

## MEMORANDUM

**TO:** Whom It May Concern

**FROM:** W. Michael Gillette, former Associate Justice, Oregon Supreme Court

**SUBJECT:** Constitutionality of HB 2961 (2019)

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**INTRODUCTION:** I have been asked to review House Bill 2961 (2019) in light of the wording of Article I, section 8, of the Oregon Constitution, and to express an opinion respecting the constitutional permissibility of that Bill. I am willing to do so. For the reasons that follow, and in view of settled principles of Oregon constitutional law, it is my opinion that the Bill violates Article I, section 8.

**LIMITATION ON SCOPE:** This memorandum opinion is confined to the question of the legal permissibility, not the desirability, of the proposed measure. I have not been asked to opine as to the conceptual value of a measure like HB 2916, and nothing in what follows should be understood as any effort on my part to do so. My sole task is to opine whether, *in the form in which it has been submitted to the legislature*, the Bill is constitutional.

THE PROBLEM: The proposed Bill's relating clause is as follows: "Relating to a requirement to disclose wholesale pricing in prescription drug advertising." And, like the relating clause, the heart of the Bill itself is brief: Subsection (2) of Section 1 of the Bill imposes an affirmative requirement on all manufacturers (defined elsewhere in the Bill) of prescription drugs:

A manufacturer that advertises a prescription drug shall clearly and conspicuously disclose in the advertisement the wholesale price that pharmacies located in this state pay for the prescription drug.

Subsection (3) of Section 1 of the Bill then sets out the consequences that may befall manufacturers who do not comply with subsection (2):

The Attorney General may impose a civil penalty of not more than \$5,000 on a manufacturer for each advertisement that does not comply with the requirement set forth in subsection (2) of this section. The Attorney General shall pay all moneys recovered as civil penalties under this subsection into the State Treasury to the credit of the General Fund. The moneys paid to the General Fund under this subsection are available for general governmental purposes.

In other words, and in addition to anything that a manufacturer may wish to say in advertisements about its own prescription drugs, the law requires that the manufacturer say something that "clearly and conspicuously" reports wholesale cost of the drug in Oregon. Any advertisement published without that additional information subjects the manufacturer to a fine of up to \$5,000 per advertisement. The question thus becomes: Is placing on manufacturers such an affirmative

obligation to speak permissible under Article I, section 8, of the Oregon Constitution?

In my opinion, it is not.

ANALYSIS: Oregon's constitutional protection of freedom of speech and expression approaches the legendary. 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.

This provision has been held to apply to commercial speech, as well as to political speech. *See Moser v. Frohnmayer*, 315 Or 372, 377-78, 845 P2d 1284 (1993); *Outdoor Media Dimensions, Inc. v. ODOT*, 340 Or 275, 294-95, 132 P3d 5 (2006) (both so holding). The key inquiry respecting whether Article I, section 8, applies is the question whether a particular law is aimed at the "content" of speech or expression. If it is, the statute violates Article I, section 8, unless it meets certain criteria that are not present here.

Well-recognized Oregon precedent, beginning with *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), holds that the Court reads the protection of Article I, section 8, as being aimed at attempts to forbid certain "content" in expression. *See also State v. Ciancanelli*, 339 Or 282, 319, 121 P3d 613 (2005) (re-examining and

adhering to principles established in *Robertson*, and emphasizing that the first step in the *Robertson* analysis is to determine whether a law is aimed at the “content” of any expression); *see also State v. Plowman*, 314 Or 157, 163-64, 838 P2d 558 (1992) (to the same effect). Thus, the first inquiry (and, as it happens, the only necessary inquiry) in this case is determining whether HB 2961 is aimed at the “content” of speech.

The Bill does not, by its own terms, purport to deal with the “content” of speech or expression that someone may have published; neither does it reserve a right to punish such speech or expression. Of course, if it were written in that way, such a measure almost certainly would be unconstitutional. *See, e.g., Outdoor Media, supra* (explaining and illustrating proposition); *Moser, supra* (same). Instead, the Bill *requires* certain speech in any advertisement for the sale of a prescription drug.

My research has not disclosed any case in which speech or expression was *required*, as opposed to *forbidden*.<sup>1</sup> It does not appear that the foregoing

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<sup>1</sup> Proponents of HB 2961 might argue that *Higgins v. DMV (In re Denial of Application for Custom Plates)*, 335 Or 481, 72 P3d 628 (2003) is such a case, but it is not. At issue in that case was the permissibility of the state controlling the content of motor vehicle licenses in order to further its regulatory scheme for motor vehicles. The focus in that case was not on the expression involved; it was on the harm that a helter-skelter system of license plates (or no plates at all) might create.

distinction matters, however. For purposes of speech and expression, it is virtually impossible to treat differently a law that punishes a person (such as a manufacturer) for *refusing* to speak in a particular way than a law that would punish the same manufacturer for choosing to speak in a forbidden way. Silence in the face of a demand that one speak is just as much a form of expression as is speaking up in the face of a demand that one be still. *Cf. Fidanque v. State ex rel. Or. Gov't Standards & Practices Comm'n*, 328 Or 1, 969 P2d 376 (1998) (statute requiring lobbyists to pay a registration fee unconstitutional).

The foregoing formulation of the meaning of Article I, section 8, seems inescapable. Refusing to speak when told to do so is a verbal act, necessarily conveying on the part of the refusing party a sentiment that the person giving the order is (1) a fascist; (2) a bully; (3) power mad; or (4) a ninny. There are, of course, many other examples to the same effect, but those listed are sufficient to demonstrate that the point is correct: Silence is a way of conveying a message; forcing a person to speak out and abandon that silence is the equivalent of forcing someone from whom one has heard enough to shut up. Either way, the order is aimed at the “content” of the message. Either way, when the government is giving the order, the order offends Article I, section 8.

The problem with the bill is exacerbated by its failure to point to any governmental purpose that it may be said to further. Normally, statutory regulation of an industry is meant to address some particular private harm or public need. *See, e.g., Higgins, supra.* But the present Bill is not part of any regulatory scheme: no records are required or provided, no rules or regulations are authorized, no standards for the protection of the public are included. Indeed, the Bill appears to have no other actual purpose than to require, under threat of significant financial penalty, prescription drug manufacturers to include certain wording in all their prescription drug advertisements. (The foregoing is true unless, of course, one sees the Bill instead as part of a plan to raise public revenue by \$5,000 at a time—a proposition too cynical to be countenanced.)

In the field of commercial advertising and public regulation, far more specific efforts have failed to pass constitutional muster. *See, e.g., Moser, supra* (regulation of autodialing advertisements); *Outdoor Media, supra* (regulation of location and content of highway signs). Here, there is no hint of legitimate governmental purpose behind the proposal.

As the foregoing discussion illustrates, I believe that HB 2961 likely is unconstitutional. It fails under the first step of the *Robertson* analysis—the bill directly regulates speech by penalizing a category of commercial speech unless

that speech contains specific content. *See Ciancanelli, supra*, at 319, (first step of *Robertson* analysis is determining “whether the statute is directed by its terms at restraining or restricting speech or expression”).

HB 2961 is directed precisely that way—it imposes a \$5000 civil penalty on each advertisement for a prescription drug that omits the wholesale price of the drug. The content of an advertisement is protected speech. *See Outdoor Media, supra*, at 294-95 (holding that a law that “would allow a sign with the message ‘Buy Gas Here,’ but prohibit the same sign from carrying the message ‘Eat at Joe’s: 10 Miles Ahead’ \* \* \* \* on its face, prohibits certain speech based on its content”). *See also City of Eugene v. Miller*, 318 Or 480, 871 P2d 454 (1994) (holding that joke books are expressive material, and an ordinance allowing use of sidewalks for the sale of food, beverages, flowers, and balloons, but not joke books, unconstitutionally burdened expression).<sup>2</sup>

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<sup>2</sup> Because I find the inquiry on whether the Bill is aimed at the content of speech or expression so dispositive, I have not gone further and discussed the “historic exception” rule under *Robertson* that would permit laws that are aimed at “content” if the prohibitions in those laws were of a kind fully recognized at the time of either the creation of the Bill of Rights or of Article I of the Oregon Constitution. *But see Moser, supra*, at 378 (holding that state had failed to establish a historical exception for regulation of advertisements and commercial solicitations); *accord. Outdoor Media, supra*, at 299 (finding no historical exception for regulations of commercial signs).

CONCLUSION: For the reasons stated, I believe that proposed HB 2961 violates the protection of the right to “speak, write, or print freely on any subject whatever” that is granted to Oregonians by Article I, section 8, of the Oregon Constitution.