IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRED VANNATTA and CENTER TO PROTECT FREE SPEECH, INC. an Oregon Not-For-Profit Corporation, Plaintiffs-Appellants. OREGON GOVERNMENT ETHICS COMMISSION, formerly known as the Oregon Government Standards and Practices Commission; and STATE OF OREGON, Defendants-Respondents.	Marion County Circuit Court No. 07C20464 **CA A140080**

APPELLANTS' OPENING BRIEF

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

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I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought.

This is an action for declaratory relief under ORS 28.020 and injunctive relief. Plaintiffs Fred VanNatta and Center to Protect Free Speech seek a declaration that certain Oregon statutes imposing restrictions on gift, entertainment, and honorarium expenditures to public officials violate their free speech rights (and other constitutional rights) under the Oregon Constitution and the United States Constitution. Specifically, plaintiffs seek a declaration that ORS 244.025(1), (2), (3), and (4) and ORS 244.042 are unconstitutional.[1] Plaintiffs seek an award of attorney fees because they are seeking to vindicate important constitutional rights of Oregon citizens and under 42 USC § 1983.

B. Nature of the Judgment Sought to Be Reviewed.

The trial court granted the summary judgment motion of defendants Oregon Government Ethics Commission and the State of Oregon, denied plaintiffs' motion for summary judgment, and entered a General Judgment as follows:

> "(1) The court declares that §§ 18(1), (2), (3), and (4) and 24(1) and (2) of SB 10 (2007) – now codified at ORS 244.025 and 244.042 – as well as the definition of a "gift" under 244.020(5) (as amended by SB 10) and the definition of a "legislative or administrative interest" under ORS 244.020(8), are valid and enforceable, contrary to plaintiffs' allegations and arguments;
> (2) plaintiffs' complaint is dismissed with prejudice, plaintiffs taking nothing thereby; and

[1] In addition, to the extent that – in the absence of the statutory provisions challenged herein (ORS 244.025(1), (2), (3), and (4) and ORS 244.042) – ORS 244.040 would impose restrictions that are the same as or more stringent than the gift, entertainment, and honorarium restrictions contained in the challenged statutes, plaintiffs further seek a declaration that such restrictions imposed by ORS 244.040 are also unconstitutional.

> (3) defendants may recover their costs and disbursements incurred herein."

ER 25.

C. Statutory Basis for Appellate Jurisdiction.

This Court has jurisdiction over this appeal pursuant to ORS 19.205.

D. Timeliness of Appeal

The trial court entered the General Judgment on September 22, 2008. Plaintiffs filed their notice of appeal on September 25, 2008, within the period prescribed by ORS 19.255.

E. Questions Presented on Appeal.

1. Do the restrictions in ORS 244.025 and 244.042 on gift, entertainment, and honorarium expenditures violate (a) the free speech protections of Article I, section 8, of the Oregon Constitution, or (b) Article I, section 26, of the Oregon Constitution?

2. Do the restrictions in ORS 244.025 on gift and entertainment expenditures impermissibly discriminate between different types of speech and different classifications of speakers and thereby violate Article I, section 8, of the Oregon Constitution or the First Amendment to the United States Constitution?

F. Summary of Argument.

Article I, section 8, of the Oregon Constitution prohibits the Legislative Assembly from adopting laws that restrain the right to speak freely. The Oregon Supreme Court has ruled that lobbying, which includes the act of obtaining the good will of a public official, is free speech that the Legislative Assembly may not restrict. ORS 244.025 and ORS 244.042 restrain core lobbying activities by, among other

things, prohibiting expenditures designed to facilitate dialogue with public officials and expenditures designed to obtain the good will of public officials. The lobbying restrictions in ORS 244.025 and 244.042 are directed at constitutionally protected expression, and not at some forbidden effects of such expression. Under the Article I, section 8, analysis, the restrictions are unconstitutional because they are not wholly confined within a historical exception and the incompatibility exception does not apply.

The gift and entertainment restrictions in ORS 244.025(1), (2), (3) and (4) are also unconstitutional under Article I, section 8, of the Oregon Constitution and under the First Amendment to the United States Constitution, as those restrictions impermissibly discriminate between different types of speech and different classifications of speakers. Specifically, the gift and entertainment restrictions prohibit certain expressive activity by persons with "economic interests" in matters before the public official, but do not restrict the same activities by persons with political interests other than economic interests (or economic interests that are also shared by the general public) in matters before the public official. In addition, the gift and entertainment restrictions also discriminate in favor of governmental entities, organizations of which a public body is a member, and certain not-for-profit corporations receiving less than five percent of funding from for-profit entities (to which the gift and entertainment restrictions do not apply for conventions, fact-finding missions or other meetings at which the public official participates).

Finally, the gift, entertainment and honorarium restrictions violate Article I, section 26, of the Oregon Constitution, in that they impermissibly restrain plaintiffs'

rights to instruct their representatives and apply to the Legislative Assembly for redress of grievances.

G. Summary of Material Facts.

The challenged restrictions were enacted by the Oregon Legislature as part of Senate Bill 10 (2007); the restrictions have since been codified into ORS 244.025 and 244.042. The restrictions imposed by Senate Bill 10 replaced less stringent restrictions. After the passage of Senate Bill 10, ORS 244.025(1), (2) and (3) now prohibit a person with a legislative or administrative interest from offering or giving gifts with an aggregate value of more than $50 per year to a public official or candidate for public office (or the receipt of such gifts by a public official or candidate). ORS 244.025(4) now prohibits a person with a legislative or administrative interest from giving any gifts of entertainment to a public official or candidate for public office. ORS 244.042(1) and (2) prohibit a person from providing honorarium with a value of more than $50 to a public official or candidate for public office in connection with the official duties of the public office.

This matter was decided in the trial court on the parties' cross-motions for summary judgment. Plaintiffs presented the facts summarized below. Plaintiff VanNatta is a registered lobbyist in the State of Oregon. He is registered to lobby on behalf of plaintiff Center to Protect Free Speech and other clients. VanNatta also is a managing member of a limited liability company that owns small woodlands property. The Oregon Legislative Assembly has or is expected to consider legislative proposals that will impact the economic interests of small woodland owners, including plaintiff VanNatta. 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. Because of the recently enacted restrictions in ORS 244.025 and 244.042, plaintiffs and some (but not all) other lobbyists in Oregon are prevented from engaging in the activities described above.

II. ASSIGNMENT OF ERROR

The trial court erred by granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment, and thereafter entering a General Judgment that declared that ORS 244.025 and 244.042 are valid and enforceable and dismissed plaintiffs' complaint with prejudice.

A. Preservation of Error.

Plaintiffs filed a motion for preliminary injunction, seeking to enjoin defendants from enforcing the gift, entertainment and honorarium expenditure restrictions. In a letter opinion dated December 20, 2007, the trial court found that the activities restricted by ORS 244.025 and 244.042 are protected forms of expression under Article I, section 8, of the Oregon Constitution. ER 4. However, the trial court held that the "incompatibility exception" applied and, accordingly, denied plaintiffs' motion for preliminary injunction. ER 5.

On February 22, 2008, plaintiffs filed a motion for summary judgment on all claims. ER 14. Defendants filed a cross-motion for summary judgment on all claims. ER 17. In a letter opinion dated August 26, 2008, the trial court denied plaintiffs' summary judgment motion and granted defendants' motion. ER 19. In its letter opinion, the trial court adhered to its prior determinations on plaintiffs' motion for preliminary injunction and, in addition, ruled in defendants favor on all other claims, including claims by plaintiffs that the challenged restrictions are unconstitutional under Article I, section 8, and the First Amendment because they discriminate among speakers and that the challenged restrictions violate Article I, section 26, of the Oregon Constitution. ER 19-23. Based on the letter opinion, the trial court filed an order on September 19, 2008, granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. ER 24. On September 22, 2008, the trial court entered a General Judgment that included the provisions set forth above on pages 1-2. ER 25.

B. Standard of Review.

The issues raised in this appeal involve questions of law, which are reviewable by this Court for "errors of law" without deference to the trial court's decision. *Oregonians For Sound Econ. Policy, Inc. v. SAIF*, 218 Or App 31, 42, 178 P3d 286 (2008). The trial court's decision was made on the parties' cross-motions for summary judgment. This Court has previously stated:

> "On appeal, plaintiff assigns error both to the entry of summary judgment in favor of defendants and to the denial of plaintiff's cross-motion. Because the parties have stipulated to the facts, the only issues are legal. Accordingly, we review the trial court's entry of summary

> judgment to determine whether the record establishes that defendants were entitled to judgment as a matter of law."

Johnson v. SAIF, 202 Or App 264, 270, 122 P3d 66 (2005), *adh'd to on recons*, 205 Or App 41 (2006), *aff'd*, 343 Or 139 (2007).

III. ARGUMENT

Plaintiffs challenge the constitutionality of the recently enacted restrictions on gifts (ORS 244.025(1), (2)and (3)), entertainment (ORS 244.025(4)) and honoraria (ORS 244.042(1) and (2)). Throughout this brief, these statutory restrictions will be referred to separately as the gift, entertainment and honorarium restrictions, or collectively as the "lobbying restrictions."

If their arguments on appeal follow their arguments in the trial court, the parties will suggest contrasting lenses through which to view the constitutional issues presented in this case. Defendants have previously framed the issue as whether plaintiffs enjoy an affirmative constitutional right to make *unlimited* gift, entertainment, and honorarium expenditures to public officials. Defendants provided imaginative and extreme examples of presumably corrupt and corrupting gifts (including gifts of "new automobiles," "a new home," "vacation homes" and "six-figure cash") as part of an apparent argument that, because such extreme examples should not enjoy constitutional protection, the Oregon Constitution should therefore allow the legislature to enact a $50.00 statutory limit on gifts and honoraria and an outright prohibition on entertainment.

Plaintiffs, on the other hand, argue that the imaginative examples raised by defendants are likely already covered by bribery statutes and, in any event, are entirely irrelevant to the legal issues presented in this case, since the constitutionality

of a statutory restriction on expression hinges on whether it impermissibly restrains constitutional activity and not on whether it might also conceivably restrain some other activity that is not protected. That is, the free expression guarantees do not allow the legislature to proscribe broad categories of speech (***e.g.***, all statements made in the presence of a large crowd of people) simply because such laws might conceivably reach some activities that enjoy little or no constitutional protection (***e.g.***, shouts of "fire" or comments intended to incite violence). Instead, the focus in this case properly belongs on the expressive activities that are prohibited by the lobbying restrictions and whether such restrictions run afoul of the applicable constitutional protections. Examples of these lobbying activities include the following that were highlighted in the trial court arguments:

> - An expenditure of $51.00 by a coalition of farmers to pay for a legislator's travel expenses to a drought-stricken part of the state for the purpose of ascertaining the need for certain public works projects.
> - 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.
> - A $15 ticket to a college theatre production given by a private college (which has other matters before the legislature) to a legislator who has been supportive of higher education to witness private college participation in the arts.

Plaintiffs submit that, for the reasons discussed herein, the lobbying restrictions cannot withstand scrutiny under Article I, section 8.

In addition, the gift and entertainment restrictions also impair protected expression in a discriminatory manner by restraining some types of speech but not

others. For example, the restrictions only apply to those with "legislative or administrative interests," defined as "an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official." ORS 244.020(8). Thus, an environmental group advocating the passage of a bill (but with no "economic interest" therein) can make unlimited lobbying expenditures (*e.g.*, gifts or entertainment to legislators) and thereby speak to an unlimited extent, but the industry group that would be subject to regulation may not provide any gift in excess of $50 or any entertainment. Similarly, a person (such as plaintiff VanNatta) lobbying the legislature for a $10 reduction in an industry specific licensing fee would be subject to the lobbying restrictions, but a person seeking a general tax rate reduction (which might substantially reduce her own income taxes) would not be subject to such restrictions on her right of expression.

Also, as noted above, the gift and entertainment restrictions have different applications depending on who the speaker is. For instance, a non-profit corporation receiving less than 5% of its funding from for-profit entities is not subject to the gift and entertainment restrictions when paying expenses for a public official's attendance at a convention or fact-finding mission (*see* ORS 244.020(5)(b)(F)), while a for-profit corporation and a non-profit corporation receiving 6% of its funding from for-profit corporations would be subject to the restrictions on these forms of political expression.

While plaintiffs disagree with the trial court's ultimate decision and appeal therefrom, plaintiffs do agree with some of the intermediate portions of the trial

court's analysis. Mostly notably, the trial court correctly held that the lobbying restrictions involve protected expression under Article I, section 8. Moreover, while plaintiffs challenge the trial court's determination that the "incompatibility exception" applies and therefore the lobbying restrictions are constitutional, plaintiffs agree with the trial court's (perhaps implicit) finding that the lobbying restrictions are "category one" laws under the framework set out by the Oregon Supreme Court in ***State v. Robertson***, 293 Or 402, 649 P2d 569 (1982).[2]

Plaintiffs take issue with the remainder of the trial court's analysis. In assessing plaintiffs' claims that the restrictions unconstitutionally discriminate against different types of speech and different classes of speakers, the trial court erred in finding that the restrictions, in this context, were category two laws and that the restrictions regulate in a "content neutral manner" and are therefore constitutionally permissible. ER 21. Finally, the trial court erred in ruling against plaintiffs' challenge under Article I, section 26, which the trial court apparently rejected because the text of that constitutional provision does not ***specifically*** address gift, entertainment, and honorarium expenditures to public officials. ER 22-23.

A. The Lobbying Restrictions Are Impermissible Infringements on Free Speech.

Article I, section 8, of the Oregon Constitution provides:

> "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."

In ***Robertson***, the Oregon Supreme Court established a basic framework for

[2] As discussed herein, the "incompatibility exception" only applies to category one laws under the ***Robertson*** analysis.

determining whether a law violates Article I, section 8. Laws that restrain protected expression are grouped into three categories. As a threshold matter, laws that focus on the speech itself are distinguished from those focusing on forbidden results. Laws of the first type, ones "written in terms directed to * * * any 'subject' of communication,"[3] are category one laws. With two exceptions, these "category one" laws violate Article I, section 8. First is the historical exception, which applies where the "scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. Second is the incompatibility exception, which applies where the proscribed speech is incompatible with a public servant's "official function." *In re Schenck*, 318 Or 402, 430, 870 P2d 185 (1994).

Laws that address forbidden results are further separated into two additional categories. One category includes laws focusing "on forbidden effects, but [which] expressly prohibit[] expression used to achieve those effects." *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992). These "category two" laws are analyzed for overbreadth. *Id.* The last category "also focuses on forbidden effects, but without referring to expression at all." *Id.* These "category three" laws are vulnerable only to an as-applied challenge. *Id.*

As will be shown, the activities restrained by the lobbying restrictions constitute protected expression, thus triggering the Article I, section 8, analysis. The lobbying restrictions are category one laws, as they focus on the protected speech

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[3] *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992)(quoting *Robertson*).

itself and not on any forbidden effect. Neither the historical exception nor the incompatibility exception is applicable. The lobbying restrictions are, therefore, unconstitutional under Article I, section 8.

1. As the trial court correctly concluded, the conduct regulated by the lobbying restrictions constitutes protected expression.

In its opinion on the parties' summary judgment motions, the trial court adopted and restated its prior determination that the "lobbying expenditures" limited by the lobbying restrictions "are forms of constitutionally protected expression." ER 19. The trial court was correct in this determination.

Oregon law defines "lobbying" as:

> "influencing, or attempting to influence, legislative action through oral or written communication with legislative officials; solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials."

ORS 171.725(7). The restrictions on gift and entertainment expenditures to members of the Legislative Assembly restrain activities that are clearly designed to attempt to influence legislative action or, at a minimum, to attempt to "obtain the good will" of a legislative official. Indeed, the gift and entertainment restrictions only apply where the expenditures are made by persons with a "legislative or administrative interest." ORS 244.025(1), (2), (3), and (4). That is, these expenditures are only restricted if there is some *political advocacy* associated with the expenditure. A gift that has no connection to legislative activity (***e.g.***, a gift given by a public official's friend who does not have a "legislative or administrative interest") is not covered by the lobbying restrictions.

Oregon courts have previously stated that lobbying is protected expression under Article I, section 8. *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or 1, 8, 969 P2d 376 (1998). In *Fidanque*, the Oregon Supreme Court struck down a $50 lobbyist registration fee under Article I, section 8. The court stated, "Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects." *Id.* at 7. The court noted that obtaining the good will of legislative officials is "bound up closely with the essentially expressive nature of the profession" and held that "[l]obbying is expression [ ] for the purposes of the first *Robertson* category." *Id.* at 8.

There can be little doubt that the activities restricted by ORS 244.025 involve "lobbying." For example, a $51 expenditure by plaintiff VanNatta to fund a fact-finding mission so that legislators can directly observe the impact that legislative proposals would have on small woodlands in Oregon is, without question, a form of lobbying. Such activity would not only constitute a direct exchange of information between lobbyist and legislator, it would also constitute the type of goodwill building activity referenced in *Fidanque*. Efforts by plaintiff VanNatta and others to establish themselves as a reliable information sources to legislators constitute core lobbying activity.[4]

Moreover, there is a strong connection between gift, entertainment, and honorarium expenditures to members of the legislature and political campaign

[4] Other courts have reached the same conclusion. For example, in *U.S. v. Sawyer*, 85 F3d 713 (1st Cir 1996), the First Circuit addressed a lobbyist's alleged violations of a similar Massachusetts gift statute. The court said that endeavors by a lobbyist to develop contacts with legislators, including goodwill entertaining with the goal of persuading and influencing legislators to benefit certain interests, are protected by the First Amendment. 85 F3d at 731.

contributions, which have already been determined to be protected expression under Article I, section 8. *See Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). Both lobbying expenditures and campaign contributions are expressions of support made for political reasons. In *Vannatta*, the court concluded that "many – probably most –" contributions to political campaigns and candidates are a form of expression under Article I, section 8. 324 Or. at 522. The court stated that political contributions are:

> "Protected ***as an expression by the contributor***[.] [T]he contribution, in and of itself, is ***the contributor's expression of support for the candidate or cause*** – an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put."

324 Or at 522 (emphasis in original).

Plaintiffs do not contend that Article I, section 8, prevents the legislature from prohibiting ***any*** gifts to legislators. As noted by the *Vannatta* court, the legislature "may prohibit certain forms of contributions such as giving bribes." 324 Or at 524. Further, after stating that "many – probably most –" contributions to political campaigns and candidates are a form of expression under Article I, section 8, the court stated:

> "We qualify our statement with the limiting word, 'many,' because there doubtless are ways of supplying things of value to political campaigns or candidates that would have no expressive content or that would be in a form or from a source that the legislature otherwise would be entitled to regulate or prevent. To give but a few examples: A bribe may be an expression of support (with an anticipated ***quid pro quo***), but it is not protected expression; a gift of money to a candidate from a corporation or union treasury may be expression but, if it is made in violation of neutral laws regulating the fiscal operation of corporations or unions, it is not protected; a donation of something of

> value to a friend who later, and unexpectedly, uses that thing of value to support the friend's political campaign is not expression."

Id. at 522, n 10.

The lobbying restrictions, however, are certainly not targeted only at expenditures that have no expressive content or only at expenditures that flow from transactions that may otherwise be regulated. Instead, the restrictions cover ***all*** expenditures by persons with a legislative or administrative interest. The lobbying restrictions limit both those (at least theoretical) gifts, such as bribes, that do not involve protected expression and also those core lobbying expenditures (such as travel expenses, business meals and associated entertainment) that involve a political message and that are protected expression.

Defendants argued below that the lobbying restrictions do not involve expression because there "is no particularized message inherent or even common in the making of a gift." Rec. 31. The Oregon Supreme Court has already rejected a remarkably similar argument in the context of campaign contributions: "Neither do we perceive any useful constitutional purpose to be served by purporting to gauge whether contributions constitute 'general,' rather than 'specific' or 'particularized,' support for a candidate or measure." *Vannatta*, 324 Or at 522. Moreover, there is no constitutional distinction between the degree of expressive content inherent in a lobbying expenditure and in a campaign contribution.[5] If anything, the lobbying

[5] In fact, the state has previously argued to the Oregon Supreme Curt that there is no discernible constitutional difference between campaign contributions and gifts to public officials. In its brief in *Vannatta v. Keisling*, the state argued:

> The assumption that giving a gift of money to a candidate is protected expression necessarily implicates laws governing

expenditure examples referenced above[6] contain even greater expressive content than a standard campaign contribution. In the case of a campaign contribution, a check is written to the candidate's campaign committee, which uses the money for a host of campaign activities, including general overhead expenses. As noted in *Vannatta*, however, it is the mere act of contributing that constitutes the expression, irrespective of the use the monies are later put to by the candidate. Thus, the mere undifferentiated support that inheres in a campaign check is constitutionally protected expression. The fact-finding missions (and other examples previously provided) not only signify some measure of "support" for the public official's function, but go much further and actually involve a flow of information and advocacy (and the accumulation of goodwill as a reliable information source) between the lobbyist and public official.

> government standards and practices. When a gift becomes speech because it is a "general expression of support," it is impossible to find a meaningful distinction between a gift of money to the candidate (who may, after all, be running for re-election) and a gift of money to an elected official. The level at which the court analyzes campaign contributions therefore implicates, for example: ORS 244.040(5), which prohibits the offer of a gift with a value in excess of $100 to an official; ORS 244.040(2), which prohibits accepting such a gift; ORS 244.040(1)(b) and (c) governing honoraria to public officials; and ORS 244.045, which limits the employment and lobbying activities of former public officials.

Respondent's brief, pg. 30, n. 31.

[6] The expenditure examples referenced previously are a $51 expenditure on travel expenses for a fact-finding mission for a legislator to obtain first-hand knowledge on a legislative matter, a $15 expenditure for a legislator to watch a theater production by a private college to observe the college's contributions to the arts, and a payment of a $100 honorarium for a legislator to prepare, research, travel and give a speech to an association.

Moreover, it is difficult to understand just how, for example, a fact-finding mission could be said to lack any "particularized message." If plaintiff VanNatta were to expend $51 for a fact-finding mission to advocate for or against certain legislation relating to small woodlands, the message is certainly no less substantive than other forms of political expression.

Defendants acknowledged that "picking up a dinner check" may "facilitate" lobbying, but argued in the trial court that it is not in itself lobbying because the gift is not an attempt to say anything. Rec. 31. However, the very statutory definition of "lobbying" specifically includes "attempting to obtain the goodwill of legislative officials." ORS 171.725(8). *See also Fidanque*, 328 Or at 8. Moreover, even as defendants contend in this case that the gift and entertainment expenditures restricted by ORS 244.025 are not "lobbying," defendants' official forms directly contradict this position. For instance, defendants' "Lobbyist Quarterly Expenditure Report" form instructs registered lobbyists as follows: "List the total amount of all moneys expended for food, refreshments and entertainment *for the purpose of lobbying*." App. 1. This reporting form, which was last revised in March 2008, further requires lobbyists to state, under penalty of false affirmation, that the listed food, refreshments, and entertainment expenditures constitute all moneys expended by the signatory "for the purpose of lobbying." *Id.*

For all these reasons, the trial court was correct in finding that the activities restrained by the lobbying restrictions are protected expression under Article I, section 8.

2. The lobbying restrictions are category one laws under *Robertson* because they are directed at the subject of political speech, not at a claimed forbidden effect.

In considering a challenge under Article I, section 8, Oregon courts first determine whether the challenged provision is written in "terms that are directed to the substance of an opinion or subject of communication" or whether it instead "is written in terms that are directed at a harm that may be proscribed." *Vannatta*, 324 Or at 784. In *State v. Rich*, 218 Or App 642, 180 P3d 744 (2008), this Court recently provided a helpful summary of the three categories under the *Robertson* framework:

> Category One: "laws that explicitly and in terms prohibit speech itself, regardless of whether the speech causes or is an attempt to cause harm[.]" *Id.* at 646. An example is a statute prohibiting obscenity. *Id.*
>
> Category Two: "laws that prohibit the accomplishment of, or attempt to accomplish, harm and specify that one way that the harm might be caused is by speech[.]" *Id.* An example is a "statute prohibiting one person from using a verbal threat to coerce another into doing something she does not want to do." *Id.*
>
> Category Three: "laws that, without reference to or specification of speech, prohibit the accomplishment of, or attempt to accomplish, harm that, in some circumstances, could be caused by speech." *Id.* An example is a "trespass statute that, although it does not mention expressive activity, could be enforced against political protestors engaging in political expression." *Id.*

The lobbying restrictions directly prohibit certain persons (those with legislative or administrative interests) from engaging in certain forms of constitutionally protected speech. For the restrictions to be category two or three laws, the laws must instead be focused directly on "forbidden effects." *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994). That is, to be a category two

or three law the statute must be written such that the restriction can only apply when the harms are shown to exist. *See, e.g., City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988)(finding that zoning ordinance was directed at expression, not harm, where harms did not have to be shown for the zoning ordinance to be applied).

The policy underpinnings for the lobbying restrictions are not clear from the statutory text (or from any other provision in ORS Chapter 244). Defendants maintained below that the perceived harms sought to be addressed by the lobbying restrictions are corruption and the appearance thereof. It should first be noted that corruption in the form of bribery is already prohibited by statute[7] and the nebulous "appearance of corruption" rationale has been criticized by the *VanNatta* court. 324 Or at 538-539 (concluding that the freedom of expression "cannot be limited whenever it may be said that elimination of a particular form of expression might make the electorate feel more optimistic about the integrity of the political process").

However, even if the bribery harm was not elsewhere addressed and even if the "appearance of corruption" harm was both sufficiently clear and legally permissible, the lobbying restrictions are clearly not directed at such harms under the *Robertson* framework. For the lobbying restrictions to apply, there need only be a gift or honorarium expenditure that is in excess of $50, or an entertainment expenditure of any amount. The lobbying restrictions do not contain as an additional element that the purported harm must also be present. That is, any lobbying activity that involves, for example, a payment of $51 for transportation expenses, or $1 in entertainment, is prohibited by ORS 244.025 without any showing that it actually causes corruption or

[7] *See* ORS 162.015 and 162.025.

the appearance thereof.[8] For all such lobbying restrictions, an expenditure above the stated amount is, by itself, sufficient to constitute a violation, without any showing that some forbidden harm actually occurred in each such instance.

Because the lobbying restrictions are category one laws, they are invalid, unless they fit "within an historical exception or can be justified under the 'incompatibility' exception to Article I, section 8." *Vannatta*, 324 Or at 784.

3. The historical exception does not apply.

Under the historical exception, a category one law may withstand Article I, section 8, scrutiny if it is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. Under the *Robertson* framework, the "party opposing a claim of constitutional privilege has the burden of demonstrating that a restriction on speech falls within an historical exception." *Moser v. Frohnmayer*, 315 Or 372, 376, 845 P2d 1284 (1993)(quoting *State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987)). "This is a heavy burden." *Id.*

Defendants have advanced no serious argument that the lobbying restrictions

[8] Both the lack of any identifiable "harms" in the statute and the mechanical way in which the statute is to be applied produce absurd results. Because the prohibitions and limits only apply to those with "legislative or administrative interests" (defined as "an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official"), an environmental group (with no economic interest) can make such expenditures and therefore speak to an unlimited extent, but the industry group subject to regulation may not. If corruption is the harm to which the legislation is directed, it makes no sense to permit lobbying expenditures in any amount from environmental groups, yet proscribe, ***e.g.***, $51 meals by the industry opposing the regulation sought by the environmental group.

trigger the historical exception. Despite the "heavy burden" imposed on them, defendants presented their historical exception argument in the trial court only by way of footnote, in which they argued that the existence of bribery statutes at the time of the adoption of the Oregon Constitution means that there must "surely [be] a point when the size of a gift and its circumstances render it 'corrupt' even without actual proof of a *quid pro quo* understanding." Rec. 12. Again turning the constitutional analysis on its head, defendants concluded that the absence of lobbying expenditure limitations would "likely have been foreign to the framers of Oregon's constitution." *Id.* This entirely misses the mark.

The court in *Vannatta* readily disposed of the historical exception argument with respect to campaign contribution limitations. "At the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions." 324 Or at 538. Similarly, defendants in this case have not met their burden of showing that there was some "established tradition" at the time the Oregon Constitution was adopted to restrict lobbying expenditures.[9] The existence of bribery statutes merely indicates an historical exception for bribery. 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.

Moreover, to satisfy the historical exception, the restrictions on speech must be

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[9] While defendants made no attempt to establish the existence of some historical exception, plaintiffs pointed the trial court to the diaries of Judge Mathew Deady, which illustrated that meals, transportation, and other things of value were commonly furnished by interested persons to public officials around the time the Oregon Constitution was adopted. Tr. 11-14.

"wholly confined" within the historical exception. *Robertson*, 293 Or at 412. Even if some portion of the conduct proscribed by the lobbying restrictions (*e.g.*, a *quid pro quo* payment to a public official) might find some kindred historical prohibition (on bribery), defendants still must show that all other expression proscribed by the lobbying restrictions was likewise prohibited at the time of statehood. The suggestion that the lobbying restrictions can survive simply because of the assertion that the absence of these lobbying restrictions "would likely have been foreign" to the framers is inconsistent with the sweeping terms of Article I, section 8, and the Oregon Supreme Court's interpretations thereof. The court's analysis in Article I, section 8, cases has not hinged on (or even considered) whether the Victorian-era adopters of the Oregon Constitution would have disapproved of, for example, nude dancing (*City of Nyssa v. Dufloth*, 339 Or 330, 121 P2d 639 (2005)), adult businesses (*Tidyman*), or live public sex shows (*State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005)). The appropriate analysis is instead whether, at the time of the Oregon Constitution, such forms of expression were specifically restricted (and, if so, whether the current restriction are "wholly confined" within such historical restrictions). Defendants did not and cannot make the requisite showing.

4. The incompatibility exception does not apply.

Under the "incompatibility exception," expression that would otherwise be constitutionally protected may be restrained if it is shown to be incompatible with the performance of a public official's special role or function. *See, e.g.*, *In re Lasswell*, 296 Or 121, 673 P2d 855 (1983) and *In re Fadeley*, 310 Or 548, 802 P2d 31 (1990). This incompatibility exception has rarely been invoked. Courts have only used the

exception to validate speech restrictions in three cases, one involving the ***solicitation*** (not receipt) of campaign contributions by judges (***Fadeley)***, one involving prejudicial statements by a prosecutor about pending criminal proceedings (***Lasswell***), and one involving published statements by a judge about pending cases and litigants (***In re Schenck***, 318 Or 402, 870 P2d 185 (1994)).

In its ruling on plaintiffs' motion for preliminary injunction, the trial court held that "the giving of ***unlimited gifts*** to public officials and candidates is incompatible with their official duties" and, therefore, the lobbying restrictions do not run afoul of Article I, section 8. ER 5 (emphasis added). The trial court expressly adopted this ruling in its opinion on the parties' summary judgment motions. ER 19. In finding that the incompatibility exception applied, the trial court erred as a matter of law.

The trial court's decision was likely shaped by defendants' arguments that the lobbying restrictions were necessary to protect against certain examples of outrageous gifts (cars, houses, etc). That is, the trial court likely believed that "unlimited gifts" might, in some cases, be incompatible with a public official's function. However, as will be shown below, for the incompatibility exception to apply, the state must show that it would be incompatible for a public official to receive any lobbying expenditures prohibited by ORS 244.025 and 244.042. That is, the incompatibility exception can only apply if it is shown by defendants that it is ***always*** incompatible for a legislator to accept even the examples cited above (on page 8) or, in monetary terms, any gift or honorarium of $51 and any entertainment of $1. As such expenditures are not, in all cases, incompatible with the public official's function, the exception does not apply and the lobbying restrictions cannot survive scrutiny under

Article I, section 8.

The Oregon Supreme Court has analyzed the incompatibility exception in two types of cases. In one type of case, a party subject to professional disciplinary proceedings has challenged the regulation at issue (***e.g.***, the attorney disciplinary rules in ***Lasswell*** or the Code of Judicial Conduct in ***Fadeley***). In such cases, the court has stated that the incompatibility exception applies where the expression at issue in the particular case is "highly likely" to vitiate the performance of an official function. *See Lasswell*, 296 Or at 126. The Oregon Supreme Court has also interpreted the incompatibility exception in a case like the present one, in which a party brings a facial challenge to statutory restrictions on expression. *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). In that case, the court stated that, for the incompatibility exception to apply, the regulated expression in question must be incompatible "in all cases." *Id.* at 541 ("it cannot be contended that the expression in question (contributions) actually impairs performance of, ***e.g.***, legislative functions in all cases").

In *Vannatta*, the court rejected arguments that are substantially similar to those advanced by defendants in this action. The court in *Vannatta* held that campaign contribution limitations were unconstitutional under Article I, section 8, despite the state's claims that "unlimited" contributions would lead to corruption and the appearance of corruption. The Oregon Supreme Court declared that such arguments were "not well taken":

> "[A]n underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who

> are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions."

324 Or at 541. This is the best indication of how the Oregon Supreme Court would dispose of defendants' arguments that the "appearance of corruption" rationale justifies the lobbying restrictions. Defendants have neither established, nor cited to any persuasive authority, that the expenditures prohibited by the lobbying restrictions would be incompatible with a legislator's official duties in all cases.

This distinction between incompatibility in all cases and incompatibility in some conceivable situation is a significant one. A prohibition on a judge's ***receipt*** of campaign contributions (whether or not they were solicited by the judge) would not have been permissible under the ***Fadeley*** analysis, even though such a restriction would have included some "incompatible" conduct. A prohibition on all public statements by a prosecutor (whether or not the prosecutor knows or should know them to be prejudicial to a pending case) would not have survived scrutiny under ***Lasswell***, even though it would also have included some "incompatible" conduct. In both cases, the prohibited conduct (soliciting contributions in ***Fadeley*** and making likely prejudicial statements in ***Lasswell***) must "always" be incompatible for the exception to apply.

The lobbying restrictions prohibit countless expressive activities that are in no way "incompatible" with a legislator's functions. There has been no showing, nor can

defendants now show, that every receipt by every public official of any expenditure over $50 (or any entertainment) is, in every instance, incompatible with the public official's performance. Indeed, as illustrated by the examples above, the receipt of such lobbying expenditures in many cases actually ***furthers*** a public official's performance (***e.g.***, acquiring information on matters before the public official, disseminating information to constituents, etc.). It would belie reality to suggest that participation in a fact-finding mission organized by Mr. VanNatta to observe small woodland operations would be incompatible with a legislator's function. Rather, participation in such an activity would go to the very core function of a legislator considering legislation on that subject.

In addition, the recent passage of Senate Bill 10 means that certain lobbying expenditures that were permissible during the 2007 legislative session (***e.g.***, $51 for travel expenditures or for honorarium, or $1 of entertainment) are now suddenly impermissible. Defendants have not demonstrated any dramatic change in social conditions (or some very recent change in the value of money) to now make the receipt of these lobbying expenditures suddenly "incompatible."

Moreover, the incompatibility exception has never been extended to legislators and there is nothing in ***Fadeley*** or the other incompatibility cases (all of which applied to judicial officers) that suggests it should be. Legislative office is inherently more political than judicial office and legislative processes are entirely different than judicial processes. Justice Unis, in his dissent in ***Fadeley***, discussed some of the significant differences between judicial and non-judicial elected offices:

> "I recognize that a state need not treat candidates for judicial office the same as candidates for other elective offices. A judicial office is different in key respects from other elective offices. The state may, subject to constitutional constraints, regulate the conduct of its judges with the differences in mind.
>
> > For example the contours of the judicial function make inappropriate the same kind of particularized pledges of conduct in office that are the very stuff of campaigns for most non-judicial offices. A candidate for the mayoralty can and often should announce his determination to effect some program, to reach a particular result on some question of city policy, or to advance the interests of a particular group. It is expected that his decisions in office may be predetermined by campaign commitment. Not so the candidate for judicial office. He [or she] cannot, consistent with the proper exercise of his [or her] judicial powers, bind himself [or herself] to decide particular cases in order to achieve a given programmatic result. Moreover, the judge acts on individual cases and not broad programs.
>
> *Morial v. Judiciary Com'n of State of Louisiana*, 565 F.2d 295, 305 (5th Cir 1977), cert. denied 435 U.S. 1013, 98 S. Ct. 1887, 56 L.Ed.2d 395 (1978). A state may require candidates for judicial office to maintain a higher standard of conduct than can be expected in other types of elective contests. Judges and lawyers are members of a responsible profession, and their adherence to their profession's ethical standards may require abstention from what, in other circumstances, would be constitutionally protected behavior. *See, e.g., In re Lasswell*[.]"

310 Or at 589-90.

The trial court's "incompatibility exception" ruling suffers additional shortcomings and inconsistencies. For instance, ORS 244.025 does not completely prohibit ***all*** gifts, so gifts themselves are apparently not inherently incompatible. Instead, an arbitrary line has been drawn to demarcate "compatible" gifts of $50 and

"incompatible" gifts of $51. Moreover, as noted above, certain persons lobbying the legislature without an actual "economic" interest can give to a legislator unlimited gifts (even the egregious gift examples previously cited by defendants, including new cars and vacation houses) and such unlimited gifts would evidently be "compatible" with the legislator's function, while a $51 gift from a person with an economic interest would somehow be "incompatible." Each of these absurdities reveals the problems inherent in defendants' incompatibility arguments, as well as the danger inherent in any Article I, section 8, inquiry that is improperly focused on only the most unsavory speech prohibited by a law and not the most innocuous (and, indeed, salutary) speech that would also be restrained under the law.

In sum, the incompatibility exception does not apply to save the lobbying restrictions in ORS 244.025 and 244.042, because the gift, entertainment and honorarium expenditures restricted by those statutes are not incompatible with the proper performance of a legislator's duties. Thus, under the ***Robertson*** framework for challenges under Article I, section 8, the lobbying restrictions should be declared unconstitutional.

B. The gift and entertainment restrictions impermissibly discriminate among speakers and, therefore, are unconstitutional under Article I, section 8, and the First Amendment.

As shown above, the gift and entertainment restrictions do not apply evenhandedly. That is, ORS 244.025 restricts the expression by plaintiffs and others similarly situated, but other persons lobbying the legislature are allowed to make unlimited gift and entertainment expenditures. These persons enjoying unfettered speech rights include persons without a defined "economic interest" and (for limited

types of expenditures) certain non-profit organizations that receive less than 5% of their funding from for-profit organizations. Neither the state constitution nor the federal constitution allows the state to engage in such disparate treatment of speakers, particularly speakers engaged in core political speech.

1. The discriminatory classifications violate Article I, section 8.

Oregon courts have stated that the free expression guarantee of Article I, section 8, (and not the guarantee of equal privileges and immunities under Article I, section 20) is the major obstacle to restrictions that discriminate among different speakers and types of speech. *See, e.g., City of Portland v. Tidyman*, 306 Or 174, 182, 759 P2d 242 (1988)(striking ordinance imposing restrictions on adult bookstores and theaters). In *Ackerly Communications v. Multnomah County*, 72 Or App 617, 696 P2d 1140 (1985), for example, the court found that a county ordinance that regulated "commercial" billboards, but left "noncommercial billboards" exempt from regulation, violated Article I, section 8. The court in *Ackerly* held that "an ordinance that imposes a regulation on one kind of nonabusive speech and no regulation on others, because of the difference in their content, is inconsistent with Article I, section 8." *Id.* at 623-24. That is, Article I, section 8, precludes "any value-based distinctions between different kinds of nonabusive speech." *Id.* at 624, n 5 (citing *State v. Harrington*, 67 Or App 608, 680 P2d 666 (1984)).

The very recent case of *Outdoor Media v. Dept. of Transportation*, 340 Or 275, 132 P3d 5 (2006), provides additional support for plaintiffs' position. In *Outdoor Media*, the plaintiff challenged the state's billboard restriction that required permits for billboards related to off-premises activities (*e.g.*, "Eat at Joe's: 10 Miles Ahead")

but not for billboards related to on-premises activities (***e.g.***, "Gas for Sale"). 340 Or at 292-293. The state argued that the "on-premises/off-premises distinction is a content- and viewpoint-neutral regulation" but the court disagreed, finding that the distinction was content-based because it allowed a sign owner to convey one type of message but not another. ***Id.*** at 296 (the "distinction allows a sign owner without a permit to display one narrowly defined category of message – a message related to activity conducted on the premises where the sign is located – but not to display any message respecting any" off-premises activities).

To enforce the billboard restrictions in *Outdoor Media*, the regulator would have to know who owns (or occupies) the property. A sign for "Joe's legal services" would not need a permit if the owner/operator of the property was Joe, but a permit would be necessary if the owner/operator was someone other than Joe. Or, in an example used by the court, the propriety of a non-permitted sign with the message "Pray for Peace" could not be determined by interpreting the message on the sign; rather, a regulator would instead have to ascertain the owner of the property. If the owner of the property was a church or a resident who "prays for peace and exhorts others to do the same," the sign would not be subject to the permitting requirement. 340 Or at 294. Because of this different treatment based on the characteristics of the speaker, the statute in *Outdoor Media* was deemed a content-based restriction.

The gift and entertainment restrictions imposed by ORS 244.025 represent the same type of discriminatory speech restriction forbidden by Article I, section 8. Just as the distinction between commercial and noncommercial billboards cannot survive scrutiny, the lobbying restrictions that apply only against certain political speakers

(*e.g.*, those with an "economic interest") improperly favor one type of speech, and one type of speaker, over another. That is, the gift and entertainment restrictions allow a person to engage in political speech regarding certain matters pending before a public official (*i.e.*, matters in which the person *does not* have a defined "economic interest") but prohibits the person from engaging in other types of political speech involving matters in which the person *does* have an economic interest. Similarly, ORS 244.025 allows certain lobbying expenditures by certain classes of persons (a governmental entity, a Native American tribe, an organization with a public body among its membership, or a non-profit receiving less than 5% of its funds from for-profit entities) but not others (a for-profit entity or a non-profit receiving more than 5% of its funds from for-profit entities).

These discriminatory classifications impose content-based restrictions and cannot survive Article I, section 8, scrutiny. These restrictions on core political speech are every bit as offensive to the free expression guarantee of Article I, section 8, as the restriction imposed upon off-premises billboards in *Outdoor Media*.

The gift and entertainment restrictions are similar to the "classification restriction among users of telemarketing equipment (distinguishing between charitable and political entities, on the one hand, and all others)" that were struck down in *Moser v. Frohnmayer*, 315 Or 372, 845 P2d 1284 (1993).[10] Under Article I,

[10] The Court of Appeals in *Moser* held that because the statute at issue "regulates commercial speech differently from other subjects of speech, it is unconstitutional." 112 Or App 226, 233, 829 P2d 84 (1992). The Oregon Supreme Court affirmed the Court of Appeals, relying on a more traditional *State v. Robertson* analysis. 315 Or at 279-80.

section 8, jurisprudence, the state may not impose discriminatory restrictions on constitutionally protected expression. Accordingly, the gift and entertainment restrictions are, for this additional reason, unconstitutional under Article I, section 8.

Notwithstanding the legal points discussed above, the trial court reached a different conclusion. The trial court first found that the lobbying restrictions are ***not*** category one laws for purposes of plaintiffs' discriminatory classifications claim. The trial court then stated that "content neutral regulations can be imposed for reasons of public safety, aesthetics, or other important purposes." ER 21 (citing ***Outdoor Media***, 340 Or at 288). Finding that the restrictions in ORS 244.025 were "content neutral" and "reasonable," the trial court concluded that the restrictions "do not unconstitutionally infringe expression under Article I, section 8." ***Id.***

Plaintiffs submit that the trial court's analysis and conclusion are flawed in a number of ways. First, for all the reasons discussed above, the gift and entertainment restrictions are category one laws under the ***Robertson*** methodology. Indeed, in the context of plaintiffs' primary challenge under Article I, section 8, the trial court necessarily concluded that the lobbying restrictions were category one laws, as the trial court's ultimate decision on that claim was based on its determination that the "incompatibility exception" applied. As discussed previously, the incompatibility exception applies only in the case of category one laws, and has no place in the category two or three analyses.

Because the challenged restrictions are category one laws, the court's analysis misses the mark. "Because content-neutral time, place, and manner restrictions ***focus on the accomplishment of 'forbidden results,'*** but do so by restricting expression, such

restrictions appear to come within the second of the three *Robertson* categories." *Outdoor Media*, 340 Or at 288 (emphasis added). As demonstrated above, the lobbying restrictions do not focus on the accomplishment of forbidden results; instead, they are absolutely silent as to whether such forbidden results need to be present for a violation to occur.

Second, even if the trial court applied the proper test for plaintiffs' discriminatory classifications claim, the trial court erred in finding that the ORS 244.025 restrictions are "content neutral." The gift and entertainment restrictions are not "reasonable time, place, and manner restrictions that are unrelated to the substance of any particular message." *Outdoor Media*, 340 Or at 290. The restrictions do not, for example, forbid all citizens from giving gifts or honoraria over $50 to any other person, or forbid all citizens from making all expenditures for entertainment for any other person. Instead, ORS 244.025 only prohibits such expenditures in the political arena, and only to or on behalf of public officials. In addition, it does not even prohibit all such expenditures by all persons to or on behalf of public officials; ORS 244.025 only prohibits such expenditures where the person making the expenditure has a legislative or administrative interest, *i.e.*, a particular economic interest.

The actual fact-specific holding in *Outdoor Media* provides even more support to plaintiffs' position. The state argued in *Outdoor Media* that the on-premises/off-premises distinction was content neutral. The state contended that the distinction (which required permits for signs for off-premises, but not for on-premises, goods, products or services) "has no meaning in terms of the content of the speech" and that "the only distinction is the relationship between the message on the sign and its

location." *Id.* at 294. The court rejected the state's arguments and found that the on-premises/off-premises distinction was not content neutral because the distinction "allows a sign owner without a permit to display one narrowly defined category of message - a message related to activity conducted on the premises where the sign is located - but not to display any message respecting any other subject." *Id.* at 296. That is, the statute regulated the content of the signs depending on who was operating on the premises. A sign advertising legal services could only be erected by a person providing legal services on the premises, not by someone who renders the very same legal services on some other location.

Likewise, in this case, only certain persons can make the gift and entertainment expenditures regulated by ORS 244.025. A person with a "legislative interest" is prohibited from taking a legislator on a $51 fact-finding mission, but a person without such a "legislative interest" is free to do so. A law that prohibits gifts and entertainment only in the lobbying context (and only such expenditures to public officials by persons with legislative or administrative interests) is not content neutral.[11] The circumstances presented by ORS 244.025 are equivalent to prohibiting those with an economic interest in legislation from highlighting their message on a billboard but permitting non-profits and environmental organizations to do so. Indeed, the distinction at issue in this case is far more severe than in *Outdoor Media* because the off-premises service provider only needed to obtain a permit in order to achieve equal footing with on-premise service providers, while a person with a particular economic

[11] *Outdoor Media* further states: "In *Fidanque*, for example, a law that required registration fees for lobbyists was held to violate Article I, section 8, because it focused on only one category of speech – political speech." 340 Or at 294.

interest is absolutely precluded from exercising his/her fundamental rights to engage in certain forms of protected political speech.

Even more fundamentally, the lobbying restrictions are not "time, place, or manner" restrictions at all. There is no time, no place, and no manner in which plaintiffs can fund a fact-finding mission costing over $50, and no time, place or manner in which they can make lobbying expenditures for entertainment. These restrictions are not things that plaintiffs can wait until after 8:00 p.m. to do, or that they can do if they get some requisite permit or license. Instead, the gift and entertainment restrictions constitute an outright prohibition on certain types of expressive conduct by certain classes of citizens. Such laws are unconstitutional. *See, e.g., City of Hillsboro v. Purcell*, 306 Or 547, 761 P2d 510 (1988) (striking down ordinance that banned all door-to-door solicitation).

Finally, if the trial court's decision is accepted, it would seem to necessarily follow that the Oregon Supreme Court wrongly decided the *Vannatta* case. That is, if a restriction on lobbying expenditures (by some, but not all, lobbyists) is simply a reasonable, content neutral regulation that is constitutionally permissible under Article I, section 8, then a restriction on campaign contributions (applicable to *all* campaign contributions regardless of the source of the contribution) would presumably be yet another putative "time, place and manner" restriction against which Article I, section 8, provides no protection. The Oregon Supreme Court's holding in *Vannatta*, however, makes plain that such restrictions on political speech cannot be tolerated under Article I, section 8.

For the foregoing reasons, the trial court erred in concluding that the

discriminatory classifications under ORS 244.025 are permissible under Article I, section 8.

2. The discriminatory classifications violate the First Amendment.

Plaintiffs also challenge the gift and entertainment restrictions under the First Amendment, not because the First Amendment is necessarily more protective than Article I, section 8, but because the First Amendment case law on discriminatory restrictions is more developed and structured. Whether as a helpful guide in interpreting the (presumably enhanced) protections of Article I, section 8, or as an independent basis for plaintiffs' challenge, the case law under the First Amendment makes plain that the discriminatory gift and entertainment provisions cannot survive constitutional scrutiny.

In deciding that the gift and entertainment restrictions did not violate plaintiffs' right under the First Amendment, the trial court relied upon its finding that the restrictions "advance the State's interest in safeguarding the public confidence in the State's electoral and other public processes." ER 22. For the reasons that follow, plaintiffs submit that the trial court has not identified a sufficient basis for the discriminatory restrictions, nor has there been any sufficient showing that the restrictions are necessary (or reasonably calculated) to accomplish the identified governmental interests.

The United States Supreme Court has repeatedly stated that "[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict First Amendment principles." *United States v. Playboy Entertainment Group*, 529 US 803, 812, 120 S Ct 1878 (2000)(applying strict scrutiny and striking down a regulation

applicable only to television channels "primarily dedicated to sexually-oriented programming"); *see also First National Bank of Boston v. Bellotti*, 435 US 765, 785-86, 98 S Ct 1407 (1978)("In the realm of protected speech, the legislature is constitutionally disqualified from dictating * * * the speakers who may address a public issue"). Moreover, the Supreme Court instructs that where the "legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id*. at 785-86.

The Ninth Circuit case of *Service Employees International v. Fair Political Practices Commission*, 955 F2d 1312 (9th Cir 1992), provides compelling authority and a useful summary of Supreme Court case law. In the *Service Employees* case, plaintiffs challenged a campaign finance restriction that was found to discriminate against challengers and in favor of incumbents. The court first noted that "the government must remain scrupulously neutral when regulating expressive activities protected by the First Amendment." *Id*. at 1319. The court then stated that a "line of [United States] Supreme Court cases * * * firmly establishes the principle that discrimination is permissible in the First Amendment context only when the discrimination is itself necessary to achieve a substantial governmental interest." *Id* (citations omitted). For instance, in *Police Dept. of Chicago v. Mosley*, 408 US 92, 92 S Ct 2286 (1972), the Court struck down an ordinance that prohibited all picketing on school grounds except for labor picketing. The Court stated that the "crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Id*. at 95. Finding that there was no showing that non-labor

picketing was "clearly more disruptive" than labor picketing, the Court held the restriction unconstitutional. *Id.* at 100. That is, even though a general prohibition on all picketing on school grounds might well have been permissible, the discriminatory prohibition was not sufficiently justified to survive First Amendment scrutiny.

The defendants in *Service Employees* attempted to justify the discriminatory campaign finance regulation with the same rationale advanced by defendants in this appeal: preventing corruption and the appearance of corruption. 955 F2d at 1321. The court, however, ruled that –whatever the merit of such governmental interest in connection with evenhanded restrictions – preventing corruption and the appearance thereof did not justify a restriction that discriminated among different speakers. *Id.* ("we recognize that the state has a legitimate interest in preventing corruption and the appearance of corruption, but hold that this interest will not support a discriminatory formula for limiting contributions").[12]

Similarly, in this case, defendants cannot justify the discriminatory gift and entertainment restrictions based on the interest of preventing corruption or the appearance thereof. Assuming for the sake of argument that defendants could somehow show that gifts of $51 and entertainment of $1 create an appearance of impropriety on the part of legislators and therefore constitute a substantial or compelling state interest under the First Amendment, there is simply no basis whatever for only restricting such expenditures by some persons and allowing other persons to make unlimited gift and entertainment expenditures. That is, the

[12] The intent of the state in preventing corruption or the appearance thereof is applicable in a First Amendment analysis but has no relevance in an analysis under Article I, section 8, of the Oregon Constitution.

government has not shown and cannot show that a gift of $51 or entertainment of $1 from a person with an "economic interest" (*e.g.*, a member of a regulated industry) is clearly more deleterious than a $1 million gift (or entertainment) from a person whose interest in pending legislative is not "economic" (as defined), such as an environmental organization, a political organization, or some other group that is similarly motivated to influence public officials. As between the two examples, it is clear that the only expenditure that could conceivable create the "appearance of impropriety" would be the unlimited gifts from those persons not regulated by the gift and entertainment restrictions.

The same result obtains in connection with the gift distinction that is based on whether the speaker is a favored person (a governmental entity, a Native American tribe, an organization with a public body among its membership, or a non-profit receiving less than 5% of its funds from for-profit entities) as opposed to a disfavored person (a for-profit entity or a non-profit receiving more than 5% of its funds from for-profit entities). The U. S. Supreme Court has held that corporate speech shares in First Amendment protections and that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 US at 777. Moreover, a restriction in favor of government entities must also be subjected to the same rigorous scrutiny as other discriminatory restrictions on expression. *See, e.g.*, *Nat. Ass'n of Social Workers v. Harwood*, 874 F Supp 530, 541-542 (D.C. R.I. 1995), *rev'd on other grounds*, 69 F3d 622 (1st Cir 1995) (restriction allowing certain lobbying by governmental, but not private, lobbyists found to be an unconstitutional,

where discrimination was "not narrowly drawn to effectuate a compelling government interest").

Not only are the discriminatory restrictions not supported by any sufficiently important governmental interest, there can be no showing that the discrimination among speakers is necessary or reasonable to achieve the purported interests. In enacting ORS 244.025, the State of Oregon has, despite its obligation under the First Amendment to remain "scrupulously neutral" in regulating expressive conduct, improperly favored some political advocates over others. The gift and entertainment restrictions are, therefore, unconstitutional under the First Amendment.

3. The remedy for the unconstitutional classifications.

As discussed above, the discriminatory gift and entertainment restrictions are unconstitutional, whether under the outright prohibition on discriminatory speech restrictions under Article I, section 8, or under the rigorous test for such regulations under the First Amendment. The restrictions are plagued by two distinct unconstitutional classifications, both of which require a remedy by the Court.

One of the constitutionally infirm classifications stems from ORS 244.020(5)(b)(F). That subsection creates the exception from the definition of "gift" for certain expenditures by "any unit of the federal government, a state or local government, a Native American tribe[,] a membership organization to which a public body * * * pays memberships dues or a not-for-profit corporation * * * that receives less than five percent of its funding from for-profit organizations or entities[.]" The appropriate remedy for this unconstitutional classification is rather simple: the preferential treatment provided to these entities can be addressed by simply striking ORS

244.020(5)(b)(F) and removing this particular exception to the definition of "gift."

The other classification is created by the gift and entertainment restrictions themselves, ORS 244.025(1), (2), (3), and (4). These provisions restrict gifts and entertainment from persons with a "legislative or administrative interest." The phrase "legislative or administrative interest" is defined as "an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person in the capacity of the public official." ORS 244.020(8). As explained above, this "legislative or administrative interest" provision creates an unconstitutional scheme in which some speakers, but not others, are allowed to exercise their Article I, section 8, and First Amendment rights.

In the trial court, defendants proposed that the proper remedy (if this classification was deemed unconstitutional) would be to simply eliminate the term "economic" from the definition of "legislative or administrative interest." However, this would not suffice, as the gift and entertainment restrictions would still be enforced against only those with a interest in pending legislation that is "distinct from that of the general public" (***e.g.***, a person with an interest in a bill that affects certain low income housing she owns), as opposed to those whose interest is shared with the general public (***e.g.***, a person seeking to pass a bill relating to air quality or seeking to have all income taxes lowered, including his own). Persons in the former category would be subject to the lobbying restrictions, but persons in the latter category would not. Thus, even if the term "economic" was stricken from the definition, this restriction against certain speakers and messages would continue to render the gift and

entertainment restrictions unconstitutional.

The available remedial resolutions for the impermissible "legislative or administrative interest" provision, then, are (a) eliminating the gift and entertainment restrictions altogether, until the legislature can adopt a replacement statute that passes constitutional muster; or (b) striking the "legislative or administrative interest" provisions from the gift and entertainment restrictions, such that gifts and entertainment from all persons (whether or not they have a "legislative or administrative interest") would be restricted. The first available remedy would exclude from regulation some gifts and entertainment that the legislature sought to prohibit (*i.e.*, gifts and entertainment furnished by lobbyists), while the second available remedy would subject to the restrictions many, many forms of gifts and entertainment that the legislature did not intend to prohibit (*e.g.*, meals furnished to a public official by a neighbor, a birthday gift to a public official's child, a wedding gift to a public official from a college friend, etc.).

The court in *Outdoor Media* faced a strikingly similar situation once it concluded that the disparate treatment of on-premises and off-premises signs was unconstitutional. The court had to decide whether to strike the permit and fee requirements altogether or, alternatively, to extend the permit and fee requirements to on-premises signs as well. The court provided the following discussion and resolution of this issue:

> "We can end that infirmity either by striking from the OMIA the exemption from the permit requirement for on-premises signs, [] or by striking the permit requirement itself, [] as it applies to outdoor advertising signs (off-premises signs). In choosing between those alternatives,

> we are mindful of the legislature's policy statement [] that the purposes of the OMIA include 'promot[ing] public safety,' 'preserv[ing] the natural beauty and aesthetic features' of state highways, and 'prohibit[ing] the indiscriminate use of * * * outdoor advertising.' However, we also are aware from the record that the number of existing on-premises signs, which do not require OMIA permits or fees, far exceeds the number of outdoor advertising signs, which do require permits and fees. We thus find ourselves faced with the same two unpalatable choices that the legislature would face: permitting sign owners to display 'off-premises' (outdoor advertising) signs without obtaining the permits required by the OMIA, or imposing new permit and fee requirements on thousands of individuals and businesses that now have on-premises signs. We think that, faced with that choice, the legislature would not have been willing to extend the OMIA's permit and fee requirements to the large category of new and existing on-premises signs. Accordingly, we conclude that the appropriate remedy in light of our holding is to strike from the OMIA the permit and fee requirements for outdoor advertising signs[.]"

340 Or at 301-302.

As was the case in *Outdoor Media*, the remedial alternatives amount to striking the government regulation (and thereby allowing a small subset of all gifts and entertainment to go without regulation) or extending the government regulation to a great number of people whom the legislature did not intend to regulate. Just like *Outdoor Media*, this may present the Court with two "unpalatable choices." However, faced with the choice, there is little doubt that the legislature would have chosen to strike the gift and entertainment restrictions altogether. The legislature, of course, is aware of bribery statutes and many other laws that already regulate any unlawful conduct involving public officials. Moreover, at a time when local public officials are deciding to resign from public office in the face of the onerous

requirements imposed by Senate Bill 10, it is highly unlikely that the legislature would possibly have wanted to prohibit all public officials (*i.e.*, nearly all public employees, including school teachers, city, county and local district employees, and all state employees) from being able to accept meals, transportation, gifts, etc., from their neighbors, friends, and acquaintances. Much less harm and disturbance would be caused, between now and the time that the legislature passes a replacement statute that complies with the applicable constitutional protections, by the elimination of the gift and entertainment restrictions than by the extension of those onerous and tedious restrictions to public employees and all persons with whom they associate. In addition, eliminating the gift and entertainment restrictions is also the remedial alternative that will not impinge upon free speech rights.

C. The gift, entertainment and honoraria restrictions violate Article I, section 26.

Article I, section 26, of the Oregon Constitution provides:

> No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good, nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances (sic).

By prohibiting Mr. VanNatta and others from making expenditures to inform or persuade legislators regarding legislative matters, the lobbying restrictions impermissibly restrain Oregon inhabitants from "instructing their Representatives" or "applying to the Legislature for redress of" grievances. As the trial court correctly determined, the lobbying expenditures restricted by ORS 244.025 and 244.042 constitute political "expression" for purposes of Article I, section 8. Plaintiffs submit that there is no basis for concluding that such political expression does not also

constitute "instructing" legislators or "applying to the Legislature for redress of" grievances. As such, Article I, section 26, makes plain that no law shall be passed restraining such constitutionally protected activities.

The trial court rejected plaintiffs' Article I, section 26, challenge because the "text of Article I, section 26[,] does [not] specifically provide for any right to give * * * gifts, entertainment or honorarium" to public officials. ER 22. The lobbying restrictions, the trial court continued, "do not prohibit or limit Plaintiffs' right to assemble, access their representatives, or address the Legislature." ER 22-23. While the trial court is correct that Article I, section 26, does not expressly address lobbying expenditures, that alone does not end the constitutional analysis (just as the fact that Article I, section 8, only references a "right to speak * * * freely on any subject" does not mean that there is no right under that provision to, ***e.g.***, make campaign contributions, make door-to-door solicitations, or dance nude). The right to instruct representatives and apply to the legislature for redress would have little value if, for example, a person could not make lobbying expenditures to facilitate discussions with members of the legislature. If the only real protection afforded by the "instructing their Representatives" provision is that a person can utter words of "instruction" within earshot of one or more members of the legislature, such "protection" would likely already be afforded by Article I, section 8, and – in any event – would do little or nothing to safeguard a person's right to effect political change.

The lobbying expenditures restricted by ORS 244.025 are designed to foster a direct exchange of information between lobbyist and legislator, to create goodwill, and to establish the lobbyist as a reliable information source to legislators on political

matters. The Oregon Court of Appeals recently described the "instruction" and "apply for redress" provisions of Article I, section 26, as "unequivocally political" rights that "protect[] the ability of 'the inhabitants' to give practical effect to their deliberations by ensuring that they may voice their determinations to others who might respond accordingly." *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 202 Or App 123, 134-135, 121 P3d 671 (2005). The court further declared that the "historical foundation on which Article I, section 26, was built also demonstrates that its objective was to protect the people's right to gather for the purpose of deliberating and promoting political policies." *Id.* at 136.

Plaintiffs submit that the examples discussed herein (including the expenditure of $51.00 to pay for a legislator's travel expenses to a drought-stricken area to ascertain the need for certain public works projects) represent paradigmatic examples of constitutionally protected efforts to "instruct" legislators and "apply" to the Legislative Assembly for redress of grievances. If these words are to be given their ordinary and customary meanings, it is difficult to imagine that a fact-finding mission to inform legislators as to matters under their consideration would not be deemed "instructing" representatives or "applying to the legislature for redress." The entire fact-finding process (as well as other examples previously provided, including shared "entertainment" to educate a legislator regarding a matter under political consideration) is specifically designed to instruct representatives and seek some redress. Without the ability to expend monies on (and thereby engage in) such activities, those constitutionally protected "instruction" and "redress" rights will be impaired.

The lobbying restrictions imposed by ORS 244.025 and 244.042 are unconstitutional under Article I, section 26.

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reverse the trial court and declare unconstitutional the gift, entertainment and honorarium restrictions in ORS 244.025(1), (2), (3) and (4) and 244.042(1) and (2). In addition, plaintiffs ask the Court to also declare unconstitutional any restrictions in ORS 244.040 that would, in the absence of the lobbying restrictions challenged herein, impose the same or more stringent limitations on gifts, entertainment and honoraria.

Dated this _____day of March, 2009.

Respectfully submitted,

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INDEX OF EXCERPT OF RECORD

CERTIFICATE OF MAILING

I hereby certify that on 27th day of March, 2009, I filed the original and 13 copies of the foregoing **APPELLANTS' OPENING BRIEF** with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301-2563, by mail, and on:

John Kroger
Erika Hadlock
State of Oregon, Dept. of Justice
Appellate Division
1162 Court Street NE
Salem, Oregon 97301

by mailing two copies thereof in a sealed, postage prepaid envelope, certified by me as such, placed in a sealed envelope addressed to said attorneys at the address set forth, and deposited in the United States Post Office at Portland, Oregon.

DATED this 27th day of March, 2009.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on 31st day of March, 2009, I amended the foregoing original and 13 copies of the foregoing **APPELLANTS' OPENING BRIEF** by adding the 1-page appendix to each copy of the brief and filing the original of the 1-page appendix with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301-2563, by hand delivery, and on:

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by mailing two copies of the appendix in a sealed, postage prepaid envelope, certified by me as such, addressed to said attorneys at the address set forth above, and deposited in the United States Post Office at Portland, Oregon.

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