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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' MOTION FOR  
PRELIMINARY INJUNCTION**

**ORAL ARGUMENT REQUESTED**

Plaintiffs request that the Court hear oral argument concerning this motion. Plaintiffs estimate that the time required for oral argument will be 90 minutes. Official court reporting services are requested.

**MOTION**

Pursuant to ORCP 79A, plaintiffs move the Court for a preliminary injunction enjoining defendants from enforcing Section 18(1), (2), (3) and (4), and Section 24(1) and (2) of 2007 Senate Bill 10 (Ch. 877, Or. Laws 2007). Plaintiffs' motion is supported by the Complaint filed in this matter, the Declaration of Fred VanNatta filed herewith, and the following points and

1 authorities.

2 **POINTS AND AUTHORITIES**

3 Article I, section 8, of the Oregon Constitution prohibits the Legislative Assembly from  
4 adopting laws that restrict the right to speak freely. The Oregon Supreme Court has ruled that  
5 lobbying—which includes the act of obtaining the good will of a public official—is free speech  
6 that the Legislative Assembly may not restrict. Senate Bill 10 (Ch. 877, Or. Laws 2007) restricts  
7 lobbying by prohibiting actions calculated to obtain the good will of public officials. The  
8 restrictions in Senate Bill 10 are, therefore, unconstitutional.  
9

10 A. ORCP 79A Standard.

11 Pursuant to ORCP 79A, the Court may issue a preliminary injunction under the following  
12 two circumstances:

13 A(1)(a) When it appears that a party is entitled to relief demanded  
14 in a pleading, and such relief, or any part thereof, consists of  
15 restraining the commission or continuance of some act, the  
commission or continuance of which during the litigation would  
produce injury to the party seeking the relief; or

16 A(1)(b) When it appears that the party against whom a judgment is  
17 sought is doing or threatens, or is about to do, or is procuring or  
18 suffering to be done, some act in violation of the rights of a party  
19 seeking judgment concerning the subject matter of the action, and  
tending to render the judgment ineffectual. This paragraph shall  
not apply when the provisions of Rule 83 E, F(4) and H(2) are  
applicable, whether or not provisional relief is ordered under those  
provisions.  
20

21 In their moving papers and any subsequent hearing the Court conducts, plaintiffs will  
22 demonstrate that they are likely to obtain the relief they seek in their complaint and, if defendants  
23 are not enjoined from enforcing the unconstitutional provisions of Senate Bill 10, plaintiffs will  
24 suffer irreparable injury, for which no adequate remedy exists at law.

25 B. Facts.

26 During the 2007 session, the Oregon Legislature passed Senate Bill 10, which (among

1 other things): (a) prohibits a person with a legislative or administrative interest from giving gifts  
2 with an aggregate value of more than \$50 per year to a public official or candidate for public  
3 office;<sup>1</sup> (b) prohibits a person with a legislative or administrative interest from giving gifts of  
4 entertainment to a public official or candidate for public office;<sup>2</sup> and (c) prohibits a person from  
5 providing honorarium to a public official or candidate for public office in connection with the  
6 official duties of the public office.<sup>3</sup> Plaintiffs Fred VanNatta (“VanNatta”) and Center to Protect  
7 Free Speech (“CTPFS”) bring this action to obtain a declaration that these statutory prohibitions  
8 violate Article I, section 8, (and other provisions) of the Oregon Constitution.<sup>4</sup>

9 VanNatta, an Oregon resident, is the president of CTPFS. Declaration of Fred VanNatta,  
10 ¶1. He is registered to lobby on behalf of CTPFS to, among other things, seek a repeal of the  
11 offending provisions of Senate Bill 10 during the Special Legislative Session scheduled to begin  
12 in February 2008. *Id.* at ¶2. As part of such lobbying efforts, VanNatta and CTPFS desire to  
13 engage in lobbying activities that would be prohibited and penalized if defendants were to  
14 implement and enforce the prohibitions of Senate Bill 10. *Id.* Conduct in which VanNatta and  
15 CTPFS would engage includes obtaining the good will of public officials and candidates for  
16 public office through offering and providing to such public officials and candidates (and their  
17 families) entertainment and business meals (with an aggregate value of over \$50) in connection  
18 with their substantive discussions, as well as honorarium in connection with official duties. *Id.*  
19 To most effectively engage in these lobbying activities for the February 2008 special session,  
20 plaintiffs need to commence such lobbying immediately and, therefore, will suffer irreparable

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21 <sup>1</sup> See Section 18(1), (2) and (3) of Senate Bill 10. A copy of the Enrolled Senate Bill is attached as  
22 Exhibit 1 to plaintiffs’ complaint.

23 <sup>2</sup> See Section 18(4)(a), (b) and (c) of Senate Bill 10.

24 <sup>3</sup> See Section 24(1) and (2) of Senate Bill 10.

25 <sup>4</sup> The term “gifts” will be used herein to refer to all that is prohibited by the challenged provisions,  
26 including business meals, entertainment, and honoraria. All of the prohibited acts involve traditional  
means designed to build or maintain good will.

1 harm if Senate Bill 10 is allowed to remain in effect during the pendency of this case. *Id.* at ¶3.

2 Defendant Oregon Government Ethics Commission (the “Commission”)<sup>5</sup> is charged with  
3 enforcing the provisions of Senate Bill 10 (and the rest of the code of ethics contained in ORS  
4 Chapter 244). To plaintiffs’ knowledge, the Commission intends to enforce the above referenced  
5 prohibitions contained Section 18(1), (2), (3) and (4) and Section 24(1) and (2) of Senate Bill 10.

6 C. Constitutionality of the gift limitations in Senate Bill 10.

7 Plaintiffs challenge the above-described prohibitions in Senate Bill 10 under three  
8 provisions of the Oregon Constitution: Article I, section 8 (freedom of expression), Article 1,  
9 section 26 (instructing representatives), and Article I, section 20 (equal privileges and  
10 immunities). Because Senate Bill 10 most patently offends Article I, section 8, under the well-  
11 developed case law interpreting that constitutional provision, this motion will focus exclusively  
12 on plaintiffs’ challenge under Article I, section 8.<sup>6</sup> While the other two constitutional provisions  
13 also present compelling reasons for the Court to find portions of Senate Bill 10 unconstitutional;  
14 plaintiffs will reserve the discussion of those provisions for later proceedings.

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

16 No law shall be passed restraining the free expression of opinion,  
17 or restricting the right to speak, write, or print freely on any subject  
18 whatever; but every person shall be responsible for the abuse of  
19 this right.

20 In *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982), the Oregon Supreme Court

21 <sup>5</sup> This agency is, at the time of this motion, still known as the Oregon Government Standards and  
22 Practices Commission. However, in a provision of Senate Bill 10 that is not operative until January 1,  
23 2008, the legislature changed the agency’s name to the Oregon Government Ethics Commission. Section  
24 40 of Senate Bill 10 permits the Commission to take actions prior to the respective operative dates to  
25 enable it to exercise its authority on those dates. One such action has been to refer to itself by its new  
26 name. To avoid confusion, plaintiffs have filed this action against “Oregon Government Ethics  
Commission, formerly known as the Oregon Government Standards and Practices Commission.”

27 <sup>6</sup> It should be noted that counsel for the Oregon Assembly has previously opined that the gift limits in  
effect prior to the passage of Senate Bill 10 (which provided for *higher* annual limits of \$100) were  
unconstitutional. This Legislative Counsel opinion dated March 10, 2000, is attached as Exhibit 3 to  
plaintiff’s complaint. Many of the arguments contained in this memorandum track closely and borrow  
extensively from the analysis of Legislative Counsel.

1 established a basic framework for determining whether a law violates Article I, section 8. The  
2 framework separates laws that affect speech into three categories. The Oregon Supreme Court  
3 has summarized this framework as follows:

4 The first *Robertson* category consists of laws that focus on the  
5 *content* of speech or writing or are written in terms directed to the  
6 substance of any opinion or any subject of communication. Laws  
7 within that category violate Article 1, section 8, unless the scope of  
8 the restraint is wholly confined within some historical exception  
9 that was well established when the first American guarantees of  
10 freedom of expression were adopted and that the guarantees then  
11 or in 1859 demonstrably were not intended to reach. The second  
12 *Robertson* category consists of laws that focus[ ] on forbidden  
13 effects, but expressly prohibit [ ] expression used to achieve those  
14 effects. Laws in that category are analyzed for overbreadth.  
15 Finally, the third *Robertson* category consists of laws that focus[ ]  
16 on forbidden effects, but without referring to expression at all.  
17 Laws within the third category are analyzed to determine whether  
18 they violate Article 1, section 8, as applied.

19 *City of Eugene v. Miller*, 318 Or. 480, 488, 871 P.2d 454 (1994)(citations omitted).

20 The first issue, therefore, under the court’s *Robertson* analysis is whether the gifts,  
21 entertainment and honoraria restricted by Senate Bill 10 are protected expression under Article I,  
22 section 8. If they are, the Court will then need to apply the methodology described in *Robertson*.

23 *1. Are gifts to public officials protected expression under Article I, section 8?*

24 Based on prior decisions of Oregon appellate courts, the gifts prohibited by Senate Bill  
25 10 are protected expression under Article I, section 8. Oregon law defines “lobbying” as, among  
26 other things, attempts to “obtain the good will of legislative officials.”<sup>7</sup> The giving of a gift by a  
27 person with a legislative interest to a member of the Legislative Assembly is clearly an effort to  
28 “obtain the good will” of a legislative official. The gifts restricted by Senate Bill 10 are  
29 “lobbying” for purposes of Article I, section 8, as evidenced by the fact that the gift limitations

30 <sup>7</sup> ORS 171.725(7) (as amended in Section 6 of Senate Bill 10) provides:

31 “Lobbying” means influencing, or attempting to influence, legislative action through oral  
32 or written communication with legislative officials, solicitation of executive officials or  
33 other persons to influence or attempt to influence legislative action or attempting to  
34 obtain the good will of legislative officials.

1 only apply to gifts from persons with a “legislative or administrative interest.”<sup>8</sup> A gift is limited  
2 only if there is some *political advocacy* associated with the gift. A gift that has no connection to  
3 legislative activity (e.g. a gift given by a public official’s friend who does not have a “legislative  
4 or administrative interest”) is not covered.

5 Oregon courts have previously stated that the very act of lobbying is protected expression  
6 under Article I, section 8. In *Fidanque v. State ex rel. Oregon Government Standards and*  
7 *Practices Commission*, 328 Or. 1, 969 P.2d 376 (1998), the Oregon Supreme Court struck down  
8 a \$50 lobbyist registration fee under Article I, section 8. The court stated: “Lobbying is political  
9 speech, and being a lobbyist is the act of being a communicator to the legislature on political  
10 subjects.” 328 Or. at 7. The court noted that obtaining the good will of legislative officials is  
11 bound up closely with the essential expressive nature of the profession and held that “[l]obbying  
12 is expression [ ] for the purposes of the first *Robertson* category.” 328 Or. at 8.<sup>9</sup>

13 Moreover, there is a strong connection between the giving of gifts to members of the  
14 legislature and the giving of political campaign contributions. Political contributions are  
15 protected expression under Article I, section 8. See *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d  
16 770 (1997). Both gifts and campaign contributions are expressions of support made for political  
17 reasons. The act of giving is the protected expression. In *VanNatta*, the court concluded that  
18 “many – probably most – ” contributions to political campaigns and candidates are a form of  
19 expression under Article I, section 8. 324 Or. at 522. The court stated that political  
20 contributions are:

21 \_\_\_\_\_  
22 <sup>8</sup> See Section 18(1), (2), (3) and (4) of Senate Bill 10.

23 <sup>9</sup> The conclusion by the Oregon Supreme Court that lobbying is constitutionally protected expression is in  
24 accord with decisions of courts in other jurisdictions. For example, in *U.S. v. Sawyer*, 85 F.3d 713 (1<sup>st</sup>  
25 Cir. 1996), the First Circuit addressed a lobbyist’s alleged violations of a similar Massachusetts gift  
26 statute. The court said that endeavors by a lobbyist to develop contacts with legislators, including  
goodwill entertaining with the goal of persuading and influencing legislators to benefit certain interests,  
are protected by the First Amendment. See 85 F.2d at 731.

