IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable JOHN A. WITTMAYER, Judge

Opinion Filed: January 7, 2009

Author of Opinion: Landau, J. (joined by Haselton and Ortega, JJ.)
Concurring Opinion: Brewer, C. J. (joined by Edmonds, J.)
Concurring Opinion: Schuman, J.
Dissenting Opinion: Sercombe, J. (joined by Armstrong, Wollheim, and Rosenblum, JJ.)

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STATEMENT OF THE CASE

The people of Oregon wield a single weapon in the battle against the potentially corruptive influence of campaign contributions—knowledge. Because campaign contributions cannot be capped in this state, the electorate must rely on knowing *who* contributes to political candidates and measures. Armed with that knowledge about candidates, electors can make more informed decisions about the integrity of, and values held by, the individuals who seek their vote. And given similar information about referenda and initiative measures, voters more easily can determine what political interests are served by various proposals on the ballot.

The statute challenged in this case—ORS 260.402—is the cornerstone of the system designed to provide voters with accurate information about the source of campaign contributions. The statute makes it a crime to donate money to a campaign "in any name other than that of the person who in truth provides the contribution." ORS 260.402. In other words, the statute prohibits misrepresenting the source of campaign contributions. This case presents the question whether Article I, section 8, of the Oregon Constitution, protects those falsehoods, leaving Oregon with an elections system in which voters cannot be confident of knowing who really funds politics in this state.

A. Questions presented and proposed rules of law

First question presented: ORS 260.402 prohibits making a campaign contribution "in any name other than that of the person who in truth provides the

contribution." Does the statute "criminalize the making of a political contribution *without any representation* about the source of the funds," as defendants contend? (Def BOM 1; emphasis added)[1]

Answer and first proposed rule of law: No. ORS 260.402 prohibits only a certain type of misrepresentation: making a campaign contribution in a false name. The statute does not restrict the amount of money that a person can donate to any campaign. Nor does it criminalize contributions that are made without any representation about the source of the funds.

Second question presented: Does Article I, section 8, of the Oregon Constitution prevent the legislature from criminalizing the act of falsely attributing a campaign contribution to somebody other than the true contributor?

Answer and second proposed rule of law: No. This court already has held that Article I, section 8, does not protect speech that misleads the electorate during the course of a political campaign. ORS 260.402 prohibits only that kind of expression: a campaign contribution that is attributed to somebody other than the person who actually provided funds for the purpose of influencing an election. Operating in conjunction with the rest of Oregon's campaign-finance laws, ORS 260.402 is directed against the harm of deceiving the electorate and other participants in the political process; it is constitutional because it is directed against that proscribable harm and is not overbroad. And even if ORS 260.402 were directed against

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[1] The state refers to defendants' brief on the merits as "Def BOM" throughout this brief.

expression *per se*, it would be constitutional as a modern variant of a historic exception to the protection of Article I, section 8.

Third question presented: Is ORS 260.402 unconstitutionally vague on its face?

Answer and third proposed rule of law: No. ORS 260.402 gives reasonably intelligent people fair notice of the conduct it prohibits: donating funds to a political campaign in one person's name when another person actually is the source of the contribution. And the statute's terms limit its reach, so that judges, juries and police officers do not have unbounded discretion to decide what behavior is illegal. Because the statute describes a discernable standard of conduct, it is not unconstitutionally vague on its face.

B. Summary of argument

Oregon's campaign-finance system, outlined in ORS chapter 260, is designed to give voters accurate information about who funds political campaigns in this state. The system requires campaigns for candidates and measures to report all contributions they receive, and to individually identify the name, address and occupation of each donor whose aggregate contributions total more than a threshold amount ($50, during the time periods relevant to this case). ORS 260.402, the statute challenged in this litigation, simply requires that the identifying information be accurate. It prohibits making false-name contributions, *i.e.*, making a donation to a political campaign "in any name other than that of the person who in truth provides the contribution." Defendants argue that ORS 260.402 violates Article I, section 8, of the Oregon Constitution because it interferes with the ability to express political views by making

campaign contributions. The argument fails because it misinterprets the statute and misapplies this court's case law.

Contrary to defendants' contention, ORS 260.402 does not interfere with any person's ability to express his or her political views. The statute does not restrict the amount of money that a person can donate to any political campaign. Nor does the statute criminalize anonymous donations. Rather, ORS 260.402 merely requires that when a donation is made in a particular person's name, that person be the true source of the contribution. Thus, the only expression the statute prohibits is the misrepresentation associated with falsely attributing a contribution to somebody other than the person who made it.

The next question is whether that restriction is constitutional. Under Article I, section 8, a statute that restricts speech is constitutional if it is directed against a proscribable harm and is not overbroad. This court already has held that the legislature may seek to prevent (or punish) the type of harm at issue here: that associated with misleading participants in the electoral process. *See Vannatta v. Keisling*, 324 Or 514, 544, 931 P2d 770 (1997) (Article I, section 8, does not prevent the legislature from punishing somebody who "has misled the electorate"). Read in the context of ORS chapter 260, ORS 260.402 is directed against that kind of harm. The electorate is defrauded any time somebody makes a false-name contribution that is large enough that it is (or should be) disclosed to the public, which then receives misleading information about who supports candidates and measures on the ballot. And even small false-name contributions lead to similar harm because they mislead

campaigns about who their supportors are, even if the campaigns choose not to publicize that information. ORS 260.402 is not overbroad because, at least in the vast majority of its applications, it restricts only expression that injects false information into the electoral system.

Minimizing ORS 260.402's importance to the integrity of Oregon's campaign-finance system, defendants argue that the statute is unconstitutional because it is not directed against any harm, but prohibits expression *per se*. Even if defendants' characterization of the statute were correct, the statute still would be constitutional. In *Vannatta*, this court described various statutes that prohibit people from misleading the public during election campaigns, suggesting that they could withstand constitutional challenge as contemporary variants of the historic "fraud exception" to Article I, section 8. *Vannatta*, 324 Or at 544. ORS 260.402 also falls within that exception.

Defendants' contention that ORS 260.402 is unconstitutionally vague also lacks merit. The statute does not include any terms that give police officers, judges or juries unbridled discretion to determine, based on their subjective views, what behavior is prohibited. Nor does the statute fail to give ordinarily intelligent people fair notice of the conduct it proscribes. Rather, the statutory text is reasonably precise in defining the act it prohibits: making a campaign contribution in one person's name when the donation actually was funded by somebody else. And even if one could posit some hypothetical circumstances in which it is not clear whether the statute would apply, those few examples of uncertainty would not make the statute

unconstitutionally vague *on its face*. Because a reasonably intelligent person easily can discern some actions which ORS 260.402 would criminalize, the statute is not facially unconstitutional.

C. Nature of the proceedings and material facts

The state agrees with defendants that the pertinent facts are set out in the indictment:

> **COUNT 1**
> **CONTRIBUTION IN FALSE NAME**
>
> The said defendants **THOMAS PAUL MOYER and VANESSA COLLEEN KASSAB**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than other than [*sic*] that of the person who in truth provided the contribution, to-wit: by making a contribution of $2,500 in the name of "**VANESSA KASSAB**" to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,[2]
>
> **COUNT 2**
> **CONTRIBUTION IN FALSE NAME**
>
> The said defendants **THOMAS PAUL MOYER and SONJA R TUNE**, on or about May 16, 2003, in the County of Multnomah County, State of Oregon, did unlawfully and knowing make a contribution to a candidate, in relation to his campaign for election to public office, in a name other than other than [*sic*] that of the person who in truth provided the contribution, to-wit: by making a contribution of $2,000 in the name of "**SONJA TUNE**" to Jim Francesconi in support of his campaign for the Mayor of Portland, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon[.]

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[2] As indicated in some of the trial-court documents, defendant Vanessa Colleen Kassab also is known as Vanessa Sturgeon.

(App Br ER-1).[3]

ARGUMENT

A. ORS 260.402 prohibits making a contribution in a false name.

Oregon law requires political campaigns to disclose all contributions made by a single donor that, alone or in aggregate, exceed a certain threshold amount ($50 at times relevant to this case, $100 now) and to identify who made those contributions.[4] The Secretary of State and other officials then make that information available to the public.[5] ORS 260.402, which defendants are charged with violating, is directed at ensuring the accuracy of that campaign-finance information. The 2003 version of the statute, applicable to this case, provides:

> 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*. No person shall knowingly receive the contribution or enter or cause it to be entered in accounts or records in another name than that of the person by whom it was actually provided. However, if the contribution is received from the treasurer of any

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[3] The state uses the abbreviation "App Br" to refer to its opening brief in the Court of Appeals.

[4] *See* ORS 260.083(1)(a) (2003) (requiring disclosure of any contribution from a person or political committee that "contributed an aggregate amount of more than $50," along with the contributor's name, occupation and address); ORS 260.083(1)(a) (2007) (similar requirement for contributions in "an aggregate amount of more than $100").

[5] *See* ORS 260.255(2), (3) (2003) (describing public officials' duty to publicize the submitted information, including "a list of all contributions of more than $50"); ORS 260.057 (2007) (describing new electronic-filing system that results in all information filed with the Secretary of State under ORS 260.083 and certain other statutes being made publicly available on the internet).

> political committee, it shall be sufficient to enter it as received from the treasurer.

ORS 260.402 (2003) (emphasis added).[6] Violations of ORS 260.402 may be prosecuted as Class C felonies. ORS 260.993(2).

In determining whether ORS 260.402 unconstitutionally restricts protected expression, this court's first step should be to determine exactly how the statute functions. Defendants' argument that the statute violates Article I, section 8, starts from two premises: (1) that the statute criminalizes campaign contributions that are made "without any representation about the source of the funds." (Def BOM 1); and (2) that the statute prohibits individuals from making contributions using other people's money (Def BOM 6). Neither premise is correct.

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[6] Unless indicated otherwise, this brief's citations to ORS 260.402 refer to the 2003 version of the statute, which the legislature amended in 2005 and 2007. However, the analysis set forth in this brief would apply equally to the current version of the statute, which still prohibits making a campaign contribution "in any name other than that of the person who in truth provides the contribution." ORS 260.402 now provides, in pertinent part:

> (1) A person may not make a contribution in any name other than that of the person who in truth provides the contribution to:
>
> (a) Any other person, relating to a nomination or election of any candidate or the support of or opposition to any measure;
>
> (b) Any political committee; or
>
> (c) A chief petitioner of an initiative, referendum or recall petition or a treasurer required to file a statement under ORS 260.118.

Detailed discussions of how the 2003 campaign-finance-disclosure statutes worked may be found in the Court of Appeals opinion, *State v. Moyer*, 225 Or App 81, 86-87, 200 P3d 619 (2009), and in the state's opening brief in the Court of Appeals. (App Br 12-13).

1. The statute applies only when the purported source of the contribution is identified.

Two critical aspects of the statutory text limit the expression to which ORS 260.402 applies. First, the statute reaches only those campaign contributions that are made "in any name other than" that of the person who truly provides the contribution. Thus, the statute applies only when money has been donated "in" somebody's "name"—that is, when the contribution is attributed to a specific person. Defendants simply ignore those words when they repeatedly assert that the statute can be violated "merely by the act of giving money without any representation as to the source of the funds." (Def BOM 7; *see also*, *e.g.*, Def BOM 1, 2, 17, 36 (similar)).[7] The lead Court of Appeals opinion accurately described "the gravamen of the offense" as "supplying *false information* to the recipient of the contribution." *State v. Moyer*, 225 Or App 81, 88, 200 P3d 619 (2009) (emphasis in original).

[7] Because ORS 260.402 applies only to those contributions that are made in somebody's name, it does not criminalize anonymous contributions. However, ORS 260.083 requires that committees disclose the names and addresses of all individuals and entities that contribute more than the threshold reporting amount. Accordingly, the Secretary of State's administrative rules require campaigns to refuse or disgorge contributions for which campaigns cannot provide that information—those funds that are donated anonymously. *See 2008 Campaign Finance Manual* at 30-31 ("No committee shall accept an anonymous contribution. If a committee cannot identify a contributor, the contribution must be donated to an organization that can accept anonymous contributions"); OAR 165-012-0005 (designating *Campaign Finance Manual* and associated forms "as the procedures and guidelines to be used for compliance with Oregon campaign finance regulations"). This case does not involve anonymous contributions and the court need not address whether Article I, section 8, would prevent the legislature from prohibiting people from making campaign contributions anonymously.

2. The statute applies only when somebody other than the identified donor provided the funds for the purpose of influencing an election or supporting a campaign.

The second textual guide relates to the statute's repeated use of the word "contribution" and the way in which that term is defined in Oregon's campaign-finance laws. ORS 260.402 does not criminalize all acts of making political donations with another person's money; rather, it applies only when the person who "provides the contribution" is falsely identified. That limitation is significant because "contribution" is defined, essentially, as a payment made: (1) to "influenc[e] an election"; (2) to "reduc[e] the debt of a candidate * * * or the debt of a political committee"; or (3) "[t]o or on behalf of a candidate, political committee or measure." ORS 260.005(3).[8] Thus, ORS 260.402 prohibits only falsely identifying the person

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[8] ORS 260.005(3) provides now, as it did in 2003:

> (a) Except as provided in ORS 260.007, "contribute" or "contribution" includes:
>
> (A) The payment, loan, gift, forgiving of indebtedness, or furnishing without equivalent compensation or consideration, of money, services other than personal services for which no compensation is asked or given, supplies, equipment or any other thing of value:
>
> (i) For the purpose of influencing an election for public office or an election on a measure, or of reducing the debt of a candidate for nomination or election to public office or the debt of a political committee; or
>
> (ii) To or on behalf of a candidate, political committee or measure; and
>
> (B) Any unfulfilled pledge, subscription, agreement or promise, whether or not legally enforceable, to make a contribution.

Footnote continued…

who, in truth, provided a payment *for the purpose of influencing an election or supporting a campaign.* Because it includes that requirement, the statute will not always apply when one person "mak[es] a contribution with someone else's money," as defendants contend it will. (*E.g.*, Def BOM 11).

An example may clarify the point. Suppose a person directs her accountant to donate $10,000 of her money to a charity. The accountant instead deposits the money into his own bank account, then sends his check for $10,000 to a political campaign. In addition to committing theft, the accountant has made a campaign contribution using somebody else's money. Nonetheless, no violation of ORS 260.402 has occurred because the accountant, not his client, is the person who in truth made a payment for the purpose of influencing an election.

But suppose the client had directed her accountant to do exactly what he did: make a campaign contribution in his own name, using his client's funds. In that case—assuming the accountant identified himself as the sole source of the funds, and did not disclose his client as the true source—ORS 260.402 has been violated. The contribution: (1) was made in the accountant's name; but (2) in truth was provided by the client, who knew precisely where her money was going. ORS 260.402 prohibits that kind of money laundering in the political arena. The central question here is whether Article I, section 8, protects that activity.

(…continued)

> (b) Regarding a contribution made for compensation or consideration of less than equivalent value, only the excess value of it shall be considered a contribution.

B. ORS 260.402 does not unconstitutionally interfere with protected expression.

With the meaning of ORS 260.402 settled, the next step in the Article I, section 8, analysis is determining whether the statute limits expression and, if so, whether it permissibly focuses on preventing some "palpable harm," or impermissibly is aimed at "protecting the hearer from the message." *State v. Ciancanelli*, 339 Or 282, 317, 318, 121 P3d 613 (2005); *see id.*, 339 Or at 322. In the state's view, the analysis begins there no matter which *Robertson* category the statute falls into. *See State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) (describing Article I, section 8, analysis). Statutes fall into the first *Robertson* category if they focus, by their terms, on expression *per se*. *See State v. Johnson*, 345 Or 190, 195, 191 P3d 665 (2008). Nonetheless, the specific "category one" crimes that *Robertson* identified as historical exceptions to the protection of Article I, section 8, all "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." *Ciancanelli*, 339 Or at 318 (emphasis added). Thus, a "category one" statute still is constitutional if it proscribes a harm that historically was viewed as beyond section 8's reach. And the gravamen of a *Robertson* "category two" law, by definition, "is not in the prohibition of expression *per se*, but in the prevention of a type of 'harm' that the legislature believes can be caused by expression." *Johnson*, 345 Or at 195. Thus, the "category two" analysis also focuses on whether the statute addresses a proscribable harm. Because the fundamental questions are: (1) whether the statute limits expression; and (2) whether

the statute is aimed at preventing "actual harm," the state starts there, rather than with a discussion of which of the *Robertson* categories applies to ORS 260.402. *Cf. Ciancanelli*, 339 Or at 318 (*Robertson*'s "overall point" is that "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").

1. The only expression the statute limits is misrepresentation of campaign donors' identities; it does not limit campaign contributions or other political speech.

By prohibiting false-name contributions, ORS 260.402 undoubtedly restricts one narrow form of expression in one limited context: It prohibits misrepresenting who donates money to political campaigns, when those misrepresentations are made in conjunction with the contributions themselves.[9] The state explains later in this brief why that restriction is constitutional. But defendants contend that the statute reaches much further by prohibiting people from freely expressing their support for candidates or measures by making certain types of campaign contributions. (*E.g.* Def BOM 6). They suggest that, under *Vannatta*, *any* regulation of campaign contributions must be viewed as a restriction on expression. (*See* Def BOM 14). Defendants misunderstand the decision.

In *Vannatta*, this court explained that a campaign contribution is a type of speech when it "is *the contributor's expression of support for the candidate or*

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[9] The statute does not prohibit misrepresenting the sources of campaign contributions in other circumstances, such as during press conferences or in campaign materials, although other statutes might come into play if false information was conveyed in those contexts.

cause—an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put." 324 Or at 522 (emphasis in original). Caps on campaign contributions limit donors' ability to engage in that form of political expression and are, for the reasons set out in *Vannatta*, unconstitutional.

But the giving of money that eventually is used in a campaign is not, alone, "expression," for purposes of Article I, section 8. Rather, a campaign contribution is expressive only if it conveys a message of support by the contributor:

> [T]here doubtless are ways of supplying things to political campaigns or candidates that *would have no expressive content* or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated *quid pro quo*), but it is not protected expression; a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected; a donation of something of value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign *is not expression*."

Vannatta, 324 Or at 522 n 10 (emphasis added).

Consequently, in identifying the expression that ORS 260.402 limits, it is not enough to note that the statute relates to campaign contributions. What matters is whether the statute limits a person's ability to express support for a candidate. It does not. As explained above, ORS 260.402 does not restrict any person's ability to give any amount of money to any political campaign. Nor does it require the contributor to identify himself or herself. It requires only that any identification that is made be truthful.

Thus, a person who wishes to express support for a candidate may do so by contributing any amount of money—in his or her own name—to the candidate's campaign. A person who lacks money to contribute can express support for the candidate in other ways. And that person can express support even by making a campaign contribution using another person's funds as long as he does not give the money in his own name. For example, he might send money to the campaign with a note that both expresses his own support for the candidate and indicates that the other person is the source of the enclosed funds. Again, nothing in ORS 260.402 interferes with either person's ability to express support for the candidate. It prohibits them only from misrepresenting who supports the candidate financially.

In sum, the only expression that ORS 260.402 limits is the misrepresentation associated with making a campaign contribution in a false name. The next question is whether that kind of falsehood causes "actual harm" that the legislature constitutionally may prohibit.

2. ORS 260.402 is aimed at the harm of deceiving the electorate and other participants in the democratic process.

As explained above, ORS 260.402 does not broadly forbid all falsehoods about who donates money to political campaigns. Rather, it prohibits only misrepresentations that are made in the context of Oregon's campaign-finance disclosure system—the Secretary of State's public identification of the people and institutions that fund politics in this state. Although the details of Oregon's campaign-finance statutes have changed over the years, the principle remains the same: "People have the right to know—and it is so contemplated by the act—who is

spending money and the amount thereof to secure the approval or rejection of an initiative measure." *Nickerson v. Mecklem*, 169 Or 270, 277, 126 P2d 1095 (1942). That knowledge can influence a person's decision how to vote. As the United States Supreme Court stated in upholding federal law that required reporting the name of every person who contributed more than $100 to a political campaign:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. * * *
>
> [D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. * * *

Buckley v. Valeo, 424 US 1, 66-67, 96 S Ct 612, 46 L Ed 2d 659 (1976) (footnotes omitted).

Oregon's system of campaign-finance regulation similarly is designed to ensure that voters can make informed political choices. Treasurers for candidates and political committees must keep detailed accounts of all contributions received and expenditures made, no matter how small.[10] Candidates and political committees are required to periodically file statements of all contributions received and expenditures

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[10] *See* ORS 260.055(1) (2003) (requiring accounts of all information to be reported under certain statutes, including ORS 260.083); ORS 260.083 (2003). *See also* ORS 260.055(1) (2007); ORS 260.083 (2007) (describing similar requirements, except with different individual-donor reporting threshold).

made.[11] Those statements, submitted to the Secretary of State, must include individualized information about any donor who contributed more than the threshold amount, which was $50 in 2003:

> Except as provided in ORS 260.085, the statement shall list the name, occupation and address of each person, and the name and address of each political committee, that contributed an aggregate amount of more than $50 on behalf of a candidate or to a political committee and the total amount contributed by that person or political committee. The statement may list as a single item the total amount of other contributions, but shall specify how those contributions were obtained.

ORS 260.083 (2003); *see* ORS 260.083 (2007) (similar, except with $100 threshold).

Under chapter 260, the Secretary of State is required to publish the campaign-contribution information that she has received from candidates and campaigns. In 2003, the Secretary published the reports as they were filed. Now, she makes all electronically filed data available to the public on the internet. ORS 260.257 (2007).

The integrity of this system depends entirely on accurate identification of the people who contribute campaign funds. Misrepresentation of donors' identities most obviously undermines the system when it results in voters receiving false information, which can happen in several ways. Posit wealthy Ms. Smith, who believes that a particular legislative candidate would support bills that benefit her business interests. And suppose Ms. Smith wishes to support the candidate financially, but believes that

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[11] In 2003, those requirements were described in ORS sections 260.058, 260.063, 260.068, 260.073, 260.076, and 260.083. Those requirements have since been supplemented with (and, in some instances, supplanted by) electronic reporting requirements. *See* ORS 260.057 (2007).

some voters would be dismayed to discover her monetary backing. ORS 260.402 is all that prevents her from deceiving the voters by, for example:

- Contributing any amount over $100 in the name of another person who also supports the candidate, perhaps a person who does not share business interests that new legislation is likely to affect. This kind of false-name contribution misleads the electorate in two respects: it hides the fact that Ms. Smith is financing the campaign and it misrepresents the financial extent of the other person's support.
- Contributing over $100 in the name of another person, Mr. Doe, who does *not* support the candidate. In addition to hiding Ms. Smith's backing of the candidate, this false-name contribution misleads the public (and the candidate) about Mr. Doe's views on the election.
- Contributing less than $100 in her own name, but making future donations in a false name so the campaign never will have to disclose Ms. Smith's initial contribution.
- Making multiple small donations (totaling more than $100) in multiple false names, so neither the public nor the candidate ever learns that Ms. Smith is financing the campaign.

In each of these circumstances, truthful reporting would result in public reporting that Ms. Smith backed the candidate, including the financial extent of her support. But if Ms. Smith's contribution is made in another person's name, the public will never know who really is financing the candidate's race. And the resulting harm is one that

is not easily remedied after an election, as it is impossible to know the extent to which votes were based on the misinformation. As discussed in the next section of this brief, the constitution does not prevent the legislature from prohibiting that fraud on the electorate.

3. The legislature may criminalize deception of the electorate.

This court's Article I, section 8, jurisprudence reflects a fundamental tenet: Although the government may not criminalize all falsehoods, it may punish those that undermine governmental integrity. For example, the historic exceptions to section 8's reach outlined in *Robertson* all relate to deception or other speech that subverts a fundamental aspect of the American political system. Perjury undercuts the integrity of the judicial system, which depends entirely on the honesty of all participants. Solicitation of criminal activity thwarts the state's efforts to prevent crime in general. Theft, forgery and fraud interfere with the private-property rights that our constitutions protect.

And this court already has held that deception of the electorate—which undermines the integrity of democracy itself—is a harm that the legislature constitutionally may seek to prevent and punish. Although *Vannatta* invalidated caps on campaign contributions, it rejected an Article I, section 8, challenge to statutory requirements aimed at giving voters accurate information about campaign finance. One of the statutes at issue required publication of a Voters' Pamphlet statement indicating whether each candidate had agreed to limit his or her campaign expenditures. As this court explained, voters might rely on those promises in deciding how to vote. *Vannatta*, 324 Or at 544. Another statutory provision created

ramifications for any candidate who did not abide by that pledge: it required the Voters' Pamphlet to identify any candidate who, in an earlier election, had agreed to limit campaign expenditures but had broken that promise. *See id.*

This court held that neither provision violated Article I, section 8. *Id.* at 543-45. No constitutional violation occurred even if the provision identifying candidates who broke their spending-cap pledges could be characterized as punishment, because a candidate who "has misled the electorate" has engaged in "misleading conduct" that section 8 does not protect. *Id.* at 544-45. And that is true even though campaign expenditures, necessarily including those that exceed a voluntary cap, are a form of expression for purposes of Article I, section 8. *See id.* at 520.

In explaining that holding, the *Vannatta* court described—with no apparent constitutional discomfort—other legislation that prohibits deceiving the voters during a political campaign:

> Even if there were a basis for holding that the publication by the Secretary of State [of names of candidates who had breached earlier spending-cap pledges] were some sort of "punishment"—a proposition that we reject—that publication still would be permissible and not run afoul of Article I, section 8. *Oregon laws provide penalties for political candidates who mislead the public or engage in fraud*. *See* ORS 260.355 (providing that a candidate may lose a nomination or political office for deliberate and material violation of election laws); ORS 260.532 (making it an offense for a candidate to make, or allow to be made, publication of a false statement of material fact during a campaign). *See also Cook v. Corbett*, 251 Or 263, 446 P2d 179 (1968) (overturning a primary nominating election because the winning candidate made false statements in the course of the campaign). Laws that are targeted at fraud do not violate Article I, section 8, because they constitute an historical exception to Article I, section 8. *Robertson*, 293 Or at 412, 649 P2d 569.

324 Or at 544 (emphasis added). This court specifically suggested that some campaign-finance-disclosure statutes might be constitutional:

> 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 * * *) and their choice may not *necessarily* offend the constitutional requirement.

Id. at 523 (emphasis in original).

In short, *Vannatta* serves as recent confirmation that Article I, section 8, respects the importance of truthfulness in the political process. But that concept has deep historic roots in Oregon law. The Deady Code made it a crime for a person "having any interest in the passage or defeat of any measure before" the legislature to attempt to influence a legislator on that subject "without first truly and completely disclosing to such member [the person's] interest therein." General Laws of Oregon, Crim Code, ch 46, § 622, p 556 (Deady 1845-1864).[12] That section of the code footnoted *Marshall v. Baltimore and Ohio Railroad Company*, 57 US 314, 16 How

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[12] The statute provided, in full:

> If any person, having any interest in the passage or defeat of any measure before, or which shall come before either house of the legislative assembly of this state, or if any person being the agent of another so interested, shall converse with, explain to, or in any manner attempt to influence any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, or that of the person whom he represents, and his own agency therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail, not less than three months, nor more than one year, or by fine not less than fifty, nor more than five hundred dollars.

(Footnote omitted.)

314 (1853), in which the United States Supreme Court voiced its concern with corrupting influences in politics. In holding that a contract "to use personal or any secret or sinister influence on legislators, is void by the policy of the law," the Court focused on the need for honesty and transparency in the political arena: "Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public." *Id.*, 57 US at 334-36.[13]

Acting on similar concerns about "the secret use of money to influence elections," Oregon voters enacted the Corrupt Practices Act in 1908. *See* Official Voters' Pamphlet, General Election, June 1, 1908, 103 (statement by the Act's sponsors).[14] Since then, the Corrupt Practices Act has required public disclosure of campaign contributions and has prohibited false-name contributions like those at issue here. *See, e.g.*, Oregon Code, title XXXVI, ch XXIV, § 36-2418 (1930) ("No person shall make a payment of his own money or of another person's money to any other

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[13] In addition to requiring people attempting to influence the legislature to reveal their interests, the Deady Code included provisions designed to protect the integrity of the ballot. It was a crime in 1864 to give a voter anything of value "with intent to influence or induce such voter to vote" in a particular way. General Laws of Oregon, Crim Code, ch 46, § 616, p 554 (Deady 1845-1864). A voter who accepted that sort of gift also was guilty of a crime. *Id.* at § 617. *Cf.* ORS 260.655 (modern provision prohibiting undue influence in voting and some other aspects of elections). Those provisions, too, were foreshadowed by a federal court decision: *Denney v. Elkins*, 4 Cranch CC 161, 7 F Cas 464, 466-67 (CCDC 1831), in which the District of Columbia circuit court held that a private wager on which presidential candidate would win an election was void as against public policy because it created a motive to influence the vote for pecuniary gain, rather than for the public good.

[14] Excerpts from the 1908 Voters' Pamphlet are included in the appendix to the state's opening brief in the Court of Appeals.

person in connection with a nomination or election in any name other than that of the person who in truth supplies such money * * *").

The "evils" that can result from concealment of "the names of contributors and the amounts contributed by them in election campaigns—whether measures or candidates are involved," long have been recognized as harms that the legislature constitutionally may seek to prevent. *Nickerson*, 169 Or at 282. ORS 260.402 is constitutional because its prohibition of false-name contributions is aimed directly at preventing that kind of harm, which is difficult to remedy once it has occurred.

In arguing to the contrary, defendants and the dissenters in the Court of Appeals focus on the fact that Oregon statutes no longer require public disclosure of *all* campaign contributions, but mandate reporting only of contributions that reach a threshold amount, now $100. *See Moyer*, 225 Or App at 107-08 (Sercombe, J., dissenting). Defendants contend that, because the public does not automatically receive information about contributions that do not reach the threshold, no genuine harm results if those small contributions are made in false names. They conclude that ORS 260.402 reaches too broadly—that is, that the statute prohibits conduct that is not associated with any meaningful harm—because it prohibits people from making even small false-name contributions. (*See, e.g.*, Def BOM 30). The argument fails for two reasons.

First, the basic premise of defendants' argument is flawed. Although campaigns are not required to disclose contributions that do not meet the mandatory-reporting threshold, they certainly may choose to publicize information about small

donations. And even if the public does not learn of such small contributions, the campaigns that receive those donations still are misled about who supports their candidate or cause. That kind of misinformation is harmful because it hinders campaigns' ability to comply with the statutory requirement to promptly report when a single donor's *aggregate* contributions reach the threshold disclosure amount. *See* ORS 260.083. Thus, a person who donates any amount of money in a false name hampers the campaign's ability to track that person's combined contributions and to fulfill the campaign's mandatory reporting duties.

Information about contributors' identities also is important because it educates campaigns about the constituencies to which they appeal, and because harm results when that information is manipulated. For example, somebody who opposes a campaign might donate small amounts in the names of politically notorious figures to mislead the campaign about the effects of its campaign strategies. Deception of campaigns is no less an "actual harm" than is a fraud on the voters.

Second, the *facial* constitutionality of ORS 260.402 should not turn on the legislature's reasonable decision not to burden political campaigns with the responsibility of reporting even very small campaign contributions. The defendants in this case are alleged to have made false-name contributions of $2500 and $2000. If the statute is constitutional as applied to those contributions—and to every other false-name contribution that exceeds the reporting threshold—this court should not invalidate the statute in its entirety based on the possibility that it might not be constitutional as applied to smaller contributions. Such a ruling would thwart

legislative intent and, in some respects, amount to an advisory opinion about the statute's constitutionality as applied to facts not currently before the court. If this court does reach the question and determine that the statute is unconstitutional as applied to below-threshold contributions, however, it should simply narrow the statute so it applies only to situations in which the person "who in truth provides the contribution" has contributed sums that, alone or in aggregate, trigger the public-disclosure requirement. In other words, the court should hold that the statute applies only to contributions which the legislature has determined have significance to the electorate, *i.e.*, are material to the decision how to vote.

4. ORS 260.402 is constitutional no matter how it is classified under *Robertson*.

To this point, the state has not addressed the *Robertson* categories because it believes that—no matter where ORS 260.402 fits in that paradigm—the crucial points are that: (1) the only expression that ORS 260.402 prohibits are false-name contributions that misrepresent who funds political campaigns; and (2) that prohibition is aimed at preventing and punishing "actual harm" to the electorate and other participants in the political process. Because the statute is directed against "palpable harm" and only rarely, if at all, will reach protected speech, it does not violate Article I, section 8, on its face. *Robertson* does, however, provide a useful framework for analyzing the constitutionality of a statute that restricts expression. In this section of the brief, the state adjusts its discussion of the issues to fit that construct.

a. *Robertson*

This court described the first step of the *Robertson* analysis concisely in *State v. Chakerian*, 325 Or 370, 398 P2d 756 (1997):

> That framework requires that [the court] first determine whether the challenged provision is on its face "written in terms directed toward the substance of any 'opinion' or any 'subject' of communication."

325 Or at 374 (citation omitted). Statutes that fall within that first *Robertson* category—that is, statutes that are directed toward the substance of an opinion or a subject of communication—are unconstitutional unless they are "wholly confined within some historical exception" that was well established and that Article I, section 8, demonstrably was not intended to reach. *See Ciancanelli*, 339 Or at 318 (quoting *Robertson*). "Category two" statutes focus on harm:

> If the statute is not directed to the substance of an opinion or subject of communication, but rather is directed at a harm that the legislature is entitled to proscribe, then a further level of inquiry follows. If the statute, by its terms, targets the harm, but the statute expressly prohibits expression used to achieve that harm, then the statute must be subjected to an overbreadth analysis before it can survive Article I, section 8, scrutiny. That is the second level of the *Robertson* analysis.

Chakerian, 325 Or at 375 (citations omitted).

b. ORS 260.402 does not fall within the first *Robertson* category; even if it did, the statute would be constitutional because it prohibits fraud in the electoral process, a contemporary variant of a common-law exception to the protection of Article I, section 8.

ORS 260.402 does not fall within the first *Robertson* category because the gravamen of the false-name contribution offense "is not in the prohibition of expression *per se*, but in the prevention of a type of 'harm' that the legislature

believes can be caused by expression." *Johnson*, 345 Or at 195 (placing the abusive-speech provision of the criminal-harassment statute in the second *Robertson* category). As discussed above, ORS 260.402 is not a stand-alone statute that generally prohibits falsehoods on a particular subject. Rather, the statute must be considered in its context as the cornerstone of Oregon's system of making campaign finance transparent to the electorate. The statute prohibits misrepresenting the source of campaign contributions *only* when the misrepresentations are made in that context, *i.e.*, when the contribution itself is made in a false name. Thus, ORS 260.402 "focuses on effects that the legislature wishes to forbid"—deception of voters and political campaigns—even though "it expressly prohibits the use of particular forms of expression * * * as a means to achieve those effects." *Johnson*, 335 Or at 195. Consequently, the statute falls within the second *Robertson* category, not the first.

Even if the statute does belong in the first *Robertson* category, however, it still is constitutional. Laws directed against speech *per se* do not violate Article I, section 8, if

> 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. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants.

Robertson, 293 Or at 412.

We know from *Vannatta* that laws that prohibit deception in the electoral process are contemporary variants of fraud and, therefore, do not violate Article I, section 8. That is the foundation for the court's explanation that the legislature

constitutionally may require public identification of candidates who violate expenditure-cap pledges and constitutionally may prohibit candidates from making material misstatements during campaigns. *See* 324 Or at 544. That rationale applies equally to ORS 260.402's requirement that identification of campaign donors be accurate. ORS 260.402 falls within a "historic exception" to Article I, section 8, because it prohibits fraud on the electorate.

In arguing against application of the historic-exception principle to ORS 260.402, defendants focus on the lack of an intent element in the statute. Because common-law fraud required an intent to deceive, defendants argue, ORS 260.402 cannot be a variant of that crime. (Def BOM 37). But this court already has held that a statute that prohibits fraud *on the electorate* need not include an intent element to be constitutional. *Vannatta* upheld the constitutionality of the statute requiring public identification of candidates who broke expenditure-cap promises even though the statute did not require that the deceit have been intentional:

> The fact that a candidate may have intended to abide by expenditure limitations when he or she made the pledge, and only later decided to ignore that promise, does not make the failure to abide by the promise any less a fraud on the voters who have relied on the candidate's Voters' Pamphlet statement to choose their candidate.

324 Or at 545 n 28. Similarly, voters are defrauded when the Secretary of State publishes campaign-finance reports that include inaccurate information regarding the identities of campaign contributors, whether or not the people who made the false-name contribution intended the deception. Thus, ORS 260.402 falls within the same "historic exception" that *Vannatta* applied to the statute imposing consequences for

breaking campaign-expenditure-cap pledges. Whether that is a stand-alone exception related to deception of the electorate, or a contemporary variant of the exception for common-law fraud, no intent element is required under *Vannatta.*

Alternatively, if ORS 260.402 can be constitutional only if it requires the state to prove that a person who made a false-name contribution *intended* to deceive a voter or a campaign, this court should read that intent element into the statute. *See State v. Moyle*, 299 Or 691, 703-04, 705 P2d 740 (1985) (construing harassment statute to apply only to a limited range of threats accompanied by an expression of intent to carry out the threats); *see also State v. Rangel*, 328 Or 294, 303-06, 977 P2d 379 (1999) (similar holding with respect to stalking statute, relying on *Moyle*). That narrowing would be more consistent with legislative intent than striking the statute in its entirety on the ground that it might be unconstitutional as applied in some circumstances.

c. ORS 260.402 falls within the second *Robertson* category and is constitutional because it is not overbroad.

As explained above, ORS 260.402 falls within the second *Robertson* category because it is directed against the harm of deceiving voters and campaigns.[15] The question then becomes whether the statute reaches constitutionally protected expression. If it does so only "at its margins," the statute is facially valid, although it may successfully be challenged as applied to particular circumstances. *State v. Illig-Renn*, 341 Or 228, 232, 142 P3d 62 (2006). If the statute does reach protected

[15] Those are, of course, the same harms that the state believes also save the statute even if it properly is viewed as falling within *Robertson* "category one."

expression more than rarely, this court considers "whether a narrowing construction is possible to save it from overbreadth." *Rangel*, 328 Or at 299. ORS 260.402 is constitutional because it restricts little, if any, *protected* expression.

As explained above, the only expression that ORS 260.402 restricts is the misrepresentation associated with a false-name contribution. Article I, section 8, does not protect that expression, which causes "real harm" to voters when the true contributor's donations reach the threshold reporting amount. The legislature's intent that ORS 260.402 prevent that harm is evident when the statute is read in context with the rest of chapter 260's record-keeping, reporting and public-disclosure provisions; thus, this court need not speculate about the harm against which the statute is directed.[16] And even small false-name contributions harm political campaigns, which must rely on accurate identification of campaign contributors when fulfilling their own reporting obligations and making strategic campaign decisions. To the extent that ORS 260.402 might not be constitutional as applied to some small false-name donations that do not cause actual harm, that application is "at the margins" of the statute's reach and does not present so significant a problem as to justify striking the entire statute as invalid on its face.

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[16] In this respect, ORS 260.402 is analogous to the child-pornography statutes at issue in *State v. Stoneman*, 323 Or 536, 545-47, 920 P2d 535 (1996). Although the particular statutes being challenged do not explicitly identify the harm against which they are directed, when read in context with related legislation (in *Stoneman*, the laws criminalizing child sex abuse), the legislature's intent is manifest. There is no merit to defendants' contention that ORS 260.402 cannot be a "*Robertson* category two" statute because the statute does not explicitly describe the targeted harms. (*See, e.g.*, Def BOM 27).

Finally, even if the statute were overbroad because it reaches campaign contributions that do not trigger reporting requirements, this court easily could narrow the statute consistent with legislative intent. The legislature has designed a complex system of campaign-finance disclosure requirements precisely so the voters can learn who funds political campaigns in this state. Facial invalidation of ORS 260.402 would wreak havoc with that system, allowing manipulation of the information that is available to the electorate. Instead, if this court determines that the statute reaches too far, it should narrow the statute consistent with the legislature's determination that a particular size of donation—now, $100—is significant enough that the public should know about it. That is, the court should announce only that ORS 260.402 is unconstitutional as applied to contributions that do not, either solely or in aggregate with the true contributor's other donations, meet that public-reporting threshold. That type of narrowing respects the legislature's right to criminalize false-name contributions that do cause real harm, and respects the legislature's determination of the size of donation that has public significance.

C. ORS 260.402 is not overbroad under the federal constitution.

Defendants assert that ORS 260.402 is overbroad under both the federal and state constitutions, but do not develop a separate First Amendment argument. (*See* Def BOM 43-46). In light of *Buckley v. Valeo*—a case not mentioned in the pertinent portion of defendants' brief—the absence of a distinct federal argument is not surprising. In *Buckley*, the United States Supreme Court upheld the constitutionality of a statute requiring campaigns to report the identity of every person who contributed more than $100. 424 US at 65-68. And Supreme Court cases decided since *Buckley*

do not call into question that central holding. For example, even when it struck down prohibitions against anonymous leafleting in *McIntyre v. Ohio Elections*, the Court approvingly cited *Buckley*'s holding that Congress may require candidates to disclose the identities of people to contribute to their campaigns, because of "the importance of providing 'the electorate with information as to where political campaign money comes from and how it is spent by the candidate.'" *McIntyre*, 514 US 334, 354, 115 S Ct 1511, 131 L Ed 2d 426 (1995) (quoting *Buckley*; internal quotation marks omitted). The distinction, according to the Court, is that the anonymous-leafleting prohibition was not prompted by concerns about corruption similar to those that justified the disclosure requirements in *Buckley*.[17]

Given that the First Amendment does not prevent Congress from requiring that campaign contributors be publicly identified, it is difficult to understand how the federal constitution could, nonetheless, prohibit the Oregon legislature from requiring that any identification that occurs be accurate. Defendants' federal overbreadth argument cannot withstand *Buckley*.

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[17] In a more recent case, *Davis v. Federal Election Commission*, the Supreme Court invalidated a law that imposed "asymmetrical [campaign] contribution limits" on self-financed candidates. __ US __, 128 S Ct 2759, 171 L Ed 2d 737 (2008). Having held those limitations unconstitutional, the court then also invalidated certain disclosure requirements that "were designed to implement" the unconstitutional limits, reasoning that the disclosure no longer served a valid purpose. __ US at __, 128 S Ct at 2775. But *Davis* relied on *Buckley*'s assessment of when disclosure requirements are constitutional; it did not alter that analysis.

D. ORS 260.402 is not unconstitutionally vague.

This court, like the Court of Appeals, should not be detained long by defendants' alternative argument that ORS 260.402 is unconstitutionally vague. *See Moyer*, 225 Or App at 97-98. Defendants invoke several constitutional provisions as support for their vagueness argument. (*See* Def BOM 47-50). At bottom, however, defendants' vagueness claims all center on describing various hypothetical circumstances and asserting that it is difficult to tell whether ORS 260.402 would apply in those situations. (*See, e.g.*, Def BOM 47). As explained in detail below, those arguments fail because they do not meet the fundamental challenge of a facial vagueness claim: to establish that the challenged statute is unconstitutional in *all* of its applications, not merely in some circumstances.[18]

1. This court will not strike a statute because it is unconstitutionally vague on its face unless the statute is unconstitutional in all its applications.

Defendants first contend that the terms of ORS 260.402 "invite arbitrary and unequal application and allow uncontrolled discretion in its prosecution." (Def BOM 47-48). That kind of vagueness claim arises under both the state and federal constitutions, which prohibit the legislature from enacting statutes that are so vague that they allow judges or juries "to exercise uncontrolled discretion in punishing defendants." *Illig-Renn*, 341 Or at 239 (quoting *State v. Graves*, 299 Or 189, 195,

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[18] On the vagueness issue, defendants' brief on the merits largely echoes their briefing in the Court of Appeals. The state, too, has adapted its Court of Appeals briefing on this point. Accordingly, much of what appears in this section of the brief is very similar to the state's reply brief in the Court of Appeals.

700 P2d 244 (1985)).[19] Defendants also argue that the statute does not provide "fair notice" of the conduct that it prohibits. (Def BOM 49-50). That argument arises under the federal Due Process Clause, not under the state constitution. *Illig-Renn*, 341 Or at 239 n 4.

Both types of facial vagueness claims can succeed only if the person challenging a statute shows that it is "vague in all [its] possible applications." *State v. Compton*, 333 Or 274, 280, 39 P3d 833 (2002) (addressing "uncontrolled discretion" claim); *see Delgado v. Souders*, 334 Or 122, 150, 46 P3d 729 (2002) (a person challenging a statute on "fair notice" grounds must establish that the statute is "unconstitutionally vague 'in *all* of its applications'"; citation omitted; emphasis by *Delgado* court). A statute is unconstitutionally vague in all its applications if it specifies no discernable standard of conduct at all. *Chakerian*, 325 Or at 381-82.

> A corollary to that limitation is that a party who engages in "conduct that is clearly proscribed" cannot complain that the statute is unconstitutionally vague with respect to others. That must be the case

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[19] On the state level, the "uncontrolled discretion" branch of the vagueness doctrine arises from Article I, sections 20 and 21, of the Oregon Constitution. *See Illig-Renn*, 341 Or at 239. Those sections state, in part:

> No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

Or Const, Art I, § 20.

> No *ex-post facto* law * * * shall ever be passed * * *.

Or Const, Art I, sec 21. The Due Process Clause of the Fourteenth Amendment to the United States Constitutional also protects against this kind of vagueness problem. *Illig-Renn*, 341 Or at 239.

> because, if a party's conduct clearly is proscribed by a statute, then that statute by definition cannot be said to be vague in *all* its applications.

Id. at 382 (emphasis in original; citations omitted).

The state explains in the next sections of this brief why ORS 260.402 is not unconstitutionally void for vagueness. In short, the statute neither creates an "uncontrolled discretion" problem nor fails to give defendants "fair notice" of what is unconstitutional. As an initial matter, though, it is worth noting that defendants have not grappled with the "unconstitutional in all applications" principle. Nowhere in their briefing, before either this court or the Court of Appeals, have defendants attempted to demonstrate that there is *no* conduct that the statute clearly proscribes. Instead, defendants merely describe particular hypothetical acts and argue that it is not clear whether the statute would criminalize those behaviors. (*See* Def BOM 47-48; Resp Br 40-41 & n 18). But even if defendants were correct that ORS 260.402 might be unconstitutionally vague as applied to some hypothetical circumstances, that sort of case-specific uncertainty would not make the statute unconstitutional on its face. As the state discusses below, it is only at the margins, if at all, that ORS 260.402 is unclear in any significant way.

2. The statute does not give judges, juries or police officers "uncontrolled discretion" to determine what behavior is illegal.

As noted above, both the state and federal constitutions require criminal statutes to include standards that prevent the laws from being enforced on an ad hoc basis. Article I, section 20, of the Oregon Constitution protects people from statutes that give "unbridled discretion to judges and jurors to decide what is prohibited in a given case * * *." *State v. Graves*, 299 Or 189, 195, 700 P2d 244 (1985). Similarly,

Article I, section 21, protects people from statutes that "permit a judge or jury to exercise uncontrolled discretion in punishing defendants, because this offends the principle against *ex post facto* laws * * *." *Ibid*. The Fourteenth Amendment to the United States Constitution also requires that statutes provide adequate standards aimed at preventing "arbitrary and discriminatory enforcement * * *." *Hoffman Estates v. Flipside, Hoffman Estates*, 455 US 489, 498, 102 S Ct 1186, 71 L Ed 2d 362 (1982).

The common concern reflected in those constitutional provisions is that statutes not leave the definition of crimes "to the ad hoc judgment of the individual police officer, judge or jury." *Illig-Renn*, 341 Or at 240. Instead, a statute should provide "ascertainable standards." *Id.* Nonetheless, 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." *Id.* at 239 (quoting *Graves*, 299 Or at 195). Rather, only "a reasonable degree of certainty is required * * *." *Id.*

Statutes that have been held unconstitutionally vague under that standard generally called upon police officers, judges or juries to make *subjective* assessments of whether certain behavior fit the statutory proscription. For example, in *State v. Graves*, the statute defining "burglar's tool" included the phrase "*commonly used* for committing or facilitating a forcible entry into premises or theft by a physical taking." 299 Or at 191 (emphasis added). The Supreme Court concluded that the term

"commonly used" was vague because different people could give it different meanings:

> It is unclear to which geographic area "common use" should be applied. Common usage may vary by precinct, county, state or region. Also, unlike the other adjectives in the catch-all phrase here under review, "commonly used" does not refer to a specific article. It requires a potential defendant to know about other burglars' practices.

Id. at 196; *see id.* at 197 (statute invited "standardless and unequal application").

The challenged statute in *Kolender v. Lawson* also included terms that could be interpreted subjectively, by requiring anyone wandering the streets to provide "credible and reliable" identification to a peace officer upon request. 461 US 352, 353, 103 S Ct 1855, 75 L Ed 2d 903 (1983). The United States Supreme Court held the statute unconstitutionally vague because it provided "no standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification." *Id.*, 461 US at 358. The Court suggested that different police officers, with different beliefs about what is "credible and reliable," had "virtually complete discretion * * * to determine whether the suspect has satisfied the statute." Consequently, the statute was unconstitutional on its face. *Id*. *See also City of Chicago v. Morales*, 527 US 41, 47, 62, 119 S Ct 1849, 144 L Ed 2d 67 (1999) (statute making it unlawful to "remain in any one place with no apparent purpose" was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"; the statute was, therefore, unconstitutional).

ORS 260.402 does not suffer from the type of flaw that rendered the *Graves*, *Kolender* and *Morales* statutes unconstitutional. A plain reading of the statute gives

the requisite "reasonable degree of certainty" about what behavior is prohibited—making a campaign contribution in a false name:

> 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.

ORS 260.402 (2003).

Nothing in this statute calls for the sort of subjective assessment that can make a statute unconstitutionally vague. A police officer's or judge's personal views and perceptions do not come into play when determining, as a matter of law, whether money that has been donated is "a contribution," whether the circumstances surrounding the donation mean that it "relat[es] to a * * * candidate or * * * measure," or whether the contribution has been made in a "name other than that of the person who in truth provides the contribution." Although a jury may need to be instructed about the meaning of those phrases in a particular case, they are not so open-ended as to render ORS 260.402 unconstitutionally vague. *Cf. Illig-Renn*, 341 Or at 243 (although "there may be room to argue about whether certain conduct does or does not fall within the 'passive resistance' exception [to the crime of interfering with a peace officer], the exception is not broad enough to obfuscate the meaning of the overall prohibition").

Nonetheless, defendants contend that two terms in ORS 260.402 are so unclear that the statute is unconstitutionally vague. Defendants first complain that the words "relating to" are "not adequately defined by common usage or context," with the result that the statute could reach any donation that "*eventually* serves to benefit a

measure or campaign." (Def BOM 47; emphasis added). Defendants conclude that the term is so broad that it could lead to the criminalization of a person's decision to pick up the tab at a dinner where he and his friends "decide if they should encourage a person to run for a local office." (Def BOM 47). Because the potential reach of ORS 260.402 is so broad, defendants argue, the statute lacks any discernable standard of conduct.

By focusing on this single hypothetical, defendants' argument ignores the "unconstitutional in all applications" rule. Moreover, the phrase "relating to" does not leave the statute devoid of any objective standard of behavior, as defendants suggest. Again, ORS 260.402 (2003) provides:

> 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.

(Emphasis added). Thus, the phrase "relating to" connects "a contribution" and "a nomination or election of any candidate or the support or opposition to any measure." In other words, inclusion of "relating to" ensures that the statute may be triggered only when a person makes a contribution that is related to a political candidate or ballot measure. The text narrows the breadth of the statute and more clearly defines the behavior it criminalizes; it does not create uncertainty.

In addition, by using the present-tense phrase "relating to," the legislature indicated that the contribution must relate to a candidate or measure *at the time it is made*. *See Martin v. City of Albany*, 320 Or 175, 181, 880 P2d 926 (1994) ("The use of a particular verb tense in a statute can be a significant indicator of the legislature's

intention"). Consequently, the statute applies only when a person makes a contribution that *currently* relates to a candidate or measure.

The statutory definition of "contribution" further sharpens the meaning of "relating to" as used in ORS 260.402. To be a "contribution," money or something else of value must be given "[f]or the purpose of influencing an election, * * * of reducing the debt of a candidate * * * or the debt of a political committee" or must be made "[t]o or on behalf of a candidate, political committee or measure." ORS 260.005. Thus, contributions "relating to" a candidate are those that are made *to* the candidate or to influence his or her chances of being elected. Consequently, ORS 260.402 would not reach even the hypothetical dinner-party behavior that defendants describe because, in that scenario, nobody picked up the tab *for the purpose of influencing* an election.

In sum, the legislature's use of the phrase "relating to" in ORS 260.402 does not mean "the statute is lacking any 'discernable standard of conduct,'" as defendants contend. (Def BOM 47). To the contrary, the phrase clarifies the statute's reach in a way that allows a person of ordinary intelligence to be reasonably certain about the scope of behavior the statute prohibits. Nothing more is required.

Defendants also contend that the phrase "in truth provides" is hopelessly vague. (Def BOM 47). Again, they rely on fact-specific hypothetical examples, pondering, for example, whether a car-wash owner who allows his facility to be used for a fundraiser is the person "who in truth provides" the resulting donation to a candidate. (Def BOM 48). But any uncertainty about whether the statute prohibits

that behavior—which fairly may be characterized as behavior "at the margins"—does not render the statute unconstitutionally vague *on its face*. What matters is that a reasonably intelligent person easily can discern circumstances in which the statute clearly would apply: to take an obvious example, when one person gives an employee and a relative money to donate to a political candidate, with instructions that those other people contribute the money in their own names without disclosing the source of the funds. Because ORS 260.402 does not give police officers, judges or juries any discretion to determine whether that type of behavior is illegal, the statute is not unconstitutionally vague on its face.

3. The statute gives defendants fair notice of what behavior is illegal.

The Due Process Clause of the Fourteenth Amendment also requires statutes to give persons of ordinary intelligence "fair notice" or "a reasonable opportunity to know what is prohibited." *Hoffman Estates,* 455 US at 498. In assessing a "fair warning" claim, this court determines "whether the statute would 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *Illig-Renn*, 341 Or at 241 (quoting *Grayned v. City of Rockford,* 408 US 104, 108, 92 S Ct 2294, 33 L Ed 2d 222 (1972)). ORS 260.402 satisfies that standard.

ORS 260.402 gives ordinarily intelligent people reasonable notice of the behavior it prohibits for the same reasons that it does not give police officers, judges or juries unbridled discretion to determine what behavior the statute forbids. As discussed above, a reasonably intelligent person can determine by reading the statute that it prohibits donating money to a candidate or cause in a way that indicates that

one person has contributed the money when, in fact, a different person made the contribution. Although people reasonably might disagree about whether the statute would apply in certain hypothetical circumstances like those outlined in defendants' brief, "absolute precision is not required to overcome a facial vagueness challenge." *Illig-Renn*, 341 Or at 243. Individuals prosecuted under ORS 260.402 who believe that the statute did not give them fair notice that the behavior in which *they* engaged was illegal may present that argument in as-applied vagueness challenges to the statute.

CONCLUSION

This court should affirm the Court of Appeals' decision, which rejected each of defendant's constitutional challenges to ORS 260.402 and remanded this case to the trial court for further proceedings.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 29, 2009, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on July 29, 2009 I directed the Brief on the Merits of Respondent on Review to be served upon Michael T. Garone, attorney for petitioner on review Thomas Paul Moyer, Ronald H. Hoevet, attorney for petitioner on review Vanessa Colleen Sturgeon and upon Janet Lee Hoffman, attorney for petitioner on review Sonja R. True, by mailing two copies, with postage prepaid, in an envelope addressed to:

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