IN THE SUPREME COURT OF THE STATE OF OREGON

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.

MULTNOMAH COUNTY,
Petitioner-Appellant,

and

ELIZABETH TROJAN, MOSES ROSS, JUAN CARLOS ORDONEZ, DAVID DELK, JAMES OFSINK, RON BUEL, SETH ALAN WOOLLEY, and JIM ROBISON,
Intervenors-Appellants,

and

JASON KAFOURY,
Intervenor,

v.

ALAN MEHRWEIN, PORTLAND BUSINESS ALLIANCE, PORTLAND METROPOLITAN ASSOCIATION OF REALTORS, and ASSOCIATED OREGON INDUSTRIES,
Intervenors-Respondents.

Multnomah County Circuit Court No. 17CV18006
Court of Appeals No. A168205
Supreme Court No. S066445

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC.

Caption continued on next page

July 2019

On Certified Appeal from a Judgment of the Multnomah County Circuit Court,
the Honorable Eric J. Bloch, Judge.

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I. INTEREST OF AMICUS

The American Civil Liberties Union Foundation of Oregon, Inc. ("ACLU of Oregon") is a statewide, nonprofit, nonpartisan organization funded almost entirely by voluntary contributions and dedicated to the principles of liberty and equality embedded in the Oregon Constitution, the United States Constitution, and civil rights laws. The ACLU of Oregon is an affiliate of the national American Civil Liberties Union ("ACLU National"), with over 33,000 members in Oregon and more than 1.6 million members nationally.

Due to the important constitutional interests implicated, the ACLU of Oregon has previously appeared as amicus in major Oregon cases involving freedom of expression and campaign finance laws, including *Vannatta v. Kiesling*, 324 Or 514, 931 P2d 770 (1997) ("*Vannatta I*"). The ACLU of Oregon has vigilantly defended Article I, section 8 of the Oregon Constitution in cases like this one.

Similarly, ACLU National has been engaged for decades in the effort to reconcile campaign finance legislation and free expression principles. ACLU National's efforts have spanned from *Buckley v. Valeo,* 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976), where the national organization represented our New York affiliate, who was a plaintiff, to *McConnell v. Federal Election Com'n,* 540 US 93, 124 S Ct 619, 157 L Ed 2d 491 (2003), where ACLU National was both co-counsel and plaintiff, to) *Randall v. Sorrell,* 548 US 230, 126 S Ct

2479, 165 L Ed 2d 482 (2006, where ACLU National was lead counsel. In addition, ACLU National has appeared as *amicus curiae* in many of the U.S. Supreme Court's campaign finance cases, including *Federal Election Com'n v. Wisconsin Right to Life, Inc.,* 551 US 449, 127 S Ct 2652, 168 L Ed 2d 329 (2007) and *Citizens United v. Federal Election Com'n*, 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010).

The ACLU of Oregon has a particular interest in this case because in recent years, the organization's understanding of the relationship between campaign finance regulation and the freedom of expression enshrined in both the U.S. and Oregon Constitutions has evolved. This reckoning started in 2011, in the wake of *Citizens United*. ACLU National came to recognize the multiple, deleterious effects of excessive money in politics – including its negative impact on communities historically excluded from meaningful political participation – and reconsidered its previous absolute opposition to any regulation of campaign finance.

The ACLU of Oregon and its members have similarly witnessed several years of increasing costs of campaigns and growing corporate influence in the politics of Oregon. We have seen the harms of an unregulated elections system, including favoring the views of the rich to such an extent that the views of less affluent Oregonians are largely erased from the political sphere, suppressing the very political participation that the ACLU of Oregon has defended throughout

its 60-year history. This has changed the ACLU of Oregon's analysis of both the interplay between different expressive interests at stake in Oregon's campaigns and the ways they are protected under the Oregon Constitution. The proper resolution of that delicate balance remains an issue of substantial importance to the ACLU of Oregon and its members.

II. STATEMENT OF THE CASE

Amicus ACLU of Oregon incorporates Multnomah County's ("the County") Statement of the Case, excluding the County's Questions Presented and Summary of Arguments.

III. SUMMARY OF ARGUMENT

Central to this case are two of the most venerable principles in our democratic republic: the public's right to express itself free of government censure and their right to participate in free and fair elections. The Oregon Constitution proscribes governmental censure of expression in Article I, section 8. Similarly, the Oregon Constitution demands that elections be fair and free from undue influence in Article II, section 8.

Today, the power of unchecked money in politics is a central theme in public discourse about electing our leaders and shaping our government. This is uniquely true in Oregon because it remains one of the few places in the country with no limitations on campaign contributions. As a result of the Court's decision in *Vannatta I* – with its correctly expansive interpretation of Article I,

section 8 and its incorrectly narrow view of Article II, section 8 – Oregon is now awash in cash for state and local political campaigns. The absolute protections currently afforded to many campaign finance activities have led to an imbalance in constitutional principles that requires correction.

The Court should revisit its ruling in *Vannatta I* and correct its holding regarding the meaning and scope of Article II, section 8 of the Oregon Constitution. As *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992) and its progeny require, the Court should apply the principles underlying the text and history of Article II, section 8 to current election circumstances in Oregon. With modern election circumstances in mind, the principles underlying Article II, section 8 grant state and local governments the authority to set reasonable limits on campaign contributions and expenditures. Indeed, Article II, section 8 must be read in this manner to protect free suffrage and safeguard the integrity of elections from the undue influence of unrestricted campaign financing.

The conclusion in *Vannatta I* that campaign contributions and expenditures are protected expression under Article I, section 8 is correct and should not be disturbed. Nevertheless, Article II, section 8 establishes a corresponding constitutional protection for free suffrage, requiring the Court to harmonize these two fundamental constitutional protections. The Court should adopt a framework that allows legislators, courts and election administrators to determine when a given limit on campaign contributions or expenditures

balances with equal dignity the expressive interests and harm of undue influence associated with both. A harmonizing test should consider what type of limit is at issue (contribution or expenditure), geography, the historical costs of a particular race and the number of eligible electors. The test should prevent limits that are so low that they prevent meaningful communication with the electorate.

While disclosure laws alone are insufficient to protect the integrity of elections, they are an important aspect of campaign finance regulation. Applying the same harmonizing test, the Court should ensure that disclosure laws are not so broad that they chill speech beyond that which is necessary to protect free suffrage. Robust disclosure laws should be deemed constitutional when their application is limited to communications directly for or against a candidate or measure. Strict disclosure laws must also permit exceptions when disclosing the identity of a funder would threaten the safety of the donor, subjecting them to threats, harassment or reprisals.

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IV. ARGUMENT

A. *Stare decisis does not prevent the Court from reconsidering Vannatta I on the meaning and scope of Article II, Section 8.*

Stare decisis principles allow the Court to balance promoting stability in legal rules against the Court's ability to correct past errors. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53, 11 P3d 228 (2000). The Court has "ultimate responsibility for construing our constitution," and the exclusive ability to review and remedy errors in interpretation. *Id*.

Stare decisis does not render past decisions inflexible. *Id*. (quoting *Landgraver v. Emanuel Lutheran*, 203 Or 489, 528, 280 P2d 301 (1955)). The Court will reconsider prior rulings under the Oregon Constitution:

> [W]henever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decisions to follow its usual paradigm for considering and construing the meaning of the provision in question.

Stranahan, 331 Or at 54. The Court also considers how long the decision has been in place and the risk of unwinding a large body of law that may rest on a particular precedential decision. *State v. Ciancanelli,* 339 Or 282, 290, 121 P3d 613 (2005).

These principles support reconsidering *Vannatta I*. The Court decided *Vannatta I* twenty-two years ago. Its ruling on Article II, section 8 has not

served as a major foundation for a larger body of law, so overruling this aspect of the decision will not cause undue confusion or uncertainty. This is especially true since the Court has already limited other aspects of *Vannatta I*. *See Vannatta v. Oregon Government Ethics Comm'n*, 347 Or 449, 222 P3d 1077 (2009) ("*Vannatta II*") (withdrawing *Vannatta I*'s statement that the ultimate use of contributions had no bearing on the protections afforded them by Article I, section 8).

In the time since *Vannatta I* was decided, the Court has also clarified the analytical framework under *Priest v. Pearce* to require the application of historical principles to modern circumstances. *See, e.g., State v. Savastano*, 354 Or 64, 72, 309 P3d 1083 (2013). Applying this framework to *Vannatta I* reveals the error in the Court's overly narrow construction of Article II, section 8. *Stare decisis*, then, does not prevent the Court from correcting this error, and recognizing the power of Article II, section 8 to protect Oregon's free and fair electoral process through reasonable campaign finance regulations.

1. *Vannatta I incorrectly and incompletely interpreted Article II, section 8.*

The Court's holding in *Vannatta I* that Article II, section 8 of the Oregon Constitution does not authorize reasonable campaign contribution and expenditure limits overlooked significant historical evidence and fails to take

into account the way Oregon currently runs its elections. 324 Or at 536. Article II, section 8 provides:

> The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

Based on the structure of this provision, the meaning of the introductory mandate, "to support the privilege of free suffrage," and the definition of the terms "elections," "undue influence," and "improper conduct," Article II, section 8 authorizes reasonable campaign finance restrictions. *See Priest*, 314 Or at 415-16 (setting the framework for interpreting constitutional provisions, which examines constitutional text, the historical context of its adoption, and prior case law). Simply put, unregulated campaign contributions and expenditures can constitute improper conduct that unduly influences elections, weakening the privilege of free suffrage.

a. Article II, section 8 is structured in three components, and its command to "support the privilege of free suffrage" animates the rest of the provision.

Two salient features emerge from Article II, section 8's structure. First, its mandate to the Legislative Assembly[2] to "support the privilege of free

[2] Although Article II, section 8 is written as a mandate to the Legislative Assembly, it also applies to Multnomah County. In *Vannatta I*, this Court held that because the Legislative Assembly's authority was later granted to the people to exercise directly through the initiative process in Article IV, section 1 of the Oregon Constitution, Article II, section 8 also applied to the initiative process. *See Vannatta*, 324 Or at 528. Likewise, Article II, section 8 should be

suffrage" animates the text that follows. This language, offset by commas, can be divided into two additional components: "prescribing the manner of regulating, and conducting elections," and "prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct." *Picray v. Secretary of State*, 140 Or App 592, 916 P2d 324 (1996) (recognizing the same two components). It is essential to understand Article II, section 8's command to "support the privilege of free suffrage," because it drives the next two clauses.

The text of this introductory clause points to Article II, section 8's expansive purpose. When the Court interprets the original Oregon Constitution's text, it often uses Webster's 1828 Dictionary. *See, e.g.*, *State v. Davis*, 350 Or 440, 447, 256 P3d 1075 (2011) (citing Noah Webster, 1 *An American Dictionary of the English Language* (1828) (reprint 1970)). That dictionary defines the first word of the clause, "support," as, *inter alia*, "To maintain; to sustain; to keep from failing; as, to *support* life; to *support* the strength by nourishment." Noah Webster, *An American Dictionary of the*

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read *in pari materia* with the Home Rule provision in Article VI, section 10 of the Oregon Constitution. That provision grants some legislative authority to voters of counties, and explicitly provides that the "initiative and referendum powers reserved to the people" flow to county voters adopting legislation under county charters. Thus, Article II, section 8's grant of authority to the legislature also flows to county governments.

English Language (unpaginated) (1828) (reprint 1967). Article II, section 8 thus does more than merely protect "free suffrage"; it creates an environment that sustains and nourishes it.

Webster's 1828 dictionary further illuminates the meaning of the words "free" and "suffrage" that Article II, section 8 cultivates. Beginning with the latter term, Webster's defines "suffrage" as, *inter alia*, "A vote; a voice given in deciding a controverted question, or in the choice of a man for an office or trust." *Id.* At its core, then, "suffrage" requires personal agency, as it involves "a voice… in deciding a controverted question," or making a "choice" among political candidates. An individual must be "free" to exercise this agency, which Webster defines as, *inter alia*, "[u]nconstrained; unrestrained; not under compulsion or control. A [person] is *free* to pursue [their] own choice; [they] enjoy[] *free* will." *Id.* Thus, Article II, section 8 is aimed at sustaining and nourishing voters' unfettered agency to select their leaders and make policy choices. As described below, the rest of the provision must be interpreted with this purpose in mind.

The second salient feature of Article II, section 8's structure is the interplay between the term, "elections," and the final clause, "prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct." This Court has observed that the word "therein" in the final clause of Article II, section 8 refers to "elections." *See Vannatta*,

324 Or at 529. Thus, the last clause of Article II, section 8 prohibits "all undue influence [in elections]" resulting from the specified conduct. *See id.* Accordingly, the definitions of the terms "elections" and "undue influence" are inextricably linked—if one is interpreted expansively, the other must also be. Naturally, the converse is also true. Interpreting Article II, section 8 must, then, first begin with interpreting the term "elections."

b. By broadening its interpretation of "elections" in Vannatta I, this Court would more faithfully apply the Priest framework,[3] and better advance Article II, section 8's purpose of "support[ing] the privilege of free suffrage."

By reconsidering its definition of the Article II, section 8 term "elections" in *Vannatta I,* the Court would adhere more closely to the *Priest* framework of constitutional interpretation. *See Priest,* 314 Or at 415-16. As outlined below, the *Vannatta I* Court's narrow definition of "elections" is called into question by "new information as to the meaning of" Article II, section 8. *Stranahan*, 331 Or at 54. This definition also suffers from a "failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question." *Id.*

At the first level of the *Priest* analysis, the Court analyzes the text of the provision in question, here Article II, section 8. *See Priest,* 314 Or at 415-16.

[3] This brief does not analyze the third *Priest* prong, case law, because there is no meaningful case law, aside from *Vannatta I*, from the Oregon Supreme Court interpreting Article II, section 8. *See Vannatta*, 324 Or at 535.

This inquiry requires the Court to search for the ordinary meaning of the term "elections" at the time of Article II, section 8's adoption. *See, e.g., Wittemyer v. City of Portland*, 361 Or 854, 861, 402 P3d 702 (2017).

In *Vannatta I*, the Court relied on the definition of "election" in Webster's 1828 dictionary. *Vannatta*, 324 Or at 530. That definition limited the term "election" to the actual act of choosing a particular candidate. Bolstering this observation, the *Vannatta I* Court noted that Webster's 1828 dictionary did not contain a political definition of the term "campaign"; the closest defined term was "electioneering," which Webster's defined as, "'[t]he arts or practices used for securing the choice of one to office.'" *Id.* (quoting *Webster's American Dictionary of the English Language* (1828)). The *Vannatta I* Court interpreted the lack of a political definition for "campaign," in conjunction with Webster's definition of "electioneering," as meaning that "election" had a narrower definition than "electioneering." *Id.* at 530-31. "Election," the Court said, "refer[s] to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure." *Id.* at 531.

The Court's exclusive reliance on Webster's failure to supply a political definition for "campaign" points to a serious deficiency in the *Vannatta I* Court's textual analysis. It did not consider that Webster's definition merely "provide[s] a helpful starting point in … determin[ing] … ordinary meaning."

Wittemyer, 361 Or at 861. Other sources are often required "to understand the wording [of the Oregon Constitution] in light of the way that wording would have been understood and used by those who created the provision." *Vannatta*, 324 Or at 530.

To supplement dictionary definitions, this Court sometimes relies on the contemporaneous usage of a term. In *Wittemyer*, for example, this Court cited Alexander Hamilton's use of the term "capitation" to supplement a dictionary definition. *Wittemyer*, 361 Or at 865, n.6. The individual Intervenor-Appellants Elizabeth Trojan, David Delk, and Ron Buel ("Citizens") likewise canvassed the then-contemporaneous usage of the term "election" in their Opening Brief.[4] They persuasively demonstrated that 19th century vernacular understood the term "election" to include the period of campaigning. Citizens' Opening Brief at 69-79.

The Citizens also show that 19th century usage employed the terms "election," "political," and "electioneering" synonymously to modify the term "campaign." *Id.* Three points follow from this. First, the term "election" refers to the time period that includes campaigns because it was historically used to modify the term "campaign." Second, contrary to *Vannatta I*'s conclusion, there

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[4] Amicus ACLU of Oregon has not independently verified the historical research of the Citizens, and mentions it here only to help this Court place it in context.

is no meaningful difference between the way 19th century vernacular used "election" and "electioneering," because both were used synonymously to modify "campaign." Finally, Webster's failure to provide a definition of "campaign" was a deficiency in the dictionary, because the term was actually used with a political connotation at that time. These observations confirm that Article II, section 8 covers the full scope of a political campaign, not just the day or days when voting actually occurs.

Vannatta I adopted a similarly cramped analysis of the term "election," in analyzing the second *Priest* factor, historical context. *See Priest*, 314 Or at 415-16. The Court limited its discussion to comparing Article II, section 8 to its analogue in the 1818 Connecticut Constitution, the precursor to Article II, section 8 according to *Vannatta I*. *See Vannatta*, 324 Or at 533-34. The Court noted that the provision in the Connecticut Constitution was limited to "meetings of electors," while the Oregon provision was not similarly restricted. *Id.* at 534. The Court admitted that the difference could mean that the drafters of Article II, section 8 intended the term "elections" to be broader than "meetings of electors." *Id.* It dismissed this possibility's significance because it had previously "assumed a broader reading in [its] initial discussion of the text." *Id.*

Earlier in its textual analysis, the Court opined that "the legislature's power [under Article II, section 8] is [not] limited in time—a bribe to vote a

particular way that was given months before an election still would appear to fall within the ambit of Article II, section 8. But we do suggest that, given the relevant historical meaning of the word used, the legislature's mandate is a confined one." *Id.* at 531.

This historical analysis claims more than it proves. It asserts that Article II, section 8 could have a broader definition of "elections" than its Connecticut counterpart contemplated. It then concludes that such a broad definition would still be circumscribed, based solely on its deficient textual analysis. *Priest*'s command to consider a constitutional provision's historical context requires more than this circular logic.

Beyond Oregon, New York's regulation of campaigns provides a fuller picture of what the term "elections" meant at the time. In 1843, the New York Supreme Court interpreted a statute designed "to preserve the purity of elections" to justify regulation of campaigns. *Jackson v. Walker*, 5 Hill 27, 31-32 (NY 1843). Such a conception points to a definition of "elections" broad enough to empower the Oregon Legislature to regulate campaign contributions and expenditures under Article II, section 8 of the Oregon Constitution.

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c. A broader definition of "undue influence" would also more faithfully apply the Priest framework,[5] and better advance Article II, section 8's purpose of "support[ing] the privilege of free suffrage."

Because Article II, section 8 is structured so that the definition of "elections" influences the scope of what constitutes "undue influence," a more accurate understanding of the former term requires a broader reading of the latter. The *Priest* analytical framework confirms Article II, section 8's structural implications.

Like its analysis of the term "elections," the Court in *Vannatta I* narrowly defined Article II, section 8's mandate to prohibit "undue influence … from … improper conduct." The Court did so by misapplying the doctrine of *ejusdem generis*. It interpreted "improper conduct" by reading it in conjunction with the preceding terms "power," "bribery," and "tumult," "to refer to conduct that interferes with the act of voting itself, rather than with the far broader concept of political campaigning." *Vannatta*, 324 Or at 533. From this, the Court reasoned that "[o]rdinary campaign contributions and expenditures do not constitute 'undue influence' under any one of the specified sources of undue influence." *Id.*

The Court's application of *ejusdem generis* to the phrase "improper conduct" is flawed for two alternative reasons. First, the doctrine is inapplicable

[5] *See* comment in note 2, supra.

in this context. As then-Judge De Muniz noted in his dissenting opinion in *Picray*, *ejusdem generis* is appropriately applied to text where the defined terms are more specific than those in Article II, section 8. *Picray*, 140 Or App at 608. Because the terms that precede "improper conduct" in Article II, section 8 are more general, *ejusdem generis* does not meaningfully aid in its interpretation.

Ejusdem generis is also inapplicable because a list of specific terms accompanying a general term does not always narrow the general term. As then-Justice Walters noted in her concurring opinion in *Schmidt v. Mt. Angel Abbey*, sometimes the intent behind including a list of specific terms with a general term is to allow "[t]he legislature […] [to] instead use examples to illustrate the applicability of a term, without intending to limit or narrow its common meaning, or to broaden the common meaning of a term." 437 Or 389, 408-09, 223 P3d 399 (2009)(en banc).[6] Article II, section 8's broad purpose to support free suffrage suggests that its framers similarly intended the specific examples of undue influence to be illustrative, instead of limiting.

Alternatively, even if it were appropriate to apply *ejusdem generis* in this case, the Court has more interpretations to choose from than the *Vannatta I*

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[6] Rules for analyzing statutory text probably apply to constitutional interpretation as well, since this Court applies the framework for interpreting Oregon statutes to interpreting legislatively-referred constitutional amendments. *See e.g. State v. Sagdal*, 356 Or 639, 642, 343 P3d 226 (2015).

Court suggests. The *Picray* majority made the distinction between passive, non-coercive conduct (which does not constitute "undue influence" within the meaning of Article II, section 8), and active, coercive conduct (which does constitute "undue influence"). 140 Or App at 600.[7] Campaign contributions and expenditures represent active conduct that becomes coercive when they distort the political process. Regardless of whether this Court rejects *ejusdem generis* in this context, or applies it differently than *Vannatta I* did, Article II, section 8's text allows for a broader definition of "improper conduct." This Court must, therefore, look to the provision's historical context for its meaning.

Article II, section 8's historical context demonstrates that its framers intended to prohibit a broad swath of "undue influence." In their Opening Brief, the Citizens pointed to early Oregon legislation as evidence for this intent.[8] They highlighted two statutes, one enacted in 1864, and the other in 1870. Citizens' Opening Brief at 58-62. The 1870 statute is particularly important because Oregon Constitutional Convention delegate Lafayette Grover was governor at the time that it was enacted and he did not question its

[7] In his *Picray* dissent, Judge De Muniz speculated that the majority thought that coercive conduct was limited to physical acts. This, however, was "not completely clear." *Picray*, 140 Or App at 608, n.1.

[8] Again, Amicus ACLU of Oregon only cites the Citizens' brief to put it in proper context; it did not perform original research, except where indicated.

constitutionality. *Id*. at 59. Its provisions thus offer proof of the type of law that a Convention delegate thought Article II, section 8 authorized.

Among other things, the 1870 law provided that "any person who shall [by promise of favor or reward, or otherwise] … induce or persuade any legal voter to remain away from the polls, and not vote at any general election in this state, shall, on conviction, be deemed guilty of a felony." General Laws of Oregon, Crim Code, title II, ch V, § 634, p. 429 (Deady & Lane 1843-1872). Though it is true that this statute "speak[s] to actual interference in the act of voting itself,"[9] as described below, it evinces a broader desire to support voters' unfettered agency to select their leaders and make policy choices. It does this by going beyond bribery and overt coercion, the limited frame that *Vannatta I* used for viewing Article II, section 8's undue influence clause. *See Vannatta*, 324 Or at 532-33.

Two features of this 1870 provision illustrate how it goes beyond *Vannatta I*'s cramped conception of undue influence. First, it is aimed at supporting voter agency beyond merely preventing fraud; there is nothing inherently fraudulent about persuading somebody not to vote. Second, the use of the general "or otherwise" shows that the statute is aimed at more than preventing mere bribery.

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[9] *Vannatta*, 324 Or at 533.

In *State v. Reed*, the Oregon Supreme Court construed a similar provision of the 1870 law that provided:

> Any person who shall by promise of favor or reward, or otherwise, induce or persuade any person to come into this state, or into any county or precinct within this state, for the purpose and with the intent that such person shall, by so changing his habitation, vote at any general election which may hereafter be held in this state, at any place where such voter or person is not a bona fide resident, shall be deemed guilty of a felony, and upon conviction thereof shall be punished as hereinafter provided.

52 Or 377, 380, 97 P 627 (1908) (quoting B. & C. Comp. § 1907). In that case, defendant was charged with paying for lodging to allow an individual to vote in a jurisdiction in which he was not legally entitled to do so. *Id.* at 379-81, 388. Facilitating fraudulent voting activity by paying another's expenses is not a bribe; rather, it is mere persuasion. When the *Reed* Court listed the statutory elements of the offense, bribery was not among them. Rather, the Court held that "in order to justify the verdict rendered, [it was necessary] only to show, beyond a reasonable doubt, defendant's intent to have the voter make the change of precincts for the purpose of voting at the election …, and that such change was made." *Id.* at 383.

Although fraud was involved in the statute that *Reed* interpreted, it was not an inherent component of the provision making it illegal to persuade a voter to stay away from the polls. When viewed through *Reed*'s lens, this provision targets undue influence beyond mere fraud and bribery. It is directed at

supporting the privilege of free suffrage in a much broader sense than *Vannatta I* envisioned.

Beyond Oregon, New York also had a law lending this privilege similarly broad support. During the same historical period, it had a statute that, among other things, made it illegal "*[t]o contribute money for any other purpose intended to promote an election of any particular person or ticket*, except for defraying the expenses of printing, and the circulation of votes, handbills, and other papers previous to any such election." *Jackson v. Walker*, 5 Hill 27 (1843) (quoting *Stat.* 1829, *p.* 565, *ch* 373). The New York Supreme Court interpreted this statute in *Jackson*. There, it held that the statute invalidated a contract to pay for meeting space for a political campaign. *Id.* at 32. This was so, the court said, even though there was nothing corrupt about the transaction. *Id.* at 31.

The New York statute's introductory clause stated its purpose, which was "to preserve the purity of elections." *Id.* at 30. This prefatory language, which was similar to the first clause of Article II, section 8, guided the court's reasoning. Declining to read a corruption element into the statute, the court relied on this purpose: "[t]he legislature evidently thought that the most effectual way 'to preserve the purity of election [*sic*],' was to keep them free from the contaminating influence of money." *Id.* at 31. In doing so, it confirmed its broad support for free suffrage. At the same time, however, it preserved core political speech rights by making an exception for "defraying the expenses of

printing, and the circulation of votes, handbills, and other papers previous to any such election." *Id.* at 30.

The broad conception of "undue influence" in elections, embodied in the New York Supreme Court's decision in *Jackson* and the Oregon Supreme Court's decision in *Reed*, fits comfortably with the expansive definition of "elections" described above. If elections are to encompass more than just activities related to the actual act of voting, the possible ways to exert undue influence increase. Conversely, if the legislature is empowered to root out undue influence in all of its variety, the constitutional term "elections" must be interpreted broadly enough to give it room to work. In this way, broad definitions of "elections" and "undue influence … from … improper conduct" work in tandem to allow the legislature, and in this case Multnomah County, to act as Article II, section 8 requires it to do. The Court's jurisprudence requires it to apply these broad principles to contemporary electoral realities in Oregon.

2. *The Court in Vannatta I failed to apply the principles of Article II, section 8 to modern circumstances as required by the Priest constitutional interpretation framework.*

Revisiting *Vannatta I*'s constitutional interpretation is appropriate because it was incomplete. *Vannatta I* correctly relied on *Priest* when it looked to the text, surrounding case law, and historical circumstances to interpret Article II, section 8, but the court's discussion incorrectly ended there. More

recent opinions clarify that the purpose of the *Priest* framework is not to adhere to strict originalism, but rather to create a modified originalist framework that applies the historical principals to modern circumstances. *See, e.g., Savastano*, 354 Or 64 ("In undertaking the inquiry outlined in *Priest*, our goal is to identify the historical principles embodied in the text of Article I, section 20, and to apply those principles faithfully to modern circumstances as they arise." [citations omitted]) (en banc); *accord Ciancanelli*, 339 Or 282. This means that the scope of a given constitutional provision "is not limited to the historical circumstances surrounding its adoption." *Savastano*, 354 Or at 72.

If *Vannatta I* controls the Court's understanding of Article II, section 8, that portion of the constitution will remain locked in history and fail to serve the purpose for which it was written—to support free suffrage.[10] While *Ciancanelli* named *Vannatta I* in a list of cases "consistently" applying the described *Priest* analysis, *Vannatta I*'s analysis was actually inconsistent with *Priest's* modified originalist approach. By its own description, *Vannatta I* only "considered the text and context of Article II, section 8, the historical circumstances

[10] Affirming a strict originalism interpretation of the Oregon Constitution would also reinforce the social inequities upon which our state government was originally built. For example, an originalist view of the meaning of "free" in Article II could require the Court to adopt the racist view that "[free] did not mean Chinese or [Black people]." Carey, Charles Henry, The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, 318 (1984).

surrounding its adoption, and this court's case law that interpreted it." 324 Or at 536. *Vannatta I* makes no mention of the provision's underlying principles or the application of those principles to *modern* circumstances.

Vannatta I pays lip service to the modern understanding of elections in 1997 by acknowledging that it includes the period from candidacy through election returns, *see* 324 Or at 530, but failed to apply that understanding when it relied solely on Webster's 1828 dictionary. Such a limitation disregards the modern realities of voter choice on a ballot. In 2019 in Oregon, when voters make decisions over a period of weeks, rather than a day, and when voters can be inundated with political messaging through a variety of media, a narrow understanding of "elections" severely limits Oregon's ability to support free and fair elections.

Had *Vannatta I* applied Article II, section 8's underlying principles to modern circumstances, it would have recognized that reasonable limits on campaign contributions and expenditures fall squarely within the provision's scope. Even if modern circumstances in 1997 would not have justified limiting contributions and expenditures under Article II, section 8, the election process in Oregon fundamentally changed one year later. In 1998, voters approved Measure 60, which required that voting in biennial and general elections be conducted through vote-by-mail. County clerks now send voting ballots to eligible voters 14-20 days before Election Day. ORS 254.470(2)(a). Voters

make choices and can be influenced in ways that could not be contemplated by a system of single-day polling places.

Measure 60 exemplifies why the pure originalism analysis used in *Vannatta I* was insufficient. Article II, section 8's scope should expand along with the modern conception of elections, adapting to modern circumstances "as they arise." *Savastano*, 354 Or at 72. Proper constitutional interpretation demands that this Court continue to evolve its thinking to give breathing room to the government's ability to support free suffrage.

B. *The Court is required to harmonize Article I, section 8 and Article II, section 8 in a way that ensures both provisions are given equal dignity.*

When there are potentially conflicting provisions of the constitution, "[the court's] function is to harmonize the two." *In re Fadeley*, 310 Or 548, 560, 802 P2d 31 (1990). Article I, section 8 is not absolute. *Id.* at 559. In censuring a judicial candidate who admitted to violating a judicial ethics rule prohibiting personal solicitation of campaign contributions, the Court in *In re Fadeley* had "no difficulty in holding" Article I, section 8 was modified by another constitutional provision. *Id.* at 560 (finding Article VII (Amended), section 8, which empowered the Oregon Supreme Court to remove judges from judicial office, in part, for violation of rules of judicial conduct established by the same, modified the rights of judicial candidates to solicit campaign funds). In so holding, it emphasized that the people adopted the later amendment "in

the face of the pre-existing right to speak, write, or print freely on any subject whatever." *Id.* (citing the rule of construction that the "last in order of time and in local position is to be preferred").

When harmonizing two conflicting constitutional provisions, "the later-enacted provision controls." *State v. Reinke*, 354 Or 98, 121, 98 P3d 1103 (2013) (citing *In re Fadeley*, 310 Or at 560), *adh'd to as modified on recons*., 354 Or 570, 316 P3d 286 (2013). The ACLU of Oregon found only three opinions, all from the court of appeals, that cite *In re Fadeley* for its mandate to "harmonize." *See Picray*, 140 Or App. at 592, fn. 9 (1996) (failing to reach the issue of whether to reconcile Article I, section 8 and Article II, section 8 because the statute in question was deemed to be outside the scope of Article II, section 8); *State ex rel. Adams v. Powell*, 171 Or App 81, 15 P3d 54 (2000) (in banc) (harmonizing an original provision of the constitution with a 1978 voter-approved amendment by interpreting the two provisions as consistent with each other and noting that constitutional amendment by implication is disfavored); *State v. Sagdal*, 258 Or App 890, 311 P3d 941 (2013) (harmonizing the 1934 constitutional amendment permitting non-unanimous jury verdicts by ten out of twelve jurors with the 1974 amendment permitting juries of less than twelve but not less than six to dismiss an argument that the Oregon constitution mandated 10 person juries in criminal cases), *aff'd* 356 Or 639, 343 P3d 266 (2015).

Lack of sequential adoption should not dissuade the Court from undertaking a harmonization analysis here. As the Court noted in *In re Fadeley*, the purpose of harmonizing is to ensure "equal dignity" is afforded to "portions of the same fundamental document." 310 Or at 560; *Carey v. Lincoln Loan Co.*, 342 Or 530, 542, 998 P2d 724 (2007) (citing with approval *In re Fadeley*'s recognition of the need to afford equal dignity to constitutional amendments). The Court should ensure that two foundational principles of the Oregon Constitution—free expression and free suffrage—be afforded equal dignity.

This Court has not yet announced the method by which, as here, it should harmonize two conflicting provisions that existed in the original constitution or that were adopted at the same time. In this case, a harmonizing approach would allow legislators and courts to determine when a given campaign limit affords equal dignity to the competing constitutional interests. Considerations should include what type of limit is at issue (contribution or expenditure), geography, the historical costs of a particular race, and the number of eligible electors. Limits that are so low that they prevent meaningful communication with the electorate would violate Article I, section 8 and should not be permitted. The result of this approach should also permit lawmakers to work to combat racial, economic, and other inequities that limit electors' ability to choose from a diverse set of candidates.

In part, the Court can harmonize the free expression and free suffrage interests in the Oregon constitution by properly understanding campaign contributions and expenditures as the speech-conduct hybrid that they are. Limits on expenditures should consider and protect the more expressive nature of expenditures as compared to contributions. *Vannatta II* was correct to withdraw as overbroad the statement that the ultimate use of moneys has no bearing on the need to protect certain types of political expression that money facilitates. Whereas contributions and campaign expenditures can be used to support non-expressive activities, and in Oregon, possibly non-campaign related activities,[11] *independent* expenditures by definition facilitate communication.[12] Political expression is the very type of activity that both Article I, section 8 and Article II, section 8 aim to support.[13] However, some

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[11] *See, e.g.,* Nakamura, Beth, "Perfectly Legal: The clear-cut rewards of campaign cash (Part 4 of 4)" The Oregonian (March 15, 2019), *available at* https://projects.oregonlive.com/polluted-by-money/part-4.

[12] *See* ORS 260.005(10) (defining "Independent expenditure" as "an expenditure by a person for a communication in support of or opposition to a clearly identified candidate or measure…").

[13] While *Citizens United v. FEC* forecloses the ability to limit communicative expenditures because such laws are an outright ban on speech that is "central to the meaning and purpose of the First Amendment," this Court should not avoid the state constitutional analysis. 558 US at 329. It is the practice of this Court to consider state constitutional questions before federal ones. *See, e.g., State v. Babson*, 355 Or 383, 432-33, 326 P3d 559 (2014) (discussing policy reasons for analyzing state constitutional claims first). Further, the state constitutional inquiry is fundamentally different than that in *Citizens United* because there is a competing fundamental freedom enshrined in the state constitution. While the

campaign finance limits must be observed to ensure that the Oregon Constitution is not used to protect the amplification of the voices of only those who have access to the most capital.[14]

C. *Subjecting campaign finance laws to a Robertson analysis alone fails to recognize the equal dignity of Article I, section 8 and Article II, section 8.*

Vannatta I correctly held that campaign finance laws regulate expression protected under Article I, section 8 and that there is no applicable historical or other exception that would exempt such laws from the coverage of Article I,

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state analysis yields a different result in the context of this particular type of speech, the state analysis does not change the more protective scrutiny this Court recognizes for laws infringing on speech that are not otherwise justified.

[14] *See, e.g.,* Borrud, Hillary, "Political spending in Oregon governor's race tops $37 million, shatters old record," The Oregonian (Nov. 20, 2018), *available at* https://www.oregonlive.com/politics/2018/11/political-spending-in-oregon-governors-race-tops-37-million-shatters-old-record.html. As this article illustrates, a single wealthy donor can, in a single transaction, give the candidate of their choice a strong chance of winning an election. They can thereby drown out the political expression of a multitude of Oregonians, especially less affluent ones. While *Vannatta I* was right to recognize that some electors are forced to associate to gain political power, this is not true for the wealthiest electors. In fact, the lack of limits discourages political association and allows a few wealthy electors to cancel out the voices of many, a reality antithetical to the notion of free expression. Additionally, the Court should not assume that more money equates to more speech. For example, two electors could decide that they both support a single candidate and that the amount of support they want to express is one percent of each of their pay checks for six months leading up to the general election. That one of the elector's paychecks is twice the amount of the second elector's paycheck does not mean that the second elector is less supportive of the candidate.

section 8. *See State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992) (describing the framework set forth in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982)).

Yet while campaign contributions and expenditures enjoy protection, those free expression interests should be balanced with the Constitution's equal protection of free suffrage interests in Article II, section 8. Both foundational freedoms should be accorded the equal dignity contemplated in *In re Fadeley*.

Protecting free expression is central to our democracy. At the same time, campaign finance regulation is necessary to combat serious harms to particular parts of our society, to free suffrage, and to our election process. Unregulated contributions can undermine a system of representative democracy. For example, unregulated contributions provide people and entities a medium to "improper[ly] influence" current and potential office holders through their large contributions. *Nixon v. Shrink Missouri Govt. PAC*, 528 US 377, 389, 120 S Ct 897, 145 L Ed 2d (2000) (citing *Buckley v. Valeo*, 424 US at 28). Additionally, unregulated contributions can create the appearance of corruption in politics and impact the participation of the people in a system of representative government. *Buckley*, 424 US at 27. As *Nixon* suggested, "democracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.'" *Nixon*, 528 US at 390

(quoting *United States v. Mississippi Valley Generating Co*., 364 US 520, 562, 81 S Ct 294, 5 L Ed 2d 268 (1961)).

D. *Disclosure laws are authorized by Article II, section 8, as long as they are not written so broadly that they apply to communications merely "related to" political campaigns.*

Laws mandating disclosure of financing sources or gifts are distinct from campaign finance laws limiting contributions or expenditures. *Vannatta,* 324 Or at 523. This Court has not decided whether campaign finance disclosure laws are subject to Article I, section 8 protection. On the one hand, laws like Multnomah County's that specifically require disclosure of funders of political communications mandate the content of speech (i.e. a person's name), so can be understood as being directed at that content. Disclosure laws could also be understood as a restraint on political expression because disclosure may discourage funding political communications. On the other hand, transparent communications may invite more trust in political discourse and a clearer ability to directly communicate such that disclosure facilitates more expression. And one could distinguish between the identity of a speaker and the content of that which they seek to express.

Assuming that Article I, section 8 protects Oregonians against compelled disclosure, the Court would still need to harmonize those interests with Article II, section 8. Money contributed to campaigns without disclosure of its source can lead to undue influence in elections by eroding public trust in the integrity

of the process. Money contributed to campaigns without disclosure can also prevent the government from protecting campaigns from undue influence or other corruption from undisclosed funders. Indeed, reasonable limits on contributions may not be enforceable if honest disclosures are not required. Money contributed to campaigns without disclosure can have undue influence on the conduct of candidates in office in ways that shield the public from meaningfully engaging those candidates on issues of importance. Applying the correct interpretation of Article II, section 8, the Court should find that there is clear authority to combat the lack of transparency around campaign financing sources with laws requiring identification of funders.

However, a law as broad as that in Multnomah County exceeds the authority granted in Article II, section 8. Disclosure laws that apply to communications merely "related to" a candidate campaign, such as the one included in the Multnomah County ordinance may not influence an election at all, let alone cause any undue influence. Neither "related to" nor the definition of "communication" articulate a clear standard that will guide those enforcing or operating under the law to fairly and freely determine when a particular communication must disclose its funders. For example, does any communication that merely mentions a candidate "relate to" that candidate's campaign? The definition of "communication" is extremely broad and contains no express advocacy requirement. Similarly, "related to" provides no helpful

guidance. Disclosure laws that apply to a communication that only mentions a candidate in an election would exceed the authority of Article II, section 8 and risks restraint of expression well beyond the political sphere. Confining disclosure laws to the realm of expressive activities for or against an identifiable candidate or measure maintains the balance between the constitutional need to protect the integrity of elections with the constitutional need to protect core political dialogue.

The interests in disclosure should also be harmonized with the right of free association in Article I, section 26. While association with others might imply at least some loss of anonymity, some may want to keep their associations private for important reasons. The United States Supreme Court has recognized that there should be exceptions to robust disclosure regimes. *See Citizens United*, 558 US at 370 (citing *McConnell*, 540 US at 198) (recognizing the availability of as-applied challenges to disclosure laws when a group could show a "reasonable probability" that disclosure of its contributors' names "will subject them to threats, harassment, or reprisals").

Supporters of advocacy organizations that engage in public discourse on issues of public interest have legitimate reasons to be concerned about how their support of a particular side of the debate may engender threats of serious harm. This is especially true for people who are members of historically targeted or marginalized communities. This Court should permit harm-based

exceptions to disclosure laws when determining how best to harmonize the significant interest in disclosure with expressive and associational interests.

V. CONCLUSION

The Court should partially overrule *Vannatta I* by reinterpreting Article II, section 8 to allow regulation of excessive campaign contributions and expenditures within its prohibition of undue influence in elections. At the same time, it should leave *Vannatta I*'s analysis of contributions and expenditures under Article I, section 8 and the *Robertson* framework intact. To afford equal dignity to free suffrage and free expression, the Court should harmonize these constitutional interests to set forth a framework permitting reasonable limits on

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campaign contributions and expenditures, as well as authorizing disclosures of financing sources of communications advocating directly for or against a particular vote.

Dated this 18th day of July, 2019.

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Dated this 18th day of July, 2019.

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