by a political
32 committee must include the information on the (~~"Top Five~~
33 ~~Contributors" consistent with subsections (2), (4), and (5) of this~~
34 ~~section)) top five contributors and top three contributors, other
35 than political committees, as required by section 2 of this act. A
36 series of political advertising sponsored by the same political
37 committee, each of which is under one thousand dollars, must include
38 the (~~"Top Five Contributors" information required by this section))
39 top five contributors and top three contributors, other than~~~~

1 political committees, as required by section 2 of this act once their
2 cumulative value reaches one thousand dollars or more.

3 (7) Political yard signs are exempt from the requirements of this
4 section that the sponsor's name and address, and (~~"Top Five~~
5 ~~Contributor" information~~) the top five contributors and top three
6 PAC contributors as required by section 2 of this act, be listed on
7 the advertising. In addition, the public disclosure commission shall,
8 by rule, exempt from the identification requirements of this section
9 forms of political advertising such as campaign buttons, balloons,
10 pens, pencils, sky-writing, inscriptions, and other forms of
11 advertising where identification is impractical.

12 (8) For the purposes of this section, "yard sign" means any
13 outdoor sign with dimensions no greater than eight feet by four feet.

Passed by the House April 22, 2019.

Passed by the Senate April 15, 2019.

Approved by the Governor May 7, 2019.

Filed in Office of Secretary of State May 13, 2019.

--- END ---