IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

FRED VANNATTA AND CENTER TO PROTECT FREE SPEECH, INC., an Oregon Not-For-Profit Corporation,

Plaintiffs,

V.

OREGON GOVERNMENT ETHICS COMMISSION, formerly known as the Oregon Government Standards and Practices Commission, and STATE OF OREGON,

Defendants.

Case No. 07C20464

Honorable Joseph C. Guimond

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

The questions presented by plaintiffs' motion for preliminary injunction are straightforward. Are the challenged lobbying expenditures of Senate Bill 10 "expression" for purposes of Article I, section, 8, of the Oregon Constitution? If so, do they withstand scrutiny under the framework of *State v. Robertson*[1] and its progeny?

Defendants' response memorandum goes well beyond the scope of plaintiffs' motion. By

[1] 293 Or. 402, 649 P.2d 569 (1982)

agreement, defendants have combined their response to plaintiffs' motion for prehminary judgment with their memorandum in support of summary judgment. Consequently, defendants address certain issues (e.g. plaintiffs' challenges under Article I, sections 20 and 26) that are not before the Court on the preliminary injunction motion and that will not be covered herein.^

Defendants' actual response to the preliminary injunction motion is, itself, larded with numerous statements that enjoy no place in the *Robertson* framework. The thrust of defendants' argument appears to be that if they can conjure up several extreme examples of lobbying expenditures that they deem to be in need of govermnental regulation, then all other restrictions on such expression must also be permissible. Specifically, defendants suggest (among other things) that plaintiffs have claimed the "right to give new automobiles" "a new home," "vacation homes" and "six-figure cash gift[s]" to public officials "before whom plaintiffs have pending business." With the issue thus framed, defendants state that plaintiffs' claims would fulfill "people's worst fears about public corruption," would "create suspicion in the minds of people" who "might wonder" whether something improper is afoot, and that the "public expects" or has the "right to expect" that such gifts should not be made. With these and other hyperbolic examples (including an "old joke about petty corruption in a third-world country") as the fiame of reference, defendants contend, almost *a priori,* that the government has the right to enact the prohibitions of Senate Bill 10.

As is perhaps natural when one is consistently *required* to defend the constitutionality of any challenged laws, the State has (perhaps inadvertently) advanced arguments that would turn

^ The parties have agreed that plaintiffs' response to defendants' motion for summary judgment (as well as plaintiffs' cross-motion for summary judgment) may be filed sometime after the Court's resolution of plaintiffs' motion for preliminary injunction.

the very purpose and meaning of Article I, section 8, on its head. Article I, section, 8, provides very expansive protection against laws restricting or restraining expression. So expansive are the protections of Article I, section 8, that the Oregon Supreme Court has even commented that "one is struck by its sweeping terms, both with respect to the [limitation on legislative power] and the kinds of expression protected[.]" *State v. Ciancanelli,* 339 Or. 282, 311, 121 P.3d 613 (2005). The challenged provisions of Senate Bill 10 are unconstitutional if they reach expression that is protected by Article 1, section 8. Thus, for the purpose of analyzing plaintiffs' claims, the focus should not be on the outlandishly colorful scenarios conjured up by defendants (e.g. "new cars"), but rather on the most pure or common forms of political speech that are impaired by Senate Bill 10, including the following:

- 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 pajonent 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 and who is interested in seeing first-hand how the Oregon Cultural Trust's contributions to the University theatre program has improved opportunities in the arts.

With each of the examples above, there is no cause for genuine concern of corruption, the appearance of corruption, or any of the other purported rationales advanced by defendants. Even

more importantly for the purposes of this constitutional challenge, each of these examples involves protected expression. As will be shown, the challenged restrictions of Senate Bill 10 are addressed to this expression (not to any alleged harmful effects), and there is no exception that permits such an infringement.

Another flaw in defendants' analysis comes in the suggestion that plaintiffs are challenging more than just the existing restrictions on lobbying expenditures. Despite defendants' suggestion to the contrary, these existing limits are substantially different from the restrictions in place prior to the passage of Senate Bill 10. For instance. Senate Bill 10 creates a new *prohibition* on entertainment that did not exist previously. However, it matters not what was previously prohibited or allowed under the Code of Ethics. Plaintiffs' challenge is only to the *current* restrictions on lobbying expenditures, including the current restrictions on (a) giving or receiving things of value over $50, (b) providing or receiving entertainment, and (c) providing or receiving honoraria. While defendants suggest that all manner of pernicious consequences might occur if *no restrictions* are allowed, those concerns are beyond the scope of this proceeding. It is not for plaintiffs (or the Court) to propose some other restrictions that would both pass constitutional muster and fit defendants' theoretical concerns for better government. If the current restrictions on lobbying expenditures fail, it is up to the legislature to pass any other laws that are consistent with Article I, Section 8.

As discussed herein, the legislature has enacted a law that offends Article I, section 8. No matter how forcefully defendants argue that the restrictions of Senate Bill 10 make for good government, they are unconstitutional and must therefore be stricken. This is the case even if the restrictions enjoy popular support. *Ciancanelli,* 339 Or. at 629 (the protections of Article. I,

section 8, "extend to the kinds of expression that a majority of citizens in many communities would dislike").

REPLY ARGUMENT

Defendants have suggested that a ruling that the challenged sections of Senate Bill 10 violates Article I, section 8, would represent some historic interpretation of that constitutional provision. Because the Oregon courts have never decided the *precise* issues presented in this case, defendants counsel that the Court "should not be the first" to find that these lobbying restrictions are impermissible under Article I, section 8. Again, defendants have it backwards. A ruling by this Court that Oregon's sweeping free speech protections do *not* cover lobbying expenditures (such as those examples cited above) would constitute a major departure from prior case law, most notably the Oregon Supreme Court cases dealing with very analogous factual settings (including campaign contributions and lobbyist registration fees). Consistent with Article I, section 8, jurisprudence, the restrictions of Senate Bill 10 should be stricken, for the. reasons discussed below.

The lobbying expenditures restricted by Senate Bill 10 are protected forms of "expression," thus triggering the *Robertson* analysis. The restrictions of Senate Bill 10 are aimed at expression (not some identifiable harm) and there is no applicable historic or incompatibility exception. Finally, there is no merit in the arguments advanced by defendants regarding (a) some reserved legislative powers of Article IV, section 15, and (b) the independent viability of Senate Bill lO's restrictions on the receipt by public officials of certain lobbying expenditures.

L The lobbying expenditures restricted by Senate Bill 10 are protected forms of expression under the Oregon Constitution.

Conspicuously absent from defendants' discussion of whether the challenged lobbying

expenditures constitute expression is any mention of the Oregon Supreme Court's decision in *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission,* 328 Or. 1, 969 P.2d 376 (1998). That case, discussed in plaintiffs' opening memorandum, stated that lobbying is political speech, that obtaining goodwill is bound up closely with the essential expressive nature of the profession, and that "lobbying is expression [] for the purposes of the first *Robertson* category." 328 Or. at 7-8. Plaintiffs further noted that other courts have found that lobbyist goodwill building, such as entertainment, is protected expression vinder the First Amendment. *See, e.g., U.S. v. Sawyer,* 85 F.3d 713 (l" Cir. 1996). Defendants did not address *Fidanque* or *Sawyer.* Plaintiffs submit, however, that these cases are the most helpfiil guidance available to the Court in assessing whether the lobbying activities restricted by Senate Bill 10 constitute expression.

The supplemental declaration of Plaintiff Fred VanNatta and the examples provided above represent core political speech imder Article I, section 8. Mr. VanNatta has a significant economic interest in family owned "small woodlands" in Oregon. Past legislative sessions have considered many bills that could directly impact the livelihood of small woodlands owners. Defendants admit that fixture sessions are expected to consider fiirther regulation of small woodlands. Mr. VanNatta wishes to avail himself of the very goodwill building activities (e.g., entertainment and provision of business means in the course of substantive conversation) that *Fidanque* protects as expression in order to advance his legislative interest.

Defendants instead appear to rely entirely on a particular footnote in *VanNatta* v. *Keisling,* 324 Or. 514, 522 n. 10, 931 P.2d 770 (1997); indeed, defendants even excerpted this footnote on the cover page of their memorandum. However, defendants' reliance on this

footnote is entirely misplaced, as it lends no support to their position.

In *VanNatta*, the court found that campaign contributions are protected forms of expression. 324 Or. at 520. The court stated that a contribution "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 depends in no way on the ultimate use to which the contribution is put." *Id.* at 522. Finding that "many - probably most" contributions are protected expression, the court explained (in the footnote relied upon by defendants) that its use of the limiting word "many" reflects that some contributions might (1) have no expressive content, or (2) be in a form or from a source that the legislature is otherwise entitled to regulate. *Id.* at 522 n. 10. In the first category, the court gave the example of a donation to a friend "who later, and unexpectedly, uses that thing of value to support the friend's political campaign." *Id.* In the second category, the court provided examples of bribery and corporate/union contributions that violate neutral laws governing such entities. *Id.*

From this discussion, defendants appear to conclude that two of these three examples (a gift to a friend and a bribe) somehow "encompass all gifts" by lobbyists to public officials. That is, defendants contend that a gift is either made for the purpose of improperly influencing the public official (i.e. bribery) or it is devoid of any expressive content ("made merely in friendship"). It is unclear just how defendants arrived at this binary universe of lobbying expenditures. As reflected in the very examples provided above, lobbying expenditures can occur in the form of things of value (e.g. transportation), entertainment, and honorarium. They can be made for a great number of expressive purposes, including advocating the merits of a lobbyist's position, sharing information on the subject of pending legislation, or building

goodwill as a reliable source of valuable information. Indeed, these lobbying activities also often involve the flow of information from the public official to the lobbyist, as is most often the case with honoraria. The purposes and effect of these lobbying activities are entirely distinguishable from both a bribe (defined by the *VanNatta* court as an "anticipated *quid pro quo)* and a gift merely given to a friend with utterly no expressive content. Again, defendants' reliance on this footnote is misplaced; their further suggestion that the footnote somehow "demonstrates that the Oregon Supreme Court does not deem a gift to a public official to be protected expression" is without any support. No Oregon court has ever held, or even intimated, that lobbying expenditures are not expression (and, in fact, the *Fidanque* court held that they are expression).

Defendants are also misguided in their attempt to distinguish lobbying expenditures (such as the examples provided above) from campaign contributions. If anything, the lobbying expenditures referenced above contain even greater expressive content than a standard campaign contribution. In the case of a contribution, a check is vwitten 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 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 cheek is constitutionally protected expression. However, the above-referenced lobbying activities, while also signifying a measure of "support" for the public official, 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.

For all these reasons (and if prior Oregon case law is to be respected), the lobbying

activities restricted by Senate Bill 10 are constitutionally protected expression.

II. The restrictions on expression in Senate Bill 10 cannot withstand scrutiny under Article I, section 8.

In considering a challenge under Article 1, 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. To be directed at a harm, the restriction must only apply when the harm is shown to exist. *See, e.g., City of Portland v. Tidyman,* 306 Or. 174, 759 P.2d 242 (1988)(finding that zoning ordinance was directed at expression, not harm, where the harms did not have to be shovra for the zoning ordinance to be applied). Because, as will be shown, the challenged provisions of Senate Bill 10 are directed at expression (and not harmful effects), 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.

The policy underpirmings for the restrictions on lobbying expenditures are not clear from the text of Senate Bill 10 (or the Code of Ethics). Defendants claim that the perceived harms sought to be addressed by Senate Bill 10 are corruption and the appearance thereof. It should first be noted that corruption in the form of bribery is already prohibited by statute^ 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

' *See* ORS 162.015 and 162.025.

optimistic about the integrity of the pohtical 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 statute is clearly not directed at such harms under the *Robertson* framework. For the restrictions of Senate Bill 10 to apply, there need only be a lobbying expenditure that is in excess of $50, or in any amount in the form of entertainment or honorarium. The restrictions of Senate Bill 10 do not contain as an additional element that the purported harms 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 Senate Bill 10 without any showing that it actually causes corruption or the appearance thereof'*

Defendants do not contest this point and apparently concede that, assuming the restricted lobbying activities are expression. Senate Bill 10 is directed at expression, not some harmfiil effects. Instead, defendants attempt to invoke both the historical exception and incompatibility exception. For the reasons discussed below, neither exception is availing.

A. The incompatibility exception does not apply.

Defendants first contend that Senate Bill lO's restrictions on lobbying expenditures are saved by the incompatibility exception, a narrow exception to Article I, section 8, that was carved in the disciplinary cases of *In re Lasswelf* and *In re Fadely.*[^] In order to satisfy that

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" (SB 10, Section 16a)), 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 exempt all gifts from environmental groups, yet proscribe $51 meals by the industry opposing the regulation sought by the environmental group.

' 296 Or. 121,673 P.2d 855 (1983).

exception, the expression at issue "must actually vitiate the proper performance of the particular professional's official function, under the facts of the specific case." *VanNatta,* 324 Or. at 541 (citing *Lasswell* and *Fadely).* Defendants argue that their generalized concerns, regarding the appearance of impropriety for all public officials are sufficient to bring the lobbying expenditure restrictions within the incompatibility exception. Their argument should be rejected.

First, defendants cite to no authority for this incredibly expansive reading of the exception. Not only do they cite to no authority that the benefit of lobbying expenditures are incompatible with the role of legislators, they cite to no authority for the application of the incompatibility exception outside the context of a legal professional violating prescribed rules of the judicial canons or the attorney code of professional conduct.

Second, the limited holdings in *Lasswell* (that a public prosecutor must abide by professional rules prohibiting extrajudicial statements with the intent or knowledge that such statements pose an imminent threat to the process) and *Fadely* (that a judge must abide by professional rules prohibiting the personal solicitation of campaign contributions) cannot be extended to fit defendants' argument. There has been no showing, nor can defendant's now show, that every receipt by every public official of any thing of value over $50, any entertainment, or any honorarium is, in every instance, incompatible with the public official's performance. Indeed, as shown in 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 would be incompatible with a

* 310 Or. 548, 802 P.2d 31 (1990).

legislator's function. Rather participation in such an activity goes to the very essence of being a legislator. Moreover, these very lobbying expenditures ($51 for travel expenditures, $1 of entertainment and honorarium) were just permitted prior to the passage of Senate Bill 10 and no circumstances have changed to now make the receipt of these lobbying expenditures suddenly "incompatible." Even the restrictions of Senate Bill 10 permit *some* gifts to public officials, so gifts themselves are apparently not inherently incompatible. Instead, an arbitrary line has been drawn to demarcate "compatible" gifts of $49 and "incompatible" gifts of $51.

Interestingly, defendants argue that the rationale in *FadeJy* applies with equal force to the restrictions at issue in this case, even though the Oregon Supreme Court has decided that the actual rule applied against a judge in *Fadely* (the prohibition on solicitation of campaign contributions) is not incompatible with the fimctions of legislators and staff covered by Senate Bill 10. In *VanNatta,* the court specifically held that the campaign contribution limits could not constitutionally apply to legislators and other elected officials, 324 Or. at 540-541, in part because the court determined that there is nothing incompatible about a legislator soliciting and receiving campaign contributions. The court rejected the State's arguments to the contrary: "an underlying assumption of the American electoral system always has been that, in spite of 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 time again." *Id.* at 541. There can be no valid argument that the application of the incompatibility exception in *Fadely* should be extended to legislators, when the Oregon Supreme Court has already rejected a direct invitation to extend the *Fadely* rule to legislators.

Moreover, the extreme swath of Senate Bill 10 embraces a whole host of scenarios that could only be met with the most absurd of incompatibility arguments. The following is but one example. An owner of a stationery store in a small town wishes to compete for a stationary supply contract with the local elementary school district. The owner's child attends the elementary school and has a friend whose parent is a school teacher in the district. Under Senate Bill 10, the owner carmot treat his child and the child's friend to a movie because the owner has an "administrative interest" in the district and his child's friend is a relative of a public official (the teacher) who works for the district. The owner is therefore prohibited from paying for "entertainment expenses" attributable to the child's friend. See Section 18(4)(b) and (c). There is certainly nothing "incompatible" with the teacher's child receiving the movie entertainment or in the teacher allowing his/her child to receive the entertainment. But, these are the absurd results that would follow from a finding in favor of defendants' incompatibility argument.

This final example reveals yet another flaw in defendants' incompatibility argument, as they contend that the incompatibility exception somehow applies to the restriction on a lobbyist giving lobbying expenditures to or on behalf of a public official. Defendants make no argument that such expenditures are in any way "incompatible" with the lobbyist's fimction, only that a lobbyist cannot *give* such expenditures to a public official because it would be incompatible for the public official to *receive* such expenditures. In other words, defendants say a lobbyist caimot give because a public official cannot receive. This certainly belies defendants' other argument (discussed below) that the giving of a lobbying expenditure is somehow unrelated to (and is wholly divisible for constitutional purposes fi-om) the receipt of such expenditure. As will be discussed below, and as defendants' incompatibility argument illustrates, the giving and receipt

of lobbying expenditures are inextricably bound together for purposes of constitutional analysis.

B. The historical exception does not apply.

Under the *Robertson* framework, the "party opposing a claim of constitutional privilege has the burden of demonstrating that a restriction on speech falls with an historical exception." *Moser* v. *Frohnmayer*, 315 Or. 372, 376, 845 P.2d 1284 (1993). "This is a heavy burden." *Id.*

Faced with this heavy burden, defendants present their historical exception argument by way of footnote (Def. Mem., p. 17-18, n. 10), in which they argue 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." Again turning the constitutional analysis on its head, defendants conclude that the *absence* of lobbying expenditure limitations would "likely have been foreign to the framers of the Oregon 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 contribution." 324 Or. 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 the lobbying restrictions at issue in Senate Bill 10. The existence of bribery statutes merely indicates an historical exception for bribery. Just as there was no historical antecedent for campaign contributions, there is no historical exception to Article I, section 8, for lobbying expenditures of more than $50, or on entertainment or honorarium. Indeed, such an argument cannot even seriously be made because, not only were there no historic laws prohibiting such expenditures

but, until the most recent legislative session, such expenditures were expressly permitted (i.e. unlimited amounts expended for meals, travel and beverages consumed in the presence of the lobbyist and certain forms of entertainment and honorarium were allowed).

Moreover, to satisfy the historical exception, the restrictions on speech must be "wholly confined" within the historical exception. *Robertson,* 293 Or. at 412. Even if some portion of the conduct proscribed by Senate Bill 10 (e.g., a *quid pro quo* "six-figure cash gift" to a public official) might find some kindred historical prohibition (on bribery), defendants still must show that all other expression proscribed by Senate Bill 10 also has an historical antecedent. The suggestion that Senate Bill 10 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 Coxirt'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 P.2d 639 (2005)), aduh businesses *(Tidyman)* or even live public sex shows *(Ciancanelli).* 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 have not made, and cannot make, the requisite showing."

^ Defendants also argue that other provisions in the Oregon constitution empower the legislature to enact lobbying restrictions that would otherwise violate Article I, section 8. As discussed below, these arguments are untenable. Furthermore, they have no bearing on the historical exception analysis because (a) if another provision of the constitution "trumps" Article I, section 8, then there would be no *Robertson* analysis, (b) the legislature, even if it had such authority to trump Article I, section 8, did not do so, and (c) the historical exception analysis only applies to laws actually adopted, not latent powers that the

II. The legislature has no constitutional authority to pass Senate Bill 10 in violation of Article I, section 8.

Defendants argue that Article IV, section 15, ("Either house may punish its members for disorderly behavior, and may with the concurrence of two thirds, expel a member but not a second time for the same cause.") "plainly authorize[s] the legislature to discipline its members for transgressions of rules the legislature itself develops." ^ Defs. Mem., p. 14-15. Defendants cite to no authority for this sweeping proposition that Article IV, section 15, somehow trumps the protections of Article I, section 8. In addition, the restrictions of Senate Bill 10 are not the type of "punish[ment] for disorderly behavior" that falls under the purview of Article IV, section 15. That is, the authority provided in Article IV, section 15, is simply not applicable to Senate Bill 10.

First, Senate Bill 10 is a statute, passed by both houses of the legislature and signed into law by the governor. It is not an act by one house to punish its members, nor is it even a rule adopted by one house to police its members. Article IV, section 15, does not authorize one house to "pxmish" members of another house, or the governor to "punish" members of either house. Thus, even if the prohibitions and penalties in Senate Bill 10 were somehow deemed a "punishment," they were not adopted pursuant to Article IV, section 15.

Second, the statute is plainly made applicable to not only members of one house (or even

legislature could have exercised prior to the protections imposed by Article I, section 8. We assume that the territorial legislature could have enacted many infringements on the right to speak (like regulation of nude dancing) before there ever was an Oregon Constitution. The point is: it did not do so and therefore there is no historical exception to Article I, section 8.

^ Defendants also claim that this authority also derives from Article I, section 17 ("Each house shall have all powers necessary for a branch of the Legislative Department, of a free and independent (sic) State.") but provide no meaningful discussion as to how this constitutional provision empowers the legislature to adopt the restrictions of Senate Bill 10.

both houses), but to nearly *every* state and local employee in Oregon. It strains credulity to suggest that Senate Bill 10 is an effort by one house to pass rules under which its members can be punished. Article IV, section 15, does not authorize the legislature to infringe upon the civil rights of non-legislators (including private parties), which is the unmistakable result of Senate Bill 10.

Third, the "punishment" power in Article IV, section 15, applies only, in cases of "disorderly behavior." Defendants provide no authority to support the position that the term "disorderly behavior" is so elastic as to cover the receipt of $1 of entertainment or honorarium or $51 for travel expenses for a legislative fact-finding trip, all of which were perfect legal (and, presumably, not "disorderly behavior") prior to the last legislative session.

Fourth, Senate Bill 10 does not do anything to "punish" members of either house. It instead imposes restrictions on expression between (a) private parties with legislative or administrative interests and (b) nearly all public officials. The only "punishment" under Senate Bill 10 would be meted out by the Oregon Goverrmient Ethics Commission. *See* Senate Bill 10, section 11a. Were Senate Bill 10 really an exercise of each chamber's authority under Article IV, section 15, there could be no valid delegation to the Ethics Commission.

Fifth, the cases cited by defendants merely illustrate that the legislatures of Oregon and elsewhere have historically been authorized to punish their own members for ethical or criminal transgressions. The legislative authority to do that is not in dispute, but it is also not relevant to the issue before the Court.

Sixth, the Attorney General himself has already rejected this very argument. In response to a question from Secretary of State Bradbury, the Attorney General has opined that ORS

260.174 (restricting campaign contributions and expenditures while the legislature is in session) violates Article I, section 8. Letter of Advice dated January 2, 2001 (No. 8274). If the legislature had the power to prohibit lobbying expenditures notwithstanding Article I, section 8, by virtue of Article IV, section 15, it stands to reason that it would also have the power to prohibit in-session campaign contributions notwithstanding Article I, section 8.^

Finally, and perhaps most importantly, any right the legislature has to make rules for disciplining its own members is itself subject to the requirement that such rules must be constitutional. Cases interpreting Article I, section 5, clause 2 of the United States Constitution (upon which defendants rely in their interpretation of Article IV, section 15, of the Oregon Constitution) make this abundantly clear. For instance, in *United States v. Ballen,* 144 U.S. 1, 5, 12 S.Ct. 507 (1892), the Court held that the "constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights[.]" *See also Shape of Things to Come, Inc. v. County of Kane,* 588 F.Supp. 1192 (N.D. 111. I984)(rules adopted by House of Representatives have force of law and are subject to constitutional restrictions). Were legislative rules *not* subject to other constitutional protections, each legislative chamber could adopt and enforce rules that (a) prohibit members from voting in any elections; (b) prohibit members from practicing certain religions; or (c) do not allow members of a particular race or gender. Just as such legislative rules would be invalid restrictions on constitutional rights, a rule that prohibits members from engaging in political

' Plaintiffs do not fault the Attorney General for advocating one position while opining another, as that is likely unavoidable given the Attorney General's duty to at least attempt to defend challenges to even patently unconstitutional statutes (such as Senate Bill 10).

expression with concerned constituents (including lobbyists) cannot survive under Article I, section 8.

For all these reasons, Article IV, section 5, does not authorize the legislature to enact those portions of Senate Bill 10 that are themselves unconstitutional under Article I, section 8.

III. The restrictions in Senate Bill 10 on the *receipt* of political expenditures also violate Article I, section 8.

Defendants argue that even if the restrictions on the right to *make* lobbying expenditures are unconstitutional, the restrictions on the right to *receive* the benefit of such expenditures somehow independently survive Article I, section 8, scrutiny. That is, under defendants' position, even if a person has the constitutional right to make lobbying expenditures (e.g. to pay a legislator's transportation costs for a fact-finding trip), the state may nevertheless prohibit the public official from *receiving* the expenditure (e.g. a public official could not actually attend the fact-finding trip). Once more, defendants provide no authority for this argument, which flies in the face of prior Oregon case law and utterly fails to appreciate the very nature of constitutionally protected lobbying activities.

Defendants first contend that the restriction on a public official's receipt of the lobbying expenditures prohibited by Senate Bill 10 is supported by the incompatibility exception. For the reasons discussed above, this argument is without merit.

Defendants next argue that plaintiffs (and others) only have the constitutional right to *offer* (and not to actually *make)* lobbying expenditures for entertainment, honorarium or things of value over $50. They claim that "any expression inherent in an offer is complete when the offer is made." Defs. Mem., p. 25. For example, under defendants' view, the only expression that inheres in a joint fact-finding mission by lobbyists and legislators is the mere invitation for such

mission by the lobbyist. This, of course, ignores the very act of political dialogue that is the essence of lobbying itself - the interaction between the lobbyist and public official that occurs on the fact-finding mission and the information that public official gleans by seeing things for himself or herself It is absurd to contend that Article I, section 8, only protects the *invitation* to conduct such political expression, not the political expression itself A similar argument could have been made in the context of campaign contributions in *VanNatta:* that it is only the offer of a campaign contribution that constitutes speech, not the contribution itself. Of course, that is not the result of *VanNatta.*

In a related argument, defendants assert that, even if there is a constitutionally recognized right to make a lobbying expenditure, the government can nevertheless prohibit the receipt of it. Again, if the regulated conduct is speech, the giving and receiving of it are merely one in the same, as one carmot, for example, give honorarium or pay travel expenses for a fact-finding mission unless the other party receives the honorarium or the benefit of the travel for the fact-finding mission. As the Oregon Supreme Court has acknowledged, the "constitutional prohibition against laws restraining speech [] cannot be evaded simply by phrasing statutes as to prohibit 'causing another person to see' or 'to hear' whatever the lawmakers wish to suppress." *State* ***V.*** *Moyle,* 299 Or. 691, 699, 705 P.2d 740 (1985). Returning again to the result in *VanNatta,* a right to give a campaign contribution is illusory if there is a nullifying prohibition on its receipt. Defendants' suggestion that plaintiffs only have the constitutional right to "clap with one hand" would only allow for noiseless expression, a result certainly not consistent with the sweeping protections of Article I, section 8.

In addition, defendants argue that (even if there is a constitutionally recognized right to

offer, make and receive lobbying expenditures) the "solicitation" of such lobbying expenditures by the public official is still not protected. Here, again, is an example of defendants distorting the Article I, section 8, analysis under *Robertson.* If the statute at issue is directed at speech (as is certainly the case with Senate Bill lO's restriction against a legislator, for example, proposing a fact-finding mission to be subsidized by one or more interested parties), then it is unconstitutional unless either the historical exception or incompatibility exception applies. For the reasons set forth above, neither exception is applicable to any provisions of Senate Bill 10, including the restrictions on public officials soliciting or otherwise initiating lobbying activities. The narrow incompatibility rule in *Fadely* (regarding the direct solicitation of campaign contributions by a judge) has never been, and should not be, extended to a legislator's solicitation of lobbying activities. As noted in this and plaintiffs' prior memorandum, the receipt (or solicitation) by a public official of lobbying expenditures (whether in the form of travel expenses, honorarium, or entertainment) is not incompatible with the official's public function.

Finally, defendants suggest that, if plaintiffs are successfiil in their challenge to sections 18 and 24 of Senate Bill 10, then section 17 of Senate Bill 10 would remain and (bereft of the cross-referenced exceptions of sections 18 and 24) would prohibit "a// gifts, entertainment, and honoraria, regardless of how small[.]" Defs. Mem., p. 24, n. 14. Like many other statutory challenges, plaintiffs' claims (if successftal) may collaterally impact other statutes within the same statutory scheme. If the (relatively) limited restrictions of sections 18 and 24 are deemed unconstitutional, there is no question that any resulting absolute prohibition in section 18 would also violate Article I, section 8, and be unenforceable. Any order of the Court enjoining application of the limits in section 18 and 24 should equally be extended to Section 17.

IV. Plaintiffs' motion for preliminary injunction should be granted.

For all the foregoing reasons, plaintiffs submit that there is a high likelihood that they will succeed on the merits. Moreover, defendants have conceded that, assuming plaintiffs ultimately prevail in this action, any continued abridgment of plaintiffs' rights during the pendency of this action would constitute irreparable harm. Defs. Mem., p. 28. Defendants nonetheless have asked the Court to balance the respective hardships of the parties: the hardship on plaintiffs of being deprived of their constitutional rights (presumably for the entire 2008 legislative session) and the hardship on defendants of not being able to enforce the (likely unconstitutional) provisions during that period. Any such balancing, however, would tip in favor of plaintiffs. As noted in plaintiffs prior memorandum, Oregon courts routinely enjoin enforcement of laws that abridge free speech. *See, e.g., Roman v. City of Portland*, 909 F Supp 767 (D. Or 1995)(Haggerty, J., preliminarily enjoining law restricting location of speakers); *Moser* ***V.*** *Federal Communications Commission*, 811 F Supp 541 (D. Or. 1992)(Redden, C.J., preliminarily enjoining law restricting method of speech) Plaintiffs ask the Court to likewise issue a preliminary injunction against the enforcement of the challenged restrictions in Senate Bill 10.

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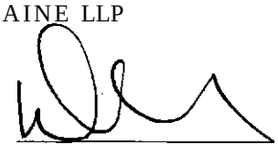
CONCLUSION

Plaintiffs respectfully ask the Court to grant their motion and issue a preliminary injunction enjoining defendants from enforcing the lobbying expenditure restrictions contained in Section 18(1), (2), (3) and (4) and Section 24(1) and (2) of Senate Bill 10 (and, if the Court deems necessary, the provisions of Section 17 of Senate Bill 10 that v^ould otherwise lead to an inconsistent result).

DATED this y ? ^ day o f November, 2007.

DAVIS *WMGm* TREMAINE LLP



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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** on:

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1^ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

^ by causing a copy thereof to be e-mailed to said attorney's e-mail address as shown above on the date set forth below;

_J by personally handing a copy thereof to said attorney on the date set forth below;

by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below; or

Dated this day of November 2007.

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