



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

JOHN A. DILORENZO, JR.
Direct (503) 778-5216
johndilorenzo@dwt.com

SUITE 2300
1300 SW FIFTH AVENUE
PORTLAND, OR 97201-5630

TEL (503) 241-2300
FAX (503) 778-5299
www.dwt.com

November 20, 2007

VIA E-MAIL (judy.stutrud@ojd.state.or.us)

The Honorable Joseph C. Guimond
Circuit Court Judge
Marion County Courthouse
P. O. Box 12869
Salem, OR 97309-0869

Re: *VanNatta, et al v. Oregon Government Ethics Comm. and State of Oregon*
Marion County Circuit Court Case No. 07C-20464

Dear Judge Guimond:

Enclosed for filing is Plaintiffs' Reply Memorandum in Support of their Motion for a Preliminary Injunction.

As defendants have noted in their cover letter to you of November 13, only portions of the memorandum they filed address the issues raised in the plaintiffs' motion for a preliminary injunction. Defendants have agreed that plaintiffs' response to defendants' motion for summary judgment, which would normally be due within 20 days of service (ORCP 47C), may be postponed until after the court has ruled on plaintiffs' preliminary injunction motion. We would therefore appreciate your permission to enlarge the time for our response to defendants' motion for summary judgment (ORCP 15D) since your ruling here may well affect the posture of the parties going forward.

Please let us know whether you are amenable to our request to enlarge time and have your assistant sign and date the attached confirmation card and return it to me. Thank you for your

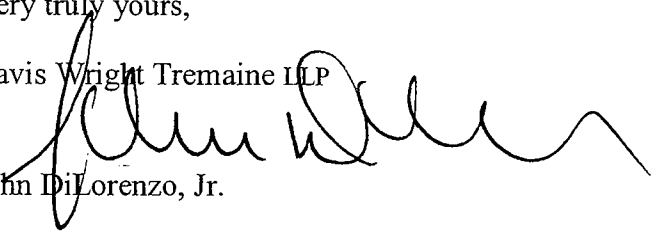
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time and attention to this matter. We look forward to arguing the motion on Monday, November 26.

Very truly yours,

Davis Wright Tremaine LLP


John DiLorenzo, Jr.

JAD:mg

Enclosures

cc: Charles E. Fletcher
Fred VanNatta

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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' REPLY
MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

INTRODUCTION

The questions presented by plaintiffs' motion for preliminary injunction are straight-forward. 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)

1 agreement, defendants have combined their response to plaintiffs' motion for preliminary
2 judgment with their memorandum in support of summary judgment. Consequently, defendants
3 address certain issues (e.g. plaintiffs' challenges under Article I, sections 20 and 26) that are not
4 before the Court on the preliminary injunction motion and that will not be covered herein.²
5

6 Defendants' actual response to the preliminary injunction motion is, itself, larded with
7 numerous statements that enjoy no place in the *Robertson* framework. The thrust of defendants'
8 argument appears to be that if they can conjure up several extreme examples of lobbying
9 expenditures that they deem to be in need of governmental regulation, then all other restrictions
10 on such expression must also be permissible. Specifically, defendants suggest (among other
11 things) that plaintiffs have claimed the "right to give new automobiles" "a new home," "vacation
12 homes" and "six-figure cash gift[s]" to public officials "before whom plaintiffs have pending
13 business." With the issue thus framed, defendants state that plaintiffs' claims would fulfill
14 "people's worst fears about public corruption," would "create suspicion in the minds of people"
15 who "might wonder" whether something improper is afoot, and that the "public expects" or has
16 the "right to expect" that such gifts should not be made. With these and other hyperbolic
17 examples (including an "old joke about petty corruption in a third-world country") as the frame
18 of reference, defendants contend, almost *a priori*, that the government has the right to enact the
19 prohibitions of Senate Bill 10.
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22 As is perhaps natural when one is consistently *required* to defend the constitutionality of
23 any challenged laws, the State has (perhaps inadvertently) advanced arguments that would turn
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25 ² The parties have agreed that plaintiffs' response to defendants' motion for summary judgment (as well
26 as plaintiffs' cross-motion for summary judgment) may be filed sometime after the Court's resolution of
plaintiffs' motion for preliminary injunction.

1 the very purpose and meaning of Article I, section 8, on its head. Article I, section, 8, provides
2 very expansive protection against laws restricting or restraining expression. So expansive are the
3 protections of Article I, section 8, that the Oregon Supreme Court has even commented that “one
4 is struck by its sweeping terms, both with respect to the [limitation on legislative power] and the
5 kinds of expression protected[.]” *State v. Ciancanelli*, 339 Or. 282, 311, 121 P.3d 613 (2005).
6
7 The challenged provisions of Senate Bill 10 are unconstitutional if they reach expression that is
8 protected by Article I, section 8. Thus, for the purpose of analyzing plaintiffs’ claims, the focus
9 should not be on the outlandishly colorful scenarios conjured up by defendants (e.g. “new cars”),
10 but rather on the most pure or common forms of political speech that are impaired by Senate Bill
11 10, including the following:

12 • An expenditure of \$51.00 by a coalition of farmers to pay for a legislator’s travel
13 expenses to a drought-stricken part of the state for the purpose of ascertaining the need for
14 certain public works projects.

15 • The payment of a \$100 honorarium for a legislator to prepare and give a speech to
16 an association, where preparation of the speech is likely to require hours of research and the
17 speech is to be delivered hours away from the legislator’s district.

18 • A \$15 ticket to a college theatre production given by a private college (which has
19 other matters before the legislature) to a legislator who has been supportive of higher education
20 and who is interested in seeing first-hand how the Oregon Cultural Trust’s contributions to the
21 University theatre program has improved opportunities in the arts.
22
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24 With each of the examples above, there is no cause for genuine concern of corruption, the
25 appearance of corruption, or any of the other purported rationales advanced by defendants. Even
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1 more importantly for the purposes of this constitutional challenge, each of these examples
2 involves protected expression. As will be shown, the challenged restrictions of Senate Bill 10
3 are addressed to this expression (not to any alleged harmful effects), and there is no exception
4 that permits such an infringement.

5
6 Another flaw in defendants' analysis comes in the suggestion that plaintiffs are
7 challenging more than just the existing restrictions on lobbying expenditures. Despite
8 defendants' suggestion to the contrary, these existing limits are substantially different from the
9 restrictions in place prior to the passage of Senate Bill 10. For instance, Senate Bill 10 creates a
10 new *prohibition* on entertainment that did not exist previously. However, it matters not what
11 was previously prohibited or allowed under the Code of Ethics. Plaintiffs' challenge is only to
12 the *current* restrictions on lobbying expenditures, including the current restrictions on (a) giving
13 or receiving things of value over \$50, (b) providing or receiving entertainment, and (c) providing
14 or receiving honoraria. While defendants suggest that all manner of pernicious consequences
15 might occur if *no restrictions* are allowed, those concerns are beyond the scope of this
16 proceeding. It is not for plaintiffs (or the Court) to propose some other restrictions that would
17 both pass constitutional muster and fit defendants' theoretical concerns for better government. If
18 the current restrictions on lobbying expenditures fail, it is up to the legislature to pass any other
19 laws that are consistent with Article I, Section 8.
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22 As discussed herein, the legislature has enacted a law that offends Article I, section 8.
23 No matter how forcefully defendants argue that the restrictions of Senate Bill 10 make for good
24 government, they are unconstitutional and must therefore be stricken. This is the case even if the
25 restrictions enjoy popular support. *Ciancanelli*, 339 Or. at 629 (the protections of Article I,
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1 section 8, “extend to the kinds of expression that a majority of citizens in many communities
2 would dislike”).

3 REPLY ARGUMENT

4 Defendants have suggested that a ruling that the challenged sections of Senate Bill 10
5 violates Article I, section 8, would represent some historic interpretation of that constitutional
6 provision. Because the Oregon courts have never decided the *precise* issues presented in this
7 case, defendants counsel that the Court “should not be the first” to find that these lobbying
8 restrictions are impermissible under Article I, section 8. Again, defendants have it backwards.
9 A ruling by this Court that Oregon’s sweeping free speech protections do *not* cover lobbying
10 expenditures (such as those examples cited above) would constitute a major departure from prior
11 case law, most notably the Oregon Supreme Court cases dealing with very analogous factual
12 settings (including campaign contributions and lobbyist registration fees). Consistent with
13 Article I, section 8, jurisprudence, the restrictions of Senate Bill 10 should be stricken, for the
14 reasons discussed below.
15
16

17 The lobbying expenditures restricted by Senate Bill 10 are protected forms of
18 “expression,” thus triggering the *Robertson* analysis. The restrictions of Senate Bill 10 are aimed
19 at expression (not some identifiable harm) and there is no applicable historic or incompatibility
20 exception. Finally, there is no merit in the arguments advanced by defendants regarding (a)
21 some reserved legislative powers of Article IV, section 15, and (b) the independent viability of
22 Senate Bill 10’s restrictions on the receipt by public officials of certain lobbying expenditures.
23

24 **I. The lobbying expenditures restricted by Senate Bill 10 are protected forms of**
25 **expression under the Oregon Constitution.**

26 Conspicuously absent from defendants’ discussion of whether the challenged lobbying

1 expenditures constitute expression is any mention of the Oregon Supreme Court's decision in
2 *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or. 1,
3 969 P.2d 376 (1998). That case, discussed in plaintiffs' opening memorandum, stated that
4 lobbying is political speech, that obtaining goodwill is bound up closely with the essential
5 expressive nature of the profession, and that "lobbying is expression [] for the purposes of the
6 first *Robertson* category." 328 Or. at 7-8. Plaintiffs further noted that other courts have found
7 that lobbyist goodwill building, such as entertainment, is protected expression under the First
8 Amendment. *See, e.g., U.S. v. Sawyer*, 85 F.3d 713 (1st Cir. 1996). Defendants did not address
9 *Fidanque* or *Sawyer*. Plaintiffs submit, however, that these cases are the most helpful guidance
10 available to the Court in assessing whether the lobbying activities restricted by Senate Bill 10
11 constitute expression.
12

13
14 The supplemental declaration of Plaintiff Fred VanNatta and the examples provided
15 above represent core political speech under Article I, section 8. Mr. VanNatta has a significant
16 economic interest in family owned "small woodlands" in Oregon. Past legislative sessions have
17 considered many bills that could directly impact the livelihood of small woodlands owners.
18 Defendants admit that future sessions are expected to consider further regulation of small
19 woodlands. Mr. VanNatta wishes to avail himself of the very goodwill building activities (e.g.,
20 entertainment and provision of business means in the course of substantive conversation) that
21 *Fidanque* protects as expression in order to advance his legislative interest.
22

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