TESTIMONY ON SJR 18 AND PROPOSED AMENDMENTS

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Senate Committee on Campaign Finance Reform

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I submit this testimony on behalf of Honest Elections Oregon and the Oregon Progressive Party.

On March 12 I submitted written testimony that addressed SJR 18, along with HJR 13 and SJR 13. On March 13, I briefly testified about those resolutions at the Committee hearing.

The Committee is now again hearing SJR 18. So this is more detailed testimony about that resolution.

The case for campaign finance reform is firmly established by the Oregonian's 4-part series, "*Polluted by Money: How Corporate Cash Corrupted One of the Greenest States in America*." I attached the first 3 parts to my March 12 testimony and attach part 4 to this testimony. Much additional literature is available at the Honest Elections website.

SJR 18 HAS FIVE PROBLEMS

SJR 18 would add this to Article II, § 8, of the Oregon Constitution:

> (2) Notwithstanding section 8, Article I of this Constitution, the Legislative Assembly, or the people through the initiative process, may enact laws limiting or prohibiting contributions received by or made to candidates, or the principal campaign committees of candidates, for nomination or election to public office.

1. SJR 18 DOES NOT ADDRESS EXPENDITURES OR INDEPENDENT EXPENDITURES AND PROVIDES NO PROTECTION FOR ADDED DISCLOSURE REQUIREMENTS.

This is a very limited authorization for campaign finance reform legislation. It addresses only limits on "contributions" but not any sort of regulation of "expenditures" or "independent expenditures." Thus, it would not serve as

authorization for mandatory taglines or disclaimers on political advertisements, such as those proposed by HB 2716.

If voters were to enact the SJR 18 amendment (limited to regulation of contributions), that would still leave Oregon with a ***Citizens United*** regime (unlimited individual and corporate independent expenditures, including from undisclosed dark money sources), even if the United States Supreme Court were to reverse ***Citizens United***.

> Reversal of ***Citizens United*** is a realistic prospect. It remains a 5-4 decision of the Court that entirely contradicted its earlier decisions. Both of the recent justices leaving the Court were in the ***Citizens United*** majority, which leaves the current lineup with a 5-4 split. One further appointment of a justice by the President following Donald Trump could result in reversal of it.

In the meantime, the effective response to unlimited independent expenditures are mandatory taglines on political advertisements, identifying the largest several funders of the independent expenditure effort. The model for requiring such taglines is Section 3-303 of the Portland City Charter (attached), which was enacted as part of Measure 26-200 in 2018. It requires:

> 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 ve Dominant Contributors providing the largest amounts of funding to each such Political Committee or Entity in the current Election Cycle:

SJR 18 would not protect such law from invalidation under the Oregon Constitution. I do not believe that such protection is necessary. There is no Oregon Supreme Court decision striking down any law requiring disclosure of the sources of funds for political advertisements. But Legislative Counsel seems to believe that the Oregon Constitution may not allow laws requiring disclaimers or taglines. If his view is correct, SJR 18 would not overcome it (while HJR 13 would overcome it).

Thus, the result of SJR 18, if enacted by voters, would be the opportunity for legislation to limit political contributions but not expenditures. Why the Legislature would desire that outcome is a mystery.

2. SJR 18 LEAVES UNCLEAR THE AUTHORITIES OF LOCAL GOVERNMENTS TO ADOPT CAMPAIGN FINANCE REGULATIONS FOR THEIR JURISDICTIONS.

SJR 18 refers only to "the Legislative Assembly, or the people through the initiative process" as the authorities which "may enact laws limiting or prohibiting contributions." This leaves unclear the authority of local governments to limit contributions in their elections.

3. SJR 18 EXCLUDES BALLOT MEASURE CAMPAIGNS FROM ITS AUTHORIZATION FOR LIMITS.

SJR 18 addresses only candidate campaigns, not measure campaigns. Decisions of the United States Supreme Court in 1978 and 1981 indicated that spending in measure campaigns could not be restricted.[1] Both decisions included dissents, and both could be reversed in the future. But SJR 18 would leave measure contributions and spending in Oregon uncontrolled, even if those cases were reversed.

4. SJR 18 HAS AN UNNECESSARILY NARROW "NOTWITHSTANDING" PHRASE.

Should say "Notwithstanding any other provision of this Constitution." Opponents would argue that limits on contributions also violate Article I, § 26 of the Oregon Constitution, which states:

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

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1. ***First National Bank of Boston v. Bellotti***, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); ***Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley***, 454 US 290, 297, 102 S Ct 434, 438, 70 L Ed 2d 492 (1981).

5. SJR 18 FAILS TO PROTECT CAMPAIGN REGULATION ADOPTED BY INITIATIVE FROM NULLIFICATION BY THE SITTING LEGISLATURE.

This has occurred to campaign finance reform enacted initiatives several times in just the past 15 years (Massachusetts 2003, Missouri 2007, South Dakota 2016). The Oregon Legislature in 1973 repealed the contribution limits that had been in place since adopted by initiative in 1906. In contrast, Initiative Petition #1 (2020) protects campaign finance reform laws adopted by initiative from being gutted by politicians elected under the existing big money system by requiring at least 3/4 of them to approve the gutting.

A SIMPLE ALTERNATIVE TO SJR 18

If a simple amendment is desired, we recommend the language of Initiative Petition #1 (2020):

> Be it enacted by the People of the State of Oregon, there is added to Article I, Section 8, of the Constitution of Oregon, as follows:
>
> > Laws consistent with the freedom of speech guarantee of the United States Constitution may regulate contributions and expenditures, of any type or description, to influence the outcome of any election; provided, that such laws are adopted or amended by an elected legislative body by a three-fourths vote of each chamber or by initiative.

This language could be part of Article I, § 8, or Article II, § 8, or be placed somewhere else in the Oregon Constitution. Its location does not matter.

This language solves the five problems discussed above.

If the 3/4 vote requirement is not wanted, that could be omitted.

THE SJR 18 PROPOSED -2 AMENDMENT

The -2 Amendment (by Sen. Knopp) would replace the substantive language of SJR 18 with proposed amendment to the Oregon Constitution that would limit the political contributions of individuals and certain entities to $5,000 per election to any individual candidate. The primary and general elections would each be considered an election. Thus, the limit per election cycle would be $10,000.

The -2 Amendment has all of the same 5 problems identified for SJR 18 above. It does not alleviate any of those problems.

The -2 Amendment introduces the possibility of loopholes, because it applies its limit only to "an individual, corporation, professional corporation, nonprofit corporation, labor organization or political committee." What about an unincorporated association or a partnership? No doubt political veterans could think of other entities that are beyond the -2 list.

Also, the courts may well find that the -2 Amendment preempts the adoption of any lower limit by any government in Oregon, including local governments and the Oregon Legislature itself. The result would be increasing the contribution limits adopted by 88% of the voters in Multnomah County and Portland in 2016 and 2018 from $500 per election cycle to $10,000 per election cycle. An added result is that the limit in races for the Legislature would be the same as for statewide races. This is not the usual practice in other states, where limits applicable to legislative races are typically much lower than limits in statewide races.

THE SJR 18 PROPOSED -3 AMENDMENT

The -3 Amendment (by Sen. Golden) is an improved version of HJR 13. It mostly solves 2 of the 4 flaws in HJR 13 described in my written testimony to this Committee on March 12 but does not solve the other 2 problems, which are:

1. It defeats the will of the voters in Multnomah County (2016) and Portland (2018) by not applying to the campaign finance reform measures they enacted by overwhelming votes of 89% and 87% in favor. Instead, it only applies to laws enacted on or after December 3, 2020. This is a direct insult to the voters of Oregon's most populous county and city.

4. Another constraint is created by the HJR 13 language "(d) Any other regulation on the use of moneys in political campaigns permitted under federal law." It is unclear what that means. Federal law does not regulate the use of moneys in state or local political campaigns, except for the law that bans receipt of funds from foreign persons or entities. Other than that, federal law does not "permit" or "not permit" regulation on the use of moneys in state or local political campaigns. For example, you will find no federal law that "permits" limits on contributions in state or local campaigns. Nor will you find a federal law that forbids such limits. So, if all you can do for regulation is what is

"permitted under federal law," you cannot do much at all. The U.S. Constitution, however, is interpreted as permitting or not permitting certain state or local regulation of campaign money. Maybe that is what the drafter of HJR 13 means to refer to. So the term "federal law" should be replaced with "the United States Constitution" in HJR 13.

Instead of replacing the term "federal law" with "the United States Constitution," the drafter of the -3 Amendment instead just added the term "and the Constitution of the United States." This does not solve the problem.

The -3 Amendment has additional problems:

1. In order to prevent the enumeration of 4 types of regulation from being interpreted by the courts as an exclusive list, the word "including" on page 1, line 4, should be followed by "but not limited to:"

2. The -3 Amendment does have the unnecessarily narrow "notwithstanding" phrase in SJR 18 discussed above. This is easily fixed by inserting the words "Notwithstanding any other provision of this Constitution," if a "notwithstanding" phrase is desired.

3. The -3 Amendment introduces a potential loophole in its Section 1(2)(d) by limiting disclosure requirements to "contributions or expenditures, as defined in state law, made in connection with political campaigns." A future legislature can thus redefine "contribution" or "expenditure" in ways that would defeat meaningful disclosure requirements. For example, a future legislature could define "contribution" to exclude anything other than cash, thus excluding all in-kind contributions from the authorization for disclosure requirements. The result could be that the bulk of contributions would thereafter be made in-kind in order to avoid disclosure. The phrase "as defined in state law" should be removed from the -3 Amendment.