

Political Contributions Under a False Name Not Protected Speech Under Oregon and US Constitutions

The Oregon Court of Appeals recently issued an opinion concerning ORS 260.402 in *State of Oregon v. Thomas Paul Moyer et al*, __ Or App __ (January 7, 2009). The statute makes it unlawful for political contributions to be made under a false name. This case focuses on whether the statute limits speech itself or only the harmful effects that result from the speech. It is another in a long line of cases interpreting Oregon's constitutional free speech guarantee, arguably considered to be the nation's broadest in protecting the right to free expression.

Defendants knowingly contributed money under a false name to a Portland mayoral candidate in 2003. At the trial court, they moved to dismiss the indictment against them. Defendants contended that ORS 260.402 is an unlawful restraint on speech and political association under Article I, section 8 of the Oregon Constitution and the First Amendment to the United States Constitution. In addition, they argued that the statute is impermissibly vague and overbroad.

The trial court agreed with defendants that the statute violates the state and federal guarantees of freedom of expression and dismissed the indictment. According to the trial court, a political contribution is a form of speech and ORS 260.402 regulates that speech itself, as opposed to the harmful effects of that speech. The trial court disagreed with the defendants that the statute is unconstitutionally vague.

On appeal, the court cited *State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982) as establishing the framework to determine whether a statute is unconstitutional under Article I, section 8. Once a challenged law is categorized as either regulating the content of speech or proscribing harmful effects of speech, it is analyzed differently to determine its constitutionality, as laid out in *Robertson* and most recently discussed in *State v. Johnson*, 345 Or. 190, 193-94, 191 P.3d 665 (2008).

With respect to money and political campaigns, "first-category" regulations under *Robertson* are those that limit contributions or expenditures *per se*. They are unconstitutional unless they lie within an established historical exception, like fraud for example.¹ However, the majority found that a disclosure requirement, such as the one contained in ORS 260.402, is treated as a *Robertson* "second-category" regulations. Such regulations generally do not violate the constitution unless they are overbroad.²

As to the defendant's argument that ORS 260.402 violates the *First Amendment*, the Court of Appeals pointed to *Buckley v. Valeo*, 424 US 1 (1976). In that case, the US Supreme Court concluded that requiring campaign contributors to disclose their identities does not offend the *First Amendment*. The Court of Appeals in this case concluded that a law in which disclosures of identity must be truthful does not run afoul of the *First Amendment* either.

Because the court found the statute to be lawful under both the state and federal constitutions, it reversed the decision and remanded it to Multnomah County Circuit Court for further proceedings. The decision is a victory for those concerned about the role money can play in politics and will assist the efforts of regulators seeking to eliminate fraud in the political process.

¹ The *Robertson* court held that if a challenged law regulates the content of speech, it is unconstitutional "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 demonstrably were not intended to reach." *Id.* 293 Or at 412.

² The dissenting opinion disagrees with the classification of the majority. Judge Sercombe concludes that ORS 260.402 is a first-category regulation and therefore unconstitutional under *Robertson* because it does not fit comfortably under a historical exception. The majority opinion responds by additionally analyzing ORS 260.402 as a first-category regulation, and it holds that the statute falls at least within the historical exception for fraud.