

HARDY MYERS  
Attorney General



PETER D. SHEPHERD  
Deputy Attorney General

DEPARTMENT OF JUSTICE  
TRIAL DIVISION

March 21, 2008

RECEIVED

MAR 24 2008

Davis Wright Tremaine

VIA HAND DELIVERY

Honorable Joseph C. Guimond  
Circuit Court Judge  
Marion County Courthouse  
P.O. Box 12869  
Salem, Oregon 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 are:

1. Defendants' Motion for Summary Judgment; and
2. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment.

Please have your assistant sign and date the attached confirmation card and return it to me. Thank you for your time and attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Leith".

David E. Leith  
Attorney-in-Charge  
Michael A. Casper  
Assistant Attorney General  
Special Litigation Unit

TRIU4982/MC2/cjw

Enclosures

cc: John DiLorenzo, Jr.

1  
2  
3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MARION

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

9 Plaintiffs,

10 v.

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

15 Defendants.

Case No. 07C-20464  
Honorable Joseph C. Guimond

DEFENDANTS' (RENEWED) MOTION FOR  
SUMMARY JUDGMENT

**(ORAL ARGUMENT REQUESTED)**

16 Defendants hereby renew their motion for summary judgment pursuant to ORCP 47B.

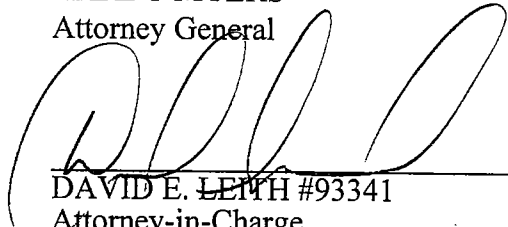
17 As explained in defendants' *Memorandum in Opposition to Plaintiffs' Motion for Summary*  
18 *Judgment and in Support of Defendants' Motion for Summary Judgment*, submitted herewith,  
19 there is no genuine issue of material fact and defendants are entitled to judgment as a matter of  
20 law. Defendants' motion is supported also by the record and file herein. Defendants request oral  
21  
22  
23  
24  
25  
26

1 argument on this motion, with official court reporting services, and estimate that such oral  
2 argument will take 90 minutes.

3 DATED this 21 day of March, 2008.

4 Respectfully submitted,

5 HARDY MYERS  
6 Attorney General




7  
8 DAVID E. LEITH #93341  
9 Attorney-in-Charge  
10 MICHAEL A. CASPER #062000  
11 Assistant Attorney General  
12 Trial Attorneys  
13 Tel (503) 947-4700  
14 Fax (503) 947-4793  
15 David.Leith@doj.state.or.us  
16 Michael.Casper@doj.state.or.us  
17 Of Attorneys for Defendants  
18  
19  
20  
21  
22  
23  
24  
25  
26

1 **CERTIFICATE OF SERVICE**

2 I certify that on March 21, 2008, I served the foregoing DEFENDANTS' (RENEWED)  
3 MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated  
4 below, and addressed to the following:

5 John DiLorenzo, Jr.  
6 Gregory A. Chaimov  
7 Davis Wright Tremaine LLP  
8 1300 SW Fifth Avenue, Suite 2300  
9 Portland, Oregon 97201

- HAND DELIVERY
- MAIL DELIVERY
- OVERNIGHT MAIL
- TELECOPY (FAX)



11 DAVID E. LEITH #93341  
12 Attorney-in-Charge  
13 MICHAEL A. CASPER #06200  
14 Assistant Attorney General  
15 Special Litigation Unit  
16 Trial Attorneys  
17 David.Leith@doj.state.or.us  
18 Michael.Casper@doj.state.or.us  
19 Of Attorneys for Defendants  
20  
21  
22  
23  
24  
25  
26

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. 07C-20464  
Honorable Joseph C. Guimond

MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT AND IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

TABLE OF CONTENTS

1 INTRODUCTION..... 1
2 BACKGROUND..... 2
3 I. The Code of Ethics prior to amendment by SB 10..... 2
4 II. Amendments made by SB 10 (2007)..... 3
5 III. Proceedings in this case..... 4
6 ARGUMENT..... 5
7 I. The challenged restrictions do not infringe free speech under Article I,
8 section 8..... 5
9 A. The court correctly held that the alleged expression is within the
10 incompatibility exception ..... 7
11 1. Under Lasswell and Fadeley, the gift restrictions are within
12 the incompatibility exception ..... 7
13 2. Plaintiffs' argument that the incompatibility exception does
14 not apply is without merit..... 9
15 a. Unlike the contribution restrictions rejected in
16 Vannatta I, the gift restrictions are narrowly tailored ..... 9
17 b. Determining where to draw the line between
18 compatible and incompatible gifts is within the
19 legislature's prerogative ..... 10
20 B. If the court were to reconsider the incompatibility exception, it also
21 should reconsider whether gifts to public officials are protected
22 expression at all ..... 12
23 C. In any event, expression is not a sufficiently intrinsic component of
24 gift-giving to warrant entertaining a facial challenge..... 16
25 D. In all events, the challenged regulations do not violate free
26 expression rights ..... 18
1. The Code of Ethics gift restrictions are not "category one"
laws under Robertson because they are content-neutral
restrictions aimed at the possible effects of gift giving ..... 18
a. The Outdoor Media framework..... 18
b. Under Outdoor Media, the Code of Ethics gift
restrictions are constitutionally permissible ..... 20

1 i. The Code of Ethics gift restrictions are content-neutral .....20

2 ii. The Code of Ethics gift restrictions place reasonable limitations on the time, place, and manner of gift-giving while leaving open ample avenues for expression .....21

3

4

5 2. The Court of Appeals’ recent decision in *State v. Rich* confirms that conclusion.....23

6 II. The classifications in the Code of Ethics do not offend free expression rights .....24

7

8 A. Plaintiffs’ facial challenges to those classifications should not be entertained .....24

9

10 B. The classifications in any event do not violate free speech protections .....25

11 1. The limited application to only those with a legislative or administrative interest is a permissible, content-neutral classification .....25

12

13 a. The classification does not violate Article I, section 8 .....26

14

15 b. The classification also does not violate the First Amendment .....27

16 2. The exemption for governmental entities and nonprofits also is a reasonable, content-neutral classification .....28

17 C. The remedy if the classifications were impermissible.....29

18 III. The classifications in the Code of Ethics do not violate Article I, section 20 .....30

19

20 IV. Plaintiffs’ Article I, section 26 challenge to the offer restrictions of the Code of Ethics is without merit, because nothing in the Code of Ethics restricts plaintiffs’ ability to instruct their representatives or petition the legislature.....31

21

22 A. The text of Article I, section 26 demonstrates that plaintiffs’ challenge under that provision is without merit .....31

23

24 B. Case law does not support plaintiffs’ Article I, section 26 challenge .....32

25

26 C. The history of Article I, section 26 shows that the framers did not intend that provision to protect unlimited gifts, entertainment, or honoraria for candidates or public officials .....33

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

V. Even if the court were to agree with plaintiffs as to the offer restrictions,  
the court should reject plaintiffs' challenge to the solicitation-and-receipt  
restrictions .....34

CONCLUSION .....35

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *Amster v. City of Tempe*, 248 F.3d 1198 (9<sup>th</sup> Cir. 2001)..... 17

4 *Bessett v. Huson*, 179 Or. App. 69, 39 P.3d 220 (2002)..... 13

5 *Brian v. Oregon Govt. Ethics Comm.*, 320 Or. 676, 891 P.2d 649 (1995)..... 25

6 *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)..... 16, 17

7 *City of Dallas v. Stanglin*, 490 U.S. 19 (1989)..... 27

8 *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988) ..... 26

9 *Crocker & Crocker*, 332 Or. 42, 22 P.3d 759 (2001)..... 30

10 *Fidanque v. Oregon Gov't Standards and Practices*, 141 Or. App. 495, 920 P.2d 154

11 (1996) ..... 32

12 *Fidanque v. Oregon Gov't Standards and Practices*, 328 Or. 1, 969 P.2d 376 (1998) ..... 14, 26

13 *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990)..... 16

14 *Gale v. Department of Revenue*, 293 Or. 221, 646 P.2d 27 (1982)..... 11

15 *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990)..... passim

16 *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983) ..... 7, 9

17 *In re Schenck*, 318 Or. 402, 870 P.2d 185 (1994) ..... 7

18 *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 202 Or. App. 123, 121 P.3d 671

(2005) ..... 32, 33, 34

19 *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) ..... 16

20 *Libertarian Party of Oregon v. Roberts*, 305 Or. 238, 750 P.2d 1147 (1988) ..... 31

21 *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998) ..... 16

22 *Oregon v. Rich*, \_\_\_ Or. App. \_\_\_, \_\_\_ P.3d \_\_\_ (March 19, 2008) ..... 23

23 *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Or. 275, 132 P.3d 5

24 (2006) ..... passim

25 *Priest v. Pearce*, 314 Or. 411, 840 P.2d 65 (1992) ..... 31

26 *Roulette v. City of Seattle*, 97 F.3d 300 (9<sup>th</sup> Cir. 1996) ..... 17

*Spence v. Washington*, 418 U.S. 405 (1974) ..... 13

1 *State v. Ausmus*, 336 Or. 493, 85 P.3d 864 (2004).....32

2 *State v. Illig-Renn*, 341 Or. 228, 142 P.3d 62 (2006) .....17, 32

3 *State v. Laundry*, 103 Or. 443, 204 P. 958 (1922) .....34

4 *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982).....passim

5 *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).....11

6 *Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) .....passim

7  
8 **Statutes**

9 Or. Laws 2007 ch. 877, section 16a .....14

10 ORS 166.025(1)(b) .....23

11 ORS 174.040 .....29

12 ORS 244.010(1).....2

13 ORS 244.020(10).....2

14 ORS 244.020(5)(b)(F) .....4, 28

15 ORS 244.020(7).....2

16 ORS 244.020(7)(a) .....14

17 ORS 244.020(8).....13

18 ORS 244.025 .....3

19 ORS 244.025(1).....4

20 ORS 244.025(4).....4

21 ORS 244.040 .....3

22 ORS 244.040(1).....3, 35

23 ORS 244.040(1)(a) .....2

24 ORS 244.040(1)(b) .....3

25 ORS 244.040(1)(c) .....3

26 ORS 244.040(2).....2

ORS 244.040(2)(e) .....3

1 ORS 244.040(5).....2

2 ORS 244.042 .....4

3 ORS 260.407 .....22

4

5 **Other Authorities**

6 37 WILLAMETTE L. REV. 469 (2001).....33

7 C. BURTON & A. GRADE, *A Legislative History of the Oregon Constitution of 185 – Part*  
*I (Articles I & II)*.....33

8 THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL  
9 CONVENTION OF 1857 (1926) (C. Carey, ed.).....33

10

11 **Constitutional Provisions**

12 Mass. Const. Pt. I, art. XIX (1780).....33

13 N.C. Const. art. I, § 12 (1776).....33

14 Or. Const., Art. I, section 20.....30

15 Or. Const., Art. I, section 26.....passim

16 Or. Const., Art. I, section 8.....passim

17 Vt. Const. Ch. I, art. § XVIII (1786) .....33

18

19

20

21

22

23

24

25

26



1 **BACKGROUND**

2 **I. The Code of Ethics prior to amendment by SB 10.**

3 Even before the 2007 legislative session, the Oregon Code of Ethics declared public  
4 office in Oregon a public trust, safeguarded by the Code itself. ORS 244.010(1). And even  
5 before the 2007 legislative session, the Code of Ethics set forth strict limitations on the use of  
6 public office for personal gain. The most basic prohibition was (and is) codified in ORS  
7 244.040(1)(a):

8 No public official shall use or attempt to use official position or  
9 office to obtain financial gain or avoidance of financial detriment  
10 that would not otherwise be available but for the public official's  
11 holding of the official position or office[.]”

11 That subsection went on to provide exceptions for official salary, honoraria subject to  
12 limitations, reimbursement of expenses, and unsolicited awards for professional achievement.  
13 *Id.* (2005).

14 With respect to gifts, ORS 244.040(2) (2005) prohibited public officials from soliciting  
15 or receiving gifts with an aggregate value in excess of \$100 during a calendar year from any  
16 single source, where the source was known or reasonably should have been known to have a  
17 legislative or administrative interest before the official or before the official’s agency. A  
18 corollary provision similarly prohibited anyone from offering gifts that, if accepted, would  
19 violate that prohibition. ORS 244.040(5) (2005). A “legislative or administrative interest” was  
20 defined as an economic interest distinct from the general public’s interest. ORS 244.020(10)  
21 (2005).

22 A “gift” was defined as a thing of economic value given for less than full consideration to  
23 a public official or an official’s relative. ORS 244.020(7) (2005). The definition specifically  
24 excluded campaign contributions, gifts from family members, food or lodging at events attended  
25 in the official’s official capacity, food or beverage consumed in the purchaser’s presence, or  
26

1 entertainment attended in the presence of the purchaser up to \$100 per event and \$250 per year.

2 *Id.*

3 The gift provisions essentially carved out an exception to ORS 244.040(1)'s general  
4 prohibition against obtaining personal financial gain from public office. The offer and receipt of  
5 some gifts was permitted, even though the donor had a legislative or administrative interest  
6 before the official or the official's agency.

7 With respect to honoraria, the Code of Ethics included separate restrictions applicable to  
8 statewide officials and legislative officials or candidates. Statewide officials were prohibited  
9 from soliciting or receiving honoraria. ORS 244.040(1)(b). Legislative officials and candidates  
10 for legislative office were prohibited from soliciting or receiving honoraria for appearances in  
11 the state or during a legislative session, but otherwise could accept honoraria up to \$1,500.  
12 ORS 244.040(1)(c). Honoraria for services related to the official's private profession or  
13 occupation were exempted. *Id.*<sup>1</sup>

14 **II. Amendments made by SB 10 (2007).**

15 SB 10 made numerous amendments to many provisions of the government ethics laws.  
16 The changes pertinent here, however, may be summarized briefly.

17 While the general prohibition against obtaining personal financial gain from one's public  
18 office remains unchanged, the exception allowing certain gifts was amended. As before, the  
19 Code of Ethics applies only to gifts given by someone who has a "legislative or administrative  
20 interest" before the official or the official's agency. ORS 244.040(2)(e); ORS 244.025. The  
21 statutory definition of that term also remains unchanged: an economic interest distinct from the  
22 interest of the general public. ORS 244.020(8).

23

24

---

25 <sup>1</sup> The Code of Ethics also contained (and contains) a number of other specific restrictions not  
26 pertinent to plaintiffs' challenge. Among those, public officials may not trade on their public  
offices for promises of future employment, trade on confidential information for personal gain,  
or represent a paying client before the body of which the official is a member. ORS 244.040.

1 With the passage of SB 10, the permissible aggregate gift from any single source with a  
2 legislative or administrative interest was reduced from \$100 to \$50. ORS 244.025(1) (enacted as  
3 section 18(1) of SB 10). SB 10 also eliminated the exception allowing limited gifts of  
4 entertainment. ORS 244.025(4). Under SB 10, gifts of entertainment fall back within the  
5 general prohibition against obtaining personal financial gain from one's public office.

6 In addition, SB 10 refined the definition of a "gift" in several particulars. In so doing, it  
7 added several exceptions not at issue here and one that is at issue. While SB 10 exempted the  
8 reimbursement of "reasonable expenses" in several circumstances, plaintiffs take issue only with  
9 a provision allowing reimbursement for certain expenses by a federal, state, tribal, or local  
10 government, by an organization to which a public body pays membership dues, or by a nonprofit  
11 corporation that receives less than five percent of its funding from for-profit entities. That  
12 provision applies to expenses to attend a meeting where the official makes a speech or  
13 presentation, participates on a panel, or represents the government. *See* ORS 244.020(5)(b)(F).

14 Finally (and contrary to plaintiffs' description of SB 10), the amended law continues to  
15 allow limited honoraria. It allows honoraria up to \$50, and it exempts honoraria for services  
16 performed in relation to an official's private profession, occupation, avocation, or area of  
17 expertise. ORS 244.042 (enacted as section 24 of SB 10).

18 **III. Proceedings in this case.**

19 Plaintiffs originally filed this lawsuit together with a motion to preliminarily enjoin  
20 operation of specified gift limitations set out in the Code of Ethics, as amended by SB 10. While  
21 their complaint asserted claims under various provisions of the state constitution, the motion for  
22 preliminary relief relied on their claim that the challenged provisions unconstitutionally restrain  
23 free expression under Article I, section 8.

24 The State argued in response that the regulated conduct—gift-giving—is not  
25 "expression" for constitutional purposes. The State argued further that if the conduct is  
26 expressive, then its regulation still would be permissible under the doctrine that expression may

1 be regulated in those circumstances where expression would be incompatible with the concept of  
2 public service. Defendants' Memorandum Opposing Preliminary Relief.

3 This court denied plaintiffs' motion for preliminary injunction. The court found that the  
4 gifts in question may be expressive, but held that they fall within the "incompatibility exception"  
5 and are therefore not protected expression. Opinion at 6.

6 Plaintiffs subsequently amended their complaint to add a federal First Amendment claim  
7 and to add the allegation that classifications drawn by the Code of Ethics violate plaintiffs' free  
8 expression rights. Plaintiffs then moved for summary judgment on their amended complaint.  
9 They ask this court to reconsider its prior ruling that the expression in question is not protected  
10 based on the incompatibility exception.

11 **ARGUMENT**

12 **I. The challenged restrictions do not infringe free speech under Article I, section 8.**

13 Plaintiffs contend that under *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982), the  
14 Code of Ethics restrictions violate Article I, section 8 of the Oregon Constitution. Specifically,  
15 plaintiffs argue that the restrictions are "category one" laws under *Robertson* because—plaintiffs  
16 claim—they are aimed directly at expression but do not satisfy either the historical or  
17 incompatibility exceptions for such laws. Plaintiffs thus ask this court to reconsider its ruling  
18 that the challenged restrictions are warranted by the incompatibility exception.

19 As discussed in Section I.A. below, the court should deny that request, because the  
20 court's conclusion is correct: the Code of Ethics restrictions fit squarely within the  
21 incompatibility exception. In *In re Fadeley*, 310 Or. 548, 802 P.2d 31 (1990), the Oregon  
22 Supreme Court held that a complete ban on all solicitation by judges was constitutional, because  
23 *any* such solicitation was incompatible with the judge's role and could jeopardize the public's  
24 faith in the integrity of judges. Exactly the same reasoning applies here—the legislature has set  
25 reasonable gift limits because, in its judgment, all gifts beyond those limits jeopardize the

26

1 public's perception of the integrity of public officials and the public's confidence in their  
2 government.

3 Even if the court were to reconsider its ruling on the incompatibility exception, however,  
4 plaintiffs' claim still fails, for at least three reasons. Those reasons are addressed more fully in  
5 Sections I.B. through I.D., below.

6 First, contrary to plaintiffs' assertions, the gift restrictions in the Code of Ethics do not  
7 limit protected political speech. Unlike campaign contributions, personal gifts to public officials  
8 do not contain within them an inherent political message and are not protected expression.<sup>2</sup>

9 Second, a court should be cautious when asked to entertain a facial challenge to a  
10 regulation of conduct, where the regulated conduct is allegedly expressive. Even if the conduct  
11 may be expressive in some circumstances, a facial challenge is appropriate only if the regulated  
12 conduct is intrinsically expressive. Assuming the conduct of giving a gift may include protected  
13 expression in some circumstances, it is not intrinsically expressive, so as to warrant a facial  
14 challenge.

15 Third, even assuming some of the restricted gifts do contain an inherent message, the gift  
16 restrictions are certainly not aimed at the content of that message and are therefore not "category  
17 one" laws under *Robertson*. Rather, the gift restrictions are content-neutral limits aimed at the  
18 pernicious *effects* of giving unlimited gifts to public officials—specifically, the appearance of  
19 impropriety and diminished public trust in government officials. Under the Supreme Court's  
20 recent opinion in *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Or. 275, 132  
21 P.3d 5 (2006), which clarified the scope and application of the *Robertson* test, the restrictions are  
22 constitutionally permissible time, place and manner restrictions.

23  
24 <sup>2</sup> Defendants acknowledge that this court, in its opinion denying plaintiffs' motion for  
25 preliminary injunction, determined that the gifts in this case *are* protected expressions. As  
26 discussed more fully below, if the court accepts plaintiffs' invitation to reconsider the  
incompatibility exception, the State would ask the court also to reconsider its determination that  
the regulated conduct is expressive.

1 Each of those points is explained more fully below.

2 **A. The court correctly held that the alleged expression is within the**  
3 **incompatibility exception.**

4 **1. Under *Lasswell* and *Fadeley*, the gift restrictions are within the**  
5 **incompatibility exception.**

6 The Oregon Supreme Court has repeatedly recognized that, notwithstanding the  
7 expansive protections afforded by Article I, section 8, expression involving a public official may  
8 be regulated if the expression at issue is incompatible with the public official's official duties.  
9 *See In re Schenck*, 318 Or. 402, 870 P.2d 185 (1994); *In re Fadeley*; *In re Lasswell*, 296 Or. 121,  
10 673 P.2d 855 (1983).

11 The court first discussed the incompatibility exception in *Lasswell*. *Lasswell*, a District  
12 Attorney, made statements to the press about a pending prosecution. When the bar charged him  
13 with thereby violating disciplinary rules, he challenged the rules under Article I, section 8. The  
14 Oregon Supreme Court upheld the rules. The court concluded that it is always incompatible with  
15 the prosecutor's official responsibilities to make statements that the prosecutor intends to be, or  
16 that he or she does recognize or should recognize as being, prejudicial to the conduct of a fair  
17 trial. *Lasswell*, 296 Or. at 125. The problem, the court explained, was not that the statements  
18 actually harmed the defense, but rather the incompatibility of those statements with the  
19 prosecutor's responsibility to ensure a fair trial at the time the statement is made. *Id.* at 126.

20 The next case, *Fadeley* involved a free speech challenge to ethics rules; it is therefore  
21 particularly instructive here. *Fadeley* was a judicial candidate who was charged with violating  
22 the Code of Judicial Ethics by personally soliciting campaign contributions. *Fadeley* argued that  
23 the code's restrictions on soliciting contributions violated his Article I, section 8 rights. The  
24 Supreme Court disagreed, relying on its opinion in *Lasswell* and explaining:

25 The stake of the public in a judiciary that is both honest in fact and  
26 honest in appearance is profound. A democratic society that, like  
ours, leaves many of its final decisions, both constitutional and  
otherwise, to its judiciary is totally dependent on the scrupulous  
integrity of that judiciary. A judge's direct request for campaign

1 contributions offers a *quid pro quo* or, at least, can be perceived by  
2 the public to do so. Insulating the judge from such direct  
3 solicitation eliminates the appearance (at least) of impropriety and,  
4 to that extent, preserves the judiciary's reputation for integrity. On  
5 the other side of the ledger, the candidate is not seriously impaired  
6 either in the ability to solicit and receive funds—a committee is  
7 permitted to do that—or in the ability otherwise to communicate  
8 the candidate's position on any issues the candidate is entitled to  
9 address—something the candidate himself or herself may do, as  
10 long as the message does not include a request for funds.

11 310 Or. at 563.

12 The parallels between *Fadeley* and this case are apparent. The restrictions in the Code of  
13 Judicial Ethics at issue in *Fadeley* were designed to protect the public's confidence in the  
14 integrity of the judiciary by eliminating even the appearance of impropriety. The purpose of the  
15 restrictions at issue in this case is virtually identical: to protect the public's trust in public  
16 officials by eliminating the appearance of impropriety.

17 What *Fadeley* teaches is that the appearance of corruption can harm public confidence as  
18 much as the reality can. It is always incompatible with a judge's official position to fail to  
19 maintain the appearance of impartiality. Because the direct solicitation of funds "can be  
20 perceived by the public" as an offer of a *quid pro quo*, the prohibition on direct solicitations  
21 "eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's  
22 reputation for integrity." *Id.*

23 This court has already recognized—and correctly so—that the reasoning from *Fadeley*  
24 applies with equal force in this case. The purpose of the gift restrictions is to ensure public  
25 confidence in the integrity of government officials—to prevent the appearance that public access  
26 to such officials has a price, that officials may be profiting from their positions, or that political  
27 favors may be purchased.<sup>3</sup> As this court explained in its opinion denying plaintiffs' motion for

---

28 <sup>3</sup> Moreover, as in *Fadeley*, the restrictions in this case do not seriously impair a public official's  
29 or an interested constituent's ability to speak. Indeed, the gift restrictions in no way restrain the  
30 communication that might surround the offer and receipt of a gift. The regulation of gifts does  
31 not preclude or restrain any conversation or any meeting.

1 preliminary injunction, “[t]he public has an expectation that decisions made by public officials  
2 and candidates be made honestly, objectively, and without favor.” Opinion at 5.

3 **2. Plaintiffs’ argument that the incompatibility exception does not apply**  
4 **is without merit.**

5 In their motion for summary judgment, plaintiffs argue that the court erred in reaching  
6 the conclusion that the challenged restrictions fall within the incompatibility exception.  
7 Notwithstanding *Lasswell* and *Fadeley*, plaintiffs contend that the court’s conclusion is  
8 inconsistent with the Oregon Supreme Court’s subsequent decision in *Vannatta v. Keisling*, 324  
9 Or. 514, 931 P.2d 770 (1997) (*Vannatta I*), which rejected the argument that the incompatibility  
10 exception applied to restrictions on political contributions.

11 Plaintiffs’ argument is without merit, for two reasons. First, their reliance on *Vannatta I*  
12 is misplaced; as this court has already recognized, the restrictions on campaign contributions that  
13 were at issue in that case are readily distinguishable from the gift restrictions at issue here.  
14 Second, plaintiffs themselves tacitly acknowledge that at some point, gifts to public officials are  
15 incompatible with the official’s duties.<sup>4</sup> But if there is a line to be drawn between gifts that are  
16 compatible and those that are incompatible with public office, it is for the legislature to  
17 reasonably draw that line.

18 **a. Unlike the contribution restrictions rejected in *Vannatta I*, the**  
19 **gift restrictions are narrowly tailored.**

20 At issue in *Vannatta I* was whether campaign contributions are protected political  
21 expression. The State argued that under *Fadeley*, even if contributions were protected  
22 expression, the incompatibility exception applied. The Oregon Supreme Court rejected that  
23

24  
25 <sup>4</sup> In asking the court to direct its attention away from “extreme” examples such as new cars,  
26 homes or large sums of money, plaintiff concedes such gifts are “appalling,” and enjoy “little or  
no constitutional protection.” Plaintiffs’ Memo, pp. 4-5.

1 argument. Unlike the solicitation of campaign funds at issue in *Fadeley*, the court concluded, the  
2 restricted campaign contributions were not necessarily incompatible with public office.

3 Plaintiffs argue that the Supreme Court’s conclusion in *Vannatta I* (that campaign  
4 contribution restrictions are not subject to the incompatibility exception) is controlling here. But  
5 this court has already considered—and correctly rejected—that argument.

6 Unlike the contribution restrictions at issue in *Vannatta I*, the Code of Ethics gift  
7 restrictions apply only when the donor has a legislative or administrative interest before the  
8 official receiving the personal gift. As the court recognized in its opinion rejecting plaintiffs’  
9 motion for preliminary injunction, that is a critical difference. Unlike the restrictions at issue in  
10 *Vannatta I*, the gift restrictions at issue here apply “only where the risk of the appearance of  
11 impropriety is at its greatest.” Opinion at 5. The legislature has adopted a narrowly tailored set  
12 of restrictions that apply only where the appearance of impropriety is unacceptable. The Code of  
13 Ethics reflects the high ethical standard to which public officials in Oregon are held.

14 In that way, the gift restrictions are just like the solicitation rules that were upheld in  
15 *Fadeley*. *Fadeley* was a facial challenge to restrictions on solicitations by judges. The Supreme  
16 Court upheld those restrictions because it recognized that it is *always* incompatible with a  
17 judge’s official position to fail to maintain both the reality and the appearance of impartiality.  
18 The same reasoning applies here. The personal gifts prohibited by the Code of Ethics are  
19 necessarily incompatible with the ethical standards that, in the legislature’s estimation, are  
20 inherent in the public official’s duty.

21 **b. Determining where to draw the line between compatible and**  
22 **incompatible gifts is within the legislature’s prerogative.**

23 Plaintiffs do not dispute that, at some point, gratuities bestowed upon a public official  
24 that enrich the official personally become incompatible with the official’s duties. Indeed,  
25 plaintiffs tacitly admit as much by asking the court not to consider examples of extravagant gifts  
26 that are prohibited by the Code of Ethics, but to focus instead on more modest examples which,

1 they insist, might be compatible with public service.<sup>5</sup> But once it is acknowledged—as common  
2 sense dictates it must be—that *some* degree of gift giving or receiving is inconsistent with a  
3 public official’s duties, the question is only where to draw the line.

4 It is not for plaintiffs to decide where to draw that line. Nor is it for the courts to decide  
5 where to draw that line. The Oregon Supreme Court and the United States Supreme Court have  
6 long recognized that where lines must be drawn to effect a legislative policy choice, that decision  
7 is committed to the legislature. As the United States Supreme Court has explained:

8 “Where \* \* \* there are plausible reasons for Congress’ action, our  
9 inquiry is at an end. It is, of course, constitutionally irrelevant  
10 whether this reasoning in fact underlay the legislative  
11 decision \* \* \* because this court has never insisted that a  
12 legislative body articulate its reasons for enacting a statute. This is  
13 particularly true where the legislature must necessarily engage in a  
14 process of line drawing. The task of classifying persons for \* \* \*  
benefits inevitably requires that some persons who have an almost  
equally strong claim to favored treatment be placed on different  
sides of the line, and *the fact the line might have been drawn  
differently at some points is a matter for legislative, rather than  
judicial consideration.*”

15 *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (emphasis added) (internal quotation  
16 marks and citations omitted). *See also Gale v. Department of Revenue*, 293 Or. 221, 229, 646  
17 P.2d 27 (1982) (quoting from and relying on *Fritz*).

18 It is apparent that at some point, gifts are incompatible with public officials’ duties. The  
19 gift restrictions in the Code of Ethics reflect the legislature’s judgment about the point at which a  
20 gift might threaten the public’s faith in the integrity of its government officials. Plaintiffs do not  
21 contend, and could not contend, that the lines drawn by the legislature in that regard have no  
22 rational basis. Plaintiffs’ argument that *these* gift limitations are not truly incompatible with a  
23 public official’s duties is little more than an assertion that they believe the lines should have been  
24

25 <sup>5</sup> In making that request, plaintiffs do little more than urge the court to deliberately avert its eyes  
26 from the absurd implications of their position and from the extravagant gifts that they ask the  
court to imbue with constitutional protection.

1 drawn elsewhere, and a request that the court second-guess the legislature’s judgment. Because  
2 the legislative judgment in that respect is reasonable and appropriate, it should be sustained as a  
3 matter of law.

4 **B. If the court were to reconsider the incompatibility exception, it also should**  
5 **reconsider whether gifts to public officials are protected expression at all.**

6 In its opinion denying plaintiffs’ motion for a preliminary injunction, the court concluded  
7 that the gifts at issue in this case are protected expression. The court recognized that, under  
8 *Vannatta I*, many gifts to public officials fall outside the scope of Article I, section 8: some gifts  
9 are not expression at all, and some gifts are expressive only of an unprotected attempt to bribe.  
10 But the court went on to conclude that there is a third category of gifts that are intended to  
11 convey a protected political message, and that the Code of Ethics gift restrictions are aimed at  
12 gifts in this third category:

13 “SB 10 appears to regulate gifts that would have an expressive  
14 content—SB 10 only regulates *gifts from a person with a*  
15 *legislative or administrative intent*. SB 10 does not regulate gifts  
16 from those persons who do not have a legislative or administrative  
17 **intent**. Thus from a reading of [*Vannatta I*], there are several  
18 categories of gifts: a group of gifts that have no expressive content,  
19 and, therefore, are not an expression for purposes of Article I,  
20 section 8; a group of gifts that are given an anticipated quid pro  
21 quo, and therefore, a bribe, which is not protected expression; and  
22 also a group of gifts that do have expressive content, and therefore,  
23 are protected expressions. Seemingly, SB 10 regulates gifts that do  
24 have an expressive content in that SB 10 only regulates gifts from  
25 a person with a certain political or administrative **agenda**.  
26 Accordingly, the court finds that the gifts at issue in this particular  
case are indeed expressions for purposes of Article I, section 8.”

21 Opinion at 5 (italics in original, boldface added).

22 That analysis begins with the premise that SB 10 regulates only those “gifts from a  
23 person with a legislative or administrative *intent*.” *Id.* (emphasis added). Although the gift  
24 restrictions apply when the donor has a legislative or administrative *interest*, their applicability  
25 does not depend on whether the donor has a legislative or administrative *intent*.

1 The difference is not insignificant. The primary purpose of the restrictions is to protect  
2 the integrity of public officials by preventing the appearance of impropriety. To accomplish that  
3 goal, the legislature has prohibited all gifts that, in the legislature’s judgment, might appear to the  
4 public to be intended to buy favor, *regardless of the intentions of the giver or the receiver*.  
5 Because gifts are most likely to create such an appearance when they are given by a person with  
6 a legislative or administrative “interest,”<sup>6</sup> the legislature chose to restrict those gifts in particular.  
7 Thus, the ethics restrictions apply depending on the giver’s *interest*, and irrespective of the  
8 giver’s *intent*—that is, irrespective of any message the giver might or might not be attempting to  
9 convey.

10 The expressive content of a gift—or, more properly, the lack thereof—is perhaps most  
11 easily observed by analyzing a gift’s legal contours. The giving of a gift is conduct. It is the  
12 conveyance—an action—of a valuable thing. The legal elements of a gift consist of: (1)  
13 delivery; (2) a donative intent; and (3) acceptance. *See, e.g., Bessett v. Huson*, 179 Or. App. 69,  
14 74-75, 39 P.3d 220 (2002).

15 The donative intent may of course be evidenced by contemporaneous words. Thus, a  
16 person taking responsibility for a restaurant bill may simultaneously say, “This is on me,” or  
17 something to that effect. Similarly, a person giving money or an object may, at the time of  
18 delivery, explain the intent. The gift itself, however, has no clear expressive meaning other than  
19 the legally necessary donative intent. A gift may be given in the midst of a political or other  
20 constitutionally protected discussion. In that event, the discussion is protected, but that discourse  
21 does not somehow imbue the act of gift-giving with constitutional protection. Instead, the gift  
22 remains legally distinct from the surrounding conversation. It is mere conduct without the sort of  
23 distinct message required to make conduct sufficiently communicative to warrant constitutional  
24 protection. *See, e.g., Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (conduct may be

25 \_\_\_\_\_  
26 <sup>6</sup> As discussed above, a “legislative or administrative interest” is a defined term. *See* ORS  
244.020(8).

1 protected expression if it: (1) is intended to convey a particularized message, and (2) it likely  
2 would be understood by those who viewed it).

3 There is no particularized message inherent or even common in the making of a gift. A  
4 gift may be born from generosity, admiration, pity, ulterior design, or any number of other  
5 motives. Further, how it is received is subject to the donee's interpretation. There is no clear,  
6 particularized message delivered or understood by a gift generally. Thus, the regulated  
7 conduct—offering or accepting gifts—is not constitutionally expressive.

8 Moreover, even if the gifts at issue were expressive conduct, they do not involve a  
9 *protected* message. Although the Code of Ethics would apply to those who are attempting to  
10 further a legislative or administrative agenda, it does not follow that a *protected* message must be  
11 involved. Instead, to the extent that the Code of Ethics does regulate gifts intended to convey a  
12 message regarding one's legislative or administrative agenda, those gifts may be expressive but  
13 they are *not* protected under Article I, section 8. If the intended meaning of a gift is about  
14 furthering one's political agenda, then the gift's message is bribery, or something closely akin to  
15 bribery, and the gift is subject to the historical exception for such transactions. If that is not the  
16 point of the gift—if it is really “just a gift”—then Article I, section 8 does not apply.

17 In reaching the opposite conclusion, the court presumes a category of gifts that are  
18 intended to express a protected political message. But for a gift to convey a political message, it  
19 would have to be either: (1) a political contribution, *see Vannatta I* (campaign contributions are  
20 protected political expression); or (2) lobbying, *see Fidanque v. Oregon Gov't Standards and*  
21 *Practices*, 328 Or. 1, 969 P.2d 376 (1998) (lobbying is protected political expression). The gifts  
22 at issue in this case, however, are neither of these.

23 As this court has already recognized, gifts are not political contributions. The term “gift”  
24 has always excluded campaign contributions. *See* former ORS 244.020(7)(a). SB 10 also  
25 excludes campaign contributions from the definition of “gift.” *See* SB 10, Or. Laws 2007  
26 ch. 877, section 16a. Campaign contributions may *only* be used to further their expressive

1 content and may not be used for personal gain. *See* ORS 260.407(2). Because campaign  
2 contributions may not be used for personal gain, they may be viewed as embodiments of political  
3 expression stripped of the risk of corruption inherent in unrestricted personal gifts to officials  
4 before whose office one has an administrative or legislative interest.

5 Nor is a gift a form of lobbying. The gift restrictions may apply to lobbyists, who  
6 frequently will be lobbying officials before whom they have a legislative or administrative  
7 interest. But it is critical not to confuse the expressive content of lobbying with the expressive  
8 content of gifts that a lobbyist might offer. If a lobbyist takes out a public official to a lobster  
9 dinner and, over the *crème brulee*, attempts to persuade the official to take a particular action, or  
10 even simply gain the official's trust or good will, the protected expression consists of the  
11 evening's conversation, and the exchange of ideas. But no protected expression is involved in  
12 picking up the check.

13 Arguably, allowing the lobbyist to pick up a dinner check, for example, may in some  
14 instances *facilitate* lobbying, but the gift is not *itself* lobbying, because the gift itself is not—or,  
15 at least, should not be—an attempt to “say” anything.<sup>7</sup> When the gift itself *is* intended to deliver  
16 a message or further a specific political agenda, the giver has crossed the line from protected  
17 expression to something quite different—at that point, the giver is no longer engaging in  
18 protected expression at all. The Oregon Constitution is not blind to the distinction between  
19 advocating an idea—which it steadfastly protects—and plying someone with money or other  
20 valuable favors—which it does not.

21

22

23

---

24 <sup>7</sup> To the extent that gift giving facilitates lobbying, plaintiffs may argue that regulations on gift  
25 giving therefore act to deter or burden protected speech. Even assuming that were true, the gift  
26 restrictions would not be analyzed under *Robertson* category one because they are not  
restrictions on expression *per se* and they are content neutral. Rather, as the next section  
explains, to the extent that the restrictions potentially burden speech, they are properly analyzed  
as time, place, and manner restrictions.

1           **C. In any event, expression is not a sufficiently intrinsic component of gift-**  
2           **giving to warrant entertaining a facial challenge.**

3           Even assuming that in some instances the distinct act of gift-giving may be of such an  
4           expressive nature as to enjoy free speech protection, gift-giving is not intrinsically of such an  
5           expressive nature. Accordingly, a plaintiff claiming free speech protection for that conduct  
6           should be required to challenge an allegedly invalid restriction only on an as-applied basis.

7           As a general rule, courts disfavor facial challenges to statutes. *FW/PBS, Inc. v. Dallas*,  
8           493 U.S. 215, 223 (1990) (“[f]acial challenges to legislation are generally disfavored”); *see also*  
9           *National Endowment for Arts v. Finley*, 524 U.S. 569, 580 (1998). Generally, a plaintiff  
10          asserting a facial claim is required to demonstrate that the challenged statute is incapable of valid  
11          application. A limited exception to that general rule has been carved out for overbreadth  
12          challenges in certain circumstances where free speech interests are implicated. *Broadrick v.*  
13          *Oklahoma*, 413 U.S. 601, 611-12 (1973). But that exception “is, manifestly, strong medicine  
14          that has been employed by the Court sparingly and only as a last resort.” 413 U.S. at 613.

15          The Supreme Court’s decision in *Lakewood v. Plain Dealer Publishing Co.*, articulated  
16          the standard for “distinguish[ing] laws that are vulnerable to facial [First Amendment] challenge  
17          from those that are not.” 486 U.S. 750, 759 (1988). In *Lakewood*, the court held that for a  
18          licensing law to be subject to facial invalidation, it must “give[] a government official or agency  
19          substantial power to discriminate based on the content or viewpoint of speech” and it “must have  
20          a close enough nexus to expression, or to conduct commonly associated with expression, to pose  
21          a real and substantial threat” of censorship. *Id.* As the Supreme Court explained, if the law is  
22          not directed “narrowly and specifically” at expressive activities, it “provide[s] too blunt a  
23          censorship instrument to warrant judicial intervention prior to an allegation of actual misuse.” *Id.*  
24          at 761.

25          Applying that principle, the Ninth Circuit has declined to entertain a facial challenge to  
26          an ordinance that prohibited lying or sitting on the sidewalk in certain areas at certain times.

1 *Roulette v. City of Seattle*, 97 F.3d 300 (9<sup>th</sup> Cir. 1996). There, the court rejected the plaintiffs’  
2 argument that because “sitting can possibly be expressive” the law should be subject to a facial  
3 challenge. *Id.* at 303. The court explained that “the Supreme Court has entertained facial  
4 freedom-of-expression challenges only against statutes that, ‘by their terms,’ sought to regulate  
5 ‘spoken words,’ or patently ‘expressive or communicative conduct’ such as picketing or  
6 handbilling.” *Id.* (quoting *Broadrick*, 413 U.S. at 6 12-13); see also *Amster v. City of Tempe*,  
7 248 F.3d 1198, 1199-1200 (9<sup>th</sup> Cir. 2001) (refusing to allow a facial challenge because the statute  
8 only regulated “sitting and lying in certain places at certain times” and not “speech or patently  
9 expressive conduct”).

10 A similar doctrine is recognized under Article I, section 8. The Oregon Supreme Court  
11 recently stressed that its cases “foreclose the possibility of a facial challenge under Article I,  
12 section 8, to a ‘speech-neutral’ statute.” *State v. Illig-Renn*, 341 Or. 228, 234, 142 P.3d 62  
13 (2006). Instead, a statute is “subject to a facial challenge only if it expressly or obviously  
14 proscribes expression.” *Id.* Otherwise, infringement of free expression rights must be addressed  
15 on an as-applied basis. *Id.*

16 Even assuming that “gift-giving” includes some protected expression in some discrete  
17 instances, a regulation of gift-giving is not “narrowly and specifically” directed towards  
18 expressive activity, nor is it directed at an activity that is intrinsically or obviously expressive.  
19 Indeed, the Oregon Supreme Court said as much in *Vannatta I*, when it expressly recognized that  
20 many gifts are not expressive at all. See *Vannatta I*, 324 Or. at 522 n. 10.

21 Accordingly, a facial challenge to a limitation on gift-giving should not be entertained. If  
22 the challenged regulation of that conduct unconstitutionally limits expression in a particular  
23 circumstance, plaintiffs must bring an as-applied challenge as to that circumstance.

24  
25  
26

1           **D. In all events, the challenged regulations do not violate free expression rights.**

2           **1. The Code of Ethics gift restrictions are *not* “category one” laws under**  
3           ***Robertson* because they are content-neutral restrictions aimed at the**  
4           **possible *effects* of gift giving.**

5           In their motion for summary judgment, plaintiffs assert that the challenged gift  
6           restrictions are “category one” laws under *Robertson*, because—plaintiffs claim—they are  
7           “aimed at the content of speech, not specifically at the existence of some pernicious effect  
8           thereof.” Plaintiffs are mistaken.

9           Even assuming the gift restrictions do affect protected speech, the gift restrictions are  
10          manifestly *not* aimed at the content of that speech and are therefore *not* “category one” laws  
11          under *Robertson*. Rather, the gift restrictions are reasonable, content-neutral limits, aimed  
12          squarely at the possible *effects* of gift-giving—specifically, the appearance of impropriety and  
13          diminished trust in public officials—and they apply regardless of the message, if any, that the  
14          gift is intended to convey. They do not foreclose all gifts, and they leave ample channels open  
15          for lobbying or other protected expression. Therefore, even if the incompatibility exception did  
16          not apply, and even if the challenged conduct were so clearly expressive as to warrant  
17          entertaining a facial challenge, the restrictions still are constitutionally permissible as time, place  
18          and manner restrictions.

19                           **a. The *Outdoor Media* framework.**

20          At issue in *Outdoor Media* was the validity of the Oregon Motorist Information Act of  
21          1971 (OMIA), which regulated signs visible from public highways. *Outdoor Media*, 340 Or. at  
22          280-81. The OMIA prohibited certain kinds of signs, set size and other limitations on signs that  
23          were not prohibited, and established a fee and permit requirement for certain signs. The court  
24          confronted two issues.

25          The plaintiff argued first that the OMIA’s fee and permit requirements placed an  
26          impermissible burden on petitioner’s free speech rights under Article I, section 8. *Id.* at 291.  
27          The Supreme Court rejected that argument. The court began by outlining the *Robertson*

1 framework, and then noting that *Robertson* was of little assistance with respect to such content-  
2 neutral regulations:

3 *Robertson* distinguished “between laws that focus on the content of  
4 speech or writing and laws that focus on proscribing the pursuit or  
5 accomplishment of forbidden results,” holding that the former  
6 violate Article I, section 8, unless the prohibition comes within a  
7 well-established historical exception. *Robertson* further divided  
8 the latter type of laws, those that focus on forbidden results, into  
9 two categories: those laws that prohibit expression used to achieve  
10 those prohibited effects and those laws that focus on the forbidden  
11 effects without referring to expression at all. Because content-  
neutral time, place, and manner restrictions focus on the  
accomplishment of “forbidden results,” but do so by restricting  
expression, such restrictions appear to come within the second of  
the three *Robertson* categories. Yet *Robertson* itself did not  
elaborate on the appropriate analysis of content-neutral  
government regulation of the time, place, and manner of speech,  
and, surprisingly, this court rarely has had occasion to consider the  
validity of such regulations.

12 *Id.* at 288-89. The court then proceeded to examine its earlier Article I, section 8 cases, noting  
13 that it had consistently reached the conclusion that, within the *Robertson* framework, there is  
14 “room for regulations imposed for reasons other than the substance of a particular message.” *Id.*  
15 at 289. More specifically, the court concluded that Article I, section 8 allows “reasonable”  
16 content-neutral regulation of the time, place, and manner of speech. *Id.*

17 Applying that rule, the court sustained most of the challenged OMIA regulations. The  
18 court noted that any fee or permit system could potentially “deter” or burden speech to some  
19 extent, and the court acknowledged that the OMIA was no exception. But the court held that the  
20 challenged sign regulations were nonetheless reasonable, because they did not suppress speech in  
21 such a way as to “restrain” the free expression of opinion, and because the regulations still left  
22 petitioner with “ample avenues to communicate its messages, both on highway signs and by  
23 other means.” *Id.* at 292.

24 The second issue in *Outdoor Media* was whether it was constitutionally permissible to  
25 impose different requirements depending on whether a sign advertised goods and services on the  
26 premises as opposed to off the premises. *Id.* at 292-93. The court held that the OMIA’s different

1 treatment of on-premises and off-premises signs was a restriction on the content of speech for  
2 purposes of Article I, section 8, and therefore properly was analyzed under *Robertson* category  
3 one. The differential treatment of signs was a content-based regulation of expression because the  
4 only way to know if the regulation applied was to read the sign to determine what it expressed.  
5 The Supreme Court concluded that the OMIA’s different treatment of on-premises and off-  
6 premises signs was an unconstitutional restriction on the content of speech, because it would  
7 permit a sign owner to display one message, but not to display a different message, based solely  
8 on the message’s content. *Id.* at 295.

9 **b. Under *Outdoor Media*, the Code of Ethics gift restrictions are**  
10 **constitutionally permissible.**

11 The Code of Ethics gift restrictions are reasonable, content-neutral limitations on the  
12 time, place, and manner of gift-giving to public officials. Accordingly, under *Outdoor Media*,  
13 they are constitutionally permissible.

14 **i. The Code of Ethics gift restrictions are content-neutral.**

15 To the extent that they restrict expression at all,<sup>8</sup> the Code of Ethics gift restrictions are  
16 like the content-neutral fee and permit requirements upheld in *Outdoor Media*. They do not  
17 focus on “the content of speech or writing.” Rather, they are focused on the possible effect that  
18 gift-giving might have—that is, they focus “on proscribing the pursuit or accomplishment of  
19 forbidden results.” The purpose of the restrictions is to protect the integrity of public officials  
20 by preventing the appearance of a *quid pro quo* or that public officials are using their offices for  
21 private gain. To accomplish that goal, the legislature has prohibited all gifts that, in the  
22 legislature’s judgment, might appear to the public to be intended to buy favor, *regardless of the*

23 \_\_\_\_\_  
24 <sup>8</sup> As explained in the preceding section, the gifts at issue have no protected expressive content.  
25 Thus, defendants contend that they are properly in the third *Robertson* category—laws that focus  
26 on the forbidden effects without referring to expression at all. The purpose of this section is to  
argue that, to the extent that the court concludes that some of the gifts do have expressive  
content, the restrictions still are not aimed at the expressive content, and are therefore properly  
analyzed as time, place and manner restrictions under *Outdoor Media*.