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This opinion responds to a question from Secretary of State Bill Bradbury concerning ORS 260.174, a statute generally regulating campaign contributions and expenditures by and to public officers and candidates for public office while the Legislative Assembly is in session.

QUESTION PRESENTED

Is ORS 260.174 constitutional?

ANSWER GIVEN

No. ORS 260.174 violates Article I, section 8 of the Oregon Constitution and therefore cannot be enforced.

DISCUSSION

ORS 260.174 contains numerous prohibitions, many of which differ from each other in respects that are not relevant to an analysis under the Oregon Constitution.¹ For example, the statute distinguishes between office-holders, office-holders-elect, and candidates for office; between the Governorship and other offices; between soliciting and attempting to solicit; between solicitation of funds and reception of funds; between activity involving public officials other than the Governor while the Legislative Assembly is in session, and activity involving the Governor during the same time period plus an additional thirty days; and between contributions and expenditures.² When prohibitions that differ from each other only in constitutionally irrelevant respects are merged, the statute reduces to three limitations: (1) no elected official³ may raise funds⁴ during a legislative session;⁵ (2) no person or political committee may make a donation⁶ to an elected official during a legislative session; and (3) no person, political committee affiliated with a political party, caucus of either house of the Legislative Assembly or elected official may receive funds⁷ on behalf of an elected official during a legislative session.

Under the First Amendment to the United States Constitution, statutes similar to ORS 260.174 require elaborate analysis, and various federal courts have reached differing conclusions. *Compare, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 168 F3d 705 (4th Cir 1999) (upholding North Carolina ban on contributions during legislative session) *with Shrink Missouri Government PAC v. Maupin*, 922 F Supp 1413 (ED Mo 1996) (striking down Missouri ban on contributions during legislative session). Oregon courts, however, examine questions of constitutional law first under the Oregon Constitution and proceed to federal constitutional analysis only if the challenged state action survives state constitutional scrutiny. If the action violates the Oregon Constitution, federal analysis is irrelevant. *Moser v. Frohnmayer*, 315 Or 372, 379 n 4, 845 P2d 1284 (1993); *State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983). We follow this sequence as well.

Under Article I, section 8, of the Oregon Constitution, a statute that bans or limits speech *per se*, as opposed to one that bans or limits harmful effects caused by speech, is unconstitutional unless the restriction on speech (1) was well established at the time that free speech guarantees were adopted into the constitution and those constitutional guarantees were not intended to eliminate the restriction, or (2) proscribes speech that is incompatible with the official function of a state official. *State v. Stoneman*, 323 Or 536, 543-45, 920 P2d 535 (1996); *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983); *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982). The Oregon Supreme Court has recently applied this test to Ballot Measure 9 (1994), a law limiting campaign contributions and expenditures, and concluded that the law was unconstitutional. *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). The reasoning of that case leads unavoidably to the same conclusion regarding ORS 260.174.

Analyzing the statutes challenged in *Vannatta* under the state constitution, the court first determined “that both campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8.” 324 Or at 524. In doing so, the court rejected the proposition “that campaign *contributions* are distinguishable from expenditures and do not constitute expression under Article I, section 8.” *Id.* at 520. The court reasoned that “a contribution is protected *as an expression by the contributor*, not because the contribution eventually may be used by a candidate to express a particular message,” but because “the contribution, in and of itself, is *the contributor’s expression of support for the candidate or cause.*” *Id.* at 522. Rejecting the argument that political contributions do not constitute expression because they represent only “expressions of generalized support for a candidate,” the court held that “[e]xpressions do not fall within or without the scope of Article I, section 8, based on the particularity or the intensity of their message.” *Id.* at 524.

The court next determined that Measure 9 targeted the content of this “expression,” and not some form of forbidden harm. *Id.* at 538. The court expressly rejected the argument that Measure 9 attacked the harm of undue political influence, or even the appearance of undue influence, stating that the Measure did

not in itself or in its statutory context identify a harm in the face of which Article I, section 8, rights must give way. * * * The right to speak, write, or print freely on any subject whatever cannot be limited whenever it may be said that elimination of a particular form of expression might make the electorate feel more

optimistic about the integrity of the political process.

Id. at 539.

Since Measure 9 limited “speech per se” as opposed to “harm caused by speech,” the court next took up the question of whether there was some historical exception to free speech law at the time the constitution was adopted that permitted regulation of campaign finance. The court found none, observing that “[a]t the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions,” nor was there “any indication that, at the time of statehood, the possibility of excessive campaign contributions was considered a threat to the democratic process.” *Id.* at 538.

Finally, the court concluded that the “incompatibility exception” did not apply, because Measure 9 did not “address specific cases of official misconduct, and it cannot be contended that the expression in question (contributions) actually impairs performance of, e.g., legislative functions in all cases.” *Id.* at 541. The court flatly rejected the proposition “that money necessarily and inherently corrupts candidates,” observing that “an underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest.” *Id.*

The provisions of Measure 9 that the court struck down differ from ORS 260.174 in only one significant respect: the limitations in Measure 9 applied at all times, not just during legislative sessions. That difference does not produce a different outcome to the constitutional analysis. Like Measure 9, ORS 260.174 addresses contributions and expenditures, which are “protected expression”; like Measure 9, it targets this “expression” and not an explicitly named, regulable harm; like Measure 9, it is not the modern equivalent of a well-settled historical exception to free speech guarantees; and like Measure 9, it does not address specific cases of official misconduct or regulate expression that actually impairs official performance in all cases. Inescapably, *Vannatta* compels our conclusion that ORS 260.174 violates Article I, section 8 of the Oregon Constitution.⁸

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¹ ORS 260.174 provides:

(1) No legislative official, statewide official or candidate therefor shall attempt to receive or to solicit or receive or solicit a contribution to the official or candidate or the official's or candidate's principal campaign committee or attempt to solicit or solicit an expenditure in support of the official or candidate from any person or political committee during the period beginning January 1 immediately preceding a regular biennial session

of the Legislative Assembly and ending upon adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly.

(2) The Governor, Governor-elect or a candidate for Governor shall not attempt to receive or to solicit or receive or solicit a contribution to the Governor or candidate for Governor or the Governor's or candidate's principal campaign committee or attempt to solicit or solicit an expenditure in support of the Governor or candidate for Governor from any person or political committee during the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending 30 business days following adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly.

(3) No person or political committee during the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending upon adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly, shall attempt to make or promise to make or make or promise to make a contribution to a legislative official, statewide official or candidate therefor or to the official's or candidate's principal campaign committee, or promise to make an expenditure in support of the official or candidate.

(4) No person or political committee during the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending 30 business days following adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly, shall attempt to make or promise to make or make or promise to make a contribution to the Governor, Governor-elect or candidate for Governor, or to the Governor's or candidate's principal campaign committee, or promise to make an expenditure in support of the Governor or candidate for Governor.

(5) No person or political committee affiliated with a political party, caucus of either house of the Legislative Assembly, legislative official, statewide official or the Governor, Governor-elect or candidate for Governor shall attempt to receive or solicit or receive or solicit a contribution on behalf of a legislative official, statewide official or candidate therefor during the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending upon adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly.

(6) No person or political committee affiliated with a political party, caucus of either house of the Legislative Assembly, legislative official, statewide official or the Governor, Governor-elect or candidate for Governor shall attempt to receive or solicit or receive or solicit a contribution on behalf of the Governor, Governor-elect or candidate for Governor during the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending 30 business days following adjournment of the regular biennial session of the Legislative Assembly, or during any special session of the Legislative Assembly.

(7) Nothing in this section shall prohibit:

(a) A legislative official, statewide official or candidate therefor from making a contribution as an individual from the individual's personal funds to the same official, candidate or the candidate's principal campaign committee; or

(b) The Governor, Governor-elect or a candidate for Governor from making a contribution as an individual from the individual's personal funds to the same individual

as Governor, Governor-elect, a candidate for Governor or the candidate's principal campaign committee.

(8) As used in this section:

(a) "Legislative official" means any member or member-elect of the Legislative Assembly, any member of an agency, board or committee that is part of the legislative branch and any staff person, assistant or employee thereof.

(b) "Statewide official" means the Secretary of State or Secretary of State-elect, State Treasurer or State Treasurer-elect, Superintendent of Public Instruction or Superintendent-elect of Public Instruction, Attorney General or Attorney General-elect and the Commissioner of the Bureau of Labor and Industries or the Commissioner-elect of the Bureau of Labor and Industries.

² The distinction between contributions and expenditures is relevant to an analysis under the First Amendment to the United States Constitution, *Buckley v. Valeo*, 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976), but not to analysis under the Oregon Constitution. *Vannatta v. Keisling*, 324 Or 514, 520-22, 524, 931 P2d 770 (1997).

³ The term "elected official" means the Governor, Governor-Elect, candidate for Governor, Secretary of State, Secretary of State-Elect, candidate for Secretary of State, Treasurer, Treasurer-Elect, candidate for Treasurer, Superintendent of Public Instruction, Superintendent-Elect, candidate for Superintendent, Attorney General, Attorney General-Elect, candidate for Attorney General, Commissioner of the Bureau of Labor and Industries, Commissioner-elect, candidate for Commissioner, members or members-elect of the Legislative Assembly, members of legislative agencies and boards, and legislative staff. ORS 260.174(8).

⁴ For ease of reference, we use the term "raise funds" as a substitute for the statutory phrase "attempt to receive or to solicit or receive or solicit a contribution * * * or attempt to solicit or solicit an expenditure."

⁵ The term "legislative session" means "the period beginning January 1 immediately preceding a regular biennial session of the Legislative Assembly and ending upon adjournment of the regular biennial session of the Legislative Assembly (or 30 days thereafter, in the case of limitations imposed on the Governor), or during any special session of the Legislative Assembly." See generally ORS 260.174(1) to (6).

⁶ For ease of reference, we use the term "make a donation" as a substitute for the statutory phrase "attempt to make or promise to make or make or promise to make a contribution * * * or promise to make an expenditure."

⁷ For ease of reference, we use the term "receive funds" as a substitute for the statutory phrase "attempt to receive or solicit or receive or solicit a contribution."

⁸ Two caveats somewhat modify this conclusion. First, to the extent that Article I, section 8 would invalidate provisions of ORS 260.174 that govern contributions and expenditures to state office-holders who are candidates for federal office, Oregon law is preempted by the Federal Election Campaign Act of 1971. 48 Op Atty Gen 53 (1996). The extent of this preemption is beyond the scope of this opinion. Second, *Vannatta* notes that the legislature "would be entitled to regulate or prevent" some forms of contributions such as bribes, defined as a financial expression of support made with an anticipated *quid pro quo*." 324 Or at 522 n 10. Nothing in this opinion implies that conventional speech crimes that were well-settled exceptions to free speech guarantees at the time the Oregon Constitution was adopted are beyond the power of the legislature to regulate.