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May 4, 2016

No. 8292

The Secretary of State enforces state election laws. ORS 260.345. ORS 260.695(2) is an election law that prohibits "electioneering" at local and state election offices during times that electors may deposit their ballots. "Electioneering" is expressive conduct protected by free speech guarantees in the Oregon Constitution. The Director of the Secretary of State's Elections Division asks whether ORS 260.695(2) comports with those free speech guarantees. Below we set out the question presented and our short answer, followed by a discussion.

QUESTION PRESENTED

Does ORS 260.695(2) violate the free speech guarantee of Article I, section 8, of the Oregon Constitution?

SHORT ANSWER

While there is no controlling case law, we conclude that ORS 260.695(2) likely violates Article I, section 8, of the Oregon Constitution.

DISCUSSION

I. Organization

We first discuss Oregon's change from a system of voting at polling places to a vote-by-mail system. Next, we set out the specifics of ORS 260.695(2). We then analyze whether ORS 260.695(2) violates Article I, section 8, of the Oregon Constitution and conclude that it does. Finally, we address whether Article II, section 8, of the Oregon Constitution, which allows the Legislative Assembly to enact certain laws regulating elections, changes our conclusion under Article I, section 8, and conclude that it does not.

II. Voting Process

Until recently, Oregon electors, except absentee voters, voted at precinct polling places on election day. In 1998, Oregon voters passed a ballot measure authorizing an exclusively vote-by-mail system. Ballot Measure 60 (1998). Under this system, registered voters receive their ballots two to three weeks before an election. ORS 254.470(2)(a).[1/] Voters may fill out their ballots in the privacy of their own homes or any place they choose. Marked ballots are then inserted into security envelopes which are placed in return envelopes. Voters must sign the return envelopes. ORS 254.470(6).

Voters then may return their ballots by mail or by dropping them off at any official drop box in the state "or at any location described in ORS 254.472 [places where ballots are issued and where at least three compartments, shelves or tables must be provided for marking ballots] or ORS 254.474 [places designated by county clerks to have at least one voting booth in counties with fewer than 35,000 electors or one booth per 20,000 electors in bigger counties.]" ORS 254.470(6)(b). When the ballots are received the voter's signature on the return envelope is checked against the signature on the most current voter registration card. OREGON SECRETARY OF STATE, VOTE BY MAIL PROCEDURES MANUAL at 29 (2015) (so stating).

III. ORS 260.695(2)

ORS 260.695(2) is the most current version of a law that has existed in some form since 1891 when Oregon first adopted a secret ballot system. It provides:

> A person may not do any electioneering, including circulating any cards or handbills, or soliciting of signatures to any petition, within any building in which any state or local government elections office designated for the deposit of ballots under ORS 254.470 is located, or within 100 feet measured radially from any entrance to the building. A person may not do any electioneering by public address system located more than 100 feet from an entrance to the building if the person is capable of being understood within 100 feet of the building. The electioneering need not relate to the election being conducted. This subsection applies during the business hours of the building or, if the building is a county elections office, during the hours the office is open to the public, during the period beginning on the date that ballots are mailed to electors as provided in ORS 254.470 and ending on election day at 8 p.m. or when all persons waiting in line at the building who began the act of voting as described in ORS 254.470 (10) by 8 p.m. have finished voting.

A. Prohibited conduct

ORS 260.695(2) does not define "electioneering" except to state that it "includ[es] circulating any cards or handbills, or soliciting of signatures to any petition" and that the electioneering "need not relate to the election being conducted." The ordinary meaning of "electioneering" is "to take active part in an election campaign * * * to try to sway public

opinion especially by the use of propaganda." *See* WEBSTER'S THIRD NEW INT'L DICTIONARY at 731(2002) (so defining "electioneering"). "Propaganda" includes ideas or information spread "through any medium of communication in order to further one's cause or to damage an opponent's cause" and any public action or "display having the purpose or the effect of furthering or hindering a cause." *Id.* at 1817. The Secretary of State's Election Law Summary explains that electioneering:

> includes the display, distribution or circulation of any political material or verbal statements supporting or opposing a candidate or ballot measure on any election, *even an election other than the one being conducted* * * * includ[ing] exit polling and the gathering of signatures on **any** election-related petition.

OREGON SECRETARY OF STATE ELECTION LAW SUMMARY at 42. http://sos.oregon.gov/elections/Pages/laws-rules.aspx (emphasis in original). However, "electioneering" does not include wearing political badges, buttons and other political insignia. *Id.* Although that conduct would otherwise fall within the definition of "electioneering," a ban on wearing those things at polling places on election day has been held to violate the Oregon Constitution. *See* ***Picray v. Secretary of State***; 140 Or App 592, 916 P2d 324 (1996), *aff'd by an equally divided court,* 325 Or 279, 936 P2d 974 (1997) (so holding).

B. Where the prohibition applies

The prohibition applies in three places: (1) "within any building in which any state or local government elections office designated for the deposit of ballots under ORS 254.470 is located"; (2) "within 100 feet measured radially from any entrance to the building"; and, (3) "more than 100 feet from an entrance to the building" if the person uses a "public address system" and "is capable of being understood within 100 feet of the building." ORS 260.695(2).

The restriction is not limited to rooms in the building where ballots are deposited, but applies to the entire building. The restriction also encompasses any portion of a parking lot that is within 100 feet of the entrance to the building raising questions about whether it is a violation to park a car with a bumper sticker endorsing or opposing a measure in those lots. *See* OREGON SECRETARY OF STATE ELECTION LAW SUMMARY at 43 (discussing that issue). But, as explained by the Secretary of State:

> **Ballot deposit sites** that are **not** located within a state or local government elections office *are not under this restriction.* Ballot deposit sites may include post office boxes, the post office and official drop sites designated by the county elections official, other than state or local government elections offices. A ballot drop site is a deposit for voter ballots. A voter may choose to complete the voter's ballot at a drop site location (or anywhere else the voter wishes), but voting assistance, special privacy measures or other polling place amenities are not required.

Id. at 42 (emphasis in original). Hence there are no electioneering restrictions at many of the places where voters may drop their ballots.

C. When the prohibition applies

The prohibition begins when ballots are mailed and ends on election day. ORS 260.695(2). That is a period of fourteen to twenty days. *See* ORS 260.695(2) (applying the prohibition "during the period beginning on the date that ballots are mailed to electors as provided in ORS 254.470" and ending on election day); ORS 254.470(2) (ballots must be mailed no sooner than the 20th day before an election and no later than the 14th day before the election). Ballots may be issued up to four times a year. OREGON SECRETARY OF STATE ELECTION LAW SUMMARY at 43. The statute was amended in 2014 to limit the times of the restriction to "during the business hours of the building or, if the building is a county elections office during the hours the office is open to the public." Or Laws 2014, ch 112, § 6.

IV. Article I, section 8, of the Oregon Constitution

A. Framework of analysis

The Elections Division asks if ORS 260.695(2) violates Article I, section 8, of the Oregon Constitution, which prohibits the legislature from enacting laws "restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]" For purposes of evaluating whether a law violates Article I, section 8, laws are divided into three categories: (1) laws directed at the content of speech; (2) laws that focus on forbidden results but restrict speech that achieves those results; and, (3) laws that do not mention speech, but that may be applied in a way that affects speech. ***State v. Robertson***, 293 Or 402, 412-18, 649 P2d 569 (1982).

A different analysis applies to each type of law. A law directed at the content of speech violates 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 and that the guarantees then or in 1859 were not intended to reach." ***State v. Robertson,*** 293 Or at 412. A law that focuses on forbidden effects but expressly prohibits speech that achieves those effects is scrutinized for "overbreadth," *i.e.,* to determine whether it restrains privileged speech, in which case it is unconstitutional, or whether it can be interpreted in a way that avoids restricting privileged speech. *Id.* at 417-18. If a law is not directed to expression at all, but may be enforced in a way that restricts expression, the law is not facially unconstitutional, but may be unconstitutional as applied in a particular case. *Id.* at 418.

B. ORS 260.695(2) is content-directed

We conclude that ORS 260.695(2) is a content-directed law as it prohibits only expression that conveys a political message. In ***Picray v. Secretary of State,*** the Court of Appeals majority sitting in banc held that *former* ORS 260.295(4), which prohibited wearing political badges, buttons, and other political insignia at polling places on election day was a content-directed law for the same reason. 140 Or App at 596. The Oregon Supreme Court issued a memorandum opinion affirming the Court of Appeals' decision by an equally divided court, ***Picray v. Secretary of State,*** 325 Or 279, 936 P2d 974 (1997) (Kulongoski, J, not

participating). The Oregon Supreme Court does not give such opinions precedential weight. *See* ***Perez v. Bay Area Hospital,*** 315 Or 474, 478 n 5, 846 P2d 405 (1993) (so stating). The United States Supreme Court has also characterized a law prohibiting electioneering within 100 feet of polling places on election day as a facially content-based restriction on political speech. *See* ***Burson v. Freeman,*** 504 US 191, 197, 112 S Ct 1846, 119 Led2d 5 (1992) (so stating).

That ORS 260.695(2) restricts speech only at certain places and times does not alter our conclusion that ORS 260.695(2) is directed at the content of speech. *See* ***Moser v. Frohnmayer,*** 315 Or 379, 845 P3d 1284 (1993) (analyzing a "content-selective" time place and manner restriction on speech as a content-directed law); ***Burson v. Freeman***, 504 US at 197 (refusing to apply time, place, and manner analysis to a law prohibiting electioneering at polling places on election day, because the restriction was not content neutral); *but see,* ***Moser v. Frohnmayer,*** 315 Or at 384 (Graber, J, concurring in part and specially concurring in part) (stating that content-selective time, place and manner restrictions should be analyzed for overbreadth and citing ORS 260.695(2) as an example of such a law).

Not only is ORS 260.695(2) directed at the content of speech; it does not mention the harm that it is intended to prevent nor limit its restrictions to speech that causes that harm. For that reason, too, we conclude that the law is focused on speech, not harm. *See* ***Vannatta v. Keisling,*** 324 Or 514, 539, 931 P2d 770 (1997) (treating a statute limiting campaign contributions that was calculated to prevent fraud as a law focused on speech, because it penalized speech even when it did not produce harm); ***Picray v. Secretary of State,*** 140 Or App at 596 (concluding that *former* ORS 260.695(2) was not a law focusing on forbidden effects as it did "not mention, much less focus on, forbidden effects of displaying political paraphernalia in polling places.").[2/]

C. Historical exception

A law directed at the content of expression violates 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 and that the guarantees then or in 1859 [when Article I, section 8, was adopted] were not intended to reach." ***State v. Robertson,*** 293 Or at 412. To meet that test, a restriction must: (1) have been well established when the first American guarantees of freedom of expression were adopted; (2) fit wholly within the well-established exception; and, (3) the drafters of the Oregon Constitution must not have intended to abolish the exception in adopting Article I, section 8. *See* ***State v. Ciancanelli,*** 339 Or 289, 316, 121 P3d 613 (2005) (explaining that even if a restriction fits within an historical exception, the proponent of the restriction must demonstrate that the drafters did not intend Article I, section 8, to abolish the exception).

The restriction in ORS 260.695(2) fails on the first count as the speech restriction it imposes was not established at all when the first American guarantees of freedom of expression were adopted. In ***Burson v. Freeman,*** the United States Supreme Court exhaustively examined the history of American election reforms that led to the adoption of laws restricting

electioneering at polling places. In the colonial period, voting was done publicly by voice or a show of hands and was "witnessed by all and improperly influenced by some." 504 US at 200. The opportunity that system "gave for bribery and intimidation led to its repeal." *Id.*

Within twenty years of the formation of the union, many states adopted a paper ballot system under which people made "their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting." *Id.* That system initially was a "vast improvement" but soon was eroded as political parties wishing to gain influence began making their own easily-recognizable ballots and state efforts to standardize ballots failed. *Id.* Those wanting to buy votes could place their ballot in the voter's hand and watch until the ballot was placed in the ballot box.

> Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." * * * Often the competition became heated when several such peddlers found an uncommitted or wavering voter. * * * . Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. * * *. In short, these early elections "were not a very pleasant spectacle for those who believed in democratic government."

Id. at 202 (citations removed). "Polling places were frequently * * * 'scenes of battle, murder, and sudden death.'" *Id.* at 204 (citations removed).

To remedy those evils, states began adopting election reforms in 1888. The first authorized secret ballots to be marked in private voting booths with a surrounding fifty foot restricted area which only voters, candidates or their agents and electors could enter. *Id.* at 203. Candidates' agents were not allowed to "persuade, influence or intimidate anyone" in their choice of candidate. *Id.* New York and Massachusetts adopted laws excluding the general public only from an area within a guardrail constructed six feet from the voting booths. That had the advantage of providing additional monitoring by the public and prevented candidates from buying the election officers of the other party. New York also prohibited any person from "electioneering on election day within any polling place, or within one hundred feet of any polling place." *Id.* The reforms were so successful at ensuring orderly elections and avoiding voter bribery and intimidation that all states soon adopted them. *Id.* at 204.

Oregon adopted the reforms in 1891, including a ban on electioneering within fifty feet of polling places on election day. 2 Codes and Statutes of Oregon, Title XXVIII (Bellinger and Cotton 1902). But before 1891, no Oregon law banned electioneering, or any sort of political expression, at polling places. Rather, Oregon territorial laws and laws adopted shortly after the Oregon Constitution was adopted banned only "disorderly" or "riotous" conduct at polling places. ***Picray,*** 140 Or App at 602.

In short, although laws restricting electioneering in and around polling places are venerable, they substantially post-date both the ratification of the First Amendment in 1791 and the adoption of Article I, section 8, in 1859. Accordingly, there was no well-established restriction on electioneering in and around polling places when the First Amendment or Article I, section 8, were adopted. *See* ***Picray,*** 140 Or App at 605 (holding there to be no well-established historical exception restricting wearing political badges at polling places on election day).

Nor would ORS 260.695(2) wholly fit within an historical exception for electioneering at polling places on election day had there been one. The restriction in ORS 260.695(2) is not limited to "election day" but applies for a two to three week period surrounding elections. Nor do Oregonians vote at "polling places" under the vote-by-mail system.

We conclude that ORS 260.695(2) is a content-directed law that does not wholly fit within any well-established historical exception and, therefore, appears to violate Article I, section 8. But before reaching that conclusion we must also consider the effect of another provision of the Oregon Constitution, Article II, section 8.

V. Article II, section 8, of the Oregon Constitution

Article II, section 8, provides:

> The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.

Article II, section 8, like Article I, section 8, was adopted in 1859 as an original provision of the Oregon Constitution.

No Oregon appellate case has addressed whether the drafters of the Oregon Constitution intended Article II, section 8, to empower the legislature to enact election laws that infringe on Article I, section 8, guarantees. Oregon appellate courts have been asked to address that question on two occasions, but in both cases they concluded that the laws at issue did not implement Article II, section 8, and, therefore, did not decide the issue.[3/]

We first address whether ORS 260.695(2) implements Article II, section 8. In ***Vannatta v. Keisling***, 324 Or 514, the court considered whether laws imposing campaign contribution and expenditure limitations violated Article I, section 8. The state asserted that expression otherwise protected under Article I, section 8, is not protected in the context of political campaigns due to the countervailing effect of Article II, section 8. *Id.* at 525. In response, the court explained that Article II, section 8, authorizes three different types of laws. The first type prescribes the manner of regulating elections. The court explained that these laws "establish what offices will be elective, who will run for and serve in them, when and how such persons must make their candidacy official" and such. *Id.* at 531. ORS 260.695(2) does not concern those things.

The second type prescribes the manner of conducting elections. These laws concern "the mechanics of elections themselves, *i.e.,* * * * questions of where and how many polling places there will be, how they shall be operated, who may be present in them to ensure their proper operation, and the like." *Id.* at 532. Because the law at issue in ***Vannatta*** was a campaign finance law rather than a law governing election-day mechanics, the court did not expound further on the second type of laws.

The Court of Appeals majority in ***Picray*** discussed these laws in more detail. The majority explained that the first phrase of Article II, section 8, authorizing both laws prescribing the manner of regulating elections and the manner of conducting elections must be read in the context of the second phrase authorizing laws that prohibit undue influence in elections. If the first phrase authorized laws that regulate all elections conduct it would subsume the second phrase's authority to prohibit undue influence in elections; in other words, the second phrase would be superfluous. Instead, the majority concluded that the first and second phrases address "qualitatively different concerns." 140 Or App at 604.

The majority interpreted the "undue influence" phrase to address "'intramural' influences * * * that is * * * conduct or expression that affects whether, or how, individual electors cast their votes." *Id.* "Conversely, and necessarily" the first phrase "pertains to legislative oversight of matters other than 'influencing' conduct or expression." *Id.* The majority, therefore, concluded that authority to enact laws prescribing the manner of "regulating" elections and "conducting" elections did not include authority to enact laws prohibiting electors' influencing conduct, such as *former* ORS 260.695(4). *Id.*

The majority explained that the historical context surrounding adoption of Article II, section 8, supported that conclusion. Specifically, before 1857,"a panoply of territorial legislation" regulated the mechanics of elections, but none regulated citizens' "influencing" conduct at polling places, except when such conduct was demonstrably disruptive or disorderly. *Id.* at 605. Prohibitions on electors' expression before and for a long time after the adoption of Article II, section 8, were limited to disruptive and coercive conduct, which corresponded to the second phrase's authorization to prohibit "all undue influence * * * from power, bribes, tumult, and other improper conduct." *Id.*

As discussed, the Oregon Supreme Court issued an affirming memorandum opinion that contains no analysis and has no precedential weight. But, applying the reasoning of the Court of Appeals' majority opinion, we conclude that ORS 260.695(2) is not a law prescribing the conduct of an election.

We last consider the third type of laws authorized by Article II, section 8: those prohibiting and punishing "all undue influence * * * from power, bribes, tumult and other improper conduct." In ***Vannatta,*** the Oregon Supreme Court explained that Article II, section 8:

> specifically enumerates the sources of influence that it considers to be "undue": power, bribery, tumult, and other improper conduct. * * * * *. "Power" appears to be a reference to the possibility that a person might, by a show of force, either

> attempt to prevent an election from occurring or coerce a particular outcome * * *. "Bribery" appears to be a reference to someone actually paying a voter to vote in a particular way. And "tumult" * * * is a reference to the kind of unruly and riotous conduct at or near the polling place that would have the actual effect of hindering or preventing the voting process.

324 Or at 532. We conclude that "electioneering" does not fit within any of those sources of undue influence.

The court in ***Vannatta*** also addressed the meaning of "other improper conduct." It applied the doctrine of *ejusdem generis,* under which "a nonspecific or general phrase that appears at the end of a list of items in a statute is to be read as referring only to other items of the same kind." *Id.*at 533 (citing ***State v. K.P.***, 324 Or 1, 11 n. 6, 921 P2d 380 (1996)). It concluded that all three specific examples of "undue influence" spoke to "actual interference in the act of voting itself." *Id.* It did not expound further as the campaign finance laws at issue did not pertain to the act of voting. *Id.*

The Court of Appeals majority in ***Picray*** (decided before ***Vannatta)*** discussed the meaning of "other improper conduct" in greater detail. It too applied the principle of *ejusdem generis* to construe "other improper conduct" concluding that "power, bribery and tumult" "all describe active, demonstrably coercive conduct calculated to subvert free suffrage * * * [that] can effect undue influence by impeding, intimidating, or impermissibly inducing the exercise of the franchise." *Id.* at 600. It noted that conduct could be prohibited under this provision only if it had the effect of unduly influencing an election or adversely affecting free suffrage. *Id.* at 600, 603. The majority concluded that *former* ORS 260.695(4) "indiscriminately punishes the mere display of political paraphernalia without referring to, much less requiring any showing of, some adverse effect on suffrage." *Id.* at 604. It held that:

> The mere passive display of a political button or badge in a polling place does not constitute 'improper conduct' of the sort contemplated in Article II, section 8. The silent expression of political opinion is not coercive. To the extent that such expression in the polling place might affect the votes of others, that influence cannot be deemed constitutionally "undue."

Id. at 600.

Like *former* ORS 260.695(4), ORS 260.695(2) does not refer to nor require any showing that electioneering at ballot deposit sites at state or local elections offices has an adverse effect on suffrage. ORS 260.695(2) also prohibits expression that is not "demonstrably coercive." Some of the expression, such as displaying election material, is the "silent expression of political opinion" indistinguishable from the conduct at issue in ***Picray***. Other conduct, like soliciting signatures on petitions or voicing support or opposition to a candidate or measure *not related* to a candidate or measure in the present election is not conduct calculated to influence voting in the

election at hand at all. Nor is voicing support or opposition to a candidate or measure in itself demonstrably coercive conduct. Expression has the potential to become demonstrably coercive if it becomes threatening or intimidating, but ORS 260.695(2) restricts expression that is neither.

Moreover, electioneering at ballot deposit sites is unlikely to actually hinder or prevent voting in a vote-by-mail system. Electors may vote anywhere they like over a two-to-three-week period and may return their ballots at a wide variety of locations, including by mail. Although a few voters may choose to vote at state or local elections offices, the vast majority vote by mail. Under the vote-by-mail system, electioneering at ballot deposit sites is unlikely to influence – let alone unduly influence – voting. Indeed, electioneering at some ballot deposit sites is not restricted. As the majority in ***Picray*** observed, *former* ORS 260.695(4), in restricting expression at "polling places," likely would be rendered "an anachronism" under a vote-by-mail system. 140 Or App 592, 595 n 3.

In short, no plausible interpretation of ORS 260.695(2) confines its restrictions to unduly influential or demonstrably coercive conduct that would have an actual effect of hindering or preventing the voting process. Therefore, ORS 260.695(2) does not implement Article II, section 8's mandate to enact laws prohibiting undue influence in elections. And, because ORS 260.695(2) is content-directed and does not fall within any well-established historical exception or implement Article II, section 8, it appears to violate Article I, section 8.

Nothing in this opinion is meant to suggest that county elections officers may not enforce content-neutral laws that facilitate order at county elections offices during elections. ORS 260.695(3), for example, prohibits persons from obstructing an entrance to a building in which ballots are issued or deposited or where a voting booth is maintained during elections. ORS 254. 472 requires the county to arrange compartments, shelves or tables provided for persons to mark their ballots in such a way that ensures secrecy. Under this provision, county elections officers could take measures such as permitting access around the compartments, shelves or tables only to those who are marking their ballots. And, if necessary, county elections officers could alert law enforcement officers to possible criminal conduct, such as disorderly conduct, taking place at county elections offices.

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[1/] Out-of-state non-military or oversees voters must be mailed their ballots "not sooner than the 29th day before the date of the election." ORS 254.479(2)(c).

[2/] While there was a dissent in ***Picray,*** it did not argue that ORS 260.695(2) fell into the second ***Robertson*** category, but was based on the effect of another constitutional provision, Article II, section 8. The Oregon Supreme Court was equally divided in affirming ***Picray*** (one justice did not participate) and issued only a memorandum opinion that does not reveal why four justices would have reached a different result.

[3/] Although the Court of Appeals majority in ***Picray*** did not address whether it was constitutionally permissible for a law implementing Article II, section 8, to infringe on Article I, section 8, rights, concurring and dissenting opinions did. The concurring opinion concluded that Article II, section 8, was intended to require the legislature to adopt certain laws, but not to permit those laws to infringe on Article I, section 8, rights. ***Picray,*** 140 Or at 606 (Armstrong, J, concurring). The dissenting opinion concluded that Article II, section 8, permitted the legislature to enact laws that "minimally restrict[]" political expression and that Article I, section 8, and Article II, section 8, must be harmonized. *Id.* at 609 (DeMuniz, J, dissenting).