CONSTITUTIONALITY OF CAMPAIGN CONTRIBUTION AND EXPENDITURE LIMITS AND POLITICAL ADVERTISEMENT TAGLINE REQUIREMENTS IN OREGON

Testimony of Daniel Meek, Attorney

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Whether a particular statute or rule or government policy is "constitutional" is not etched in stone. For example, until last year the Oregon Supreme Court for decades had issued opinions stating that the courts of Oregon had no power, under the Oregon Constitution, to hear cases where the plaintiff had no "personal interest" or actual stake in the outcome or cases which had become moot during the judicial process, such as cases involving the conduct of elections after the election is over. But in July 2015 the Oregon Supreme Court expressly reversed those opinions in ***Couey v. Atkins***, 357 Or 460, 355 P3d 866 (2015).[1]

Express abrogation of earlier opinions is not as unusual as non-lawyers may think.

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1. The plaintiff, Marquis Couey, was represented by Linda K. Williams and me.

1. OREGON COURTS ARE REASONABLY LIKELY TO UPHOLD LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS.

Reformers in Oregon face the unique hurdle that the Oregon Supreme Court ruled in ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997) ("***Vannatta 1***") that the free speech clause of the Oregon Constitution disallows limits on political contributions. The decision struck down most of Measure 9 of 1994, and the Oregon Legislature then repealed the parts of Measure 9 of 1994 that the Oregon Supreme Court had upheld.

Oregon's free speech clause is essentially identical to similar clauses in the constitutions of 36 other states. But no other state court has held that a state free speech clause in any way precludes limits on political contributions.

Oregon voters again in 2006 enacted stringent limits on political contributions. The Oregon Supreme Court in 2012 ruled in ***Hazell v. Brown***, 352 Or 455, 287 P3d 1079 (2012), that those limits are currently in limbo. The Court did not rule the limits contrary to Oregon's free speech clause; it did not address that issue.

At the end of 2010, however, in a case involving limits on "gifts" by lobbyists to candidates and public officials, the Oregon Supreme Court repudiated the basis for its 1997 opinion regarding Measure 9 of 1994: that contributions (transfers of money or property) constitute "expression" that receives free speech protection. ***Vannatta v. Oregon Government Ethics Com'n***, 347 Or 449, 222 P3d 1077 (2009), *cert denied*, 560 US 906, 130 SCt 3313, 176 LEd2d 1187 (2010) ("***Vannatta II***").

Justice Robert Durham's dissent in ***Hazell v. Brown*** (2012) pointed the way to further litigation about contribution limits. Justice Durham noted how the Court's 1997 decision, ***Vannatta I***, was very substantially eroded by the 2010 gift limits case, ***Vannatta II***.[2] He stated:

> The majority's reliance here on the absolute declaration, quoted above, in ***Vannatta I*** is not correct. This court already has begun to reconsider and pull back from that absolute statement. In ***Vannatta v. Oregon Government Ethics Comm.***, 347 Or 449, 464, 222 P3d 1077 (2009) (***Vannatta II***), this court acknowledged the extreme nature of the statement in ***Vannatta I***, but attempted to clarify and explain it, and, I submit, to alter it. Thus, ***Vannatta II*** declared that the

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2. Justice Durham was the only member of the 2010 Oregon Supreme Court who had also served there in 1997.

statement in ***Vannatta I*** that a campaign contribution constituted free speech regardless of the ultimate use to which the contribution was put

> "was unnecessary to the court's holding. On further reflection, we conclude that that observation was too broad and must be withdrawn. Second, because ***Vannatta I*** assumed a symbiotic relationship between the making of contributions and the candidate's or campaign's ability to communicate a political message, this court did not squarely decide in ***Vannatta I*** that, in every case, the delivery to a public official, a candidate, or a campaign of money or something of value also is constitutionally protected expression as a matter of law."

Vannatta II, 347 Or at 465, 222 P3d 1077. ***Vannatta II*** makes it clear that this court already has begun the process of reconsidering the absolute position voiced in ***Vannatta I*** and, as a consequence, to focus the free speech analysis under Article I, section 8, on whether a financial contribution in fact constitutes not merely a delivery of property but an act of protected expression by the donor.

Aside from the problems already noted, the court's reasoning in ***Vannatta I*** for its absolute conclusion seems suspect. A campaign contribution, as noted, is a gift of property. A delivery of property may be accompanied by a donor's protected expressions of political or personal support, but that constitutional protection pertains to the donor's words, not the delivery of property by itself. It may be possible to imagine circumstances in which the delivery of an article of property or money might constitute expression, perhaps akin to wearing a black armband. But an act--giving property to another--that does not constitute free speech in most conceivable contexts is not transformed into protected speech simply because the donee is a candidate or campaign and the donor is a political supporter. The answer cannot consist of categorically pronouncing, as the court did on occasion in ***Vannatta I***, that contributing political money constitutes speech always or even most of the time. Rather, the answer depends on a careful examination of all the circumstances to determine whether and to what extent the conduct of giving or spending political money itself constitutes a protected expression.

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> In my view, this court should be particularly sensitive to the need to reassess its past statements concerning the impact of the constitution on the giving and spending of political money because the exact scope of the legislature's authority in that area turns on the answer.
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> This court has expressed its willingness to reconsider prior interpretations of the state constitution or statutes under the correct circumstances. ***Stranahan v. Fred Meyer, Inc.***, 331 Or 38, 54, 11 P3d 228 (2000).

Hazell v. Brown, 352 Or at 475-77.

Thus, it appears reasonably likely that the Oregon Supreme Court would now view limits on political contributions as constitutional.

Further, there is a strong public movement toward amending the Oregon Constitution to allow limits on political contributions.

2. OREGON COURTS ARE VERY LIKELY TO UPHOLD POLITICAL ADVERTISEMENT TAGLINE REQUIREMENTS.

There would appear no reason to believe that Oregon courts would invalidate requirements that political advertisements identify their major funders. In evaluating a statewide proposed initiative with a requirement very similar to that in the Multnomah County proposal, the Attorney General wrote on May 24, 2016:

> Nor have Oregon courts addressed whether any [] provision of the Oregon Constitution prohibits or limits such laws.

Laws requiring that political advertisements identify their source are in place in 46 states. The Oregon law so requiring was repealed by the Oregon Legislature in 2001. There appears to be no constitutional barrier to restoring such a law while enhancing it by requiring that the advertisements identify their true, original major sources of funding, not merely the nice-sounding names of political committees. Such enhanced laws are in place in several states, including California, Washington, Connecticut and Maine and to a lesser extent also Montana, Nebraska, Indiana, and Massachusetts.

3. THE U.S. SUPREME COURT, POST-SCALIA, IS LIKELY TO UPHOLD LIMITS ON CONTRIBUTIONS, LIMITS ON INDEPENDENT EXPENDITURES, AND TAGLINE REQUIREMENTS.

Even with its current 5-4 anti-reform majority, the U.S. Supreme Court has upheld limits on political contributions, which currently are in place in 44 states.

The U.S. Supreme Court, however, did in ***Citizens United*** (2010) by 5-4 vote strike down the prohibition on independent expenditures by corporations, unions, and other entities adopted in the McCain Feingold Act of 2002.

The Multnomah County proposal includes limits on independent expenditures that the "Scalia Court" may well have struck down. But that Court no longer exists. By the time challenges to the Multnomah County proposal get to the U.S. Supreme Court, the 5-4 majorities that struck down many campaign finance laws will be long gone. It is very likely that the next President will replace 3 of the 5 members of the ***Citizens United*** majority, because:

(1) Antonin Scalia is gone.

(2) Clarence Thomas announced that he is thinking about retiring.

(3) Anthony Kennedy will be 80 on July 23.

Assuming Hillary Clinton is President, replacing those 3 justices would produce a 7-2 majority in favor of reversing ***Citizens United*** and similar decisions. **But replacing Scalia is enough by itself.** And Hillary Clinton has publicly declared that reversing ***Citizens United*** is a litmus test for anyone she appoints to the Court. She stated at the March 6, 2016 debate: "On the first day of my campaign, I said, we are going to reverse ***Citizens United***."

> At the March 9 debate, she said, "So clearly, I would look for people who believe that ***Roe v. Wade*** is settled law and that ***Citizens United*** needs to be overturned as quickly as possible."
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> On April 14, she said: There is no doubt that the only people that I would ever appoint to the Supreme Court are people who believe that ***Roe v. Wade*** is settled law and ***Citizens United*** needs to be overturned.

4. THE U.S. SUPREME COURT, POST-SCALIA, IS LIKELY TO UPHOLD POLITICAL ADVERTISEMENT TAGLINE REQUIREMENTS.

Even the Scalia Court never struck down a law requiring that political advertisements prominently disclose their major funders. ***Citizens United*** upheld disclaimer requirements by a vote of 8-1, stating:

> The disclaimers required by § 311 "provide[e] the electorate with information," ***McConnell***, supra, at 196, 124 SCt 619, and "insure that voters are fully informed" about the person or group who is speaking, ***Buckley***, supra, at 76, 96 SCt 612.

Citizens United, 558 US 310, 368 (2010).

5. ADOPTING CONTRIBUTION LIMITS IS NECESSARY IN ORDER TO GENERATE THE COURT CHALLENGES NECESSARY TO OVERTURN *VANNATTA V. KEISLING* (OREGON 1997) AND *CITIZENS UNITED* (U.S. 2010).

The Multnomah County Commission has a history of doing what is right, whether or not that is contrary to then-current constitutional doctrine.

A. Multnomah County Commission approved same-sex marriage on March 3, 2004.

B. Oregon Attorney General on March 12, 2004, issued opinion that Oregon law prohibits same-sex marriage.

C. On March 15, 2004, Multnomah County Commission announced it would continue to issue marriage licenses to same-sex couples.

D. These actions by the Commission led to litigation that resulted ultimately in the legalization of same sex marriage in Oregon, despite the fact that Oregon voters in November 2004 placed into the Oregon Constitution a ban on same-sex marriage.

6. COMMENTS ON LETTER BY MULTNOMAH COUNTY ATTORNEY.

The Charter Review Committee received a memorandum and legal opinion from a Deputy County Attorney, dated March 16, 2016, on the subject of campaign finance reform.

The memorandum first appears to suggest that ORS Chapter 260 precludes local governments from adopting campaign finance reform laws. It does not. ORS 260.163 involves only city or county campaign finance provisions pertaining to the reporting of campaign contributions or expenditures to the government. And that law expressly allows cities and counties to adopt such provisions. There is nothing in ORS 260.163 or any other provision in Oregon statutes that precludes local governments from adopting political contribution limits or tagline requirements.

The memorandum then refers to Article II, Section 22, of the Oregon Constitution, without noting that it (Measure 6 of 1994) was struck down by the federal courts in 1998 because it prohibited all political contributions to Oregon candidates by any person or entity not a human resident of each candidate's district. It was not an ordinary political contribution limit. The memorandum draws no conclusions from the existence of Article II, Section 22.

I agree with the ultimate conclusion of the memorandum: "Therefore, any charter amendment attempting to impose a cap on campaign contributions would be subject to challenge as a violation of Article I, section 8 of the Oregon Constitution." That would be true for virtually any reform of the campaign finance system in Oregon. But, as shown at pages 1-3 above, Oregon courts are now reasonably likely to uphold limits on political campaign contributions and very likely to uphold requirements that political advertisements identify their major funders.

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