IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

In the Matter of:
Validation Proceeding to Determine the Regularity and Legality of Multnomah County Home Rule Charter Section 11.60 and Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure.

Civil No. 17CV18006

COMBINED REPLY BRIEF ON REMAND OF THESE INTERVENORS:

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I. AMICUS TAXPAYERS ASSOCIATION OF OREGON AND ITS PAC HAVE NO STANDING.

They have no recognized interest. Oregon Taxpayers Association and Oregon Taxpayers Association PAC [hereinafter collectively "TAO"] claim in their original Motion to Intervene:

> To fund their missions, including candidate contributions and independent expenditures, the Association Intervenors receive contributions from donors, including contributions exceeding the amounts proscribed by the Measure.

That is patently false. Measure 26-184 places no limits whatever on the contributions that TAO or TAO PAC receive from any source.

TAO and TAO PAC have no more interest in the application of Measure 26-184 than any other person or organization in Oregon. Hence, they lack standing. To have standing, a plaintiff must have "some injury or other impact upon a legally recognized interest beyond an abstract interest in the correct application or the validity of a law." ***Morgan v. Sisters Sch. Dist. No. 6***, 353 Or 189, 195 (2013) (citation omitted). Also, the relief that the plaintiff seeks must vindicate the right that is alleged to be injured. *Id.*, 353 Or at 197.

The status of TAO and TAO PAC in this case is merely *amicus*. Such a participant is not allowed to raise issues not raised by the actual parties.

> Amicus status, however, does not allow amici to raise issues or arguments and gives no right of appeal. ***United States v. City of Los Angeles***, 288 F3d 391, 400 (9th Cir 2002).

Manago v. Rosario, 91 Fed Appx 9, 10, 2004 WL 94045, at *1 (9th Cir 2004).

> An amicus may not raise issues not advanced by the parties themselves, id. at 165, and none of the Defendants raised this argument.

United States v. Mullet, 868 FSupp2d 618, 6245 (ND Ohio 2012).

> "In the absence of exceptional circumstances, which are not present here, [a court] does not address issues raised only in an amicus brief." ***Artichoke Joe's Cal. Grand Casino v. Norton***, 353 F3d 712, 719 n. 10 (9th Cir 2003) (citing ***Swan v. Peterson***, 6 F3d 1373, 1383 (9th Cir 1993)); ***Santiago v. Rumsfeld***, 425 F3d 549, 552 n. 1 (9th Cir 2005) ("We follow our general rule in declining to address these arguments [raised by amicus curiae, but] not raised by the parties.").

Rocky Mountain Farmers Union v. Goldstene, 2010 WL 1949146, at *2 (ED Cal May 11, 2010).

Even if TAO were an actual party in this case, it would not have standing to raise issues for which TAO has no recognized legal interest. TAO claims that the limits on a candidate's contributions to her own campaign violate the First Amendment. But TAO is not a candidate for office and, of course, never has been. That provision has no application to TAO. Nor has TAO alleged that any of its members (if members exist) are candidates for Multnomah County office. Even if they were, Oregon does not recognize "representational standing," so TAO would have no standing to assert the interests of those candidates.

> ORS 28.020 "does not allow an organization to assert the rights of its members[.]") ***Oregon Taxpayers United PAC v. Keisling***, 143 OrApp 537, 544, 924 P2d 853 (1996).

Oregon Trucking Associations, Inc. v. Dept. of Transp., 288 OrApp 822, 824, 407 P3d 849 (2017), *aff'd*, 364 Or 210 (2019).[1]

TAO might reply that the Oregon Supreme Court in ***Multnomah County v. Mehrwein***, 366 Or 295, 329, 462 P3d 706 (***Mehrwein***), remanded this case to the Circuit Court to address First Amendment issues. The only First Amendment issue

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1. See also Response of the Citizen Parties to "Appearance and Motion to Intervene of Taxpayers Association of Oregon and Taxpayers Association of Oregon Political Action Committee" (July 19, 2017), pp. 9-10.

raised by any party in the First Round was this passage in the Appearance and Contest of Alan Mehrwein (et al.) (June 2, 2017), p. 3:

> Subsections (l)(a) and (b) and (2Xa) and (c) of the Charter Amendment violate the rights of Mehrwein, PBA, PMAR, and AOI to free expression under Article I, section 8, of the Oregon Constitution and the First Amendment of the United States Constitution as made applicable to the County through the Fourteenth Amendment.
>
> 14.
>
> Subsection (3) of the Charter Amendment violates the rights of Mehrwein, PBA, PMAR,and AOI to speak anonymously under Article I, section 8, of the Oregon Constitution and the First Amendment of the United States Constitution as made applicable to the County through the Fourteenth Amendment.

The Mehrwein parties (Mehrwein, PBA, PMAR, AOI) then did not brief any First Amendment issues in the First Round, either in Circuit Court or on appeal. Yet, the issues were technically raised in the First Round. But now there is no party pursuing them.

Note that the only issue raised by TAO is a federal one. Hence, federal concepts of standing and justiciability apply, which are considerably more stringent than Oregon's, according to ***Couey v. Atkins***, 357 Or 460, 502, 355 P3d 866 (2015).

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. ***Lujan***, 504 U.S., at 560, 112 S.Ct. 2130. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Id.*, at 560-561, 112 S.Ct. 2130; ***Friends of the Earth, Inc.***, 528 U.S., at 180-181, 120 S.Ct. 693.

Spokeo, Inc. v. Robins, 136 S Ct 1540, 1547, 194 LEd2d 635 (2016).

> To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." ***Lujan***, 504 U.S., at 560, 112 S.Ct. 2130 (internal quotation marks omitted).

Id., 136 SCt at 1547-48.

> For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Ibid.*, n.1; see also, e.g., ***Cuno***, *supra*, at 342, 126 S.Ct. 1854 ("'plaintiff must allege personal injury' "); ***Whitmore v. Arkansas***, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("'distinct'"); ***Allen v. Wright***, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("personal"); ***Valley Forge***, *supra*, at 472, 102 S.Ct. 752 (standing requires that the plaintiff "'personally has suffered some actual or threatened injury'"); ***United States v. Richardson***, 418 U.S. 166, 177, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (not "undifferentiated"); ***Public Citizen, Inc. v. National Hwy. Traffic Safety Admin.***, 489 F.3d 1279, 12921293 (DC Cir 2007) (collecting cases).

Id., 136 SCt at 1548.

II. NO PARTY HAS MADE THE REQUIRED EVIDENTIARY SHOWING THAT THE CONTRIBUTION LIMITS ARE A BURDEN ON PROTECTED SPEECH.

Multnomah County v. Mehrwein, 366 Or at 329, recognized that there are "factual findings that are necessary to" determining whether the contribution limits violate the First Amendment. A party challenging the constitutionality of contribution limits must show that the restriction is a severe burden on speech in order to invoke strict scrutiny under the First Amendment. ***Nixon v. Shrink Missouri Government PAC***, 528 US 377, 392, 120 SCt 897, 145 LEd2d 886 (2000) (***Shrink Missouri***); ***Prete v. Bradbury***, 438 F3d 949, 951 (9th Cir 2006); ***Crawford v. Marion Cty. Election Bd.***, 553 US 181, 200-01, 128 SCt 1610, 1612, 170 LEd2d 574 (2008).

The U.S. Supreme Court requires an evidentiary showing (that the contribution limit imposes a "significant inference with associational rights") to establish the need to satisfy even the lesser standard that the contribution limits are "closely drawn' to match a 'sufficiently important interest.'" ***Fed. Election Comm'n v. Beaumont***, 539 US 146, 161-62, 123 SCt 2200, 2210 (2003) (***FEC v. Beaumont***).

Neither any party nor TAO has submitted evidence that the Measure 26-184 contribution limits impose a "significant inference with associational rights" or with speech rights. Absent such a finding, those limits are not even subject to the lesser standard and thus necessarily pass First Amendment review. TAO submitted no evidence at all.

III. THE AVAILABLE SOURCES OF FACTUAL FINDINGS AND EVIDENCE.

A. MEASURE 26-184 IS SUPPORTED BY LEGISLATIVE FINDINGS OF FACT ENTITLED TO NEAR TOTAL DEFERENCE.

TAO does not contest this.

B. MEASURE 26-184 IS SUPPORTED BY THE DECLARATIONS SUBMITTED BY THE CITIZEN PARTIES.

TAO does not contest this.

IV. THE CONTRIBUTION LIMITS ARE NOT "SUBSTANTIALLY LOWER THAN BOTH THE LIMITS PREVIOUSLY UPHELD AND COMPARABLE LIMITS IN OTHER STATES."

TAO (pp. 6) incorrectly claims that the Multnomah County limits are "lower than any that the Supreme Court has upheld, the first danger sign under ***Randall/Thompson***." TAO (p. 12) makes the same claim. TAO (p. 7) incorrectly states, "The Supreme Court sees it as a danger sign if the County's limits are among the lowest in the nation." TAO both times misstates the "danger sign," which was whether the "contribution limits are substantially lower than **both** the limits we have previously upheld **and** comparable limits in other States." ***Randall v. Sorrell***, 548 US

230, 253, 126 SCt 2479, 165 LEd2d 482 (2006) (***Randall***) (emphasis added).

Mehrwein, 366 Or at 327-28, stated:

> First, the [***Randall***] opinion identified "danger signs," principally that Vermont's "contribution limits are substantially lower than both the limits we have previously upheld and comparable limits in other States." *Id.* at 253.

The "danger sign" is the combination of two factors, not just one or the other.[2]

TAO does not address the jurisdictions with contribution limits lower than Measure 26-184 for contests comparable to Multnomah County elections, including Alaska, Colorado, Connecticut, Kansas, Montana, and Maine, none of which have been struck down.[3] ER-15-28, ER-44. Instead, TAO (p. 8) looks only at some states with low populations and higher limits.

The Reply Brief of the Citizen Parties, pp. 14-15, shows that many states and local governments have contribution limits similar to or lower than those of Measure 26-184, none of which have been invalidated in court. Exhibit R3 (ER-45-46); Exhibit R4 (ER-47-48); Exhibit 1, Decl. Daniel Meek. In particular, many cities and counties in California and Washington have limits lower than those adopted in Measure 26-184. The California table identifies 48 cities and counties with lower limits and 24 with the same $500 limit. There include large population centers, such as San Francisco, Sacramento County, Berkeley, Burbank, Long Beach, Chula Vista, Irvine, Livermore,

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2. The Oregon Supreme Court's references to the ***Randall*** opinion are actually to the Breyer opinion there, which ***Mehrwein*** concluded was the narrowest grounds for ***Randall*** decision. ***Thompson v. Hebdon***, 140 SCt 348, 205 LEd2d 245 (2019), refers to that same Breyer opinion as the ***Randall*** "plurality opinion." The references to ***Randall*** in this brief are to the Breyer "plurality opinion."

3. https://ballotpedia.org/State-by-state_comparison_of_campaign_finance_requirements

Pomona, Roseville, Santa Rosa, and others. The limits in San Diego ($550) and Los Angeles ($700) are not much higher.

Seattle limits contributions to candidates for mayor, city council or city attorney to $500 per election cycle. Seattle City Code § 2.04.370. Spokane limits contributions to candidates for any city to "50% of the applicable contribution limit set by the Washington Public Disclosure Commission from any person. Spokane City Code § Section 01.07.030. That statewide limit applicable to cities is $1000 per election, rendering the Spokane limit at $500.

Instead of examining the evidence already presented by the Citizen Parties, TAO (p. 8) laments that "the parties have not provided comprehensive data of the type necessary for comparison to counties under the second ***Randall/Thompson*** danger sign." The Citizen Parties have provided data on dozens of local jurisdictions. TAO was free to submit evidence but failed to do so.

Note that the test suggested in ***Mehrwein***'s excerpt from ***Randall v. Sorrell***, 548 US 230, 126 SCt 2479, 165 LEd2d 482 (2006) (***Randall***) is that contribution limits are suspect, if they "are substantially lower than both the limits we have previously upheld and comparable limits in other States." The test is not whether the contribution limits at issue are substantially lower than <u>either</u> the previously upheld limits or comparable limits in other jurisdictions. To be suspect, the contribution limits must be substantially lower than both the previously upheld limits <u>and</u> limits in other jurisdictions. TAO does not at all attempt to compare the Measure 26-184 limits to those in other local government jurisdictions and presents no response to Exhibits R3

and R4 (ER-45-48). Thus, TAO has not even attempted to show that the Measure 26-184 limits contravene the ***Mehrwein*** view of ***Randall***.

TAO (p. 6) attempts to establish the $1,000 limit (in 1976 dollars) upheld in ***Buckley v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659 (1976) (***Buckley***) as the lowest limit that survives scrutiny. But the U.S. Supreme Court has expressly rejected that notion.

> In ***Buckley***, we specifically rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. As indicated above, we referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to "amas[s] the resources necessary for effective advocacy," 424 U.S., at 21, 96 S.Ct. 612. We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming. As Judge Gibson put it, the dictates of the First Amendment are not mere functions of the Consumer Price Index. 161 F.3d, at 525 (dissenting opinion).

Shrink Missouri, 528 US at 397.

TAO (pp. 7, 7-8) repeatedly claims that the "danger sign" identified in ***Randall*** is that the limits are among "the lowest in the Nation." That was not a "danger sign" specified in ***Randall***. The opinion remarked that the Vermont limits were "the lowest in the nation" 548 US at 250, but the "danger sign" was when "contribution limits are substantially lower than **both** the limits we have previously upheld **and** comparable limits in other States." 548 US at 253 (emphasis added).

Further, the notion that contribution limits cannot pass First Amendment muster, if they are the lowest in the nation, makes no sense. The logical result of that analysis

is that all limits would be struck down, no matter how high. One need only address the validity of the limits in the order of lowest first. Once the lowest limits are struck down, the second lowest limits become the lowest and therefore must also be struck down, causing the third lowest limits to become the lowest and therefore be struck down, and so on until all limits are struck down.

TAO fails to address the fact that federal courts have upheld many sets of limits that are lower than those adopted in Measure 26-184. Our OBRCP (pp. 10-11, 23-24, 34,36) discussed:

1. ***Lair v. Motl***, 873 F3d 1170 (9th Cir 2017), *cert den sub nom* ***Lair v. Mangan***, 139 SCt 916, 202 LEd2d 644 (2019) ("***Lair III***"): upheld Montana's low limits, including a limit of $340 per election cycle to any candidate for city or county office from any individual or political committee, applying ***Randall***;

2. ***Thompson v. Hebdon***, 909 F3d 1027 (9th Cir 2018) (discussed below);

3. ***Thalheimer v. City of San Diego***, 2012 WL 177414 (SD Cal 2012): upheld San Diego's $500 limit on contributions to candidates in city races, applying ***Randall*** (San Diego has 75% more people than Multnomah County);

4. ***Zimmerman v. City of Austin*** 881 F3d 378 (5th Cir 2018), *cert denied*, 139 SCt 639, 202 LEd2d 492 (2018): upheld $350 limit on contributions to candidates for city council, applying ***Randall*** (Austin has 20% people and 35% more registered voters than Multnomah County);

5. ***Ognibene v. Parkes***, 671 F3d 174, 179-80 (2d Cir 2011), *cert denied*, 567 US 935, 133 SCt 28 (2012): upheld limits of $400 for the three New York City-wide offices, $320 for Borough offices, and $250 New York City Council, while banning all corporate contributions, applying ***Randall***).

TAO fails to address *Lair III*, *Thalheimer*, *Zimmerman v. Austin*, or *Ognibene v. Parkes*, three of which survived certiorari petitions to the U.S.

Supreme Court after *Randall* (***Thalheimer*** was not appealed). Instead, TAO offers the argument by snippet approach, cobbling together a few words each from many cases (most not addressing campaign contribution limits at all) to produce conclusions that the relevant cases do not support.

Lair III upheld Montana's limits, which restricted candidates for city or county office to receiving contributions of $340 per person during the election cycle. The corresponding limit in Measure 26-184 per election cycle is $500. ***Lair III*** included ***Randall*** in its analysis; the U.S. Supreme Court denied certiorari.

> Even if we were wrong in ***Lair II*** to hold ***Eddleman*** controls our evaluation of Montana's contribution limits, we would reach the same conclusion under the plurality's decision in ***Randall***.

Lair III, 873 F3d at 1186 (*cert denied*).[4]

Of the relevant cases, TAO addresses only ***Thompson v. Hebdon***, 909 F3d 1027, 1036-37 (9th Cir 2018), which upheld Alaska's contribution limit of $500, applicable to all candidates at all levels, including statewide candidates. The Measure 26-184 limits apply only to candidates for Multnomah County public office, only three of which are elected on a county-wide basis (Chair, Auditor, sheriff).[5] The other four commissioners are elected from districts, each equal in population to one-fourth of the County. The U.S. Supreme Court remanded the case to the Ninth Circuit for

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4. Plaintiffs in ***Lair III*** recently filed a motion for relief from judgment, arguing that the U.S. Supreme Court's vacation of ***Thompson v. Hebdon*** required reconsideration of ***Lair III***. The District Court denied the motion, because ***Lair III*** had considered ***Randall*** in reaching its conclusions about the Montana limits. ***Lair v. Mangan***, 2020 Wl 4436422 (D Mont August 3, 2020).

5. The "Multnomah County District Attorney" is elected by the voters of Multnomah County, but it is a state government office, not a county one, and thus is not covered by Measure 26-184.

reconsideration that applies the ***Randall*** plurality opinion. As in ***Lair III***, application of the ***Randall*** plurality opinion is very likely to make no difference in the outcome, which we await. In any event, TAO fails to demonstrate how Alaska's $500 statewide limit is similar to the Measure 26-184 limits in accordance with the ***Randall*** danger signs.

The cases from which TAO takes snippets involve mainly limits on independent expenditures, not contributions. The analysis of the U.S. Supreme Court on expenditure limits is very different from that applied to contribution limits. Expenditure limits are subject to "exacting scrutiny" and must be narrowly tailored to achieve a compelling state interest. Contribution limits are subject at most to "intermediate scrutiny" and need only be designed to "employ means closely drawn to avoid unnecessary abridgement of associational freedoms." ***McCutcheon v. Fed. Election Comm'n***, 572 US 185, 197, 134 SCt 1434, 1444 (2014) (***McCutcheon***).

> ***Buckley [v. Valeo***, 424 US 1, 96 SCt 612, 46 LEd2d 659] * * * distinguished expenditure limits from contribution limits based on the degree to which each encroaches upon protected First Amendment interests. Expenditure limits, the Court explained, "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.*, at 19, 96 SCt 612. The Court thus subjected expenditure limits to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.*, at 44-45, 96 SCt 612. Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest. See ***Sable Communications of Cal., Inc. v. FCC***, 492 US 115, 126, 109 SCt 2829, 106 LEd2d 93 (1989).
>
> By contrast, the Court concluded that contribution limits impose a lesser restraint on political speech because they "permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues." ***Buckley***, 424 U.S., at 21, 96 SCt 612. As a result, the Court focused on the effect of the contribution limits on the freedom of political association and

> applied a lesser but still "rigorous standard of review." *Id.*, at 29, 96 SCt 612. Under that standard, "[e]ven a ' "significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." *Id.*, at 25, 96 SCt 612 (quoting ***Cousins v. Wigoda***, 419 US 477, 488, 95 SCt 541, 42 LEd2d 595 (1975)).
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> The primary purpose of FECA was to limit *quid pro quo* corruption and its appearance; that purpose satisfied the requirement of a "sufficiently important" governmental interest. 424 U.S., at 2627, 96 SCt 612.

McCutcheon, 572 US at 196-97.

A well-known technique of opponents of campaign finance reform is to conflate contribution limits with independent expenditure limits in order to invoke the wrong standard of review.

> The dissent's reliance on ***Colorado Republican***[6] is also misplaced. Because Colorado Republican is a campaign expenditure case, not a contribution case, it has no application here.

Lair v. Motl, 889 F3d 571, 580 (9th Cir 2018) (***Lair IV***). So the various snippets offered by TAO from cases not involving contribution limits can be safely disregarded. Those cases cited by TAO include:

- ***Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.***, 470 US 480 (1985) (independent expenditures)
- ***Davis v. Fed. Election Comm'n***, 554 US 724 (2008) (candidate spending)
- ***McDonnell v. United States***, 136 SCt 2366 (2016) (conspiracy to commit honest services fraud)

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6. ***Colorado Republican Federal Campaign Committee v. FEC***, 518 U.S. 604, 618, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996).

> ***Citizens United v. Federal Election Comm'n***, 558 US 310, 130 SCt 876 (2010) (***Citizens United***) (independent expenditures)

> ***Brown v. Entertainment Merchants Ass'n***, 564 US 786, 802 (2011) (restrictions on sale or rental of violent video games)

> ***Nat'l Inst. of Family & Life Advocates v. Becerra***, 138 S.Ct. 2361 (2018) (crisis pregnancy centers required to provide notice about existence of publicly-funded family planning services)

TAO (p. 5) then implies that someone must show "actual or apparent quid pro quo corruption" or (pp. 9-11) must "prove actual or apparent quid pro quo corruption." That is not the case. Perhaps the most cogent recent description of the required showing was set forth in the decision of the Ninth Circuit in ***Lair IV*** denying rehearing *en banc* in ***Lair III***, 889 F3d 571 (2018) (before the denial of *certiorari* by the U.S. Supreme Court), by the two judges who wrote the majority opinion in ***Lair III***.

> The dissent from the denial of rehearing *en banc* contends that, to demonstrate a sufficiently important state interest, Montana needed to produce evidence that quid pro quo arrangements actually exist. Dissent at ___-___. The evidentiary burden the dissent proposes, however, has never been adopted by the Supreme Court or this court. The evidentiary standard established by the Supreme Court requires that a state need only demonstrate a *risk* of quid pro quo corruption or its appearance that is neither conjectural nor illusory.

Lair IV, 889 F3d at 578.

> The dissent also disagrees with us regarding the nature of the evidence a state must produce to establish a sufficiently important interest in preventing quid pro quo corruption or its appearance. The dissent contends a state can meet its burden at step one only by proving "the *existence* of corrupt arrangements or their appearance." Dissent at ___-___ (emphasis added). Without such evidence, according to the dissent, states are wholly precluded from imposing direct contribution limits in any amount. We, by contrast, held that a state can satisfy its burden at step one by showing a *risk* of quid pro quo corruption or its appearance that is neither conjectural nor illusory. See ***Lair***, 873 F3d at 1178. A review of the case law compels the conclusion that our approach is correct.

> Tellingly, the dissent can cite to no authority, at either the Supreme Court or any other level, requiring a state to prove the existence of quid pro quo arrangements at step one. The Supreme Court has never required a state to do so. Instead, the Court has required a state to demonstrate only "a cognizable *risk* of corruption"--a "*risk* of quid pro quo corruption or its appearance" that rises above "mere conjecture." ***McCutcheon***, 134 SCt at 1452 (emphasis altered) (quoting ***Nixon v. Shrink Missouri Gov't PAC***, 528 US 377, 392, 120 SCt 897, 145 LEd2d 886 (2000)). The state need only "demonstrate that the problem is not an illusory one." ***Buckley***, 424 US at 27, 96 SCt 612.
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> When it comes to direct contribution limits, the Court has never imposed an onerous evidentiary burden at step one. As the Court made clear in Shrink Missouri, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." ***Shrink Missouri***, 528 US at 391, 120 SCt 897. Because "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible," *id.*, the Court has "declined to impose, let alone articulate, a stringent evidentiary burden" in the context of direct contribution limits, ***Thalheimer v. City of San Diego***, 645 F3d 1109, 1122 (9th Cir 2011) (quoting ***Citizens for Clean Gov't v. City of San Diego***, 474 F3d 647, 653 (9th Cir 2007)).
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> This low evidentiary burden is confirmed by case law. Because "the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt" are generally understood as presenting a real problem, ***Shrink Missouri***, 528 US at 391, 120 SCt 897, the Supreme Court has never held that a state--or Congress--failed to meet its evidentiary burden at step one.

Lair IV, 889 F3d at 579-80.

> Nor does anything in ***Citizens United*** or ***McCutcheon*** require a state produce evidence that quid pro quo arrangements actually *exist*. On the contrary, "because few if any contributions to candidates will involve quid pro quo arrangements," and "'the scope of such pernicious practices can never be reliably ascertained,'" ***Citizens United*** expressly recognizes that "restrictions on direct contributions are preventative." ***Citizens United***, 558 US at 356-57, 130 SCt 876 (emphasis altered) (quoting ***Buckley***, 424 US at 27, 96 SCt 612). They "ensure against the reality or appearance of corruption." *Id.* at 357, 130 SCt 876 (emphasis added). Similarly, recognizing "'the opportunities for abuse inherent in a regime of large individual financial contributions' to particular candidates," ***McCutcheon*** requires a state to demonstrate only "a cognizable *risk* of corruption"a "*risk* of quid pro quo corruption or its appearance" that rises above "'mere

> conjecture.'" ***McCutcheon***, 134 SCt at 1450, 1452 (emphasis altered) (quoting ***Buckley***, 424 US at 27, 96 SCt 612, and ***Shrink Missouri***, 528 US at 392, 120 SCt 897).
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> 2. We do not read ***Citizens United*** and ***McCutcheon*** as calling the ongoing validity of direct contribution limits into doubt. ***Citizens United*** noted that direct contribution limits "have been an accepted means to prevent quid pro quo corruption." ***Citizens United***, 558 US at 359, 130 SCt 876 (emphasis omitted). In the post-***Citizens United***, post-***McCutcheon*** world, the Supreme Court continues to recognize that "contribution limits advance the interest in preventing quid pro quo corruption and its appearance in political elections." ***Williams-Yulee v. Fla. Bar***, 575 US 433, 455, 135 SCt 1656, 1672, 191 LEd2d 570 (2015) (emphasis omitted).
>
> When it comes to direct contribution limits, then, ***Citizens United*** and ***McCutcheon*** go hand in hand with previous decisions, not toe to toe. This line of cases, beginning with ***Buckley*** and continuing through ***McCutcheon***, demonstrates that, in the context of contribution limits, the anti-corruption interest is sufficiently well-established that a state need not satisfy a stringent evidentiary burden at step one. Indeed, a state's contribution limits may even be "prophylactic." See ***McCutcheon***, 134 SCt at 1458 (describing direct contribution limits as a "preventative," "prophylactic measure"); ***Nat'l Conservative Political Action Comm.***, 470 US at 500, 105 SCt 1459 (noting that the Court will accord "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); ***FEC v. Nat'l Right to Work Comm.***, 459 US 197, 210, 103 SCt 552, 74 LEd2d 364 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

Lair IV, 889 F3d at 580-81.

TAO (p. 11) refers to "artful misrepresentations of interested men" and, utterly without documentation, asserts that the "reports grading Oregon's system" as very weak in combatting corruption use "measures of corruption [that] are circular: alleging corruption merely because Oregon allowed unlimited contributions." That is a faulty description of the methodology of the Center for Public Integrity and Public Radio

International, which undertook extensive study of the governments of every state and the consequences for public policy.[7]

Further, large contributions need not materialize in order for a regime of "no limits" to persuade candidates and officeholders to bend to the will of potential large donors. The corrupt influence does not depend upon the actual receipt of large contributions. Every candidate knows that, under a system of no limits, anyone and any entity can at any time contribute an unlimited amount to the candidate or to the candidate's opponent. This creates a regime of fear, whether or not large contributions are often given. The $2.5 million personal contribution of Phil Knight to the 2018 campaign of Knute Buehler for Governor was, according to the National Institute on Money in State Politics, among the largest campaign contributions in American history. It would have been illegal in 39 states--but legal for a Multnomah County candidate to receive, absent Measure 26-184.

Twelve-year Oregon legislator Chip Shields testified that a bill to amend the Unlawful Trade Practices Act to allow consumers to sue insurance companies for wrongfully denying claims was defeated, "not because the 47 lobbyists were so eloquent but because the legislators knew that supporting the bill would probably result in huge amounts of money flowing to their potential opponents in the next election. They also knew that opposing the bill would pave the way for those huge amounts of money to flow into their own campaigns, if needed." Declaration of Chip Shields, p. 2.

> Oregon, with its unlimited contributions and many major donors, has the most expensive per capita swing races in the country -- more money is spent

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7. https://publicintegrityorg/accountability/how-does-your-state-rank-for-integrity/

> in those races by all candidates per voter than in any other state. Some candidates for the Oregon House or Oregon Senate now raise and spend more than $1 million in a single election. Since House races can be won with about 11,000 votes, that amounts to nearly $100 per vote necessary to prevail.
>
> It is also true that these large unlimited donations, which the donors know will be directed or redirected to target swing races, cause those donors to have undue influence on legislation and on the selection of leadership in the Oregon Legislature.
>
> Limits on campaign contributions are needed to prevent corruption and the appearance of corruption. In order to obtain large campaign contributions, candidates shape their views, how they vote on bills, and which bills they introduce and work on. They believe, correctly, that they need to follow the wishes of the large contributors in order to fund their future campaigns and to de-fund their opponents.

Declaration of Chip Shields, p. 2.

> Fifteen-year legislator Mitch Greenlick (deceased) testified:
>
> An example presented itself in the last session of the Oregon State Legislature in which I served as Chair of the House Health and Health Care Committee. Some Coordinated Care Organizations ("CCOs") have been taken over by private corporations, yet these CCOs receive their revenues wholly from Oregon taxpayers and are charged to serve the public. Yet, these private corporations have made large contributions to the campaigns of other representatives and then lobbied those members successfully for outcomes which favor their profits.
>
> It is unfortunately true that public officeholders often accede to the wishes of big donors and potential big donors. Public officeholders often give undue weight to the views of these donors who can give unlimited contributions to candidates. And public officeholders frequently feel that they must spend large amounts of time listening to the demands and views of big donors and/or potential big donors.

Declaration of Mitch Greenlick, p. 1.

> Portland City Commissioner Jo Ann Hardesty testified:
>
> Limits on campaign contributions are absolutely necessary to counter corruption and the appearance of corruption. In order to obtain large campaign contributions, candidates need to tailor their views and policies to satisfy the desires of the large donors. Public officials need to accede to the wishes of large donors in order to secure funding for future elections and to avoid having those

> large donors support their political opponents. And, because the way Oregon's political system works is not a secret, even the appearance of corruption discourages persons who are not wealthy from fully participating in elections and government processes.

Declaration of Jo Ann Hardesty, pp. 2-3.

Former Multnomah County Chair and Commissioner Diane Linn testified:

> When a company or major donor could give unlimited amounts, their expectations of how I should vote were, in some cases, made very clear to me. The larger the donor, in some cases, the more influence they expected to have. When sometimes I did not agree, I lost their future support.

Declaration of Diane Linn, p. 1.

Former Oregon Representative Jefferson Smith documented two instances of *quid pro quo* corruption involving campaign contributions offered or withheld. Declaration of Jefferson Smith, pp. 1-2.

Many examples of government decisions essentially purchased by campaign contributions are described in the series of articles in THE OREGONIAN, "*Polluted by Money*." App-79-115.

V. THE CONTRIBUTION LIMITS DO NOT "PREVENT CANDIDATES FROM AMASSING THE RESOURCES NECESSARY FOR EFFECTIVE CAMPAIGN ADVOCACY."

A. LEGISLATIVE FINDINGS OF FACT.

TAO does not dispute the existence of legislative findings that relatively low contribution limits do not prevent candidates from amassing sufficient funds to campaign effectively. ORS Chapter 259, § (1)(s).

B. THE FILED DECLARATIONS.

TAO does not dispute any of the evidence presented in the filed declarations, which now include the ones filed in the First Round of this case and in the similar City of Portland validation case (No. 19CV06544).

C. TYPICAL CONTRIBUTION SIZES IN PAST RACES FOR MULTNOMAH COUNTY OFFICE.

One of the factors in ***Randall*** is to what extent the contribution limits at issue would reduce funds previously received by candidates.

> Their statistics showed that the party contributions accounted for a significant percentage of the total campaign income in those races. And their studies showed that Act 64's contribution limits would cut the party contributions by between 85% (for the legislature on average) and 99% (for governor).

Randall v. Sorrell, 548 US 230, 254, 126 SCt 2479 (2006). This test makes no sense, as it assumes that large contributions are automatically entitled to protection. It also sets up a Catch-22: The justification for contribution limits is that large contributions work the reality and/or appearance of *quid pro quo* corruption. Thus, the justification depends upon the existence of large contributions. Then, when it comes to "tailoring," ***Randall*** seems to disfavor laws that reduce candidates' reliance on the large contributions and favor laws that only somewhat reduce that reliance. Thus, to the extent that the *quid pro quo* justification for a law is strong, ***Randall*** appears to penalize it on the "tailoring" end.

In any event, Seth Woolley documents that the Measure 26-184 contribution limits would have reduced amounts flowing to Multnomah County candidates in 2018 and 2020 by modest amounts, assuming that zero Small Donor Committees ("SDCs")

had been created. That assumption is not realistic, considering the opportunities presented to SDCs by Measure 26-184.

The Declaration of Seth Woolley (filed with the OBRCP) documented the sizes of contributions relied upon by past candidates for Multnomah County and City of Portland office. Sharon Meieran won a Multnomah County Commission seat in 2018. Her campaign raised $47,931 during 2019-2020, with 93% of that within the Measure 26-184 limits (even though the County was not enforcing those limits prior to April 28, 2020). Excluding the amounts received on or after October 1, 2018, 37.5% of Jo Ann Hardesty's funds in her successful race for Portland City Commissioner came in contributions higher than the $500 limit, while 80.4% of her unsuccessful opponent's funds violated that limit. Portland Measure 26-200 took effect on September 1, 2019.

The Second Declaration of Seth Woolley (filed with this Reply Brief) documents the sizes of contributions received by candidates for Multnomah County public office during the 2018 and 2020 election cycles and specifies how much of the contributed amounts would have violated the Measure 26-184 limits, were they being enforced. The tables show that two successful candidates for Multnomah County Commissioner raised funds with only 5% or 12% received in amounts that would violate those limits. In other words, had the limits been enforced, the candidates would have lost 5%-12% of their overall funding, at worst. Several of the "over-limit" contributions could have been received in a slightly different form. For example, some of those contributions were in the form of $1,000 from a joint checking account but were attributed to only one of the married partners. Other "over-limit" contributions were $500 directly from

an incorporated associations, which could have lawfully contributed the same $500 from its political committee.

Other candidates would theoretically have lost 24%, 29%, 48%, 5%, 12%, 46%, 70%, 3%, 0%, 27%, and 42%--far lower than the 85-99% in ***Randall***.

D. THE SIZE OF THE TARGET VOTER POPULATION.

The Court should not merely compare the contribution limits examined in other cases with the Measure 26-184 limits. Instead, the Court should consider the size of the voter population affected and the size of the relevant media markets. See Combined Opening Brief on Remand of These Intervenors [hereinafter "Opening Brief on Remand of Citizen Parties" or "OBRCP"], pp. 18-20.

TAO does not address this, except to misstate the size of the relevant media markets. TAO (p. 6) fails to note that Portland is one major media market, while Vermont (***Randall***) is in three. ***Buckley***, *supra*, upheld contribution limits of $1,000 to any candidates, including those running statewide for US Senate or running nationwide for President. Most of those candidates would also need to cover the cost of advertising in multiple media markets, not just one, and would need to reach millions, tens of millions, or even hundreds of millions of voters. And the Declaration of Seth Woolley documents that the cost of reaching voters has actually declined, due to the internet and social media.

TAO (p. 6) claims that $1,000 in 1976 is equivalent to $4,636 in 2020. But federal law does not think so. The federal limits are adjusted for inflation[8] and are now $2,800 per person per election, not $4,636.

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8. 52 U.S.C. § 30116(a)(1)(A).

As for the limits in ***Shrink Missouri*** in 1998, those applied to statewide races. Missouri has 6,137,428 people[9] (v. 812,855 in Multnomah County)[10] and occupies 12 separate major media markets: St. Louis (1,099,590 TV households), Kansas City (896,850), Memphis (TN) (580,600), Omaha (NE) (380,630), Columbia (154,210), St. Joseph, Springfield, Cape Girardeau (Paducah, KY) (330,920), Hannibal (Quincy, IL) (84,040), Jonesboro (AR), Joplin (121,260), and Kirksville (Ottumwa, IA).[11] Only California has more major media markets (14) than Missouri. Multnomah County is part of one media market (1,112,500 TV households).[12]

E. THE COMMUNICATION OPPORTUNITIES AVAILABLE TO MULTNOMAH COUNTY CANDIDATES.

The Court should also consider the size of the unique communication opportunities available to Multnomah County candidates under Measure 26-184, including the Small Donor Committee ("SDC") feature, Oregon's Voters' Pamphlet, and Oregon's political tax credit.

1. SMALL DONOR COMMITTEES.

Measure 26-184 allows candidates to receive unlimited contributions from "Small Donor Committees," defined by Multnomah County Charter § 11.60(7)(j):

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9. https://en.wikipedia.org/wiki/Missouri.

10. https://en.wikipedia.org/wiki/Multnomah_County,_Oregon.

11. https://tbh.lerctr.org/~ekb/TVMarkets; https://mediatracks.com/resources/nielsen-dma-rankings-2020.

12. https://mediatracks.com/resources/nielsen-dma-rankings-2020.

> "Small Donor Committee" means a Political Committee which cannot accept Contributions in amounts exceeding one hundred dollars ($100) per Individual contributor per calendar year.

The declarations of Portland and Multnomah County candidates quoted above all indicate that their ability to effectively communicate with voters would be enhanced by the SDC feature.

2. THE VOTERS' PAMPHLET.

Oregon has a government-issued Voters' Pamphlet that enables any candidate, including any candidate for Multnomah County office, to reach all registered voters at a low cost, unlike in Vermont or Montana. TAO offers no response.

3. THE OREGON INCOME TAX CREDIT.

Since 1969, candidates for any public office in Oregon have offered their contributors a dollar-for-dollar annual state income tax credit of up to $50 per person ($100 per couple filing jointly). Vermont, Alaska, and Montana have no political tax credits. Only Oregon, TAO offers no response.

F. THE GENERALLY INCREASING ABILITY OF CANDIDATES TO RAISE FUNDS FROM SMALL DONORS.

Bernie Sanders in 2016 used the internet to raise over $231 million from 7 million donations, an average of $33 per donation.[13] The internet offers all candidates a much larger opportunity to raise substantial funds from small donors than existed when ***Randall*** was decided in 2006. TAO offers no response.

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13. https://www.opensecrets.org/pres16/candidate?id=N00000528.

G. THE GENERALLY DECREASING COST OF COMMUNICATING WITH LARGE NUMBERS OF VOTERS.

The Declaration of Seth Woolley states that the advent of Facebook, Google, and other internet portals and platforms has reduced the cost of reaching large numbers of voters: "Communicating with voters is becoming less expensive." TAO offers no response.

VI. THE CONTRIBUTION LIMITS DO NOT "MAGNIFY THE ADVANTAGES OF INCUMBENCY TO THE POINT WHERE THEY PUT CHALLENGERS TO A SIGNIFICANT DISADVANTAGE."

No party has offered any evidence that the Measure 26-184 limits magnify the advantages of incumbency at all. The OBRCP (p. 25) documented that under Oregon's regime of no contribution limits:

> In 2016, 96% of incumbent legislators outspent their opponents, and 100% of them won.

> In 2014, 95% of incumbent legislators outspent their opponents, and 97% of them won.

TAO offers no response to the several studies cited in the OBRCP (pp. 25-27) that contribution limits in the range of $500 greatly benefit challengers, not incumbents. Nor can TAO overcome the statements of the U.S. Supreme Court:

> And, to the extent that incumbents generally are more likely than challengers to attract very large contributions, the Act's $1,000 ceiling has the practical effect of benefiting challengers as a class.

Buckley, 424 US at 32.

> Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions.

Buckley, 424 US at 31. TAO offers no record evidence of invidious discrimination against challengers.

VII. THE CONTRIBUTION LIMITS DO NOT IMPAIR THE LEGITIMATE FUNCTIONS OF POLITICAL PARTIES.

Crucial to the controlling rationale in ***Randall*** was that Vermont's low limits were accompanied by onerous limits on political parties and on volunteer activities.

> Our examination of the record convinces us that, from a constitutional perspective, Act 64's contribution limits are too restrictive. We reach this conclusion based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections. Taken together, Act 64's substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives.

Randall, 548 US at 253.

The OBRCP (pp. 27-30) showed that Measure 26-184 does not impair the functions of political parties and does not apply at all to volunteer activity. **The lack of such restrictions removes Measure 26-184 from the realm of *Randall* entirely, because *Randall* relied on the concurrent existence of "low dollar limits" and onerous restrictions on political parties and volunteer activity.**

TAO offers no response, except this (pp. 13-14) incorrect statement:

> At best, assuming that political parties are not among the entities banned from making contributions altogether under MCC § 5.201(B)(3), but are merely limited to $500 under § 5.201(B)(1), the Measure errs in treating political parties exactly the same as other groups. ***Randall***, 548 US at 256-59.

First, ***Randall*** stated that the problem in Vermont was that each political party **as a whole** was subject to the same limits that applied to each individual.

> The Act applies its $200 to $400 limits--precisely the same limits it applies to an individual--to virtually all affiliates of a political party taken together as if they were a single contributor. Vt. Stat. Ann., Tit. 17, §§ 2805(a) (2002). That means, for example, that the Vermont Democratic Party, taken together with all its local affiliates, can make one contribution of at most $400 to the Democratic gubernatorial candidate, one contribution of at most $300 to a Democratic candidate for State Senate, and one contribution of at most $200 to a Democratic candidate for the State House of Representatives.

Randall, 548 US at 257. In contrast, Measure 26-184 allows any political committee to contribute up to $500 to any candidate and does not limit the number of political committees that any political party can maintain. Oregon's major parties do maintain multiple political committees. ORESTAR identifies 32 separate current Democratic Party political committees and 41 separate current Republican Party political committees.[14] These committees are attached to party organizations at the statewide, county, and congressional district levels. Nothing prevents any party from creating more political committees, regardless of level. Measure 26-184 allows any Oregon political committee to make the $500 contribution, whether or not or how it is affiliated with a political party.

Second, unlike the limits in Vermont (which applied to both partisan and non-partisan candidates), Measure 26-184 does not at all limit what political parties can contribute **to those parties' candidates**. The limits apply only to Multnomah County public offices, all of which are elected on a nonpartisan basis. Nor does Measure 26-184 impose any limit on what any individual or entity can contribute to a political party. The ORESTAR system does not show that Oregon political parties have contributed any money to candidates for Multnomah County office. ***Randall*** found

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14. Result of search for "Democratic" and "Republican" at https://secure.sos.state.or.us/orestar/GotoSearchByName.do.

that the Vermont limits on party contributions would cut such contributions by 85% to 99%. Here, there is no cut in such party contributions.

Lair III upheld Montana's limits, which include a ceiling on any political party's contribution to any local office candidate to $1,700 per election cycle. Measure 26-184 allows Oregon political parties to continue their practice of each maintaining several political committees and allows each such committee to contribute up to $500 to a candidate for Multnomah County office, a far more lenient limit than Montana's.

TAO (p. 14) then seeks to invoke ***Citizens United***, a case about independent expenditures, as establishing that an organization cannot be required to create a separate organization to speak. The U.S. Supreme Court has never held that in a case involving contribution limits.

VIII. THE CONTRIBUTION LIMITS DO NOT APPLY TO UNPAID VOLUNTEER SERVICES.

The OBRCP (pp. 29-30) shows that Oregon law, unlike the Vermont law in ***Randall***, does not count as "contributions" any of the items found troublesome in ***Randall*** (travel costs, use of house for events, providing snacks). TAO offers no response.

IX. THE CONTRIBUTION LIMITS ARE ADJUSTED FOR INFLATION.

TAO offers no response.

X. THE CONTRIBUTION LIMITS ARE PER ELECTION CYCLE.

The OBRCP showed that most races for Multnomah County office (all of them in 2020 and all but one in 2018) were resolved in the primary election, which means that

there is usually no difference between limits applicable per election v. per election cycle. Further, the Montana contribution limits upheld in ***Lair III*** (*cert denied*) were also expressed per election cycle.

XI. THERE ARE SPECIAL JUSTIFICATIONS THAT WARRANT A "LOW" CONTRIBUTION LIMIT.

Randall does not require proof of any sort of "special justification," unless the limits at issue are otherwise impermissibly low.

> Fifth, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described.

Randall, 548 US at 261. Since that is not the case here, no "special justification" is required, although it does exist. See pages 16-18, *ante*; OBRCP, pp. 31-33.

XII. MEASURE 26-184 DOES NOT "FAIL TAILORING."

TAO (p. 12) claims that the "closely drawn" test of ***McCutcheon*** requires that the law employ "a means narrowly tailored to achieve the desired objective." Again, the snippet approach has removed the context and meaning of those words. ***McCutcheon***, 572 US at 218, actually referred to a test requiring limits to be "closely drawn to avoid unnecessary abridgment of associational freedoms." TAO has not identified any "abridgment of associational freedoms." ***McCutcheon*** also stated:

> Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' ... that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." ***Board of Trustees of State Univ. of N.Y. v. Fox***, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (quoting ***In re R.M.J.***, 455 U.S. 191, 203, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982)).

Id.

TAO (p. 5) claims that the SDC feature is "the Measure's provision allowing unlimited contributions by favored groups." First, the SDC feature does not identify any favored groups. It does not restrict who may create or maintain SDCs, which may be created and maintained by any person or entity. Second, the SDC feature does not allow an SDC to make "unlimited contributions." Any SDC's contributions to candidates are inherently limited by the restriction on the SDC's sources of funds: only $100 per year per individual human donor and nothing more from any source.

TAO (pp. 12-13) argues that Measure 26-184 is somehow invalid, because it fails to restrict Small Donor Committees (SDCs) enough. Thus, TAO simultaneously argues that the Measure 26-184 limits are too strict and that they are not strict enough. Apart from that contradiction, TAO's "underinclusiveness" argument depends upon an initial conclusion that some of the Measure 26-184 limits are unconstitutionally strict. If there is no such finding, then the alleged discrimination in favor of SDCs is immaterial. If none of the limits are too strict, then there is no cognizable advantage to SDCs.

Underinclusiveness is not a rationale for invalidating a system of limits that "aims squarely at the conduct most likely to undermine public confidence."

> A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws--even under strict scrutiny--that conceivably could have restricted even greater amounts of speech in service of their stated interests. ***Burson***, 504 U.S., at 207, 112 S.Ct. 1846; see ***McConnell***, 540 U.S., at 207-208, 124 S.Ct. 619; ***Metromedia, Inc. v. San Diego***, 453 U.S. 490, 511-512, 101 S.Ct. 2882, 69 L.Ed.2d 800 (plurality opinion); ***Buckley***, 424 U.S., at 105, 96 S.Ct. 612.

> Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates.

Williams-Yulee v. Florida Bar, 575 US 433, 449, 135 SCt 1656, 1668, 191 LEd2d 570 (2015).

The SDC feature does not allow conduct that undermines public confidence. All funds flowing into SDCs are limited to $100 per year only from individual humans. TAO has offered no reason that this would shake public confidence. It is TAO's burden of proof to demonstrate that the SDC feature would do so.

Even the cases cited by TAO do not support its position. ***Brown v. Entertainment Merchants Ass'n***, 564 US 786, 802 (2011) (***Brown***), stated about a law restricting sale or rental of violent video games:

> The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. * * * Here, California has singled out the purveyors of video games for disfavored treatment--at least when compared to booksellers, cartoonists, and movie producers--and has given no persuasive reason why.

Brown, 564 US at 802.

The SDC feature does not make Measure 26-184 "wildly underinclusive when judged against its asserted justification." Measure 26-184 is about imposing limits on campaign <u>contributions</u> in order to prevent and combat actual and perceived corruption. The SDC feature is a limit on contributions to SDCs. It is not a limit on expenditures by SDCs. Nor does Measure 26-184, as trimmed by ***Mehrwein***, include any limits on expenditures by any person or entity. TAO argues that Measure 26-184's validity

depends upon imposing expenditure limits on SDCs, while not imposing any other expenditure limits and while adamantly arguing that expenditure limits are invalid.

Further, the proponents of Measure 26-184 have provided persuasive reasons why SDCs should be treated differently from other political committees.

> Also, Measure 26-184 provides for Small Donor Committees, which is any PAC that limits its incoming contributions to $100 per year per individual. The Small Donor Committee can then spend all those funds to support or oppose candidates. So candidates can obtain significant financial support from grassroots organizations that receive only small contributions. We call that Grassroots Democracy.

Honest Elections Multnomah County, Voters' Pamphlet Argument (2016) [ER-10]. See other arguments at ER-5, ER-9, ER-13.

Under Measure 26-184, there are no limits whatever on contributions to non-SDC political committees. So Measure 26-184 imposes limits on contributions from non-SDC political committees to candidates ($500 per election cycle) so that candidates are not subject to the actual or perceived corruption stemming from large contributions. Measure 26-184 limits contribution to SDCs to only $100 per individual per year. SDCs cannot obtain large amounts of money from sources with special interests in government actions. Hence, there is no justification for limiting the size of their contributions to candidates.

In fact, if Measure 26-184 did impose limits on the size of contributions from SDCs to candidates, no doubt TAO would argue that such limits violate the First Amendment, because there would be insufficient connection between such limits and the purpose of countering actual or perceived corruption. TAO would likely argue that, since SDCs are limited to inflow of only $100 per individual per year, their funds pose no threat of corruption.

TAO (p. 13) contends that the SDC feature is so "novel" that it requires "a higher 'quantum of empirical evidence' to justify its restrictions," selectively quoting from ***Shrink Missouri***. What the Court actually said was:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. ***Buckley*** demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Shrink Missouri Gov't PAC, 528 US at 391.

> [T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.

Shrink Missouri Gov't PAC, 528 US at 395.

TAO has not countered the plausibility of the justifications for the SDC feature. And SDCs are not entirely novel, as they operate in California and Colorado.

TAO (p. 13) claims that "the interest pursued here is not combatting actual or apparent corruption, but a desire to "amplif[y] the voice of ordinary voters," selectively quoting a Voters' Pamphlet argument by three people (who are among the Citizen Parties in this case). A statement by three people of a desired consequence does not constitute the whole of the rationale for Measure 26-184. Also, an enactment is not limited to having only one rationale. The anti-corruption rationale for Measure 26-184, including the SDC feature, is abundantly established in the Voters' Pamphlet arguments and elsewhere in the Exhibits provided in the Second Declaration of Daniel Meek.

Further, the rationale for an enactment is not a matter of motivation.

> The district court incorrectly cast the narrow focus test as a motive inquiry that looks at the voters' underlying intent when they enacted the limits. The

> narrow focus test, however, is a tailoring test, not a motive test. It measures how effectively the limits target corruption compared to how much they inhibit associational freedoms--i.e., whether the
>
> > limitation focuses precisely on the problem of large campaign contributions--the narrow aspect of political association where the actuality and potential for corruption have been identified--while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.
>
> ***Buckley***, 424 US at 28, 96 SCt 612; see ***Eddleman***, 343 F.3d at 1094 (analyzing fit without reference to underlying voter intent). We are aware of no case looking to underlying legislative or voter intent in making this evaluation. Although there is some logic that the sponsors' goal behind I-118 reveals something about the limits' fit, the actual content and effect of the limits--which, as discussed, target the contributions most likely to generate corruption or its appearance--better show their tailoring. We therefore disapprove the district court's reasoning.

Lair III, 873 F3d at 1184.

TAO (p. 15) offers the further contradiction that the "equalization of influence" rationale is not available to **support** the validity of contribution limits but is available to **invalidate** the limits. The only time in which that rationale could be applied to invalidate the limits would be if the limits had already passed First Amendment scrutiny under the "corruption" rationale. Then, says TAO, an "equalization of influence" rationale would invalidate all of the limits, because the SDC feature would give SDCs too much influence. TAO simultaneously denounces and uses the same "equalization of influence" rationale. TAO argues that an "equalization of influence" rationale invalidates the SDC limits, while simultaneously arguing that the "equalization of influence" rationale itself is invalid.

SDCs operate in other states and have not been struck down. California allows a "Small Contributor Committee" to accept only contributions of $200 or less per person

per year. It can then contribute twice as much as a regular political committee to any candidate for any office other than Governor. California Government Code §§ 85203, 85302. Colorado allows a "Small Donor Committee" to accept only contributions of $50 or less per "natural person" per year. It can then contribute 10-fold to 13-fold more to any and all candidates than can any other type of political committee.[15]

XIII. LIMITS ON CANDIDATE SELF-FUNDING ARE VALID OR NOT SUBJECT TO CHALLENGE IN THIS CASE.

TAO (pp. 2-4) addresses candidate self-funding.

First, as noted at pages 1-4, *ante*, TAO has no standing to challenge the application of Measure 26-184 to instances of candidate self-funding, because TAO is not a candidate and have never even sought to represent any candidate in this proceeding.

Second, Multnomah County's position is that candidate self-funding does not constitute a "contribution" under the applicable definition in ORS 260.005(3)(a):

> (3) 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:

Multnomah County's position is that the self-funded candidate does receive "equivalent compensation" for her contributions, because her campaign gets to use the money in the campaign--which benefits the candidate and the campaign.

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15. https://www.sos.state.co.us/pubs/elections/CampaignFinance/limits/contributions.html#smallDonor.

The Citizen Parties need not agree with that interpretation, as Multnomah County controls the enforcement of the Measure 26-184 limits. See Multnomah County Code § 5.204(D)-(G), (I). If Multnomah County concludes that candidate self-funding is not a "contribution," then no enforcement actions will be taken. Multnomah County has itself removed any threat of enforcement. Consequently, there is no live controversy here. If the contribution limits were later applied to a candidate's self-funding, that candidate could seek to interpose the First Amendment in defense.

The fact that two past candidates reported to ORESTAR self-funding as contributions does not establish the definition of "contribution."

TAO might wish to rely upon the "voluntary cessation" exception to mootness. But it does not apply when the enforcement authority has renounced authority to enforce.

> Moreover, we have explained that the [voluntary cessation] exception applies only where "the defendants maintain[ ] that they [have] a legal right" to resume the challenged conduct and a court determines "that a future dispute [is] likely." ***Crandon Capital Partners v. Shelk***, 202 OrApp 537, 548, 123 P3d 385 (2005), *rev'd on other grounds*, 342 Or 555, 157 P3d 176 (2007). At least the second of those two factors is not present here. Defendant [Secretary of State] has asserted that she has no plans to adopt a rule similar to the 2010 rule that plaintiffs challenged, and she has explained that--in her view, at least--the circumstances that led to adoption of that rule no longer exist. Because plaintiffs have not established that a future dispute over three-character political-party designations is likely, the ***Tanner*** exception to the mootness doctrine does not apply.

Progressive Party of Oregon v. Atkins, 276 Or App 700, 709, 370 P3d 506 (2016), *review denied*, 360 Or 697 (2016).

TAO (p. 2) cites ***United States v. Stevens***, 559 US 460, 480 (2010). But there the government was actually prosecuting the defendant under a statute prohibiting

depictions of animal cruelty. Here, no one is prosecuting TAO or any candidate for self-funding.

The State of Washington has limited candidate self-funding for decades.[16] No candidate or political committee can accept more than $50,000 for a statewide campaign or $5,000 for any other campaign within the last 21 days before the general election. That includes contributions by the candidate to her own campaign.

> During the 21 days before the general election, no candidate for legislative office or local office may contribute to his or her own campaign more than $5,000 in the aggregate, and no candidate for state executive office or Supreme Court justice may contribute to his or her own campaign more than $50,000 in the aggregate.

Public Disclosure Commission, 2016-17 Contribution Limits (ER-47). These limits have not been invalidated.

XIV. THE COURT'S OPINION UNDER ORS 32.710 DOES NOT "CUT OFF THE RIGHTS OF OREGONIANS TO USE THE STATE COURTS TO CHALLENGE THE LAW WHEN AN ACTUAL CASE AND CONTROVERSY ARISES."

TAO (p. 14) makes that incorrect contention about ORS 33.720(6), which addresses only proceedings authorized by ORS 33.710(2)(b) and states:

> (6) Upon conclusion of a proceeding authorized by ORS 33.710 (2)(b), including any appeal of a judgment, the judgment entered in the proceeding is binding upon the parties and all other persons. Claim preclusion and issue preclusion apply to all matters adjudicated in the

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16. **RCW 42.17A.420 Reportable contributionsPreelection limitations.**

> (1) It is a violation of this chapter for any person to make, or for any candidate or political committee to accept from any one person, contributions reportable under RCW 42.17A.240 in the aggregate exceeding fifty thousand dollars for any campaign for statewide office or exceeding five thousand dollars for any other campaign subject to the provisions of this chapter within twenty-one days of a general election.

> proceeding. Except for an action to enforce a judgment, the courts of this state do not have jurisdiction over an action by or against the governing body or municipal corporation named in the judgment if the purpose of the action is to seek judicial review or judicial examination, directly or indirectly, of a matter adjudicated in the proceeding.

This "conclusiveness" provision applies only to "a proceeding authorized by ORS 33.710 (2)(b)," which is one limited to the "proceedings of the governing body and of the municipal corporation providing for and authorizing the issue and sale of bonds of the municipal corporation." That does not describe the validation proceeding in either ***Multnomah County v. Mehrwein*** or in ***City of Portland and Trojan et al.***, as neither of them pertained to the validity of a government bond. Thus, ORS 33.720(6) does not apply to either of the recent validation cases.

Thus, TAO's "due process" lament (p. 14 n21) is entirely baseless. Opponents of Measure 26-184 have always had the opportunity to challenge it in the court of their choosing.

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XV. THE VALIDITY OF THE CHARTER AMENDMENT IS NOT AT ISSUE IN THIS PROCEEDING.

TAO offers no response.

Dated: August 31, 2020

Respectfully Submitted,

/s/ *Linda Williams*

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the original of:

COMBINED REPLY BRIEF ON REMAND OF THESE INTERVENORS

by means of the Oregon Judicial Department File & Serve system and by emailing a copy to attorneys listed below at their last-known email addresses.

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