

**HART
WAGNER**^{LLP}
TRIAL ATTORNEYS

Matthew J. Kalmanson
mjk@hartwagner.com
Admitted in Oregon, Washington and New York

Twentieth Floor
1000 S.W. Broadway
Portland, Oregon 97205
Telephone (503) 222-4499
Fax (503) 222-2301

Holly E. Pettit
hep@hartwagner.com
Admitted in Oregon and Washington

February 21, 2017

RE: HB 2702 and Article I, Section 8 of the Oregon Constitution.

Daniel:

At your request, we reviewed HB 2702, which we understand will be further amended to change Section 2(d) to focus only on political candidates. We also reviewed the Attorney General Opinion of March 10, 1999, which concerned a different statute –former ORS 260.522 – as well as Legislative Counsel’s opinions of December 5 and December 14, 2016, which concerned different versions of HB 2702. Legislative Counsel concludes that the versions of the bill that it reviewed (but not this version of the bill) are “likely” unconstitutional under Article I, section 8 of the Oregon Constitution.

HB 2702, as amended, requires communications that are in support of or in opposition to candidates that are paid for by a candidate, a petition committee or a political committee, to disclose whether the candidates authorized the communication. In addition, if a person makes an independent expenditure to pay for a communication in support of or in opposition to a candidate, the communication must state if the candidate authorized the communication. The proposed legislation applies only to candidates, committees and persons who already are required to use the “Ore Star” filing system. It is narrowly drawn not to burden most speech by individuals, and does not apply to lawn signs, T-shirts, pins and other communications that the Secretary of State must further define. Assuming the bill is further amended to change Section 2(d), the bill does not require a speaker to state their identity, except arguably communications by candidates themselves.

We believe HB 2702 is constitutional under the First Amendment, and we refer you to the thorough analysis provided to you by the Campaign Legal Center on that issue. As you know, however, Article I, Section 8 of the Oregon Constitution has been interpreted to be much broader than the First Amendment. Article I, section 8, provides “[n]o 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.” In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court held that a law that is directed at the content or substance of speech is unconstitutional, unless it falls within a well-defined historical exception. Laws that are directed at preventing harms are evaluated under a more deferential standard, even if the law impacts speech in some way.

In our opinion, Legislative Counsel correctly flagged the Article I, section 8 issue, but the bills that it reviewed were very different than HB 2702, as amended. On its face, HB 2702, as amended, does not restrain the free expression of opinion, or restrict the right to speak. Anyone who wishes to advertise for a candidate may do so, and they may do so anonymously if they wish. Only candidates cannot mass market anonymously, but we think there is a significant difference between anonymous speech by the public, and anonymous advertisements by individuals who are candidates for public office.

We know of no case where an Oregon appellate court analyzed a statute similar to HB 2702. That alone is significant. Free speech law is not simple or static; it is complex and evolves over time. For example, in the 1999 Attorney General opinion, the Attorney General made the reasonable assumption that a disclosure statute violated the First Amendment. The Attorney General's prediction proved to be wrong – disclosure statutes are constitutional under the First Amendment. It is true that the Oregon Supreme Court has blazed its own path on free speech, but we expect that, if faced with an issue of first impression, the Oregon court might be influenced in some manner by the reasoning of the United States Supreme Court, which believes the First Amendment does not prevent reasonable disclosure requirements that are designed to ensure transparent elections by an informed populace.

Moreover, Oregon courts have regularly upheld the constitutionality of statutes that apply to the substance of political communications, when the statutes are directed at preventing fraud or misrepresentation. For example, in *State v. Moyer*, 348 Or 220, 230 P3d 7 (2010), the Oregon Supreme Court upheld the constitutionality of ORS 260.402, which prohibits making a contribution to a candidate or political committee in a name other than that of the person actually providing the contribution, because laws that are targeted at preventing fraud do not violate Article I, section 8. Our understanding is that this is the purpose of HB 2702.

Moreover, HB 2702 does not impact anonymous speech, other than by candidates themselves, and we believe that the legislature is free to conclude that anonymous speech by those running for office hinders a transparent and truthful election by an educated populace. Moreover, the burden on most political speech, particularly speech by individuals, is small. The bill exempts “items of *de minimus* value relating to a candidate or measure,” and other items to be defined by the Secretary of State.

For those reasons, we think HB 2702 is facially constitutional under Article I, Section 8. We can imagine it being applied in an unconstitutional manner, and it will be important for the Secretary of State to promulgate thoughtful rules to assist in the statute's purpose. We also again note that this is a complex issue of first impression in Oregon, and we agree with Legislative Counsel that any statute that impacts political speech is subject to a plausible, well-founded legal challenge. It is our opinion, however, that HB 2702, as amended, is not facially unconstitutional.

Very truly yours,

Matthew J. Kalmanson and Holly Pettit