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JUDGE

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OREGON TAX COURT
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Re: Karuk Tribe v. TriMet, No. 080202663

Dear Counsel:

This matter is before the court on cross-motions for summary judgment. As an initial matter, Respondent's motion to strike was and is granted except to the extent that material to which objection was taken was considered as to the court's ruling at the hearing on the standing of Petitioner Karuk Tribe of California. The matter to which Respondent objected was not considered in the following analysis and ruling.

Article I, section 8, of the Oregon Constitution is broadly worded, proscribing any law restraining free expression of opinion or restricting the right to speak, write, or print freely on any subject. Apart from historical exceptions not relevant here, it has been interpreted and consistently applied to proscribe government regulatory action that is content related. However, nothing in the constitutional provision suggests that the broad restriction on lawmaking—the constitution says "no law shall be passed"—applies only to regulatory laws.

Governments in our country and state act by law, whether in regulating the behavior of citizens or undertaking their own governmental activities. As the court in *State v. Robertson* stated, Article I, section 8, "forecloses the enactment of any law written in terms directed to the substances of any 'opinion' or any 'subject' of communication." 293 Or 402, 412, 649 P2d 569 (1982). The restriction is on the wording of a law, not whether the law regulates private activity or carries out governmental objectives. Government and governors are not permitted to act

based on the content of expression. Accordingly, the court sees no basis on which to recognize any "government as proprietor" distinction. What matters is not in what capacity the government is acting, but rather whether the action is conditioned on the content of expression.

Athough Respondent need not make its buses or other vehicles available for expression by others, (*see City of Eugene v. Miller*, 318 Or 480, 491, 871 P2d 454 (1994)) when it does so, it places itself in the same position as a government that is not required to provide other types of benefits, but chooses to do so. Having made the choice, the government may not, in its delivery of the benefit—here, licensing space for a charge or free—violate the Oregon Constitution.

One clear theme that consistently runs through the Article I, section 8, jurisprudence of our Supreme Court is that laws containing content classifications, unless reflecting certain historical exceptions, do not satisfy the Oregon Constitution. Unlike provisions that have been upheld under the federal constitution when restrictions are viewpoint neutral, Oregon cases demand content neutrality. For example, *Outdoor Media Dimensions v. Dept. of Transportation*, 340 Or 275, 132 P3d 5 (2006) stands for the proposition that although time, place and manner restrictions, each being some restriction on completely unfettered expression, are permissible, they remain so only if content neutral.

The rules Respondent has promulgated and relied upon depend entirely on the content of what Petitioners submitted. The communication was rejected either because it was not a commercial solicitation or because it was a communication regarding a "public issue." In either case, the content of the communication was the focus of the government decision. That is not permitted.

Petitioner is also entitled to prevail under the First Amendment to the United States Constitution, applicable to Oregon and its political subdivisions by reason of the Fourteenth Amendment. Assuming the vehicle spaces are limited public forums, the legal test under the First Amendment is whether the government limits are viewpoint neutral and reasonable in light of the purpose served by the forum. As to viewpoint neutrality, "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Sammartano v. First Judicial Dist. Court*, 303 F3d 959 (9th Cir 2002) (quoting *Cornelius v. NAACP Legal Defense & Education Fund*, 105 S Ct 3539, 473 US 788 (1985)).

Nothing in the proposed communication violates the 16 standards contained in Respondent's Advertising Policy, applicable to paid as well as non-profit communications. Nor is the proposed communication inconsistent with the five "interests" identified by Respondent in its policy. Respondent rejected this communication because it was not an "advertisement" as defined by Respondent—it did not seek to sell a good or service. Insofar as the communication was offered by a non-profit, and was therefore a public service announcement, the action of Respondent was explained as based on a desire not "to allow or cause its property to become a public forum for the dissemination, debate, and/or discussion of public issues." Notwithstanding this statement, based on the statement of content in its policy, Respondent only prohibits some *public issue speech*—*that relating to specific* ballot questions and any candidate for public office.

The court concludes that Respondent's decision was made on the basis of the nature of this message rather than any risks or limitations expressed in its standards. That action was not viewpoint neutral and was therefore invalid under the First Amendment.

Petitioner's motion is granted and the Respondent's motion is denied. Counsel for Petitioner is directed to prepare an appropriate form of order and judgment.

Very Truly Yours,

Henry C. Breithaupt
Judge