IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

MIKE ERICKSON FOR CONGRESS COMMITTEE, a political committee, Plaintiff, vs. ANDREA SALINAS FOR OREGON COMMITTEE, a political committee, and ANDREA SALINAS, an individual, Defendants.	No. 22CV33968 **DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE AND MOTION FOR ATTORNEY'S FEES** **ORS 31.150 AND ORS 31.152** **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression[.]" *Buckley v. Valeo*, 424 US 1, 14 (1976). Plaintiff Mike Erickson's claim that a statement in Defendants' political Ad that Erickson was charged with possession of oxycodone was a false publication under O.R.S. 260.532 cannot surmount the First Amendment's fundamental protection of this core political speech, not least of all because it was ***true***. The Court should not countenance Erickson's attempt to punish Defendants' political expression and overturn the results of a free and fair election.

The Ad uses the word "charged" consistent with how that word is used in the law enforcement records that the advertisement cites, the common usage of the word "charge" is nowhere near as narrow as Erickson argues, and multiple dictionary definitions confirm this.

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In other words, this is not a hard case. It is precisely the type of action—in which a litigant seeks to use the judicial process to chill free speech on a matter of public significance—that the legislature had in mind when it enacted Oregon's anti-SLAPP statute, ORS 31.150, which instructs courts to "liberally construe[]" its provisions allowing for expedited dismissal of claims "in favor of the exercise of the rights of expression." ORS 31.152(4).

To survive Defendants' motion to strike, Erickson must present sufficient evidence that the Ad was materially false and Defendants knew or recklessly disregarded the falsity. He has not and cannot make this showing. This Court should grant Defendants' motion to strike and award attorney's fees.

THE FACTS

Erickson's entire lawsuit is premised on a single word in the Ad—"charged." The term appears throughout Erickson's official criminal records because law enforcement did, indeed, "charge" Erickson with unlawful possession, before he cut a deal under which the Hood River District Attorney agreed not to file that charge.

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First, the term appears in two places in the Incident Report cited on-screen in the Ad and reviewed by Defendants before publishing the Ad. Under the header "Involved Offenders—Persons," Erickson's classification is listed as "Charged." (11/02/2022 Decl. of Shannon Geison in Support of Defs.' Special Mot. to Strike ("First Geison Decl.") Ex. B at 2.) The "Charges" section lower on the page answers the question "charged with what?" and lists *both* Possession of Oxycodone and DUII.

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Involved Offenders - Persons

Name:	**ERICKSON, MICHAEL KURTIS**			Gender:	Male
Classification:	Arrested; Charged; Driver			DOB:	[redacted]
DL:					
Address:	[redacted]				
Height:	6'5"	Weight:	240lb	Build:	
Race:	White	Hair Color:	Gray or partially gray	Eye Color:	

Arrest Report:

Author:	#52231 FERRER, JACOB	Report Time:	09/17/2016 05:12
Entered By:	#52231 FERRER, JACOB	Entered Time:	09/17/2016 05:12
Arrest Date/Time:	09/17/2016 01:59	Arresting Officer:	#52231 FERRER, JACOB
Place Of Arrest:	EUGENE ST and SERPENTINE RD, HOOD RIVER OR USA (Beat: TDO, Region: ER)		
Apprehension Type:	Probable cause - Felony; Probable cause - Misdemeanor		
Warrant #:		Warrant Agency:	
Remarks:			

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Charges/Pending Charges:

- **475.834 Possession of Oxycodone** (Fel, C); Status: Cleared by Arrest (OSP); Offense Date: 09/17/2016; Charge Date: 09/17/2016; Offense Location: EUGENE ST and SERPENTINE RD, HOOD RIVER OR USA (Beat: TDO, Region: ER)
- **813.010 DUII - Alcohol** (Misd, A); Status: Cleared by Arrest (OSP); Offense Date: 09/17/2016; Charge Date: 09/17/2016; Offense Location: EUGENE ST and SERPENTINE RD, HOOD RIVER OR USA (Beat: TDO, Region: ER)

This is the record expressly cited in the Ad, and it says exactly what Defendants repeated in the Ad—Erickson was charged with unlawful possession of oxycodone. But this is not the only time the fact that Erickson was "charged" with unlawful possession is noted in his criminal records. As explained in Defendants' motion, after he was arrested, Erickson was booked into jail. He then secured his release from jail. The terms of his release from custody are set out in a Release Agreement, filed in Hood River County Circuit Court. (*See* 11/21/2022 Decl. of Shannon Geison in Support of Defs.' Reply ("Second Geison Decl."), Ex. A.) The Release Agreement requires Erickson to post bail and comply with various conditions such as not consuming intoxicants. As reflected below, the Release Agreement lists two "Charges": "UP Controlled Substance Schedule II" and "DUII."

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Release Agreement - Circuit Court

○ Wasco Co. Circuit Court 511 Washington Street P.O. Box 1400 The Dalles, OR 97058 541-506-2700	◉ Hood River Co. Circuit Court 309 State Street Hood River, OR 97031 541-386-3535	○ Gilliam Co. Circuit Court 221 South Oregon Street P.O. Box 622 Condon, OR 97823 541-384-3303	☐ Domestic Violence ☒ Security Release
○ Sherman Co. Circuit Court 500 Court Street P.O. Box 402 Moro, OR 97039 541-565-3650	○ Wheeler Co. Circuit Court 701 Adams Street P.O. Box 308 Fossil, OR 97830 541-763-2541	○	☐ Matrix ☐ Recognizance

Charges: UP CONTROLLED SUBSTANCE SCHEDULE II, DUII Case #:

Defendant's Name: ERICKSON, MICHAEL KURTIS Phone: [redacted]

Finally, Erickson's Plea Petition states that the "DAA has agreed to dismiss felony possession of controlled substance upon tender of guilty plea."[1] (First Geison Decl., Ex. C at 4.) In response to the next prompt reading, "I understand that the District Attorney will make the following recommendation to the Court about my sentence or other pending charges," the Petition states, "DAA dismiss felony possession of C.S. upon guilty plea." *Id.*

No threats or promises.

18. I declare that no government agents have made any threats or promises to me to make me enter this plea other than the District Attorney's recommendation set forth in Paragraph 19, except: The DAA has agreed to dismiss felony possessing controlled substance upon tender of guilty plea.

19. I know that the sentence is up to the Court to decide. The District Attorney may provide reports or other information if requested by the Court. I understand that the District Attorney will make the following recommendation to the Court about my sentence or about other pending charges. This recommendation is (X) is not ( ) made pursuant to ORS 135.432 (2):
DAA dismiss felony possession of C.S. upon guilty plea, Defendant to endangering another person and the violations.

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There is no real factual dispute here. Erickson was arrested. The police charged him with two offenses—DUII and unlawful possession. He was released from jail. His counsel worked out a plea deal with the Hood River DA, in which he pled guilty to DUII, and the DA agreed not to pursue other charges, including unlawful possession. There is a reason that Erickson runs from the facts in his opposition, and it is that his criminal records repeatedly describe him as being charged with unlawful possession of oxycodone.

[1] Erickson's criminal attorney submitted an affidavit to say the language in the Plea Petition was a mistake, but "official records and documents open to the public are the basic data of governmental operations" with "respect to judicial proceedings in particular," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Defendants were entitled to rely upon the Petition and assume its accuracy.

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ARGUMENT

Under ORS 31.150, the Court engages in a two-step burden-shifting process to resolve a special motion to strike. First, this Court must determine whether Defendants have shown that Erickson's claim "arises out of" activities protected in ORS 31.150(2). *Bryant v. Recall for Lowell's Future Comm.*, 286 Or App 691, 692 (2017). Erickson did not respond to Defendants' argument that they satisfy ORS 31.150(2), and the Ad plainly concerned a matter of public interest. *See* Defs.' Mot. to Strike & for Att'y's Fees (hereinafter "Mot.") at 5-6. Accordingly, Erickson has conceded that Defendants have satisfied the first step. *See, e.g.*, *State v. McCrorey*, 216 Or App 301, 304 n3 (2007) (recognizing "silence to be an implicit concession").

Under the second step, the Court must consider whether Erickson has presented substantial evidence of a prima facie case to establish a probability of prevailing. *Bryant*, 286 Or App at 692. For the reasons articulated below and in Defendants' motion, he has not met that burden.

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I. Erickson has not presented substantial evidence of a prima face case.

"Substantial evidence of a prima facie case" means "sufficient evidence from which a reasonable trier of fact could find that the plaintiff met its burden of production" to show that defendants "(1) published (2) a false statement (3) of a material fact (4) with knowledge or reckless disregard that it was false." *Bryant*, 286 Or App at 698 (citations omitted). In other words, Erickson must present *sufficient* evidence to show "a likelihood of success on the merits" on *each* element of his claim. *Dossett v. Ho-Chunk, Inc.*, 472 F Supp 3d 900, 909 (D Or 2020).

Consistent with the entire purpose of Oregon's anti-SLAPP statute, ORS 31.150 is thus much more than a pleading standard. It is an evidentiary standard that has teeth. Courts

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regularly grant ORS 31.150 motions when plaintiffs fail to meet their burden.[2] *E.g., Wingard v. Or. Fam. Council, Inc*., 290 Or App 518, 524 (2018) (reversed and remanded when "plaintiff failed to establish his prima facie case, as is required"); *Mohabeer v. Farmers Ins. Exch*., 318 Or App 313, 320, *review denied*, 370 Or 212 (2022) (same); *Mullen v. Meredith Corp*., 271 Or App 698, 715 (same). These decisions show courts take seriously the legislature's directive to "liberally construe[]" ORS 31.150 "in favor of the exercise of the rights of expression." ORS 31.152(4).

A. Erickson cannot establish the Ad contains a false statement because the Ad was true.

Under Oregon Supreme Court precedent, "statements are not 'false,' as that term is used in ORS 260.532(1), if *any reasonable inference* can be drawn from the evidence that the statement is factually correct[.]" *Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers,* 296 Or 195, 202 (1983) (emphasis added). As such, it is not sufficient for Erickson to present evidence that "charge" *can* mean the filing of an accusatory instrument with a court. Instead, Erickson must present substantial evidence that this meaning is the *one and only* relevant meaning of the word. Erickson has not—and cannot—make that showing. Criminal records, multiple dictionaries, common understanding, and Defendants' own sworn statements each alone and together demonstrate a reasonable inference that police can, as they did with Erickson, "charge" crimes.

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Although Erickson fails to acknowledge other definitions of "charge" in his response, Oregon courts "may rely on dictionaries to discern the meaning of words in common usage."

[2] *E.g., Roberts, MD. v. Legacy Health*, No. 17CV27713, 2018 WL 8263891, at *1 (Or Cir Oct. 05, 2018); *Gelfland v. Holmes*, No. 18CV18884, 2018 WL 9880409, at *1 (Or Cir Sep. 28, 2018); *Campos v. Jensen*, No. 17CV05259, 2017 WL 11272345, at *1 (Or Cir June 26, 2017); *Param Hotel Corp. v. Port of Astoria*, No. 15CV29806, 2016 WL 11034610, at *6 (Or Cir Apr. 29, 2016); *Oracle Am., Inc. v. Looper*, No. 15-CV-04705, 2015 WL 13079418, at *1 (Or Cir Aug. 05, 2015); *Gibson v. McKeon*, No. 1401-00261, 2014 WL 12580501, at *1 (Or Cir May 15, 2014); *Robinson v. Defazio,* No. 12CV1144, 2013 WL 12203837, at *1 (Or Cir June 03, 2013); *Goertzen v. Sisters Sch. Dist. #6*, No. 12CV0950, 2013 WL 8372888, at *2 (Or Cir Feb. 13, 2013).

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Dep't of Hum. Servs. v. J. R. D., 286 Or App 55, 60 (2017). And "charge" means, among other things, "to bring an accusation against." Webster's Third New Int'l Dictionary 377 (unabridged ed 2002). This common meaning of charge is used similarly in the criminal justice system. For example, Black's Law Dictionary defines "charge" as "to accuse (a person) of an offense" and provides the example "the police charged him with murder." Black's Law Dictionary, "Charge" (11th ed. 2019). That sentence is a strange choice for the leading law dictionary if, as Erickson suggests, only prosecutors have charging authority for felonies.

Indeed, courts routinely use charge the same way as Black's Law Dictionary. *See, e.g.*, Mot. at 8, n 3; *see also Brown v. Ohio*, 432 US 161, 162 (1977) ("The Wickliffe police *charged* him with 'joyriding' taking or operating the car without the owner's consent in violation of Ohio Rev. Code Ann. s 4549.04(D) (1973, App. 342)" (emphasis added)); *Child v. City of Portland*, 547 F Supp 2d 1161, 1167 (D Or 2008) ("criminal charges arose directly from Defendant Officers' reports"); *State v. Frisby*, 174 NJ 583, 590 (NJ 2002) ("after the investigation the police decided not to charge Patterson with endangering the welfare of the child"); *Godwin v. Daily Local News Co.*, 47 Pa D & C 3d 639, 643 (Ct Comm Pleas 1987) ("police charged him with the theft").

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Erickson does not respond to any of the authority cited in Defendants' motion. Instead, he cites three cases decided under ORS 31.150; two are inapposite, and one dismissed the plaintiff's claim for want of adequate evidence of actual malice. *Yes on 24-367 Committee v. Deaton* concerned the word "double," which as used there could only mean two times larger. 276 Or App 347, 351 (2016). Charged, on the other hand, can mean various things, and as reflected by the dictionary definitions above, common court usage, and Erickson's underlying criminal records, the Ad used the term to mean he was accused of a criminal offense. *Bryant* is also inapposite, as that case turned on the dividing line between a statement of fact and one of hyperbole or opinion. 286 Or App at 703-04. That isn't the

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issue here. Defendants used the term to mean "accused by police," as it was used in the cited law enforcement records. Lastly, the "evidence" of actual malice that Erickson believes distinguishes this case from *Wingard* is insufficient for reasons discussed in the next section, below.

Erickson's citations to Oregon statutes fare no better. First, the definition of "charged" in ORS 137.705(1)(a)(A) is expressly *limited* to two sections of Oregon's code concerning juvenile offenders. *See* ORS 137.705 ("As used in this section and ORS 137.707: (A) Charged means * * *"). If the word "charged" could mean one and only one thing in the criminal context, there would have been no need for the legislature to expressly define the term in the juvenile offender context. More broadly, these statutes do not address the question of police officers' authority in charging individuals with crimes; they only prescribe the process for district attorneys moving forward with criminal charges in court. They are not, then, evidence of the Ad's falsity.

ORS 131.005(3), which Erickson also cites, shows that "charge" does not mean a formal accusatory instrument. It states: "'Complaint' means a written accusation, verified by the oath of a person and bearing an indorsement of acceptance by the district attorney * * *, charging another person with the commission of an offense[.]" This statutory definition is consistent with both Webster's Third New International Dictionary and Black's Law Dictionary. A complaint is not itself a charge, it makes a charge, *i.e.*, an accusation. Under the statutory definition, a complaint is a formal instrument composed of several elements, one of which is a "charge" of an offense. The definition does not limit the authority for "charging" to only district attorneys.

Likewise, Oregon Constitution Article VII sets out certain protections for criminal defendants; nothing in the constitutional text suggests that it is inaccurate to say that the police charge a suspect by accusing them of a particular criminal offense.

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Again, the Court need look no further than the underlying factual records in this case, which reflect the common usage of the word "charge." The Incident Report has a "charged" classification. (First Geison Decl., Ex. B at 2.) The Release Agreement lists "charges." (Second Geison Decl., Ex. A.) There were "pending charges" negotiated as part of a plea petition. (First Geison Decl., Ex. C at 4.). Erickson's crabbed construction of "charged" renders these records nonsensical.

As set out in Defendants' Motion and above, Erickson must show that there is *no* reasonable construction of the Ad's language under which it is substantially true. *Comm. of One Thousand to Re-Elect State Senator Walt Brown*, 296 Or at 202. Defendants proffer the same meaning of "charged" used in the underlying records, common usage, legal dictionaries, and myriad court opinions. Erickson has failed to present substantial evidence that Defendants' usage of "charge" in the Ad is false.

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B. Even if this Court were to conclude that "charge" is capable of only the meaning advanced by Erickson, Defendants did not act with knowledge or reckless disregard that the Ad was false.

For the reasons discussed above, the Ad is true. But even if the Court concludes that "charge" is capable of only the meaning advanced by Erickson, Defendants did not act with knowledge or reckless disregard that the Ad was false. Defendants are not police officers. Nor are they judicial officers. When they read law enforcement and judicial records saying that Erickson was charged with unlawful possession of oxycodone, they reasonably believed that those records were true. They said so in sworn declarations submitted along with Defendants' motion. (Salinas Decl. ¶ 6; First Geison Decl. ¶¶ 8, 9, 12.) Defendants did not know the Ad's use of "charged" was "false" or act with reckless disregard for the truth. Defendants can scarcely be expected to know that (in Erickson's telling) the Oregon State Patrol and Hood River Circuit Court do not know what "charged" means and their official documents used the word incorrectly.

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By contrast, Erickson presents a single piece of purported "evidence" of reckless disregard: a declaration by Erickson's former defense attorney in which she says that she was told by Hood River District Attorney Carrie Rasmussen that she told Shannon Geison, the Committee's campaign manager, that Erickson was not charged with unlawful possession. This declaration does not carry Plaintiff's burden for multiple, independent reasons.

First, this conversation occurred after Defendants had already caused the Ad to be run on various television stations in Oregon. (*See* Compl. ¶ 11; Lawrence Aff. ¶ 5; First Geison Decl. ¶ 13.) Under ORS 260.532, the defendant must "cause an[] advertisement to be placed in a publication * * * with knowledge or with reckless disregard that" it "contains a false statement of material fact relating to any candidate." Erickson cites no authority under ORS 260.532 holding that liability flows from a defendant's failure to *unpublish* something they have already "caused" to be published.[3]

Second, as explained in Defendants' motion and Ms. Geison's first declaration, the call from DA Rasmussen that her office did not file charges did not lead Defendants to believe the ad was false because the Ad referenced the law enforcement records indicating police had charged Erickson with unlawful possession. *See* Mot. at 10-12.

Two California cases are instructive.[4] *Annette F. v. Sharon S.*, 119 Cal App 4th 1146, 15 Cal Rptr 3d 100 (2004), concerned another term used in the criminal justice system—"convicted." The Court found that "the dictionary meaning of the word 'convict' does not necessarily connote a finding of guilt of a crime; it can also mean 'to show or prove to be guilty of something blamable (as wrong or error).'" *Id.* at 1167-68. The court further

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[3] Erickson instead relies on cases addressing common law defamation claims, which do not contain the "cause to be published" standard set out in ORS 260.532.

[4] Because ORS 31.150 was modeled after California's anti-SLAPP law, it "was intended that California case law would inform Oregon courts regarding the application of ORS 31.150 to ORS 31.155." *Page v. Parsons*, 249 Or App 445, 461 (2012); *see also Handy v. Lake County,* 360 Or 605, 623, n12 (2016) ("California cases decided after 2001 are relevant * * * for their persuasive value.").

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explained that "even assuming" the use of convicted "could be construed as false," the evidence did not establish that the defendant had acted with actual malice. *Id*. at 1168. The Court noted that "breathing space" is required to protect free debate and found it significant that the defendant, like the Defendants here, submitted a sworn declaration that she was not a lawyer and used the term consistent with its common usage in a way she believed was true. *Id*. at 1168-69. The opinion also explained that "even appellate courts are not immune to this loose usage of the term" convicted, which is equally true for "charged" as summarized *supra*. *Id*. at 1169. The Court concluded that "false statements that have some element of truth to them are logically less susceptible" to a finding of reckless disregard and rejected ill will, motive, and lack of investigation as sufficient bases for finding actual malice. *Id*. at 1170. The Court ultimately granted the defendant's anti-SLAPP motion for failure to show a probability of proving actual malice. *Id*. at 1170, 1172.

In *Rosenaur v. Scherer*, 88 Cal App 4th 260, 105 Cal Rptr 2d 674 (2001), *as modified* (Apr. 5, 2001), the Court found it significant that the defendant there, as here, relied upon public records in making a statement. The Court noted that "the contents of public records are generally thought to be reliable, and statements based thereon cannot be deemed to have been made with actual malice." *Id.* at 276. The trial court had granted the defendants' motion to strike, holding that "the undisputed evidence submitted to this Court shows that Defendants relied on public records for their statements and therefore could not act with actual malice." The appellate court affirmed the grant of defendants' motion to strike. *Id*. at 278, 287.

Here, too, Defendants relied on public records to make a statement about the criminal justice process they believed to be true. Even assuming airings of the Ad postdating the conversation between Ms. Geison and DA Rasmussen may create liability under ORS 260.532, there is no evidence that Defendants knew or recklessly disregarded the truth. That alone is sufficient to grant Defendants' motion. *Wingard*, 290 Or App at 524.

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II. The Court should award Defendants their reasonable attorney fees and costs.

Erickson's complaint is an attack on Defendants' fundamental First Amendment liberties. It is based on a clearly inapposite interpretation of the word "charged." And it was filed in an attempt to silence free speech before an election and overturn the results after. The Court should not only grant Defendants' special motion to strike, it should award Defendants' their attorney fees as required by statute. ORS 31.152(3) ("A defendant who prevails on a special motion to strike made under ORS 31.150 *shall* be awarded reasonable attorney fees and costs." (Emphasis added)).

Erickson does not (and cannot) support his contention that Defendants should be limited to representation by single counsel or that it is inappropriate for counsel appearing *pro hac vice* to collect attorney's fees if Defendants prevail on their ORS 31.150 motion. A possible fee award is not a basis for denying *pro hac vice* admission under UTCR 3.170. Counsel is plainly fit for admission under the enumerated criteria, and Erickson has not argued to the contrary.[5] Oregon courts have recognized that, consistent with UTCR 3.170, "civil litigants have a right to be represented by counsel and that that right ordinarily implies a right to retain the lawyers of their choice." *In re Sanai*, 360 Or 497, 522 (2016). Oregon law separately prescribes nine factors for courts to consider in awarding fees in ORS 20.075(2), including the time and labor required, the amount in controversy and results obtained, time limitations in the case, and the experience and ability of the attorneys, among others. ORS 20.075(2) does not identify the size of the legal team nor state bar membership as considerations in awarding fees, and Oregon courts routinely follow the interpretative

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[5] Plaintiff writes that "this Court should not allow three attorneys who represent the Democratic Congressional Campaign Committee to join this litigation by *pro hac vice*." Resp. at 16. As counsel's pending *pro hac vice* motions state, Attorneys Stafford and Khanna request leave to represent Defendants, not DCCC. DCCC is not party to this litigation, and the letters referenced in and attached to Attorney Gibson's Affidavit concerned a DCCC press release not at issue here. Plaintiff offers no explanation of why the Court should refuse to admit counsel *pro hac vice* because they also represent a different client, DCCC, in another matter.

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principle that "the expression of one thing implies the exclusion of others." *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 355 Or 476, 497 (2014) (noting that "the longer the list of enumerated items and the greater the specificity with which they are stated, the stronger the inference that the legislature intended the list to be exhaustive"). Defendants understand that Plaintiff will be amending his Complaint and will ask the Court to overturn the results of the election. In light of that extraordinary request, Defendants are surely entitled to counsel of their choice, including counsel from Elias Law Group with campaign-related defamation and election law expertise.

Should Defendants prevail on their motion, ORS 31.152(3) mandates an award of reasonable attorney's fees to Defendants' counsel.[6]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their ORS 31.150 special motion to strike, dismiss Plaintiff's Complaint, and award them their reasonable attorney's fees and costs pursuant to ORS 31.152(3).

DATED this 21st day of November, 2022.

MARKOWITZ HERBOLD PC

By: *s/ Harry B. Wilson*
Harry B. Wilson, OSB #077214
HarryWilson@MarkowitzHerbold.com

William B. Stafford*

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[6] Defendants' request for attorneys' fees flows from the plain language of ORS 31.152(3). Plaintiff's threat to seek fees from Defendants is baseless. For all the reasons articulated in Defendants' motion and above, Defendants' ORS 31.150 motion is meritorious and should be case-dispositive, but regardless of this Court's ruling, the motion is not "frivolous." *See Westfall v. Rust Int'l*, 314 Or 553, 559 (1992) (defining "frivolous" appeal as one where "every argument on appeal is one that a reasonable lawyer would know is not well grounded in fact, or that a reasonable lawyer would know is not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law"). And Defendants have not delayed resolution of the case. To the contrary, they filed their ORS 31.150 motion before their responsive pleading was due under ORCP 15 and ORS 31.152, more than a week before the mutually agreed-upon deadline, and they now file this reply three days before their deadline.

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**Pro Hac Vice Application Pending*
*** Pro Hac Vice Application Forthcoming*

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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, I have made service of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF SPECIAL MOTION TO STRIKE AND MOTON FOR ATTORNEY FEES** on the party listed below in the manner indicated:

Jill O. Gibson Lynch Murphy McLane LLP 1120 NW Couch Street, Tenth Floor Portland, OR 97209 *Attorney for Plaintiff*	☐ U.S. Mail ☐ Facsimile ☐ Hand Delivery ☐ Overnight Courier ☒ Email jgibson@lynchmurphy.com ☒ Odyssey File & Serve™

DATED this 21st day of November, 2022.

s/ Harry B. Wilson
Harry B. Wilson, OSB #077214
Of Attorney for Defendants

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