

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**

Case No. 17CV18006

ORDER ON

**Petitioner Multnomah County's Motion for
Declaration of Validity**

1 I. Introduction

2 Pursuant to ORS 33.710(2), Petitioner Multnomah County (Petitioner) has commenced
3 this proceeding for the purpose of “having a judicial examination and judgment of the court as to
4 the regularity and legality of Multnomah County Home Rule Charter Section 11.60 and
5 Implementing Ordinance No. 1243 Regulating Campaign Finance and Disclosure.” (hereafter
6 referred to as the charter and ordinance)

7 Specifically, Petitioner asks the court to declare that “Charter Section 11.60 and
8 Ordinance No. 1243 are constitutional, including under Article I, Section 8, of the Oregon
9 Constitution and the First Amendment to the United States Constitution,” and “that Charter
10 Section 11.60 and Ordinance No. 1243 are otherwise permissible under state and federal law and
11 therefore can be fully implemented by the County.”

12 Respondents Associated Oregon Industries, Portland Business Alliance, Portland
13 Metropolitan Association of Realtors, and Alan Merwhein (Industry Respondents) appeared,
14 pursuant to the notice, to “contest the validity of such proceedings, or of any of the acts or things

1 therein enumerated” ORS 33.720(3). Respondents Ron Buel, David Delk, Jason Kafoury, James
2 Ofsink, Juan Carlos Ordonez, Jim Robison, Moses Ross, Elizabeth Trojan, and Seth Alan
3 Woolley (Citizen Respondents) appeared, pursuant to the notice, to support the validity of the
4 charter rule and its implementing ordinance. ¹

5 The court has jurisdiction over this proceeding based upon the fact -- unchallenged by
6 any party -- that petitioners have complied with ORS 33.720(2): well more than 10 days ago,
7 a notice of this action appeared in “a newspaper of general circulation published in the county
8 where the proceeding is pending,” at a frequency of “at least once a week for three successive
9 weeks.” Jurisdiction having been properly established, the rulings of this court are binding on all
10 the parties and the electors of Multnomah County.

11 As the Citizen Respondents note, the voters of Multnomah County overwhelmingly
12 favored enacting contribution and expenditure limitations to govern the county's elections. While
13 it is the established task of this and any court to strike down a governmental action, regardless of
14 its popularity, when it runs afoul of state and/or federal constitutional protections, Oregon courts
15 have long recognized respect for the other branches mandates that a statute or similar enactment
16 should be “presumed to be constitutional, and all doubt must be resolved in favor of its validity.”
17 *Bergford vs. Clackamas County* 15 Or App 362, 365 (1973), quoting from *Milwaukie Co. of*
18 *Jehovah's Witnesses vs. Mullen* 214 Or 281, 293 (1958).

19 With this duty in mind, the court has conducted a thorough, and even searching, review
20 of the briefs, the cited case law, and other materials that might shed light on the court's legal
21 analysis. What follows is this court's best judgment as to what results are required under

¹ Intervenor Taxpayers Association of Oregon and Taxpayers Association of Oregon Political Action Committee (Taxpayer Intervenor) appeared after the expiration of the 10 day jurisdictional limit but moved to intervene pursuant to ORCP 33C. The motion to intervene was denied by order of this court, and they have participated in this proceeding as an *amicus curie*.

1 Oregon's existing constitutional and statutory jurisprudence that pertains to Multnomah County's
2 charter and ordinance provisions.

3 **II. The Regulatory Scheme Established by the Charter and Ordinance**

4 The charter and ordinance act upon matters relating to the financing of campaigns for
5 elective office in Multnomah in five distinct ways, detailed below.

6 **Contributions:** [§5.201 (A) and (B)] The charter and ordinance impose limits on the
7 amounts that a candidate or candidate committee can receive from individuals and political
8 committees. Individuals and political committees may give no more than \$500 to candidates or
9 candidate committees. Small donor committees, which can only accept contributions of \$100 or
10 less per individual, may give unlimited amounts to candidates and candidate committees. This
11 section does not limit the amount that may be given to a political committee.

12 **Expenditures:** [§ 5.202 (A) and (C)] The charter and ordinance limit aggregate
13 independent expenditures to \$5,000 per election cycle for individuals, and \$10,000 for political
14 committees, if the independent expenditure is funded by individual contributions of no more than
15 \$500 per individual. There is no limit on independent expenditures made by small donor
16 committees. Additionally, individuals and committees may only expend funds if they were
17 collected in the manner prescribed in the contribution limit section of the ordinance.

18 **Disclosure:** [§ 5.203] The county charter and ordinance require that “each
19 Communication to voters related to a Multnomah County Candidate Election shall prominently
20 disclose the Individual and Entities that are the five largest true original sources, in excess of
21 \$500 each, of the Contributions and/or Independent Expenditures used to fund the
22 Communication.”

1 **Registration:** [§ 5.202(B)] The charter and ordinance require entities to register as
2 political committees within 3 business days of making aggregate independent expenditures
3 exceeding \$750 within any election cycle.

4 **Payroll Deductions:** [§ 5.201(C)] The charter and ordinance require employers who
5 allow payroll deductions for any purpose to also allow deductions for campaign contributions.

6 **III. Analysis**

7 Oregon courts will examine state constitutional issues before addressing federal ones.
8 *State vs. Kennedy* 295 Or 260, 262 (1983). Only if the charter and ordinance survive the state
9 constitutional analysis will the court perform an analysis of the provisions for consistency with
10 the United States Constitution.

11 Oregon constitutional analysis here begins with the case of *State vs. Robertson* 293 Or
12 402 (1982), in which the Oregon Supreme Court established a framework for assessing whether
13 a law violates Article 1 Section 8 of the Oregon Constitution. See also *State vs. Plowman* 314 Or
14 157 (1992). The framework places laws that affect speech into one of three categories: 1) laws
15 that are directed at limiting certain identified speech regardless of the medium of communication
16 or the effects the speech produces; 2) laws that are directed at the pursuit or accomplishment of a
17 harmful result; and 3) laws that, without mentioning speech, might be applied so as to affect it.
18 The *Robertson* court went on to establish that laws within the first category must fall, when
19 challenged under Article I, Section 8, unless “the scope of the restraint is wholly confined within
20 some historical exception that was well established when the first American guarantees of
21 freedom of expression were adopted.” *Robertson* 293 Or at 412.

1 **A. Contributions**

2 In *Vannatta vs. Keisling* 324 Or 514 (1997) (*Vannatta I*), the plaintiff brought a
3 challenge under Article I, Section 8, to limitations on political contributions that were, in many
4 ways, very similar to those at issue here. In that case, the Oregon Supreme Court considered the
5 law to be in the first category established under *Robertson*, and went on to hold campaign
6 contributions are a form of expression protected by Article I, Section 8 without historical
7 exception, resulting in the court striking down the contributions limitations there at issue.

8 The court has considered whether a second case involving the same plaintiff, *Vannatta*
9 *vs. Oregon Ethics Commission* 347 Or 449 (2009), *cert denied* 560 US 906 (2010) (*Vannatta II*),
10 altered *Vannatta I* in a way that supports the constitutionality of the contribution limitations of
11 the charter and ordinance. I find this position, proffered by the proponents of the charter and
12 ordinance, to be unavailing.

13 In *Vannatta II*, the Oregon Supreme Court indeed sought to limit some of the broadest
14 interpretation and application that could be given language contained in *Vannatta I*, noting, for
15 example, that the *Vannatta I* court had not decided that “in every case, the delivery to a public
16 official, a candidate or a campaign of money or something of value also is constitutionally
17 protected expression as a matter of law.” 347 Or at 465. But the *Vannatta II* court employed that
18 clarification to distinguish the gifts at issue there from the political contributions at issue in
19 *Vannatta I*, and so to reach its holding that a ban on giving gifts to legislators was constitutional.
20 For obvious reasons, that distinction cannot save the charter and ordinance, which indeed restrict
21 political contributions.

22 While Petitioner’s argument is demonstrably accurate that since *Vannatta I* was decided,
23 the Oregon Supreme Court, in *Vannatta II* and elsewhere in dissents and dicta, has sought to

1 clarify and perhaps even limit *Vannatta I*, none of those case law circumscriptions is sufficient to
2 dislodge *Vannatta I* as the controlling authority regarding the limitations placed by the charter
3 and ordinance on political contributions, nor to otherwise assist petitioners in their effort to
4 demonstrate the constitutionality of the charter and ordinance. Indeed, the continued
5 precedential vitality of *Vannatta I* has been affirmed in cases decided since *Vannatta II*, in both
6 the Oregon Court of Appeals and the Oregon Supreme Court. *See eg. Hazell vs. Brown* 352 Or
7 455, 469 (2012); *Hazell vs. Brown* 238 Or App 497, 510-511 (2010) (“*Vanatta I* remains
8 controlling law”).

9 In sum, the court concludes that political contributions which are the subject of the
10 Petitioner’s charter and ordinance are a form of highly-valued expression that falls squarely
11 within, and are not historically excepted from, the protections of Article I, Section 8 of the
12 Oregon Constitution. As such, these contribution limitations are impermissible under the free
13 speech guarantees afforded under Article 1, Section 8.

14 ***B. Expenditures***

15 *Vannatta I* and subsequently decided cases construing Article I, Section 8, such as *Hazell*
16 and *Meyer vs. Bradbury* 341 Or 288 (2006), have uniformly considered campaign expenditures
17 to be a form of speech fully within the protections afforded by Article I, Section 8 of the Oregon
18 Constitution. And beginning with the holding in *Deras vs. Meyer* 272 Or 47 (1975) and
19 continuing to views expressed in the *Hazell* opinion almost four decades later, the Oregon
20 Supreme Court has considered limitations on political expenditures to be in conflict with these
21 Article I, Section 8 protections.

22 Beyond their previously rejected argument against the continued precedential value of
23 *Vannatta I*, the proponents of the charter and ordinance argue the constitutional analysis and

1 result should be different for restrictions placed upon independent expenditures, which are the
2 focus of the expenditure regulations at issue. This position appears wholly unfounded, the legal
3 proverbial “distinction without a difference.”

4 Thus, as the court has held with regard to political contributions, the limitations on
5 expenditures enacted by Multnomah County through the charter and ordinance are
6 unconstitutional under Article I, Section 8.

7 ***C. Disclosure***

8 The disclosure requirement acts as both a compulsion and a restraint: a compulsion upon
9 the putative political speaker to disclose their identity, and a restraint on anonymous political
10 speech. The Oregon Supreme Court has never held there is a right to anonymous speech, nor
11 whether Article I, Section 8 prohibits compelling speech. Some case law instruction comes in
12 *Vannatta I*, where the Oregon Supreme Court held a requirement of “neutral reporting of
13 objective truth” does not impermissibly burden expression.

14 But in *Vannatta I*, the court was considering a requirement that a public official publish
15 information reported to the county regarding a candidate’s agreement to limit expenditures. That
16 is decidedly different than compelling a private party who makes a campaign communication to
17 disclose whose funds permitted the specific communication to be made.

18 On these questions, I am persuaded by the argument set out in Industry Respondents’
19 Exhibit 1, a March 10, 1999 Opinion from Attorney General Hardy Myers to Secretary of State
20 Phil Keisling regarding the constitutionality of ORS 260.522, which prohibited most anonymous
21 signs, publications and broadcasts used in political campaigns. Attorney General Myers opined
22 that the statute violated Article I, Section 8 because it was directed at speech, not the effects of
23 speech and, under the *Robertson* analytical framework, there was no historical exception that

1 permitted the regulation. I conclude the same with regard to the disclosure provision of the
2 charter and ordinance.

3 In addition to the reasons stated above for setting aside the disclosure requirement, the
4 court has a genuine concern that the ordinance is vague and potentially overly broad.

5 The *Robertson* court, quoting from *Grayned v. City of Rockford* 408 US 104, 108,
6 observed:

7 “Vague laws offend several important values. First, because we assume that man is free
8 to steer between lawful and unlawful conduct, we insist that laws give the person of
9 ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may
10 act accordingly. Vague laws may trap the innocent by not providing fair warning.
11 Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide
12 explicit standards for those who apply them....” (footnotes omitted).”

13
14 Ordinance § 5.203 requires disclosure of the funders of “each” communication to voters
15 that is “related” to an election at which voters will select the County’s public officials. This
16 mandate clearly encompasses a very wide array of communications and communicators: far
17 more communications than can be justified under the legislative findings offered by the
18 Petitioner in support of the charter and ordinance, and more communicators than reasonably can
19 be expected to be “fairly warned” that their chosen exercise of free speech may carry with it a
20 disclosure obligation. These circumstances will inevitably lead to arbitrary enforcement which,
21 while never acceptable, in the elections context is perilous.

22 ***D. Registration***

23 I find this section of the ordinance to be purely administrative in a way that does not
24 burden free expression. This section of the ordinance is constitutional under both the state and
25 federal constitutions.

26 ***E. Payroll Deductions***

1 ORS 652.610(3) provides that “[a]n employer may not withhold, deduct or divert any
2 portion of any employee’s wages unless” the employer does so in accordance with one of the
3 exceptions listed, including subsection (c):

4 “[t]he employee has voluntarily signed an authorization for a deduction for any other
5 item, provided that the ultimate recipient of the money withheld is not the employer and that the
6 deduction is recorded in the employer's books.”
7

8 A plain reading of subsection (c) shows an employer may deduct money from an
9 employee’s pay if the employee asks the employer to deduct the money, and that there is no
10 restriction on the ultimate recipient of the money, except that it cannot be the employer.

11 Thus, even in the absence of the charter and ordinance, an employer could, at the
12 direction of the employee, deduct money from an employee’s pay and transmit that money to a
13 candidate or committee. The charter and ordinance do not require employers to deduct a portion
14 of an employee’s wages, but rather simply require employers to allow employees to make
15 voluntary political contributions by payroll deduction, if the employer otherwise provides for
16 payroll deductions.

17 As ORS 652.610(3)(c) allows the employee to authorize payroll deductions, and the
18 charter and ordinance require employers to allow political contributions through payroll
19 deductions if they offer any other payroll deductions, there is nothing inconsistent between the
20 state statute on the one hand, and the County’s charter and ordinance on the other. The two can
21 operate concurrently, and this provision is lawful.

22 **IV. Conclusion**

23 The record in this case is well made. Perhaps with the passage of time and the
24 occurrence of one election cycle under the requirements imposed by Multnomah County’s
25 charter and ordinance provisions, a further factual record can be provided for this or some future

1 case that can further illuminate the speech and governance issues implicated by the ongoing
2 effort to regulate the conduct of elections with respect to contributions and expenditures.

3 But as the Oregon Supreme Court clearly stated in *Meyer vs. Bradbury* 341 Or 288, 299
4 (2006), with citation to *Vannatta I*:

5 “Since the inception of the Oregon Constitution, Article I, Section 8 strictly has
6 prohibited any legislation ‘restraining the free expression of opinion or restricting the
7 right to speak right or print freely on any subject whatever[.]’ Under Oregon law, both
8 campaign contributions and expenditures are forms of expression protected by that
9 constitutional provision, thus making legislatively imposed limitations on individual
10 political campaign contributions and expenditures impermissible.”

11 Such is the state of Oregon's Article I, Section 8 precedents with respect to the regulation of
12 campaign contributions and expenditures, and, in this case, compelled disclosures.

13 Guided by the existing precedents cited and discussed above, the court orders as follows:

14 1) Multnomah County Ordinance 1243, section 5.201(A) and (B), relating to
15 contributions in Multnomah County Candidate Elections, is struck down as a violation of Article
16 I, Section 8 of the Oregon Constitution;

17 2) Multnomah County Ordinance 1243, section 5.202(A) and (C), relating to limitations
18 on expenditures in Multnomah County Candidate Elections, is struck down as a violation of
19 Article I, Section 8 of the Oregon Constitution;

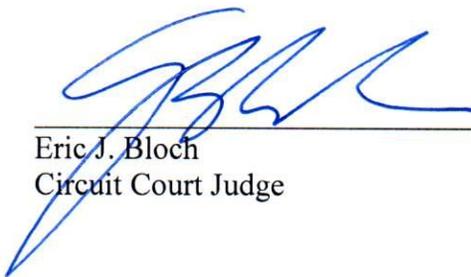
20 3) Multnomah County Ordinance 1243, section 5.203, relating to disclosure of
21 contributions and expenditures for communications, is struck down as a violation of Article I,
22 Section 8 of the Oregon Constitution;

1 4) Multnomah County Ordinance 1243 section 5.202(B) is lawful and permissible under
2 state and federal law; and

3 5) Multnomah County Ordinance 1243 section 5.201(C) is lawful and permissible under
4 state and federal law.

It is so ordered.

3/6/18
Date


Eric J. Bloch
Circuit Court Judge