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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 3, 2025

Representative Anna Scharf
900 Court Street NE H387
Salem OR 97301

Re: Constitutionality of employment restrictions post-legislative service: ORS 244.045 (6)

Dear Representative Scharf:

You asked whether ORS 244.045 (6), which restricts a member of the Legislative Assembly from receiving money or other consideration for lobbying for one year after ceasing to be a member, is constitutional. You asked this question in light of a recent court decision holding that a two-year restriction on former Missouri legislators and former Missouri legislative staff engaging in lobbying was unconstitutional under the First Amendment to the United States Constitution. We conclude that ORS 244.045 (6) likely remains constitutional.

Oregon Statutes

ORS 244.045 (6) provides:

> A person who has been a member of the Legislative Assembly may not, within one year after ceasing to be a member of the Legislative Assembly, receive money or any other consideration for lobbying as defined in ORS 171.725.

As set forth in ORS 171.725, "lobbying" is defined as:

> [I]nfluencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the goodwill or legislative officials.

Recent case

Miller v. Ziegler is a recent decision by the United States Court of Appeals for the Eighth Circuit that considered the constitutionality of a provision of the Missouri Constitution that bans lobbying by former members and employees of the Missouri legislature for a period of two years after the members or employees had left their position.[1] The plaintiffs in the case were a former legislator whose legislative service had ended within the past two years, a government relations

[1] *Miller v. Ziegler*, 109 F.4th 1045 (8th Cir. 2024).

firm that employs lobbyists and a current employee of the Missouri legislature who was seeking to become a lobbyist.[2]

The court first considered which of two possible tests to apply to determine if the lobbying ban violated the First Amendment. The less restrictive "exacting scrutiny" test requires a substantial relation between the law at issue and a sufficiently important governmental interest. The tougher test is "strict scrutiny", which requires a compelling governmental interest and the law at issue being narrowly tailored to achieve that interest. The court observed that the dividing line between the two tests "is not always clear … but it generally depends on the extent of the burden. The more 'onerous' [the burden] is, the stricter the scrutiny."[3]

The court found the Missouri ban to be sufficiently onerous to be appropriately examined under strict scrutiny. This was for two reasons: (1) because the ban curtailed speech directed at influencing government policy through information and persuasion, which qualifies as "core political speech" that is at the heart of First Amendment protection; and (2) because of the two year duration of the ban.[4] The court noted that even under strict scrutiny, the United States Supreme Court has upheld limitations placed on speech in order to combat corruption, but that the Missouri ban actually operated to limit access and influence, which the court found is not equivalent to corruption.[5] Significantly, the court noted that the Missouri ban "sweeps too broadly" in terms of both the duration of the ban and the individuals affected by the ban. "Similar laws in other states suggest that Missouri might have been able to get by with a shorter period … from six months (like North Carolina) to one year (like New Mexico), even though both states have two-year election cycles like Missouri."[6] Similarly, the court concluded that the Missouri ban was overly restrictive in treating legislators and legislative staff the same, when the level of access and influence is significantly different.[7] For these reasons, the court held that Missouri's ban, as applied to the plaintiffs, was unconstitutional under the First Amendment.

Analysis

At the outset, we note that Oregon is subject to the jurisdiction of the United States Court of Appeals for the Ninth Circuit Court. Accordingly, case decisions by the United States Supreme Court and the Ninth Circuit constitute binding precedent in Oregon, but a decision by the Eighth Circuit is merely persuasive authority that cannot overturn a Ninth Circuit decision that is inconsistent with the Eighth Circuit view.

As the *Miller* court noted, the United States Supreme Court has upheld restrictions on free speech when the objective of the restriction is to prevent actual quid pro quo corruption, or the direct exchange of an official act for money.[8] However, the court has also upheld restrictions that prevent the appearance of quid pro quo corruption.[9] While an objective of limiting influence or access was an insufficient reason under strict scrutiny to uphold a restriction on political speech, the court recognized, however, that a legislature "may permissibly limit the appearance of corruption stemming from public awareness of the opportunities for abuse" but

[2] *Miller,* 109 F.4th at 1049.
[3] *Id.*
[4] *Miller*, 109 F.4th at 1049-1050.
[5] *Id*, 109 F.4th at 1050-1051.
[6] *Miller,* 109 F.4th at 1052.
[7] *Id*.
[8] *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 359 (2010.
[9] *McCutcheon v. Federal Election Com'n*, 572 U.S. 185, 207 (2014).

may not limit the appearance of mere influence or access.[10] In establishing limits to guard against quid pro quo corruption, a legislature may not rely on mere speculation, but must have some evidentiary basis for concluding that voters would identify the act in question -- in the context of your question, the opportunity to lobby for money or other consideration -- with a corrupt purpose.[11] The Ninth Circuit has identified that evidentiary basis as a low one that merely requires a showing that the perceived threat of corruption is not illusory.[12] Finally, the Ninth Circuit has noted that, in determining whether a particular limit impeding free expression is closely drawn to the sole legitimate interest of preventing corruption or the appearance of corruption, courts are poorly positioned to determine the precise restriction necessary to carry out the legitimate objective of preventing corruption. In the court's view, legislatures are better suited to make such empirical judgments, with courts deferring to the legislature's determination. Deference to the legislature is inappropriate, however, when limitations to prevent corruption or the appearance of corruption "present constitutional risks to the democratic electoral process" that are too great, and that warrant exercising independent judicial judgment.[13]

Applying that background to the operation of ORS 244.045 (6), we make the following observations:

- ORS 244.045 (6) applies only to post-legislative service lobbying in which a former member would receive money or other valuable consideration for that lobbying.
- The prevention of the receipt of money or other valuable consideration in exchange for an official act, like a legislator's vote or a legislator's support for a measure, is a legitimate governmental interest that justifies a narrowly tailored constraint on free expression otherwise protected by the First Amendment.
- The prevention of the appearance of quid pro quo corruption is similarly a legitimate governmental interest that justifies a narrowly tailored constraint on otherwise protected expression.
- ORS 244.045 (6) does not operate to present constitutional risks to the democratic electoral process. Accordingly, the legislature's determination in ORS 244.045 (6) of the precise restrictions necessary to prevent corruption or the appearance of corruption should be granted judicial deference.
- While not entirely free from doubt, we think it likely that a legislator's taking up lobbying for money within one year of concluding legislative service could be perceived as giving the appearance of quid pro quo corruption because of the relatively short durational proximity -- less than one year -- between when the legislator is casting votes and when the now-former legislator is lobbying for money or other consideration.
- We conclude that the appearance of corruption described in the preceding bullet is sufficient to uphold ORS 244.045 (6). Missouri's two-year ban on lobbying that the Eighth Circuit found unconstitutional in *Miller* is distinguishable. A prohibition on lobbying of up to two years' duration would not be narrowly tailored to address the appearance of corruption, but rather would seek to limit access or influence, which is not a legitimate governmental interest justifying restraint on First Amendment protected activity.

[10] *McCutcheon*, 572 U.S. at 207-208.
[11] *Id,* at 218.
[12] *Moving Oxnard Forward, Inc. v. Ascension*, 124 F.4th 605, 613 (2024) (also noting that the *Citizens United* and *McCutcheon* cases have created some doubt about the continued vitality of that standard).
[13] *Id, quoting Reynolds v. Sorrell,* 548 U.S. 230, 248-249 (2006).

Finally, we note that a current measure, House Bill 2727 (2025), proposes to amend ORS 244.045 (6) to also prohibit a former legislator, within one year of ceasing to be a legislator, from receiving money or other consideration for "advocating on behalf of a public or private entity for changes in policy or funding for a public or private sector program or entity." The change HB 2727 proposes does not indicate what entity is proscribed from being the recipient of the advocacy. In other words, existing ORS 244.045 (6) is limited to "lobbying" which is defined, in relevant part, as "influencing, or attempting to influence legislative action...". Thus, what is prohibited in current law is the act of influencing or attempting to influence what a former legislator used to exercise, when they served in the Legislative Assembly. That is the basis of the quid pro quo corruption or the appearance of quid pro quo corruption that the courts have recognized as the only valid governmental interest to justify constraint on political speech otherwise at the core of First Amendment protections. If the advocacy that the HB 2727 change proposes is limited to advocacy before the Legislative Assembly, the government objective of limiting the appearance of quid pro quo corruption remains the same and therefore HB 2727 does not violate First Amendment principles. However, if the advocacy that HB 2727 prohibits is in front of some entity other than the Legislative Assembly, and the former legislator, when still in office, would not have been able to participate in an official act of that entity, then the government rationale for limiting the speech described in HB 2727 cannot be to prohibit quid pro quo corruption or the appearance of quid pro quo corruption. As those are the only governmental objectives that courts have upheld as a valid constraint on political speech, it logically follows that HB 2727, as applied to entities other than the Legislative Assembly, would be an impermissible constraint on speech protected by the First Amendment.

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Very truly yours,

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