IN THE COURT OF APPEALS OF THE STATE OF OREGON

BRYN HAZELL, FRANCIS NELSON, TOM CIVILETTI, DAVID DELK, GARY DUELL, JOAN HORTON, and KEN LEWIS,

Plaintiffs-Appellants Cross-Respondents

v.

BILL BRADBURY, Secretary of State of the State of Oregon, HARDY MYERS, Attorney General of the State of Oregon,

Defendants-Respondents Cross-Respondents

and

CENTER TO PROTECT FREE SPEECH, INC., an Oregon nonprofit corporation, and FRED VANNATTA,

Intervenors-Respondents Cross-Appellants

No. A137397

Marion County Circuit Court Case No. 06C-22473

BRIEF OF AMICUS CURIAE THE BETTER GOVERNMENT PROJECT

Appeal from the Judgment of the Circuit Court
for Marion County

Honorable Mary Mertens James, Judge

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I. Interest of Amicus.

Amicus The Better Government Project (hereinafter "TBGP") is a nonprofit organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. It was incorporated in Oregon in January 2007 (under the name "Oregon Better Government Project"). The mission of The Better Government Project is "to promote accountable, open, objective and transparent government." Within the scope of this purpose, The Better Government Project has focused efforts on studying campaign finance systems and proposals. Additionally, The Better Government Project supports efforts intended to protect the integrity and efficacy of institutions that promote citizen activism, such as the initiative and referendum processes. The implementation of Measure 47 involves issues of campaign finance regulation, the efficacy of citizen legislation, and questions about the objectivity of government officials responsible for implementing citizen legislation.

II. A Question of this Importance and Urgency Militates Strongly for Allowance of Amicus Brief.

One question before the Court is whether, as the trial court concluded [Horton ER 43-47] and Defendants contended below, the holding of ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) (hereinafter "***Vannatta***"), was so broad that it reached beyond the terms of the statutory terms before it and is therefore precedential and conclusive on the meaning of Oregon Constitution, Article I, Section 8, so that any and all statutory measures which impose upon any real or fictional person[1] any limits on political campaign contributions or expenditures are

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1. Measure 47 does not use the term "persons" but instead uses the defined term "individual" (Section (2)(s)) that includes only "any human being." We use this terminology throughout.

unconstitutional, notwithstanding Oregon Constitution, Article II, Sections 8 and 22.

In addition, the State of Oregon has recently relied heavily upon note 10 in ***Vannatta*** in supporting the constitutionality of limits on gifts to public officeholders in *VanNatta v. Oregon Government Ethics Commission and State of Oregon*, Marion County Circuit Court No. 07C-20464). This defense of the gift limits appears directly applicable to Measure 47's limits on campaign contributions, at least as to persons or entities having a pecuniary interest in legislation, rulemaking, or agency decisions.

III. Argument.

The Better Government Project believes that Measure 47 enacted valid campaign finance restrictions on non-individuals, such as corporations, unions, and other entities, due to (1) the existence in the Oregon Constitution of Article II, Section 22 (enacted by the people in 1994) and (2) the reduced nature of the free expression rights of non-individuals (compared with individuals), which has been recognized not only by the United States Supreme Court but by Oregon Supreme Court decisions, including ***Vannatta*** itself.

A. Unlike Measure 9 of 1994, Measure 47 Contains Severable Limitations on Campaign Contributions and Independent Expenditures by Corporations and Unions.

The Oregon Supreme Court in ***Vannatta*** left open the door for limits on political contributions or spending by corporations and unions.

> [T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated quid pro quo), but it is not protected expression; **a gift of money to a candidate from a**

> **corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected**; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression.

Vannatta, 324 Or at 522 n10.

> But the right to spend money to encourage some candidate or cause does not necessarily extend to spending other people's money on a political message without their consent, whether that money comes from compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar.

Vannatta, 324 Or at 524.

It is not surprising that ***Vannatta*** would recognize the validity of limits on campaign contributions by corporations. After all, Oregon for decades had and enforced a statutory ban on political campaign contributions by certain corporations, with no known constitutional challenges. See 260.415 (formerly 260.472, formerly 260.280; repealed Oregon 1983 Session Laws, c. 71, section 12.[2]

Measure 47, Section (3) and (6), contains severable limitations on political

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2. The statute read:

> No corporation, and no person, trustee or trustees owning or holding the majority of the stock of a corporation, carrying on the business of a bank, savings bank, cooperative bank, trust, trustee, surety, indemnity, safe deposit, insurance, telegraph, telephone, gas. electric light, heat, power, canal, aqueduct, water, cemetery or crematory company, or (a) any company engaged in business as a common carrier of freight or passengers by railroad, motor truck, motor bus, airplane or watercraft or (b) any company having the right to take or condemn land or to exercise franchises in public ways granted by the state, county, city or town, shall pay or contribute in order to aid, promote or prevent the nomination or election of any person, or in order to aid or promote the interests, success or defeat of any political party or organization. No person shall solicit or receive such payment or contribution from such corporation or holders of a majority of such stock.

contributions and expenditures by corporations and unions. No one has stated why such independently enforceable and severable limits are in violation of ***Vannatta***. And Section (11), Measure 47's severability section, demands that such severable limitations be preserved.

The Defendants' Reply Memorandum in Support of Motion for Summary Judgment (April 20, 2007) [hereinafter "Defendants' Reply Memorandum"], p. 6 [Hazell ER 30] stated:

> Properly understood, those passages merely acknowledge specific rules that already govern corporations and unions, and which are no part of Measure 47's CC&E limits.

This evades the issue. Either the Oregon Constitution allows laws which limit corporation and/or union political contributions and/or expenditures, or it does not. Defendants fail to refute that ***Vannatta*** recognized that there can be valid, constitutional limits on political campaign contributions or expenditures by non-individuals, such as corporations and unions. This entirely refutes Defendants' sweeping statements that ***Vannatta*** bans all limits on political campaign contributions or expenditures.[3]

Defendants' Reply Memorandum (p. 7) [Hazell ER 31] continued:

> But so long as corporations and unions are "spending their own money," they enjoy ordinary constitutional protection

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3. Defendants (*Id.*, p. 7) state that "corporate spending may be constrained to some extent by neutral laws, such as those prohibiting waste of corporate assets. See, e.g., ***Klinicki v. Lundgren***, 298 Or 662, 678, 695 P2d 906 (1985)." That case does not pertain to political contributions or expenditures. If it did apply to such contributions and expenditures, and did limit them, then Defendants have failed to explain <u>why</u> such limits are not invalid under their sweeping assertions that ***Vannatta*** forbids all limits on political campaign contributions and expenditures. In ***Vannatta***, however, the Court stated that laws could indeed validly place limits on "spending other people's money on a political message," and referred specifically to a corporation spending its shareholder's money.

> for their expressive activity, including their campaign contributions.

What does "spending their own money" mean? Where does "their own money" come from? In ***Vannatta***, the Court specifically cited these examples of entities "spending other people's money on a political message without their consent": "compulsory union fair share fees, a shareholder's equity, student activity fees, or dues paid to an integrated Bar." 324 Or at 524 (emphasis added). Where, in Defendants' view, is the corporation's "own money" coming from? All of a corporation's money belongs to its shareholders.

Further, in ***Vannatta*** the Court always referred to the free speech rights of "the people" or "the voters" or "Oregon citizens." See, e.g., 324 Or at 522-23. Corporations and unions are not people or voters or citizens. ***Vannatta*** does not even once refer to any rights of unions or corporations. Why, then, did the Measure 9 limits on corporate and union contributions not survive ***Vannatta***? Because Measure 9 contained no separate or severable limits on union and corporate contributions. Instead, it defined "person" as "an individual or a corporation, association, firm, partnership, joint stock company, club, organization or other combination of individuals having collective capacity." ORS 260.005(15) [then ORS 260.005(11)]. It then expressed its substantive limitations on contributions (its Section 3) as applicable to "a person." Thus, Measure 9 afforded no way, by means of severance at any level, to preserve limits on contributions that would be applicable only to corporations and unions. Striking down Measure 9, Section 3's contribution limits applicable to any "person" thus necessarily struck down its contribution limits applicable to any corporation or union. The construction of Measure 9 in that manner indicated the intent of the drafters that the individual and

non-individual limits would stand or fall together.

Measure 47, on the other hand, contains clearly severable limitations on contributions by corporations and unions in its Section (3)(a):

> No corporation or labor union shall make any contribution to a candidate committee, political committee, or political party.

Measure 47 does not use the term "persons" but instead uses the defined term "individual" (Section (2)(s)) that includes only "any human being." Measure 47 states its contribution limitations on "individuals" in separate subsections [see Sections (3)(b), (3)(d), (3)(i), (3)(j)] from its limitations on corporations and unions [see Section (3)(a)], thus making each set of limitations easily severable pursuant to Section (11) of Measure 47. Measure 47's limits on independent expenditures (Section (6)) are similarly bifurcated between those applicable to any "corporation or labor union" [Section (6)(a)] and those applicable to any "individual" [Section (6)(b)].

The Court in ***Vannatta*** states that political contributions by non-individuals may be subject to state limitations. Defendants claimed that corporations and unions do "enjoy free-speech protection under the Oregon Constitution." That misses the point. In ***Vannatta***, the Court conditioned the extent of their free speech protection in the specific context of political contributions. **There is no Oregon case holding that corporations or unions have the right to make unlimited political campaign contributions in Oregon candidate races.** Further, in ***State v. Ciancanelli***, 339 Or 282, 121 P3d 613 (2005), the Court concluded that the framers of the Oregon Constitution were probably either influenced by the Blackstone restrictive approach to free speech or were influenced by the "natural rights" approach. In either approach, the rights adhere to individuals, not to entities such as corporations or

unions.

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free-will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.

William Blackstone, Commentaries on the Laws of England 121 (1765).

B. Unlike Measure 9 of 1994, Measure 47 Contains Severable Limitations on Campaign Contributions and/or Independent Expenditures by Corporations and Unions Authorized by Article II, Section 22, of the Oregon Constitution.

Vannatta discusses Article II, Section 22, of the Oregon Constitution and concludes that it may well remove Article I, Section 8, protection for political contributions made by entities other than individuals residing inside the voting district of the candidate in question. 324 Or at 527. This section of the Oregon Constitution was enacted by Measure 6 of 1994. Here is its entire text:

> **Section 22. Political campaign contribution limitations.**
>
> **Section (1)** For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals who at the time of their donation were residents of the electoral district of the public office sought by the candidate, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.
>
> **Section (2)** Where more than ten percent (10%) of a candidate's total campaign funding is in violation of Section (1), and the candidate is subsequently elected, the elected official shall forfeit the office and shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought. Where more than ten percent (10%) of a candidate's total

> campaign funding is in violation of Section (1) and the candidate is not elected, the unelected candidate shall not hold a subsequent elected public office for a period equal to twice the tenure of the office sought.
>
> **Section (3)** A qualified donor (an individual who is a resident within the electoral district of the office sought by the candidate) shall not contribute to a candidate's campaign any restricted contributions of Section (1) received from an unqualified donor for the purpose of contributing to a candidate's campaign for elected public office. An unqualified donor (an entity which is not an individual and who is not a resident of the electoral district of the office sought by the candidate) shall not give any restricted contributions of Section (1) to a qualified donor for the purpose of contributing to a candidate's campaign for elected public office.
>
> **Section (4)** A violation of Section (3) shall be an unclassified felony.
>
> [Created through initiative petition filed Jan. 25, 1993, and adopted by the people Nov. 8, 1994]

The reason that ***Vannatta*** found that Article II, Section 22, did not validate the limits in Measure 9 of 1994 was:

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

324 Or at 527 n13.

Unlike the litigants in ***Vannatta***, the Hazell Plaintiffs have argued for partial application of Article II, Section 22, to validate all of the limitations in Measure 47 that do not pertain to individuals residing inside the voting district of the candidate receiving the contributions.

1. The Federal Court Litigation Involving Direct Enforcement of Measure 6 does not Remove it from the Oregon Constitution.

The litigation in federal courts about Measure 6, discussed later in this brief, is immaterial to the effect of Article II, Section 22 in this case. The fact is that Article II, Section 22, is part of the Oregon Constitution. While direct enforcement

of all of the provisions of Measure 6 of 1994 may violate the U.S. Constitution, because of the discrimination based on location of the residence of the contributor, the federal courts did not, and could not, remove Article II, Section 22, from the Oregon Constitution, where it today remains. The other provisions of the Oregon Constitution, including Article I, Section 8, are subject to the terms of the later-enacted Article II, Section 22, whether or not all of the provisions of Article II, Section 22 are directly enforceable.

The existence of Article II, Section 22, in the Oregon Constitution negates the contention that Article I, Section 8, prohibits limitations on political campaign contributions by corporations or unions. That negation of the prohibition does not offend the U.S. Constitution in any way, since (as the federal courts noted above), there is nothing in the U.S. Constitution that establishes any right by corporations or unions to make political campaign contributions in the first place. Thus, corporations and unions (and other non-individuals) cannot use Article I, section 8, as a defense to the application of a statute, such as Measure 47, that bans their campaign contributions.

This "removal of defense" effect of Article II, Section 22, even after the federal court's injunction, was explained in the Respondent's Brief of the Secretary of State in ***Vannatta***, pp. 13-18 (App 1-6).

> States are free to write their constitutions so that they do not protect some conduct that is affirmatively protected by the federal constitution. * * * The person wishing to engage in that conduct may rely on federal law to avoid the state prohibition, but may not insist that the state constitution be rewritten to contain protection for that which it affirmatively prohibits.
>
> * * *

Even if Article II, Section 22 is ultimately found unconstitutional as a

> matter of federal law, it still remains a part of the Oregon Constitution and petitioners may not claim that their rights under the Oregon Constitution are violated if Article II, Section 22 forbids the conduct they claim a right to engage in.

Id., pp. 16, 18.

Stated another way, no party has contended that any of the limitations in Measure 47 are contrary to the U.S. Constitution.[4] So the question is whether Measure 47's limitations are authorized by the continuing presence of Article II, Section 22, in the Oregon Constitution. Article II, Section 22, expressly forbids all contributions that do not "originate from individuals." This provides constitutional authority for Measure 47's ban on corporation and union contributions, as those entities are not "individuals."

Let us assume that, as Defendants assert, corporations and unions have the same Article I, Section 8, free speech rights as individuals. These rights would then be in conflict with the authority provided by Article II, Section 22 (and implemented by Measure 47) to ban political contributions by those entities. When provisions of the Oregon Constitution are in conflict, the later-enacted provision prevails.

> We have no difficulty in holding that, in this context, it is Article I, section 8, that is modified. When the people, in the face of a pre-existing right to speak, write, or print freely on any subject whatever, adopt a constitutional amendment that by its fair import modifies that pre-existing right, the later amendment must be given its due. See ***Hoag v. Washington-Oregon Corp.***, 75 Or 588, 612, 144 P 574, 147 P 756 (1915) (It is a familiar rule of construction that, where two provisions of a written [c]onstitution are repugnant to each other, that which is last in order of time and in local position is to be preferred * * *.). To hold otherwise would be to deny to later-enacted provisions of the constitution equal dignity as portions of the same fundamental document.

In re Fadeley, 310 Or 548, 560, 802 P2d 31 (1990). Thus, Article II, Section 22,

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4. Missouri's limits similar to Measure 47 were upheld against such challenges in ***Nixon v. Shrink Missouri Government PAC***, 528 US 377 (2000).

prevails over Article I, Section 8, to the extent of (1) authorizing limits on political contributions by non-individuals or (2) negating the asserted Article I, section 8, prohibition on campaign contribution limits applicable to non-individuals.

2. The Federal Court Erred, as a Matter of Oregon Law, in not Applying Severance to Preserve Measure 6's Ban on Contributions by Non-individuals.

We believe that this particular argument is unnecessary, because (as noted above) Article II, Section 22, remains in the Oregon Constitution and continues to constitute a restriction on Article I, section 8, for state constitutional law purposes. We offer the severability argument below as a completely independent justification for the constitutionality of the limits in Measure 47 applicable to non-individuals.

Defendants' Reply Memorandum (p. 8) contended that none of Measure 6 can be considered, because the U.S. District Court issued an injunction against its enforcement in ***Vannatta v. Keisling***, 899 F Supp 488, 497 (DC Or 1994), *affirmed* 151 F3d 1215 (9th Cir 1998) [hereinafter "***Vannatta*** (federal)"], which concluded that the feature of Measure 6 of 1994 that ran afoul of the U.S. Constitution was its discrimination against individuals who were not residents of the district from which the candidate was running. The federal courts had no problem with Measure 6's absolute ban on political contributions by non-individuals, since complete bans on political contributions by non-individuals (corporations and unions) have been in place in federal elections for decades and are currently also in place in about half of the states.[5]

Why, then, did the federal courts not sever the parts of Measure 6 of 1994 that

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5. Federal Election Commission (FEC), CAMPAIGN FINANCE LAWS 2002, Chart 2A (http://www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm).

discriminated on a geographic basis, while letting stand the parts that banned all contributions by non-individuals? After all, such severance or limiting construction could easily be accomplished by striking a few words from the measure. It was because they misunderstood the law of Oregon.

> Furthermore, I conclude that the unconstitutional portions of Measure are not severable because the Measure's lack of clarity prevents the Court from ascertaining the intentions of the people who enacted it.
>
> My decision not to sever is buttressed by the fact that the state legislature is free to enact legislation which limits campaign contributions by corporations for profit, labor unions, banks, etc. A ban on contributions to federal candidate elections by corporations, labor unions, banks and similar entities has been in existence for almost 90 years and has been found to comport with the First Amendment. See ***FEC v. National Right to Work Committee***, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982); ***First National Bank of Boston v. Bellotti***, 435 U.S. 765, 788 n. 26, 98 S.Ct. 1407, 1422 n. 26, 55 L.Ed.2d 707 (1978).

Vannatta v. Keisling, 899 F Supp 488, 497 (DC Or 1994), *affirmed* 151 F3d 1215 (9th Cir 1998). Thus, the federal courts believed that the legislative process in Oregon was, free to re-enact the limits on campaign contributions by corporations, labor unions, banks, etc.

The federal court also ruled that the intent of the drafters of Measure 6 of 1994 was not clear enough to allow provisions to be severed. But the federal court failed to examine the text, context, or history of Measure 6 in order to determine its intent, as is required by ***PGE v. Bureau of Labor and Industries***, 317 Or 606, 610-12, 859 P2d 1143 (1993) ("***PGE v. BOLI***"). The Oregon courts have never interpreted this measure.

Both express terms of Measure 6 and its history indicate a intent to make candidates depend for contributions on (1) individuals (2) who "are residents of the electoral district of the public office." The "residents of the electoral district" intent

is severable. If the drafters had intended merely to limit contributions to individuals or entities within the electoral district, they would not have used the term "individuals" at all. They would have simply banned all contributions made from sources outside of the electoral district. Further, the ballot title for Measure 6 reinforces this conclusion. The Explanatory Statement stated (emphasis added):

> The measure would allow a candidate for a local or state office (such as judge, city council, the legislature, or governor) to "use or direct" only contributions which "originate" from individuals who reside in the district of the office for which the candidate is running. Candidates could not "use or direct" contributions from people who reside outside the district. For example, someone who resides outside a city and works in the city could not contribute to a candidate for city council.
>
> Political Action Committees (PAC's) could under this measure contribute funds to candidates only if they could show that the funds originated from individuals who reside in the same district as the candidate.

Note that the Explanatory Statement refers to "individuals," "people," and "someone," all terms which exclude corporations and unions.

In addition, the sole argument in favor of Measure 6, authored by its Chief Petitioner, also indicated its intent to prohibit all contributions by non-individuals.

> The FREEDOM FROM SPECIAL INTERESTS initiative strikes at the root of a pervasive abuse of our political process. ln a simple, straightforward constitutional amendment, this initiative ends the vulnerability of Oregon elections to being unduly influenced by outside special interests.
>
> The FREEDOM FROM SPECIAL INTERESTS initiative requires all candidates for all public offices to accept only those campaign funds that come from individuals within the candidate's electoral district. It stops the flow of campaign contributions from beyond the boundaries where the election is held. It blocks powerful outside forces from the possibility of buying influence in our elections, and it blunts the ability of those forces to shape public policy to their own ends once a candidate is elected. In short, this initiative requires our candidates and our elected leaders to rely upon the people, not outside special interests, as their main source of support and accountability.
>
> The current system of campaign financing allows major outside donors to

> exert powerful pressures upon our political process. This system violates the most basic purpose of voting districts, which were established for the sole purpose of empowering the citizens within that district. This system disenfranchises the very citizens that our public office holders were elected to serve.
>
> The FREEDOM FROM SPECIAL INTERESTS initiative gives back to the people their right to representation that is undiluted, uncompromised and uncorrupted by powerful outside special interests.
>
> In summary, Oregon's campaign financing laws must be changed before ordinary people can again secure their rightful control of their own government. This right is sacred to all citizens, whether liberal, conservative, or moderate; Republican, Democrat, or Independent. The FREEDOM FROM SPECIAL INTERESTS initiative will do more than any reform in modem memory to help restore that right.
>
> -- Gordon Miller, AUTHOR/CHIEF PETITIONER

Note that the Chief Petitioner refers to "individuals," "people," "citizens," and "ordinary people," all terms which exclude corporations and unions and indicate an intent to make contributions from individuals the sole source for candidate campaign money. Thus, to the extent it is necessary, this Court should apply severance to Article II, Section 22, in order to preserve this intent. Such severance could be accomplished by striking a few words from Article II, Section 22.[6]

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6. For example:

> **Section 22. Political campaign contribution limitations.**
>
> Section (1) For purposes of campaigning for an elected public office, a candidate may use or direct only contributions which originate from individuals ~~who at the time of their donation were residents of the electoral district of the public office sought by the candidate~~, unless the contribution consists of volunteer time, information provided to the candidate, or funding provided by federal, state, or local government for purposes of campaigning for an elected public office.
>
> * * *

(continued...)

C. The State's Current Defense of the SB 10 (2007) Limits on Gifts also Validates the Measure 47 Limits on Campaign Contributions.

The State of Oregon has recently relied heavily upon note 10 in ***Vannatta*** in supporting the constitutionality of limits on gifts to public officeholders adopted in SB 10 (2007). Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment (March 21, 2008), in ***VanNatta v. Oregon Government Ethics Commission and State of Oregon***, Marion County Circuit Court No. 07C-20464) ("***VanNatta (SB 10)***") (hereinafter "State Summary Judgment Memorandum re Gifts" or "The State"). This defense of the gift limits is applicable to Measure 47's limits on campaign contributions, at least as to persons or entities having a pecuniary interest in legislation, rulemaking, or agency decisions.

Again, that note in ***Vannatta***, 324 Or at 522 n10, stated:

> [T]here doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated *quid pro quo*), but it is not protected expression; * * *

6.(...continued)

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

Phrases can be struck from Measure 6 of 1994, because Measure 6 did not contain a severability clause requiring severance at the level of a section, subsection, or subdivision.

In ***VanNatta SB 10***, the State currently argues that Article I, section 8 permits the limiting of gifts to public officials, including legislators, because gifts are either the equivalent of bribes (if made with an anticipated *quid pro quo*) or do not constitute expression (if not by someone with no specific business before the public official receiving the gift). This analysis would appear equally applicable to Measure 47's limits on campaign contributions. Either such contributions (1) are the equivalent of bribes (if made with an anticipated *quid pro quo*) or (2) do not constitute expression (if given by someone with no specific business before the recipient public official or candidate for that office).

Measure 47's legislative findings of fact include findings that large campaign contributions (defined as those in excess of the statute's limits) are made for the purpose of influencing government officials to take actions desired by the contributors. Thus, here the legislature has found that large campaign contributions are made with an anticipated *quid pro quo*.

1. How are Gifts Different from Campaign Contributions?

The State (p. 15) claims that gifts are different from campaign contributions, because campaign contributions "may not be used for personal gain. See ORS 260.407(2)." The practical distinction between gifts and campaign contributions, however, is nonexistent. It is legal in Oregon to use campaign contributions for trips to Hawaii, Blazer tickets, home mortgage payments, and even payments to friends or relatives for doing unsupervised work for the officeholder. In fact, the last round of the widely publicized trips to Hawaii to meet with lobbyists for the beer and wine distributors were paid for with campaign contributions from the beer and wine distributors.

> Three Oregon legislators used campaign or personal money in May to fly to Hawaii, where they accepted $30,000 in campaign contributions from beer and wine distributors at the group's biennial conference.
>
> * * *
>
> Paul Romain, director and lobbyist for the Oregon Beer and Wine Distributors Association, said he checked with the state Elections Division beforehand and was told lawmakers could use campaign money to travel to an out-of-state fundraiser for their political action committee.
>
> "I found out that if they get a PAC contribution, yes, they can use their PAC money to go get that PAC contribution," Romain said. "It's the same thing as driving to Medford to get something. It just happens to be Hawaii versus Scappoose or Sunriver or some place like that."

Dave Hogan and Janie Har, *2006 Hawaii trip hosted by beer and wine lobby pays off for legislators*, OREGONIAN (September 28, 2006).[7] This practice remains legal in Oregon.[8] Campaign contributions can be readily substituted in place of gifts.[9]

The statute on use of campaign contributions has not significantly changed in decades. It reads:

> **260.407 Use of contributed amounts for certain purposes.**
>
> (1) Except as provided in subsection (2) of this section, amounts received as contributions by a candidate or the principal campaign committee of a

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7. http://blog.oregonlive.com/politics/2006/09/2006_hawaii_trip_hosted_by_bee.html.

8. Beer, wine lobby's big clout, OREGONIAN, October 8, 2005:

> The Hawaii trips are just part of the group's influence strategy. Since 2002, the distributors have showered $1.2 million on lawmakers through lobbying and campaign giving, The Oregonian found, with much of the latter going to legislative leaders and committee chairmen who have the power to pass or kill bills.

9. David Steves, *Political gray areas in spotlight*, EUGENE REGISTER-GUARD, November 16, 2006:

> Those lobbyists may find themselves barred from picking up the tab, he [lobbyist Jim Markee] said, but they'll make up for it by telling the official, "Here, I can give you a campaign contribution to pay for that."

candidate for public office that are in excess of any amount necessary to defray campaign expenditures and any other funds donated to a holder of public office may be:

(a) Used to defray any expenses incurred in connection with the recipient's duties as a holder of public office;

(b) Transferred to any national, state or local political committee of any political party;

(c) Contributed to any organization described in section 170(c) of Title 26 of the United States Code or to any charitable corporation defined in ORS 128.620; or

(d) Used for any other lawful purpose.

(2) Notwithstanding subsection (1) of this section, amounts received as contributions by a candidate for public office that are in excess of any amount necessary to defray campaign expenditures and other funds donated to a holder of public office may not be:

(a) Converted by any person to any personal use other than to defray any expenses incurred in connection with the person's duties as a holder of public office or to repay to a candidate any loan the proceeds of which were used in connection with the candidate's campaign;

(b) Except as provided in this paragraph, used to pay any money award as defined in ORS 18.005 included as part of a judgment in a civil or criminal action or any civil penalty imposed by an agency as defined in ORS 183.310 or by a local government as defined in ORS 174.116. Contributions described in this subsection may be used to pay a civil penalty imposed under this chapter, other than a civil penalty imposed for a violation of this section or ORS 260.409; or

(c) Except as provided in this paragraph, used to pay any legal expenses incurred by the candidate or public official in any civil, criminal or other legal proceeding or investigation that relates to or arises from the course and scope of the duties of the person as a candidate or public official. Contributions described in this subsection may be used to pay legal expenses incurred by the candidate or public official in connection with a legal proceeding brought under this chapter, other than a proceeding brought under this section or ORS 260.409.

The only change since before ***Vannatta*** in 1997 has been the addition of Sections (2)(b) and (2)(c), allowing use of campaign funds to (1) pay money awards and civil penalties and (2) pay the candidate or public official's legal expenses. The only

change to the language allowing campaign contributions to be used to "defray any expenses incurred in connection with the person's duties as a holder of public office" was the deletion in 1999 of the words "ordinary and necessary" in front of "expenses." Oregon 1999 Session Laws, Ch. 999 section 20. Thus, the allowed uses of campaign funds has expanded since ***Vannatta*** was decided.

Thus, campaign contributions can be used:

1. for any campaign-related purpose, including taking extended luxury trips to Hawaii or elsewhere to meet with potential contributors; or

2. to pay "any public-office any expenses incurred in connection with the person's duties as a holder of public office," including unlimited payments to friends or relatives for undocumented office work; or

3. to repay to a candidate any loan the proceeds of which were used in connection with the candidate's campaign.

This last category means that a campaign contributions can be deposited directly into the personal bank account of the candidate or former candidate.

Since campaign contributions can be used for all of these purposes, it would appear incumbent upon the State to offer a principled distinction between a "gift" and a "campaign contribution" in Oregon. In fact, nothing in Oregon law prevents a public official or candidate from receiving a "gift" from someone and reporting it as a campaign contribution. This is of no discernible consequence to the recipient, since the uses of campaign contributions are virtually unlimited.

2. Measure 47 Requires a Narrowing Construction to Apply its Limits Only to Contributors with "a Legislative or Administrative Interest."

The State (p. 10) distinguishes the gift limits from campaign contribution limits by noting that the gift limits apply only to:

* * * any single source that could reasonably be known to have a

> legislative or administrative interest in any government agency in which the public official holds, or the candidate if elected would hold, any official position or over which the public official exercise, or the candidate if elected would exercise, any authority.

ORS 244.025(1). This limit also applies to relatives of the donor. ORS 244.025(4).

ORS 244.020(8) provides the definition.

> "Legislative or administrative interest" means an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official.

The State contends that restricting the application of the gift limits to those with a "legislative or administrative interest" (or who have relatives with such an interest) makes the limits constitutional.[10] If such a restriction makes a constitutional difference, then Measure 47 should be given a narrowing construction so that its limits also apply only to only to donors with "a legislative or administrative interest" over which the candidate, if elected, would exercise any authority.

Measure 47, Section (9)(e) requires application of narrowing constructions in order to preserve the constitutionality of the provisions of Measure 47:

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10. Later, however, the State (pp. 29-30) (App 16-17) contends that the gift limits could constitutionally be applied to everyone:

> Thus, if plaintiffs were correct that the legislature may not limit the ambit of the gift restriction to donors with an economic interest before the public official, then the section so defining a "legislative or administrative interest" readily could be severed. Further, if the court concluded that the exemptions allowing certain reimbursements by either governmental entities or nonprofit corporations were invalid, any or all of those exemptions readily could be severed.
>
> Of course, that remedy would not meet plaintiffs' hopes for this litigation, because they still would be restrained in the personal gifts they could give the public officials they seek to persuade. But it is nonetheless the proper remedy if indeed a constitutional infirmity exists in the challenged classifications.

> If, in the absence of this Section (9)(e), there would be entered in any court any order impairing the effectiveness of any part of this Act on the ground that the United States Constitution or Oregon Constitution requires that any type of individual or entity be wholly or partially exempt from any of the prohibitions or limitations in this Act, then we, the electors of Oregon, acting in our legislative capacity, hereby declare that the provisions of this Act shall be given a narrowing interpretation so as to avoid invalidation of any provision of this Act and to preserve its effectiveness to the maximum degree consistent with the constitutions.

In addition, precedents favor the use of such narrowing constructions.

> As do the federal courts, Oregon courts construe statutes to be constitutional if it is possible to do so. See ***Salem College & Academy, Inc. v. Emp. Div.***, 298 Or 471, 695 P2d 25 (1985); ***Planned Parenthood Assn. v. Dept. of Human Res.***, 297 Or 562, 687 P2d 785 (1984). When the issue is the relationship between a statute and the protections of expression in Article I, section 8, of the Oregon Constitution, we give the statute a narrowing construction when necessary to preserve its constitutionality, if it is possible to do so with reasonable fidelity to the legislature's words and apparent intent. See ***State v. Robertson***, 293 Or 402, 411-13, 649 P2d 569 (1982).

Crumpton v. Keisling, 160 OrApp 406, 416-17, 982 P2d 3 (1999), *review denied* 329 Or 650, 994 P2d 132 (2000). Thus, the Court should apply this narrowing construction to the limits in Measure 47, which should (according to the rationale of the State in the gifts case) render those limits in compliance with Article I, section 8.

Such a narrowing construction can be done with reasonable fidelity to the words and apparent intent of the drafters of Measure 47. First, the drafters stated a distinct preference for narrowing, if necessary to preserve constitutionality. Second, the drafters deemed the preponderance of political campaign contributions to have the purpose of exerting influence upon candidates and officeholders. See Measure 47, section (1). It is unlikely that a large percentage of those contributions are made by disinterested entities or persons.

IV. CONCLUSION.

This Court should uphold the parts of Measure 47 that prohibit corporations, unions, and other non-individuals from making campaign contributions or independent expenditures in campaigns for non-federal offices in Oregon. The other limits in Measure 47 are easily severable from these limits on non-individuals, and Measure 47 itself directs that all severable sections, subsections, and subdivisions be preserved.

Further, this Court should uphold the Measure 47 limits on political campaign contributions by individuals, to the extent such individuals have a "legislative or administrative interest" involving the office which the candidate seeks. This narrowing construction of Measure 47 is called for by its own Section (9)(e) and by the principles of constitutional law in Oregon.

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