IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

Sarah Iannarone, Moses Ross, David Delk and James Ofsink, Individuals, Plaintiffs, v. Friends of Ted Wheeler, a Political Candidate Committee, Defendant.	Case No.: 20CV16533 PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. SUMMARY

Defendant Friends of Ted Wheeler received campaign contributions Since September 1, 2019 that violate the $500 per-donor limit on individual contributions and the total prohibition on corporate contributions set forth in Portland City Charter Chapter 3, Article 3 and codified in Portland City Code Chapter 2.10 ("The Campaign Finance Law"). Plaintiffs seek a Temporary Restraining Order to stop Defendant from spending illegal funds on Ted Wheeler's re-election campaign, which is currently under way. The contributions at issue are more than 76% of Defendant's contributions, and they exceed the entire amount of Defendant's current campaign fund balance.

The requirements for a TRO are set forth in ORCP 78 and 82 and other applicable law, and are satisfied as follows:

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II. PLAINTIFFS ARE ENTITLED TO THE RELIEF DEMANDED. ORCP 79 A(1)(A)

A. The Campaign Finance Law Specifies Contribution Limits.

Portland Charter § 3-301 provides:

> 3-301 Contributions in City of Portland Candidate Elections.
>
> (a) An Individual or Entity may make Contributions only as specifically allowed to be received in this Article.
>
> (b) A Candidate or Candidate Committee may receive only the following Contributions during any Election Cycle:
>
> (1) Not more than five hundred dollars ($500) from an Individual or a Political Committee other than a Small Donor Committee;
>
> (2) Any amount from a qualified Small Donor Committee;
>
> (3) A loan balance of not more than five thousand dollars ($5,000) from the candidate;
>
> (4) No amount from any other Entity, except as provided in Section 3-304 below.

These limits are referred to herein as the "Portland Campaign Contribution Limits." These contribution limits went into effect on September 1, 2019, pursuant to Portland Charter § 3-305(a).

B. Friends of Ted Wheeler received and holds contributions in excess of the limits.

As detailed in the Declaration of Alan Kessler ("Kessler Decl.") submitted herewith, including the exhibits thereto, Defendant has received numerous donations from individuals and political committees in excess of the $500 limit, and from prohibited entities, since September 1, 2019. Kessler Decl. Exhs. 7, 8; ¶¶ 3 - 10. Specifically, Defendant received at least $79,250 in funds from at least 49 individuals in excess of a $500 per individual limit. *Id*. ¶ 7.[1] Defendant

[1] Plaintiffs do not concede that the Court should segregate donations over $500 into permissible (the first $500) and impermissible parts. However, for the purposes of Plaintiffs' request for preliminary relief, Plaintiffs use the most

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received at least $37,000 from a least 6 political committees in excess of a $500 per committee limit. *Id*. ¶ 8. Defendant received at least $28,500 from at least 12 private businesses. *Id*. ¶ 9. These are impermissible. Portland Charter § 3-301(4). Thus, Defendant has received at least $144,750 in contributions in excess of the limits.

Defendant continues to hold contributions that were illegally obtained. Defendant's most recently-disclosed information indicates a cash balance of $118,829.63. *Id*. ¶ 13.

C. No Court Enjoined the Application of the Portland Campaign Contribution Limits to Violators.

No court enjoined the implementation of the Portland Campaign Contribution Limits, and no party sought any injunction preventing their enforcement against violators.

The Multnomah County Circuit Court (Judge Eric Bloch) on June 10, 2019, issued an Opinion and Order in No. 19CV06544, stating that the Portland Campaign Contribution Limits did not comply with Article I, § 8, of the Oregon Constitution. Declaration of Dan Meek submitted herewith ("Meek Decl.") Exh. 1 (the "June 10 Opinion"). No party sought injunctive relief, and none was granted. There is no language in the No. 19CV06544 Opinion and Order indicating any sort of injunction against application of the Portland Campaign Contribution Limits. Nor is there such language in the Circuit Court's judgment. *Id*. Exh. 2.

All parties before the Circuit Court appealed that judgment to the Oregon Court of Appeals. The case (No. A171435) was held in abatement awaiting the outcome of the Oregon Supreme Court's review of the Multnomah County Circuit Court decision on the validity of the similar campaign contribution limits adopted by the voters of Multnomah County in 2016. The Oregon Supreme Court issued its decision in *Multnomah County v. Mehrwein*, 366 Or 295 (April

"charitable" method. Doing so results in violation amounts that exceed Defendant's current campaign balance, even without adding the codified penalties.

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23, 2020), upholding the Multnomah County contribution limits under Article I, § 8, of the Oregon Constitution. Based on that decision, the Court of Appeals in the Portland validation case (No. A171435) on April 28 issued an order, vacating the Circuit Court decision in No. 19CV06544 and remanding to the Circuit Court for resolution. *Id*. Exh. 3.

In its review of the very similar Multnomah County contribution limits, the Circuit Court (Judge Bloch) on March 3, 2018, issued an Order regarding the Multnomah County contribution limits that was very similar to the order later issued in No. 19CV06544. The Order in No. 17CV18006 stated:

> Perhaps with the passage of time and the occurrence of one election cycle under the requirements imposed by Multnomah County's charter and ordinance provisions, a further factual record can be provided for this or some future case that can further illuminate the speech and governance issues implicated by the ongoing effort to regulate the conduct of elections with respect to contributions and expenditures.

This indicates that Judge Bloch did not regard the Multnomah County contribution limits to have been enjoined but instead recognized that they would be in effect and that experience in the first "election cycle under the requirements imposed by Multnomah County's charter and ordinance provisions" may provide "a further factual record." There is no reason to believe that Judge Bloch intended to enjoin the application of the Multnomah County contribution limits or the Portland Campaign Contribution Limits.

We later address in more detail the difference between a declaratory judgment and an injunction.

D. A Later-Overturned Lower Court Decision Holding a Statute Unconstitutional Does Not Nullify the Law During the Appeal Process.

A later-overturned lower court decision holding a statute unconstitutional does not nullify the law during the appeal process.

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Imagine a city enacts a law banning the mutilation of trees adjacent to city streets ("street trees"). The constitutionality of the law is challenged. The Circuit Court holds the law unconstitutional but does not issue an injunction against enforcement of the law. That decision is appealed. During the appeal process, Mr. Johnson mutilates many street trees. The Oregon Supreme Court then rules that the law is constitutional. Is Mr. Johnson off the hook for the mutilations? Is he immune during the appeal process? Can he go wild and mutilate as many trees as he wants? No, because the City's law was not nullified by the lower court's decision.

Mr. Johnson might expect or wish that the City would refrain from taking enforcement action against him during the appeal process, and the City might voluntarily so refrain. But that does not make mutilating street trees legal during that period. The City can certainly take enforcement action against him for those mutilations, particularly after issuance of the Oregon Supreme Court decision. In this case, such action can also be taken by Portland residents, because the Portland Campaign Contribution Limits are direct prohibitions of conduct by the perpetrator, and Measure 26-200 provides for specific fines for violations.

Like the law protecting street trees, the Portland Campaign Contribution Limits were never nullified.

E. The Wheeler Campaign Could Have Sought Injunctive Protection From the Portland Campaign Contribution Limits But Did Not.

The Wheeler Campaign chose not to become a party in the Portland validation proceeding in Circuit Court (No. 19CV06544). Nothing prevented the Wheeler Campaign or "any person interested" from acting as a party in that case. ORS 33.720(3). The Wheeler Campaign could have become a party in that case and could have requested an injunction, but it did not.

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Nothing prevented the Wheeler Campaign (or any other campaign or person) from at any time separately seeking (1) a declaration that the Portland Campaign Contribution Limits were unconstitutional and (2) an injunction preventing the application of the Portland Campaign Contribution Limits during the pendency of their judicial review. No one did so.

The group Honest Elections warned the Wheeler campaign repeatedly that there was no injunction against the Portland Campaign Contribution Limits and that those limits were in effect. *Id*. Exhs. 4, 5, 6. The Wheeler campaign could have taken that advice and have sought an injunction but did not.

Instead, the Wheeler campaign proceeded to accept dozens of contributions in excess of the Portland Campaign Contribution Limits between September 1, 2019, and now, gambling that it could defend against any prosecution with the June 10 Opinion. But the June 10 Opinion has been vacated and nullified, *ab initio*, by the combination of *Multnomah County v. Mehrwein*, *supra*, and the April 28, 2020, order of the Court of Appeals in the Portland validation case (No. A171435), vacating the Circuit Court decision in No. 19CV06544. *Id*. Exh. 3.

No one forced the Wheeler campaign to take the risky course it chose (and greatly enrich itself) by relying upon unlawful contributions for about 80% of its funding. The campaigns of other candidates for Portland or Multnomah County office took the course of complying with the voter-enacted limits.

F. The Decision of The Court of Last Resort that a Statute Is Constitutional Means It Is Valid Ab Initio.

The effective date of a duly-enacted statute or charter amendment or ordinance [collectively, "statute"] that the court of last resort rules to be constitutional is the original effective date of the enactment. A statute does not become temporarily invalid due to a lower

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court ruling and is then reinstated as of the date of the ultimate court's decision. Instead, the statute is deemed valid from its date of enactment.

> We do not agree with plaintiff's position that R.S. 9:2800 was not in force when this accident occurred. R.S. 9:2800 was enacted in 1985. This accident occurred in 1992. The appellate court in *Rhodes v. State, Through DOTD*, 94-1758 (La.App. 1 Cir 5/5/95), 656 So2d 650, found that LSAR.S. 9:2800 was unconstitutional; however, that decision was vacated by the Supreme Court (951848 (La 5/21/96), 674 So2d 239). Though several trial court judgments had declared the statute unconstitutional, these were not final judgments. They were timely appealed and were vacated by the Supreme Court. *Teel v. State, Dept. of Transp. and Development*, 96-0592 (La.10/15/96), 681 So2d 340; *Guidry v. The Gray Ins. Co.*, 95-0975 (La.10/16/95), 661 So2d 432. The First Circuit handed down Rhodes on May 5, 1995. The legislature reenacted LSAR.S. 9:2800 on June 27, 1995, in response to a constitutional amendment approved by a majority of the Louisiana electorate. The Supreme Court reversed the First Circuit's decision in Rhodes on May 21, 1996, and **thus LSAR.S. 9:2800 was always in effect since its original adoption**. A non-final judgment declaring a statute unconstitutional, appealed timely and later vacated on appeal, does not render the statute void ab initio as if it were never enacted.

Hoolahan v. Munch, 719 So 2d 1094, 1095-96 (La App), 1998 WL 637209, writ denied, 729 So2d 1048 (La 1998) (emphasis added).

> Section 95.031 provided a defense to a cause of action rather than creating a cause of action. In *Battilla* the court simply held section 95.031(2) unconstitutional as applied to the facts of that case. When *Pullum* was decided, the statute became valid ab initio and was restored to its operative force.

Clausell v. Hobart Corp., 515 So2d 1275, 1276 (Fla 1987).

This doctrine of valid ab initio is the corollary to the doctrine that statutes found to be unconstitutional are void ab initio.

> The effect of declaring a statute unconstitutional--whether on substantive or procedural grounds--is to render it *void ab initio*. *See, e.g., State v. Hays*, 155 Or App 41, 48, 964 P2d 1042, *review denied* 328 Or 40, 977 P2d 1170 (1998), *cert denied* 527 US 1006, 119 S Ct 2344, 144 LEd2d 240 (1999) (statute declared unconstitutional was void *ab initio*).

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State v. Grimes, 163 Or App 340, 348, 986 P2d 1290, 1294, 1999 WL 815716 (1999), *review denied*, 332 Or 656 (2001). It makes sense that, if an unconstitutional statute is never in effect, then a constitutional statute is never not in effect.

G. The Decision of the Court of Last Resort Overruling A Prior Decision Nullifies The Prior Decision Ab Initio.

Another approach to the present situation is to understand that, when a court of last resort overrules a precedent, the overruling applies retroactively to nullify the prior ruling, ab initio.

> "'The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.'"

Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Michigan, 492 Mich 503, 536, 821 NW2d 117 (2012) (quoting *Gentzler v. Constantine Village Clerk*, 320 Mich 394, 398, 31 NW2d 668 (1948)). Thus, *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997) ("*Vannatta I*"), never was the law. Nor was the Circuit Court decision in the Portland validation case.

A very recent example is presented in *Ramos v. Louisiana*, 2020 WL 1906545 (US April 20, 2020), which struck down, as violations of the Sixth Amendment, laws allowing non-unanimous juries to make criminal convictions. Oregon's law had been upheld in *Apodaca v. Oregon*, 406 US 404, 92 S Ct 1628 (1972), but that decision was overruled by *Ramos*. Oregon told the Court in *Ramos* that invalidating non-unanimous juries would require over 1,000 retrials. The Court was not moved to declare *Ramos* prospective only.

An opinion overruling a prior precedent is given retroactive application, unless the high court states in its opinion that the decision should be applied only prospectively.

> Under state law, a substantive new rule, which changes a criminal law, will generally be given retroactive effect. (*In re Martinez* (2017) 3 Cal.5th 1216, 1222-1223, 226 Cal Rptr3d 315, 407 P3d 1.) A rule is substantive when "it alters the range of conduct or the class of persons that the law punishes, or it modifies the elements of the offense." (*Id*. at p. 1222, 226

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> CalRptr3d 315, 407 P3d 1; *see also In re Lopez* (2016) 246 Cal App4th 350, 357, 200 Cal Rptr3d 559.).

In re Brown, 45 Cal App 5th 699, 717, 259 Cal Rptr 3d 56, 71 (Ct App 2020). "[T]he general rule [is] that judicial decisions, even those overruling prior authority, have full retroactive effect." *People v. Carter*, 36 Cal4th 1114, 1144, 117 P3d 476, 496, 32 Cal Rptr 3d 759, 782 (2005). The "general rule afford[s] retrospectivity to judicial decisions overruling prior decisions." *Newman v. Emerson Radio Corp.*, 48 Cal 3d 973, 982, 772 P2d 1059, 1065, 258 Cal Rptr 592, 598 (1989).

> As a general rule, a decision of a court of last resort which overrules a prior decision is retrospective as well as prospective in its application unless declared by the opinion to have prospective effect only. *Black v. Nesmith*, 475 So2d 963 (Fla 1st DCA 1985). The *Pullum* decision was silent on the question of retroactivity, thereby indicating that it was to apply retrospectively as well as prospectively.

Melendez v. Dreis & Krump Mfg. Co., 515 So 2d 735, 736-37 (Fla 1987).

Further, a vacated judgment is of no effect.

> [W]e note that the judgment on which plaintiffs rely for their preclusion argument has been vacated. There is no indication in the record that another judgment was ever entered. There can be no preclusive effect from a vacated judgment.

Harper v. Sizemore-Burke, P.C., 115 Or App 502, 505, 838 P2d 1106 (1992), *review denied*, 315 Or 311 (1993).

H. A Declaratory Judgment Does Not Preclude Prosecution; An Injunction Requires Additional Proofs.

As noted above, no party in any case has sought an injunction against implementation of the Portland Campaign Contribution Limits. At most, the Circuit Court issued a form of declaratory judgment. The circumstance where a court issues declaratory relief but not an injunction was explained in the landmark decision of *Steffel v. Thompson*, 415 US 452, 469-71, 94 S Ct 1209 (1974):

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> First, as Congress recognized in 1934, a declaratory judgment will have a less intrusive effect on the administration of state criminal laws. As was observed in *Perez v. Ledesma*, 401 US, at 124-126, 91 SCt, at 696-697 (separate opinion of Brennan, J.):
>
> > Of course, a favorable declaratory judgment may nevertheless be valuable to the plaintiff though it cannot make even an unconstitutional statute disappear. A state statute may be declared unconstitutional in toto--that is, incapable of having constitutional applications; or it may be declared unconstitutionally vague or overbroad--that is, incapable of being constitutionally applied to the full extent of its purport. In either case, a federal declaration of unconstitutionality reflects the opinion of the federal court that the statute cannot be fully enforced. If a declaration of total unconstitutionality is affirmed by this Court, it follows that this Court stands ready to reverse any conviction under the statute. If a declaration of partial unconstitutionality is affirmed by this Court, the implication is that this Court will overturn particular applications of the statute, but that if the statute is narrowly construed by the state courts it will not be incapable of constitutional applications. Accordingly, the declaration does not necessarily bar prosecutions under the statute, as a broad injunction would. * * * What is clear, however, is that even though a declaratory judgment has "the force and effect of a final judgment," 28 USC § 2201, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt. (Footnote omitted.)

Thus, a declaratory judgment is "a milder form of relief than an injunction," and a declaratory judgment "does not necessarily bar prosecutions under the statute" that has been declared unconstitutional.

No party bothered to seek an injunction or make the factual showings necessary to obtain one.

> The Supreme Court in *Steffel v. Thompson* made it clear that declaratory judgment could be granted under lesser standards than injunction. Since that case, courts have tended to look at the requirements of the two differently and, in the marginal cases, they have considered declaratory judgment where injunction might have been improper.

Koch & Murphy, 3 ADMINISTRATIVE LAW AND PRACTICE § 8:31 (3d ed 2020). Nor does a declaratory judgment bind non-parties to the original case.

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> A judgment, however, does not bind anyone other than the parties to the underlying case. Moreover, although courts have the inherent authority to enforce their judgments, neither judgments in general, nor declaratory judgments in particular, are enforceable through contempt. If a government litigant acts contrary to a declaratory judgment, the rightholder may seek additional relief, including an injunction against future violations, but that government litigant would not be subject to any immediate sanctions.

Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO LAW REVIEW 2453, 2462 (2014). Here, plaintiff Iannarone was not a party to the Portland validation case.

I. Plaintiffs Seek Enforcement of Portland Charter § 3-302(A) That Is Purely Prospective.

One of the provisions of Measure 26-200 that Plaintiffs seek to enforce is Portland Charter § 3-302(a), which provides:

> (a) No Individual or Entity shall expend funds to support or oppose a Candidate, except those collected from the sources and under the Contribution limits set forth in this Article.

This provision prospectively forbids the spending of funds to support or oppose a candidate, unless those funds were "collected from the sources and under the Contribution limits set forth in this Article." Enforcement of this provision cannot be said to be "retroactive" in any sense.

As detailed herein, the Wheeler campaign presently holds substantial funds it collected in unlawful contributions since September 1, 2019. The Portland Charter now prospectively forbids those funds from being spent to support the Wheeler candidacy.

III. PLAINTIFFS SEEK RELIEF CONSISTING OF RESTRAINING ACTS THE COMMISSION AND CONTINUANCE OF WHICH DURING THE LITIGATION WOULD PRODUCE INJURY TO PLAINTIFFS. ORCP 79 A(1)(A)

Voters have received ballots, and can cast votes in the Portland mayoral election by mail now or at any time until May 14, 2020. Voters can deliver ballots to drop sites until 8:00 p.m. on

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May 19, 2020. Defendant's campaign expenditures and retention of penalty amounts are influencing the election now and will continue to do so.

IV. DEFENDANT IS ACTING AND THREATENS TO ACTS IN VIOLATION OF PLAINTIFFS' RIGHTS CONCERNING THE SUBJECT MATTER OF THE ACTION, AND TENDING TO RENDER THE JUDGMENT INEFFECTUAL. ORCP 79 A(1)(B).

Defendant has funds that are campaign contributions in excess of the $500 cap. Kessler Decl. ¶¶ 7, 8, 11, 13. It also has funds that are contributions made by entities that are prohibited from making any contributions. *Id*. ¶¶ 9, 11 Together, the illegally-obtained funds total at least $144,750 (even if the first $500 of what would otherwise have been legal contributions is excluded). *Id*. ¶ 10. Defendant intends to spend the illegally-obtained funds. *Id*. 14. If he does, the rights of Plaintiffs and all Portlanders to a fair election, which is underway and continuing through May 19, 2020, will be irreparably harmed.

V. TIME. ORCP 79 A(2)

ORCP 79 A(2) gives this Court authority to issue a temporary restraining order or preliminary injunction at any time after commencement of the action and before judgment. Plaintiffs seek such an Order now.

VI. NOTICE. ORCP 79 B(1)

Plaintiffs have complied with the notice requirement of ORCP 79 B(1) and the Court's requirement to provide parties one judicial day notice of *ex parte* appearances. Kessler Decl. ¶¶ 15-17 (Exhs. 11-13).

VII. PLAINTIFFS SHOULD BE REQUIRED TO PAY NOMINAL BOND OR OTHER SECURITY.

This case seeks to protect the fundamental fairness of Portland's mayoral election. ORCP 82 A(6) which provides:

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> "The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond or deposit in lieu of bond, or require other security, upon an ex parte showing of good cause and on such terms as may be just and equitable."

While Plaintiffs believe that no bond should be necessary, in order to avoid legal uncertainty, Plaintiffs respectfully request the court exercise its discretion to require nominal security that will not be prohibitive to Plaintiffs, who are a publicly-financed mayoral candidate and private citizens, respectively, all of whom are seeking to uphold Portland's Campaign Finance Laws on behalf of the public interest.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court issue the proposed Order submitted herewith.

DATED: April 30, 2020

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CERTIFICATE OF SERVICE

I certify that I served the foregoing on the following named person(s) on the date indicated below by **US MAIL and EMAIL** to said person(s) a true copy thereof, addressed to said person(s) at their last known address indicated below.

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