IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

MIKE ERICKSON FOR CONGRESS COMMITTEE, a political committee Plaintiff, v. ANDREA SALINAS FOR OREGON COMMITTEE, a political committee, and ANDREA SALINAS, an individual Defendants.	Case Number: 22CV33968 PLAINTIFF'S RESPONSE TO DEFENDANTS' SPECIAL MOTION TO STRIKE

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UTCR 5.050 STATEMENT

Plaintiff requests oral argument and estimates 60 minutes will be sufficient. Plaintiff requests official court reporting services.

INTRODUCTION

Mike Erickson has never been charged with felony possession of drugs. However, to convince voters otherwise for the purpose of winning the congressional election, Andrea Salinas ran a TV ad that falsely stated he had been charged with such a crime in Hood River County. When Hood River County District Attorney Carrie Rasmussen saw the ad, she called Ms. Salinas's campaign and told them that the ad was false and that Mr. Erickson was never charged with felony drug possession. Mr. Erickson also provided court documentation to Ms. Salinas's

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campaign that proved he was never charged with felony drug possession. However, undeterred by the truth, Ms. Salinas and her campaign (collectively "Defendants") continued their aggressive TV ad campaign that falsely accused Mr. Erickson of being charged with felony drug possession. Citing Defendants' false ad as its source, several media outlets published articles also stating that Mr. Erickson was charged with felony drug possession. When provided proof of the ad's falsity, *The Oregonian* and another newspaper retracted and corrected their articles. However, Defendants refused to ever stop running their false ad or correct their intentional dishonesty to the voters.

The Oregon Legislature prohibited Defendants' dishonest behavior when it enacted ORS 260.532. The Corrupt Practices Act established a public policy of protecting voters from material, provable untruths about candidates and drew a line between protected free speech and unprotected dishonesty in elections. The proliferation and spread of untruths in elections is one of the biggest threats to our democracy and the impact of false statements in elections falls most harshly on those who do not have the time or resources to verify them. Voters can only truly exercise their right to vote when they are equipped with accurate, reliable information. Mr. Erickson's candidacy is the victim of Defendants' dishonesty and Mr. Erickson's campaign ("Plaintiff") is entitled to bring a claim under ORS 260.532. The Court should allow Plaintiff's Corrupt Practices Act claim to proceed and should deny Defendants' motion to strike.

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BACKGROUND

On September 16, 2016, Mr. Erickson and his wife attended a wedding in Hood River, Oregon. Erickson Affidavit at 1, ¶ 3. His wife had recently had surgery and had a prescription for oxycodone for pain relief. *Id.* She did not want to carry a purse at the wedding and asked Mr. Erickson to carry a lipstick and one of her oxycodone pills for her. He put the pill in his wallet. *Id*.

After consuming alcohol at the wedding, Mr. Erickson made the very bad decision to drive and he received a DUII that night. *Id*. at 2, ¶¶ 4-5. At the police station, he gave his wallet

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1 to the police officer, who looked inside and saw the oxycodone pill. *Id.* at 2, ¶ 5. The officer
2 wrote about finding the pill in the incident report but Mr. Erickson was not charged for having
3 the pill. *Id*. On December 29, 2016, Mr. Erickson pled guilty to DUII and two traffic violations.
4 *See* Lawrence Affidavit, Ex. 1.
5 Six years later, on about September 20, 2022, when Mr. Erickson was running for
6 election to Oregon's sixth congressional district, he saw a TV ad paid for by Defendants that
7 stated "The Truth" and showed a man cutting four lines of cocaine. Erickson Affidavit at 2, ¶ 6.
8 Then words appeared on the screen stating "Mike Ericson Charged With Felony Drug
9 Possession." *Id.* Hood River County District Attorney Carrie Rasmussen ("DA Rasmussen")
10 also saw the ad and on September 29, 2022, she called Defendant Andrea Salinas for Oregon
11 Committee, spoke with campaign manager Shannon Geison, and informed her that Mr. Erickson
12 was never charged with felony possession of drugs and that the ad was false. Lawrence
13 Affidavit at 2, ¶ 5.
14 On September 26 and 29, 2022, Mr. Erickson sent cease and desist letters to Defendant
15 Andrea Salinas for Oregon and demanded that they stop running the ad because it was false and
16 in violation of ORS 260.532. Erickson Affidavit at 2, ¶ 9 and 3, ¶ 11. The September 29 letter
17 attached the Offer for Negotiated Plea which showed that the only criminal charge against Mr.
18 Erickson was for misdemeanor DUII and it stated that no additional charges would be brought.
19 *Id.* at 3, ¶ 11. That letter also stated that Mr. Erickson was aware that DA Rasmussen had told
20 Defendants that he had never been charged with felony drug possession. Gibson Affidavit, Ex.
21 2. The letters warned Defendants that if they did not stop airing the ads, Mr. Erickson will take
22 legal action. *Id.* In spite of the overwhelming, conclusive evidence presented to Defendants that
23 their statement was false, Defendants continued to air the ad. Erickson Affidavit at 3, ¶ 14.
24 Mr. Erickson gave Defendants several opportunities to stop airing the ad, and when they
25 refused, he decided he had no choice but to file this lawsuit on October 5, 2022. Mr. Erickson
26 saw the ad as late as mid-October, after filing this lawsuit. Erickson Affidavit at 3, ¶ 14.

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LEGAL STANDARD

2 The Oregon Court of Appeals has set a "low bar" for plaintiffs in defeating ORS 31.150
3 motions to strike. *Yes on 24-367 Committee v. Deatons*, 276 Or App 347, 361, 367 P3d 937, 945
4 (2016) (citation omitted). In resolving these motions to strike, the trial court must limit its
5 analysis to whether the plaintiff has met its burden by presenting substantial evidence to support
6 a *prima facie* case. *Id*. at 360. The court "may not weigh the plaintiff's evidence against the
7 defendant's to determine whether there is a 'probability' that the plaintiff will prevail." *Id*. at
8 361-62 (quoting *Young v. Davis,* 259 Or App 497, 510, 314 P3d 350 (2013). Rather, the trial
9 court may only consider opposing evidence "'*to determine if it defeats the plaintiff's showing as*
10 *a matter of law.*'" *Yes on 24-367 Committee*, 276 Or App at 362 (quoting *Young*, 259 Or App at
11 510 and *Page v. Parsons,* 249 Or App 445, 461, 277 P3d 609 (2012) (emphasis in original)).
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13
> [T]he presentation of substantial evidence to support a *prima facie* case is, *in and of itself*, sufficient to establish a probability that the plaintiff will prevail; whether it is "likely" that the plaintiff will prevail is irrelevant in determining whether it has met the burden of proof set forth by ORS 31.150(3).* * *
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> That low bar befits the pretrial nature of a special motion to strike under ORS 31.150; the goal, similar to that of summary judgment, is to weed out meritless claims meant to harass or intimidate - not to require that a plaintiff prove its case before being allowed to proceed further.
17
18
19 *Yes on 24-367 Committee*, 276 Or App at 361 (emphasis in original, citing *Young*, 259 Or App at
20 508).
21 In determining whether a plaintiff's evidence is sufficient to establish a *prima facie* case,
22 courts state the facts in the light most favorable to plaintiff. *Bryant v. Recall for Lowell's Future*
23 *Comm.,* 286 Or App 691, 692, 400 P3d 980, 985 (2017) (citation omitted); *Yes on 24-367*
24 *Committee* at 351. That means courts "consider plaintiff's evidence and draw the reasonable
25 inferences from that evidence in favor of plaintiff." *Bryant*, 286 Or App at 692-93 (quoting
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Plotkin v. SAIF, 280 Or App 812, 815-16, 385 P3d 1167 (2016), *rev. den.*, 360 Or 851, 389 P3d 1141 (2017)). "Where there is a factual conflict in the evidence, [courts] adopt the version that is most favorable to plaintiff, as long as it is supported by sufficient evidence." *Bryant*, 286 Or App at 693.

ARGUMENT

Defendants' dishonesty and its resulting voter deception and corruption of a fair election is exactly why the Oregon Legislature passed ORS 260.532. That statute states, in part:

> "No person shall cause to be written, printed, published, posted, communicated or circulated, [] any [] publication, or singly or with others pay for any advertisement or circulate an advertisement by electronic[] means, with knowledge or with reckless disregard that the [] advertisement contains a false statement of material fact relating to any candidate []."

ORS 260.532(1). This prohibition of false statements in elections serves a vital public and governmental interest and this Court should allow Plaintiff's claim to proceed.

I. Plaintiff has presented substantial evidence to support a *prima facie* case.

To present a *prima facie* case under ORS 260.532, Plaintiff must show that Defendants (1) published (2) a false statement (3) of a material fact (4) with knowledge or reckless disregard that it was false.[1] *Bryant*, 286 Or App at 698; *Yes on 24-367 Committee,* 276 Or App at 355. In this case, Plaintiff has carried its burden by presenting substantial evidence of each of these elements. Thus, Plaintiff meets the "low bar" required to defeat Defendants' special motion to strike.

A. Defendants published the statement, repeatedly.

Defendants do not dispute that they published the statement at issue. However, Defendants seem to claim that there was only one publication of the statement. Defendants state

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[1] Plaintiff does not dispute that Defendants' false statements fall within the protective scope of ORS 31.150(2).

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"The Hood River district attorney did not speak with the Committee until *after* the Ad had already been published," Motion at 11, and "After the TV AD had already aired, I spoke with the Hood River District Attorney's office. The person I spoke to informed me that the district attorney's office never filed the felony possession of oxycodone charge." Geison Affidavit at 4, ¶ 13. Any claim that there was only one publication should be rejected on factual and legal grounds.

Each time the ad ran was a separate publication. *Kraemer v. Harding,* 159 Or App 90, 104, 976 P2d 1160, 1169 (1999) ("Each publication of a defamatory statement is a discrete tort for which the publisher may be subject to liability."); Restatement (Second) of Torts § 577A, comment d (1977) ("[I]f the same defamatory statement is published in the morning and evening editions of a newspaper, each edition is a separate single publication . . . . The same is true of a rebroadcast of the defamation over radio or television [.]"). A person who publishes a defamatory statement is liable when the recipient later republishes the statement if republication was either authorized, intended, or reasonably foreseeable. *See Wheeler v. Green,* 286 Or 99, 125, 593 P2d 777, 792 (1979) (a "letter to the editor" is generally directed to the editor with the intent that the letter be republished in the newspaper).

Defendants admit they approved of and started running the ad on September 17, 2022. Salinas Declaration at 1, ¶ 6 ; Geison Declaration at 1, ¶ 4. Although Defendants do not state when the ad stopped running, Mr. Erickson saw the ad on television as late as mid-October. Erickson Affidavit at 3, ¶ 14. Viewed in the light most favorable to Plaintiff, it has produced substantial evidence that Defendants published the statement and Defendants have not produced evidence to defeat Plaintiff's showing as a matter of law.

B. The statement was false.

The statement that Mr. Erickson was "Charged with Felony Drug Possession" is false. As an initial matter, felony charges must be made by a district attorney's office or grand jury; a police officer cannot make felony charges. The statement was not a matter of opinion, was not

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ambiguous, and no reasonable inference can be drawn from the evidence (including statutes and affidavits) that Erickson was actually charged with a felony. Indeed, it is a legal impossibility that Mr. Erickson was charged with a felony.

1. Legal Standard for falsity.

Statements are not "false" under ORS 260.532(1) if "any *reasonable* inference can be drawn from the evidence that the statement is factually correct or that the statement is merely an expression of opinion." *Comm. of One Thousand to Re-Elect State Senator Walt Brown, v. Eivers*, 296 Or 195, 202, 674 P2d 1159 (1983) (emphasis added).

There are three cases that involve ORS 260.532 claims in which defendants brought special motions to strike under ORS 31.150: *Yes on 24-367 Committee*, *Bryant*, and *Wingard v. Oregon Family Council,* 290 Or App 518, 417 P3d 545 (2018). These cases should guide this Court's analysis and pursuant to these cases' rationale, the statement in the present case is false.[2]

a. Yes on 24-367 Committee

In this case, the alleged falsity was the statement: "This bond levy will DOUBLE the Fire District Tax assessments for the next 20 Years." *Yes on 24-367 Committee* at 351. The court held that was a false statement of material fact based on the evidence before the court, which included information regarding the assessments and the context in which the statement was made. *Id.* at 358 ("[T]he truth and falsity of statements must be evaluated in the context in which one would interpret them.") (citing *Neumann v. Liles,* 261 Or App 567, 578-79, 323 P3d 521, *rev. allowed,* 356 Or 516, 340 P3d 47 (2014) (considering the statements "as a whole" to determine whether they were defamatory or merely hyperbolic opinion and concluding that specific "factual details demonstrate that [the] defendant's statements are not mere hyperbole and * * * would not be brushed off as mere hyperbole by a reasonable reader of those statements").

The *Yes* Court reviewed the assessments referred to in defendants' statement and

[2] Defendants cite out-of-state cases and non-anti-slapp cases that are irrelevant to the motion before the court.

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1 concluded that the bond levy would not have "doubled" the existing assessments; it would have
2 doubled only one of the two existing assessments. Moreover, the bond levy would have resulted
3 in only a 37% increase in the assessments and not the doubling as asserted in defendants'
4 statement.

5 The defendants argued that the statement was reasonably susceptible to an interpretation
6 that made it true if only the local option assessment was considered. Defendants further argued
7 that the statement was ambiguous and was subject to different interpretations – one interpretation
8 that made the statement correct and one interpretation that made it false – and, therefore, it was
9 not false under ORS 260.532.

10 The court rejected this argument and held that that the plaintiff had made a *prima facie*
11 showing that defendants made a false statement of material fact. *Yes on 24-367 Committee* at
12 358 ("[T]aken at face value, the statement is false."). In arriving at this conclusion, the court
13 noted that the defendants' statement could have clarified that the authors meant only that the
14 smaller of the two existing assessments (the local option) would be doubled, but the statement
15 made no such clarification.

16 The court also found that the reader of the statement would need certain knowledge
17 regarding the tax assessments in order to interpret the statement in a way that made the statement
18 correct, and the court concluded that defendants could not "presume" that the audience had such
19 knowledge. *Id*. at 358-59. Because the defendants "made no showing, however, that the
20 audience for their statement had such knowledge or any other requisite context within which they
21 would have the ability to interpret the statement in a way that rendered it accurate," the court
22 concluded that plaintiff made a *prima facie* showing that defendants made a false statement of
23 material fact. *Id.*

24 This case strongly supports a finding that the statement in the current case is false.
25 Defendants claim that the statement is true if the audience adopts a "common usage" definition
26 of "charge." Motion at 8. This argument is without merit because the context of the statement

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must be considered, and the context of Defendants' ad is that it begins with the text "The Truth" and references "Case #16CR61355, 12/29/16." Erickson Affidavit at 2, ¶ 6. The ad presents the content as factually based and verifiably correct. The reference to the official case number and date demonstrates that Defendants' statement is not hyperbole or opinion. By its own terms, the ad is not speaking of the alleged charge in a casual, informal, or "common usage" sense. In this context, the only reasonable interpretation is that Mr. Erickson was legally charged with felony possession of drugs, which is false.

b. *Bryant*

Bryant is particularly instructive because it involves seven challenged statements, one of which involved a "charge." The plaintiff was a city councilor and during a city council meeting implied that the city administrator was involved with missing money. After the meeting, the city administrator was publicly very angry with plaintiff. The city administrator demanded a public retraction, an apology, and a full investigation, or else he would resign. The city administrator eventually filed a tort claim notice against the city. Based on these events, defendants sent a flier to voters entitled: "Failure to Respect City Budget and Council Protocols" and it referred to plaintiff's conduct regarding her accusations against the city administrator. It stated: "[Plaintiff] has recklessly *charged* city staff with unsupported allegations, and thus placed the city at risk of ruining people's careers and reputations with no foundation, all of which necessitated $1,927.00 of unbudgeted expenditures for legal fees." *Bryant*, 286 Or App at 694 (emphasis added). The *Bryant* Court found that the statement did not imply an assertion of objective fact because "any impression of conveying an objective fact is negated by the hyperbolic words used in the statement." *Id*. at 704.

This holding is significant because the defendants in *Bryant* used the word "charged" in the same manner Defendants in the instant case claim to be using the word. But the contexts of the two "charges" are extremely different. In *Bryant*, defendants state that the *plaintiff* charged someone with misconduct, and did so "recklessly," which risked "ruining" people's careers.

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1 *Bryant*, 286 Or App at 694. Clearly, this statement is replete with opinion and hyperbole.
2 Additionally, the "charge" was made by a city councilmember – someone who clearly did not
3 have authority to bring criminal charges – and the charge was of "unsupported allegations," not
4 of felony drug possession, thus the word "charge" was clearly used in the common usage."

5 In contrast, Defendants in the current case use "charged" very differently. The ad begins
6 with the text "The Truth" and provides an official criminal case number. No hyperbolic or
7 opinion words are used when describing the "charge"; rather, it portends to be based on legally
8 correct facts, not personal accusations from a city councilor.

9 Of the remaining six statements analyzed in *Bryant*, the court found that plaintiff
10 presented sufficient evidence to show that four of them were assertions of objective fact that
11 could not reasonably be interpreted as "factually correct." *Bryant*, 286 Or App at 700. Those
12 statements were:

13 • "[Plaintiff] cost the City money by calling the City Attorney without the
14 authorization to do so."

15 The court found that, in the light most favorable to plaintiff, she was not required to
16 obtain "authorization." *Id.* at 702. Also, the statement in context purported to state an objective
17 fact that was provided in the recall petition as one of the "statements of reasons for demanding
18 recall," no figurative or hyperbolic language was used in the statement, and it was capable of
19 being proved true or false. *Id.*

20 • "[Plaintiff] incorrectly asserts that she formed 'Save-Our-Schools Lowell' to raise
21 money for our schools."

22 • "Save-Our-Schools Lowell does not exist."

23 The court analyzed these two statements together and concluded that they implied
24 assertions of objective fact because they appeared in the flyer sent to voters under the heading
25 "FALSE STATEMENTS." The statements did not use figurative or hyperbolic words and were
26 capable of being proved true or false. *Id*. at 704.

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- "[Plaintiff] made a personal recording of a city council executive session meeting in violation of state law."

The court concluded the statement implied an assertion of objective fact because it appeared in the flyer sent to voters under the heading "VIOLATIONS." The statement did not use figurative or hyperbolic words and was capable of being proved true or false. *Id.* at 705.

Based on the reasoning in *Bryant*, Plaintiff in the present case has similarly presented sufficient proof that Defendants' statement is an assertion of objective fact that cannot reasonably be interpreted as "factually correct." The statement in context purports to state an objective fact; indeed, it appeared in an ad following the heading "The Truth." Also, the statement did not use figurative or hyperbolic words, and is capable of being proved true or false.

c. *Wingard*

In *Wingard*, the alleged falsity in defendants' statements was the word "pressured." *Wingard,* 290 Or App at 523 (defendants alleged that plaintiff "pressured a twenty-year-old staff member into a sexual relationship"). The court found that the plaintiff failed to present sufficient evidence from which a reasonable factfinder could find that defendants knew that the description of the relationship as "pressured" was false or acted with reckless disregard as to its falsity. *Id.* at 524. In contrast, as discussed below, Defendants in the present case knew that their statement was false after DA Rasmussen told them it was false.

Additionally, although not discussed by the court, the word "pressured" is not a statement of fact. Rather, whether someone *pressured* someone else is an assertion of opinion and nonactionable under ORS 260.532. As such, *Wingard* is not precedence that supports Defendants' motion.

2. A police officer is not authorized to charge felonies.

In the context of criminal law, a specific meaning and specific rights attach to the word "charge." The Oregon Constitution guarantees that "[i]n all criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of the accusation against [the accused],

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and to have a copy thereof." Or Const, Art I, § 11. Accordingly, the filing of an accusatory instrument is required to initiate the criminal process and charge a crime. The Oregon Constitution specifies that, for felony accusations, the accusatory instrument must be in the form of a grand jury indictment or information:

> (3) Except as provided in subsections (4) and (5) of this section, a person shall be *charged* in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.
>
> (4) The district attorney may *charge* a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.
>
> (5) The district attorney may *charge* a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

Or Const, Art VII (Amended), § 5 (emphasis added).

"*Charged*" means the filing of an accusatory instrument in a court of criminal jurisdiction." ORS 137.705(1)(a)(A) (emphasis added). By statute, charges are made through grand jury indictments, informations, and complaints. ORS 131.005(1). A complaint is a written accusation filed in court "*charging* another person with the commission of an offense, *other than an offense punishable as a felony*." ORS 131.005(3) (emphasis added). A complaint may thus charge a misdemeanor, but not a felony.

3. Mr. Erickson was not charged with felony drug possession.

As DA Rasmussen told Defendants on September 29, 2022, Mr. Erickson was not charged with felony drug possession. The court records in Case #16CR61355 show that Mr. Erickson was only charged with misdemeanor DUII and two traffic violations. The only charging instrument that exists in Mr. Erickson's criminal court records, which Defendants admit they reviewed, is a citation for DUII. *See* Lawrence Affidavit, Ex. 2. The court records conclusively show that there was no charge for felony possession of drugs.

Defendants claim that Mr. Erickson was charged with a felony through Officer Ferrer's

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1 incident report. However, an incident report cannot make charges; it is simply a report of an
2 officer's interaction with a person. An incident report is not a charging instrument. Within
3 incident reports, police officers may list suspected felony charges as "pending," which is a signal
4 to the district attorney to review the report and evaluate whether a felony may be charged.
5 Officer Ferrer had no authority to charge Mr. Erickson with a felony and he did not do so; he
6 merely listed it as "pending," which is not a charge. Officer Ferrer charged Mr. Erickson with
7 DUII only, through the issuance of an Oregon Uniform Citation and Complaint. The Offer for
8 Negotiated Plea provides additional proof that the only charges filed against Erickson were DUII
9 and traffic violations (Fail to Maintain Lane and Fail to Signal).

10 Defendants also claim that Mr. Erickson was charged with a felony through his own
11 Petition to Plead Guilty/No Contest and Waiver of Jury or Court Trial, which was a form filed in
12 by Erickson's then-attorney, Tara Lawrence. This form erroneously stated that "DAA has
13 agreed to dismiss felony possession of controlled substance upon tender of guilty plea."
14 Lawrence Affidavit at 1-2, ¶ 4. However, a petition signed by a defendant in a criminal
15 proceeding is not a charging instrument and cannot charge a crime.

16 The statement that Mike Erickson was "Charged with Felony Drug Possession" is not
17 ambiguous or a matter of opinion. Based on the evidence - which includes statutes, court
18 records, and affidavits – Defendants' statement cannot be reasonably interpreted to be factually
19 correct. Viewed in the light most favorable to Plaintiff, it has produced substantial evidence that
20 the statement is false and Defendants have not produced evidence to defeat Plaintiff's showing as
21 a matter of law.

22 **C. The statement is a statement of material fact.**

23 **1. The statement is a statement of fact.**

24 Defendants do not contest that the statement is a statement of fact; however, they seem to
25 argue that it is their opinion that Mr. Erickson was charged with a felony. *See* Geison
26 Declaration at 3, ¶ 11 ("…I believe and continue to believe that everything in the TV Ad was

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true, including that Mr. Erickson was charged with illegal possession of drugs.”). A belief is an opinion, but whether someone was charged with a felony is not a matter of opinion; it is a matter of objective, provable fact. Here, Plaintiff has proved that Mr. Erickson was not charged with felony drug possession.

2. The statement is material.

“[I]n the context of ORS 260.532, a false statement of fact is ‘material’ if it could significantly influence the mind of a reasonable voter in deciding how to vote in the election.” *Bryant*, 286 Or App at 706. In *Bryant*, the court concluded the plaintiff established a *prima facie* case that the false statements were “material” because they could significantly influence the mind of a reasonable voter in the election. *Id.* The court based its conclusion on the context in which the statements were made, along with the substance of the statements themselves. *Id.* The court also held that the plaintiff was not required to show that any voter did, in fact, change his or her vote because of defendants’ false statements. *Id.*

For the same reasons as in *Bryant*, the false statement of fact in the current case is material. A statement that a candidate was charged with felony drug possession could significantly influence a reasonable voter in deciding how to vote in the election. Obviously, the reason Defendants ran the ad, and continued to run the ad, is because they were trying to influence voters.

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Defendants argue that materiality should be determined by comparing the false statement with other statements; however, this is not the test articulated by the Oregon Court of Appeals. Pursuant to *Bryant*, only the statement that was published is evaluated for materiality. The argument that other statements, that were not published, could also influence voters is irrelevant. Defendants are asking the Court to implement a test that weighs the statement that was published against statements that were not published and determine their relative materiality. According to Defendants, their published statement is not material if other nonpublished statements also would be material. This approach is clearly wrong and should be rejected. Defendants also incorrectly

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infuse the element of falsity into their proposed test, but whether a statement is true or false is irrelevant when determining materiality. In fact, pursuant to the test articulated in *Bryant*, a statement's falsity is established prior to determining materiality. Viewed in the light most favorable to Plaintiff, it has produced substantial evidence that the statement is material and Defendants have not produced evidence to defeat Plaintiff's showing as a matter of law.

D. Defendants acted with knowledge or reckless disregard that the statement was false.

"[A]t this anti-SLAPP stage, plaintiff does not have to *prove* that defendants acted knowingly or recklessly. Plaintiff need only present substantial evidence of a *prima facie* case." *Yes on 24-367 Committee*, 276 Or App at 359 (emphasis in original). Plaintiffs do not have to present direct evidence of defendants' mental state. *Id.* (citing *OEA v. Parks,* 253 Or App 558, 566–67, 291 P3d 789 (2012), *rev. den.,* 353 Or 867, 306 P3d 639 (2013) ("Nothing in the SLAPP statute suggests that only direct evidence, as opposed to reasonable inferences from other evidence, will suffice to support a *prima facie* case."). "Indeed, direct proof of a defendant's subjective state of mind is typically hard to come by, and intent, knowledge, and recklessness are often inferred from surrounding circumstances." *Yes on 24-367 Committee*, 276 Or App at 359 (citing *Dunn v. City of Milwaukie*, 355 Or 339, 350, 328 P3d 1261 (2014) (explaining that "intent can be inferred from the circumstances"); *Turner, Adm'r, v. McCready et al.,* 190 Or 28, 54, 222 P2d 1010 (1950) ("The element of recklessness may, under some circumstances, be inferred from evidence of the [defendant's] conduct in the light of conditions and of what he must have known."); *State v. Neel,* 8 Or App 142, 149, 493 P2d 740 (1972) ("We are aware that seldom can direct evidence be produced that the accused had actual knowledge of a given fact. However, knowledge may be inferred from the circumstances[.]").

In the present case, Plaintiff can easily present substantial evidence that Defendants knew or acted recklessly because they admit that on September 29, 2022, DA Rasmussen called them and told them that Mr. Erickson was never charged with felony possession of drugs.

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1 Additionally, on September 29, 2022, Plaintiff sent Defendants a cease and desist letter that
2 attached the sole charging instrument filed against Mr. Erickson and the Offer for Negotiated
3 Plea which listed that sole criminal charge – DUII. Defendants continued to run the ad after
4 receiving the phone call from DA Rasmussen and the proof that Mr. Erickson was not charged
5 with felony drug possession. Based on these facts, it can be reasonably inferred that, at least for
6 purposes of surviving an anti-slapp motion, that Defendants acted with knowledge or reckless
7 disregard that the statement was false. Viewed in the light most favorable to Plaintiff, it has
8 produced substantial evidence of this element and Defendants have not produced evidence to
9 defeat Plaintiff's showing as a matter of law.

10 **II. Attorney Fees.**

11 Because ORS 31.152(3) allows attorney fees to prevailing defendants, this Court should
12 not allow three attorneys who represent the Democratic Congressional Campaign Committee to
13 join this litigation by *pro hac vice*. It is unclear why Defendants need four attorneys to litigate
14 this motion, especially when Defendants already have very competent counsel with the
15 Markowitz Herbold firm. It appears that the attorneys applying for *pro hac vice* are attempting
16 to make good on their threat to Mr. Erickson that "should he not wish to pay DCCC's legal fees .
17 . . he should cease and desist from his threats of frivolous litigation." Gibson Affidavit, Ex. 4.

18 ORS 31.152(3) also awards costs and reasonable attorney fees to a prevailing plaintiff if
19 the court finds that the motion is frivolous or is solely intended to cause unnecessary delay.
20 Plaintiff will seek costs and fees if the evidence shows this motion was made frivolously or for
21 purposes of delaying a resolution of this case, which must be resolved by January 3, 2023.

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1 **CONCLUSION**

2 For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants'

3 motion.

4

5 DATED this 14th day of November, 2022.

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7

8 **LYNCH MURPHY McLANE LLP**

9 By: *s/ Jill O. Gibson*

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2 **CERTIFICATE OF SERVICE**

3 I hereby certify that I served the foregoing PLAINTIFF'S RESPONSE TO
4 DEFENDANTS'MOTION TO STRIKE on the attorney or party listed below on the date set
5 forth below by the method(s) indicated:

6 **Conventional Paper or E-mail Service, pursuant to ORCP 9:**

7 Harry Wilson, OSB No. 077214
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- ☒ First-class mail, postage prepaid
- ☐ Facsimile, pursuant to ORCP 9 F
- ☐ Hand-delivery
- ☐ Overnight courier, delivery prepaid
- ☐ E-mail, pursuant to ORCP 9 G
- ☒ E-mail copy, as a courtesy only
- ☐ Other:

13
DATED this 14th of November 2022.
14

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