

February 3, 2020

RE: Equal protection challenge by candidates subject to different campaign contribution limits

Dear Representative Rayfield,

This is an informal opinion. You asked whether placing different campaign contribution limits at different times could raise constitutional issues under equal protection guarantees. You asked whether an individual candidate could raise an “as-applied” challenge under the equal privileges guarantee of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

In the proposed scenario, a candidate running for office under the current system can and has been raising unlimited campaign contributions for their campaign. Campaign contribution limits are then put into place in the middle of the election. Afterwards, a different candidate receives their party’s nomination. Because contribution limits are now in place, that candidate is prevented from raising campaign contributions in the same unlimited amounts as the first candidate.

Under Article I, section 20, of the Oregon Constitution, a candidate that is subject to extremely low limits for raising campaign contributions has a strong “as-applied” challenge for the inequality in treatment as an individual. In addition, under the Fourteenth Amendment, to the US Constitution, a court would review the disparate treatment under strict scrutiny to likely find it violates the Fourteenth Amendment’s equal protection guarantees, because it is not narrowly tailored to achieving the only court-recognized interest, to prevent quid pro corruption or the appearance thereof.

## **I. Oregon Constitution analysis**

Article I, section 20, of the Oregon Constitution, states, “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.” The provision protects against the disparate treatment of both individuals and classes of individuals.

An analysis of a claim that Article I, section 20, has been violated begins with the question of whether a person was denied a privilege or immunity.<sup>1</sup> In *State v. Clark*, the Oregon Supreme Court explained that the clause “forbids inequality of privileges or immunities not available upon the same terms, first, to any citizen, and second, to any class of citizens.”<sup>2</sup> There is a strong argument that donating and receiving campaign contribution is a privilege and that campaign contribution limits denies a donor and a candidate of that privilege.

The next step of the analysis is to determine whether the claim involves “inequality of treatment as an individual or inequality of treatment as a class.”<sup>3</sup> There is an argument that “as-applied” there is an inequality of treatment of the individual.

### Individual-based claim

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<sup>1</sup> *State v. Scott*, 96 Or. App. 451, 455 (1989).

<sup>2</sup> *State v. Clark*, 291 Or. 231, 237 (1981).

<sup>3</sup> *Id.*

An individual-based claim of an Article I, section 20, violation first requires a showing that the government denied to an individual a privilege similarly situated individuals received.<sup>4</sup> The Oregon Supreme Court has stated that “[a] government decision-maker will be in compliance with Article I, section 20, as long as there is a rational explanation for the differential treatment that is reasonably related to his or her official task or to the person's individual situation.”<sup>5</sup>

A candidate that is subject to extremely low limits for raising campaign contributions has a strong “as-applied” challenge for the inequality in treatment as an individual. The candidate receiving their party nomination after the limits are put into place would be similarly situated as other candidates, except those candidates who entered the election earlier would have been able to raise a large campaign fund under the prior scheme of unlimited campaign contributions.

Arguably, there is not a rational explanation for the differential treatment that is reasonably related to the person's individual situation. While we cannot predict how a court would decide, treating candidates within the same election differently is not rationally related to a government interest in preventing corruption or the appearance of corruption.

### Class-based claim

A court is unlikely to find that candidates running for office constitute a class, and therefore unlikely to find a class exist that is treated differently under the law in violation of Article I, section 20.

For there to be a legitimate class-based claim under Article I, section 20, the class must be a “true class,” meaning it must exist as a distinct group apart from the law subject to challenge.<sup>6</sup> In describing what is meant by a “true class,” the courts have drawn “a distinction between classes that are created by the challenged law or government action itself and classes that are defined in terms of characteristics that are shared apart from the challenged law or action.”<sup>7</sup> The court explains in *Tanner v. OHSU*:

The standard example of a nontrue class, drawn from the Supreme Court's decision in *Clark*, is the classification created by a statute that imposes a filing deadline for filing a petition for review. Such legislation creates two classes of persons: (1) those who timely file petitions for review, and (2) those who do not. Both are “classes” of persons, at least in the colloquial sense of groups having something in common. But in the absence of the statute, they have no identity at all. Legislation that disparately affects such “classes” does not violate Article I, section 20, because of the essentially circular nature of the argument: The legislation cannot disparately affect a class that the legislation itself creates.<sup>8</sup>

Like in the *Clark* case, here, in the absence of government action, the class of candidates filing for office at different times under different campaign contribution limits would not have existed. It is government action in enacting or enforcing campaign contribution limits that creates the disparate affect.

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<sup>4</sup> *State v. Savastano*, 354 Or. 64, 96 (2013).

<sup>5</sup> *Id.* Article I, section 20, applies to the judicial branch. *State v. Stevens*, 311 Or. 119, 125 (1991).

<sup>6</sup> *Scott* at 456.

<sup>7</sup> *Tanner v. OHSU.*, 157 Or App 502, 520 (1998).

<sup>8</sup> *Id.* at 521, citing *Clark*, 291 Or. at 240. See also *Sealey v. Hicks*, 309 Or. 387, 397 (1990); *Hale v. Port of Portland*, 308 Or. 508, 525 (1989).

Assuming for argument sake that candidates filing for office under different sets of laws describes a true class, the final step is to determine the type of class involved and apply the appropriate level of court scrutiny. There is a “more demanding” level of scrutiny<sup>9</sup> if the class is a suspect class, meaning one focusing “on characteristics that are historically regarded as defining distinct, socially recognized groups that have been the subject of adverse social or political stereotyping or prejudice.”<sup>10</sup> A court likely would not conclude that a group of candidates for elected office are a suspect class similar to a class defined by race, gender, sexual orientation or religious affiliation.<sup>11</sup>

In the absence of a suspect class, a statute is scrutinized “[u]nder the less demanding rational basis standard” and will withstand an Article I, section 20, challenge “as long as it is tied to a legitimate governmental purpose, regardless of whether that purpose is set out in the statute or legislative history, or was even considered by the legislature.”<sup>12</sup>

## II. United States Constitution analysis

The Fourteenth Amendment to the United States Constitution provides, in what is known as the Equal Protection Clause, that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” A statute challenged under an equal protection claim is examined at different levels of scrutiny depending upon the class of persons or the type of legal “protection” at issue. The Oregon Supreme Court has summarized the analysis as follows: “[i]n the absence of fundamental rights or a suspect class, statutory schemes are examined to determine whether they rationally further legitimate objectives of state law. . . . Stated otherwise, a statutory scheme violates equal protection if it discriminates without any rational basis in terms of the purposes of the act.”<sup>13</sup>

Here, a fundamental right is involved, that is free speech. Political speech is “central to the meaning and purpose of the First Amendment.”<sup>14</sup> Accordingly, “[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>15</sup> A reviewing court would apply a strict scrutiny review to determine whether the disparate treatment is narrowly tailored to achieving the only court-recognized interest in enacting campaign contribution limits, that is preventing quid pro corruption or the appearance thereof.

A court would unlikely find that campaign contributions to a candidate who entered an election at a later date than another candidate is somehow more prone to the corrupting influence of campaign contributions. Rather a court would likely find that a candidate who entered an election at a later date that is subject to different rules regarding campaign contribution limits violates the Fourteenth Amendment’s equal protection guarantees.

Sincerely,

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<sup>9</sup> *Morsman v. City of Madras*, 203 Or. App. 546, 559 (2006).

<sup>10</sup> *Id.* at 557.

<sup>11</sup> *Tanner*, 157 Or. App. at 524 (1998).

<sup>12</sup> *Morsman* at 559, citing *Kane v. City of Beaverton*, 202 Or. App. 431, 438-439 (2005).

<sup>13</sup> *Klamath Falls v. Winters*, 289 Or. 757, 772 (1980).

<sup>14</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310, 329 (2010).

<sup>15</sup> *Id.* at 340 (internal quotation marks omitted).