IN THE SUPREME COURT FOR THE STATE OF OREGON

FRED VANNATTA and CENTER TO PROTECT FREE SPEECH, INC., an Oregon Not-for-Profit Corporation, **Plaintiffs-Appellants,** **v.** **OREGON GOVERNMENT ETHICS COMMISSION and STATE OF OREGON,** **Defendants-Respondents.**	**Supreme Court No. S057570** **Court of Appeals No: A140080** **Marion County Circuit Court No. 07C20464**

BRIEF OF AMICUS CURIAE SEVEN INDIVIDUAL OREGON ELECTORS

Appeal from Judgment entered September 22, 2008
Marion County Circuit Court
Honorable Joseph C. Guimond

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I. INTEREST OF THE AMICI.

Bryn Hazell, Francis Nelson, Tom Civiletti, David Delk, and Gary Duell (the "Hazell Plaintiffs"), and Joan Horton and Ken Lewis (the "Horton Plaintiffs") are plaintiffs and appellants in ***Hazell v. Brown***, Oregon Court of Appeals Case No. A137397. Hazell, Nelson, and Delk were chief petitioners on statewide campaign finance reform measures in 2006, including the successful Measure 47 (2006). Horton, Lewis, and Civiletti were supporters of the measures.[1] All of them seek in ***Hazell v. Brown*** to require the Secretary of State and Attorney General to enforce Measure 47. They are opposed in ***Hazell v. Brown*** by the State and also by Fred Vannatta and the Center to Protect Free Speech, Inc., the Plaintiffs in the instant case, who intervened in ***Hazell v. Brown*** at the trial court and filed a Cross-Opening brief adverse to Amici's positions seeking enforcement.

The immediate interest of the proposed Amici in the instant case is to ensure that the Court receives a correct history of limits on lobbying and limits on money given to public officeholders or candidates.

In this case, Plaintiffs contend that there should be no historical exception to Article I, § 8, recognized for the various gift and entertainment limits in ORS 244.025 and ORS 244.042. The primary authority they cite is ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), which analyzed campaign finance limits for an historical exception. The Amici in this brief offer extensive primary research, conducted after ***Vannatta v. Keisling*** was decided, that demonstrates that restrictions on lobbying and on providing money to public officials and/or candidates were in place well before 1857, the time of the Oregon Constitutional Convention, and were not considered to be precluded by the freedom of speech guarantees (or in some

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1. Ken Lewis currently serves on the Oregon Government Ethics Commission. He appears here in his capacity as an Oregon elector and not as a representative of the Commission.

cases, the "natural rights" guarantees) of those states. None of the early primary source evidence or early legal authority cited in this brief was presented to the Supreme Court in ***Vannatta v. Keisling*** or to the trial court in the instant case.

This Court should consider all of the historical research necessary in what are three current appeals concerning contentions that certain laws pertaining to elections and money in politics fail under ***Vannatta v. Keisling.*** A portion of the historical research we present in this brief is also relevant to ***State v. Moyer***, 225 Or App 81, 200 P3d 619 (2009) (now S056990), in which defendant challenges the constitutionality of a ban on political donations in a "false name" as precluded by Article I, § 8. Again, the party in that case challenging the constitutionality of the statute is relying upon ***Vannatta v. Keisling*** and upon the claimed absence of an historical exception for the statute at issue. Amici filed an amicus brief, with motion for leave to appear, in ***State v. Moyer*** on July 29, 2009.

On July 1, 2009, the Hazell Plaintiffs and the Horton Plaintiffs jointly moved in ***Hazell v. Brown*** that the Court of Appeals certify those consolidated cases to the this Court, pursuant to ORS 19.405(1) and Rule 10.10, Oregon Rules of Appellate Procedure, because that would allow the Oregon Supreme Court to hear and decide ***Hazell v. Brown***, ***State v. Moyer***, and this case, ***Vannatta v. Oregon Government Ethics Commission*** [hereinafter ***Vannatta v. OGEC***], concurrently. In all three cases, parties cite and rely upon ***Vannatta v. Keisling*** extensively, and they assert (or deny) the existence of an historical exception for the statute at issue in each case. Fred Vannatta and the Center to Protect Free Speech, Inc., have filed an opposition to the motion to certify in ***Hazell v. Brown***. The Court of Appeals has not ruled upon the motion.

The interplay between ***Hazell v. Brown*** and ***Vannatta v. OGEC*** is intense. If the Oregon Constitution does not allow numerical limits on political contributions,

there would appear to be no way to enforce a limit on gifts to public officials and candidates, because any gift to an elected official or candidate could be labeled a "campaign contribution," whether or not the official ever runs for office.[2] The substitution of campaign contributions in place of gifts from lobbyists to accomplish the same activities, such as lavish trips to Hawaii resorts, has already occurred.

> Three Oregon legislators used campaign or personal money in May to fly to Hawaii, where they accepted $30,000 in campaign contributions from beer and wine distributors at the group's biennial conference.
>
> * * *
>
> Paul Romain, director and lobbyist for the Oregon Beer and Wine Distributors Association, said he checked with the state Elections Division beforehand and was told lawmakers could use campaign money to travel to an out-of-state fundraiser for their political action committee.
>
> "I found out that if they get a PAC contribution, yes, they can use their PAC money to go get that PAC contribution," Romain said. "It's the same thing as driving to Medford to get something. It just happens to be Hawaii versus Scappoose or Sunriver or some place like that."

D. Hogan & J. Har, *2006 Hawaii trip hosted by beer and wine lobby pays off for legislators*, OREGONIAN (September 28, 2006).[3] * * * Campaign contributions can be readily substituted in place of gifts.

> Those lobbyists may find themselves barred from picking up the tab, he [lobbyist Jim Markee] said, but they'll make up for it by telling the official, "Here, I can give you a campaign contribution to pay for that."

David Steves, *Political gray areas in spotlight*, EUGENE REGISTER-GUARD, November 16, 2006.[4]

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2. As shown later in this brief, a public official can maintain a campaign committee and receive campaign contributions, whether or not she runs for office.

3. http://blog.oregonlive.com/politics/2006/09/2006_hawaii_trip_hosted_by_bee.html.

4. See also, *Beer, wine lobby's big clout*, OREGONIAN, October 8, 2005:

(continued...)

Further, the Amici would have filed this brief in the Court of Appeals, but for SB 577 (2009), which ordered the Court of Appeals to immediately certify this case to the Oregon Supreme Court, causing it to leapfrog over ***Hazell v. Brown***, in which briefing at the Court of Appeals by all parties, including Fred Vannatta, has been complete since April 13, 2009. If this case had not been legislatively leapfrogged ahead of ***Hazell v. Brown***, at the behest of Plaintiffs herein, then this Court would have had the extensive new historical research at hand before deciding this case.

As it is, the consideration of election-law related arguments is being presented to this Court piecemeal. For example, in ***Hazell v. Brown***, Amici have briefed extensively the history, proper construction and robust intent of Article II, § 8, to allow regulation of campaign restrictions, which they believe is relevant to a comprehensive analysis of the understanding of the drafters of the 1857 Oregon Constitution. The filing of the Amicus brief in the ***Moyer*** case and allowance of the Amicus brief in this case will still not be sufficient to fully analyze the comprehensive legal framework.

II. STATEMENT OF THE CASE.

Defendants challenge the constitutionality of ORS 244.025 and ORS 244.042. Amici adopt the Respondent State of Oregon's statement of the case, except we offer these additional specific questions:

4.(...continued)

> The Hawaii trips are just part of the group's influence strategy. Since 2002, the distributors have showered $1.2 million on lawmakers through lobbying and campaign giving, The Oregonian found, with much of the latter going to legislative leaders and committee chairmen who have the power to pass or kill bills.

1. Are gifts and entertainment expenses so similar to campaign contributions that the analysis of ***Vannatta v. Keisling*** should apply in this case?

2. Are ORS 244.025 and ORS 244.042 within an historical exception to Article I, § 8?

3. Are the activities desired by Plaintiffs (providing gifts, entertainment, and honoraria) nevertheless made unlawful by ORS 260.407, which Plaintiffs have not challenged?

4. Do nonprofit entities have greater legal opportunities to provide benefits to Oregon's public officeholders and candidates than do for-profit entities?

5. Are Plaintiffs entitled to challenge ORS 244.040, as none of them are candidates or public officials who are subject to that statute?

III. SUMMARY OF ARGUMENT.

Throughout the Appellants' Opening Brief, Plaintiffs contend that the limits on gift, entertainment, and honoraria expenditures are so similar to political campaign contributions that ***Vannatta v. Keisling*** should be applied to invalidate those limits on gifts, entertainment, and honoraria. The focus of this brief is to provide a correct, objective history on regulation of lobbying, gifts, and campaign contributions. The notion that freedom of speech for lobbyists included the right to engage in the activities of bestowing gifts, entertainment, and honoraria upon public officeholders and/or candidates for the purpose of aggrandizing the lobbyist's own reputation or increase the lobbyist's payments from others would have been considered outlandish in mid-19th Century America. To the contrary, lobbying itself was considered so contrary to public policy that lobbying for an undisclosed principal was a crime in Oregon. Even lobbying for a disclosed principal was so repugnant to the law that contracts for lobbying were unenforceable in the courts.

Lobbying has been found by American juries and courts to be contrary to public interest in since at least 1837. The conduct of currying personal favor with

officials or trying to engender private feelings of obligation from elected officials through gifts and entertainment was long targeted as incompatible with the duties of elected representatives to serve the greater public good. Efforts to curb such conflicts of interest of elected representatives were reflected in Article IV, §§ 15-17, of the Oregon Constitution and early statehood statutes forcing disclosure of lobbyists' interests. Crimes Against Public Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, C V, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.

The 1864 lobby restriction is based on a section of earlier Wisconsin statutes banning lobbying altogether. Wisconsin General Laws C 145, § 2 (1858). Amicus App-5-6. This is part of a history in America of laws targeting any conduct which tended to harm the popular will expressed by suffrage, including limits or outright prohibitions on lobbying and campaign contributions, that extends for more than 200 years.[5]

Early American statutes and application of the common law targeted harmful conduct and effects by regulating election campaign conduct, curbing direct and "indirect" bribery of both voters and candidates, limiting or prohibiting conduct of classes of contributors (such as corporations), declaring some conduct contrary to public policy (lobbying), limiting amounts donated or spent for proscribed activities, and criminalizing conduct aimed at potential voters in the run-up to balloting. Such statutes were in place for decades before the Oregon Constitutional Convention of 1857. They were closely followed by restrictions on the conduct of political

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5. To the extent necessary, we request judicial notice of the facts for which we provide references in this brief pursuant to Rule 201(b)(2), Oregon Rules of Evidence. The citations in this brief should satisfy Rule 201(c)(d)(2). Detailed historical research is no longer beyond the reach of attorneys. The historical texts cited in this brief are all available in digital form from Google Books and can be located by entering search terms at http://books.google.com.

supporters and others. Wagering on elections was prohibited for similar reasons--because it gave third parties an incentive to influence election results.

These laws regulating campaigns were not seen as weakening the freedom of speech guaranteed in many early American state constitutions but as serving to strengthen free government envisioned by the federal Constitutional Convention delegates in 1789. This concern for protecting the American experiment in extended suffrage and making elected representatives servants of the public's will was the historical backdrop for both Article I, § 8, and Article II, § 8, of the Oregon Constitution.

That the Oregon Constitution allows limits on campaigns is further evidenced by the statutes adopted by early sessions of the Oregon State Legislature. Many members of these legislatures were delegates to the 1857 Oregon Constitutional Convention. With the new Oregon Constitution fresh in their minds, they promptly (in 1864 and 1870) adopted limits on money and "influence" in election campaigns. Many of these statutes, in various forms, have remained on the books in Oregon ever since.

Amici also question the reasoning of the Plaintiffs, who rely upon ***Vannatta v. Keisling***, not merely for legal precedent but also as a sort of history super-treatise. The Court in deciding ***Vannatta v. Keisling*** did not appear to have extensive historical research at its disposal. The briefs of the parties in that case did not present any substantial discussion of early statutes and historical facts. The prior incomplete examination of history does not enshrine the resulting incorrect historical findings with the cloak of precedent. The historical facts are the historical facts, even if they have not previously been presented to this Court.

Assuming *arguendo* that the challenged gift limits are functionally the same as campaign contributions, we first demonstrate that there were in 1857 laws

limiting campaign contributions in states having free speech clauses upon which Article I, § 8, was closely modeled. The parties in ***Vannatta v. Keisling*** simply did not do the historical research to find those statutes. We have.

Second, Amici next show that framing the issue as to whether there were "laws to limit campaign contributions" is too narrow a focus. Such limits were but one example of laws aimed at protecting the rights of suffrage, including laws targeting conduct which either improperly influenced voters, election outcomes, or the legislative actions of elected representatives.

Third, we demonstrate that, from the 1830s on, there were legal and political efforts to specifically target the profession of lobbying and the particular conduct which tended to create conflicts of interest for elected officials, such as providing gifts, entertainments, or honoraria, intended to curry personal favor. These efforts are reflected in the powers of the Oregon Legislature set out in Article IV, S§ 15-17, and Oregon laws limiting lobbying conduct adopted as early as 1864. These provisions were not unusual in the least, as lobbying was considered almost a criminal enterprise in mid-19th Century America.

IV. PLAINTIFFS CONTEND THAT THIS CASE SHOULD BE GOVERNED BY *VANNATTA V. KEISLING*, BECAUSE GIFTS AND ENTERTAINMENT EXPENSES ARE SIMILAR TO CAMPAIGN CONTRIBUTIONS.

Throughout the Appellants' Opening Brief, Plaintiffs contend that the limits on gifts and entertainment expenditures are so similar to political campaign contributions that ***Vannatta v. Keisling***, 324 Or 514, 931 P2d 770 (1997), should be applied to invalidate those limits on gifts, entertainment, and honoraria.

A. GIFTS, ENTERTAINMENT, AND HONORARIA ARE SIMILAR TO CAMPAIGN CONTRIBUTIONS IN OREGON.

We agree that, under Oregon statutes, gifts, entertainment, and honoraria expenses are indeed very similar to campaign contributions, because Oregon law allows money in the form of "contributions" to Political Committees to be spent on a wide variety of purposes. In fact, any of the activities identified in the Appellants' Opening Brief as what Plaintiffs would like to do, but are allegedly precluded from doing by ORS 244.025 and ORS 244.042, could be done by means of campaign contributions,[6] except actions that would be illegal, anyway, under statutes that Plaintiffs have not challenged. We examine those activities after presenting the relevant law.

1. CAMPAIGN CONTRIBUTIONS IN OREGON CAN BE SPENT FOR ALMOST ANY PURPOSE.

The limits on gifts do not apply to campaign contributions. ORS 244.020(5)(b)(A). ORS 260.005(7) allows the committee receiving a campaign contribution to spend it "for any reason."[7] This includes spending campaign funds

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6. This discussion presumes continued non-enforcement of the limits in Measure 47, adopted by statewide vote in November 2006. See ***Hazell v. Brown***, Oregon Court of Appeals No. A137397.

7. One might think that spending by a political committee would be restricted to campaign purposes, but not so. ORS 260.005(7) states (emphasis added):

> (7) Except as provided in ORS 260.007, "expend" or "expenditure" includes the payment or furnishing of money or anything of value or the incurring or repayment of indebtedness or obligation by or on behalf of a candidate, political committee or person in consideration for any services, supplies, equipment or other thing of value performed or furnished <u>for any reason, including</u> support of or opposition to a candidate, political committee or measure, or for reducing the debt of a candidate for nomination or election to public office. "Expenditure" also includes contributions made by a candidate or political committee to or on behalf of any other candidate or political committee.

(continued...)

in order to meet with lobbyists or with other potential contributors of additional campaign funds, no matter where (such as in Hawaii or at Trailblazer games); see pages 3-3, *ante*. If that is not broad enough, ORS 260.407 (reproduced at Amicus App-7-8) then allows the candidate or committee to spend money that is "in excess of any amount necessary to defray campaign expenditures" on other purposes. It can be:

> (a) Used to defray any expenses incurred in connection with the recipient's duties as a holder of public office;
>
> (b) Transferred to any national, state or local political committee of any political party;
>
> (c) Contributed to any organization described in section 170(c) of Title 26 of the United States Code or to any charitable corporation defined in ORS 128.620; or
>
> (d) Used for any other lawful purpose.

ORS 260.407(1). Organizations described in section 170(c) of Title 26 of the United States Code include not only charities under IRS Code §501(c)(3) but also

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7.(...continued)
ORS 260.007. The restrictions on spending of political committee money applies only to candidate committees (a particular type of political committee) under ORS 260.407. The Campaign Finance Manual 2008, adopted as a rule by the Secretary of State, also states no limits on uses of political committee money. It can even be used to make direct payments to sitting legislators.

> The political action committee for the House Republicans' caucus reported Friday that it paid Rep. Karen Minnis, a caucus member, $2,700 for campaign consulting services this month.
>
> Minnis, R-Wood Village, donated $10,000 to the caucus' PAC, Promote Oregon Leadership PAC, in December. She formed a consulting business, Karen Minnis and Associates, that month and the caucus committee has now paid her $15,500 for consulting services.

House Republicans Pay Minnis $2,700, THE OREGONIAN (August 23, 2008); http://www.oregonlive.com/politics/index.ssf/2008/08/house_republicans_pay_minnis_2.html. Note that these payments occurred after the effective dates of ORS 244.025 and ORS 244.042.

essentially all other types of nonprofit corporations, whether or not they have or fulfill charitable purposes.

Thus, campaign contributions can be spent:

1. for any campaign-related purpose, including taking extended luxury trips to Hawaii or elsewhere to meet with potential contributors; and

2. to pay "any expenses incurred in connection with the person's duties as a holder of public office," including unrestricted payments to friends or relatives for undocumented office work;[8] and

3. to repay to a candidate any loan the proceeds of which were used in connection with the candidate's campaign.

This last category means that a campaign contributions can be deposited directly into the personal bank account of the candidate or former candidate.

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8. The Campaign Finance Manual 2008, p. 34, provides examples of acceptable expenditures, even from a candidate committee that is restricted by ORS 260.407:

> A candidate who is an office holder may use campaign funds for expenses incurred as an office holder if directly related to an office holder's official duties, including: * * *
>
> > salary or expenses associated with employees performing official business
> >
> > gifts of nominal value and donations of a nominal amount made on a significant occasion such as a holiday, graduation, marriage, retirement, or death, unless made to a member of the candidate's family
> >
> > any legal expenses incurred by the public official [with exceptions]
> >
> > to pay for any civil penalty imposed under ORS Chapter 260, except for any penalty imposed for a violation of ORS 260.407 or 260.409 or
> >
> > any other expenses incurred to perform official office holder duties

2. CAMPAIGN CONTRIBUTION READILY SUBSTITUTE FOR GIFTS.

Is there a practical distinction between gifts and campaign contributions in Oregon? It is legal in Oregon to use campaign contributions for lavish, leisurely trips to Hawaii, Blazer tickets, mortgage payments on a house near Salem, and even payments to friends or relatives for doing unsupervised work for the officeholder, during or not during a legislative session. In Oregon, the "campaign contributions" can be readily substituted in place of gifts.

ORS 260.407 has not significantly changed since ***Vannatta v. Keisling*** was decided in 1997.[9] The only change since then to the language allowing campaign contributions to be used to "defray any expenses incurred in connection with the person's duties as a holder of public office" was the deletion in 1999 of the words "ordinary and necessary" in front of "expenses." Oregon 1999 Session Laws, Ch. 999, § 20. Thus, the allowed uses of campaign funds has expanded since ***Vannatta v. Keisling*** was decided in 1997.

In fact, it appears that nothing in Oregon law prevents a public official or candidate from receiving a "gift" from someone and reporting it as a campaign contribution. This is of no discernible consequence to the donor, since there are no enforced limits on campaign contributions involving state or local office.

The gift limit at issue in this case, however, applies not just to candidates but to public officials. But any public officeholder can have a candidate committee,

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9. It was adopted as § 18 of Measure 9 of 1994 but was specifically not struck down by ***Vannatta v. Keisling***, 324 Or at 549:

> Sections 3, 4, 11, 14, 15, 16, and 17 of Measure 9 are declared void. The remainder of Measure 9 is not invalid on any ground urged by the petitioners in this proceeding.

ORS 260.407 has been enforced as recently as 2006. ***In re Doyle***, 340 BR 381 (D Or 2006).

whether or not he ever runs for election. Oregon's statutory definition of "candidate" appears circular. It includes:

> (B) An individual who has solicited or received and accepted a contribution, made an expenditure, or given consent to an individual, organization, political party or political committee to solicit or receive and accept a contribution or make an expenditure on the individual's behalf to secure nomination or election to any public office at any time, whether or not the office for which the individual will seek nomination or election is known when the solicitation is made, the contribution is received and retained or the expenditure is made, and whether or not the name of the individual is printed on a ballot; * * *

So, any person who has received a contribution for the purpose of securing nomination or election is a "candidate," whether or not (1) she ever appears on any future ballot or (2) the office she might run for is even identified.

Further, any persons (including lobbyists) can form any number of "political committees," which also can receive campaign contributions, in unlimited amounts from unlimited sources under Oregon law. There is no law banning those political committees from expending their funds for the activities identified in Appellants' Opening Brief as those which Plaintiffs desire to undertake (field trips for legislators, etc.). Such funds can be spent for "any services, supplies, equipment or other thing of value performed or furnished for any reason * * *. ORS 260.005(7). Even the minimal restrictions of ORS 260.407(1) do not apply to the expenditures of political committees that are not "candidate committees."

B. PLAINTIFFS' DESIRED ACTIVITIES ALLEGEDLY PRECLUDED BY ORS 244.025 AND ORS 244.042 COULD BE DONE BY MEANS OF CAMPAIGN CONTRIBUTIONS.

First, Plaintiffs in their pleadings have not alleged that they wish to give a "gift" to anyone that would be precluded by ORS 244.025 and ORS 244.042 or even 244.040. They stated in their Second Amended Complaint (ER-7):

> Conduct in which VanNatta would engage includes obtaining the good will of public officials and candidates for public office through offering and providing public officials, their families and candidates

> for public office entertainment, business meals with an aggregate value of more than $50 in a calendar year in connection with their discussions, and honorariums in connection with official duties.

In their brief on appeal Plaintiffs do claim a desire to make gifts, including gifts in excess of $50 per year to any one person.

Second, the conduct Plaintiffs desire to engage in can be accomplished by campaign contributions. Public officials and candidates for public office can certainly spend campaign contributions on "entertainment, business meals with an aggregate value of more than $50 in a calendar year in connection with their discussions [with Plaintiffs]." See pages 9-13, *ante*. That is how the recipients of campaign contributions from the beer and wine distributors spent those funds: on trips to luxury hotels in Hawaii to share days of entertainment and meals with the beer and wine lobbyists.

As for the desired "honorariums in connection with official duties," Plaintiff clarified their intent in the Appellants' Opening Brief, pp. 4-5:

> If not prohibited by statute, VanNatta would seek to engage in the following lobbying activities on behalf of his clients and to protect his own interests: (1) giving gifts with an aggregate value of more than $50 in a calendar year to a public official or candidate for public office, including meals, lodging, and travel expenses for legislators to witness the impacts of legislative proposals on small woodlands and their owners; (2) giving gifts of entertainment to a public official or candidate for public office; and (3) providing honorarium with a value of over $50 to a public official or candidate for public office in connection with official duties.

They further clarified their desired honoraria (p. 8):

> > The payment of a $100 honorarium for a legislator to prepare and give a speech to an association, where preparation of the speech is likely to require hours of research and the speech is to be delivered hours away from the legislator's district.

All of these activities could be done with campaign contributions. Note that the desired gifts ("including meals, lodging, and travel expenses") are "for legislators to witness the impacts of legislative proposals on small woodlands and their

owners." That witnessing would clearly be within the allowable uses for campaign contributions under ORS 260.407(1)(a) ("used to defray any expenses incurred in connection with the recipient's duties as a holder of public office"). Campaign contributions could also pay for the legislator's expenses in connection with preparing and delivering the speech for which she would not receive the $100 honoraria.[10] But she can be paid a consulting fee, from political committee funds, for the speech. See note 7, *ante*.

And ORS 244.042 does not ban the payment of honoraria. It limits them (presumably per occasion) to: "an honorarium or a certificate, plaque, commemorative token or other item with a value of $50 or less" and "an honorarium for services performed in relation to the private profession, occupation, avocation or expertise of the public official or candidate." So Plaintiffs could give a $100 honorarium by giving two $50 honoraria or perhaps by giving the full $100 honorarium for the politician's professional services in preparing and delivering a speech (requiring "hours of research" by the politician). Researching and analyzing public policy issues may be the "private profession, occupation, avocation or expertise of the public official or candidate."

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10. Further, as noted at pages 45-47 of this brief, it would be unlawful for Plaintiffs to pay the $100 honoraria, if it were "funds <u>donated</u> to a holder of public office." ORS 260.407(2) (a statute Plaintiffs have not challenged), unless the donation consisted of a campaign contribution and the proceeds were used to "defray any expenses incurred in connection with the person's duties as a holder of public office." Even if Plaintiffs win all of their claims in this suit, it will remain illegal to donate to a public officeholder any honorarium that is "converted by any person to any personal use other than to defray any expenses incurred in connection with the person's duties as a holder of public office." Since the money must be used to defray such expenses, it can be given to the public officer as a campaign contribution. If Plaintiffs wish to give a public officeholder more money than is necessary to "defray any expense," they can use their own political committee funds to pay her a consulting fee. In any event, any conduct Plaintiffs have alleged a desire to undertake can be done by means of campaign contributions.

V. ORS 244.025 AND ORS 244.042 ARE WITHIN AN HISTORICAL EXCEPTION TO ARTICLE I, § 8.

One central issue is whether these limits on gifts, entertainment, and honoraria are within the historical exception prong of ***State v. Robertson***, 293 Or 402, 412, 649 P2d 569 (1982).[11] Plaintiffs' discussion of the historical exception (Appellants' Opening Brief, pp. 20-22) contends that no historical exception applies to ORS 244.025 and ORS 244.042, because:

> The Court in ***Vannatta*** readily disposed of the historical exception argument with respect to campaign contribution limitations. * * * Just as there was no historical antecedent for campaign contribution limits, there is no historical exception to Article I, section 8, for restrictions on gift, entertainment, honorarium expenditures.

To the contrary, we demonstrate below that there were ample historical antecedents for restricting the activities of lobbyists. Further, since Plaintiffs insist that the gifts and entertainment expense limits should be treated like campaign contribution limits, we also demonstrate the historical antecedents for limits on campaign contributions.

A. LIMITS ON CAMPAIGN CONTRIBUTIONS WERE ESTABLISHED IN MID-19TH CENTURY AMERICA BEFORE ADOPTION OF OREGON CONSTITUTION.

Plaintiffs (p. 21) quote ***Vannatta v. Keisling***. "At the time of statement and the adoption of Article I, § 8, there was no established tradition of enactment laws to limit campaign contributions." 324 Or at 538. The factual premise relied upon by the Plaintiffs is incorrect.

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11. We offer the historical overview also to urge that the harms were sufficiently identified and known to the public and lawmakers that a "second category" analysis would conclude that campaign and gift limitations are permitted under Article I, § 8, for targeting the harm to suffrage.

1. LAWS SPECIFICALLY LIMITING CONTRIBUTIONS TO POLITICAL CAMPAIGNS PREDATE THE OREGON CONSTITUTION.

Laws existed to limit the use of money in politics in Oregon as early as 1864 and in the British colonies and colonial America from 1699.[12] The states then adopted laws modeled after the British reform acts, which first targeted indirect bribery by restricting campaign conduct and financial transactions by candidates, such as campaign expenditures to influence voters by "treating" or serving liquor.[13]

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12. In 1699, members of the Virginia House of Burgesses asked themselves the same questions that define today's campaign finance debates: How should we regulate campaign money? * * *. What we do know is that they enacted what may have been the first campaign finance law on this side of the Atlantic * * *.

Robert E. Mutch, essay, *Three Centuries of Campaign Finance Law,* A USERS GUIDE TO CAMPAIGN FINANCE LAW, (Lubenow ed., Rowman & Littlefield 2001).

13. According to contemporary early 19th century British writers, statutes based on "ancient usage" forbid campaign contributions.

> The Act of 49th Geo III, c 118, proceeds on a preamble, that giving or promising money to procure a seat in Parliament is not bribery, if the money is not given or promised to a voter or returning officer; but that such gift or promise is contrary to the ancient usage, right, and freedom of election, and laws and constitution of the realm; and, therefore, if any person give, directly or indirectly, any sum, &c., on an engagement, &c., to procure, or endeavour to procure, the return of any person to serve in Parliament for any county, &c., the consequences shall be, 1. Forfeiture of ££1000 by the person so offending; 2. If returned, incapacity to serve in that Parliament; 3. Forfeiture to the Crown of the gift, &c., by the receiver, besides a penalty of ££500. No action is maintainable at common law on bonds of this description; and this principle, combined with the fair protection is oppressive, and, in the eye of the law, unreasonable. Whatever injures the public interest is void, on the ground of public policy.

Patrick Shaw, A TREATISE ON THE LAW OF OBLIGATIONS AND CONTRACTS (T. & T. Clark 1847), p. 78.

These laws regulating campaigns were not seen as weakening the freedom of speech guaranteed in many early American state constitutions but as serving to strengthen free and representative government envisioned by the Constitutional Convention delegates in 1789. In 1829, New York sought to protect the entire campaign process, making it unlawful to try to influence voters "previous to, or during the election" and made it illegal to contribute money to promote the election of any particular candidate or party ticket. ***Jackson v. Walker***, NYSup, 5 Hill 27 (1843). Referring to the policy behind New York's campaign contribution limits passed in 1829 (after ***Rust v. Gott***, 9 Cow 169, 18 Am Dec 497 (NY 1828), *infra*, was decided), a court stated in 1858:

> [I]ts provisions were designed to prohibit contributions in money to a common fund to be expended for election purposes, and which might be employed by unscrupulous men to demoralize and corrupt the electors and to defeat the public will.

Hurley v. Van Wagner, 28 Barb 109, NYSup (1858).

By 1852, Maryland had made it an offense for any "political agent" (defined as "all persons appointed by any candidate before an election or primary election") "to receive or disburse moneys to aid or promote the success or defeat of any such party, principle, or candidate." ELECTIONS LAWS OF THE STATE OF MARYLAND, (Lucas 1852), p. 90.

Texas provides a particularly relevant example of pre-1857 campaign funding limits. As the table at Amicus App-9-12, the Constitution of Texas (1845) contains sections essentially identical to Article I, § 8, and Article II, § 8, of the Oregon Constitution. A year before the Oregon Constitutional Convention, the Texas Legislature passed the Act of August 28, 1856, codified at Title VIII, "Offenses Affecting the Rights of Suffrage," Chapter I, "Bribery and Undue Influence." Article 262 provided (Amicus App-2):

> If any person shall furnish money to another, to be used for the purpose of promoting the success or defeat of any particular candidate, or any particular question submitted to a vote of the people, he shall be punished by fine, not exceeding two hundred dollars.

Later in this brief we also discuss early limits on lobbying, *inter alia*, in New York and Pennsylvania. It is interesting that all of these states (as well and many others), in addition to Texas, had free speech clauses in place before 1857 which are very similar to that later adopted in Oregon.[14] Here are the free speech provisions contained at the relevant time in those state constitutions.

STATE (year adopted)	FREE SPEECH PROVISION IN CONSTITUTION
New York (1776, readopted 1852)	Article I, § 8 Every citizen may freely speak, write and publish his sentiments on all subjects; being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.
Pennsylvania (1776, readopted 1838 version)	Article IX, § 7 The free communication of thoughts an opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.
Texas (1845)	Article I, § 5 Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.
Oregon (1857 drafted)	Article I, § 8 No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

14. In fact, 37 other states have freedom of speech clauses that are extremely similar to Article I, § 8, of the Oregon Constitution. See page 41, *post*.

When a state with a constitutional provision similar to the one later adopted in Oregon has taken action which tends to show what the constitutional provision means, the Oregon Supreme Court notices. ***State v. Cookman***, 324 Or 19, 28, 920 P2d 1086 (1996) (referring to Indiana Supreme Court's 1822 decision interpreting a provision similar to one adopted in the Oregon Constitution in 1857).[15]

2. OTHER LAWS LIMITING USE OF MONEY IN POLITICAL CAMPAIGNS PREDATE THE OREGON CONSTITUTION.

As pointed out in ***Nickerson v. Mecklem et al.***, 169 Or 270, 278 126 P2d 1095 (1942), the 1908 initiative was adopted "to prevent fraud and insure purity of elections." "People" the court said, "have the right to know--and it is so contemplated by the act--who is spending money and the amount thereof * * *." *Id.* The "evil" that the statute addressed, the court summarized, was concealing the names of election campaign contributors and the amounts that they contributed. *Id.*

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15. ***Cookman*** assumes the Indiana Constitution and decisions were available to the Oregon Constitution's framers and voters in 1857 and 1858. That assumed knowledge of the constitutions of other states is equally valid applied to the constitutions of other states. Recent research by Willamette University professor emeritus Claudia Burton shows that LaFayette Grover owned the 1850 edition of THE AMERICAN'S GUIDE, a compilation of state constitutions which Grover used at the Oregon Constitutional Convention. She believes it likely that Delazon Smith and William Packwood had similar compilations. Thus, we now know that the Oregon delegates had the earlier state constitutions with them at the Constitutional Convention.

> The book, THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE, THE ARTICLES OF CONFEDERATION, THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (1850), is in the collection of the Oregon Historical Society Library. The flyleaf bears the following inscription: "L.F. Grover Philadelphia 1850. This book was used in the constitutional convention of Oregon in 1857. L.F.G."

Claudia Burton, *A Legislative History of the Oregon Constitution of 1857 -- Part II*, 39 WILLAMETTE LAW REVIEW 245, 456 n15 (Spring 2003). The 1850 and earlier editions of THE AMERICAN'S GUIDE are available on Google Books.

at 282, 126 P2d 1095. But both the recognition of the evils, and the demand for reform, have far deeper historical roots.

The forging of a true public in the sense meant by framers of the Constitution was threatened by popular opinion and fleeting majorities inspired by "factions." James Madison warns in FEDERALIST NO. 10 that:

> Men of factious tempers, or local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people.

George Washington criticized both false statements and physical intimidation arising from "faction" in his *Farewell Address*. Faction "agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another, foments occasionally riot and insurrection." "Factions" were interest groups that abandoned the public good for sectarian, even covert, agendas. They played demagogic politics with issues in order to confuse the electorate.

Later reformers attacked the concentration of money in the coffers of such factions (which evolved into well-established political parties), but from the outset the founders condemned contamination of the public will by votes influenced by force, false statements, intrigue, corruption, "or by other means."

The watchword for the foundational thinkers in the American Revolution was "the public," which they understood to mean the collective interest of the citizenry, binding them together in a new nation-state. The public will was to be expressed through suffrage, and that collective will should not be subverted by "impure" votes or elected representatives with conflicts of interest.

Equally repugnant was persuasion of elected representatives by hidden agendas. An informed public and laws to assure free and fair suffrage were the solution. Thus the concepts of campaign regulation and public disclosure are as old as the United States itself. Oregon's Constitutional drafters acknowledged this

tradition in Article II, § 8, by expressly mandating that "[t]he Legislative Assembly shall enact laws to support the privilege of free suffrage * * *" and following 7 other states which had earlier included such a command within their constitutions, as shown in the comparative table prepared for the Opening Briefs in ***Hazell v. Brown***, Oregon Court of Appeals Case No. A137397. Amicus App-9-12.

> [T]he right of suffrage is at the foundation of our government * * *. If this right * * is improperly exercised, it so far tends to endanger the government-- * * * It will corrupt the people, because it will bring corrupt men and corrupt principles into action in the elections; and corrupt measures will be resorted to, as the means of gaining success. And it will corrupt the rulers, because they must resort to corrupt means to obtain and to keep their offices.

Jones, Samuel, TREATISE ON THE RIGHT OF SUFFRAGE, (Otis, Broaders & Co Boston 1842), p. 53.

How reformers sought to protect suffrage from the evils of undue influence and destructive faction evolved over time. The earliest laws restricted candidate expenditures aimed at influencing voters at any time leading up to election day, which "might" incite corrupt behavior. Money expended to "treat" voters to food and liquor, money wagered on election outcomes, and money donated by wealthy corporate interests were all regulated as "indirect" forms of bribery in many states long before the Oregon Constitutional Convention.

This kind of regulation upon office-seekers was joined well before 1857 by laws limiting actual campaign contributions *to* candidates by anyone, without regard to the use of the funds. The conduct of the supporters and "agents" of political figures was also regulated. A brief history of limits on monetary "expression" and "indirect bribery" during the entire election campaign process *and* subsequent conduct of elected lawmakers shows that the colonies and states enacted laws patterned after 17th century British statutes, adopted in the reign of King William III, which limited influence over potential voters during campaigns (note 18 *post*).

In other states, concentrations of wealth and interest in legislation were deemed so suspect that corporate contributions were banned altogether, and state courts uniformly refused to enforce contracts for lobbying as against public policy. These early prohibitions targeted the harm of corrupting the will of the people expressed through suffrage (not just the act of election day balloting) for the entire time period of the campaign. Limits on contributions, and disclosure of the source of campaign funds, followed in the tradition of targeting harmful conduct which infected elections. See pages 17-19, *ante*.

a. EARLY 19TH CENTURY CONTROL OF IMPROPER INFLUENCES ON SUFFRAGE.

Echoing Washington and Madison and long before 1857, state courts upheld restrictions upon conduct and expression that "might," or had a "tendency" to, unduly influence even a single vote. An early New York case stated that wagering (a form of expression or opinion as to the outcome of a future event) on elections was against public policy, because of the underlying harmful effects upon voters: a tendency "to produce clamor, misrepresentation, abuse, discord; the exertion of improper influence; of intrigue, bargain and corruption * * *." ***Rust v. Gott***, *supra*, 9 Cow 169, 18 Am Dec 497 (NY 1828).[16] The temptation of winning sums by bets placed upon election outcomes was deemed an "indirect form of bribery."[17]

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16. [T]he parties interested might be led to exert a corrupt influence upon that board, with a view to produce a fraudulent determination in favor of the candidates bet upon. The result of the state election, closely contested, may depend on a single county canvass, or even that of a single town. Some bearer of votes may, by management, be defeated in his purpose of attending. Thus, even after the poll closed, the evil consequences may be much more extensive than the influence of the single vote of an elector, which is the reason why a bet with him, previous to his vote being given, is void.

Rust v. Gott, *supra*.

17. Louise Overacker, POLITICS AND PEOPLE, THE ORDEAL OF SELF-GOVERNMENT IN AMERICA (1932), p. 291.

In 1699, Virginia limited candidate expenditures deemed improper, distinct from criminal bribery. In 1790 Virginia went further and prohibited legislative candidates from using any "reward" "to promote their election." 1 VA REV CODE 389 (1790).

> The legislature, in the act for regulating elections, (24 Sess ch 10 § 17) evince a disposition to guard them from undue influence, by prohibiting bribery, menace, or any other *corrupt means or device, directly or indirectly*, to influence an elector [1 Rev Stat 149]. They intended that the suffrages of the people should be, as far as possible, free and unbiassed [*sic*].

Lewis v. Few, 5 Johns 1, NY Sup (1809) (emphasis supplied). This statute was noted with approval in ***Barker v. People***, 3 Cow 686, 15 Am Dec 322, (Sup Ct NY 1824).

North Carolina enacted an 1801 statute which banned "treating with either meat or liquor, on any day of election or on any day previous thereto, with intent to influence the election, under the penalty of two hundred dollars."[18] The courts agreed on the essential nature of suffrage and need to curb all undue influences:

> Everything, not merely the proper action, but the very existence, of our institutions, depends on the free and unbiased exercise of the elective franchise; and it is manifest, that whatever has a tendency, in any way, unduly to influence elections, is against public policy. This position we assume, as self-evident.

Bettis v. Reynolds, 12 Ired 344, 34 NC 344, 1851 WL 1199, 1-2 (1851). The ***Bettis*** opinion then condemns any wagering on elections because it leads to the underlying

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18. ***Duke v. Asbee***, 11 Ired 112, 33 NC 112, 1850 WL 1267, *2 (1850), traces North Carolina limits to the "British Statute passed in the 7th of William the 3rd, ch 4th."

> The 23rd sec. forbids *treating* with either meat or liquor, on *any day of election or on any day previous thereto,* with intent to influence the election, under the penalty of two hundred dollars. The 22nd sec. of the act of 1836 is taken from the 11th sec. of the 116th ch of an act passed in 1777, and the 23rd was originally passed in 1801.

"self-evident" harms of "perversion of facts" and "circulating falsehoods." *Id.* Such activities are certainly form of "expression" or "speech," yet they were not protected by mid-19th Century concepts of freedom of speech.

b. BRIBERY AND INDIRECT BRIBERY OF VOTERS AND CANDIDATES LONG PROHIBITED.

Bribery and indirect bribery are pernicious to suffrage by corrupting the "honest" vote of an elector or corrupting the vote of an elected representative.[19] Outright bribery, whether to influence the votes of electors or the votes of lawmakers has long a crime. "Indirect bribery" was a term used on both sides of the Atlantic to describe financial ties meant to influence a vote--whether the vote was cast by an elector or by an elected official casting a vote as a representative. Statutes criminalizing bribery and forcing disclosure of the extent of contributions are directed at conduct which corrupts the elections process directly (improperly influenced vote and distorted outcomes) and indirectly (undermining confidence in the system).

The targeting of these effects has a long history. The British Reform Act of 1835, restricting sums spent by candidates, was aimed specifically at closing loophole that existed for "indirect bribery" by reducing election campaign costs:

> Whereas it is expedient to make further regulations for preventing corrupt practices at elections of members to serve in parliament, and for diminishing the expenses of such elections.[20]

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19. Plaintiffs (p. 7) admit that "examples [of large gifts] raised by defendants are likely already covered by bribery statutes." But Plaintiffs do not even attempt to specify the level at which a gift becomes a bribe. Nor do Plaintiffs in their pleadings or briefing specify the size of gifts and honoraria they wish to make.

20. The 7 & 8 Geo IV is an act specially framed to protect the freedom of elections from the undue influence which a wealthy candidate may acquire over a large body of the poorer class of voters, by engaging them nominally in his service as agents, messengers, or flagmen, but in reality under that pretence purchasing their votes. It is in fact an act passed to

(continued...)

In Great Britain one form of indirect bribery prohibited by the 1835 reforms was the hiring of unnecessary election day "workers."

> The story of a pure election in this ancient city [Gloucester] is quite a hard thing to come at. * * *. The indirect bribery before the Reform Act [1835] was shown in the employment of bands, messengers, clerks and flagbearers, and also in swearing in so many special constables to keep the peace.

Our Eyewitness at Gloucester, ALL THE YEAR ROUND (November 19, 1859).[21]

B. ENTERTAINMENTS, PERSONAL GIFTS AND PRIVATE MEETINGS WITH LEGISLATORS "TO EXPLAIN" BILLS WERE WIDELY CONDEMNED IN MID-19TH CENTURY AMERICA.

1. LEGISLATING BECAUSE OF "PERSONAL OBLIGATIONS OR PRIVATE FRIENDSHIPS" CONFLICTS WITH PUBLIC DUTY.

The correct question for historical analysis is: Was there ever a common law right in America to curry favor or aggrandize one's own personal "political capital" with elected officials by providing gifts, entertainment, and honoraria to public officers and candidates? The answer is "no." These forms of conduct were so disreputable that American courts uniformly found contracts to engage in such personal favors and influence-peddling unenforceable as contrary to public policy.

20.(...continued)

> carry out the full design of the Bribery Act, as is shewn by its preamble: "Whereas it is expedient to make further regulations for preventing corrupt practices at elections of members to serve in parliament, and for diminishing the expenses of such elections."

Jerome William Knapp, Edward Ombler, CASES OF CONTROVERTED ELECTIONS IN THE TWELFTH PARLIAMENT OF THE UNITED KINGDOM (Sweet, Stevens and Maxwell 1837).

21. The "eyewitness" essays by Charles Collins from the magazine were reprinted in 1860 as THE EYE-WITNESS AND HIS EVIDENCE ABOUT MANY WONDERFUL THINGS (Sampson, Low, Son & Co. 1860), where the quotation appeared at p. 101.

In 1837, a New York jury refused to enforce a contract for lobbying. ***Hillyer v. John Travers***, AMERICAN LAW REPORTS, July 1837 (New York Court of Common Pleas). The plaintiff had successfully lobbied the New Jersey legislature to secure passage of a bill favorable to the promoters of the Bergen Port Company; he later sued the directors for payment for his lobbying services. This trial was widely reported in the popular press for its details about lobbying practices. A witness testified:

> [O]ne of the means which the plaintiff used to facilitate the passage of the bill was by treating the members to champagne and suppers, and that he gave a supper on the 22d of February while the bill was pending.[22]

In another commentary on the ***Hillyer*** case, the writer explained:

> Any agreement to use the influence of relations or others, or to use private influence of any sort, would be corrupt, and all agreements of such a kind are consequently void.
>
> The reason for this distinction is manifest. If it was not so, the legislature would be surrounded by men seeking for private objects, which concerned not the public good, but their own private interests only. And members of the legislature would be harassed into giving their votes, on the grounds of personal obligations or private friendship.

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22. Thomas Brothers, THE UNITED STATES OF NORTH AMERICA AS THEY ARE: NOT AS THEY ARE GENERALLY DESCRIBED; BEING A CURE FOR RADICALISM (Longman, Orme, Brown, Green & Longmans, 1840), pp. 88-9.

    According to the *New York American*, July 20, 1838, p. 422:

    > We copy from the Journal of Commerce the report of a trial, wherein the plaintiff was one of those shameless persons known at Albany, and, as it would seem, at Trenton, as members of the Lobby, or of the third House, and who sues for his compensation for "operating" upon members of the legislature.
    >
    > It is the first time, so far as we remember, that an attempt was ever made to enforce, through a court of justice, contracts of such a nature; and we are glad to believe, from the failure of this, that there will be no future attempts and we say this without meaning to applaud or approve the morality of the defence, which, after accepting services, equivocal in their kind, pleads public morality in bar of stipulated payment.

> A legislator selected by the people to discharge a public trust, ought to discharge it independently and honestly: but the legislator who votes from private influence, acts dishonestly and corruptly. And every effort to obtain votes through private influence, is adverse to public policy and legislative purity, and at variance with every sense of propriety.
>
> It is therefore scarcely necessary to observe, that to procure votes by means of suppers, or harassing legislators by making applications to them, is dishonest in the extreme, and that no person can recover compensation for it.[23]

Two themes arose in tandem in the following 50 years. First, many courts, including Oregon's, found lobbying contracts contrary to public policy. Second, the image of "champagne and suppers" as entertainments came to symbolize the false camaraderie and petty corruptions of lobbying in the popular mind, indicating that the real target of lobbying restrictions was the use of gifts and entertainment to create personal bonds which interfered with public duties.[24]

2. THE LAW REFLECTED THE UNDERSTANDING OF PUBLIC POLICY.

Other cases followed ***Hillyer***, illustrating the universal understanding of the times that currying favor through private entertainment or meetings with lawmakers

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23. James Silk Buckingham, AMERICA, HISTORICAL, STATISTIC, AND DESCRIPTIVE: BY J. S. BUCKINGHAM, Vol II, Appendix pp. 559-562 (Fisher, Son & Co., 1841), commenting with approval on the jury verdict.

24. Plaintiffs might argue that laws and policies against lobbying *per se* are not relevant, because the statutes at issue here do not ban lobbying but only limit the bestowal of gifts, entertainment, and honoraria by persons with an economic interest in government decisions. But Plaintiffs themselves, in arguing that the conduct restricted by ORS 244.025 and ORS 244.042 is "political speech, conflate "lobbying" with the restrictions on gifts, entertainment, and honoraria. The statutes at issue do not ban lobbying; they merely restrict certain techniques that lobbyists may wish to use. In ***Fidanque v. State ex rel. Oregon Government Standards and Practices Commission***, 328 Or 1, 8, 969 P2d 376 (1998), the Court states that "Lobbying is political speech." It did not state that giving gifts, entertainment, and honoraria is political speech. ORS 244.025 and ORS 244.042 do not limit the amount of money that can be spent on "lobbying." Instead, they limit amounts that can be spent by anyone with an economic interest (whether or not that person engages in lobbying) on gifts, entertainment, and honoraria for public officials and candidates. It is Plaintiffs who repeatedly equate such giving with "lobbying."

was inherently corrupt, including ***Marshall v. Baltimore & Ohio Railroad Company***, 16 How 314, 57 US 314, 14 LEd 953 (1843) (applying Virginia law). In ***Clippinger v. Hepbaugh***, 5 Watts & Serg 315, 40 AmDec 519, 1843 WL 5037 (Pa 1843), the court refused to enforce a lobbying contract as contrary to public policy:

> It matters not that nothing improper was done, or expected to be done, by the plaintiff. It is enough that such is the tendency of the contract that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive some, that is sufficient to stamp its character with the seal of disapprobation before a judicial tribunal.

This reasoning was later quoted and followed in ***Sweeny v. McLeod***, 15 Or 330, 332, 15 P 275 (1887).

In ***Frost v. Inhabitants of Belmont***, 6 Allen 152, 88 Mass 152, 160 1863 WL 3369, *5 (1863), the Massachusetts Supreme Court noted:

> The business of "lobby members" is not to go fairly and openly before the committees, and present statements, proofs and arguments that the other side has an opportunity to meet and refute, if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be; and to bring illegitimate influences to bear upon them. * * *
>
> The practice of procuring members of the legislature to act under the influence of what they have eaten and drunk at houses of entertainment tends to render those of them who yield to such influences wholly unfit to act in such cases. They are disqualified from acting fairly towards interested parties, or towards the public. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be obtained fairly.

The RESTATEMENT (FIRST) OF CONTRACTS § 559 (1932), *Bargain To Influence Legislation*.[25] offers these illustrations of illegal conduct:

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25. **§ 559. Bargain To Influence Legislation.**

(1) A bargain to influence or to attempt to influence a legislative body or members thereof, otherwise than by presenting facts and arguments to

(continued...)

Illustrations of Subsection (1):

1. A desires to secure the passage of a municipal ordinance by a board of aldermen. He enters into a bargain with B, his attorney, in which B promises to make an argument before the members of the Board at a dinner to be given by A at his club, to which all members of the Board are to be invited. The bargain is illegal. * * *

3. A is interested in promoting the passage of a bill in the Congress of the United States. He agrees with B, an attorney, to pay B for his services in drawing the required bill, and in presenting arguments to A's congressman to induce him to introduce the bill, and to endeavor to get a hearing on it before the Committee to which it will be referred. If it is contemplated that the only influence to be used by B is argument on the merit of the bill, the agreement is legal, but if it is contemplated that solicitation on personal grounds shall be used so far as necessary to secure the desired result, even though the agreement does not in terms so provide, it is illegal whether B does or does not in fact make use of such solicitation.

While the right of a citizen to openly and freely petition the government--including legislators in public fora--was protected in the organizing documents of the colonies, the U. S. Constitution, and the various states' bills of rights, there has never been a constitutional right to advance a legislative agenda through cultivating personal relationships or feelings of indebtedness or in any manner other than appearing at public legislative hearings and making arguments on the merits.

> A person may, without doubt, be employed to conduct an application to the legislature as well as to conduct a suit at law, and may contract for, and receive pay for, his services in preparing and presenting a petition or other documents, in collecting evidence, in making a statement or exposition of facts, or in preparing or making an oral or written argument; provided all these are used, or designed to be used, either before the legislature itself, or some committee thereof, as a body; but **he cannot, with propriety, be employed to exert his personal influence, whether it be great or little, with individual**

25.(...continued)

> show that the desired action is of public advantage, is illegal; and if a method is provided by law for presenting such facts and arguments, a bargain that involves presenting them in any other way is illegal.
>
> (2) A bargain to conceal the identity of a person on whose behalf arguments to influence legislation are made, is illegal.

> **members, or to labor privately in any form with them out of the legislative halls**, in favor of, or against any act or subject of, legislation.

Sweeny v. McLeod, *supra,* 15 Or at 337 (emphasis added).

> [P]ublic policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws or ordinances. This principle applies to common councils or other lawmaking bodies of municipal corporations to the same extent that it does to Congress or the Legislature of a state.

Hyland v. Oregon Hassam Paving Co., 74 Or 1, 11, 144 P 1160, 1163 (1914).

3. THE PUBLIC RAILED AGAINST LOBBYING AND ITS "CHAMPAGNE-SUPPER INTIMACY."

The details of ***Hillyer***, *supra*, with the testimony of the "entertainment" of lawmakers with luxuries such as champagne, came to symbolize in the popular imagination the corrupting conduct of lobbyists. In 1841, a correspondent described "extensive jobbing and treating relative to private bills" before the Pennsylvania Legislature by the agents who, "under the pretence of explaining the subject to the members, flatter then, give them suppers, and open their understandings by means of plentiful libations of wine." He continued that there were legislators:

> who would reject with indignation a money bribe, but who unconsciously fall before personal flatteries and champagne. The technical name for these practices is "lobbying."[26]

Other references were written in the popular vernacular style of pseudonymous correspondence. In 1854, an anonymous writer in a New York magazine lamented, "Lobby-members control, with their champagne-suppers and

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26. *Comb's Notes of the United States*, THE SELECT CIRCULATION LIBRARY OF THE BEST POPULAR LITERATURE (A.W. Waldie Philadelphia 1841), p. 267.

money-bags, alike the State legislatures and the halls of the national Congress."[27] That same year a competing magazine described a lawyer who is "a capital lobby-member, and is frequently at Albany during a session--making a judicious distribution of champagne at dinner."[28] A satirical sketch appeared in 1855:

> I had a suite of rooms at the most frequented and expensive hotel, where I kept open house to all the members, and where they were treated sumptuously to suppers of oysters and champagne. If any one of them wanted a discount, I could generally procure it from the banks, some one of which was always in hot water with, or wanting some favor from, the Legislature; or if another was anxious to get his uncle, brother, or second cousin appointed to some snug office, where there was money passing through his hands, I was the man to get it for him, for a proper consideration.
>
> * * *
>
> For these purposes a purse is usually made up by the disinterested applicants for legislative bounty, which the Lobby Member may dispose of as he pleases, and for which he is not accountable, providing he is only successful in enlightening the Legislature to a proper perception of the public good.[29]

In 1857, a prominent theologian lamented that Congress placed far less "reliance on facts and arguments, than on good dinners and champagne."[30] The criticism then become more direct and specific. When the publishers of WEBSTER'S sought to lobby the Ohio Legislature to direct school libraries to purchase the new

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27. *Popular Amusements*, NEW-YORK QUARTERLY, DEVOTED TO SCIENCE, PHILOSOPHY AND LITERATURE, Vol III:1 (April 1854), (Charles B. Norton, New York 1854), p. 73.

28. Tony Fudge (pseud), *Guelin Versus Quid*, THE KNICKERBOCKER, XVIV:1 (July 1854), p. 277

29. Hon. Ichabod Ragamuffin (pseud.), *Autobiography*, UNITED STATES REVIEW, Vol IV (Lloyd & Campbell, New York 1855), p. 429. Earlier editions were subtitled "A Whig Journal of Politics, Literature, Art and Science."

30. John Henry Hopkins, THE AMERICAN CITIZEN HIS RIGHTS AND DUTIES ACCORDING TO THE SPIRIT OF THE CONSTITUTION OF THE UNITED STATES, (Pudney & Russell New York, 1857), p. 396. He was Chancellor the University of Vermont, first Episcopal Bishop of Vermont, and later became the Presiding Bishop of the Episcopal Church.

edition in 1860, a former state Senator claimed, "[O]ysters and champagne" were deemed "those potent auxiliaries to legislation" for such lobbying.[31] The culture of "champagne-supper intimacy" continued to draw fire in popular publications from named reporters:

> [Lobbyists] make it a point to cultivate a certain kind of intimacy with members, a billiard-room intimacy, a champagne-supper intimacy. They like to be seen on the floor of the House of Representatives, and may go so far as to slap a senatorial carpetbagger on the back.[32]

"[P]romiscuous receptions, promiscuous dinners" with "baskets of champagne" during the Grant years were widely denounced.

> [T]he choicest wines, coming successively to wash down sweet-breads, unseasonable game, rich capons with sauce *Goddard*, and terrapin stewed in Madeira wine.[33]

> The great railway and subsidy rings "lobby" upon a grand scale. Champagne suppers, railway and steamboat excursions, junketing parties of all descriptions, fashionable dissipation, superb dinners at "swell" restaurants, board at the best hotels, costly wines, cigars, and stylish turnouts, are among the many numerous appliances that a powerful lobby always has at its command.[34]

Gifts to family members of public officials were condemned as well: "It is very common for the lobbyists to approach public men through their families. Mrs.

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31. THE OHIO EDUCATIONAL MONTHLY: A JOURNAL OF SCHOOL AND HOME EDUCATION (Ohio State Teachers Association 1860), p. 119 (reporting that a former Ohio legislator turned down an offer to lobby for the publishers of WEBSTER'S QUARTO DICTIONARY for a bill directing the state schools commissioner to purchase that dictionary for school libraries).

32. James Parton, *The Pressure on Congress*, ATLANTIC MONTHLY Vol XXV, February 1870 (Fields, Osgood & Co., Boston), p. 157.

33. George Alfred Townsend, WASHINGTON, OUTSIDE AND INSIDE (James Betts & Co., Hartford 1874), p. 683.

34. G. H. Jenness, *Congressional Papers No. III, The "Third House,"* GRANITE STATE MONTHLY: A NEW HAMPSHIRE MAGAZINE DEVOTED TO LITERATURE, HISTORY, AND STATE PROGRESS, Vol II, (Metcalf, Concord 1879), p. 111.

A. or Mrs. B. will receive magnificent presents from persons who are but little more than casual acquaintances." James Dabney McCabe, BEHIND THE SCENES IN WASHINGTON (Continental Publishing Co. 1873), p. 222.

This popular outrage was aimed at the conduct of lobbyist self-aggrandizement by flattery and treating of legislators with gifts and entertaining. This is consistent with the understanding from early case law that personal considerations and private influences on law-making were forms of indirect bribery, because the real proponents of legislation were hidden from public scrutiny and corrupted a representative government, as discussed at pages 25-26 of this brief.

"Indirect bribery" was a term used on both sides of the Atlantic to describe financial ties meant to influence a vote--whether the vote was cast by an elector or by an elected official casting a vote as a representative. Statutes criminalizing bribery and forcing disclosure of the extent of contributions were directed at conduct which corrupts the elections process directly (improperly influenced vote and distorted outcomes) and indirectly (undermining confidence in the system).

In the States, the term "indirect bribery" referred to hidden influences infecting the legislative process and is understood in the same sense today. During the debates on the revision of the Indiana Constitution in 1850, a delegate stated that officers and directors of railroads should be prohibited from serving the Legislature because their corporate interests amounted to "a form of indirect bribery" upon legislators--a common concern that political party machines, employers, or paid lobbyists would secretly and indirectly influence lawmakers in considering bills.[35]

> But indirect bribery, by promises of promotion, or allowing shares in profitable undertakings, and, above all, intimidation, positive or indirect, I believe to have existed in the largest possible extent. We

35. H. Fowler, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (A.H. Brown 1850), p. 1215.

> may certainly assume that every government officer, or person connected in some way with government, is worth his four or five votes at least which he will direct as he in turn is directed to do by his superiors, or he loses his place.

Francis Lieber, ON CIVIL LIBERTY AND SELF-GOVERNMENT (Lippincott, Philadelphia, 1850), p. 390.

This longstanding antipathy to covert influences led to early "publicity" statutes that required the registration of lobbyists, publicity of committee hearings, and the recording of all votes in committee hearings. Far older is the underlying principle of conducting the public's business in the open, free of personal and private interests that were thought to inherently taint both elections and lawmaking.

VI. THE OREGON CONSTITUTION ITSELF GRANTS THE LEGISLATURE POWER TO PREVENT LOBBYISTS FROM GIVING ANYTHING OF VALUE TO LAWMAKERS.

Against this backdrop, it was commonly believed by the public and the legal conclusion of 19th century jurists that state legislatures had the power to regulate the conduct of their own members as well as the conduct of those seeking to influence them, even without specific state constitutional authority. The authority arose as a "necessary and incidental" power or by a common law of "parliamentary customs and usages."[36] It was also widely accepted that states and federal legislative bodies could ban what we call "lobbying" and make contingent-fee lobbying a crime. *See*, "Bill to protect the people against corrupt and secret influence in matters of legislation" recommended by the Select Committee Appointed to

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36. Thomas M. Cooley, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Little, Brown and Company Boston, 1868), pp. 133-4. Justice Cooley sat on the Michigan Supreme Court and taught law at the University of Michigan, where the law school is named in his honor. ***State v. Ciancanelli***, 339 Or 282, 300-301, 121 P3d 613 (2005), cites this 1868 Treatise, in considering competing legal theories about what constitutes "abuse" of free speech, but does not refer to the discussion of the powers of state legislatures referenced herein.

Investigate Certain Alleged Corrupt Combinations of Members of Congress," 34th Cong, 3d Sess, Report No. 243 (March 3, 1857), Amicus App-4; Wisconsin General Laws C 145 (1858), Amicus App-5-6.

The Wisconsin law, at § 1, states that "no person shall agree to accept or receive * * * any money * * * for aiding or advocating or procuring the passage or defeat of any measure before either house of the Legislative of this State", repeating verbatim the prohibition in the Congressional bill. Compare Amicus App-4 and App-5. Thus, just as the Oregon Constitution was being drafted and voted upon, both the federal government and states including Wisconsin believed that paid lobbying was not protected by freedom of speech and could be banned entirely.

At the time, "lobbying" was widely known as influence purchased through gifts and entertainment and was condemned as being contrary to the conduct of the public's business. In the spirit of combatting secret agreements on legislation, the Oregon Constitution required that legislative votes be public and *viva voce*, Article II, § 15, and prohibited "log-rolling" bills. Article IV, § 20.[37]

The emphasis on conducting the public's business openly was rooted in suspicion of efforts to entertain and cultivate favor with officials distinct from concern with outright bribery and buying legislative votes. Despite Article I, § 8, of the recently adopted Oregon Constitution, the Crimes Against Public Justice Act of

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37. The first paragraph of Article IV, § 20 was adopted in 1857.

> This section of the Constitution was designed to do away with several abuses, among which was the practice of inserting in one bill two or more unrelated provisions so that those favoring one provision could be compelled, in order to secure its adoption, to combine with those favoring another provision, and by this process of logrolling the adoption of both provisions could be accomplished, when neither, if standing alone, could succeed on its own merits.

Lovejoy v. City of Portland, 95 Or 459, 465, 188 P 207, 209 (1920).

1864, § 622, included criminal penalties for "explaining" a measure to an elected representative without disclosing an interest or the interest of one's principal.[38]

> If any person, having any interest in the passage or defeat of any measure before, or which shall come before, either house of the legislative assembly of this state, or if any person being the agent of another so interested, shall converse with, explain to, or in any manner attempt to influence any member of such assembly in relation to such measure, without first truly and completely disclosing to such member his interest therein, or that of the person whom he represents, and his own agency therein, such person, upon conviction thereof, shall be punished by imprisonment in the county jail, not less than three months, nor more than one year, or by fine not less than fifty, nor more than 500 hundred dollars.

Justice Act of 1864, (October 19, § 622), Or Gen Laws (Deady 1872), T II, C V, § 638, later codified at Hill's Code Or, T II, c 5, § 1855.

The Oregon statute is very similar to § 2 of a proposed "Bill to protect the people against corrupt and secret influence in matters of legislation" recommended by the Select Committee Appointed to Investigate Certain Alleged Corrupt Combinations of Members of Congress," 34th Cong, 3d Sess, Report No. 243 (March 3, 1857) (Amicus App-4) and Wisconsin General Laws C 145, § 2 (1858). Amicus App-6.

The early statehood limits on lobbying and campaign regulations cannot be viewed as a sudden and radical revision of the understanding of the law that occurred after the drafting of the Oregon Constitution. It was the expression of the legal and popular understanding of what the Oregon Constitution meant to the drafters and voters. The 1864 restriction upon lobbying, the adoption of particular Articles and phrases in the Oregon Constitution, early state legislation and judicial interpretation through case law, can be traced to the drafting skills and later

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38. An obvious effort to curb the practices described above of "under the pretence of explaining the subject to the members, flatter then, give them suppers, and open their understandings by means of plentiful libations of wine." *Comb's Notes of the United States*, op cit.

decisions of a relatively small group of lawyers who served in the Territorial Legislature, the Constitutional Convention, and on the state and federal bench.

The core group of lawyers who shaped the Territorial codes, were deeply involved in the Constitutional Convention, and then served in or advised the early statehood legislatures was both influential and consistent in their legal thinking. They include 1854 Code Commissioners James Kelly and Reuben Boise and Convention Chair and early state code codifier, Matthew Deady.[39] These foundational thinkers and shapers of Oregon law also include Judge George Williams, who served in the Territorial Legislature, sat on the Territorial Supreme Court and was a delegate to the Convention, and his law partner, Addison Gibbs. Gibbs had served in Territorial Legislature and, as sitting Governor, signed into law statutes to limit lobbying (and election campaign misconduct) in 1864. Lawyer Lafayette Grover had also been a delegate, and as Governor, signed into law additional limits on election misconduct in 1870.

Oregon cases have looked to the later careers of the delegates to Constitutional Convention to discern their intent and understanding of constitutional provisions. ***State v. Finch***, 54 Or 482, 497, 103 P 505, 511 (1909), in upholding the death penalty, stated:

> Among the members of the constitutional convention were Judges Boise, Prim, Shattuck, Kelly, Kelsay, and Wait, all of whom were afterwards members of the Supreme Court of this state, and all of whom, excepting Judge Kelly, performed circuit duty. * * *. Rousseau well observes that "He who made the law knows best how it ought to be interpreted," and this judicial and legislative recognition of the validity of capital punishment by the very men who framed the Constitution ought itself to be sufficient answer to the contention of defendant's counsel.

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39. Matthew Deady, Chair of the Constitutional Convention, had served on the Territorial Oregon Supreme Court (1853-1859) and was appointed a federal judge after Oregon statehood (1859-1893).

There is a strong relationship between contemporaneous construction and Constitutional originalism:

> * * * [C]ontemporaneous construction of a constitutional provision by the legislature, continued and followed, is a safe guide as to its proper interpretation. Such contemporaneous construction affords a strong presumption that it rightly interprets the meaning and intention of the constitutional provision.

State ex rel Gladden v. Lonergan, 201 Or 163, 177-8, 269 P2d 491, 496 (1954) (quoting, with approval, 11 AMJUR, p. 699).

Furthermore, in Oregon, the Legislature has specific Constitutional authority, granted at the same time that Article I, § 8, was adopted, to regulate the conduct of those who appear before it in efforts to influence legislation. The Oregon Constitution provided (and still provides) that the legislative authority of the state shall be vested in a bi-cameral legislative assembly. Article IV, §1. The original Oregon Constitution expressly granted the Legislature the powers: to regulate its own operations; to determine rules of proceeding, Article IV, § 11; to discipline its members, Article IV, § 15; to discipline others "who shall have been guilty of disrespect to the house", Article IV, § 16; and to exercise "all powers necessary for a branch of the legislative department of a free and independant [sic] State." Article IV, § 17. All of these provisions in the 1857 Constitution have analogs in other, earlier state constitutions and seem to be drawn in particular from the 1850 Indiana Constitution.[40]

Regarding these constitutional provisions from the mid-19th Century, the Indiana Supreme Court has upheld the creation of the Indiana Lobby Registration

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40. The Indiana Constitution expressly grants the General Assembly the power to regulate its own operations. The General Assembly the authority to determine rules of proceeding, Ind Const, Article IV, § 10, to discipline members, Ind Const, Article IV, § 14, and to discipline others "who shall have been guilty of disrespect to the house." Ind Const, Article IV, § 15. It also grants each house "all powers necessary for a branch of the legislative department of a free and independent State." Ind Const, Article IV, § 16.

Committee against challenges that the statute went too far in attempting to regulate lobbying. ***Common Cause, Inc. v. State***, 691 NE2d 1358, 1360-1361 (Ind App 1998). The Court adopted special conclusions of law, including: "the General Assembly must be able to regulate lobbyists who come before it, so that it can fulfill its primary duty to represent Indiana citizens." *Id.*

VII. VIRTUALLY EVERY STATE HAS LIMITS ON GIFTS FROM LOBBYISTS, AND 37 OF THEM HAVE PROVISIONS ESSENTIALLY IDENTICAL TO ARTICLE I, § 8, IN THEIR CONSTITUTIONS.

In further support of the argument that there has been a long historical tradition of targeting the conduct of lobbyists, we note that the federal government and every one of the 50 states has limits on the activities of lobbyists, including limits on gifts and entertainment they can bestow upon public officials, including legislators.[41]

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41. 18 U.S.C. § 201(c) imposes fines and up to 2 years in prison for:

> (c) Whoever--
>
> (1) otherwise than as provided by law for the proper discharge of official duty--
>
> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

According to ***United States v. Sawyer***, 85 F3d 713, 737 (1st Cir 1996):

> The government also relies on cases interpreting the similarly worded federal gratuity statute, 18 U.S.C. § 201(c), that indicate that a conviction under that statute does not require a showing that the gratuity was linked to a specific official act. See, e.g., ***United States v. Bustamante***, 45 F.3d 933, 940 (5th Cir.) ("it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office"), cert. denied, 516 U.S. 973, 116 S.Ct. 473, 133 L.Ed.2d 402 (1995); ***United States v. Niederberger***, 580 F.2d 63, 68-69 (3d Cir.), cert. denied, 439 U.S.

(continued...)

> Many states place the greatest restrictions on gifts from lobbyists to legislators. In some states, these restrictions take the form of a general prohibition or gift ban.

National Conference of State Legislatures (NCSL), ETHICS: LEGISLATOR GIFT RESTRICTIONS OVERVIEW (July 2009).[42] In addition, 26 states prohibit honoraria offered in connection with a legislator's official duties.

> Most states address whether state legislators can receive an honorarium. Generally speaking, an honorarium is a payment for a service on which custom or propriety forbids a set price. Such services usually include giving a speech, making an appearance, participating on a panel or writing articles or publications. The U.S. Office of Government Ethics Agency defines the term "honorarium" as a payment or money or anything of value for a "series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government." * * *
>
> States are almost equally divided between prohibiting and allowing honorarium for legislators. Twenty-six states prohibit honorarium if it is offered in connection with a legislator's official duties. Meaning, a legislator could accept honorarium for services performed in relation to their private profession or occupation if unrelated to the legislator's duties as a member of the Legislature.

NCSL, HONORARIUMS (June 2008).[43]

At least 37 states currently have "free speech" clauses either identical to Oregon's or functionally identical, most of which were adopted in the late 1700s and early 1800s, prior to the Oregon Constitutional Convention of 1857.[44] Each of

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41.(...continued)
980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978); ***United States v. Standefer***, 610 F.2d 1076, 1080 (3d Cir.1979) (en banc), aff'd on other grounds, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980).

42. http://www.ncsl.org/?tabid=15316. This site includes a table describing the restrictions in each of the 50 states.

43. http://www.ncsl.org/default.aspx?tabid=15294. This site includes a table describing the restrictions in each of the 50 states.

44. For example, Kentucky (admitted 1792, constitution 1799), Louisiana (admitted 1812, constitution with free expression provision 1848), Alabama (admitted (continued...)

them declares that every person has the right "to speak, write, or print freely on any subject." Some of them use the word "publish" instead of "print," but they are otherwise the same as Oregon's.[45]

Alaska	Iowa	New Mexico
Arizona	Kansas	New York
Arkansas	Kentucky	North Dakota
California	Maine	Ohio
Colorado	Maryland	Oklahoma
Connecticut	Michigan	Pennsylvania
Delaware	Minnesota	South Dakota
Georgia	Missouri	Tennessee
Florida	Montana	Texas
Idaho	Nebraska	Virginia
Illinois	Nevada	Washington
Indiana	New Jersey	Wisconsin
		Wyoming

We are not aware of any reported cases in which the limits or prohibitions on gifts, entertainment, or honoraria in any of these states has been held to be invalid due to the free speech clause (or any other clause) in the state's constitution. Among cases upholding bans on gifts to legislators by lobbyists is ***Florida Ass'n of Professional Lobbyists, Inc. v. Division of Legislative Information Services of Florida Office of Legislative Services***, 535 F3d 1073 (11th Cir 2008).[46]

44.(...continued)
1813, constitution 1819), Florida (constitution 1838, admitted 1845), Indiana (admitted 1816), Illinois (admitted 1818), Missouri (admitted 1820), Ohio (admitted 1803), Michigan (admitted 1837), Texas (constitution 1845), California (constitution 1850), Minnesota (constitution 1858). The constitutions of Connecticut, Delaware, George, Maryland, New York, New Jersey, Pennsylvania, and Virginia were adopted near the time of the 1789 constitutional convention.

45. This list was produced by doing a natural language search in the Westlaw state constitutions database, using the language of Article I, § 8, as the search term.

46. Plaintiffs cite ***U.S. v. Sawyer***, 85 F3d 713, 731 n15 (1st Cir 1996), for the proposition that lobbying is "protected by the First Amendment." In that case, the Court did not rule that any part of Connecticut's laws against giving gifts to legislators was in any way unconstitutional. Further, the footnote referred to endeavors "to develop contacts in the Legislature," not the giving of gifts. Again, Plaintiffs seek to conflate "lobbying" with gift-giving.

(continued...)

As noted above, many states had essentially the same free expression clause at the time of the adoption of the Oregon Constitution, including Kentucky, Mississippi, Connecticut, Alabama, Florida, Texas, Louisiana, and California.

46.(...continued)

> ***Sawyer***, 85 F3d at 731, affirmed that giving gifts to legislators can indeed be penalized.
>
> > At trial, there was evidence that Sawyer intentionally and repeatedly provided legislators with valuable gifts of entertainment for the purpose of obtaining "greater access" to,[15] and of developing a "certain relationship with," legislators. A jury could credit Sawyer's defense that he thought his expenditures were lawful and that they were meant only for goodwill entertaining. Taking the evidence in the light most favorable to the prosecution, however, see ***United States v. Olbres***, 61 F.3d 967, 970 (1st Cir.), cert. denied, 516 U.S. 991, 116 S.Ct. 522, 133 L.Ed.2d 430 (1995), a jury could also rationally infer, beyond a reasonable doubt, that Sawyer intended that his repeated gifts and gratuities would induce legislators to perform official acts to benefit Hancock's interests regardless of, or at the expense of, the public interest. Hence, retrial is not precluded.
>
> The ***Sawyer*** footnote quoted ***U.S. v. Harriss***, 347 US 612, 74 S Ct 8808, 98 LEd 989 (1954), which itself fully upheld the constitutionality of the Federal Regulation of Lobbying Act. However, ***Sawyer*** misquotes ***Harriss***, which did not state that lobbying is protected by the U.S. Constitution. ***Harriss*** does state, 347 US at 625:
>
> > Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent.[16]
> >
> > 16. Similar legislation has been enacted in over twenty states. See Notes, 56 YALE L.J. 304, 313-316, and 47 COL.L.REV. 98, 99-103.

Additionally, before 1858 Vermont,[47] Michigan,[48] Iowa,[49] and New Jersey[50] had in place very close analogs to Oregon's Article I, § 8. As of 2009, all of these states have laws limiting or banning the provision of gifts, entertainment, honoraria, or all three, by lobbyists. NCSL, ETHICS: LEGISLATOR GIFT RESTRICTIONS OVERVIEW (July 2009).[51]

This uniqueness calls into question the accuracy of Plaintiffs' historical analysis, because (1) at least 37 other states have free expression clauses essentially identical to Oregon's, (2) each of those states have laws limiting or banning the provision of gifts, entertainment, honoraria, or all three, by lobbyists, by persons with an economic interest in government action, or by everyone. Many of those states apply originalism or an historical approach to determining the meaning of their state constitutions, similar to that adopted in ***Vannatta v. Keisling*** and ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982). For example, Article I, § 8, of the Oregon Constitution is quite similar to provisions of the Utah Constitution adopted in 1895, which states:

> All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to

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47. (1793 version) Chapter I, § 13: The people have a right to a freedom of speech, and of writing and publishing their sentiments concerning the transactions of government, and therefore the freedoms of the press ought not to be restrained.

48. (1835) Art I, § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right: and no laws shall be passed to restrain or abridge the liberty of speech or the press.

49. (1844) Art II, § 7: Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press.

50. (1844 Constitution) Art I, § 5: Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

51. http://www.ncsl.org/?tabid=15316. This site includes a table describing the restrictions in each of the 50 states.

> worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Utah Constitution, Article 1, § 1. In addition:

> No law shall be passed to abridge or restrain the freedom of speech or of the press.

Utah Constitution, Article 1, § 15. Utah has also adopted the doctrine of constitutional originalism, requiring that the Utah Constitution (specifically its freedom of speech provisions) be interpreted in light of the knowledge and intent of its framers. ***American Bush v. City of South Salt Lake***, 140 P3d 1235 (Utah 2006) (extensive discussion of freedom of speech concepts in the 19th Century). Utah also has limits on gifts to public officers and legislators rather similar to Oregon's. NCSL, ETHICS: LEGISLATOR GIFT RESTRICTIONS OVERVIEW, *supra*. The Utah Public Officers' and Employees' Ethics Act, Utah Code § 67-16-5, makes it a crime for a public officer to receive certain gifts, subject to a $50 occasional gift exception. Amicus App-13. No court in Utah has struck down these limits, despite Utah's freedom of speech provision and its doctrine of constitutional originalism.

VIII. PROVIDING GIFTS AND HONORARIA IS NEVERTHELESS MADE UNLAWFUL BY ORS 260.407, WHICH PLAINTIFFS HAVE NOT CHALLENGED.

Plaintiffs have not challenged any part of ORS 260.407 (reproduced at Amicus App-7-8).[52] That statute outlaws all of the gift and honoraria activities that the Appellants' Opening Brief claims that Plaintiffs wish to undertake, regardless of the constitutional validity of ORS 244.025 and ORS 244.042, unless

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52. This law was enacted in 1995 and was amended somewhat in 1999, as described at page 12 above.

Plaintiffs undertake those activities by means of campaign contributions (as explained at pages 9-13, *ante*). ORS 260.407(2) states (emphasis added):[53]

> Notwithstanding subsection (1) of this section, amounts received as contributions by a candidate for public office that are in excess of any amount necessary to defray campaign expenditures and other funds donated to a holder of public office may not be:
>
> (a) Converted by any person to any personal use other than to defray any expenses incurred in connection with the person's duties as a holder of public office or to repay to a candidate any loan the proceeds of which were used in connection with the candidate's campaign;

ORS 260.407(3) states:

> As used in this section:
>
> (a) "Funds donated" means all funds, including but not limited to gifts, loans, advances, credits or deposits of money that are donated for the purpose of supporting the activities of a holder of public office. "Funds donated" does not mean funds appropriated by the Legislative Assembly or another similar public appropriating body or personal funds of the office holder donated to an account containing only those personal funds.

This statute clearly and unambiguously bans any "other funds donated to a holder of public office" from being "Converted by any person to any personal use other than to defray any expenses incurred in connection with the person's duties as a holder of public office or to repay to a candidate any loan the proceeds of which were used in connection with the candidate's campaign." ORS 260.407(2)(b) and (c) allow certain other uses but only for "Contributions described in this subsection," which means campaign contributions.[54]

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53. The full text of ORS 260.407 is provided at Amicus App-7.

54. In construing statutes, words are to be given their common meanings. ***State v. Cornell/Pinnell***, 304 Or 27, 31, 741 P2d 501 (1987); ***PGE v. Bureau of Labor and Industries (PGE)***, 317 Or 606, 612, 859 P2d 1143 (1993). In interpreting the text, a court considers statutory and judicially developed rules of construction "that bear directly on how to read the text," such as "not to insert what has been omitted, or to omit what has been inserted," and to give words of common usage their plain, natural and ordinary meaning. *Id*. at 611; ORS 174.010.

A gift or honorarium consists is something that is converted to personal use.[55] Thus, gifts and honoraria to public officeholders are banned by ORS 260.407. That is further clarified by ORS 260.407(3), which states:

> "Funds donated" means all funds, including but not limited to gifts, loans, advances, credits or deposits of money that are donated for the purpose of supporting the activities of a holder of public office.

This definition includes all funds which are donated to any public officeholder.

Thus, the gift and honoraria activities Plaintiffs desire to undertake (other than those activities which can be accomplished by means of campaign contributions) will continue to be unlawful, even if ORS 244.025 and ORS 244.042 are invalidated. Plaintiffs will receive no concrete legal benefit from prevailing on the merits of this case. All of the activities they have identified are either allowed anyway, as campaign contributions, or are banned anyway, by ORS 260.407(2). Thus, there is no justiciable controversy here.

> In ***Yancy v. Shatzer***, 337 Or 345, 97 P3d 1161 (2004), this court explained that, under the Oregon Constitution, application of judicial power is limited to the resolution of justiciable controversies. Id. at 349, 97 P3d 1161. A controversy is justiciable when "'there is an actual and substantial controversy between parties having adverse legal interests.'" Id. (quoting ***Brown v. Oregon State Bar***, 293 Or 446, 449, 648 P2d 1289 (1982)). The absence of such a controversy means that a decision from this court in such a case would be moot because it would no longer "'have some practical effect on the rights of the parties to the controversy.'" Id. (quoting ***Brumnett v. PSRB***, 315 Or 402, 405, 848 P2d 1194 (1993)).

Kerr v. Bradbury, 340 Or 241, 244 131 P3d 737 (2006).

Plaintiffs have not identified any activity they wish to engage in that would be affected by a decision in this case. Either the activity they desire is available to them by means of campaign contributions, or it is banned by ORS 260.407(2), which they have not challenged.

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55. Entertainment is also converted to the personal use of being entertained but might not be covered by ORS 260.407, because it does not necessarily consist of "funds" or "gifts."

IX. PLAINTIFFS' CLAIMS OF UNCONSTITUTIONAL DISCRIMINATION DISREGARD STATUTES THAT PLAINTIFFS HAVE NOT CHALLENGED AND RELY UPON ABROGATED AUTHORITY.

The Appellants' Opening Brief (pp. 28-44) consists of argument that the gift and entertainment restrictions "impermissibly discriminate among speakers." Plaintiffs describe activities that ORS 244.025 and ORS 244.042 would prohibit for them but supposedly allow for others, such as environmentalists or non-profit entities receiving less than 5% of their funding from for-profit entities. These claims disregard the existence of ORS 260.407(2), described in the above section of this brief. Plaintiffs (p. 9) are wrong in their assertion that "an environmental group * * * can make unlimited lobbying expenditures (e.e., gifts or entertainment to legislators)."

To the contrary, Plaintiffs are treated with more leniency than environmental groups under Oregon and federal statutes.[56] Both of them are subject to the restrictions in ORS 260.407(2) on any "'funds donated'" * * * for the purpose of supporting the activities of a holder of public office, regardless of ORS 244.025 and ORS 244.042. But, as explained at pages 9-13, *ante*, Plaintiffs can make unlimited campaign contributions to Oregon candidates (including officeholders), with that money used in the same manner as gifts, entertainment, and honoraria.

But non-profit environmental groups cannot make those campaign contributions, due to federal tax laws. Under the Internal Revenue Code, a non-profit entity with a determination under § 501(c)(3) cannot make any campaign contributions to support (or oppose) candidates.

> Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political

> campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.

IRS, THE RESTRICTION OF POLITICAL CAMPAIGN INTERVENTION BY SECTION 501(C)(3) TAX-EXEMPT ORGANIZATIONS (2009)[57] Further, non-profit social welfare organizations under 501(c)(4) must promote social welfare, which according to IRS "does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." U.S. Treasury, 26 C.F.R. § 1.501(c)(4)-1(a)(2).

Plaintiffs (pp. 37-38) rely on ***Service Employees Int'l Union v. Fair Political Practices Comm'n***, 955 F2d 1312 (9th Cir 1992), without noting that the decision, including its discussion of discrimination, was later abrogated by an *en banc* decision of the Ninth Circuit in 2003:

> [Appellant] notes that in 1992, the Ninth Circuit held an annual contribution limit violated the First Amendment, due to disparities in fundraising between incumbents and challengers. See ***Service Employees Int'l Union v. Fair Political Practices Comm'n***, 955 F.2d 1312 (9th Cir.), cert. denied, 505 U.S. 1230, 112 S.Ct. 3056, 120 L.Ed.2d 922 (1992). However, the Ninth Circuit has since recognized that this holding is superceded by ***Beaumont*** and ***Shrink PAC***. ***Montana Right to Life Ass'n v. Eddleman***, 343 F.3d 1085, 1091-92 & n. 2 (9th Cir.2003), cert. denied., 543 U.S. 812, 125 S.Ct. 47, 160 L.Ed.2d 16 (2004), quoting ***Beaumont***, 539 U.S. at 161, 123 S.Ct. 2200, and ***Shrink PAC***, 528 U.S. at 387-88, 397, 120 S.Ct. 897.

Minnesota Citizens Concerned for Life, Inc. v. Kelley, 427 F3d 1106, 1113 (8th Cir 2005). Thus, Plaintiffs rely upon an abrogated decision.

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57. http://www.irs.gov/charities/charitable/article/0,,id=163395,00.html

X. PLAINTIFFS ARE NOT ENTITLED TO CHALLENGE ORS 244.040, AS NONE OF THEM ARE CANDIDATES OR PUBLIC OFFICIALS WHO ARE SUBJECT TO THAT STATUTE.

ORS 244.040 is a statute that restricts actions by public officials. None of the Plaintiffs are public officials, and none are subject to ORS 244.040. Thus, no case or controversy has been presented in this matter as to the validity of ORS 244.040, as Plaintiffs lack the requisite interest.

> [T]hat plaintiff is affected in some manner by the challenged statute does not give it the right to contend for the vindication of anyone's rights but its own. Plaintiff has never contended for its own rights in this case. Even in its post-argument briefing it steadfastly clings to its assertion that it is entitled "to raise the constitutional claims of its members." The declaratory judgment statute affords a person affected by a statute to seek a declaration of that person's own rights under that statute, not the rights of others. See ***Eacret et ux v. Holmes***, 215 Or 121, 125, 333 P2d 741 (1958) ("[t]here is no case for declaratory relief where the 'plaintiff seeks merely to vindicate a public right * * * '" (citations omitted)).

Oregon Taxpayers United PAC v. Keisling, 143 Or App 537, 544-45, 924 P2d 853, *review denied*, 324 Or 488, 930 P2d 852 (1996), *cert denied*, 520 US 1252, 117 S Ct 2410, 138 LEd2d 176 (1997).

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Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing BRIEF OF AMICUS CURIAE SEVEN INDIVIDUAL OREGON ELECTORS by Efile and further that:

1. I SERVED by Efile the parties indicated by "*" and registered with Efile system;

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