



STATE OF OREGON  
LEGISLATIVE COUNSEL COMMITTEE

December 31, 2019

Representative Dan Rayfield  
900 Court Street NE H275  
Salem OR 97301

Re: Constitutionality of Ballot Measure 47 (2006) under the United States Constitution

Dear Representative Rayfield:

You asked for an opinion identifying the provisions of Ballot Measure 47 (2006) that are unconstitutional under the United States Constitution and in consideration of *Citizens United v. FEC*. To answer, the following four areas that Measure 47 seeks to limit are similar to laws or regulations that the United States Supreme Court has previously found to be unconstitutional:

- Aggregate contribution limits
- Limits on individual contributions that are too low
- Limits on a candidate's personal contributions or expenditures
- Limits on independent expenditures

The specific provisions within each area of Measure 47 that would be vulnerable to a constitutional challenge in court are described below.

Aggregate contribution limits have been found to be unconstitutional

Aggregate limits on the total amount that an individual may contribute to candidates, political committees and party committees have been found to be unconstitutional in violation of the First Amendment to the United States Constitution.<sup>1</sup> The United States Supreme Court has reasoned that aggregate limits restrict an individual's right to participate in the political process while doing little, if anything, to target *quid pro quo* corruption or its appearance in campaign financing.<sup>2</sup> Therefore, the following provisions of Measure 47, section 3, would likely be found to be unconstitutional under the United States Constitution:

- Individuals may contribute no more than \$2,000 in the aggregate to a political party and \$2,500 in the aggregate to all candidate committees, political committees, political parties and political nonprofit organizations per year.
- Political committees (other than a small donor committee or political party finance committee) may contribute no more than \$2,000 in the aggregate to a political party per year.
- Minors who are at least 12 years old but less than 16 years old may contribute no more than \$500 in the aggregate per election period.

<sup>1</sup> *McCutcheon v. FEC*, 572 U.S. 185 (2014).

<sup>2</sup> *Id.*

### Limits on individual contributions that are too low are constitutionally suspect

The government may establish contribution limits on the amount an individual may contribute to candidates. This is in furtherance of the government's "sufficiently important" interest in preventing corruption or the appearance of corruption.<sup>3</sup> However, those limits cannot be so low as to place a substantial burden on a candidate's ability to run competitively.<sup>4</sup> A candidate must retain an ability to amass sufficient resources to cover campaign costs.<sup>5</sup>

In 2006, the United States Supreme Court struck down as too low and unconstitutionally burdensome, Vermont's contribution limits of \$200 per election cycle for state representatives, \$300 per election cycle for state senators and \$400 per election cycle for statewide offices.<sup>6</sup>

As recently as November 2019, the United States Supreme Court directed the United States Court of Appeals for the Ninth Circuit to reconsider whether Alaska's contribution limit of \$500 per year for a candidate is so low as to be unconstitutional.<sup>7</sup> While the limit of \$500 per year per candidate was upheld in 1999, the United States Supreme Court questioned whether that limit was still constitutional in today's dollars.<sup>8</sup> In its opinion, the Court offered that the lowest campaign contribution limit that the Court has upheld, in today's dollars, is a limit of \$1,600 per two-year election cycle. Even with that observation, it is unclear whether the Court would uphold a limit of that amount should a case present itself.

Measure 47's contribution limit of \$100 per election period for a nonstatewide office is equivalent to Vermont's contribution limit of \$200 per election cycle for state representatives, even before accounting for inflation. Likewise, Measure 47's limit of \$500 per election period for a candidate for statewide office is roughly equivalent to Alaska's limit of \$500 per year. In light of the two court decisions in Vermont and Alaska, the following provisions of Measure 47, section 3, are susceptible to being struck down as unconstitutional should they be challenged in court:

- Individuals may contribute no more than \$500 for a candidate for statewide office and \$100 for a candidate for nonstatewide office per election period.
- Political committees (other than a small donor committee or political party finance committee) may contribute no more than \$400 for a candidate for nonstatewide office per election period.
- Minors who are at least 12 years old but less than 16 years old may contribute no more than \$50 to a candidate committee, political committee or political party per election period.

### Limits on a candidate's personal contributions or expenditures have been found to be unconstitutional

The United States Supreme Court has held that individuals have a First Amendment right to spend as much of their personal money on their campaign as they wish.<sup>9</sup> In addition, the

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<sup>3</sup> *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976); see also *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (Court describes government's interest in preventing corruption or its appearance as "compelling.").

<sup>4</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Thompson v. Hebdon*, 589 U.S. \_\_\_ (November 25, 2019) (slip op. 19-122) (per curiam).

<sup>8</sup> *State v. Alaska Civil Liberties Union*, 978 p.2d 597 (1999).

<sup>9</sup> *Buckley* at 54.

government does not have justifiable interest in limiting candidates' use of personal funds toward their own campaign.<sup>10</sup> Therefore, the government may not prohibit or limit the amount of personal funds that candidates may contribute to or spend on their campaign.<sup>11</sup> For those reasons, the following provisions of Measure 47, section 4, that impose limits on a candidate's personal contributions and expenditures would likely be found to be unconstitutional under the United States Constitution should they be challenged in court:

- Candidates for statewide office may contribute no more than \$50,000 to their own campaign committees per election period. Candidates for nonstatewide office may contribute no more than \$10,000 to their own campaign committees. If the candidate is not the incumbent, the candidate may contribute an additional 50 percent beyond those maximum amounts.
- Candidates may not make loans to their own campaign committees.
- Independent expenditures by candidates will be treated as contributions to the candidates' own campaign committees.

#### Limits on independent expenditures have been found to be unconstitutional

Under *Citizens United*, a prohibition or limit on the amount of independent expenditures by corporations or unions is unconstitutional under the First Amendment.<sup>12</sup> Because the freedom of expression is a fundamental right under the First Amendment, "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"<sup>13</sup>

In *Citizens United*, the Court found that because a "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," such a restriction violates the First Amendment.<sup>14</sup> Likewise, a prohibition or limit on the amount of contributions that may be made to an organization or political committee that makes only independent expenditures is also unconstitutional.<sup>15</sup>

For those reasons, the following provisions of Measure 47, section 6, that impose limits on independent expenditures would likely be found to be unconstitutional under the United States Constitution if they were challenged in court:

- Individuals may make independent expenditures of no more than \$10,000 in the aggregate per year.
- Minors who are at least 12 years old but less than 16 years old may make independent expenditures of no more than \$500 in the aggregate per year.
- Minors who are less than 12 years old may not make any independent expenditures.
- Corporations and labor unions may not make any independent expenditures to support or oppose a candidate or political party.
- Candidates, political committees and other entities may make independent expenditures only in accordance with the contribution limits set out in Measure 47.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 339, quoting *Buckley* at 19.

<sup>15</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

Please let me know if we can be of more assistance.

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Very truly yours,

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