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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
20 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.

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;¹ (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;² 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.³ 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.⁴

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

21 ¹ 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 ² See Section 18(4)(a), (b) and (c) of Senate Bill 10.

24 ³ See Section 24(1) and (2) of Senate Bill 10.

25 ⁴ 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”)⁵ 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 8.⁶ 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 ⁵ 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 ⁶ 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.”⁷ 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 ⁷ 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.”⁸ 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 8.⁹

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 ⁸ See Section 18(1), (2), (3) and (4) of Senate Bill 10.

23 ⁹ 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 (1st
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.

1 Protected as an expression by the contributor . . . the contribution,
2 in and of itself, is the contributor's expression of support for the
3 candidate or cause – an act of expression that is completed by the
 act of giving and that depends in no way on the ultimate use to
 which the contribution is put.

4 324 Or. at 522 (emphasis in original).¹⁰

5 Plaintiffs do not contend, of course, that Article I, section 8, prevents the legislature from
6 prohibiting any gifts to legislators. As noted by the *VanNatta* court, the "law may prohibit
7 certain forms of contributions such as giving bribes." 324 Or. at 524. Further, in footnote 10,
8 after stating that "many—probably most—" contributions to political campaigns and candidates are
9 a form of expression under Article I, section 8, the court said:

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

17 ¹⁰ The State has previously argued to the Oregon Supreme Court that there is no discernible constitutional
18 difference between campaign contributions and gifts to public officials. In its brief in *VanNatta*, as part
 of its argument that gifts of money are *not* expression, the State argued:

19 The assumption that giving a gift of money to a candidate is protected
20 expression necessarily implicates laws governing government standards
21 and practices. When a gift becomes speech because it is a "general
22 expression of support," it is impossible to find a meaningful distinction
23 between a gift of money to the candidate (who may, after all, be running
24 for *re*-election) and a gift of money to an elected official. The level at
25 which the court analyzes campaign contributions therefore implicates,
26 for example: ORS 244.040 (5); which prohibits the offer of a gift with a
 value in excess of \$100 to an official; ORS 244.040 (2), which prohibits
 accepting such a gift; ORS 244.040 (1)(b) and (c) governing honoraria to
 public officials, and ORS 244.045, which limits the employment and
 lobbying activities of former public officials. (Respondent's brief, page
 30, footnote 31.)

1 The prohibitions of Senate Bill 10, however, are certainly not targeted only at gifts that
2 have no expressive content or only at gifts that flow from transactions that may otherwise be
3 regulated. Instead, Senate Bill 10 covers *all* gifts from persons with a legislative or
4 administrative interest. The statute limits both those (at least theoretical) gifts, such as bribes,
5 that do not involve protected expression and also those core lobbying gifts (like business meals
6 and associated entertainment) that convey a political message and that are protected expression.
7 Further, as described below, the general desire to prevent corruption or the appearance of
8 corruption is not a sufficient basis for limiting all gifts to public officials and candidates.

9 For all these reasons, the gifts limited or prohibited by Senate Bill 10 are “lobbying”
10 activities that are protected expression under Article I, section 8.

11 2. *Are the prohibitions of Senate Bill 10 category one laws under Robertson? That is, are*
12 *they written in terms directed to the substance of any opinion or subject of*
13 *communication?*

14 For the reasons that follow, the gift limits are “category one” laws under *Robertson*. The
15 gift restrictions are targeted at the content of speech, *i.e.*, support of a public official for political
16 reasons. As such, the limits are directed at protected expression *per se* and not to any harm. The
17 laws limit certain identified expression regardless of the specific nature of the communication or
18 the effects the communication produces. No distinction is made between gifts made to develop
19 “good will” and gifts made to obtain some harmful result (*e.g.* a bribe).

20 In both *VanNatta* and *Fidanque*, the Oregon Supreme Court examined laws enacted for
21 the stated purpose of protecting the integrity of the elections and legislative processes. In each
22 case, the court found that the laws fit within the first *Robertson* category as statutes addressed
23 not to a harm, but to speech *per se*. *See* Op. Att’y Gen. No. 8266, March 10, 1999.

24 In *Fidanque*, the court found that a fee imposed on lobbyists had the effect of limiting
25 lobbying and therefore was a direct restraint on protected expression. The court stated that
26 “[l]obbying is expression, for the purposes of the first *Robertson* category.” 328 Or. at 8. The

1 court described lobbying as political speech and said that "being a lobbyist is the act of being a
2 communicator to the legislature on political subjects." 328 Or. at 7. The court also found that
3 lobbyists are defined, in part, by their involvement in attempting to obtain the good will of
4 legislative officials and that such attempts are "bound up closely with the essentially expressive
5 nature of the profession." 328 Or at 7-8. Thus, since a lobbying fee restricted lobbying, it also
6 restricted expression. The same reasoning applies to the gift limit. Most gift giving limited by
7 Senate Bill 10 involves protected expression. A law that directly limits gifts therefore directly
8 limits expression *per se* and fits within the first *Robertson* category.

9 Similarly, in *VanNatta*, the court decided that the laws imposing contribution limits were
10 targeted at the content of speech (that is, political support for a candidate) and fell under the first
11 level of Article I, section 8, scrutiny. 324 Or. at 537. The court stated that the contribution limits
12 and prohibitions were "targeted at protected speech." 324 Or. at 537-538.

13 As in *VanNatta*, the gift limits of Senate Bill 10 are also targeted expressly at the content
14 of speech: support for a public official for political reasons. Gifts from persons with a legislative
15 interest to members of the Legislative Assembly are protected expression. Senate Bill 10
16 severely limits that expression. Therefore, the gift limits are speech-focused and fall under the
17 first level of Article I; section 8; scrutiny. The limits are unconstitutional unless they are saved
18 by either the historical exception or the incompatibility exception.

19 a. *Does any historical exception apply to save the gift restrictions?*

20 Under *Robertson*, a law that limits the substance of a subject of communication might
21 nevertheless survive an Article I, section 8, challenge if it is "wholly confined within some
22 historical exception that was well established when the first American guarantees of freedom of
23 expression were adopted and that the guarantees then or in 1859 demonstrably were not intended
24 to reach." 293 Or. at 412. In *Moser v. Frohnmayer*, 315 Or. 372, 376, 845 P.2d 1284 (1993), the
25 court stated that "the party opposing a claim of constitutional privilege" has the burden of
26 demonstrating that a restriction on speech falls within an historical exception." (quoting *State v.*

1 *Henry*, 302 Or. 510, 515-525, 732 P.2d 9 (1987)).

2 In *VanNatta*, the court found no historical exception that would save political
3 contribution limits. 324 Or. at 538. In footnote 23, the court said:

4 The earliest indication that we have found of Oregon's distrust of
5 the role that money plays in the political process is the 1909
6 "Corrupt Practice Act Governing Elections." That Act prohibited
7 certain corporations (such as banks and public utilities) from
contributing to candidates. Title XXVII, ch. XII, § 3510. It also
limited candidate expenditures to 15 percent of the annual salary
for the elective office. *Id.* at § 3486.

8 The earliest statute known to plaintiffs that addressed gifts to Oregon public officials was
9 in the General Laws of Oregon; 1845-1864, Criminal Code; Sections 601 and 602,¹¹ adopted
10 October 1864 (page 550). These sections prohibited using gifts to "bribe" public officials. The
11 statues prohibited the "corrupt" giving of a gift with the intent to influence the vote of a public
12 officer or with the intent to influence the officer to act in a particular manner or to produce or
13 prevent any particular result. Further, section 622 prohibited lobbying members of the
14 Legislative Assembly without disclosing the lobbyist's interest in the particular measure
15 involved.

16 The 1864 laws can readily be distinguished from the gift limits in Senate Bill 10 and do
17 not provide the basis for a historical exception under the Article 1, section 8, analysis. Senate
18 Bill 10 does not require any corrupt intent, intent to influence any vote, or intent to influence a
19 public official to act in a particular manner or produce any particular result. Senate Bill 10
20 instead prohibits all gifts that exceed \$50, all gifts of entertainment, and all honorarium, even
21 without any corrupt intent or the presence of any *quid pro quo*. While Oregon or federal law
22 *might* contain a historical exception for laws prohibiting the bribery of public officials, there is
23 *no* historical exception for the broader category of gifts covered by Senate Bill 10. As noted

24 _____
25 ¹¹ The Deady law can be traced to current ORS 162.015 and 162.025 (sections 179 and 180, chapter 743,
26 Oregon Laws 1971). (See D&L-612, H-1878, B&C-1878, LO-2029, O-2029, O-14-405, OCLA-23-607
and ORS 162.220 and 162.230, both repealed by section 432, chapter 743, Oregon Laws 1971.)

1 above, the bribery of public officials is already prohibited under ORS 162.015 and 162.025. The
2 prohibitions of Senate Bill 10 are not anti-bribery statutes; rather, they are impermissible
3 restrictions on protected expression.

4 *b.. Does the incompatibility exception apply?*

5 Under the "incompatibility exception," expression that may not constitutionally be
6 prohibited may be restrained because it is incompatible with the performance of one's special
7 role or function. *See, e.g., In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *Oregon State*,
8 *Police Association v. State of Oregon*, 308 Or. 531, 783 P.2d 7 (1989) (Linde, J., concurring);
9 and *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990). Several requirements must be met for the
10 incompatibility exception to apply: "[A] professional's speech must actually vitiate the proper
11 performance of the particular professional's official function, under the facts of the specific case"
12 (*VanNatta* at 541); the incompatibility must be shown to be a highly likely result of the
13 expression (*Lasswell* at 126); the incompatibility must be assessed at the time the expression
14 occurs and not assumed at the time of enactment of the provision that restricts expression
15 (*Fadeley*, 310 Or. at 582 (Unis, J., concurring in part, dissenting in part)); and the speech in
16 question must pose a serious and imminent threat to the process in which the speech is involved
17 (*In re Schenck*, 318 Or. 402, 430, 870 P.2d 185 (1994)).

18 In *Fadeley*, the court considered an Article I, section 8, challenge to provisions of the
19 Code of Judicial Conduct that prohibited the personal solicitation of campaign contributions by a
20 judge or judicial candidate. Citing the incompatibility exception, the court upheld the restriction
21 on solicitations and held that the solicitation was incompatible with the profound public interest
22 in a judiciary that is both honest in fact and honest in appearance. The court stated:

23 A democratic society that, like ours, leaves many of its final
24 decisions, both constitutional and otherwise, to its judiciary is
25 totally dependent on the scrupulous integrity of that judiciary. A
26 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
the judge from such direct solicitation eliminates the appearance
(at least) of impropriety and, to that extent, preserves the

1 judiciary's reputation for integrity.

2 310 Or. at 563.

3 In *VanNatta*, the court rejected the argument that the incompatibility exception should
4 remove campaign contribution limits from the protection of Article I, section 8. The court held
5 that contribution limits do "not address specific cases of official misconduct, and it cannot be
6 contended that the expression in question (contributions) actually impairs performance of, e.g.,
7 legislative functions in all cases. * * * There is no necessary incompatibility between seeking
8 political office and the giving and accepting of campaign contributions." 324 Or. at 541.

9 The reasoning in *VanNatta* regarding contributions to legislators and executive officials,
10 and not the rationale in *Fadeley* regarding members of the judiciary, applies with respect to the
11 gifts limits in Senate Bill 10. While fundraising by judicial candidates may threaten the integrity
12 or the appearance of the integrity of the judiciary *in every case*, the giving of gifts to members of
13 the Legislative Assembly will not actually impair performance of legislative functions in *all*
14 cases.

15 First, legislative and judicial officers, and the respective decisions made by judges and
16 legislators, are inherently different. Judges make final decisions, including decisions on the
17 constitutionality of statutes enacted by the Legislative Assembly; legislators enact laws that are
18 subject to judicial review. Moreover, legislative office is inherently more political than judicial
19 office. Most *ex parte* contacts with judges are prohibited, while the Legislative Assembly is
20 designed for political debate. Hence, the lobbying of members of the legislature, including
21 efforts to develop good will is a constitutionally-protected activity. Further, judges are governed
22 by the Code of Judicial Conduct, which, in part, is aimed at preventing the *appearance* of
23 impropriety. In fact, both *Lasswell* and *Fadeley* involved professions governed by a separate set
24 of professional rules. Legislators are not subject to a separate code of professional rules.

25 In his dissent in *Fadeley*, Justice Unis discussed some of the differences between judicial
26

1 office and other offices:

2 I recognize that a state need not treat candidates for judicial office the
3 same as candidates for other elective offices. A judicial office is different
4 in key respects from other elective offices. The state may, subject to
5 constitutional constraints, regulate the conduct of its judges with the
6 differences in mind.

7 For example the contours of the judicial function make
8 inappropriate the same kind of particularized pledges of
9 conduct in office that are the very stuff of campaigns for
10 most non-judicial offices. A candidate for the mayoralty
11 can and often should announce his determination to effect
12 some program, to reach a particular result on some question
13 of city policy, or to advance the interests of a particular
14 group. It is expected that his decisions in office may be
15 predetermined by campaign commitment. Not so the
16 candidate for judicial office. He [or she] cannot, consistent
17 with the proper exercise of his [or her] judicial powers,
18 bind himself [or herself] to decide particular cases in order
19 to achieve a given programmatic result. Moreover, the
20 judge acts on individual cases and not broad programs.

21 *Morial v. Judiciary Com'n of State of Louisiana*, 565 F.2d 295, 305 (5th
22 Cir 1977), cert. denied 435 U.S. 1013, 98 S. Ct. 1887, 56 L.Ed.2d 395
23 (1978). A state may require candidates for judicial office to maintain a
24 higher standard of conduct than can be expected in other types of elective
25 contests. Judges and lawyers are members of a responsible profession, and
26 their adherence to their profession's ethical standards may require
abstention from what, in other circumstances, would be constitutionally
protected behavior. *See, e.g., In re: Lasswell*, supra.

310 Or. at 589-590.

19 Second, Senate Bill 10 does allow some gifts. Specifically, gifts with an aggregate value
20 of \$50 or less per calendar year are allowed. Since some gifts are allowed, it is difficult to argue
21 generally that all gifts from persons with a legislative interest are necessarily incompatible with
22 the integrity of the legislative process. The law does not state directly or infer any harm that
23 occurs with gifts valued at more than \$50 or with all gifts (in any amount) of entertainment.

24 Finally, as with the contribution limits in *VanNatta*, the notion that gifts to elected
25 officials will lead to corruption, bribery or other impropriety is unsubstantiated in the law. There
26

1 is no evidence in SB 10 or elsewhere that a “highly likely effect” of a gift to a legislator does
2 actual harm to any legislative office or the legislative process itself.

3 In sum, the incompatibility exception does not apply to save the gift limits in Senate Bill
4 10, because giving and accepting gifts will not “actually vitiate the proper performance” of the
5 duties of a member of the Legislative Assembly in every case. Due to the nature of legislative
6 office and the role that lobbying plays in the legislative process, gifts do not pose the same
7 "serious and imminent threat to the process" as do fund-raising solicitations from a judge. There
8 is no *necessary* incompatibility between holding legislative office and accepting gifts from
9 persons with a legislative interest.

10

11

12 Thus, under the *Robertson* framework for Article I, section 8, the gift restrictions of
13 Senate Bill 10 should be declared unconstitutional. The lobbying activities restricted or
14 prohibited by Senate Bill 10 are protected expression, the relevant provisions of Senate Bill 10
15 are “category one” laws, and the historical and incompatibility exceptions do not apply.
16 Therefore, the gift limitations are unconstitutional impairments of the freedom of expression
17 under Article 1, section 8. Assuming the Court reaches this determination, there would be no
18 need to further consider the remaining categories of laws under the *Robertson* methodology.
19 Those remaining categories are, however, addressed below, both to further illustrate that the gift
20 limitations of Senate Bill 10 are not category two or three restrictions and to show that, even if
21 they were, they still cannot survive constitutional muster under these analytical categories.

22 3. Are the gift restrictions in Senate Bill 10 category two laws under Robertson and, if so,
23 do they survive the corresponding constitutional scrutiny?

24 Category two laws are ones that focus on forbidden effects, but expressly prohibit
25 expression used to achieve those effects. Category two laws are analyzed for overbreadth. *City*
26 *of Eugene v. Miller*, 318 Or. 480, 488, 871 P.2d 454 (1994). A law may "expressly prohibit

1 expression" in two ways: (1) the law identifies communicative conduct as a proscribed means of
2 achieving a forbidden effect, or (2) the law does not explicitly refer to communicative conduct
3 but can be violated only by means of expression. *Oregon State Bar v. Smith*, 149 Or. App. 171,
4 187, 942 P.2d 793 (1997).

5 Under decisions of the Oregon Supreme Court, in order to be "valid as a law that focuses
6 on a harmful effect of speech, the law must 'specify expressly or by clear inference what "serious
7 and imminent" effects it is designed to prevent.'" *Moser v. Frohnmayer*, 315 Or. at 379. The
8 harm must be one that the legislature has a right to restrict or prohibit (*VanNatta* at 539), and the
9 harm must necessarily result from the act of creating the expression (*State v. Stoneman* 323 Or.
10 536, 546, 547, 920 P.2d 535 (1996)). Finally, the statute must avoid overbreadth.

11 In *VanNatta*, the court rejected the argument that contribution limits and prohibitions
12 were targeted at proscribing a particular harm that could be inferred. The harm was alleged to be
13 "the existence of undue influence in the political process, or at least the appearance thereof." 324
14 Or. at 539. The court stated that the harm must be one that the legislature has a right to restrict
15 or prohibit and that the harm necessarily has to occur by the act of creating the expression. *Id.*

16 With respect to the harm, "where expressive conduct is involved, the legislative target
17 must be clear and a legally permissible subject of regulation or prohibition, and the means
18 chosen to deal with it must not spill over into interference with other expression." *Id.* Moreover,
19 "the 'harm' that legislation aims to avoid must be identifiable from [the] legislation itself, not
20 from social debate and competing studies and opinions." *Id.* Finally, the court found that the
21 harm alleged to be associated with political contributions did not necessarily (if ever) occur each
22 time a contribution was made. *Id.* at 540.

23 Similar reasoning applies to the gift limits. Senate Bill 10 does not itself or in its
24 statutory context identify any harm that a limit on gifts aims to avoid. Some legislators might
25 have felt the law was aimed at bribery or corruption or the appearance thereof. But these harms
26 are not named or implied within the statute itself. As indicated in *VanNatta*, it is not sufficient to

1 select a general theory (i.e., that gifts to members of public officials will result in corruption or
2 undue influence) and label it as a harm. The law, therefore, does not target a harm that the
3 legislature has a right to restrict.

4 Even assuming that bribery, corruption and undue influence in the legislative process are
5 the "harms" targeted by the gift limits, Senate Bill 10 does not clearly target those harms. The
6 law sets a much broader target and also restricts gifts that are part of legitimate lobbying. The
7 gifts proscribed by Senate Bill 10 (like business meals) do not necessarily involve a corrupt
8 intent or a threat to the integrity of legislative or administrative processes. In other words, the
9 legislative target is imprecise, and Senate Bill 10 spills over into interference with other
10 protected expression. The law is therefore overbroad.

11 Finally, Senate Bill 10 does not proscribe expression only when it actually or necessarily
12 produces, or is likely to produce, the harm. The limits presume that the harm will automatically
13 follow from the expression. Expression will be penalized even when it does not produce any
14 harm. This presumption makes the law speech-focused and not harm-focused. 49 Op. Atty.
15 Gen. 179 (1999). For all of these reasons, the restrictions of Senate Bill 10 are not category two
16 laws, but, assuming they are, they are overbroad and must therefore be declared unconstitutional.

17 4. Are the gift restrictions in Senate Bill 10 category three laws under Robertson and, if so,
18 do they survive the corresponding constitutional scrutiny?

19 The third and final *Robertson* category consists of laws that focus on forbidden effects,
20 but *without referring to expression at all*. Laws within this category must be analyzed to
21 determine whether they violate Article I, section 8, as applied. *City of Eugene*, 318 Or. at 488.
22 A category three law could be challenged on vagueness grounds or because the law, when
23 applied in a particular case, extends to expression protected by Article I, section 8. *Oregon State*
24 *Bar*, 149 Or. App. at 187.

25 For the gift restrictions of Senate Bill 10 to fit within the third *Robertson* category, the
26 Court would have to make two determinations, neither of which would be supported by the prior

1 Oregon cases. The Court would first have to find that the gift limits are focused solely on
2 forbidden effects (*i.e.*, targeted at a harm) and, second, that the giving of gifts to public officials
3 by persons with a legislative or administrative interest is not protected expression in every case.
4 For all the reasons stated above, plaintiffs submit that these category three criteria are not
5 satisfied in this case. By its terms, the law is aimed at speech, not effects, and whatever bad acts
6 the law might be trying to stop do not occur *every* time a lobbyist makes a gift.

7 Even assuming, however, that the Court applied the category three analysis, the gift
8 restrictions of Senate Bill 10 would still be unconstitutional under Article I, section 8, as applied
9 to gifts from lobbyists. In other words, gifts from persons with a legislative interest who are *not*
10 registered lobbyists might not involve protected expression. But gifts from registered lobbyists
11 with a legislative interest will necessarily involve protected expression. As discussed above, it is
12 clear that the activities covered by the term "lobbying" include efforts to "obtain the good will of
13 legislative officials" and that the giving of gifts by lobbyists can be part of those efforts. In
14 *Fidanque*, the Oregon Supreme Court said that lobbying is political speech and "expression[,] for
15 purposes of the first *Robertson* category." 328 Or. at 7-8. As such, the gift limits in ORS
16 244.040, *as applied* to gifts from lobbyists, would be unconstitutional even under the category
17 three analysis.

18 D. A Preliminary Injunction Should Be Issued to Preclude Enforcement of the Gift
19 Limitations of Senate Bill 10.

20 If a preliminary injunction is not issued in this action, plaintiffs will be deprived of their
21 constitutionally protected right of expression (as well as other rights secured by the Oregon
22 Constitution). If the challenged sections of Senate Bill 10 are allowed to become operative
23 pending the resolution of this action, VanNatta and all others similarly situated will be precluded
24 from fully exercising their constitutionally-protected right to lobby the legislature. In the case of
25 VanNatta, the prohibitions imposed by Senate Bill 10 will, indeed, impair his efforts to lobby
26 during the scheduled February 2008 special legislative session for the repeal of the very

1 unconstitutional laws that are being imposed on him. As the United States Supreme Court has
2 held in the context of First Amendment freedoms, a deprivation of a person's freedom of
3 expression, for any period of time, constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347,
4 373-74, 96 S.Ct. 2673, 2689-90, 49 L.Ed.2d 547 (1976). Moreover, plaintiffs would have no
5 adequate legal remedy if the unconstitutional laws are allowed to become operative while this
6 case is decided in the regular course. As a result, the courts in this state routinely enjoin the
7 implementation and enforcement of laws that abridge free speech rights. *See, e.g., Roman v. City*
8 *of Portland*, 909 F Supp 767 (D. Or 1995)(Haggerty, J., preliminarily enjoining law restricting
9 location of speakers); *Moser v. Federal Communications Commission*, 811 F Supp 541 (D. Or.
10 1992)(Redden, C.J., preliminarily enjoining law restricting method of speech).¹²

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24 ¹² In fact, a Colorado trial court has recently issued a preliminary injunction blocking similar gift limits in
25 Colorado's "Ethics in Government" law on less protective federal First Amendment grounds.
26 *Development Pathways v. Ritter*, City and County of Denver District Court Case No. 07CV1353 (May 31,
2007)(<http://www.fwlaw.com/amendment41decision.pdf>).

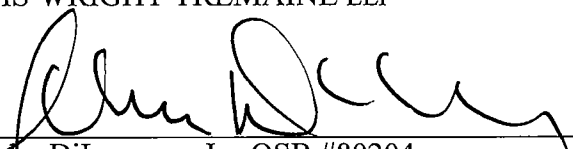
1 **CONCLUSION**

2 For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion
3 and issue a preliminary injunction enjoining defendants from enforcing the gift restrictions
4 contained in Section 18(1), (2), (3) and (4) and Section 24(1) and (2) of Senate Bill 10.

5 DATED this 10 day of October, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** on:

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by e-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 hand-delivered to said attorney's address as shown above on the date set forth below;

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 10 day of October, 2007.

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