

March 10, 1999

No. 8266

This opinion is issued in response to questions presented by Colleen Sealock, Director of the Elections Division in the Office of Secretary of State Phil Keisling.

FIRST QUESTION PRESENTED

Does ORS 260.522,⁽¹⁾ which prohibits most anonymous signs, publications and broadcasts used in political campaigns, violate the free speech provisions of the Oregon Constitution or the United States Constitution?

ANSWER GIVEN

The statute as currently written is unconstitutional. The liberty to produce and distribute anonymous campaign material is protected by free speech guarantees. Under Article I, section 8, of the Oregon Constitution,⁽²⁾ the Legislative Assembly may not restrain "the free expression of opinion" or restrict a person's right to "speak, write, or print freely on any subject" unless the limitation was well-established at the time that free speech guarantees entered the federal or state constitutions and was not a limitation that those guarantees were designed to eliminate, or unless the limitation is directed not at speech *per se* but at the effects of the speech. No historical exception covering anonymous political speech exists, nor does ORS 260.522 focus on effects as opposed to speech *per se*. Therefore, the statute violates Article I, section 8.

Under the First Amendment to the United States Constitution,⁽³⁾ which would only come into play if the statute were to survive state constitutional scrutiny, a state legislature may not enact a content-based limitation on speech unless the limitation is narrowly tailored to achieve a compelling state interest. Although ORS 260.522 may address a compelling state interest, a court would likely find that the statute as written is fatally overbroad because it limits speech in ways that are not necessary to achieve that interest.

SECOND QUESTION PRESENTED

If part of ORS 260.522 is unconstitutional, is there any part that can be enforced?

ANSWER GIVEN

The Oregon Constitution would preclude enforcement of any part of ORS 260.522. If the statute were to survive state constitutional scrutiny, then ORS 260.522 could possibly be enforced consistent with the First Amendment insofar as it regulates broadcast campaign material only.

DISCUSSION

I. Article I, Section 8, of the Oregon Constitution

Oregon courts examine state constitutional issues before addressing federal ones. *State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983). We follow the same approach. 49 Op Atty Gen ___ (No. 8256, April 27, 1998).

In a line of cases beginning with *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court "established a framework for evaluating whether a law violates Article I, section 8."⁽⁴⁾ *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992). Within that framework, all laws that affect speech are divided into three categories: (1) laws that are directed at speech *per se*, that is, laws that purport to limit certain identified messages regardless of their medium of communication or the effects they produce (e.g., "no person may advocate abolition of the initiative"), (2) laws that are directed at the pursuit or accomplishment of a harmful result (e.g., "no person may cause alarm by credibly threatening to injure another person"), and (3) laws that, without mentioning speech, might be applied so as to affect it (e.g., a trespass law that might be applied against protesters or a law prohibiting amplified noise in a residential area). *State v. Robertson*, at 412-18.

The Oregon Supreme Court has on two occasions applied this framework to analyze statutes that limited political speech. In *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997), the court struck down provisions of Oregon Laws 1995, chapter 1 (Ballot Measure 9) that prohibited certain campaign contributions (donations of money to a candidate) but sustained other provisions of the measure that allowed candidates to agree to voluntary expenditure limitations (spending by a candidate). In *Fidanque v. Oregon*, ___ Or ___, ___ P2d ___ (SC No. S43705, November 27, 1998), the court struck down

ORS 171.743, which required some persons to pay a \$50 fee to register as lobbyists. In both *Vannatta* and *Fidanque*, the court treated statutes designed to ensure the integrity of the political process as statutes that are within the first category, that is, statutes addressed not to a harm, but to speech *per se*.

ORS 260.522 falls within this category as well. With certain exceptions,⁽⁵⁾ ORS 260.522 prohibits anyone from publishing "any written matter * * * relating to any candidate or measure at any election, unless it states the name and address of the person responsible for the publication." Whether viewed as a law prohibiting anonymous political speech or one conditioning the publication of a political message on its disclosure of the speaker's identity, the statute is directed at speech *per se*. The statute "restrain[s]" or "restrict[s]" speech within the meaning of Article I, section 8.⁽⁶⁾ The statute is also directed at the content of expression or any subject of communication within the meaning of *Robertson*. Put another way, the focus of the statute is prohibiting anonymous political speech; the difference between permitted and prohibited speech depends on what the speaker says, as opposed to how it is said or what its results are. A person who distributes a leaflet with the text "Vote for Jones" violates the statute and is subject to a fine, regardless of how, where or when the statement occurs, and regardless of whether any person is deceived, confused, or enlightened by it, while another person whose leaflet says "Vote for Jones (This message authorized by Smith)" escapes sanction.⁽⁷⁾

While it is arguable that the law is directed against harms that may legitimately be regulated, such as fraud and misrepresentation, these harms are not named or implied within the statute itself, nor does the statute proscribe the speech only when it actually or necessarily produces (or is imminently likely to produce) the harm. Rather, the statute seems to presume that such harm will automatically follow from the utterance of anonymous campaign speech. That presumption is precisely what makes a statute speech-focussed. See *Vannatta*, 324 Or at 539 (statute limiting campaign contributions, calculated to prevent fraud, nonetheless was speech-focussed and not harm-focussed because it penalized the speech even when it did not produce harm); see *City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988) (ordinance based on presumption that unnamed harm will occur treated as statute addressed to speech *per se*).

Laws of this first type -- those directed at speech *per se* -- violate Article I, section 8, unless "the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted," such as the traditional restraints against perjury, solicitation, conspiracy and some forms of fraud. *Robertson*, at 412. Although this historical inquiry can sometimes involve conflicting interpretations of the past, no such dispute exists here. The very pamphlets that urged adoption of the United States Constitution itself, The Federalist Papers, were anonymous, and they followed in a long tradition of anonymous political discourse. *McIntyre v. Ohio Elections Comm'n*, 514 US 334, 343 n 6, 115 S Ct 1511, 131 L Ed2d 426 (1995); *Talley v. California*, 362 US 60, 64-65, 80 S Ct 536, 4 L Ed2d 559 (1960).

Because ORS 260.522 prohibits certain speech *per se*, regardless of whether it causes harm or not, and its constraints were not well-established speech regulations at the time of the founding nor, as far as our research has disclosed, at the time of statehood, we conclude that ORS 260.522 violates Article I, section 8, of the Oregon Constitution.

Moreover, unlike the First Amendment to the United States Constitution, as currently interpreted by the United States Supreme Court, see, e.g., *First Nat. Bank of Boston v. Bellotti*, 435 US 765, 786, 98 S Ct 1407, 55 L Ed2d 707 (1978), Article I, section 8, does not permit limitations of speech even if they are narrowly tailored to achieve some compelling state interest. Thus, amending or revising ORS 260.522 to limit its application to corporate speech or to speech addressed to candidate elections so as to more precisely address fraud or corruption would be of no avail with respect to Article I, section 8; the statute would still be speech-focussed. Further, although limiting the statute so that it would permit anonymous published campaign information but continue to prohibit anonymous broadcast campaign statements might make the statute constitutional under the First Amendment, *McIntyre*, 514 US at 338 n 3, that limitation would not make the statute constitutional under Article I, section 8, because the Oregon free speech guarantee makes no distinction between spoken, written or broadcast messages. The only amendment that could salvage the statute would be one that rewrites it into a direct prohibition of named harms. Such statutes are not facially unconstitutional (although they might be applied unconstitutionally in some circumstances). *Robertson*, at 412.

The Oregon Supreme Court has not addressed the constitutionality of anonymous campaign statements. We are confident that if and when it does, it will reach the same conclusions we reach. We therefore advise your office that it should not enforce ORS 260.522 as written. In the highly unlikely event that the court does conclude that ORS 260.522 passes state constitutional scrutiny, then the ultimate survival of that statute would depend on First Amendment analysis. We turn now to that.

II. The First Amendment to the United States Constitution

The United States Supreme Court recently addressed the constitutionality under the First Amendment to the United States Constitution of an Ohio statute prohibiting anonymous campaign signs and literature.⁽⁸⁾ In *McIntyre v. Ohio Elections Comm'n*, 514 US 334, the Court held that Ohio's interest in preventing the potential misuse of anonymous election-related publications did not justify the prohibition.

In *McIntyre*, the Court began with the premise that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. The Court then determined the appropriate standard of review to apply to the Ohio statute. Critical to this determination was whether the statute would be regarded as a regulation of the electoral process or of speech. If a statute regulates the mechanics of the electoral process then it is subject to a less stringent standard of review than if the statute regulates speech. The Court concluded that the Ohio statute regulated speech because it limited political expression by requiring disclosure of the author's name. *Id.* at 345.

Since the Ohio statute regulated the content of speech -- in particular, core political speech, which enjoys heightened protection -- and not the electoral process itself, the statute was subject to "exacting scrutiny." *Id.* at 345-46. Under the exacting scrutiny test, a restriction on speech will be upheld only if the restriction is "narrowly tailored to serve an overriding state interest." *Id.* at 347 (citing *Bellotti*, 435 US at 786).

Ohio argued that the statute was justified by two state interests: providing the electorate with relevant information, and preventing fraudulent and libelous statements. *McIntyre*, at 348. The Court rejected both these rationales. First, the Court stated that Ohio's informational interest "is plainly insufficient to support the constitutionality of its disclosure requirement" because the identification of the author is analogous to other components of a document's content which an author is free to include or omit. *Id.* at 348-49. As for the second interest, the Court did acknowledge that preventing fraud "carries special weight during election campaigns," but noted that the interest could be, and indeed was, adequately addressed by other less intrusive statutory measures. *Id.* at 350-51.⁽⁹⁾

For purposes relevant to First Amendment analysis, ORS 260.522 appears indistinguishable from the statute at issue in *McIntyre*. Both impose anonymity requirements and therefore regulate the content of political speech and not the conduct of elections. Thus, the fate of ORS 260.522 under the First Amendment is probably identical to the fate of the Ohio statute -- it would probably not survive "exacting scrutiny." The doubt arises because courts subsequent to *McIntyre* have been unable to agree as to its precise meaning or scope.

Since *McIntyre*, a number of states have had to determine whether their anonymity prohibitions were still valid under the First Amendment. Outcomes vary, and no consensus emerges. Compare, e.g., *Virginia Society for Human Life, Inc., v. Caldwell*, 500 SE2d 814 (Va 1998) (saving statute) with *State v. Moses*, 655 So 2d 779 (La App 1995) (striking down Louisiana's prohibition on all anonymous campaign literature). The differences reflect states' and courts' choices whether to read *McIntyre* broadly or narrowly. Read broadly, it applies to all anonymity prohibitions; read narrowly, it applies only to situations that are identical to the precise one at issue in *McIntyre*.

To some extent, these differing results reflect mixed signals within the *McIntyre* opinion itself. On the one hand, the opinion contains language implying that its holding was intended to be limited to the facts of that case. The Court concludes at one point that "a State's enforcement interest might justify a more limited identification requirement," *McIntyre*, at 353, and, again, that Supreme Court precedent "may permit a more narrowly drawn statute" than "Ohio's blunderbuss approach." *Id.* at 356, 357. Describing the ways in which the Ohio statute is overbroad, the Court describes how it applies indiscriminately to material distributed by candidates as well as by unaffiliated individuals, and to speech related to candidate elections as well as to issues, thus hinting that it might approve a statute aimed only at organized or corporate anonymity in candidate elections. *Id.* at 351-52. In a significant footnote, the Court notes that the Ohio statute contains a provision dealing with broadcast anonymity and then announces that "[n]o question concerning that provision is raised in this case. Our opinion, therefore, discusses only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed." *Id.* at 338 n 3.

On the other hand, the Court's statements noted above are couched in speculative terms: a State "might" have justification for a limited identification requirement, and precedent "may" permit a narrower statute. Further, the Court begins the opinion by announcing that the "question presented" by the case is "whether an Ohio statute that prohibits the distribution of anonymous campaign literature" violates the First Amendment. *Id.* at 336. It is the entire statute that the Court addresses, not just the part that is implicated by the facts of this case. The challenge is facial, not as applied; the issue is whether the statute could be enacted by the Ohio legislature in the first instance, not whether it may lawfully be applied against Mrs. McIntyre. The result of the case is the invalidation of Ohio's statute, not a narrowing interpretation of it or a simple reversal of Mrs. McIntyre's conviction. Had the Court been interested in limiting its holding to candidate elections

or individual (as opposed to organized) distribution, it could have so held.

In short, until the Supreme Court revisits this issue, only two absolutely clear conclusions exist. First, a statute prohibiting an individual from distributing issue-related leaflets violates the First Amendment. Second, no case yet holds that prohibiting anonymous broadcasts violates the First Amendment. Beyond these conclusions lies speculation. Perhaps some statutes prohibiting anonymity could survive a First Amendment challenge. We do not know that for certain, nor do we know what those statutes, if they exist, would look like. It is not impossible that ORS 260.522 is such a statute.

III. Conclusion

ORS 260.522 as currently written violates Article I, section 8, of the Oregon Constitution. In the unlikely event ORS 260.522 were to survive state constitutional scrutiny, in all probability the statute violates the First Amendment to the United States Constitution. Whether or not the statute could be narrowed by amendment or revision so as to avoid with certainty any First Amendment infirmities is not clear, but the likelihood is small. In any event, the only amendment or revision that would bring the statute into compliance with the more stringent free speech requirements of Article I, section 8, of the Oregon Constitution would alter the focus and language so that it addressed the effects of the harm.

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Attorney General

1. ORS 260.522 states:

(1) Except as provided in subsections (2) and (3) of this section, no person shall cause to be printed, posted, broadcast, mailed, circulated or otherwise published, any written matter, photograph or broadcast relating to any candidate or measure at any election, unless it states the name and address of the person responsible for the publication, including a statement that the publication, including a statement that the publication was authorized by that person.

(2) Any radio or television broadcast required to be identified under subsection (1) of this section and that is subject to the Communications Act of 1934, as amended, and regulations adopted thereunder is not required to state the name and address of the person responsible for the broadcast, including a statement that the publication was authorized by the person. Instead, the broadcast shall state the following:

(a) If paid for and authorized by a candidate, the principal campaign committee of a candidate or a political committee, that the broadcast has been paid for by the candidate, the principal campaign committee of the candidate or the political committee;

(b) If paid for by other persons but authorized by a candidate, the principal campaign committee of a candidate or a political committee, that the broadcast is paid for by the other persons and authorized by the candidate, the principal campaign committee of the candidate or the political committee; or

(c) If not authorized by a candidate, the principal campaign committee of a candidate or a political committee, the name of the person who paid for the broadcast and that the broadcast is not authorized by any candidate, principal campaign committee of a candidate or political committee.

(3) Subsection (1) and (2) of this section do not apply to:

(a) Any sign relating to a candidate if the candidate or the principal campaign committee of the candidate is responsible for the sign and the sign displays the name of the candidate;

(b) Any written matter relating to a measure at any election prepared under the direction of the governing body of the city, county or district that referred the measure if the written matter is impartial, neither supports nor opposes passage of the measure and contains the name and address of the city, county or district; or

(c) Any written matter, photograph or broadcast relating to any candidate or measure at any election if the written matter, photograph or broadcast is part of any bona fide news coverage, article, story, report, interview, documentary, newscast or on the spot coverage of bona fide news events. This subsection applies if:

- (A) The written matter, photograph or broadcast is news or editorial coverage and not paid or public service advertising;
 - (B) The written matter, photograph or broadcast appears in a publication or broadcast that is regularly published or broadcast;
 - (C) In the case of written material, the name and address of the publisher or editor is printed on the publication containing the written material; and
 - (D) In the case of a broadcast, the person making the broadcast is licensed by the Federal Communications Commission.
- (4) Any written matter or broadcast which has been previously published shall have the publisher and the date of publication clearly identified when it is referred to in a publication listed under subsection (1) of this section.
- (5) "Address" for purposes of this section means the address of a residence, office, headquarters or similar location where the person may be conveniently located. If the person is a political committee, the address shall be the address of the political committee included in the statement of organization under ORS 260.042.
- (6) The Secretary of State by rule may define the term "sign" as used in subsection (3)(a) of this section.

Return to [previous location](#).

2. Article I, section 8, of the Oregon Constitution provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Return to [previous location](#).

3. The First Amendment to the United States Constitution reads in part: "Congress shall make no law * * * abridging the freedom of speech." This prohibition applies to the states. *McIntyre v. Ohio Elections Comm'n.*, 514 US 334, 336 n 1, 115 S Ct 1511, 131 L Ed2d 426 (1995)

Return to [previous location](#).

4. Article II, section 8, of the Oregon Constitution enables the Legislative Assembly to enact statutes "regulating, and conducting elections" so as to prohibit "undue influence therein, from power, bribery, tumult, and other improper conduct." However, the Oregon Supreme Court has held that this provision applies only to elections themselves and not to election campaigns, and therefore does not insulate statutes regulating campaigns from "whatever protections are afforded to such activities by Article I, section 8." *Vannatta v. Keisling*, 324 Or 514, 536, 931 P2d 770 (1997).

Return to [previous location](#).

5. Broadcasts that are subject to federal law receive slightly different treatment. ORS 260.522(2). Further, the statute's constraints do not apply to a candidate's signs if the candidate or a campaign committee is responsible for them, to a local government's impartial signs relating to a measure it has referred or to certain material used in news coverage. ORS 260.522(3).

Return to [previous location](#).

6. If the statute is viewed as a direct prohibition on anonymous political speech, it clearly constitutes a restraint. Alternatively, if it is viewed as conditioning the publication of a political message on its disclosure of the speaker's identity, the condition imposes such a burden on expressive rights that it constitutes the sort of restraint or restriction that Article I, section 8, was intended to prohibit.

Not all conditions requiring disclosure constitute a forbidden restraint, however. The nature of the required disclosure and the timing matter. In this context, the United States Supreme Court has held that a law requiring the message to contain the speaker's identity differs, for the purposes of the First Amendment, from a law requiring the speaker to file a separate statement of expenditures with the Federal Elections Commission. *McIntyre v. Ohio Elections Comm'n*, 514 US at 334.

Return to [previous location](#).

7. Presuming, of course, that the sponsorship identification is truthful.

Return to [previous location](#).

8. Ohio Rev. Code Ann. § 3599.09(A) provides in pertinent part:

No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes or is responsible therefor.

Return to [previous location](#).

9. In addition, the Court noted that Ohio's statute encompasses all publications, not just ones that are false or misleading. Therefore, the statute is not narrowly tailored to the state's asserted interest.

Return to [previous location](#).

Go to:

[Top of page.](#)

[AG Opinions home page.](#)