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 REPLY TO BRIEFS OF AMICI

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

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September 2009

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I. INTRODUCTION

On August 17, 2009, *amicus curiae* ACLU Foundation of Oregon, Inc. ("ACLU") filed a brief in this case in which it correctly concluded that ORS 260.402 is a content-based restraint on speech. Brief on the Merits of *Amicus Curiae* ACLU Foundation of Oregon, Inc. ("ACLU Brief"), p 2. However, the ACLU incorrectly claims (1) that ORS 260.402 applies only where there is a false representation as to the source of the funds being contributed; and (2) that this Court may properly engage, consistent with the analytical framework of *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), in a narrowing construction of a first-category law to create an intent-to-deceive requirement where none is set forth in the statute. ACLU Brief, pp 3-4.

On July 29, 2009, *amicus curiae* Policy Initiatives Group and seven individual Oregon electors (collectively referred to hereafter as "the Policy Initiatives Group") filed a brief in which they purport to provide this Court with "a correct, objective history on regulation of campaign contributions and of false statements pertaining to such contributions and to political affairs generally." Brief of Amicus Curiae Policy Initiatives Group and Seven Individual Oregon Electors ("Policy Initiatives Group Brief"), p 2. Instead, the Policy Initiatives Group provides this Court with a hodgepodge of disjointed historical references which are either misleading or irrelevant to the issues posed by this case and which fall far short of establishing that there was a well established tradition of regulating campaign contributions at the time of Oregon's statehood.

In addition, the Policy Initiatives Group devotes a large portion of its brief to an argument that, even if ORS 260.402 is not within a historical exception to Article I, section 8, of the Oregon Constitution, it is nonetheless authorized by Article II, section 8, of the Oregon Constitution. Policy Initiatives Group Brief, pp 27-48. This alleged basis to uphold ORS 260.402 from constitutional attack was not raised by any party in the trial court or in the Court of Appeals. This Court did not grant review regarding any issue arising under Article II, section 8, and no party has discussed this provision in the merits briefs. Accordingly, any issues regarding Article II, section 8, have been waived and are not properly before this Court on review.

II. ARGUMENT

1. The ACLU Correctly Recognizes That ORS 260.402 Is a First-Category, Content-Based Restraint on Free Expression.

The ACLU begins with a sound application of the *Robertson* test but then departs from a proper constitutional analysis. For example, the ACLU correctly embraces the *Robertson* framework and does not distance itself from its application, as the State does in its brief. ACLU Brief, p 1. The ACLU correctly recognizes that, in light of *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997), "this case should begin and end with a level one analysis of ORS 260.402" because campaign contributions are a protected form of expression. ACLU Brief, p 2. The ACLU also correctly recognizes that ORS 260.402 is not a second-category law because "the focus of the law is the speech itself, not the ensuing

harm * * *." ACLU Brief, p 3. Importantly, the ACLU also concludes that ORS 260.402 is "a content-based restraint" on speech because it is the content of the speech "which determines whether the speech is lawful." ACLU Brief, p 2. Accordingly, the statute is constitutional "only if the restraint is confined with a well-established historic exception to free speech guarantees circa 1859, or within a 'contemporary variant' thereof." ACLU Brief, p 3.

2. By Its Express Terms, ORS 260.402 May Be Violated Without Any Representation Regarding the Source of the Contributed Funds.

The ACLU begins to stray from a proper *Robertson* analysis in its interpretation of the plain language of the statute. For example, the ACLU asserts that ORS 260.402 only applies when there is a false representation about the source of the contributed funds. ACLU Brief, p 3. This claim ignores the plain language of the statute. To obtain a conviction under the statute, the State must only prove that the defendant expressed support for a candidate or measure by making a contribution with someone else's money. No affirmative statement or representation regarding the source of the funds is required. The State need not prove that the defendant lied about the source of the money or used a false name. For this reason alone, the statute, as written, cannot be deemed to be "wholly contained" within the historical exception for fraud or any contemporary variant.

3. The ACLU Further Errs by Asking This Court to Engage in a Narrowing Construction of a First-Category Law.

Both the Policy Initiatives Group and the ACLU argue that ORS 260.402

falls under a historical exception to free speech guarantees, although each relies on different reasoning. The Policy Initiatives Group erroneously claims that there is a lengthy historical record of laws pertaining to elections and campaigns, in Oregon and throughout the United States, and therefore ORS 260.402 falls under an historical exception on that basis. Policy Initiatives Group Brief, pp 6-7. The ACLU argues that ORS 260.402 falls under the historical exception for fraud but only if this Court rewrites the statute to include an intent-to-deceive element. ACLU Brief, p 5. Without such a narrowing construction, the ACLU concedes that the statute is unconstitutional. ACLU Brief, p 4.

But ORS 260.402 cannot be saved by rewriting the statute under the guise of a narrowing construction because, as recognized by the ACLU, ORS 260.402 is a first-category law directed at the content of speech, and therefore an overbreadth analysis is wholly inappropriate. This fundamental principle is made abundantly clear by *Robertson* itself, in which the Court stated that Article I, section 8, prohibits "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. In a critical passage, the Court then stated, "(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.* (emphasis added). To be valid, first-category

laws under *Robertson* must therefore be "wholly confined" within a historical exception as written by the legislature and cannot be properly rewritten by a reviewing court to satisfy Article I, section 8.

The Court clarified *Robertson* in *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992), and explained the distinction between laws directed at the content of speech (first-category laws) and laws directed at forbidden effects (second-category laws). First-category laws are unconstitutional unless they are "wholly confined" within a historical exception. *Id.* at 164. Laws that focus on forbidden effects are divided into two categories, laws that focus on forbidden effects by expressly prohibiting expression and those that do not refer to expression at all. *Id.* Only second-category laws that focus on forbidden effects by expressly prohibiting expression are analyzed for overbreadth. *Id. See also State v. Illig-Renn*, 341 Or 228, 234-35, 142 P3d 62 (2006) (interpreting *Plowman* to this effect); *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994) (the same). Therefore, only if the Court considers ORS 260.402 to be a second-category law that focuses on forbidden effects by expressly prohibiting expression would an overbreadth analysis, and thus a narrowing construction, be permitted. *See also State v. Rangel*, 328 Or 294, 299, 977 P2d 379 (1999) (holding that the Court may consider a narrowing construction to save an unconstitutionally overbroad statute).

The ACLU relies heavily on *State v. Moyle*, 299 Or 691, 705 P2d 740 (1985), to support the proposition that a narrowing construction is proper in this case. *Moyle*, however, applied a narrowing construction to a second-category

statute, *i.e.*, a statute expressly targeted at forbidden effects. *Id.* at 699. Subsequent Oregon Supreme Court cases interpreting *Moyle* have reiterated this point. For example, in *Rangel*, the Court explained: "As *Moyle* illustrates, a law written to focus on undesired effects, but which includes speech or writing as the proscribed means of violation, must be examined to determine whether it reaches privileged communication and, if it does so more than rarely, whether a narrowing construction is possible to save it from overbreadth." 328 Or at 299 (emphasis added). The ACLU has not pointed to any instances of the Court narrowly construing a first-category statute in order to bring it within an historical exception, nor should the Court allow such a substantial deviation from the *Robertson* framework in this case.

Additionally, even if the Court were to consider applying a narrowing construction to ORS 260.402, reading an intent-to-deceive into the statute is not an appropriate judicial narrowing. As stated in *Robertson*, it is "a legislative responsibility to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion." *Robertson*, 293 Or at 437. By its clear terms, ORS 260.402 includes no intent element that would make it a contemporary variant of fraud. To read such a requirement into the statute would drastically alter the breadth of the statute by converting it into a specific intent crime, which is far from the judicial narrowing contemplated by *Robertson*. *See Rangel*, 328 Or at 306 (finding a judicial

narrowing appropriate "because that determination leaves the statutory mental element, 'knowingly,' undisturbed").

Finally, the narrowing construction suggested by the ACLU would not result in ORS 260.402 being "wholly confined" within the historical exception for fraud. Aside from intent to deceive, fraud requires an affirmative representation regarding a material fact which is reasonably relied upon and causes harm. *Pollock v. D.R. Horton, Inc. – Portland*, 190 Or App 1, 20, 77 P3d 1120 (2003). The ACLU does not explain how it would propose to rewrite the statute to require an affirmative misrepresentation, materiality or actual deception, which are clearly defined elements of the alleged historical exception.

The ACLU correctly recognizes that ORS 260.402 is a first-category, content-based restraint on free expression and is not a second-category law focused on forbidden effects. However, in its effort to shoehorn a statute which does not contain any of the traditional elements of fraud, neither intent to deceive, an affirmative misrepresentation, materiality, reliance nor harm, into that historical exception, the ACLU departs from a proper constitutional analysis.

4. The Policy Initiatives Group's Historical Research Is Unhelpful and Does Not Support a Well Established Tradition of Limiting Campaign Contributions in 1859.

Neither the State nor the ACLU contends that there was a well established tradition of limiting campaign contributions in 1859, agreeing with this Court's previous express finding to that effect. *See Vannatta*, 324 Or at 538 ("At the time of statehood and the adoption of Article I, section 8, there was no established

tradition of enacting laws to limit campaign contributions."). But the Policy Initiatives Group contends that this Court's finding in *Vannatta* was the result of inadequate historical research and purports to offer a correct, objective history. Policy Initiatives Group Brief, pp 2, 5.

The Policy Initiatives Group fails in its effort, offering mostly out-of-state laws and writings that are not relevant to the issues of this case and which do not establish that there was any well established tradition of prohibiting or restricting campaign restrictions at the time of Oregon statehood. In fact, if anything, its historical research bolsters and supports the findings of this Court in *Vannatta* that there was no such well established tradition.[1]

The Policy Initiative Group's brief contains much discussion that is either irrelevant to the issues of this case or that is simply not helpful. For example, several pages are taken up with discussions of early American statutes targeting

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[1] For example, the very first historical source cited by the Policy Initiatives Group supports the conclusion that there was no well established tradition of limiting campaign contributions in 1859. Policy Initiatives Group Brief, p 2 n 2. Thus, between 1699 when the Virginia House of Burgesses passed a law prohibiting the bribery of voters and the late nineteenth century, campaign laws "were concerned almost exclusively with what came to be known as 'corrupt practices,' i.e., the manipulation of votes through bribery, intimidation, and fraud." Robert E. Mutch, essay, *Three Centuries of Campaign Finance Law, A User's Guide to Campaign Finance Law*, (Lubenow ed. Rowman & Littlefield 2001), p 1. These laws were focused on the candidate's actions in buying support or bribing voters. *Id.* at pp 4-5. Candidates in the eighteenth century "clearly spent large sums of money to get elected" but "it was their money." *Id.* at 20. It was only in the late nineteenth century, "with the rise of large corporations as the primary source of party money, did the separation between candidates and the source of their money become an important feature of our politics." *Id.* "It is this development that explains why 'money in politics' came to be a public policy concern." *Id.* This historical analysis is completely in accord with this Court's finding in *Vannatta* that the "earliest indication * * * of Oregon's distrust of the role that money plays in the political process" came in 1909. *Vannatta*, 324 Or at 538 n 23.

the buying of votes by candidates, plying voters with food and alcohol, wagering on elections, and bribery. Policy Initiatives Group Brief, pp 9-10, 22-24. But this case, and ORS 260.402, does not involve such alleged conduct. Other pages of the brief are taken up with discussion of early American statutes regarding perjury and false statements under oath to elections officials. Policy Initiatives Group Brief, pp 8-10. But no party has contended in this case that narrowly-drawn laws, unlike ORS 260.402, that expressly focus on perjury or false statements under oath are prohibited by Article I, section 8.

Stripped of the irrelevant or unhelpful discussion contained throughout, the Policy Initiatives Group's brief identifies only three of the 32 states in the Union at the time that had statutes regulating, to some degree, campaign contributions in 1859. Policy Initiatives Group Brief, pp 17-18. Therefore, the Policy Initiatives Group concedes that 29 states and the federal government did not regulate campaign contributions in any manner at the time of Oregon's statehood. This fact alone suffices to support the accuracy of this Court's finding in *Vannatta* that there was no well established tradition of limiting campaign contributions in 1859.

The three states that apparently did have laws which appear to regulate campaign contributions to some degree–Maryland, Texas, and New York–are clearly insufficient to support a "well established" historical exception under *Robertson*. For example, the Texas law identified by the Policy Initiatives Group was allegedly passed in late August 1856, less than a year before the commencement of the Oregon Constitutional Convention. Policy Initiatives

Group Brief, pp 17-18. The Maryland statute, which by its express terms, covers only the receipt and disbursement of funds by "political agents" and which does not prohibit voters from contributing money or property directly to candidates, was passed in 1852, only five years before the Oregon Constitutional Convention. These anomalous and recently passed laws do not support a "well established" historical tradition as of Oregon statehood in 1859.

The Policy Initiatives Group misleads the Court regarding the New York statute, passed in 1829. Policy Initiatives Group Brief, p 17. This statute did not prohibit all campaign contributions as asserted by the Policy Initiatives Group, but rather permitted unlimited contributions used to "defray[] the expenses of printing, and the circulation of votes, handbills and other papers previous to such election." *Jackson v. Walker*, 5 Hill 27, 30 (N.Y. Sup. Ct. 1843).

In relying on the smattering of unrelated laws and political theory contained in its brief to show that ORS 260.402 falls under a historical exception, the Policy Initiatives Group largely ignores this Court's specific guidance on what must be shown to establish an historical exception to Article I, section 8, free speech guarantees. First, in *Robertson* the Court explained that a statute directed at the content of speech is unconstitutional unless it 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. By pointing out historical

instances limited to three states of laws that prohibited some type of campaign contributions, the Policy Initiatives Group has not shown that there was a "well established" tradition of regulating campaign contributions, or that ORS 260.402 is "wholly confined" within that historical exception. *See Moyle*, 299 Or at 696 (finding no historical exception for harassment statute when historical equivalent was a "politically repressive" English law, with variants enacted in seven states in 1859).

As explained in *State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987), "the constitutional guarantee of free speech and press will not be overcome by the mere showing of some legal restraints on one or another form of speech or writing." Instead, "[t]he party opposing a claim of constitutional privilege must demonstrate that the guarantees of freedom of expression were not intended to replace the earlier restrictions." *Id. See also State v. Ciancanelli*, 339 Or 282, 318, 121 P3d 613 (2005) ("for historical crimes that are directed at expression, both 'in terms' and in their real focus," the Court "would require a more direct expression of the framers' intent" that free speech guarantees adopted in 1859 were not intended to reach these restrictions). The Policy Initiatives Group has not pointed to any affirmative evidence, let alone the direct evidence required by this Court, establishing that a few isolated instances of campaign contribution regulations passed by three other states in the first half of the nineteenth century were intended to prevail over the guarantees of freedom of expression contained in Article I,

section 8.

5. Any Argument Based on Article II, Section 8, Has Been Waived.

The Policy Initiatives Group also argues that ORS 260.402 is constitutional under Article II, section 8, of the Oregon Constitution. No party has raised Article II, section 8, before either the trial court or the Court of Appeals and the implications of this constitutional provision have not been addressed in any manner by either court. This constitutional provision is brought up for the first time by the Policy Initiatives Group in its *amicus* brief to this Court. Under these circumstances, issues regarding the application of Article II, section 8, are unpreserved. *See Ailes v. Portland Meadows, Inc.*, 312 Or 376, 380, 823 P2d 956 (1991) (generally, before an appellate court may address a claim of error in the trial court, the adversely affected party must have preserved the alleged error in the trial court and raised the issue on appeal by an assignment of error in its opening brief).

In addition, because issues regarding Article II, section 8, were not properly before the Court of Appeals and were not raised by Petitioners on Review, they may not be raised in the first instance in this Court. *See* ORAP 9.20(2) (where Supreme Court has not limited the issues on review, the questions before the Court include "all questions properly before the Court of Appeals that the petition or the response claims were erroneously decided by that court" and any other issues that this Court might choose to consider "that were before the Court of Appeals").

III. CONCLUSION

For the reasons set forth in Petitioners' Joint Brief on the Merits and those set forth herein, Petitioners respectfully request that the decision of the Court of Appeals be reversed and the trial court's judgment dismissing the indictments against Petitioners be reinstated.

Dated this 2nd day of September, 2009.

Respectfully submitted,

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I certify that on September 2, 2009, I electronically filed the **PETITIONERS' JOINT REPLY TO BRIEFS OF AMICI** with the Supreme Court of the State of Oregon by using the appellate CM/ECF System. The following participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system:

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