

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

In the Matter of: Validation
Proceeding to Determine the
Legality of City of Portland Charter
Chapter 3, Article 3 and Portland
City Code Chapter 2.10 Regulating
Campaign Finance and Disclosure.

Civil No. 19CV06544

**POST-HEARING SUPPLEMENTAL
MEMORANDUM BY THE CITIZEN
PARTIES:**

**Juan Carlos Ordonez, David Delk,
Ron Buel, Moses Ross, James Ofsink,
Seth Alan Woolley.**

At the hearing on May 8, 2019, the Court raised two matters that have stimulated further thought.

I. ARE THE CITIZEN PARTIES "CONTESTING * * * ANY OF THE ACTS OF THINGS" ENUMERATED IN THE CITY'S PETITION?

The Court addressed whether the Citizen Parties were proper parties under ORS 33.720, which provides in part:

33.720 Proceeding in rem; practice and procedure as in action not triable by right to jury; service by publication; appeal; costs.

(1) The determination authorized by ORS 33.710 shall be in the nature of a proceeding in rem; and the practice and procedure therein shall follow the practice and procedure of an action not triable by right to a jury, as far as the same is consistent with the determination sought to be obtained, except as provided in this section.

* * *

(3) Any person interested may at any time before the expiration of the 10 days appear and contest the validity of such proceeding, or of any of the acts or things therein enumerated. * * *

The Court asked whether the Citizen Parties could be said to be "contest[ing] the validity of such proceeding, or of any of the acts or things therein enumerated."

Counsel responded that:

- > "contest" does not necessarily mean "oppose" but could mean engage in discussion about;
- > the Citizen Parties are "contesting" the validity of the Portland ordinance, as its validity is called into question by the March 2018 opinion of this Court on the Multnomah County ordinance in No. 17CV18006;
- > the Citizen Parties in this case are "contesting" the Portland ordinance no less than were the Citizen Parties in No. 17CV18006, who appealed the decision of this Court in that case and have received certification of that appeal for direct Supreme Court consideration; and
- > One of the Citizen Parties, Seth Woolley, could change his position on the validity of the limits on independent expenditures; and
- > The actual "contest" in an *in rem* proceeding is between those asserting rights to or in the subject and "the world,"¹ whether or not the interests asserted by those who timely appeared are adverse. Counsel suggested that "the world" in this case includes those who at any time may assert that controlling appellate authority is adverse to the validity of the subject ordinance.

As for the definition of "contest," the Oregon Supreme Court's most often referenced dictionary, WEBSTER'S UNABRIDGED DICTIONARY (1913), provides its definition of "contest" when used in the context of "law":

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1. Proceedings are in rem when they are directly against the property and terminate in an adjudication against all mankind equally binding upon everyone.

Linn Cty. v. Rozelle, 177 Or 245, 258, 162 P2d 150, 156 (1945). *Accord, Cadle Co. II v. Schellman*, 126 Or App 372, 379, 868 P2d 773, 777 (1994).

(Law) To make a subject of litigation; to defend, as a suit; to dispute or resist; as a claim, by course of law; to controvert.

This definition indicates that "contest" means "defend" as much as it means "dispute" or "controvert."

Also, it is clear that the Citizen Parties have argued in opposition to part of the City's petition. Part VIII of the Citizen Parties' memorandum on summary judgment discusses why "THE VALIDITY OF THE CHARTER AMENDMENT IS NOT AT ISSUE IN THIS PROCEEDING." This position stands contrary to the City's assertion that the validity of the charter amendment (Measure 26-200) can be determined in a proceeding under ORS 33.710.

II. WHAT SHOULD THE COURT CONCLUDE ABOUT THE STATUS OF *VANNATTA I*?

The Court asked for a correct statement of the status of *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997) ("*Vannatta I*"). In part, Counsel answered that the Court should consider "withdrawn" its legal conclusion that campaign contributions are the "expression" of the contributor, protected by Article I, § 8. That repudiation occurred in two later decisions: *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*"), and *State v. Moyer*, 348 Or 220, 229, 230 P3d 7 (2009).

Counsel then offered other statements about the unsoundness of *Vannatta I* but neglected to mention an important one: *Vannatta II* established that limiting the

receipt of money is not expression and can be regulated regardless of Article I, § 8, even if the giving or offering of money cannot. The Court upheld the \$50 limit on the **receipt** of gifts from lobbyists by candidates and officeholders, struck down the \$50 limit on the offering of such gifts to candidates or officeholders, and recognized that upholding the limit on **receipt** of gifts validly rendered "nugatory" the right to offer such gifts.

Portland Measure 26-200 and the ordinance both expressly limit the **receipt** of large contributions by candidates:

3-301. Contributions in City of Portland Candidate Elections.

- (a) An Individual or Entity may make Contributions only as specifically allowed to be received in this Article.
- (b) A Candidate or Candidate Committee may receive only the following Contributions during any Election Cycle:
 - 1. Not more than five hundred dollars (\$500) from an Individual or a Political Committee other than a Small Donor Committee;
 - 2. Any amount from a qualified Small Donor Committee;
 - 3. A loan balance of not more than five thousand dollars (\$5,000) from the candidate;
 - 4. No amount from any other Entity, except as provided in Section 3-304 below.

Even if the separately-stated limit on the making of large contributions is struck down, the limit on **receiving** large contribution will remain (particularly under the terms of the severability clause, Section 3-307). This is the same situation in *Vannatta II* pertaining to the limit on the size of lobbyist gifts to candidates and officeholders.

The Court concluded that the limit on **receipt** was valid, even if it rendered the giving or offering of such gifts impossible.

This is briefly explained in the MOTION FOR SUMMARY JUDGMENT BY THE CITIZEN PARTIES, pp. 6, 8-11. It is more completely explained by the Court in *Vannatta II*:

In our view, the receipt of gifts restrictions are not written in terms directed to the substance of any opinion or any subject of communication, as *Robertson* explained that analytical principle. A public official who is subject to restrictions on the receipt of gifts can violate the restrictions without saying a word, without engaging in expressive conduct, and regardless of any opinion that he or she might hold.

Vannatta II, 347 Or at 458-59.

Because the receipt of gifts restrictions do not focus on the content of speech or writing, or on the expression of any opinion, we have no reason to analyze whether the restrictions fall within a well-established historical exception, *id.* at 163, 838 P2d 558, or whether they restrain communications that are incompatible with a speaker's official role or responsibility. See *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983) (discussing incompatibility exception). Neither do the receipt of gifts restrictions focus on proscribing the pursuit or accomplishment of forbidden results, nor do they prohibit expression used to accomplish those forbidden results.

Vannatta II, 347 Or at 459.

We recognize that the same statutes that restrict plaintiffs' right to communicate an offer of a gift that exceeds the statutory limitations also prohibit the public official from accepting the offered gift. As we have discussed earlier, the statutory restrictions on a public official's ability to accept specified gifts from lobbyists are constitutionally valid. In that light, it can be argued that, if the statutory restrictions on the receipt of gifts are constitutionally permissible, there is no need to analyze the statutory restriction on offering a gift: any claimed right to offer a gift to a public official is essentially rendered nugatory, if a public official cannot accept it.

Vannatta II, 347 Or at 466. But the Court nevertheless decided to address the validity of the limit on the offering of gifts:

For the foregoing reasons, we conclude that the statutory restrictions on "offer[ing]" a gift to a public official, candidate for public office, or relative or household member impermissibly restrict the right of free expression protected by Article I, section 8.

Vannatta II, 347 Or at 468.

The same analysis, applied here, would find that the limits on the **receipt** of campaign contributions in Portland Measure 26-200 and the ordinance are valid. Then "any claimed right to [make such contributions] is essentially rendered nugatory."

Dated: May 10, 2019

Respectfully Submitted,

/s/ Daniel Meek

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing POST-HEARING SUPPLEMENTAL MEMORANDUM BY THE CITIZEN PARTIES by following methods:

- Electronic service - UTCR 21.100(1)(a)
- hand delivery
- facsimile transmission
- overnight delivery
- USPS first class mail
- courtesy email

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