IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant/Respondent on Review, vs. THOMAS PAUL MOYER, Defendant-Respondent/Petitioner on Review.	Supreme Court No. S056990 Court of Appeals No: A128796 Multnomah County Circuit Court No. 040935104
STATE OF OREGON, Plaintiff-Appellant/Respondent on Review, vs. VANESSA COLLEEN STURGEON, aka Vanessa Sturgeon, aka Vanessa Colleen Kassab, Defendant-Respondent/Petitioner on Review.	Court of Appeals No: A128797 Multnomah County Circuit Court No. 040935105
STATE OF OREGON, Plaintiff-Appellant/Respondent on Review, vs. SONJA R. TUNE, Defendant-Respondent/Petitioner on Review.	Court of Appeals No: A128798 Multnomah County Circuit Court No. 040935106

PETITIONERS' JOINT BRIEF ON THE MERITS

Review of the Decision of the Oregon Court of Appeals on Appeal from the Circuit Court for Multnomah County, Honorable John A. Wittmayer.

OPINION FILED: January 7, 2009
AUTHOR OF OPINION: Landau, joined by Haselton and Ortega
CONCURRING OPINION: Brewer, joined by Edmonds
CONCURRING OPINION: Schuman
DISSENTING OPINION: Sercombe, joined by Wollheim, Rosenblum and Armstrong

Names and Addresses of Counsel Appear on Inside Cover

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MICHAEL T. GARONE, OSB #802341
DAVID AXELROD, OSB #750231
SCHWABE, WILLIAMSON & WYATT
1211 S.W. Fifth Avenue, Suites 1600-1900
Portland, OR 97204
Telephone: (503) 222-9981
Of Attorneys for Defendant-Respondent/ Petitioner on Review Thomas Paul Moyer

RONALD HOEVET, OSB #751746
HOEVET, BOISE & OLSON P.C.
1000 S.W. Broadway, Suite 1500
Portland, OR 97205
Telephone: (503) 228-0497
Of Attorneys for Defendant-Respondent/ Petitioner on Review Vanessa Colleen Sturgeon

JANET LEE HOFFMAN, OSB #781145
SHANNON RIORDAN, OSB #060113
HOFFMAN ANGELI, LLP
1000 SW Broadway, Suite 1500
Portland, OR 97205
Telephone: (503) 222-1125
Of Attorneys for Defendant-Respondent/ Petitioner on Review Sonja R. Tune

JOHN KROGER, OSB #077207
Attorney General
MARY H. WILLIAMS, OSB #911241
Solicitor General
ERIKA L. HADLOCK, OSB #912978
Assistant Solicitor General
1162 Court St., Suite 400
Salem, OR 97301-4096
Telephone: (503) 378-4402
Of Attorneys for Plaintiff-Appellant/ Respondent on Review State of Oregon

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I. QUESTIONS PRESENTED ON REVIEW

1. Is ORS 260.402 directed at the content of speech under Article I, section 8, of the Oregon Constitution and therefore facially invalid as a first-category statute under the interpretative framework set forth by this Court in *State v. Robertson* ("*Robertson*"), 293 Or 402, 649 P2d 569 (1983)?

2. Is ORS 260.402 sufficiently targeted to the harmful effects of speech so that it may be properly analyzed as a second-category statute under *Robertson*?

3. If ORS 260.402 is a first-category statute, is it wholly contained within a historical exception to free speech guarantees under Article I, section 8?

4. If ORS 260.402 is a second-category statute, is it overbroad in violation of Article I, section 8, and the First and Fourteenth Amendments to the United States Constitution?

5. Is ORS 260.402 void for vagueness in violation of Article I, sections 20 and 21, of the Oregon Constitution and the First and Fourteenth Amendments to the United States Constitution?

II. PROPOSED RULES OF LAW

1. Because ORS 260.402 directly restrains and restricts protected speech under Article I, section 8, of the Oregon Constitution by criminalizing the making of a political contribution without any representation about the source of the funds, it is a first-category statute under *Robertson* which is unconstitutional on its face.

2. Being a statute that directly restrains and restricts protected speech, ORS 260.402 is not properly classified as a second-category statute under *Robertson* because (a) it does not specify the forbidden effects to which it is directed; (b) the

purported forbidden effects are not specified clearly in any related statutes; and/or (c) the purported forbidden effects do not appear as elements of the offense itself.

3. By its terms, ORS 260.402 may be violated merely by making a contribution without any representation as to the source of the funds or the execution of any oath, affidavit or certification. The statute does not require that the contributor have any intent to deceive and it may be violated even if the amount of the contribution is so small that the candidate or political committee has no legal obligation to report it. Under these circumstances, ORS 260.402 is not wholly confined within any historical exception to Oregon's free speech guarantees including the exceptions for fraud or perjury which require, at the least, intentionally deceitful misrepresentations of material facts and resulting harm with regards to fraud and willfully false and material statements under oath or affirmation to a public official with regards to perjury.

4. Even assuming that ORS 260.402 is a second-category law, it is unconstitutionally overbroad under both Article I, section 8, and the First Amendment because it criminalizes constitutionally protected nonfraudulent speech and is not narrowly tailored to reach only the harm against which it is allegedly directed.

5. Because ORS 260.402 provides insufficient notice of the criminalized conduct, delegates too much discretion to law enforcement, and has a chilling effect on protected speech, it is void for vagueness under Article I, sections 20 and 21, and the First and Fourteenth Amendments to the United States Constitution.

III. NATURE OF THE ACTION

On September 24, 2004, the State of Oregon ("the State"), charged petitioners,

Thomas Paul Moyer, Vanessa Colleen Sturgeon and Sonja R. Tune ("Defendants") with violating ORS 260.402, which provides, in pertinent part:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."[1]

The first count of the State's felony indictment alleged that, on or about May 16, 2003, Defendants Moyer and Sturgeon "did unlawfully and knowing[ly] make a contribution to a candidate, in relation to his campaign for public office, in a name other than * * * that of the person who in truth provided the contribution" by giving $2,500 to Portland mayoral candidate Jim Francesconi in Sturgeon's name. (ER-1.) The second count asserted the identical charge against Defendants Moyer and Tune regarding a contribution of $2,000 to Francesconi in Tune's name. (*Id.*)

Upon Defendants' joint demurrer, the trial court dismissed the indictment on the grounds that ORS 260.402 "violates Article I, section 8 of the Oregon Constitution in that it restrains protected speech and political association." (ER-5.) The trial court also held that ORS 260.402 was overbroad, "finding that the statute prohibits conduct that is clearly protected by the state and federal constitutions." (*Id.*) In a fractured *en banc* decision, the Court of Appeals reversed and reinstated the indictments. *State v. Moyer*, 225 Or App 81, 200 P3d 619 (2009). Writing for a plurality, Judge Landau stated that ORS 260.402 was not directly targeted at the content of speech itself but was instead targeted at the harmful effects of speech and

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[1] Although ORS 260.402 has been amended in ways not relevant to the issues on appeal, the current version still provides that it is a felony to make "a contribution in any name other than that of the person who in truth provides the contribution,"

was therefore properly analyzed for purposes of Article I, section 8, as a "second-category statute" under *Robertson*. *Id.* at 91. Despite this conclusion, Judge Landau further analyzed the case under the assumption that ORS 260.402 was directed at the content of speech and was therefore a "first-category statute" under *Robertson*. *Id.* at 93. Judge Landau concluded that, even under this assumption, ORS 260.402 did not violate Article I, section 8, because it was "wholly contained" within either one of two historical exceptions to free speech guarantees, those for fraud and perjury. *Id.* at 96.[2] Judge Landau's opinion was joined only by Judges Haselton and Ortega.

Chief Judge Brewer, joined by Judge Edmonds, concurred in the result but wrote separately to express his disagreement with portions of Judge Landau's opinion. Judge Brewer agreed that ORS 260.402 "focuses on the harmful effects of speech, not speech itself," but he disagreed with the conclusion that, if viewed otherwise, "the statute is wholly contained within a historical exception to the guarantee of Article I, section 8, of the Oregon Constitution." *Id.* at 99.

Judge Schuman also concurred in the result but wrote separately to make clear his disagreement with other portions of Judge Landau's opinion. Judge Schuman did not accept the proposition that ORS 260.402 was a second-category statute directed at the harmful effects of speech. *Id.* at 99. Judge Schuman stated that the statute was rather a first-category statute that "prohibits expression *per se*." He stated that the

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retaining the operative, and objectionable, language of the 2003 version.

[2] In its brief to the Court of Appeals, the State argued only that ORS 260.402 "essentially prohibits committing a fraud on the electorate" and was hence a "modern variant of common-law fraud." Appellant's Brief, p. 18. The State never argued that the statute was a variant of the crime of perjury and that issue was never briefed below, surfacing for the first time in the Court of Appeals plurality opinion. *Moyer*,

statute "prohibits a specified type of expression: falsely attributed campaign contributions." *Id.* Since the deception that the statute was "presumably" directed at "can be achieved *only* through expression," Judge Schuman held that it was properly considered a first-category statute under *Robertson*. *Id.* at 99 (emphasis in original). However, Judge Schuman agreed with the plurality's alternative conclusion that ORS 260.402 was a "contemporary variant" of "a historical exception to free speech guarantees." *Id.* at 100.

Judge Sercombe dissented and was joined by each of the other judges who heard oral argument, Judges Wollheim and Rosenblum, and by Judge Armstrong as well. The dissenters took issue with several of the lead opinion's legal conclusions. First, the dissenters, in agreement with Judge Schuman, concluded that ORS 260.402 was "a direct prohibition on a type of speech and that its legality is tested by the *Robertson* standards for category one laws." *Id.* at 104. Judged under this legal standard, the dissenters concluded that the statute did not fit wholly within any historical exception to the free speech guarantees of Article I, section 8, and "has nothing in common with any traditional crime that punishes untrue speech other than a common subject of false utterances." *Id.* at 101. The dissenters also opined that, even if the statute was viewed as a second-category law directed only at the harmful effects of speech and not speech itself, it did not pass constitutional muster since "a violation of the statute can occur even when any inferred harm does not." *Id.* at 108.

The Court of Appeals was evenly split, 5-5, on whether ORS 260.402 is a category one or category two criminal law under *Robertson*. However, a 6-4 majority

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225 Or App at 95-96.

concluded that, if it is a category one offense, it is not wholly contained within a historical exception to the free speech guarantees of Article I, section 8.

IV. FACTS MATERIAL TO THIS COURT'S REVIEW

No facts are in dispute in this case because the trial court decided the constitutional defenses presented in the demurrer on the face of the indictment. Therefore, the only relevant "facts" are those alleged in the indictment as set forth above. *Infra*, pp. 2-3.

V. SUMMARY OF ARGUMENT

Political contributions constitute a form of free expression under Article I, section 8. ORS 260.402 directly restrains and restricts this form of expression by criminalizing such contributions when they are made with the funds of another. Nothing except a contribution is required to violate the statute—the statute does not require any representation, oath, affirmation, verification or certification about the source of the funds, nor any fraudulent mental state, materiality or demonstrable harm to anyone. Under these circumstances, the statute cannot properly be viewed as a law making it unlawful to lie about the source of political campaign contributions. Rather, ORS 260.402 is a direct prohibition of protected speech and is a facially invalid first-category statute under *Robertson.*

The plurality's holding that ORS 260.402 can be construed as a second-category statute is in error because ORS 260.402 does not specify the harms to which it is directed, either alone or in context with related state laws. Because the forbidden effects do not appear as elements of the offense and the regulated communications do not necessarily violate related laws, ORS 260.402 cannot be properly viewed as a

second-category law.

Being a first-category law directly focused on a protected form of speech, ORS 260.402 can only be upheld if it is wholly contained within a well-established historical exception to free speech guarantees. No such historical exception applies to this statute, including those for fraud or perjury. Common-law fraud requires that the speaker, with intent to deceive, makes a false representation about a material fact, causing tangible harm to another who relies on the misrepresentation. ORS 260.402 contains none of these elements. The statute may be violated merely by the act of giving money without any representation as to the source of the funds. It may be violated despite the fact that the contributor has no intent to deceive and even if the amount of the contribution is so small that the candidate or committee has no legal obligation to report it under Oregon's campaign finance laws.

ORS 260.402 is also not wholly contained within the historical exception for perjury. Perjury or false swearing traditionally required willful and material misstatements to a public official under oath or affirmation. Here, the statute contains no requirement of willfulness or any other intent element. Nor does it require a material misstatement to a public official. Just as importantly, ORS 260.402 also does not require the contributor to execute an oath, affidavit, verification or certification about the source of the funds being contributed.

ORS 260.402 is an unconstitutional restraint on protected expression which is not subject to any historical exception. But even if viewed as a second-category law focused on the forbidden effects of speech, it is nonetheless unconstitutionally overbroad under both Article I, section 8, and the First Amendment because the

statute criminalizes contributions made in another's name which may be the product of mental states that are plainly inconsistent with an intent to deceive. The statute also criminalizes even the smallest contribution made in another's name even if that contribution is substantially below the cutoff for public disclosure that the Legislature has set and is therefore of no demonstrable interest to the public. It cannot be narrowed because it is impossible to discern the legislature's intent regarding the statute's scope.

ORS 260.402 is also void for vagueness under Article I, sections 20 and 21, of the Oregon Constitution and the First Amendment to the United States Constitution. The use of phrases in the statute such as "relating to" and "in truth provides" are so lacking in specificity that it is impossible to say with any reasonable degree of certainty what conduct is made criminal by the statute and what is not. ORS 260.402, as written, simply does not provide fair notice to the public as to the precise conduct that is prohibited, casting a cloud on important political speech.

ORS 260.402 must be struck down. While the State will likely argue that the requirement that contributors disclose the source of funds is the linchpin of Oregon's election laws, this exaggerated statement is not the issue. The issue is whether this statute, drafted as it is without any effort to confine itself to intentionally deceptive and material misrepresentations, violates Article I, section 8. As the dissent eloquently states, it surely does so because it:

> "restricts a communicative act (the making of a political contribution) without regard to any necessary effect of that act (as affecting voter behavior, the election process, or the content of public disclosures), and in an unprecedented fashion (because any historic regulation of untrue speech requires that the untruth be material and the deceit to be

intentional)." *Moyer*, 225 Or App at 101.

VI. ARGUMENT

1. *Robertson* and Its Progeny Provide the Proper Standard for Evaluating Constitutionality under Article I, section 8.

Article I, section 8, of the Oregon Constitution provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." In *Robertson*, this Court established a three-tiered analytical framework for assessing whether laws unconstitutionally "restrain" or "restrict" free expression under Article I, section 8. The Court stated that Article I, section 8, foreclosed: "* * * the enactment of any law written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* at 412. The Court further held that "(o)nly if a law passes that test is it open to a narrowing construction to avoid 'overbreadth' or to scrutiny of its application to particular facts." *Id.*

In *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992), the Court clarified its holding in *Robertson*. The Court stated that there was "a distinction between laws that focus on the content of speech or writing and laws that focus on proscribing the pursuit or accomplishment of forbidden results," holding that the former facially violate Article I, section 8, unless the scope of the restraint is wholly confined within a well-established historical exception. *Id.* at 164 (summarizing holding of

Robertson; emphasis in *Plowman*). Laws that focus on forbidden results are divided into two categories: those laws that prohibit expression used to achieve those forbidden effects and those that focus on the forbidden effects without referring to expression at all. *Id.* at 164 (citing *Robertson*, 293 Or at 417-18). Laws that focus on forbidden effects by expressly prohibiting expression are reviewed for overbreadth, while such laws that do not refer to expression are analyzed to determine if they violate Article I, section 8, as applied in a particular case. Id.

The language of Article I, section 8, sets forth a "clear and sweeping limitation" on legislative enactments that are "directed at restraining verbal or nonverbal expression of ideas of any kind." *State v. Ciancanelli*, 339 Or 282, 311, 121 P3d 613 (2005). The language permits one exception, where the speaker "abuses" his or her right by causing palpable harm to others within the strict confines of "certain well-recognized traditional crimes" that Article I, section 8, was demonstrably not intended to reach. *Id.* at 314.[3]

2. ORS 260.402 Criminalizes All Acts of Contribution Made with the Funds of Another, Even Without a Statement Regarding the Source of the Funds.

The first step in challenging the constitutionality of any statute is to discern the conduct that the statute proscribes. *State v. Ausmus*, 336 Or 493, 499, 85 P3d 864 (2004). ORS 260.402 prohibits expressing one's support for a candidate or a measure simply by making a political contribution with funds provided by another. The statute

[3] The continued viability of the *Robertson* framework is unquestioned. In *Ciancanelli*, the State's direct attack on *Robertson* was categorically rejected by this Court. *Ciancanelli*, 339 Or at 285. *Robertson* continues to be the guiding light in this Court's Article I, section 8, jurisprudence. *See State v. Johnson*, 345 Or 190, 191 P3d 665 (2008) (applying *Robertson*); *State v. Illig-Renn*, 341 Or 228, 142 P3d 62 (2006) (the same).

requires neither an affirmative reporting nor a written declaration as to the source of the funds used to make the contribution.

When the indictments at issue in this case were issued, ORS 260.402 stated, in relevant part, as follows:

> "No person shall make a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution."

The plurality opinion, in its first sentence, mischaracterizes this criminal statute, rewriting it to provide, "in essence, that it is unlawful to lie about the source of political campaign contributions." *Moyer*, 225 Or App at 84. The qualifier in the plurality's opinion, "in essence," is necessary because the actual words of the statute do not punish a false statement about the source of the money used to make a contribution.

The plurality's attempt to recast the statute as one prohibiting fraud is wrong. "To interpret a statute properly, this court must focus on the exact wording of the statute." *State v. Vasquez-Rubio*, 323 Or 275, 280, 917 P2d 494 (1996) (emphasis added). "A criminal offense cannot be created by inference or implication. Nor can the embrace of a criminal statute reach beyond the plain import of the language used." *State v. Bailey*, 115 Or 428, 432, 236 P 1053 (1925) (citations omitted).

To obtain a conviction under the statute, the State is not required to prove that the defendant lied about the source of the money or used a false name. The State need only prove that the defendant expressed support for a candidate or measure by making a contribution with someone else's money. Despite the fact that the statute contains no language mandating a disclosure by the contributor, the plurality opinion

inexplicably concludes that ORS 260.402 requires that the contributor "truthfully report the source of the contribution." *Id.* at 91.

Later in the opinion, the plurality acknowledges that the statute can be violated by making a contribution in one's own name with someone else's money. *Id.* at 88. The plurality opinion persists, however, in calling the act of making such a contribution in one's true name a "false name contribution," which involves "supplying false information to the recipient of the contribution." *Id.* (emphasis in original). This erroneous conclusion ignores the fact that the act of making a political contribution expresses support for a candidate or a cause and says nothing about where or from whom the contributor got the money to express that support.[4]

3. ORS 260.402 Is Directly Focused on Protected Speech, Not Prohibited Effects, and Is Therefore a Facially Invalid First-Category Law.

The first step in the *Robertson* analysis is to determine whether the statute at issue is a first-category law aimed at the content of speech or a second-category law that prohibits expression only to the extent that it proscribes the forbidden effects of that expression. *Robertson*, 293 Or at 412. While the plurality states that the line between a first-category and a second-category statute "has proved somewhat elusive" and "challenging to the courts," this Court's case law does not support this

[4] The plurality's misstep in concluding that the statute prohibits lying permeates the other opinions as well. For example, Judge Schuman agrees with the plurality that the statute prohibits "falsely attributed campaign contributions." *Moyer*, 225 Or App at 99. Even the dissenting opinion is affected to some degree. While correctly recognizing that ORS 260.402 does not require that the contributor "disclose the name of the owner of the money," the dissent nonetheless adopts at times the wording of the plurality, for example, by describing a contribution with another's money as "a false name contribution." *Id.* at 103, 105.

conclusion. *Moyer*, 225 Or App at 89.

The distinction between a first-category and second-category statute is relatively clear and straightforward. If the gravamen of the offense is engaging in the protected speech itself, the statute is within the first-category and is facially invalid unless saved by a historical exception. If the gravamen of the offense is the speech's production of a forbidden effect, the statute is within the second-category. *See, e.g., State v. Moyle*, 299 Or 691, 697, 705 P2d 740 (1985) (in judging constitutionality of a prior version of the harassment statute, the Court recognized that the determinative factor between a first-category law and second-category law was "* * * whether the gravamen of the offense is the act of making the threat (speech), or whether it is producing the effect, alarm"). If the communication constitutes the offense without the occurrence of any particular harm or effect, the statute is facially invalid under Article I, section 8. *Id.* at 697, citing *State v. Spencer*, 289 Or 225, 611 P2d 1147 (1980), and *State v. Blair*, 287 Or 519, 601 P2d 766 (1979).

a. ORS 260.402 Is Directed at Expression *Per Se* and Is therefore a First-Category Law under *Robertson*.

As correctly recognized by five judges of the Oregon Court of Appeals, ORS 260.402 directly prohibits protected expression, i.e., certain types of political campaign contributions, and is not focused on any harm allegedly caused by that expression. *See Moyer*, 225 Or App at 101 (dissenting opinion) ("the statute restricts a communicative act * * * without regard to any necessary effect of that act * * *"). *See also id.* at 99 (concurring opinion of Judge Schuman) ("I agree with the dissent that ORS 260.402 (2003) is a law that prohibits expression per se and not a law that

focuses on harm that is caused by expression.").

In reaching this conclusion, the four dissenters and Judge Schuman properly analyzed the meaning and effect of ORS 260.402 and faithfully followed this Court's decision in *Vannatta v. Keisling*, 324 Or 514, 536, 931 P2d 770 (1997), which squarely held that political contributions constitute a form of protected expression under Article I, section 8. *Id.* at 522 (an individual's "contribution, in and of itself, is the contributor's expression of support for the candidate or cause—an act of expression that is completed by the act of giving * * *.") (emphasis in original).

As stated above, the first step in determining whether a statute is a first-category or second-category statute under *Robertson* is to analyze the meaning and effect of its plain language. *Ausmus,* 336 Or at 499. Here, the text of ORS 260.402 is unambiguous. As stated by the dissent, "a violation of ORS 260.402 occurs by an actual or promised transfer of money, certain services, or things of value directly or indirectly to a political campaign 'in any name other than that of the person who in truth provides the contribution.'" *Moyer*, 225 Or App at 103. Because it is "settled" under *Vannatta* that political contributions are a protected form of free expression under Article I, section 8, and because ORS 260.402 directly restricts and punishes "making a contribution" under certain circumstances without mentioning any "particular effect of the speech," the dissent properly characterized the statute as a first-category law that directly "restricts a communicative act." *Id.* at 101, 103-04.

Being compelled by *Vannatta* to conclude that "a campaign contribution is a form of expression" protected by Article I, section 8, Judge Schuman agreed "with the dissent that ORS 260.402 is a law that prohibits expression per se and not a law that

focuses on harm that is caused by expression." *Id.* at 99. Further agreeing with the dissent that ORS 260.402 "itself specifies no harm that it is intended to prevent," Judge Schumann presumed that it was intended "to prevent members of the public from being deceived about the source of the contribution." *Id.* Although Defendants do not agree with this presumed purpose, it lent additional support to Judge Schuman's conclusion that ORS 260.402 was a first-category statute because the presumed harm "is a kind of harm—being deceived—that can be achieved only through expression, that is, through one person's communication of some sort of falsehood to another person." *Id.* (emphasis in original). Under *Robertson*, "statutes that impose criminal sanctions for deception that can be accomplished only through speech are presumptively unconstitutional" unless they fall within some well-established historical exception to free speech guarantees. *Id.* at 100.

The conclusion of the four dissenters and Judge Schuman that ORS 260.402 is a first-category law is correct. ORS 260.402 directly restricts political speech by prohibiting, for certain individuals but not for others, the most widely available means of participation in federal, state and local elections. Thus, certain campaign contributions are legal (where the identity of the person making the contribution and the person who "in truth provides the contribution" are the same) and others are strictly prohibited under pain of criminal prosecution (where the person making the contribution either uses someone else's name or money in making the contribution). *Moyer*, 225 Or App at 103. As stated by the dissent:

> "That effect inhibits a person from expressing political support for a candidate or measure by contributing money to that candidate or measure

> using someone else's money. Even if the implied source of the money is false, the contribution is nonetheless an expression of political support by the person making the contribution. ORS 260.402 directly restricts that contribution." *Id.* at 105.[5]

The dissent correctly recognized that the act of making the political contribution is a communicative act that is fully protected by Article I, section 8, and this conclusion is no less true simply because the funds are being provided by another.

By permitting citizens to make one form of campaign contribution but prohibiting them from making others without identifying any harm to the fundamental rights of others caused by the prohibited form of expression, ORS 260.402 makes an unconstitutional value judgment about the importance of related types of speech. But Article I, section 8, does not permit the legislature to make such value judgments. *See, e.g.*, *Vannatta*, 324 Or at 521 (Article I, section 8, does not allow for distinguishing between related forms of expression in order to determine which are more "central to the core" of free expression); *Bank of Oregon v. Independent News, Inc.*, 298 Or 434, 439, 693 P2d 35 (1985) (there is no basis under the Oregon Constitution to provide more protection to certain non-abusive communications based on the content of the communication).

While the statute does not contain any requirement that a contributor disclose, certify or attest to the accuracy of any information, the plurality opinion interprets it as requiring the contributor to supply affirmatively truthful information to the candidate about the source of the funds being contributed. *Moyer*, 225 Or App at 87-

[5] The dissent uses the word "implied" because nowhere in the statutory scheme is there any requirement that the contributor identify the source of the funds.

88.[6] There is no basis in the statute for the plurality opinion's interpretation. ORS 260.402 does not require that a campaign contributor make any type of oral or written representation, attestation or certification, either sworn or unsworn, about the source of the funds that are being contributed.[7] Without such a requirement, ORS 260.402 criminalizes pure speech.

To circumvent this unavoidable conclusion, the plurality characterizes ORS 260.402 as the "linchpin" of Oregon's campaign finance regulatory scheme and attaches no value to campaign contributions which are made without disclosing the source of the funds being contributed. *Moyer*, 225 Or App at 85. Despite the fact that ORS 260.402 contains no language requiring that any representation be made, the plurality rewrites the statute, in the first sentence of its opinion, as providing, "in essence, that it is unlawful to lie about the source of political campaign contributions." *Id.* at 84.

But, as recognized by the dissent and despite the plurality's pejorative description, campaign contributions, whether made with one's own funds or with the

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[6] Interpreting the statute to require a disclosure about the source of the funds leads to additional constitutional concerns. For example, such an interpretation burdens and may prevent anonymous political speech. Oregon's Attorney General previously recognized that anonymous political speech is protected in a legal opinion regarding the constitutionality of *former* ORS 260.522, which prohibited the publication of any written matter, photograph or broadcast relating to any candidate or measure at any election unless the name and address of the person responsible for the publication was disclosed. The Attorney General concluded that this statute fell within the first *Robertson* category and that, "[w]hether viewed as a law prohibiting anonymous political speech or one conditioning the publication of a political message on its disclosure of the speaker's identity, the statute is directed at speech *per se*." 49 Op Atty Gen 179, 182 (1999).

[7] As will be discussed later, in the absence of such a requirement, the statute cannot be upheld as a modern variant of fraud or perjury. *Infra*, pp. 31-40.

funds of another, are a constitutionally protected expression of the political support of the contributor. *Moyer*, 225 Or App at 105. While Oregon's free speech jurisprudence requires that all nonabusive speech be treated equally, a strong case can be made that political speech is at the core of free speech protections. One can easily imagine scenarios where campaign contributions made without disclosing the identity of the persons who, in truth, provide the funds nevertheless have significant societal value. For example, suppose a group of high school students decide to support a measure that would require a deposit on plastic water bottles. As a matter of collective political action, numerous like-minded students roam the city and collect discarded or donated soda, beer and other deposit bottles and cans as a means to provide financial support for the new measure regarding plastic water bottles. When, after cashing in the collected bottles and cans, the proud student body president presents forty-five dollars to the campaign committee, he has, according to the plurality opinion, committed a felony despite the fact that he never represented to anyone that the funds came from him personally, he had no intent to deceive and the contribution is not reportable by the campaign in any event.[8] And the people that donated the bottles and cans are guilty of a felony as well. This is just one example demonstrating the correctness of the dissent's statement that ORS 260.402 "restricts a communicative action * * * in an unprecedented fashion" by criminalizing allegedly untrue speech without any intent or materiality requirements. *Moyer*, 225 Or App at 101.

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[8] At the time of the indictments in this case, contributions under $50 were not required to be disclosed by the candidate or political committee. ORS 260.083(1)(a)(A). The current limit is $100.

b. A Statute Directed at the Forbidden Effects of Speech Is Not a Second-Category Law Unless Those Effects Are Elements of the Offense.

A statute directed at speech is a second-category law only if its forbidden effects are clearly set forth therein or in closely related statutes. Thus, in *City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988), the Court held that a city ordinance barring adult bookstores in certain locations was directed at speech itself and not the forbidden effects of speech because the "undesired effect" that the city claimed to be focused upon was not "an element in the rule itself." *Id.* at 184. The Court noted that, "[b]y omitting the supposed adverse effects as an element in the regulatory standard, the ordinance appears to consider the 'nuisance' to be the characteristics" of the communicative materials themselves rather than the effects that these materials might actually cause. *Id.* at 186. "Such lawmaking is what Article I, section 8, forbids." *Id.* at 186. *See also Leppanen v. Lane Transit Dist.*, 181 Or App 136, 144, 45 P3d 501 (2002) (in striking down a law prohibiting solicitation of petition signatures at a bus station, court held that, "for a regulation properly to be classified in the second *Robertson* category, its operative provisions must limit the regulation to the effects it is intended to target").

If the text does not specify the adverse effects, the Court may infer the harm from context, but will not do so without some clearly articulated basis in a related statute that the legislature has, in fact, narrowly targeted a specific, identifiable and tangible harm. *See, e.g., Moser v. Frohnmayer*, 315 Or 372, 379, 845 P2d 1284 (1993) ("To be valid as a law that focuses on a harmful effect of speech, the law must 'specify expressly or by clear inference what "serious and imminent" effects it is

designed to prevent,'" quoting *Oregon State Police Officers Ass'n v. State*, 308 Or 531, 541, 783 P2d 7 (1989) (Linde, J., concurring), and *In re Lasswell*, 296 Or 121, 126, 673 P2d 855 (1983)).

Vannatta contains the strongest statement of this principle. In *Vannatta*, the State attempted to support Measure 9, which strictly limited campaign contributions and expenditures, by arguing that the Measure was not directed at speech but was rather targeted at the forbidden effects of unlimited political contributions, the claimed undue influence of money in the political process. *Vannatta*, 324 Or at 539. Finding that the provisions of Measure 9 "do not specify in their operative texts any forbidden harms that the restrictions are designed to address," the Court refused to infer the targeted harm from context or from "social debate and competing studies and opinions." *Id.* at 538-39. The Court stated that "Measure 9 does not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way." *Id.* at 539. Refusing to infer such harm, the Court stated that, "where expressive conduct is involved, the legislative target must be clear and a legally permissible subject of regulation or prohibition, and the means chosen to deal with it must not spill over into interference with other expression." *Id.*

The Court in *Vannatta* noted and distinguished *State v. Stoneman*, 323 Or 536, 920 P2d 535 (1996), the only case under Article I, section 8, in which the presence of proscribed harm has been inferred by this Court from context when the statute at issue was silent about the effects it was intended to regulate. In *Stoneman*, the Court inferred—from the existence of several statutes which criminalized, in no uncertain terms, the sexual exploitation of children—that a related statute forbidding commerce

in child pornography was directed to forbidden effects of speech because the prohibited expression owed its "very existence to the commission of sexual abuse of a child" and therefore "necessarily involves harm to children." *Id.* at 546 (emphasis in original).

In *Vannatta*, the Court limited *Stoneman* to its unique facts. Faced with the argument that it should, under the authority of *Stoneman*, once again infer harm from the context of a silent statute, the Court stated as follows:

> "Of paramount importance to that holding was the fact that child abuse is a harm that properly is subject to governmental proscription and that such abuse necessarily had to occur in order to produce the expressive conduct in question. Neither of those criteria is present in this case." *Id.* at 538 (emphasis in original).

Stoneman is *sui generis*, standing alone for the proposition that, where expressive activity regulated by statute must by necessity produce unwanted effects which are clearly prohibited by related criminal statutes, a court may conclude, based upon context, that the statute is a second-category, and not a first-category, statute under *Robertson.*

c. ORS 260.402 Is Not Directed at Forbidden Effects and Is Therefore Not a Second-Category Law Under *Robertson.*

In its effort to salvage a poorly drafted statute from constitutional attack by characterizing it as a law directed at the harmful effects of speech, the plurality makes several significant errors in its application of the *Robertson* analytical framework and in its analysis of this Court's Article I, section 8, jurisprudence.

The plurality's first error is to analyze ORS 260.402 as a mere disclosure statute when, as recognized by the dissent, the statute is "not a disclosure law" because it "does not provide that, if you make a contribution using someone else's

money, you must disclose the name of the owner of the money." *Moyer*, 225 Or App at 105. Rather, ORS 260.402 is a blanket prohibition on making a contribution "using someone else's money—period" without any requirement that the contributor represent, certify, verify, attest or swear to any fact involving the source of the contributed funds. *Id.* at 112. It is no defense that the person making the contribution "later discloses the identity of the source of the funds" because the crime is complete when the contribution is made. *Id.* at 106.

Having mischaracterized ORS 260.402 as a disclosure statute when it contains no language requiring any disclosure, the plurality then leaps to the unsupported conclusion that "regulations that impose requirements 'distinct from contribution or expenditure limitations,' *Vannatta*, 324 Or at 523—such as disclosure requirements—are treated differently; they are *Robertson* second-category regulations, which do not necessarily offend the constitution unless they are overbroad." *Moyer*, 225 Or App at 90. The plurality's interpretation of *Vannatta* in this regard and its view that all disclosure regulations, however inartfully drafted, qualify as second-category laws under *Robertson* is without support in this Court's cases.

The plurality opinion misreads *Vannatta* as holding that no campaign finance law other than one limiting the amount of contributions or expenditures could possibly violate Article I, section 8, on its face. *See Moyer*, 225 Or App at 91 ("[u]nder *Vannatta*," a statute that "does not actually impose any limits on contributions themselves, only on the information that is reported by the contributor regarding the source of the contributions," is "*not* a first-category statute" (emphasis

in original)).[9] But this Court issued no such holding in *Vannatta*. Rather, this Court began its opinion with a "general admonition" that the scope of its opinion was "quite limited" to the specific wording of the particular provisions of the election law that were being challenged, which included campaign finance restrictions directly limiting the amount of contributions and expenditures, but which did not include any specific disclosure statutes. *Vannatta*, 324 Or at 518.

While noting that limitations upon contributions and expenditures "run afoul" of free speech protections, the Court merely stated in *dictum*:

> "But lawmakers might choose to impose requirements distinct from contribution or expenditure limitations (*e.g.*, requirements of disclosure of financing sources and the extent of any gift) as well as various sanctions (*e.g.*, civil or criminal penalties, disqualification from the ballot or Voters' Pamphlet, and the like) and their choice may not *necessarily* offend the constitutional requirement." *Id.* at 523 (emphasis in original).

This statement, upon which the plurality opinion places great reliance for its conclusion that disclosure laws are always second-category laws under *Robertson*, says no such thing. *Moyer*, 225 Or App at 90. Aside from the fact that the *dictum* in *Vannatta* regarding "disclosure of financing sources and the extent of any gift" refers to regulations imposed upon the candidate and not on the contributor, the statement implies only that a carefully crafted disclosure or sanctions statute might not necessarily violate Article I, section 8. Unfortunately, no such narrowly drawn statute is before the Court in this case.

The *dictum* in *Vannatta* says nothing about whether a disclosure or sanctions

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[9] The plurality compounds this error when it states that the Court in *Vannatta* "specifically said" that "the sort of reporting requirement" allegedly imposed by ORS 260.402 is "*not* a first-category statute." *Moyer*, 225 Or App at 91 (emphasis in original). The Court in *Vannatta* did not make this statement.

statute could (1) be struck down as a facially unconstitutional first-category law; (2) be upheld as a first-category law that was wholly confined within a historical exception; or (3) might be analyzed properly as either a constitutionally narrow or unconstitutionally overbroad second-category law. But despite this, the plurality concludes that all disclosure requirements "are treated differently" than contribution or expenditure limits and must always be treated as "second-category regulations." *Moyer*, 225 Or at 90.

The plurality opinion stretches the *dictum* in *Vannatta* past its breaking point because disclosure and/or sanctions statutes can rise or fall as either first-category or second-category statutes under *Robertson.* For example, suppose the Legislature passed a law sanctioning a candidate for discussing certain issues during a campaign, such as the legalization of marijuana. Such a law would most assuredly fail as a first-category law that was not wholly confined within a historical exception to free speech guarantees. Similarly, if the Legislature required a candidate or contributor to disclose their position on the legalization of marijuana, such a law would also fail as a first-category law under *Robertson.* These examples demonstrate that there is no basis in this Court's jurisprudence for the plurality's position that all election laws other than contribution or expenditure limits, such as those creating disclosure requirements or imposing sanctions on candidates, must always be considered second-category laws.[10]

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[10] In a footnote of its own, the plurality cites a footnote from *Vannatta* in which this Court qualified its holding regarding the constitutional protections afforded to campaign contributions by stating that "there doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive conduct or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent." *Moyer*, 225 Or App at 90 n 2, citing *Vannatta*, 324

The plurality opinion similarly errs in its conclusion that any violation of ORS 260.402 necessarily causes harm to the electorate so that the statute may properly be treated as a second-category law even though, whether read in isolation or in context with other related statutes, it contains no mention of any prohibited effects allegedly caused by the type of campaign contributions at issue. *Moyer*, 225 Or App at 93. In drawing this conclusion, the plurality attempts to avoid the clear holding of this Court in *Tidyman* that, in order to qualify as a second-category law, the "operative text" of the statute "must specify the adverse effects," *Tidyman*, 306 Or at 185-85, while coming within the ambit of *Stoneman* which, under unusual circumstances not present here, inferred the harmful effects from related criminal statutes, *Stoneman*, 323 Or at 545-47. *Moyer*, 225 Or at 89, 92.

As stated above, *Stoneman* is a unique decision in which the Court inferred harm only because the communicative materials, child pornography, owed their very existence to abusive acts committed against a child, acts which were clearly criminalized in related portions of Oregon's criminal code. *Stoneman*, 323 Or at 546. Because production of child pornography "necessarily involves harm to children," a harm that the Legislature is entitled to prohibit, the Court in *Stoneman* had "little difficulty" in concluding that the legislature may "regulate commerce in communicative products derived from actual sexual exploitation of children." *Id.* at 548-49. *Stoneman* was therefore limited to its unusual facts by this Court in *Vannatta*

Or at 522 n 10. As noted by the dissent, "ORS 260.402, however, is not restricted by its terms to applying only to contributions that do not express political support." *Moyer*, 225 Or App at 105. The cited footnote from *Vannatta* is simply not helpful here where "the contribution at issue in this case—the payment of money to a political candidate—is an expression of political support." *Id.*

and does not disturb the well-established principle that the operative language of the statute must specify the adverse effects for the statute to be properly treated as a second-category law. *See Leppanen*, 181 Or App at 146 (the court expressly held that *Stoneman* was not contrary to the principle that "[t]o be a second-category, effects-based regulation, it must state as an element of the prohibition itself the forbidden effect").

To the extent that there is any "tension" between *Stoneman* and *Tidyman*, the dissent offers a simple and well-reasoned way to harmonize the two cases, stating that "at the very least, the *Stoneman* analysis should be confined to regulated communications that necessarily offend a related law." *Moyer*, 225 Or App at 107. Put another way, in order to justify treating a statutory restriction on speech which is silent as to forbidden effects as a second-category law, "any harmful effects engrafted to a law under a *Stoneman* analysis must be clearly and expressly identified in a related law." *Id.* at 107.

But here the plurality is unable to identify any language in ORS 260.402 or any other Oregon election law that identifies the alleged harms against which ORS 260.402 is allegedly directed. Id. This is so because, contrary to *Stoneman*, there are no such related state laws.[11] Without any related statutes to rely upon, the plurality is

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[11] ORS 260.402, like Measure 9 as construed in *Vannatta*, does not contain <u>any</u> language in its operative text identifying <u>any</u> forbidden harms that its restrictions were designed to prevent. The State attempted to cover this gap in the Court of Appeals by reference to various other provisions contained in ORS chapter 260 as "context" for ORS 260.402 and the plurality also mentions most of these provisions. Appellant's Brief, pp. 11-12; *Moyer*, 225 Or App at 86-87. However, none of the provisions relied upon by the State or the plurality as "context" identifies any forbidden harms that they were intended to address either. *See, e.g.*, ORS 260.055; ORS 260.058;

relegated to legislative history alone in order to find the harmful effects that ORS 260.402 was designed to prohibit. *Moyer*, 225 Or App at 92-93. However, no decision from this Court, including *Stoneman*, supports the notion that a law can be treated as a second-category law when neither its text nor the text of any related statute sets forth the targeted harms. In the free speech context, more precision is required than resort to legislative history will allow. *See Vannatta*, 324 Or at 539 ("where expressive conduct is involved, the legislative target must be clear").

Without any support in this Court's cases, the plurality erroneously considered one-hundred-year-old legislative history to supply the alleged statutory purpose that unquestionably is missing from the text and context of ORS 260.402. *See State v. Gaines*, 346 Or 160, 171-72, 121 P3d 613 (2009) (text and context are the primary sources of legislative intent although court may give legislative history whatever weight it deems appropriate). But even if legislative history might, in an appropriate case, help to illuminate a category-two analysis, the limited and murky legislative history here does not clearly define the fundamental harm to which the statute was targeted. And it surely does not establish that such harm is necessarily caused to the electorate when an individual makes a contribution using the funds of another, even if the contribution is made without any intent to deceive and when it would not in any event be reportable by the candidate.

As recognized by the plurality, ORS 260.402 had its genesis in 1908 when it was enacted by the citizens of Oregon as part of the Corrupt Practices Act ("the

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ORS 260.063; ORS 260.068; ORS 260.073; ORS 260.076; ORS 260.083; ORS 260.205; ORS 260.225; ORS 260.232; ORS 260.241; ORS 260.255.

Act").[12] *Moyer*, 225 Or App at 92. The ballot title of the initiative stated as follows:

> "A Bill for a law to limit the amount of money candidates and other persons may contribute or spend in election campaigns; to prohibit and punish the corrupting use of money and undue influence in elections; to protect the purity of the ballot and furnish information to voters concerning candidates and all political parties, partly at public expense." *Official Voters' Pamphlet*, General Election, June 1, 1908, 99.

The Act's primary purpose was directed to imposing monetary limits on state campaign contributions and expenditures and to barring certain entities (for example, banks and public utilities) from making such contributions. *Vannatta*, 324 Or at 538 n 23. The reasoning was that "[t]he right to spend large sums of money publicly in elections tends to the choice of none but rich men and or tools of wealthy corporations to important offices and thus deprives the people's government of the services of its poorer citizens, regardless of their ability." *Official Voter's Pamphlet*, General Election, June 1, 1908, 103 (emphasis added). That principal goal of the 1908 legislation has since been declared unconstitutional. *Vannatta*, 324 Or at 537-38. *See also First Nat'l Bank v. Bellotti*, 435 US 765, 98 S Ct 1407, 55 L Ed 2d 707 (1978) (state law prohibiting banks and other corporations from making certain political contributions violated the First Amendment).

A secondary purpose of the Act was to punish the corrupting use of money and undue influence in elections. *Official Voter's Pamphlet*, General Election, June 1, 1908, 99. Again, the focus was on large corporations and wealthy individuals spending large sums of money, either publicly or in secret, to influence elections to their private advantage. *Id.*

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[12] *Lord's Oregon Laws*, title XXVII, ch XII, § 3503.

The enactment also established a system of public disclosure under which certain candidates and campaign committees were required to report certain expenditures and contributions. *See Lord's Oregon Laws*, title XXVII, ch XII, § 3497 (candidates and political committees were required to file contribution and expenditure reports only if they received or expended more than $50; political contributions needed to be reported only if they exceeded $5). In ruling against supporters of an anti-labor union measure who contended that these disclosure provisions applied only to the election of candidates and not to measures, the Court in *Nickerson v. Mecklem*, 169 Or 270, 277, 126 P2d 1095 (1942), held that the Act "contemplated" that "[p]eople have the right to know" who is spending money and the amount thereof in a political campaign, whether for a candidate or a measure. *Nickerson*, 169 Or at 277. But it is clear that this "right to know" was created by the Act and therefore goes no further than what the Act requires.

The legislative history of the Act may support the notion that the voters intended to prevent fraud and undue electoral influence by large corporations and wealthy individuals, even to the point where unconstitutional provisions were adopted. But it does not establish that the Corrupt Practices Act was intended to afford the public the right to know about the identity of contributors even when there was no statutory obligation for the candidate or political committee to report them to the public authorities. Nor does it establish that the public is necessarily harmed under these circumstances or when a contribution is made using another's money without any intent to deceive or to improperly influence an election.

As recognized by the dissent, the plurality, in an effort to come within

Stoneman and demonstrate that "harm" is necessarily caused whenever an individual makes a political contribution with another's money, invents a public right to know where none exists and then labels the frustration of that alleged right as a harm. *Moyer*, 225 Or App at 107. But *Vannatta* squarely holds that "it is not sufficient to select a phenomenon and label it as a 'harm'" because the harm "must be identifiable from legislation itself." *Id.*, quoting *Vannatta*, 324 Or at 539. Here, as stated above, neither ORS 260.402 nor related statutes identify any harm.

And to the extent that the statutory purpose of Oregon's contribution and disclosure laws is to afford the public information about the identity of certain contributors, this purpose only extends as far as the candidate or political committee has a statutory obligation to report it. As stated by the dissent, "any 'right to know' created by the contribution and expenditure reporting laws is necessarily limited to the disclosures required by those laws." *Moyer*, 225 Or at 107.[13] Since ORS 260.402 does not involve any representation to the public, only a contribution to "any other person, relating to a nomination or election of any candidate or the support or opposition to any measure," the public is not afforded any right to know about the contribution unless there is an obligation on the part of that other person to report the contribution in a public filing.

The plurality's holding that harm is necessarily caused whenever even the

[13] The plurality attempts to minimize the importance of the legislature's decision not to require public reporting of smaller contributions (currently $100) by its statement that "the people and the legislature, however, are not obligated to regulate the full extent of any harm that they may legitimately target." *Moyer*, 225 Or App at 93. This statement is true as far as it goes, but it has no application here where the statutory scheme at issue does not designate any specific harm and where no law gives the public the right to know about small contributions which are not required to be reported.

smallest contribution is made using the funds of another simply does not withstand scrutiny. The holding by its very nature confuses the concept of a statute's purpose with the concept of harm. That one legislative purpose might be to afford the public information about the identity of those who make larger political contributions does not mean that harm is caused to the electorate whenever a smaller non-reportable contribution is made with the funds of another.

The plurality's holding to the contrary trivializes the concept of harm. As stated by the dissent, "unsatisfied curiosity" is not a harm that is identified in any of Oregon's election laws, especially when this curiosity regards political contributions which the law does not even require be reported. *Moyer*, 225 Or App at 107. The central thesis of the approach to free speech articulated by Article I, section 8, is that "only speech which directly interferes with or harms the fundamental rights of other individuals" is punishable. *Ciancanelli*, 339 Or at 313. Article I, section 8 thus permits the legislature to infringe upon the free speech rights of its citizens only where some direct "palpable" harm is caused to other individuals or groups and not when there is merely "presumed" or "supposed" harm. *Id.* The nebulous harm to the electorate which the plurality claims is present here is not fundamental or palpable, it is merely presumed.

4. ORS 260.402 Is Not Wholly Confined Within a Historical Exception to Oregon's Free Speech Guarantees.

ORS 260.402 is a first-category law that focuses directly on protected speech under Article I, section 8, and is hence facially unconstitutional unless "the scope of the restraint is wholly confined within some historical exception that was well

established when the first guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. Examples of laws restricting speech that might pass constitutional muster under Article I, section 8, include "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Id.*

However, in order to establish the applicability of an historical exception, the proponent of the statute must prove two elements: (1) the restriction on speech at issue must have been "well established" when the Bill of Rights was adopted or in 1859 when the Oregon Constitution was adopted; and (2) the guarantees of free expression expressed within the Bill of Rights and/or the Oregon Constitution must have been "demonstrably not intended to reach" or replace that restriction. *Ciancanelli*, 339 Or at 322. *See also State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987) (party opposing a claim of constitutional privilege must "demonstrate that the guarantees of freedom of expression were not intended to replace the earlier restrictions").

In order to satisfy both elements, "it may be sufficient to show the continued existence, after the adoption of Article I, section 8, of a historically well-established crime that is directed in terms at speech, but *only* when it is clear that the crime's real focus is on some underlying harm to individuals or groups, and that speech is merely a way of accomplishing that harm." *Ciancanelli*, 339 Or at 322. Thus, crimes that meet the "historical exception" test are those that "have at their core the accomplishment or present danger of some underlying actual harm to an individual or group, above and beyond any supposed harm that the message itself might be

presumed to cause to the hearer or to society." *Id.* at 318. Article I, section 8, is "concerned with prohibitions that are directed at the content of speech, not with prohibitions that focus on causing palpable harm to individuals or groups." *Id.* (emphasis added).

In the Court of Appeals, four judges held that ORS 260.402 was wholly confined within either one or two historical exceptions, those for fraud and perjury (Landau, Haselton, Ortega and Schuman), while six judges held that no historical exceptions applied (Sercombe, Rosenblum, Wollheim, Armstrong, Brewer and Edmonds). This Court should follow the lead of these six judges and refuse to adopt the unwarranted conclusion (1) that a statute which contains no requirements of a false representation, deceptive intent, materiality or actual harm can qualify as a modern variant of fraud, or (2) that a statute which can be violated even in the absence of any oath, certification, attestation or verification can qualify as a modern variant of perjury.

a. ORS 260.402 Contains None of the Traditional Elements of Fraud and Therefore Is Not Wholly Confined Within That Historical Exception.

As recognized by this Court in *Ciancanelli*, the "historical exception" language of *Robertson* creates a narrow exception to Article I, section 8's general prohibition of laws that restrain or restrict free expression. *Ciancanelli*, 339 Or at 315 n 29. The proponent of such an exception therefore bears the heavy burden of establishing that the speech restriction at issue was well-established by 1859 and that the free speech guarantees in the Oregon Constitution were not intended to replace that restriction. *Id.* at 315-16, quoting *Henry*, 302 Or at 521. In this regard, the Court

in *Ciancanelli* noted that "some students of this court's jurisprudence are intent on reading the historical exception idea of *Robertson* more broadly than the *Robertson* court intended."[14]

The State has not shouldered its burden in this case and the plurality takes the historical exception language of *Robertson* far past its intended boundaries. For example, while it is true that *Robertson* permits traditional crimes and "their contemporary variants" as valid first-category laws, the Court cautioned that, "[w]hen extending an old crime to wider 'subjects' of speech and writing, however, there is need for care that the extension does not leave its historical analogue behind and, perhaps inadvertently, reach instances of privileged expression." *Robertson*, 293 Or at 434. The contemporary variant therefore is permitted only to the extent that it "remains true to the initial principle." *Id.* The Court offered an example: "If it was unlawful to defraud people by crude face-to-face lies, for instance, free speech allows the legislature some leeway to extend the fraud principle to sophisticated lies communicated by contemporary means." *Id.* at 433-34.

The historical exception is therefore not meant to enable legislative bodies to abandon the essential elements of the traditional crime at issue so that the contemporary variant bears little or no resemblance to it. Rather, it allows the legislature some leeway to mold traditional crimes to modern contrivances, such as preventing fraud committed by way of a computer in the same manner as face-to-face fraud. Both the State and the plurality opinion ignore these principles, seeking to

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[14] In support of this observation, the Court cited Jack L. Landau, *Hurrah for the Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 Or L Rev 793, 848-50 (2000). *Ciancanelli*, 339 Or at 315 n 28.

identify historical exceptions that are unsupported by the history of campaign finance regulation in the United States and which do not conform to the essential elements of the traditional crimes selected.

To demonstrate an applicable historical exception, the State is required to establish that the speech prohibited by ORS 260.402 is the kind of speech that was prohibited in 1859 or when the first guarantees of free expression were adopted. *See, e.g., State v. Romig*, 73 Or App, 780, 787, 700 P2d 293, *rev den* 299 Or 663 (1985) (current crime of false pretenses similar enough to crime of false pretenses in Oregon territorial law and at time of statehood for historical exception to apply). The State cannot shoulder that burden in the arena of election regulation, because, as recognized in *Vannatta*, there was no established tradition in Oregon at the time of statehood to limit or otherwise regulate, in any manner, campaign contributions. *Vannatta*, 324 Or at 538. Certainly, there was no Oregon law on the books in 1859 which prohibited the giving of a contribution to a candidate in a name other than that of the person providing the funds for the contribution.[15]

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[15] Campaign contribution regulation at both the state and federal level is a 20th century invention. As noted in *Vannatta*, the earliest indication of any concern in Oregon for the role that money played in election campaigns was the 1908 Corrupt Practices Act which focused on the role which banks and public utilities played in the electoral process. *Vannatta*, 324 Or at 538 n 23. The first federal law which regulated campaign contributions to any significant degree was the Tilman Act, which banned contributions by federally chartered banks and corporations. Act of January 26, 1907, ch 420, 34 Stat 864. There is no evidence "* * * that, at the time of [Oregon] statehood, the possibility of excessive campaign contributions was considered a threat to the legislative process." *Vannatta*, 324 Or at 538. In fact, prior to 1859, there was an established tradition of political fundraising, which began in earnest with Andrew Jackson's 1828 presidential campaign. Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform* (2001), p. 19. Before that, most political contributions were made to partisan political newspapers and publishers to produce tracts promoting the candidates, which were distributed without charge to voters. *Id.* at p. 18. Prior to 1859, there was no prohibition on anonymous contributions, pooled contributions or contributions using the funds or property of another.

Without any historical evidence that the speech at issue here would have been criminal in 1859, the plurality opinion attempts to pigeonhole ORS 260.402 into traditional common-law fraud. While pointing out that a contemporary variant does not have to "match precisely, element by element" a traditional speech crime, the plurality fails to identify even one element that ORS 260.402 has in common with common-law fraud. *Moyer*, 225 Or App at 94.

Pursuant to Oregon law, traditional proof of fraud requires a showing that (1) the accused falsely represented a material fact; (2) the accused knew the representation was false; (3) the representation was made with the intent to induce the recipient to act or refrain from acting; (4) the recipient justifiably relied on the misrepresentation; and (5) the recipient was damaged by that reliance. *Pollock v. D.R. Horton, Inc. – Portland*, 190 Or App 1, 20, 77 P3d 1120 (2003). As recognized by the dissent, individuals could not be punished at common-law simply because they lied; there must have been some intentional and tangible harm associated with the lie in order to constitute fraud. *Moyer*, 225 Or at 110, citing William Blackstone, *Commentaries*, at 16 (Vol 4, ch 4). This is in keeping with Article I, section 8, which prohibits criminalizing free speech unless the speech causes some actual harm to the fundamental rights of another. *Ciancanelli*, 339 Or at 314 n 27.

ORS 260.402, by its express terms, contains none of the traditional elements of fraud. As such, it cannot be "wholly confined" within a historical exception under *Robertson*. First, it does not require that a representation be made in connection with the contribution, let alone a representation with intent to deceive. All the statute requires is that the individual tender a contribution of funds provided by another

person. The statute thus punishes protected speech in the absence of any affirmative representation that would make the speech misleading and/or in the absence of any duty to disclose, both of which are required under Oregon law. *See, e.g., Krause v. Eugene Dodge, Inc.*, 265 Or 486, 509 P2d 1199 (1973); *Palmiter v. Hackett*, 95 Or 12, 185 P 1105 (1919).

Second, ORS 260.402 does not contain an "intent-to deceive" element, a point which the State conceded below but which the plurality opinion fails to even mention. Appellant's Brief, p. 17. The intent to deceive long has been viewed as an essential characteristic of a fraud claim under Oregon law. In *Rolfes v. Russel*, 5 Or 400, 403 (1875), for example, the Oregon Supreme Court stressed that no cause of action for fraud exists – no matter how false the statement – without proof of an intention to deceive. "Fraud means an intention to deceive." (Internal citation and quotation marks omitted.) *Id.*; *see also Palmberg v. Astoria*, 112 Or 353, 370, 228 P 107 (1924) ("to constitute fraud there must be an intent to deceive and there is no intent in mistake"). Fraud crimes under Oregon law similarly long have required an intention to deceive as a necessary element. *See, e.g., General Laws of Oregon*, Crim Code, ch XLVI, § 565, p 540 (Deady 1845-1864) (requiring "intent to defraud").

Third, ORS 260.402 exceeds the permissible boundaries of fraud because it is not limited to material misrepresentations. The broad unqualified language of the statute, which covers any and all contributions of any size, penalizes by way of criminal sanctions even those who give contributions so small in amount as to be manifestly immaterial, and of no interest at all to voters. To demonstrate this flaw in the statute, one need only consider ORS 260.083, which, at the time of the alleged

conduct in this case, stated that political contributions of less than $50 do not have to be reported by the recipient.

By passage of that statute, the Oregon Legislature arguably established a floor of materiality, i.e., the identity of those giving less than $50 is of no interest to anyone.[16] However, ORS 260.402 would penalize a contributor who gave a five dollar contribution if even one cent of that amount was actually contributed by another person. The plurality offers no response to this demonstrable overbreadth other than to state, in an effort to deflect its omission, that "the dissent never explains how the element of materiality could be satisfied in a way the statute does not already state." *Moyer*, 225 Or App at 95.

ORS 260.402 also exceeds the permissible boundaries of fraud because it does not contain elements of reasonable reliance or injury in fact As stated above, the statute applies to contributions so minimal in amount that the Oregon Legislature has determined that the electorate has no interest in knowing who makes them. The names in which such small contributions are made are not reported to the public pursuant to ORS 260.083 so the elements of reasonable reliance by the electorate and damages would never be present with regards to these minimal contributions. There is simply no palpable harm to the fundamental rights of the electorate where the information that is claimed to have been misrepresented would never be disclosed in any event.

The ways in which ORS 260.402 differs from traditional fraud are numerous.

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[16] The 2005 Legislature amended ORS 260.083 to require reporting of contributions only if they are for $100 or more. Oregon Laws 2005, ch 809, § 8.

This is not simply a case in which the elements do not "match precisely, element by element" as the plurality states. *Moyer*, 225 Or App at 94.[17] It is rather a situation where ORS 260.402 leaves "its historical analogue behind" and reaches "instances of privileged expression," i.e., expression that is not fraudulent because it was not made with an intent to deceive about a material fact and did not cause harm. *Robertson*, 293 Or at 434. ORS 260.402, as currently drawn, is not "wholly confined" within the historical exception for fraud because it can be violated when no intentionally deceptive and material representations have been made.

b. ORS 260.402 Is Not Wholly Confined Within the Historical Exception for Perjury.

Without any assertion by the State or briefing by the parties, the plurality suggests that ORS 260.402 would also meet the historical exception for perjury. *See Moyer*, 225 Or App at 95 (after discussing fraud and perjury exception, plurality states "it seems to follow that one or both of the historical exceptions * * * apply to ORS 260.402").[18] The dissent disagreed, correctly concluding that "ORS 260.402 is not the progeny of the historic crimes of perjury or false swearing" because it does not

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[17] The plurality opinion notes *Vannatta's* recognition that certain statutes prohibiting election fraud and misleading the public come within the historical exception for fraud. *Moyer*, 225 Or App at 94, citing *Vannatta*, 324 Or at 544. But these statutes, unlike ORS 260.402, contain clear elements of intent and materiality. *See* ORS 260.355 (candidate could be deprived of office after being found guilty of "deliberate and material" violation of election laws); ORS 260.532 (candidate can be held liable for damages if aggrieved party can show by clear and convincing evidence that candidate made false statements of material fact "knowingly or with reckless disregard").

[18] Both the plurality and Judge Schuman state that "a" historical exception applies but neither opinion states whether that exception is fraud, perjury or both. *Moyer*, 225 Or App at 96, 99.

require an oath, affirmation or certification regarding a statement made in a judicial proceeding or to a public officer. *Moyer*, 225 Or App at 111-13.

As with fraud, intentional misrepresentations and materiality are well-established elements for perjury and false swearing. Oregon law in 1859 defined perjury as:

> "If any person authorized by any law of this state to take an oath or affirmation, or of whom an oath or affirmation shall be required by such law, shall willfully swear or affirm falsely in regard to any matter or thing concerning which such oath or affirmation is authorized or required, such person shall be deemed guilty of perjury, and if any person shall procure another to commit the crime of perjury, such person shall be deemed guilty of subornation of perjury." *General Laws of Oregon*, Crim Code, ch XLVI, § 565, p 549 (Deady 1845-1864) (emphasis added).

See also State v. Wiley, 4 Or 184, 188 (1871) ("If he willfully testified falsely, he was guilty of perjury."). False swearing similarly required willful misrepresentations. *See, e.g., Ward v. Queen City Fire Ins. Co.*, 69 Or 347, 351-52, 138 P 1067 (1914) (false swearing must have been done knowingly and willfully); *Fowler v. Phoenix Ins. Co.*, 35 Or 559, 565, 57 P 421 (1899) (false swearing requires material and knowing misrepresentations).

Modern versions of perjury and false swearing similarly require knowing misrepresentations of material fact. *See* ORS 162.065 (defining crime of perjury as making "false sworn statement in regard to a material issue, knowing it to be false"); and ORS 162.075 (defining crime of false swearing as making "false sworn statement, knowing it to be false").

The plurality recognized that "the nineteenth-century exception" for perjury "was limited to falsely sworn oaths or affirmations and did not include unsworn false

statements," but relied upon *State v. Huntley*, 82 Or App 350, 356, 728 P2d 868 (1986), for the proposition that modern laws criminalizing unsworn false statement nevertheless come within the historical exception. *Moyer*, 225 Or App at 95. However, *Huntley* is readily distinguished. In that case, the candidate signed a written certification that the material information being supplied to the Secretary of State about the candidate's education background for publication in the Voters' Pamphlet was true and accurate to the best of the signer's knowledge. The Court of Appeals upheld the law only because of this factor:

> "Although it is not a sworn statement, it is one certified as true. As with affidavits, the certification alerts the signator to the seriousness of the document and serves as an admonition to review the statement for accuracy. The certification serves a purpose similar to that served by oaths and affidavits: to impress upon the speaker the gravity of the occasion and the necessity for truth-telling. * * * When a statement, required by the election laws, is certified as true by the signator, criminal prosecution and conviction for furnishing false information is a contemporary variant of perjury and is not beyond constitutional limits." *Id.* at 356.

In this case, there is no certification required or anything else that would alert a campaign contributor that he or she is being asked to verify that the funds being contributed are not those of another. Therefore, to extend *Huntley*, as the plurality does, to completely unsworn or uncertified misstatements—and even to alleged misstatements that are only implied—would extend the crime of perjury or false swearing to any alleged lie, something way beyond any "historical exception" to free speech guarantees.[19]

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[19] The necessity for some type of forewarning to the speaker about the gravity of the statement is especially compelling in this case where the statute does not require any representation about the source of the funds and where it would not be readily apparent that there is anything inherently evil about making a contribution with the funds of another. *See, e.g.*, *United States v. Curran*, 20 F3d 560, 569 (3d Cir 1994)

Further, as recognized by the dissent, the crimes of perjury and false swearing require "the falsehood to be made in a governmental proceeding or to a public official," as ORS 260.715(1), the statute at issue in *Huntley*, required. *Moyer*, 225 Or App at 112, 113 n 7. *See also* ORS 162.085 (crime of unsworn falsification requires a "knowingly * * * false statement to a public servant in connection with an application for any benefit"). Here, the "statement" being made is to the candidate, not to any public official and the information communicated may not ever find itself in a report filed with public officials. ORS 260.402 clearly goes well beyond the traditional crimes of perjury or false swearing.

To the extent that the plurality opinion and that of Judge Schuman hold that ORS 260.402 is wholly contained within the historical exception for perjury, they ignore this Court's admonition in *Ciancanelli* against broadly construing historical exceptions. They similarly ignore *Robertson*'s cautionary statement that the contemporary variant must remain true to the "initial principle" of the historical exception and should not "leave its historical analogue behind." *Ciancanelli*, 339 Or at 315 n 29; *Robertson*, 293 Or at 433-34.[20] ORS 260.402 has nothing in common with the common-law crime of perjury or its modern variants.

(making a contribution in the name of another was not "obviously 'evil' or inherently 'bad.'"); *State v. Azneer*, 526 NW2d 298, 300 (Iowa 1995) (defendant's conduct in making a political contribution in his own name while being reimbursed by the employer "falls far short" of being *malum in se*; it was merely *malum prohibitum*).

[20] The legislature history of the statute recounted in *Huntley* indicates that this is precisely what happened because the original law was limited to false oaths and affidavits and then gradually strayed to include unsworn statements to election officials. *Huntley*, 86 Or App at 355-56.

5. Even if ORS 260.402 Is Properly Considered a Second-Category Law Under *Robertson*, It Is Unconstitutionally Overbroad Under Both Article I, Section 8, and the First Amendment.

ORS 260.402 should be struck down as a facially unconstitutional first-category restriction on speech which is not wholly contained within a historical exception. However, if the Court were to accept the plurality's view that the law is sufficiently targeted at prohibited effects to be treated as a second-category law, it should still be struck down as unconstitutionally overbroad under both Article I, section 8, and the First Amendment. The plurality does not engage in an overbreadth analysis, apparently assuming that the conclusion that harm is necessarily caused by the contribution settles the issue.[21]

The overbreadth analysis is essentially the same under the state and federal constitutions. Under Oregon law, a statute is facially overbroad if, in addition to imposing legitimate restrictions on speech, it also limits "privileged communications," i.e., speech upon which no legitimate restrictions can or should exist. *Robertson*, 293 Or at 410. With a federal overbreadth challenge, the court's "task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 494, 102 S Ct 1186, 71 L Ed 2d 362 (1982).

Under both state and federal law, a narrowing construction is only appropriate where the language of the statute is readily susceptible to such a construction and the

[21] Such an assumption by the plurality is wholly unwarranted because a crucial part of Defendants' overbreadth argument is that the statute criminalizes constitutionally protected non-fraudulent speech. The plurality fails to even consider the fact that ORS 260.402 applies to important political speech which is not intentionally deceitful.

court will not rewrite the statute. See *Ausmus*, 336 Or at 507 (where there "is nothing in the description of the elements of the statute" that would permit the "court faithfully to narrow the application of the statute to only conduct that the constitution does not protect," the statute cannot be saved from overbreadth); *State v. Rangel*, 328 Or 294, 302, 997 P2d 379 (1999) (a narrowing construction is only possible where the court can maintain "reasonable fidelity to the legislature's words and apparent intent"); *Virginia v. American Booksellers Ass'n, Inc.*, 484 US 383, 397, 108 S Ct 636, 98 L Ed 2d 782 (1988) ("The key to application of this principle is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements").

ORS 260.402 is unconstitutionally overbroad because it applies by its terms to communications which do not constitute fraud or perjury. It criminalizes fraudulent speech as well as speech that cannot conceivably be so classified. For example, the statute as written criminalizes a contribution made in another's name, prompted not by any intent to defraud the electorate, but rather, solely by the contributor's desire for privacy and anonymity. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 342, 115 S Ct 1511, 131 L Ed 2d 426 (1995) (the "decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment"); *Talley v. California*, 362 US 60, 64, 80 S Ct 536, 4 L Ed 2d 559 (1960) (ordinance requiring authors of handbills to disclose their identity violates the First Amendment).

ORS 260.402 also criminalizes contributions that may be the product of inadvertence, mistake, neglect, ignorance of the law's requirement or other mental

states inconsistent with any intent to deceive the electorate. For example, a parent who sought to instill civic virtues in his or her children by giving them each a sum of money so that they could make a contribution to the political candidate or cause of their choosing would violate the statute despite the fact that there was no intent to deceive, merely intent to teach democratic values. In criminalizing such non-fraudulent expression, ORS 260.402 attacks protected speech and is thus overbroad.

In addition, the statute criminalizes speech which is completely immaterial to the electorate and causes no harm. Thus, a contribution of even one dollar made in the name of another is a violation of the statute even though Oregon's campaign finance laws currently do not require that contributions of less than one hundred dollars be reported to election officials. ORS 260.083(1)(a)(A). As discussed above, the statute goes way beyond the State's alleged speculative purposes of preventing fraud or materially misleading the electorate.

The statute cannot be given a narrowing construction because there is nothing in its text or that of related statutes which establishes its legislative purpose or intended boundaries. To save the statute, the Court would have to limit its application to fraudulent speech only and add other required elements of fraud, such as intent, materiality, reliance and damages. This would necessarily require the Court to rewrite the statute, which it cannot do. *Virginia*, 484 US at 397. For example, the Court would need to determine what level of intent?[22] What level of materiality?[23] What

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[22] For example, is "intent to deceive" sufficient or should the State be required, as defendants argued below, to prove an intentional violation of a known legal duty? ER-5.

[23] For example, should the $100 level currently applicable to the candidate's reporting requirement be chosen or some other level?

level of harm?[24] Answering these questions calls for policy judgments to be made by the legislature, not the judiciary, especially where, as here, there is no guidance in the language of the statute to enable the Court to know how the legislature would act.

6. ORS 260.402 Is Also Unconstitutionally Vague Under Both the Oregon and United States Constitutions.

ORS 260.402 is also unconstitutionally vague because it delegates too much discretion to law enforcement, provides insufficient notice of the criminalized conduct and has a chilling effect on protected speech, in violation of Article I, sections 20 and 21, of the Oregon Constitution, and the First and Fourteenth Amendments of the United States Constitution. As explained in *State v. Krueger*, 208 Or App 166, 170-71, 144 P3d 1007 (2006) (quoting *State v. Illig-Renn*, 341 Or at 239-40):

> "To say that a law is unconstitutionally 'vague' can refer to any of three different problems. First, a statute may be so vaguely crafted as to permit arbitrary or unequal application and uncontrolled discretion in violation of Article I, sections 20 and 21, of the Oregon Constitution. Second, a statute may create an 'unlawful delegation issue' under the Due Process Clause of the Fourteenth Amendment in that it contains no identifiable standards or employs standards that rely on the 'shifting and subjective judgments of the persons who are charged with enforcing it.' Third, a statute may be so poorly written as to fail to provide 'fair warning' of the conduct that it prohibits, in violation of the Due Process Clause."

(Citations omitted.) "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 US 352, 357, 103 S Ct 1855, 75 L Ed 2d 903 (1983).

a. ORS 260.402 Is Unconstitutionally Vague Under Article I, Sections 20 and 21, of the Oregon Constitution.

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[24] For example, one could argue there is no harm to the electorate in an uncontested election so it might be a legitimate legislative judgment to not require contributor disclosure in that context.

ORS 260.402 is unconstitutionally vague because the terms of the statute invite arbitrary and unequal application and allow uncontrolled discretion in its prosecution. As stated in *State v. Graves*, 299 Or 189, 195, 700 P 2d 244 (1985):

> "[A] criminal statute must not be so vague as to permit a judge or jury to exercise uncontrolled discretion in punishing defendants, because this offends the principle against ex post facto laws embodied in Article I, section 21, of the Oregon Constitution. The equal privileges and immunities clause is also implicated when vague laws give unbridled discretion to judges and jurors to decide what is prohibited in a given case, for this results in the unequal application of criminal laws. A criminal statute need not define an offense with such precision that a person in every case can determine in advance that specific conduct will be within the statute's reach. However, a reasonable degree of certainty is required by Article I, sections 20 and 21."

ORS 260.402 fails to meet these standards. The statute does not provide a reasonable degree of certainty as to prohibited conduct. The statute criminalizes making a contribution "relating to a nomination or election of any candidate or the support of opposition to any measure." "Relating to" is not adequately defined by common usage or context. Any donation made that eventually serves to benefit a measure or campaign, however early in the process, could be considered "related to" a candidate or measure. For example, a dinner with friends to decide if they should encourage a person to run for a local office where one person picks up the tab could be considered a contribution "related to" the candidate. Without a closer nexus between the contribution and the candidate or measure, the statute is lacking any "discernable standard of conduct." *State v. Chakerian*, 325 Or 370, 381-82, 938 P2d 756 (1997).

The phrase "in truth provides" similarly lacks specificity. Arguably, Tune and Sturgeon "in truth" provided the funds at issue to Francesconi, regardless of whether Moyer provided the funds to Tune and Sturgeon. The true source of any contribution is an element of the statute that lacks any discernable standard. If a group of students

hold a car wash where the funds raised are given to a campaign, who "in truth provides" the contribution, the children or the vehicle owners? Or perhaps the car wash owner who allowed his business to be used for these purposes has in truth provided a contribution to the ballot measure? What if the "suggested donation" for the car wash was substantially greater than the market rate for such a service? As this example indicates, the phrase "in truth provides" is so vague that it will be the subject of competing but equally reasonable interpretations, either criminalizing or exculpating potential defendants on the same facts.

b. The Statute Is Unconstitutionally Vague under the Due Process Clause.

The vagueness of the statute also creates an unlawful delegation issue under the Due Process Clause. For due process purposes, a statute is vague if it either contains no identifiable standard, *Kolender*, 461 US at 358, or employs a standard that relies on the shifting and subjective judgments of the persons who are charged with enforcing it, *City of Chicago v. Morales*, 527 US 41, 62, 119 S Ct 1849, 144 L Ed 2d 67 (1999).

As explained above, the terms "related to" and "in truth provides" do not illustrate an identifiable standard of conduct. Each term could be interpreted in myriad ways, and the statute is open to subjective assessments as to when the law has been violated. Additionally, the statute requires no fraudulent intent. Without more precise standards as to what conduct is criminalized, "a criminal statute may permit a standardless sweep that allows policemen, prosecutors and juries to pursue their personal predilections." *Kolender*, 461 US at 358.

c. The Statute Does Not Provide "Fair Notice" of the Prohibited Conduct and Has a Chilling Effect on Protected Speech.

Finally, the statute does not provide "fair notice" of the conduct that it prohibits and therefore has a chilling effect on protected speech, in violation of the Due Process Clause and the First Amendment. Due process is violated "by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harris*, 347 US 612, 617, 74 S Ct 808, 98 L Ed 989 (1954). The Supreme Court has explained that "close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests." *Buckley v. Valeo*, 424 US 1, 40-41, 96 S Ct 612, 46 L Ed 2d 659 (1976).

In *Buckley*, the Supreme Court found unconstitutionally vague strikingly similar language limiting "any expenditure * * * relative to a clearly identified candidate." 424 US at 41. The Court noted "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech, unless other portions of [the challenged provision] make sufficiently explicit the range of expenditures covered by the limitation." *Id.* at 42. Here, ORS 260.402 limits any "contribution * * * relating to a nomination or election of any candidate or the support or opposition of any measure." While in *Buckley*, the Court was able to save the statute with a narrowing provision using the "clearly identified candidate" language of the provision, here no such narrowing interpretation is possible. The statute has no contextual language for the court to discern the range

of contributions that could be considered "relating to" a candidate or measure, and therefore the provision is unconstitutionally vague.

In sum, ORS 260.402 is unconstitutionally vague in violation of the state and federal constitutions on several grounds: it invites arbitrary and unequal application, allows uncontrolled discretion in its prosecution, and contains no identifiable standards for enforcement. Furthermore, the statute does not provide fair notice of the conduct it prohibits and will have a chilling effect upon political speech "an area of the most fundamental First Amendment activities." *Buckley*, 424 US at 14.

VII. CONCLUSION

For the reasons set forth above and faithfully following its Article I, section 8, jurisprudence, this Court should reverse the decision of the Court of Appeals and reinstate the trial court's judgment dismissing the indictment against Defendants in this case.

Dated this 3rd day of June, 2009.

Respectfully submitted,

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Michael T. Garone, OSB #802341
David Axelrod, OSB #750231
Attorneys for Petitioner on Review Thomas Paul Moyer

By: _____
Janet Lee Hoffman, OSB #781145
Shannon Riordan, OSB #060113
Attorneys for Petitioner on Review Sonja R. Tune

By: _____
Ronald Hoevet, OSB #751746
Attorneys for Petitioner on Review Vanessa Colleen Sturgeon

CERTIFICATE OF FILING

I certify that on that on June 3, 2009, I filed the original and fifteen copies of the **PETITIONERS' JOINT BRIEF ON THE MERITS** of Thomas Paul Moyer, Vanessa Colleen Sturgeon and Sonja R. Tune with the State Court Administrator at this address:

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1163 State Street
Salem, OR 97301-2563

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By: _____
Michael T. Garone, OSB #802341
David Axelrod, OSB #750231
Attorneys for Defendant-Respondent/ Petitioner on Review Thomas Paul Moyer

By: _____
Janet Hoffman, OSB #78114
Shannon Riordan, OSB #060113
Attorneys for Defendant-Respondent/ Petitioner on Review, Sonja R. Tune

By: _____
Ronald Hoevet, OSB #75174
Attorney for Defendant-Respondent/ Petitioner on Review, Vanessa Colleen Sturgeon

CERTIFICATE OF SERVICE

I certify that on June 3, 2009, I served two copies of the **PETITIONERS' JOINT BRIEF ON THE MERITS** of Thomas Paul Moyer, Vanessa Colleen Sturgeon and Sonja R. Tune on:

JOHN KROGER, OSB #077207
Attorney General
MARY H. WILLIAMS, OSB #911241
Solicitor General
ERIKA L. HADLOCK, OSB #912978
Assistant Solicitor General
1162 Court St., Suite 400
Salem, OR 97301-4096
Telephone: (503) 378-4402

Of Attorneys for Plaintiff-Appellant/Respondent on Review

by [specify method of service]:

__x__ United States Postal Service, ordinary first class mail
_____ United States Postal Service, certified or registered mail, return receipt requested
_____ hand delivery

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____
Michael T. Garone, OSB #802341
David Axelrod, OSB #750231
Attorneys for Petitioner on Review Thomas Paul Moyer

By: _____
Janet Lee Hoffman, OSB #781145
Shannon Riordan, OSB #060113
Attorneys for Petitioner on Review Sonja R. Tune

By: _____
Ronald Hoevet, OSB #751746
Attorneys for Petitioner on Review Vanessa Colleen Sturgeon