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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 19, 2019

Senator Herman Baertschiger Jr.
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Senate Bill 723-2 and the right of association

Dear Senator Baertschiger:

You asked whether the -2 amendments to Senate Bill 723 infringe on or violate the free speech or freedom of association rights under the First Amendment to the United States Constitution of nonprofit groups or associations that sponsor "coyote contests."

SHORT ANSWER

We believe that although a court might possibly conclude that the provisions of the -2 amendments to Senate Bill 723 infringe on a person's rights of free speech or free association under the First Amendment, the court is likely to do so only if the court makes certain factual findings with respect to the purpose of the Oregon Hunters Association (OHA), whether participating in a coyote contest is expressive activity and whether Senate Bill 723 significantly affects that expressive activity.

DISCUSSION

The First Amendment to the United States Constitution prohibits the United States Congress from making a law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] Several United States Supreme Court decisions have held that the Fourteenth Amendment's Due Process Clause requires that the provisions of the First Amendment also apply to the states.[2] Under a more recent line of cases that explicated the rights of assembly and petition, beginning with *Roberts v. United States Jaycees*, the Court determined that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[3] According to the Court, however, this right of association is not absolute[4] and "[i]nfringements on that right may be justified by regulations

[1] Amendment I, United States Constitution.
[2] *See, e.g., Gitlow v. New York,* 268 U.S. 652 (1925) (freedom of speech); *Near v. Minnesota,* 283 U.S. 697 (1931) (freedom of the press); *De Jonge v. Oregon,* 299 U.S. 353 (1937) (right of assembly and petition).
[3] 468 U.S. 609, 622 (1984).
[4] *Boy Scouts of America v. Dale*, 530 U.S. 640, 646 (2000).

adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[5]

In *Boy Scouts of America v. Dale,* the Court extended the *Roberts* analysis to state that the protection of a First Amendment right to freedom of association depends on whether the group that is subject to governmental regulation engages in "expressive association," which the Court stated does not mean that the protection is "reserved for advocacy groups," but means that the group "must engage in some form of expression, whether it be public or private."[6] Under this test, a court would likely conclude that the OHA engages in expressive association because, among other activities, the group functions as an advocacy group that "provides a lobbyist to the State Legislature to protect and enhance hunter's [sic] rights."[7]

Here the analysis becomes less certain, however, because most of the freedom of association cases the Court has heard involve governmental regulation for the purpose of preventing discrimination, such as in *Dale,* where the Court held that a state public accommodations law did not require the Boy Scouts of America to admit a gay man as a member. Senate Bill 723 does not address membership in the OHA. Rather, the bill prohibits a particular activity in which the association has previously participated or in which the association might participate in the future. The Court in *Dale* stated that the relevant standard for whether a governmental regulation impermissibly burdens an association's expressive activity is whether the regulation "would significantly affect the [association's] ability to advocate public or private viewpoints."[8] The Court noted that making this determination involves a factual inquiry into the nature of the association's purpose and the expressive activity that is subject to the regulation.[9]

A court evaluating whether Senate Bill 723 would significantly affect the OHA's expressive activity, therefore, would need to inquire into the association's purpose and whether that purpose is expressive activity. Assuming the court answers yes to that question, it might then ask whether participation in a coyote contest is expressive activity. In *Dale,* the Court looked into the Boy Scouts' values and the views the organization sought to instill in its members.[10] With respect to the OHA, a court might ask to what extent participation in a contest is expressive of particular values or a particular viewpoint. Finally, the court would likely evaluate whether the prohibition of coyote contests in Senate Bill 723 has a significant effect on OHA's ability to express its values or viewpoint. Certainly, the bill would prevent OHA from expressing any value or viewpoint that is embodied in the coyote contest itself, but a court might also seek to determine whether this prohibition significantly burdens OHA's *overall* ability to express its values or viewpoint.

A court following the *Roberts* standard would apply strict scrutiny to the prohibition in Senate Bill 723, which means that the court would have to find that the prohibition furthers a compelling state interest, unrelated to the suppression of ideas, that the state cannot achieve through less restrictive means. How the court characterizes the prohibition, therefore, will likely be determinative. If the court determines that protecting the state's wildlife (or some other purpose embodied in the bill) is a compelling interest and that the prohibition is not directed at suppressing OHA's expression of its ideas and is the least restrictive means by which to further the state's interest, the court will likely uphold the prohibition. In that context, the court might

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[5] *Roberts*, 468 U.S. at 623.
[6] *Id.* at 648.
[7] Oregon Hunters Association, https://oregonhunters.org/about-us/ (last visited March 19, 2019).
[8] 530 U.S. at 650.
[9] *Id.* at 648-649.
[10] *Id.*

note, as the letter that prompted this opinion did, that Senate Bill 723 "does not ban killing of coyotes . . . [i]t bans 'contests[,]' including those only for 'entertainment.'"[11] This might mean that the court could find that the prohibition leaves intact a wide range of other hunting activities related to coyotes, or still other activities, through which OHA can express its values and ideas, or that the prohibition on contests is the least restrictive means by which the state can further the purpose of protecting certain wildlife. Alternatively, the court could find that the blanket prohibition on participation in a coyote contest is an impermissible burden on that particular expressive activity of OHA's and that the prohibition does not serve a compelling state interest in the least restrictive manner. Unfortunately, the case law to date does not permit a more conclusive prediction.

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Very truly yours,

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By
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[11] Letter from Senator Herman Baertschiger, Jr., to Legislative Counsel (March 14, 2019) (on file with Legislative Counsel).