



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

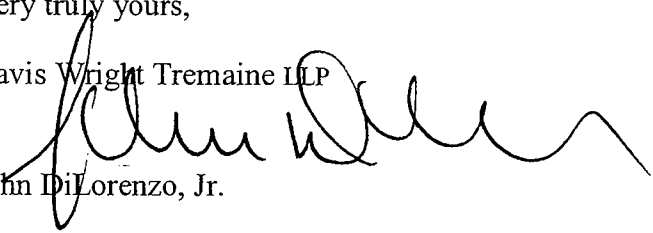
The Honorable Joseph C. Guimond
November 20, 2007
Page 2



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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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.
20
21

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
24

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
23

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
26

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.
20
21

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,
26

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
26

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

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

14 From this discussion, defendants appear to conclude that two of these three examples (a
15 gift to a friend and a bribe) somehow “encompass all gifts” by lobbyists to public officials. That
16 is, defendants contend that a gift is either made for the purpose of improperly influencing the
17 public official (i.e. bribery) or it is devoid of any expressive content (“made merely in
18 friendship”). It is unclear just how defendants arrived at this binary universe of lobbying
19 expenditures. As reflected in the very examples provided above, lobbying expenditures can
20 occur in the form of things of value (e.g. transportation), entertainment, and honorarium. They
21 can be made for a great number of expressive purposes, including advocating the merits of a
22 lobbyist’s position, sharing information on the subject of pending legislation, or building
23
24
25
26

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

11 Defendants are also misguided in their attempt to distinguish lobbying expenditures (such
12 as the examples provided above) from campaign contributions. If anything, the lobbying
13 expenditures referenced above contain even greater expressive content than a standard campaign
14 contribution. In the case of a contribution, a check is written to the candidate’s campaign
15 committee, which uses the money for a host of campaign activities, including general overhead
16 expenses. As noted in *VanNatta*, however, it is mere act of contributing that constitutes the
17 expression, irrespective of the use the monies are later put to by the candidate. Thus, the mere
18 undifferentiated support that inheres in a campaign check is constitutionally protected
19 expression. However, the above-referenced lobbying activities, while also signifying a measure
20 of “support” for the public official, go much further and actually involve a flow of information
21 and advocacy (and the accumulation of goodwill as a reliable information source) between the
22 lobbyist and public official.

25 For all these reasons (and if prior Oregon case law is to be respected), the lobbying
26

1 activities restricted by Senate Bill 10 are constitutionally protected expression.

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

4 In considering a challenge under Article I, section 8, Oregon courts first determine
5 whether the challenged provision is written in “terms that are directed to the substance of an
6 opinion or subject of communication” or whether it instead “is written in terms that are directed
7 at a harm that may be proscribed.” *VanNatta*, 324 Or. at 784. To be directed at a harm, the
8 restriction must only apply when the harm is shown to exist. *See, e.g., City of Portland v.*
9 *Tidyman*, 306 Or. 174, 759 P.2d 242 (1988)(finding that zoning ordinance was directed at
10 expression, not harm, where the harms did not have to be shown for the zoning ordinance to be
11 applied). Because, as will be shown, the challenged provisions of Senate Bill 10 are directed at
12 expression (and not harmful effects), they are invalid, unless they fit “within an historical
13 exception or can be justified under the ‘incompatibility’ exception to Article I, section 8.”
14 *VanNatta*, 324 Or. at 784.

15
16 The policy underpinnings for the restrictions on lobbying expenditures are not clear from
17 the text of Senate Bill 10 (or the Code of Ethics). Defendants claim that the perceived harms
18 sought to be addressed by Senate Bill 10 are corruption and the appearance thereof. It should
19 first be noted that corruption in the form of bribery is already prohibited by statute³ and the
20 nebulous “appearance of corruption” rationale has been criticized by the *VanNatta* court. 324
21 Or. at 538-539 (concluding that the freedom of expression “cannot be limited whenever it may
22 be said that elimination of a particular form of expression might make the electorate feel more
23
24

25 _____
26 ³ See ORS 162.015 and 162.025.

1 optimistic about the integrity of the political process”). However, even if the bribery harm was
2 not elsewhere addressed and even if the “appearance of corruption” harm was both sufficiently
3 clear and legally permissible, the statute is clearly not directed at such harms under the
4 *Robertson* framework. For the restrictions of Senate Bill 10 to apply, there need only be a
5 lobbying expenditure that is in excess of \$50, or in any amount in the form of entertainment or
6 honorarium. The restrictions of Senate Bill 10 do not contain as an additional element that the
7 purported harms must also be present. That is, any lobbying activity that involves, for example,
8 a payment of \$51 for transportation expenses, or \$1 in entertainment, is prohibited by Senate Bill
9 10 without any showing that it actually causes corruption or the appearance thereof.⁴

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

15
16 **A. The incompatibility exception does not apply.**

17 Defendants first contend that Senate Bill 10’s restrictions on lobbying expenditures are
18 saved by the incompatibility exception, a narrow exception to Article I, section 8, that was
19 carved in the disciplinary cases of *In re Lasswell*⁵ and *In re Fadely*.⁶ In order to satisfy that
20

21 ⁴ Both the lack of any identifiable “harms” in the statute and the mechanical way in which the statute is to
22 be applied produce absurd results. Because the prohibitions and limits only apply to those with
23 “legislative or administrative interests” (defined as “an economic interest, distinct from that of the general
24 public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or
25 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.

26 ⁵ 296 Or. 121, 673 P.2d 855 (1983).

1 exception, the expression at issue “must actually vitiate the proper performance of the particular
2 professional’s official function, under the facts of the specific case.” *VanNatta*, 324 Or. at 541
3 (citing *Lasswell* and *Fadely*). Defendants argue that their generalized concerns regarding the
4 appearance of impropriety for all public officials are sufficient to bring the lobbying expenditure
5 restrictions within the incompatibility exception. Their argument should be rejected.
6

7 First, defendants cite to no authority for this incredibly expansive reading of the
8 exception. Not only do they cite to no authority that the benefit of lobbying expenditures are
9 incompatible with the role of legislators, they cite to no authority for the application of the
10 incompatibility exception outside the context of a legal professional violating prescribed rules of
11 the judicial canons or the attorney code of professional conduct.
12

13 Second, the limited holdings in *Lasswell* (that a public prosecutor must abide by
14 professional rules prohibiting extrajudicial statements with the intent or knowledge that such
15 statements pose an imminent threat to the process) and *Fadely* (that a judge must abide by
16 professional rules prohibiting the personal solicitation of campaign contributions) cannot be
17 extended to fit defendants’ argument. There has been no showing, nor can defendant’s now
18 show, that every receipt by every public official of any thing of value over \$50, any
19 entertainment, or any honorarium is, in every instance, incompatible with the public official’s
20 performance. Indeed, as shown in the examples above, the receipt of such lobbying expenditures
21 in many cases actually *further*s a public official’s performance (e.g. acquiring information on
22 matters before the public official, disseminating information to constituents, etc). It would belie
23 reality to suggest that participation in a fact-finding mission would be incompatible with a
24

25 ⁶ 310 Or. 548, 802 P.2d 31 (1990).
26

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

8
9 Interestingly, defendants argue that the rationale in *Fadely* applies with equal force to the
10 restrictions at issue in this case, even though the Oregon Supreme Court has decided that the
11 actual rule applied against a judge in *Fadely* (the prohibition on solicitation of campaign
12 contributions) is not incompatible with the functions of legislators and staff covered by Senate
13 Bill 10. In *VanNatta*, the court specifically held that the campaign contribution limits could not
14 constitutionally apply to legislators and other elected officials, 324 Or. at 540-541, in part
15 because the court determined that there is nothing incompatible about a legislator soliciting and
16 receiving campaign contributions. The court rejected the State's arguments to the contrary: "an
17 underlying assumption of the American electoral system always has been that, in spite of
18 temptations that contributions may create from time to time, those who are elected will put aside
19 personal advantage and vote honestly and in the public interest. The political history of the
20 nation has vindicated that assumption time and time again." *Id.* at 541. There can be no valid
21 argument that the application of the incompatibility exception in *Fadely* should be extended to
22 legislators, when the Oregon Supreme Court has already rejected a direct invitation to extend the
23 *Fadely* rule to legislators.
24
25
26

1 Moreover, the extreme swath of Senate Bill 10 embraces a whole host of scenarios that
2 could only be met with the most absurd of incompatibility arguments. The following is but one
3 example. An owner of a stationery store in a small town wishes to compete for a stationary
4 supply contract with the local elementary school district. The owner's child attends the
5 elementary school and has a friend whose parent is a school teacher in the district. Under Senate
6 Bill 10, the owner cannot treat his child and the child's friend to a movie because the owner has
7 an "administrative interest" in the district and his child's friend is a relative of a public official
8 (the teacher) who works for the district. The owner is therefore prohibited from paying for
9 "entertainment expenses" attributable to the child's friend. See Section 18(4)(b) and (c). There
10 is certainly nothing "incompatible" with the teacher's child receiving the movie entertainment or
11 in the teacher allowing his/her child to receive the entertainment. But, these are the absurd
12 results that would follow from a finding in favor of defendants' incompatibility argument.
13
14

15 This final example reveals yet another flaw in defendants' incompatibility argument, as
16 they contend that the incompatibility exception somehow applies to the restriction on a lobbyist
17 giving lobbying expenditures to or on behalf of a public official. Defendants make no argument
18 that such expenditures are in any way "incompatible" with the lobbyist's function, only that a
19 lobbyist cannot *give* such expenditures to a public official because it would be incompatible for
20 the public official to *receive* such expenditures. In other words, defendants say a lobbyist cannot
21 give because a public official cannot receive. This certainly belies defendants' other argument
22 (discussed below) that the giving of a lobbying expenditure is somehow unrelated to (and is
23 wholly divisible for constitutional purposes from) the receipt of such expenditure. As will be
24 discussed below, and as defendants' incompatibility argument illustrates, the giving and receipt
25
26

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

2 **B. The historical exception does not apply.**

3 Under the *Robertson* framework, the “party opposing a claim of constitutional privilege
4 has the burden of demonstrating that a restriction on speech falls with an historical exception.”
5 *Moser v. Frohnmayer*, 315 Or. 372, 376, 845 P.2d 1284 (1993). “This is a heavy burden.” *Id.*
6

7 Faced with this heavy burden, defendants present their historical exception argument by
8 way of footnote (Def. Mem., p. 17-18, n. 10), in which they argue that the existence of bribery
9 statutes at the time of the adoption of the Oregon constitution means that there must “surely [be]
10 a point when the size of a gift and its circumstances render it ‘corrupt’ even without actual proof
11 of a *quid pro quo* understanding.” Again turning the constitutional analysis on its head,
12 defendants conclude that the *absence* of lobbying expenditure limitations would “likely have
13 been foreign to the framers of the Oregon constitution.” *Id.* This entirely misses the mark.
14

15 The court in *VanNatta* readily disposed of the historical exception argument with respect
16 to campaign contribution limitations. “At the time of statehood and the adoption of Article I,
17 section 8, there was no established tradition of enacting laws to limit campaign contribution.”
18 324 Or. 538. Similarly, defendants in this case have not met their burden of showing that there
19 was some “established tradition” at the time the Oregon constitution was adopted to restrict the
20 lobbying restrictions at issue in Senate Bill 10. The existence of bribery statutes merely indicates
21 an historical exception for bribery. Just as there was no historical antecedent for campaign
22 contributions, there is no historical exception to Article I, section 8, for lobbying expenditures of
23 more than \$50, or on entertainment or honorarium. Indeed, such an argument cannot even
24 seriously be made because, not only were there no historic laws prohibiting such expenditures
25
26

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

4 Moreover, to satisfy the historical exception, the restrictions on speech must be “wholly
5 confined” within the historical exception. *Robertson*, 293 Or. at 412. Even if some portion of
6 the conduct proscribed by Senate Bill 10 (e.g., a *quid pro quo* “six-figure cash gift” to a public
7 official) might find some kindred historical prohibition (on bribery), defendants still must show
8 that all other expression proscribed by Senate Bill 10 also has an historical antecedent. The
9 suggestion that Senate Bill 10 can survive simply because of the assertion that the absence of
10 these lobbying restrictions “would likely have been foreign” to the framers is inconsistent with
11 the sweeping terms of Article I, section 8, and the Oregon Supreme Court’s interpretations
12 thereof. The court’s analysis in Article I, section 8, cases has not hinged on (or even considered)
13 whether the Victorian-era adopters of the Oregon Constitution would have disapproved of, for
14 example, nude dancing (*City of Nyssa v. Dufloth*, 339 Or 330, 121 P.2d 639 (2005)), adult
15 businesses (*Tidyman*) or even live public sex shows (*Ciancanelli*). The appropriate analysis is
16 instead whether, at the time of the Oregon Constitution, such forms of expression were
17 specifically restricted (and, if so, whether the current restriction are “wholly confined” within
18 such historical restrictions). Defendants have not made, and cannot make, the requisite
19 showing.⁷

20
21
22
23 _____
24 ⁷ Defendants also argue that other provisions in the Oregon constitution empower the legislature to enact
25 lobbying restrictions that would otherwise violate Article I, section 8. As discussed below, these
26 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

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

3 Defendants argue that Article IV, section 15, (“Either house may punish its members for
4 disorderly behavior, and may with the concurrence of two thirds, expel a member but not a
5 second time for the same cause.”) “plainly authorize[s] the legislature to discipline its members
6 for transgressions of rules the legislature itself develops.”⁸ Defs. Mem., p. 14-15. Defendants
7 cite to no authority for this sweeping proposition that Article IV, section 15, somehow trumps
8 the protections of Article I, section 8. In addition, the restrictions of Senate Bill 10 are not the
9 type of “punish[ment] for disorderly behavior” that falls under the purview of Article IV, section
10 15. That is, the authority provided in Article IV, section 15, is simply not applicable to Senate
11 Bill 10.
12

13 First, Senate Bill 10 is a statute, passed by both houses of the legislature and signed into
14 law by the governor. It is not an act by one house to punish its members, nor is it even a rule
15 adopted by one house to police its members. Article IV, section 15, does not authorize one
16 house to “punish” members of another house, or the governor to “punish” members of either
17 house. Thus, even if the prohibitions and penalties in Senate Bill 10 were somehow deemed a
18 “punishment,” they were not adopted pursuant to Article IV, section 15.
19

20 Second, the statute is plainly made applicable to not only members of one house (or even
21 _____
22 legislature could have exercised prior to the protections imposed by Article I, section 8. We assume that
23 the territorial legislature could have enacted many infringements on the right to speak (like regulation of
24 nude dancing) before there ever was an Oregon Constitution. The point is: it did not do so and therefore
25 there is no historical exception to Article I, section 8.
26

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.

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

6
7 Third, the “punishment” power in Article IV, section 15, applies only in cases of
8 “disorderly behavior.” Defendants provide no authority to support the position that the term
9 “disorderly behavior” is so elastic as to cover the receipt of \$1 of entertainment or honorarium or
10 \$51 for travel expenses for a legislative fact-finding trip, all of which were perfect legal (and,
11 presumably, not “disorderly behavior”) prior to the last legislative session.

12
13 Fourth, Senate Bill 10 does not do anything to “punish” members of either house. It
14 instead imposes restrictions on expression between (a) private parties with legislative or
15 administrative interests and (b) nearly all public officials. The only “punishment” under Senate
16 Bill 10 would be meted out by the Oregon Government Ethics Commission. *See* Senate Bill 10,
17 section 11a. Were Senate Bill 10 really an exercise of each chamber’s authority under Article
18 IV, section 15, there could be no valid delegation to the Ethics Commission.

19
20 Fifth, the cases cited by defendants merely illustrate that the legislatures of Oregon and
21 elsewhere have historically been authorized to punish their own members for ethical or criminal
22 transgressions. The legislative authority to do that is not in dispute, but it is also not relevant to
23 the issue before the Court.

24
25 Sixth, the Attorney General himself has already rejected this very argument. In response
26 to a question from Secretary of State Bradbury, the Attorney General has opined that ORS

1 260.174 (restricting campaign contributions and expenditures while the legislature is in session)
2 violates Article I, section 8. Letter of Advice dated January 2, 2001 (No. 8274). If the
3 legislature had the power to prohibit lobbying expenditures notwithstanding Article I, section 8,
4 by virtue of Article IV, section 15, it stands to reason that it would also have the power to
5 prohibit in-session campaign contributions notwithstanding Article I, section 8.⁹
6

7 Finally, and perhaps most importantly, any right the legislature has to make rules for
8 disciplining its own members is itself subject to the requirement that such rules must be
9 constitutional. Cases interpreting Article I, section 5, clause 2 of the United States Constitution
10 (upon which defendants rely in their interpretation of Article IV, section 15, of the Oregon
11 Constitution) make this abundantly clear. For instance, in *United States v. Ballen*, 144 U.S. 1, 5,
12 12 S.Ct. 507 (1892), the Court held that the “constitution empowers each house to determine its
13 rules of proceedings. It may not by its rules ignore constitutional restraints or violate
14 fundamental rights[.]” *See also Shape of Things to Come, Inc. v. County of Kane*, 588 F.Supp.
15 1192 (N.D. Ill. 1984)(rules adopted by House of Representatives have force of law and are
16 subject to constitutional restrictions). Were legislative rules *not* subject to other constitutional
17 protections, each legislative chamber could adopt and enforce rules that (a) prohibit members
18 from voting in any elections; (b) prohibit members from practicing certain religions; or (c) do not
19 allow members of a particular race or gender. Just as such legislative rules would be invalid
20 restrictions on constitutional rights, a rule that prohibits members from engaging in political
21
22
23

24 _____
25 ⁹ Plaintiffs do not fault the Attorney General for advocating one position while opining another, as that is
26 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).

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

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

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

7 Defendants argue that even if the restrictions on the right to *make* lobbying expenditures
8 are unconstitutional, the restrictions on the right to *receive* the benefit of such expenditures
9 somehow independently survive Article I, section 8, scrutiny. That is, under defendants'
10 position, even if a person has the constitutional right to make lobbying expenditures (e.g. to pay
11 a legislator's transportation costs for a fact-finding trip), the state may nevertheless prohibit the
12 public official from *receiving* the expenditure (e.g. a public official could not actually attend the
13 fact-finding trip). Once more, defendants provide no authority for this argument, which flies in
14 the face of prior Oregon case law and utterly fails to appreciate the very nature of
15 constitutionally protected lobbying activities.
16

17
18 Defendants first contend that the restriction on a public official's receipt of the lobbying
19 expenditures prohibited by Senate Bill 10 is supported by the incompatibility exception. For the
20 reasons discussed above, this argument is without merit.

21 Defendants next argue that plaintiffs (and others) only have the constitutional right to
22 *offer* (and not to actually *make*) lobbying expenditures for entertainment, honorarium or things of
23 value over \$50. They claim that "any expression inherent in an offer is complete when the offer
24 is made." Defs. Mem., p. 25. For example, under defendants' view, the only expression that
25 inheres in a joint fact-finding mission by lobbyists and legislators is the mere invitation for such
26

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

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

25 In addition, defendants argue that (even if there is a constitutionally recognized right to
26

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

14
15
16 Finally, defendants suggest that, if plaintiffs are successful in their challenge to sections
17 18 and 24 of Senate Bill 10, then section 17 of Senate Bill 10 would remain and (bereft of the
18 cross-referenced exceptions of sections 18 and 24) would prohibit “all gifts, entertainment, and
19 honoraria, regardless of how small[.]” Defs. Mem., p. 24, n. 14. Like many other statutory
20 challenges, plaintiffs’ claims (if successful) may collaterally impact other statutes within the
21 same statutory scheme. If the (relatively) limited restrictions of sections 18 and 24 are deemed
22 unconstitutional, there is no question that any resulting absolute prohibition in section 18 would
23 also violate Article I, section 8, and be unenforceable. Any order of the Court enjoining
24 application of the limits in section 18 and 24 should equally be extended to Section 17.
25
26

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

2
3 For all the foregoing reasons, plaintiffs submit that there is a high likelihood that they
4 will succeed on the merits. Moreover, defendants have conceded that, assuming plaintiffs
5 ultimately prevail in this action, any continued abridgment of plaintiffs' rights during the
6 pendency of this action would constitute irreparable harm. Defs. Mem., p. 28. Defendants
7 nonetheless have asked the Court to balance the respective hardships of the parties: the hardship
8 on plaintiffs of being deprived of their constitutional rights (presumably for the entire 2008
9 legislative session) and the hardship on defendants of not being able to enforce the (likely
10 unconstitutional) provisions during that period. Any such balancing, however, would tip in favor
11 of plaintiffs. As noted in plaintiff's prior memorandum, Oregon courts routinely enjoin
12 enforcement of laws that abridge free speech. *See, e.g., Roman v. City of Portland*, 909 F Supp
13 767 (D. Or 1995)(Haggerty, J., preliminarily enjoining law restricting location of speakers);
14 *Moser v. Federal Communications Commission*, 811 F Supp 541 (D. Or. 1992)(Redden, C.J.,
15 preliminarily enjoining law restricting method of speech) Plaintiffs ask the Court to likewise
16 issue a preliminary injunction against the enforcement of the challenged restrictions in Senate
17 Bill 10.

18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///

1 **CONCLUSION**

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

7 DATED this 20 day of November, 2007.

8 DAVIS WRIGHT TREMAINE LLP

9
10 By 

11 John DiLorenzo, Jr., OSB #80204
12 Gregory A. Chaimov, OSB #822180
13 Aaron K. Stuckey, OSB #95432
14 Davis Wright Tremaine LLP
15 1300 SW Fifth Avenue, Suite 2300
16 Portland, OR 97201
17 Telephone: 503-241-2300
18 Facsimile: 503-778-5499

19 Attorneys for Plaintiffs Fred VanNatta and Center To
20 Protect Free Speech, Inc.

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:

Charles Edward Fletcher
Senior Assistant Attorney General
Department of Justice
Trial Division/Special Litigation Unit
1162 Court Street NE
Salem, OR 97301
Telephone (503) 947-4700
Facsimile (503) 947-4793
charles.fletcher@state.or.us

Of Attorneys for Defendants

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;

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

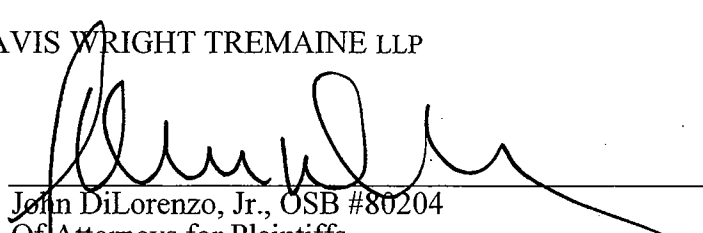
by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

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

Dated this 20 day of November 2007.

DAVIS WRIGHT TREMAINE LLP

By _____


John DiLorenzo, Jr., OSB #80204
Of Attorneys for Plaintiffs
Phone: (503) 241-2300
Fax: (503) 778-5299
Email: johndilorenzo@dwt.com