INTRODUCTION

Plaintiffs claim a constitutional right to impart gifts that will personally enrich the public officials before whom plaintiffs have business. That claimed right largely is disposed of adversely to plaintiffs by the court's legal conclusions in denying preliminary relief. The balance of plaintiffs' arguments also are without merit.

The primary question presented on these cross-motions is whether the court should revisit its conclusion that the challenged restrictions on personal gifts to public officials are constitutionally permissible under the well-settled "incompatibility exception." The court's conclusion was correct for the reasons given. Indeed, plaintiffs essentially concede that there is some point beyond which personal gifts to public officials lose any constitutional protection. Plaintiffs take issue only with the legislature's determination of where that point lies. The legislature's determination is reasonable and appropriate. That judgment should not be second-guessed by the courts.

Plaintiffs' other challenges fare no better. Plaintiffs complain that the law applies only to those with a legislative or administrative interest before the official. As the court already has noted, the law makes that distinction precisely because that is when the risk of an appearance of impropriety is at its greatest. Similarly, allowing reimbursement by governmental entities and nonprofit organizations for limited expenses to attend meetings poses little risk of an appearance of impropriety. The classifications are content-neutral, sensible, and valid.

Finally, plaintiffs' argument under Article I, section 26 is without merit. Because the Code of Ethics does not restrict any person's ability to assemble or access candidates or representatives, it does not implicate Article I, section 26. The Code of Ethics should be sustained, as a matter of law, against each of plaintiffs' claims.

BACKGROUND

I. The Code of Ethics prior to amendment by SB 10.

Even before the 2007 legislative session, the Oregon Code of Ethics declared public office in Oregon a public trust, safeguarded by the Code itself. ORS 244.010(1). And even before the 2007 legislative session, the Code of Ethics set forth strict limitations on the use of public office for personal gain. The most basic prohibition was (and is) codified in ORS 244.040(l)(a):

> No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office[.]"

That subsection went on to provide exceptions for official salary, honoraria subject to limitations, reimbursement of expenses, and unsolicited awards for professional achievement. *Id.* (2005).

With respect to gifts, ORS 244.040(2) (2005) prohibited public officials from soliciting or receiving gifts with an aggregate value in excess of $100 during a calendar year from any single source, where the source was known or reasonably should have been Icnown to have a legislative or administrative interest before the official or before the official's agency. A corollary provision similarly prohibited anyone from offering gifts that, if accepted, would violate that prohibition. ORS 244.040(5) (2005). A "legislative or administrative interest" was defined as an economic interest distinct from the general public's interest. ORS 244.020(10) (2005).

A "gift" was defined as a thing of economic value given for less than full consideration to a public official or an official's relative. ORS 244.020(7) (2005). The definition specifically excluded campaign contributions, gifts from family members, food or lodging at events attended in the official's official capacity, food or beverage consumed in the purchaser's presence, or

entertainment attended in the presence of the purchaser up to $100 per event and $250 per year. *Id.*

The gift provisions essentially carved out an exception to ORS 244.040(l)'s general prohibition against obtaining personal financial gain from public office. The offer and receipt of some gifts was permitted, even though the donor had a legislative or administrative interest before the official or the official's agency.

With respect to honoraria, the Code of Ethics included separate restrictions applicable to statewide officials and legislative officials or candidates. Statewide officials were prohibited from soliciting or receiving honoraria. ORS 244.040(l)(b). Legislative officials and candidates for legislative office were prohibited from soliciting or receiving honoraria for appearances in the state or during a legislative session, but otherwise could accept honoraria up to $1,500. ORS 244.040(l)(c). Honoraria for services related to the official's private profession or occupation were exempted. *Id}*

II. Amendments made by SB 10 (2007).

SB 10 made numerous amendments to many provisions of the government ethics laws. The changes pertinent here, however, may be summarized briefly.

While the general prohibition against obtaining personal financial gain firom one's public office remains unchanged, the exception allowing certain gifts was amended. As before, the Code of Ethics applies only to gifts given by someone who has a "legislative or administrafive interest" before the official or the official's agency. ORS 244.040(2)(e); ORS 244.025. The statutory definition of that term also remains unchanged: an economic interest distinct from the interest of the general public. ORS 244.020(8).

' The Code of Ethics also contained (and contains) a number of other specific restrictions not pertinent to plaintiffs' challenge. Among those, public officials may not trade on their public offices for promises of future employment, trade on confidential information for personal gain, or represent a paying client before the body of which the official is a member. ORS 244.040.

With the passage of SB 10, the permissible aggregate gift from any single source with a legislative or administrative interest was reduced from $100 to $50. ORS 244.025(1) (enacted as section 18(1) of SB 10). SB 10 also eliminated the exception allowing limited gifts of entertainment. ORS 244.025(4). Under SB 10, gifts of entertainment fall back within the general prohibition against obtaining personal financial gain from one's public office.

In addition, SB 10 refined the definifion of a "gift" in several particulars. In so doing, it added several exceptions not at issue here and one that is at issue. While SB 10 exempted the reimbursement of "reasonable expenses" in several circumstances, plaintiffs take issue only with a provision allowing reimbursement for certain expenses by a federal, state, tribal, or local government, by an organization to which a public body pays membership dues, or by a nonprofit corporation that receives less than fi:ve percent of its funding from for-profit entities. That provision applies to expenses to attend a meeting where the official makes a speech or presentation, participates on a panel, or represents the government. *See* ORS 244.020(5)(b)(F).

Finally (and contrary to plaintiffs' description of SB 10), the amended law continues to allow limited honoraria. It allows honoraria up to $50, and it exempts honoraria for services performed in relation to an official's private profession, occupation, avocation, or area of expertise. ORS 244.042 (enacted as section 24 of SB 10).

III. Proceedings in this case.

Plaintiffs originally filed this lawsuit together with a motion to preliminarily enjoin operation of specified gift limitations set out in the Code of Ethics, as amended by SB 10. While their complaint asserted claims under various provisions of the state constitution, the motion for preliminary relief relied on their claim that the challenged provisions unconstitutionally restrain fi-ee expression under Article I, section 8.

The State argued in response that the regulated conduct—gift-giving—is not "expression" for constitutional purposes. The State argued further that if the conduct is expressive, then its regulation still would be permissible under the doctrine that expression may

be regulated in those circumstances where expression would be incompatible with the concept of public service. Defendants' Memorandum Opposing Preliminary Relief.

This court denied plaintiffs' motion for preliminary injunction. The court found that the gifts in question may be expressive, but held that they fall within the "incompatibility exception" and are therefore not protected expression. Opinion at 6.

Plaintiffs subsequently amended their complaint to add a federal First Amendment claim and to add the allegation that classifications drawn by the Code of Ethics violate plaintiffs' free expression rights. Plaintiffs then moved for summary judgment on their amended complaint. They ask this court to reconsider its prior ruling that the expression in question is not protected based on the incompatibility exception.

ARGUMENT

I. The challenged restrictions do not infringe free speech under Article I, section 8.

Plaintiffs contend that under *State v. Robertson,* 293 Or. 402, 649 P.2d 569 (1982), the Code of Ethics restrictions violate Article I, section 8 of the Oregon Constitution. Specifically, plaintiffs argue that the restrictions are "category one" laws under *Robertson* because—plaintiffs claim—they are aimed directly at expression but do not satisfy either the historical or incompatibility exceptions for such laws. Plaintiffs thus ask this court to reconsider its ruling that the challenged restrictions are warranted by the incompatibility exception.

As discussed in Section I.A. below, the court should deny that request, because the court's conclusion is correct: the Code of Ethics restrictions fit squarely vsdthin the incompatibility exception. In *In re Fadeley,* 310 Or. 548, 802 P.2d 31 (1990), the Oregon Supreme Court held that a complete ban on all solicitation by judges was constitutional, because *any* such solicitation was incompatible with the judge's role and could jeopardize the public's faith in the integrity of judges. Exactly the same reasoning applies here—the legislature has set reasonable gift limits because, in its judgment, all gifts beyond those limits jeopardize the

public's perception of the integrity of public officials and the public's confidence in their government.

Even if the court were to reconsider its ruling on the incompatibility exception, however, plaintiffs' claim still fails, for at least three reasons. Those reasons are addressed more fully in Sections I.B. through I.D., below.

First, contrary to plaintiffs' assertions, the gift restrictions in the Code of Ethics do not limit protected political speech. Unlike campaign contributions, personal gifts to public officials do not contain within them an inherent political message and are not protected expression.

Second, a court should be cautious when asked to entertain a facial challenge to a regulation of conduct, where the regulated conduct is allegedly expressive. Even if the conduct may be expressive in some circumstances, a facial challenge is appropriate only if the regulated conduct is intrinsically expressive. Assuming the conduct of giving a gift may include protected expression in some circumstances, it is not intrinsically expressive, so as to warrant a facial challenge.

Third, even assuming some of the restricted gifts do contain an inherent message, the gift restrictions are certainly not aimed at the content of that message and are therefore not "category one" laws under *Robertson.* Rather, the gift restrictions are content-neutral limits aimed at the pernicious *effects* of giving unlimited gifts to public officials—specifically, the appearance of impropriety and diminished public trust in government officials. Under the Supreme Court's recent opinion in *Outdoor Media Dimensions, Inc.* v. *Dept. of Transportation*^ 340 Or. 275, 132 P.3d 5 (2006), which clarified the scope and application of the *Robertson* test, the restrictions are constitutionally permissible time, place and manner restrictions.

^ Defendants acknowledge that this court, in its opinion denying plaintiffs' motion for preliminary injunction, determined that the gifts in this case *are* protected expressions. As discussed more fully below, if the court accepts plaintiffs' invitation to reconsider the incompatibility exception, the State would ask the court also to reconsider its determination that the regulated conduct is expressive.

Each of those points is explained more fully below.

A. The court correctly held that the alleged expression is within the incompatibility exception.

1. Under *Lasswell* and *Fadeley*^ the gift restrictions are within the incompatibility exception.

The Oregon Supreme Court has repeatedly recognized that, notwithstanding the expansive protections afforded by Article I, section 8, expression involving a public official may be regulated if the expression at issue is incompatible with the public official's official duties. *See In re Schenck,* 318 Or. 402, 870 P.2d 185 (1994); *In re Fadeley; In re Lasswell,* 296 Or. 121, 673 P.2d 855 (1983).

The court first discussed the incompatibility exception in *Lasswell.* Lasswell, a District Attorney, made statements to the press about a pending prosecution. When the bar charged him with thereby violating disciplinary rules, he challenged the rules under Article I, section 8. The Oregon Supreme Court upheld the rules. The court concluded that it is always incompatible with the prosecutor's official responsibilities to make statements that the prosecutor intends to be, or that he or she does recognize or should recognize as being, prejudicial to the conduct of a fair trial. *Lasswell,* 296 Or. at 125. The problem, the court explained, was not that the statements actually harmed the "defense, but rather the incompatibility of those statements with the prosecutor's responsibility to ensure a fair trial at the time the statement is made. *Id.* at 126.

The next case, *Fadeley* involved a free speech challenge to ethics rules; it is therefore particularly instructive here. Fadeley was a judicial candidate who was charged with violating the Code of Judicial Ethics by personally soliciting campaign contributions. Fadeley argued that the code's restrictions on soliciting contributions violated his Article I, section 8 rights. The Supreme Court disagreed, relying on its opinion in *Lasswell* and explaining:

> The stake of the public in a judiciary that is both honest in fact and honest in appearance is profound. A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary. A judge's direct request for campaign

> contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating liie judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity. On the other side of the ledger, the candidate is not seriously impaired either in the ability to solicit and receive funds—a committee is permitted to do that—or in the ability otherwise to communicate the candidate's position on any issues the candidate is entitled to address—somediing the candidate himself or herself may do, as long as the message does not include a request for funds.

310 Or. at 563.

The parallels between *Fadeley* and this case are apparent. The restrictions in the Code of Judicial Ethics at issue in *Fadeley* were designed to protect the public's confidence in the integrity of the judiciary by eliminating even the appearance of impropriety. The purpose of the restrictions at issue in this case is virtually identical: to protect the public's trust in public officials by eliminating the appearance of impropriety.

What *Fadeley* teaches is that the appearance of corruption can harm public confidence as much as the reality can. It is always incompatible with a judge's official position to fail to maintain the appearance of impartiality. Because the direct solicitation of funds "can be perceived by the public" as an offer of a *quid pro quo,* the prohibition on direct solicitations "eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity." *Id.*

This court has already recognized—and correctly so—^that the reasoning from *Fadeley* applies vdth equal force in this case. The purpose of the gift restrictions is to ensure public confidence in the integrity of government officials—^to prevent the appearance that public access to such officials has a price, that officials may be profiting from their positions, or that political favors may be purchased.^ As this court explained in its opinion denying plaintiffs' motion for

^ Moreover, as in *Fadeley,* the restrictions in this case do not seriously impair a public official's or an interested constituent's ability to spealc. Indeed, the gift restrictions in no way restrain the communication that might surround the offer and receipt of a gift. The regulation of gifts does not preclude or restrain any conversation or any meeting.

preliminary injunction, "[t]he public has an expectation that decisions made by public officials and candidates be made honestly, objectively, and without favor." Opinion at 5.

2. Plaintiffs' argument that the incompatibility exception does not apply is without merit

In their motion for summary judgment, plaintiffs argue that the court erred in reaching the conclusion that the challenged restrictions fall within the incompatibility exception. Notwithstanding *Lasswell* and *Fadeley,* plaintiffs contend that the court's conclusion is inconsistent with the Oregon Supreme Court's subsequent decision in *Vannatta v. Keisling,* 324 Or. 514, 931 P.2d 770 (1997) *{Vannatta* 7), which rejected the argument that the incompatibility exception applied to restrictions on political contributions.

Plaintiffs' argument is without merit, for two reasons. First, their reliance on *Vannatta I* is misplaced; as this court has already recognized, the restrictions on campaign contributions that were at issue in that case are readily distinguishable from the gift restrictions at issue here. Second, plaintiffs themselves tacitly acknowledge that at some point, gifts to public officials are incompatible with the official's duties.'^ But if there is a line to be drawn between gifts that are compatible and those that are incompatible with public office, it is for the legislature to reasonably draw that line.

a. Unlike the contribution restrictions rejected in *Vannatta* /, the gift restrictions are narrowly tailored.

At issue in *Vannatta I* was whether campaign contributions are protected political expression. The State argued that under *Fadeley*^ even if contributions were protected expression, the incompatibility exception applied. The Oregon Supreme Court rejected that

In asking the court to direct its attention away from "extreme" examples such as new cars, homes or large sums of money, plaintiff concedes such gifts are "appalling," and enjoy "little or no constitutional protection." Plaintiffs' Memo, pp. 4-5.

argument. Unlike the solicitation of campaign fiinds at issue in *Fadeley,* the court concluded, the restricted campaign contributions were not necessarily incompatible with public office.

Plaintiffs argue that the Supreme Court's conclusion in *Vannatta I{thsA* campaign contribution restrictions are not subject to the incompatibility exception) is controlling here. But this court has already considered—and correctly rejected—^that argument.

Unlike the contribution restrictions at issue in *Vannatta* /, the Code of Ethics gift restrictions apply only when the donor has a legislative or administrative interest before the official receiving the personal gift. As the court recognized in its opinion rejecting plaintiffs' motion for preliminary injunction, that is a critical difference. Unlike the restrictions at issue in *Vannatta I,* the gift restrictions at issue here apply "only where the risk of the appearance of impropriety is at its greatest." Opinion at 5. The legislature has adopted a narrowly tailored set of restrictions that apply only where the appearance of impropriety is unacceptable. The Code of Ethics reflects the high ethical standard to which public officials in Oregon are held.

In that way, the gift restrictions are just like the solicitation rules that were upheld in *Fadeley. Fadeley* was a facial challenge to restrictions on solicitations by judges. The Supreme Court upheld those restrictions because it recognized that it is *always* incompatible with a judge's official position to fail to maintain both the reality and the appearance of impartiality. The same reasoning applies here. The personal gifts prohibited by the Code of Ethics are necessarily incompatible with the ethical standards that, in the legislature's estimation, are inherent in the public official's duty.

b. Determining where to draw the line between compatible and incompatible gifts is within the legislature's prerogative.

Plaintiffs do not dispute that, at some point, gratuities bestowed upon a public official that enrich the official personally become incompatible with the official's duties. Indeed, plaintiffs tacitly admit as much by asking the court not to consider examples of extravagant gifts that are prohibited by the Code of Ethics, but to focus instead on more modest examples which.

they insist, might be compatible with public service.^ But once it is acknowledged—as common sense dictates it must be—that *some* degree of gift giving or receiving is inconsistent with a public official's duties, the question is only where to draw the line.

It is not for plaintiffs to decide where to draw that line. Nor is it for the courts to decide where to draw that line. The Oregon Supreme Court and the United States Supreme Coiirt have long recognized that where lines must be drawn to effect a legislative policy choice, that decision is committed to the legislature. As the United States Supreme Court has explained:

> "Where * * * there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision * * * because this court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing. The task of classifying persons for * * * benefits inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and *the fact the line might have been drawn differently at some points is a matter for legislative, rather than Judicial consideration."*

U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (emphasis added) (internal quotation marks and citations omitted). *See also Gale v. Department of Revenue,* 293 Or. 221, 229, 646 P.2d 27 (1982) (quoting from and relying on *Fritz).*

It is apparent that at some point, gifts are incompatible with public officials' duties. The gift restrictions in the Code of Ethics reflect the legislature's judgment about the point at which a gift might threaten the public's faith in the integrity of its government officials. Plaintiffs do not contend, and could not contend, that the lines drawn by the legislature in that regard have no rational basis. Plaintiffs' argument that *these* gift limitations are not truly incompatible with a public official's duties is little more than an assertion that they believe the lines should have been

^ In making that request, plaintiffs do little more than urge the court to deliberately avert its eyes from the absurd implications of their position and from the extravagant gifts that they ask the court to imbue with constitutional protection.

drawn elsewhere, and a request that the court second-guess the legislature's judgment. Because the legislative judgment in that respect is reasonable and appropriate, it should be sustained as a matter of law.

B. If the court were to reconsider the incompatibility exception, it also should reconsider whether gifts to public officials are protected expression at all.

In its opinion denying plaintiffs' motion for a preliminary injunction, the court concluded that the gifts at issue in this case are protected expression. The court recognized that, under *Vannatta* /, many gifts to public officials fall outside the scope of Article I, section 8: some gifts are not expression at all, and some gifts are expressive only of an unprotected attempt to bribe. But the court went on to conclude that there is a third category of gifts that are intended to convey a protected political message, and that the Code of Ethics gift restrictions are aimed at gifts in this third category;

> "SB 10 appears to regulate gifts that would have an expressive content—SB 10 only regulates *gifts from a person with a legislative or administrative* ***intent.*** SB 10 does not regulate gifts from those persons who do not have a legislative or administrative **intent.** Thus from a reading of *[Vannatta* 7], there are several categories of gifts: a group of gifts that have no expressive content, and, therefore, are not an expression for purposes of Article I, section 8; a group of gifts that are given an anticipated quid pro quo, and therefore, a bribe, which is not protected expression; and also a group of gifts that do have expressive content, and therefore, are protected expressions. Seemingly, SB 10 regulates gifts that do have an expressive content in that SB 10 only regulates gifts from a person with a certain political or administrative **agenda.** Accordingly, the court finds that the gifts at issue in this particular case are indeed expressions for purposes of Article I, section 8."

Opinion at 5 (italics in original, boldface added).

That analysis begins with the premise that SB 10 regulates only those "gifts from a person with a legislative or administrative *intent." Id.* (emphasis added). Although the gift restrictions apply when the donor has a legislative or administrative *interest^* their applicability does not depend on whether the donor has a legislative or administrative *intent.*

The difference is not insignificant. The primary purpose of the restrictions is to protect the integrity of pubhc officials by preventing the appearance of impropriety. To accomplish that goal, the legislature has prohibited all gifts that, in the legislature's judgment, might appear to the public to be intended to buy favor, *regardless of the intentions of the giver or the receiver.* Because gifts are most likely to create such an appearance when they are given by a person with a legislative or administrative "interest,"^ the legislature chose to restrict those gifts in particular. Thus, the ethics restrictions apply depending on the giver's *interest*^ and irrespective of the giver's *intent*—that is, irrespective of any message the giver might or might not be attempting to convey.

The expressive content of a gift—or, more properly, the lack thereof—is perhaps most easily observed by analyzing a gift's legal contours. The giving of a gift is conduct, ft is the conveyance—an action—of a valuable thing. The legal elements of a gift consist of: (1) delivery; (2) a donative intent; and (3) acceptance. *See, e.g.,Bessett v. Huson,* 179 Or. App. 69, 74-75, 39P.3d 220 (2002).

The donative intent may of course be evidenced by contemporaneous words. Thus, a person taking responsibility for a restaurant bill may simultaneously say, "This is on me," or something to that effect. Similarly, a person giving money or an object may, at the time of delivery, explain the intent. The gift itself, however, has no clear expressive meaning other than the legally necessary donative intent. A gift may be given in the midst of a political or other constitutionally protected discussion. In that event, the discussion is protected, but that discourse does not somehow imbue the act of gift-giving with constitutional protection. Instead, the gift remains legally distinct from the surroimding conversation. It is mere conduct without the sort of distinct message required to make conduct sufficiently communicative to warrant constitutional protection. *See, e.g., Spence v. Washington,* 418 U.S. 405, 410-11 (1974) (conduct may be

^ As discussed above, a "legislative or administrative interest" is a defined term. *See* ORS 244.020(8).

protected expression if it: (1) is intended to convey a particularized message, and (2) it likely would be understood by those who viewed it).

There is no particularized message inherent or even common in the making of a gift. A gift may be born from generosity, admiration, pity, ulterior design, or any number of other motives. Further, how it is received is subject to the donee's interpretation. There is no clear, particularized message delivered or understood by a gift generally. Thus, the regulated conduct—offering or accepting gifts—is not constitutionally expressive.

Moreover, even if the gifts at issue were expressive conduct, they do not involve a *protected* message. Although the Code of Ethics would apply to those who are attempting to further a legislative or administrative agenda, it does not follow that a *protected* message must be involved. Instead, to the extent that the Code of Ethics does regulate gifts intended to convey a message regarding one's legislative or administrative agenda, those gifts may be expressive but they are *not* protected under Article I, section 8. If the intended meaning of a gift is about furthering one's political agenda, then the gift's message is bribery, or something closely akin to bribery, and the gift is subject to the historical exception for such transactions. If that is not the point of the gift—if it is really "just a gift"—then Article I, section 8 does not apply.

In reaching the opposite conclusion, the court presimies a category of gifts that are intended to express a protected political message. But for a gift to convey a political message, it would have to be either: (1) a political contribution, *see Vannatta I* (campaign contributions are protected political expression); or (2) lobbying, *see Fidanque v. Oregon Gov'/ Standards and Practices*, 328 Or, 1, 969 P.2d 376 (1998) (lobbying is protected political expression). The gifts at issue in this case, however, are neither of these.

As this court has already recognized, gifts are not political contributions. The term "gift" has always excluded campaign contributions. *See* former ORS 244.020(7)(a). SB 10 also excludes campaign contributions from the definition of "gift." *See* SB 10, Or. Laws 2007 ch. 877, section 16a. Campaign contributions may *only* be used to further their expressive

content and may not be used for personal gain. *See* ORS 260.407(2). Because campaign contributions may not be used for personal gain, they may be viewed as embodiments of political expression stripped of the risk of corruption inherent in unrestricted personal gifts to officials before whose office one has an administrative or legislative interest.

Nor is a gift a form of lobbying. The gift restrictions may apply to lobbyists, who frequently will be lobbying officials before whom they have a legislative or administrative interest. But it is critical not to confuse the expressive content of lobbying with the expressive content of gifts that a lobbyist might offer. If a lobbyist takes out a public official to a lobster dimier and, over the creme brule, attempts to persuade the official to take a particular action, or even simply gain the official's trust or good will, the protected expression consists of the evening's conversation, and the exchange of ideas. But no protected expression is involved in picking up the check.

Arguably, allowing the lobbyist to pick up a dinner check, for example, may in some ***instancQS*** *facilitate* lobbying, but the gift is not teZ/'lobbying, because the gift itself is not—or, at least, should not be—an attempt to "say" anything. When the gift itself *is* intended to deliver a message or further a specific political agenda, the giver has crossed the line from protected expression to something quite different—at that point, the giver is no longer engaging in protected expression at all. The Oregon Constitution is not blind to the distinction between advocating an idea—which it steadfastly protects—and plying someone with money or other valuable favors—^which it does not.

^ To the extent that gift giving facilitates lobbying, plaintiffs may argue that regulations on gift giving therefore act to deter or burden protected speech. Even assuming that were true, the gift restrictions would not be analyzed under *Robertson* category one because they are not restrictions on expression *per se* and they are content neutral. Rather, as the next section explains, to the extent that the restrictions potentially burden speech, they are properly analyzed as time, place, and manner restrictions.

C. In any event, expression is not a sufficiently intrinsic component of gift-giving to warrant entertaining a facial challenge.

Even assuming that in some instances the distinct act of gift-giving may be of such an expressive nature as to enjoy free speech protection, gift-giving is not intrinsically of such an expressive nature. Accordingly, a plaintiff claiming free speech protection for that conduct should be required to challenge an allegedly invalid restriction only on an as-applied basis.

As a general rule, courts disfavor facial challenges to statutes. *FW/PBS, Inc.* v. *Dallas,* 493 U.S. 215, 223 (1990) ("[f]acial challenges to legislation are generally disfavored"); *see also National Endowment for Arts* v. *Finley,* 524 U.S. 569, 580 (1998). Generally, a plaintiff asserting a facial claim is required to demonstrate that the challenged statute is incapable of valid application. A limited exception to that general rule has been carved out for overbreadth challenges in certain circumstances where free speech interests are implicated. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611-12 (1973). But that exception "is, manifestly, strong medicine that has been employed by the Court sparingly and only as a last resort." 413 U.S. at 613.

The Supreme Court's decision in *Lakewood* v. *Plain Dealer Publishing Co.,* articulated the standard for "distinguish[ing] laws that are vulnerable to facial [First Amendment] challenge from those that are not." 486 U.S. 750, 759 (1988). In *Lakewood,* the court held that for a licensing law to be subject to facial invalidation, it must "give[] a government official or agency substantial power to discriminate based on the content or viewpoint of speech" and it "must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat" of censorship. *Id.* As the Supreme Court explained, if the law is not directed "narrowly and specifically" at expressive activities, it "provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." *Id.* at 761.

Applying that principle, the Ninth Circuit has declined to entertain a facial challenge to an ordinance that prohibited lying or sitting on the sidewalk in certain areas at certain times.

Roulette v. *City of Seattle,* 97 F.3d 300 (9^^ Cir. 1996). There, the court rejected the plaintiffs' argument that because "sitting can possibly be expressive" the law should be subject to a facial challenge. *Id,* at 303. The court explained that "the Supreme Court has entertained facial freedom-of-expression challenges only against statutes that, 'by their terms,' sought to regulate 'spoken words,' or patently 'expressive or communicative conduct' such as picketing or handbilling." *Id. {quoting Broadrick, 413 U.S. at 6 12-13); see also Amster v. CityofTempe,* 248 F.3d 1198,1199-1200 (9'*' Cir. 2001) (refusing to allow a facial challenge because the statute only regulated "sitting and lying in certain places at certain times" and not "speech or patently expressive conduct").

A similar doctrine is recognized under Article I, section 8. The Oregon Supreme Court recently stressed that its cases "foreclose the possibility of a facial challenge under Article I, section 8, to a 'speech-neutral' statute." *State* v. *Illig-Renn,* 341 Or. 228, 234,142 P.3d 62 (2006). Instead, a statute is "subject to a facial challenge only if it expressly or obviously proscribes expression." *Id.* Otherwise, infringement of free expression rights must be addressed on an as-applied basis. *Id.*

Even assuming that "gift-giving" includes some protected expression in some discrete instances, a regulation of gift-giving is not "narrowly and specifically" directed towards expressive activity, nor is it directed at an activity that is intrinsically or obviously expressive. Indeed, the Oregon Supreme Court said as much in *Vannatta I,* when it expressly recognized that many gifts are not expressive at all. *See Vannatta* /, 324 Or. at 522 n. 10.

Accordingly, a facia! challenge to a limitation on gift-giving should not be entertained. If the challenged regulation of that conduct unconstitutionally limits expression in a particular circumstance, plaintiffs must bring an as-applied challenge as to that circumstance.

D. In all events, the challenged regulations do not violate free expression rights.

1. The Code of Ethics gift restrictions are *not* "category one" laws under *Robertson* because they are content-neutral restrictions aimed at the possible *effects* of gift giving.

In their motion for summary judgment, plaintiffs assert that the challenged gift restrictions are "category one" laws under *Robertson,* because—plaintiffs claim—^they are "aimed at the content of speech, not specifically at the existence of some pernicious effect thereof." Plaintiffs are mistaken.

Even assuming the gift restrictions do affect protected speech, the gift restrictions are manifestly *not* aimed at the content of that speech and are therefore *not* "category one" laws under *Robertson.* Rather, the gift restrictions are reasonable, content-neutral limits, aimed squarely at the possible *effects* of gift-giving—specifically, the appearance of impropriety and diminished trust in public officials—and they apply regardless of the message, if any, that the gift is intended to convey. They do not foreclose all gifts, and they leave ample channels open for lobbying or other protected expression. Therefore, even if the incompatibility exception did not apply, and even if the challenged conduct were so clearly expressive as to warrant entertaining a facial challenge, the restrictions still are constitutionally permissible as fime, place and mamier restrictions.

a. The *Outdoor Media* framework.

At issue in *Outdoor Media* was the validity of the Oregon Motorist Information Act of 1971 (OMIA), which regulated signs visible from public highways. *Outdoor Media,* 340 Or. at 280-81. The OMIA prohibited certain kinds of signs, set size and other limitations on signs that were not prohibited, and established a fee and permit requirement for certain signs. The court confronted two issues.

The plaintiff argued first that the OMIA's fee and permit requirements placed an impermissible burden on petitioner's free speech rights under Article I, section 8. *Id.* at 291. The Supreme Court rejected that argument. The court began by outlining the *Robertson*

framework, and then noting that *Robertson* was of little assistance with respect to such content-neutral regulations:

> *Robertson* distinguished "between laws that focus on the content of speech or writing and laws that focus on proscribing the pursuit or accomplishment of forbidden results," holding that the former violate Article I, section 8, unless the prohibition comes within a well-established historical exception. *Robertson* further divided the latter type of laws, those that focus on forbidden results, into two categories: those laws that prohibit expression used to achieve those prohibited effects and those laws that focus on the forbidden effects without referring to expression at all. 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. Yet *Robertson* itself did not elaborate on the appropriate analysis of content-neutral government regulation of the time, place, and manner of speech, and, surprisingly, this court rarely has had occasion to consider the validity of such regulations.

Id. at 288-89. The court then proceeded to examine its earlier Article I, section 8 cases, noting that it had consistently reached the conclusion that, within the *Robertson* framework, there is "room for regulations imposed for reasons other than the substance of a particular message." *Id.* at 289. More specifically, the court concluded that Article I, section 8 allows "reasonable" content-neutral regulation of the time, place, and manner of speech. *Id.*

Applying that rule, the court sustained most of the challenged OMIA regulations. The court noted that any fee or permit system could potentially "deter" or burden speech to some extent, and the court acknowledged that the OMIA was no exception. But the court held that the challenged sign regulations were nonetheless reasonable, because they did not suppress speech in such a way as to "restrain" the free expression of opinion, and because the regulations still left petitioner with "ample avenues to communicate its messages, both on highway signs and by other means." *Id.* at 292.

The second issue in *Outdoor Media* was whether it was constitutionally permissible to impose different requirements depending on whether a sign advertised goods and services on the premises as opposed to off the premises. *Id.* at 292-93. The court held that the OMIA's different

treatment of on-premises and off-premises signs was a restriction on the content of speech for purposes of Article I, section 8, and therefore properly was analyzed under *Robertson* category one. The differential treatment of signs was a content-based regulation of expression because the only way to know if the regulation applied was to read the sign to determine what it expressed. The Supreme Court concluded that the OMIA's different treatment of on-premises and off-premises signs was an unconstitutional restriction on the content of speech, because it would permit a sign owner to display one message, but not to display a different message, based solely on the message's content. M a t 295.

b. Under *Outdoor Media*^ the Code of Ethics gift restrictions are constitutionally permissible.

The Code of Ethics gift restrictions are reasonable, content-neutral limitations on the time, place, and manner of gift-giving to public officials. Accordingly, under *Outdoor Media,* they are constitutionally permissible.

i. The Code of Ethics gift restrictions are content-neutral.

To the extent that they restrict expression at all,^ the Code of Ethics gift restrictions are like the content-neutral fee and permit requirements upheld in *Outdoor Media.* They do not focus on "the content of speech or writing." Rather, they are focused on the possible effect that gift-giving might have—that is, they focus "on proscribing the pursuit or accomplishment of forbidden results." The purpose of the restrictions is to protect the integrity of public officials by preventing the appearance of a *quid pro quo* or that public officials are using their offices for private gain. To accomplish that goal, the legislature has prohibited all gifts that, in the legislature's judgment, might appear to the public to be intended to buy favor, *regardless of the*

^ As explained in the preceding section, the gifts at issue have no protected expressive content. Thus, defendants contend that they are properly in the third *Robertson* category—laws that focus on the forbidden effects without referring to expression at all. The purpose of this section is to argue that, to the extent that the court concludes that some of the gifts do have expressive content, the restrictions still are not aimed at the expressive content, and are therefore properly analyzed as time, place and manner restrictions under *Outdoor Media.*

intentions of the giver or the receiver. The restrictions apply irrespective of any message the giver might or might not be attempting to convey and are therefore content-neutral.

Conversely, the Code of Ethics gifts restrictions are unlike the on-premises/off-premises restrictions struck down in *Outdoor Media.* The Supreme Court held the on-premises/off-premises distinction was a content-based restriction because its application depended on the content of the sign: one needed to know the content of the sign to know that the restriction applied. That is not the case here. One does not need to know what message—if any—a gift is intended to convey in order to know whether the restriction applies. It necessarily follows that the gift restrictions are not content-based.

The fact that the gift restrictions are limited to those cases in which the gift giver has a legislative or administrative interest before the receiver does not make the restrictions content-based. That criterion does not have the effect of regulating any particular topic of speech. The legislature's inclusion of that criterion simply reflects the legislature's judgment that when the giver has a legislative or administrative interest, the risk of an appearance of impropriety is at its greatest. That is a reasonable, and constitutionally permissible, limitation.

ii. The Code of Ethics gift restrictions place reasonable limitations on the time, place, and manner of gift-giving while leaving open ample avenues for expression.

In *Outdoor Media,* the court recognized that the permit restrictions could potentially "deter" or burden speech to some extent. But the court held that the challenged sign regulations were nonetheless reasonable because they did not suppress speech in such a way that it "restrains" the free expression of opinion, and because the regulations still left petitioner with "ample avenues to communicate its messages, both on highway signs and by other means."

Exactly the same sort of analysis would apply in this case if the court were to conclude that the challenged restrictions indirectly burden lobbying.^ Under that analysis, the gift

^ Plaintiffs blur the distinction between lobbying and gift-giving by referring to the gift restrictions as "lobbying restrictions." The implication that giving expensive gifts is an essential component of lobbying is both question-begging and cynical.

restrictions would be akin to the permit requirements at issue in *Outdoor Media.* The issue thus ftamed, the only relevant question would be whether the gift restrictions are so burdensome as to "restrain" the free expression of opinion, or whether, instead, the restrictions are reasonable in scope and leave open sufficient alternative channels of communication.

The Code of Ethics gift restrictions are not so burdensome that they restrain free expression, and they do leave open ample room for communication. The restrictions allow many gifts, while setting reasonable limits on the time and manner (including the value) of gifts that are allowed. In essence, the Code of Ethics permits the offer and receipt of polite social graces, while prohibiting generosity that begins to resemble a bounty.

The limits imposed by the legislature are thus tailored to allow for gift-giving to public officials at certain times and in certain contexts, and to prohibit gift-giving where it might create an appearance of impropriety. The various limits represent the legislature's considered judgment about where the risk of an appearance of impropriety is unacceptable. Lobbyists and others who wish to communicate with public officials still have "ample avenues" to communicate their messages and build good will, both by bestowing personal gifts within the prescribed limits, and by countless other means. Nothing in the gift restrictions prevents a lobbyist or anyone else from talking about important issues with public officials, and nothing in the gift restrictions prevents lobbyists or anyone else from expressing friendship, concern, gratitude, or any other message.^^ The challenged provisions do not unconstitutionally restrain free speech.

Plaintiffs suggest that effective lobbying requires giving expensive personal gifts to public officials. But the very examples that plaintiffs provide in support of such an argument demonstrate just the opposite. For example, plaintiffs suggest that the gift limits would prevent legislators from information-gathering trips. But that is simply not the case. For instance, legislators lawfully may use campaign funds for such expenses. *See* ORS 260.407.

2. The Court of Appeals decision in *State v. Rich* confirms that conclusion.

The Court of Appeals very recently addressed the *Robertson* framework in *Oregon* v. *Rich,*_____Or. App.____,____P.3d____(March 19, 2008). The defendant challenged a statute prohibiting "disorderly conduct," defined as making "unreasonable noise" with the "intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[.]" ORS 166.025(l)(b).

Addressing the defendant's challenge under Article I, section 8, the Court of Appeals first readily concluded that the statute was directed not at speech but at noise. It therefore was not properly analyzed under *Robertson's* first category. The court also concluded that the statute was not in *Robertson's* second category, because it sought to prevent the harm of unreasonable noise by regulating the volume, duration, and timing of noise, not by regulafing expression.

The statute instead was properly analyzed under *Robertson's* third category: it was a law that prohibited harm that could in some circumstances be inflicted by speech. Because the regulation was content-neutral, it survived scrutiny under Article I, section 8.

A similar analysis applies here, at least in part. As in *Rich,* the challenged regulation is not directed at expression. It is instead directed at harm inherent in the regulated conduct, to *W\X* corruption or the appearance of corruption, which would undermine public confidence in the integrity of government. Thus, as in *Rich,* the challenged law is not a "category one" regulation of expression.

As discussed above, the Code of Ethics may be justified as a content-neutral regulation of expression under *Robertson's* second category. Indeed, the State contends ftirther that the Code of Ethics is even more properly analyzed—and sustained—^under *Robertson's* third category, as in *Rich.* The Code does not seek to prevent harm by regulating any expressive component of gift-giving. Just as the statute in *Rich* regulated the volume (and the like) of noise, but not its

expressive component, so too the Code of Ethics seeks to prevent harm by regulating the permissible amounts and types—but not any expressive components—of gifts.

Because the Code of Ethics regulates gift-giving in a content-neutral manner, it must be sustained under that analysis. As a matter of law, the Code does not unconstitutionally infringe expression under Article I, section 8.

II. The classifications in the Code of Ethics do not offend free expression rights.

In addition to the argument addressed above that the Code of Ethics unconstitutionally restrains free speech, plaintiffs also assert free speech claims based on two classifications drawn by the Code of Ethics. Plaintiffs contend that the two challenged classifications are discriminatory, in violation of Article I, section 8, and in violation of the First Amendment.

First, plaintiffs take issue with the application of the gift restriction only to donors who have a defined legislative or administrative interest before the official. Second, they challenge the provision exempting from the gift restriction reimbursement of expenses, by a governmental entity or by a nonprofit, to attend a meeting at which the public official presents material or represents the State. As discussed below, those arguments fail.

A. Plaintiffs' facial challenges to those classifications should not be entertained.

The arguments presented above as to the impropriety of a facial challenge in this case apply with at least as much force to plaintiffs' free expression claims based on the statutory classifications. As discussed above, to the extent that a benefactor's largess contains expression (above and apart from any discussion that may occur contemporaneously), the message expressed generally will not be of the sort entitled to free speech protection. To the extent that protected speech is implicated in some discrete instances, as-applied challenges will be adequate and more appropriate to resolve the legal issues presented.

The advisability of awaiting a concrete as-applied challenge is perhaps even clearer in the case of the challenged classifications. Plaintiffs make numerous assumptions about how the requirement of a "legislative or administrative interest" will be applied in specific circumstances.

For example, they claim that an "environmental organization" or a person disproportionately affected by a general tax law would lack a sufficiently distinct economic interest in pending legislation, and therefore would—^plaintiffs think—be free of the gift restrictions. But that is far from clear.

Indeed, the agency responsible for administering the Code of Ethics has interpreted broadly the types of interests that trigger the gift restrictions. *See, e.g., Brian v. Oregon Govt. Ethics Comm.,* 320 Or. 676, 689, 891 P.2d 649 (1995) (sustaining commission's investigation of potential ethics violation where state representative allegedly accepted cash gift from an individual who stood to benefit exceptionally—based on the exceptional value of his real estate holdings—from legislative action on property taxes). The commission likely would conclude that the hypothetical entities and people imagined in plaintiffs' examples each have a sufficient legislative or administrative interest to trigger the gift limitations.

Thus, in the end, it is likely that each instance of disparate treatment suggested by plaintiffs is illusory. The court should await a challenge based on a concrete application of the provisions at issue, if indeed an objectionable application ever occurs.

B. The classifications in any event do not violate free speech protections.

1. The limited application to only those with a legislative or administrative interest is a permissible, content-neutral classification.

The Code of Ethics restricts gifts to public officials from benefactors who have a legislative or administrative interest before the public official. This court has recognized thatthe statute's ambit, limited in that manner, is designed to restrict only those gifts that would create at least an appearance of impropriety.

Plaintiffs contend, however, that the statute's limited application constitutes a content-based regulation of speech. In particular, plaintiffs attack the provision defining a "legislative or administrative interesf as an economic interest, distinct from the interest of the general public.

a. The classtncation does not violate Article I, section 8.

Ordinarily, a challenge to statutory classifications would arise under Article I, section 20, of the Oregon Constitution. Plaintiffs here, however, claim that the classification is content-based. They would leverage that allegation to assert their challenge under Article I, section 8. That effort fails, because the challenged classification is not content-based.

The Oregon Supreme Court has struck down under Article I, section 8, classifications that create content-based regulations of speech. In *Fidanque,* for example, the court struck down a regulation that applied only to political speech. *See* 328 Or. at 8 n.4 (finding regulation at issue was not content neutral). In *City of Portland v. Tidyman,* 306 Or. 174, 759 P.2d 242 (1988), the court struck down an ordinance that treated businesses differently depending on whether they sold sexually explicit material. And in *Outdoor Media,* the court struck down a statute that regulated advertising signs differently depending on whether they were on- or off-premises advertisements.

The latter decision is particularly instructive as to what precisely makes a regulation "content-based." The distinction between on- and off-premises signs was content-based, because the message on the sign would dictate whether the sign was subject to regulation. *Outdoor Media,* 340 Or. at 298-99. A regulator would have to interpret the message to determine whether the regulation applied.

In this case, the application of the regulation depends *not at all* on the content of speech. It depends, instead, on whether the "speaker"—^that is, the donor of the gift—^has a legislative or administrafive interest before the public official or the official's agency, defined as an economic interest distinct from the general public. There is no need to examine the content of any message to determine the applicability of that provision. It is therefore not a content-based classification.

The classification reasonably describes the ambit of the law in a manner that is evenhanded and closely related to the law's purpose. The Oregon Supreme Court noted in *Tidyman* that it had "never held that an otherwise valid restriction must cover all or nothing[.]"

306 Or. at 183. The court explained, "for instance," that a regulation may "make evenhanded exceptions to an otherwise valid restriction." *Id.*

That principle applies equally here. The limitation on the ambit of the gift restriction is reasonable and evenhanded. Because the classification is not content-based, it should be sustained against plaintiffs' challenge under Article I, section 8.

b. The classincatlon also does not violate the First Amendment.

Plaintiffs' claim under the First Amendment similarly should be rejected. First, even if the court were to find constitutionally protected expression for purposes of Article I, section 8, the First Amendment has a much narrower ambit. The United States Supreme Court has explained.

> It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the *First Amendment.*

City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

In *Stanglin,* the plaintiffs asserted a First Amendment challenge to an ordinance that restricted attendance at certain dance halls, arguing that the ordinance thereby interfered with who could dance vsdth whom. The Supreme Court held, however, that "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the *First Amendment." Id.*

The distinct conduct of bestowing money or a thing of value is akin to the routine social interactions that *Stanglin* holds are not entitled to First Amendment protection. Insofar as choosing a dance partner, arranging a trip to the mall, or making a gift include a kernel of expression, it is not the sort of expression with which the First Amendment is concerned. Plaintiffs' First Amendment claim must fail, because the challenged statute in no way regulates First Amendment expression.

Moreover, plaintiffs can cite no authority for the proposition that the First Amendment extends greater free speech protection in this context than does Article I, section 8. It does not. Just as the reasonable, content-neutral limitation on the ambit of the statute satisfies the state constitutional free speech protection, so too it satisfies the First Amendment.

2. The exemption for governmenta! entities and nonprofits also is a reasonable, content-neutral classification.

Plaintiffs also challenge distinctions drawn by the amended definition of a "gift." The challenged exemptions all are codified within ORS 244.020(5)(b)(F). Each of those exemptions allows the reimbursement of reasonable expenses to attend a convention or similar event where the public official receiving the reimbursement is scheduled to participate actively.

The exemptions apply to reimbursements made by three categories of entities. First, the provision exempts qualifying reimbursements made by a state, federal, or local government entity, or a recognized Native American Tribe. Second, it exempts such reimbursements made by an entity of which a public body is a member. And third, it exempts such reimbursements made by a non-profit that receives less than five percent of its funding from for-profit organizations.

Like the classification discussed in the preceding section, those exemptions from the gift restriction are not content-based. The application of the exemptions again has nothing to do with distinctions based on the content of any speech. Instead, as above, the challenged classifications merely limit the ambit of the statute consistent with its purpose.

The gift restrictions are concerned with the reality and perception of corruption of public officials by private interests. State, federal, local, and tribal entities are all governmental entities. There is little risk of such corruption (either real or perceived) where public officials and candidates are merely reimbursed for their reasonable expenses to participate in forums sponsored by any such governmental entities, while it would risk both real and perceived corruption to permit private entities the same opportunities.

The same is true for entities that are made up of public bodies. That exemption is designed to ensure that the Code of Ethics does not inadvertently impede public bodies from participating in organizations like the National Association of Attorneys General and the National Association of Secretaries of State. It has neither the purpose nor the effect of distinguishing entities based on the content of their speech. Instead, the exemption is tailored to apply where the risk of an appearance of impropriety is at a minimum.

Similarly, there is little risk of corruption or its appearance where officials or candidates are reimbursed for their reasonable expenses to participate in forums sponsored by non-profit entities, provided the non-profit entity is not funded in large measure by for-profit entities, such as industry trade groups. But it would defeat the regulation's purpose if profit-making entities were permitted to circumvent the restrictions by using non-profit front organizations.

Each of the challenged exemptions is evenhanded, content-neutral, and appropriate in relation to the law's purpose. They should be sustained under Article I, section 8.

Furthermore, as above, plaintiffs' claim under the First Amendment fails for the additional reason that, regardless of the expressive content of a gift for purposes of the state constitution, routine social interactions—like gift-giving—are not entitled to protection under the First Amendment. The challenged exemptions do not offend plaintiffs' free speech rights under the state or federal constitution.

C. The remedy if the classifications were impermissible.

If the court were to conclude that one or more of the challenged classifications violated constitutional free speech protections, the appropriate remedy would be to sever the challenged limitation or exemption. ORS 174.040 expresses a strong preference for severing any impermissible provisions from Oregon statutes where it is possible to do so while preserving the legislative intent. The allegedly violative provisions could be readily severed in this case.

Thus, if plaintiffs were correct that the legislature may not limit the ambit of the gift restriction to donors with an economic interest before the public official, then the section so

defining a "legislafive or administrafive interest" readily could be severed. Further, if the court concluded that the exemptions allowing certain reimbursements by either governmental entities or nonprofit corporations were invalid, any or all of those exemptions readily could be severed.

Of course, that remedy would not meet plaintiffs' hopes for this litigation, because they still would be restrained in the personal gifts they could give the public officials they seek to persuade. But it is nonetheless the proper remedy if indeed a constitutional infirmity exists in the challenged classifications.

III. The classifications in the Code of Ethics do not violate Article I, section 20.

Plaintiffs also challenge classifications in the Code of Ethics under the Privileges and Immunities Clause, Article I, section 20. That provision guarantees that all citizens receive legal privileges and immunities equally. Under that provision, a court must determine whether the challenged statute bases its distinctions on immutable personal characteristics such as race, gender, and age. *See Crocker & Crocker*, 332 Or. 42, 55, 22 P.3d 759 (2001). If not, the "court reviews the classification for whether the legislature had a rational basis for making the distinction." *Id.*

There can be no suggestion that the challenged classifications are based on immutable personal characteristics. Plaintiffs merely complain that the Code of Ethics distinguishes between (a) those who have or lack a legislative or administrative interest; and (b) those organizations that meet or do not meet certain financial and organizational criteria. Those are not immutable personal characteristics. So the distinctions need have only some rational basis. Here they do.

The classifications challenged under this claim are the same ones that plaintiffs challenge as violative of free speech requirements. As explained above, the challenged classifications sensibly address the concerns and purposes of the Code of Ethics.

The classifications accordingly are rationally based. Because there is a rational basis for the classifications, they do not violate Article I, section 20.

IV. Plaintiffs' Article I, section 26 challenge to the offer restrictions of the Code of Ethics is without merit, because nothing in the Code of Ethics restricts plaintiffs' ability to instruct their representatives or petition the legislature.

Article I, section 26 does not protect the right to give gifts, entertainment, or honoraria to candidates or public officials. That provision provides as follows:

> 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 fi-om instructing their Representatives, nor from applying to the Legislature for redress of greivances [sic].

To determine if the Code of Ethics implicates plaintiffs' rights irnder Article I, section 26, we look to the section's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce,* 314 Or. 411, 415-16, 840 P.2d 65 (1992). Under the *Priest* analysis, the challenged provisions do not restrict plaintiffs from assembling, nor do they restrict access to candidates or public officials. Because the Code of Ethics does not restrict plaintiffs' ability to assemble or access to candidates and representatives, it does not implicate Article I, section 26.

A. The text of Article I, section 26 demonstrates that plaintiffs' challenge under that provision is without merit

Nowhere in Article I, section 26 does it specifically provide for any right to give candidates, public officials, or their families gifts, entertainment, or honoraria. Likewise, Article I, section 26 does not specifically provide candidates, public officials, or their families the right to receive any gifts, entertainment, or honoraria. In *Libertarian Party of Oregon* v. *Roberts,* the Oregon Supreme Court looked to the text of the provisions at issue in determining that providing blank boxes for write-in candidates was enough to overcome most of the constitutional challenges to Oregon's "minor political party" requirements. 305 Or. 238, 247, 750 P.2d 1147 (1988) ("none of [the constitutional provisions], of themselves, require[] the state to recognize political parties or list the nominees of political organizations on election ballots"). Similar to the reasoning in *Libertarian Party of Oregon,* the text in Article I, section 26 "cannot

possibly be construed to mean protecting the right to a self-selected group to share drinks, food, and fellowship." *Lahmann* v. *Grand Aerie of Fraternal Order of Eagles, 202* Or. App. 123, 136, 121 P.3d 671 (2005). The value limits on gifts, entertainment, and honoraria in no way intrude on plaintiffs' abilities to assemble to consult for the common good, or instruct their representatives, or apply to the state legislature for their grievances. The text of Article I, section 26 does not support plaintiffs' claim that the Code of Ethics restrictions on the value of gifts, entertainment, or honoraria given to candidates, public officials, or their families violate Article I, section 26.

B. Case law does not support plaintiffs' Article I, section 26 challenge.

There is no reported Oregon case regarding whether value limits on gifts, entertainment, or honoraria violate Article I, section 26. Oregon courts have struck down laws that target gatherings specifically "dedicated to polifical advocacy." *Lahmann,* 202 Or. App. at 134, n. 4 (cifing cases such as *State* v. *Ausmus,* 336 Or. 493, 507, 85 P.3d 864 (2004) (disorderly conduct charge if a person does not comply with a police order to disperse); *Vannatta I* (campaign finance limitations); F/t/a^i^we v. *Oregon Gov't Standards and Practices,* 141 Or. App. 495,506, 920 P.2d 154 (1996) (lobbying fees)). However because the Code of Ethics value limits at issue do not restrict plaintiffs' ability to assemble, access their representatives, or address Oregon's legislature, the Code of Ethics does not violate Article I, section 26.

The Oregon Supreme Court has ruled that possible violations of Article I, section 26 undergo the same analysis as Article I, section 8. *See, e.g.. State v. Illig-Renn,* 341 Or. at 236 ("the two constitutional provisions are subject to the same analytical framework, including that part of the framework that limits facial overbreadth challenges to statutes that 'in terms' proscribe constitutionally protected conduct"); *Vannatta I,* 324 Or. 514 at 547 ("[Petitioner's] argument is tied so clearly to the interests of both candidate and contributor in the concept of communication that it seems to us not to differ in principle from arguments already discussed in

Article I, section 8"). Thus, the challenged provisions of the Code of Ethics do not implicate Article I, section 26 for the same reasons previously addressed for Article I, section 8.

C. The history of Article I, section 26 shows that the framers did not intend that provision to protect unlimited gifts, entertainment, or honoraria for candidates or public officials.

Article I, section 26 was included by the 1857 constitutional convention without significant comment or debate. *See* C. BURTON & A. GRADE, *A Legislative History of the Oregon Constitution of 185 ~ Part I (Articles I & 11),* 37 WILLAMETTE L. REV. 469, 544 (2001). The framers of Oregon's constitution borrowed the rights to assemble, instruct representatives, and apply to the legislature to address grievances from Indiana's Constitution adopted in 1851, which in turn was adopted from earlier state constitutions.^' *See* THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 101-102 (1926) (C. Carey, ed.). These early states included these rights in their constitutions "to safeguard the right to assemble, and to fuse it to guarantees of the right of instruction and the right to petition the legislature for assistance in redressing wrongs" in reaction to British control of town meetings and legislatures. *Lahmann,* 202 Or. App. at 140-41 (citing to the state constitutions of Ohio, Kentucky, Pennsylvania, and Tennessee).

Although Oregon's framers did not debate Article I, section 26, the Oregon Court of Appeals has inferred that the framers "intended the assembly clause to accomplish what it recited, that is, to ensure the right to assemble in order to deliberate on matters of public concern as a part of the political process." *Id.* at 142. The Oregon Supreme Court further "venture[d] to believe that neither Mathew P. Deady nor George H. Williams, nor any of the other fifty-eight

'^ *See e.g.,* N.C. Const, art. I, § 12 (1776) ("The people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature for redress of grievances"); Mass. Const. Pt. I, art. XIX (1780) ("The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body by way of addresses, petitions, or remonstrances ..."); Vt. Const. Ch. I, art. § XVIII (1786) ("That the people have a right to assemble together, to consult for their common good - to instruct their representatives, to apply to the legislature for redress of grievances, by address, petition, or remonstrance").

members of the convention which framed [Oregon's] Constitution, ever supposed that a statute prohibiting assemblages from counseling the commission of a crime would be unconstitutional interference with the right of assemblage." *State* v. *Lamdy,* 103 Or. 443, 462, 204 P. 958 (1922). No legislative history indicates "that the framers of the Oregon Constitution understood section 26 as an expansive guarantee of expressive association or purely social assembly divorced from matters of public concern." *Lahmann,* 202 Or. App. at 142.

The idea that the framers of Oregon's constitution intended Article I, section 26 to preclude a limit on the value of gifts, entertainment, or honoraria given to public officials finds no support in the history of that provision.

In summary, the text, case law and historical circumstances of Article I, section 26's adoption all demonstrate that the provision does not guarantee plaintiffs a right to make unlimited gifts to public officials and candidates.

V. Even if the court were to agree with plaintiffs as to the offer restrictions, the court should reject plaintiffs' challenge to the solicitation-and-receipt restrictions.

Although they lump the two categories together, plaintiffs actually are challenging two distinct sets of ethics provisions. One set of challenged ethics provisions restricts the offering of gifts, entertainment, and honoraria to public officials and candidates for elected office before whom the offeror has an administrative or legislative interest. The other set that plaintiffs challenge are those that restricts the *solicitation* and *receipt* of gifts, entertainment, and honoraria by public officials and candidates from persons who have administrative or legislative interest before the official or candidate. Despite plaintiffs' failure to distinguish these two categories.

Plaintiffs may argue that their right to *offer* such things would be meaningless if the public official or candidate could not solicit or accept such offers. Such reasoning is flawed. There is no reason why a public official or candidate has to be able to *solicit* gifts proactively for plaintiffs' offer to have meaning. Any expression inherent in an offer is complete when the offer is made to an offeree who hears the offer. The offer does not have to be accepted for the expression to be complete.

in considering these cross-motions for summary judgment, the court must bear in mind that the two categories are in fact analytically quite distinct.

Even if the court were to determine that the offer restrictions are unconstitutional, it does not follow that the solicitation and receipt restrictions are unconstitutional. For all of the reasons stated above, defendants maintain that both categories—offer restrictions applicable to the public and solicitation-and-receipt restrictions applicable only to public officials and candidates—are constitutionally permissible. But if it finds the offer restrictions impermissible, this court should reject plaintiffs' challenge to the solicitation-and-receipt restrictions.

Plaintiffs do not challenge ORS 244.040(1). That part of the Code of Ethics, which was not changed by SB 10, prohibits the use by public officials of their offices for private financial gain. Public officials have never had and do not now have a constitutional right to use their public office for personal gain, and plaintiffs have no constitutional right to facilitate such behavior by public officials.

CONCLUSION

Plaintiffs are perhaps accustomed to plying with personal favors the public officials whom they seek to influence, and they have perhaps even come to think of those favors as an essential part of their political discussion. But the Legislative Assembly is well within its constitutional prerogative when it acts to eliminate the appearance of corruption by restricting personal gifts to public officials. As this court already has recognized, the legislature constitutionally may conclude that such largess is incompatible with the integrity implied by and expected in public service. Legislation to protect that integrity does not violate any constitutional right. The State's motion for summary judgment should be granted, plaintiffs'

motion for summary judgment sliould be denied, and the Code of Ethics should be sustained as a matter of law.

DATED this %L day of March, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 2J_> 2008,1 served the foregoing MEMORANDUM IN OPPOSITION TO PLAE^TIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following;

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