

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FRED VANNATTA and CENTER
TO PROTECT FREE SPEECH, INC.
an Oregon Not-For-Profit Corporation,

Plaintiffs-Appellants.

OREGON GOVERNMENT ETHICS
COMMISSION, formerly known as
the Oregon Government Standards and
Practices Commission; and STATE
OF OREGON,

Defendants-Respondents.

Marion County Circuit
Court No. 07C20464

CA A140080

APPELLANTS' OPENING BRIEF

Appeal from the Judgment entered September 22, 2008
Marion County Circuit Court
The Honorable Joseph C. Guimond

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
INDEX OF APPENDIX.....	iii
TABLE OF AUTHORITIES.....	iv
I. STATEMENT OF THE CASE	1
A. Nature of the Action and Relief Sought.....	1
B. Nature of the Judgment Sought to Be Reviewed.....	1
C. Statutory Basis for Appellate Jurisdiction.....	2
D. Timeliness of Appeal.....	2
E. Questions Presented on Appeal.....	2
F. Summary of Argument.....	2
G. Summary of Material Facts.....	4
II. ASSIGNMENT OF ERROR.....	5
The trial court erred by granting defendants’ motion for summary judgment and denying plaintiffs’ motion for summary judgment, and thereafter entering a General Judgment that declared that ORS 244.025 and 244.042 are valid and enforceable and dismissed plaintiffs’ complaint with prejudice.....	5
A. Preservation of Error.....	5
B. Standard of Review.....	6
III. ARGUMENT	7
A. The Lobbying Restrictions Are Impermissible Infringements on Free Speech.....	10
1. As the trial court correctly concluded, the conduct regulated by the lobbying restrictions constitutes protected expression.....	12
2. The lobbying restrictions are category one laws under <i>Robertson</i> because they are directed at the subject of political speech, not at a claimed forbidden effect.....	18
3. The historical exception does not apply.....	20
4. The incompatibility exception does not apply.....	23

- B. The gift and entertainment restrictions impermissibly discriminate among speakers and, therefore, are unconstitutional under Article I, section 8, and the First Amendment.29
 - 1. The discriminatory classifications violate Article I, section 8.....29
 - 2. The discriminatory classifications violate the First Amendment.36
 - 3. The remedy for the unconstitutional classifications.41
- C. The gift, entertainment and honoraria restrictions violate Article I, section 26.45
- IV. CONCLUSION48

INDEX OF APPENDIX

Document	App No.
Oregon Government Ethics Commission Lobbyist Quarterly Expenditure Report	App-1

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ackerly Communications v. Multnomah County</i> , 72 Or App 617, 696 P2d 1140 (1985)	29, 30
<i>City of Eugene v. Miller</i> , 318 Or 480, 871 P2d 454 (1994)	19
<i>City of Hillsboro v. Purcell</i> , 306 Or 547, 761 P2d 510 (1988)	36
<i>City of Nyssa v. Dufloth</i> , 339 Or 330, 121 P2d 639 (2005)	22
<i>City of Portland v. Tidyman</i> , 306 Or 174, 759 P2d 242 (1988)	19, 22, 29
<i>Fidanque v. State ex rel. Oregon Gov't Standards and Practices Comm'n</i> , 328 Or 1, 969 P2d 376 (1998)	13, 17, 35
<i>First National Bank of Boston v. Bellotti</i> , 435 US 765, 98 S Ct 1407 (1978).....	37, 40
<i>In re Fadeley</i> , 310 Or 548, 802 P2d 31 (1990)	23, 24, 26, 27, 28
<i>In re Lasswell</i> , 296 Or 121, 673 P2d 855 (1983)	23, 24, 26, 28
<i>In re Schenck</i> , 318 Or 402, 870 P2d 185 (1994)	11, 23
<i>Johnson v. SAIF</i> , 202 Or App 264, 122 P3d 66 (2005)	7
<i>Lahmann v. Grand Aerie of Fraternal Order of Eagles</i> , 202 Or App 123, 121 P3d 671 (2005)	46, 47
<i>Morial v. Judiciary Com'n of State of Louisiana</i> , 565 F2d 295 (5th Cir 1977)	28
<i>Moser v. Frohnmayer</i> , 315 Or 372, 845 P2d 1284 (1993)	21, 32
<i>Nat. Ass'n of Social Workers v. Harwood</i> , 874 F Supp 530, (D.C. R.I. 1995).....	40
<i>Oregonians For Sound Econ. Policy, Inc. v. SAIF</i> , 218 Or App 31, 178 P3d 286 (2008)	6
<i>Outdoor Media v. Dept. of Transportation</i> , 340 Or 275, 132 P3d 5 (2006)	30, 31, 32, 33, 34, 35, 43, 44

<i>Police Dept. of Chicago v. Mosley</i> , 408 US 92, 92 S Ct 2286 (1972).....	38
<i>Service Employees International v. Fair Political Practices Commission</i> , 955 F2d 1312 (9th Cir 1992).....	37, 38
<i>State v. Ciancanelli</i> , 339 Or 282, 121 P3d 613 (2005).....	22
<i>State v. Harrington</i> , 67 Or App 608, 680 P2d 666 (1984).....	30
<i>State v. Henry</i> , 302 Or 510, 732 P2d 9 (1987).....	21
<i>State v. Plowman</i> , 314 Or 157, 838 P2d 558 (1992).....	11, 12
<i>State v. Rich</i> , 218 Or App 642, 180 P3d 744 (2008).....	18, 19
<i>State v. Robertson</i> , 293 Or 402, 649 P2d 569 (1982).....	10, 11, 13, 18, 20, 21, 22, 29, 32, 33
<i>U.S. v. Sawyer</i> , 85 F3d 713 (1st Cir 1996).....	14
<i>United States v. Playboy Entertainment Group</i> , 529 US 803, 120 S Ct 1878 (2000).....	37
<i>Vannatta v. Keisling</i> , 324 Or 514, 931 P2d 770 (1997).....	14, 15, 16, 18, 19, 20, 21, 24, 25, 36
Statutes	
42 USC § 1983	1
ORS 19.205	2
ORS 19.255	2
ORS 28.020	1
ORS 162.015	19
ORS 162.025	19
ORS 171.725(7).....	12
ORS 171.725(8).....	17
ORS 244.020(5).....	1
ORS 244.020(5)(b)(F)	9, 41
ORS 244.020(8).....	9, 20, 41
ORS 244.025	3, 4, 5, 13, 17, 20, 24, 28, 29, 31, 32, 33, 34, 35, 36, 40, 45, 46, 47

ORS 244.025(1).....	1, 3, 4, 7, 13, 41, 48
ORS 244.025(2).....	1, 3, 4, 7, 13, 41, 48
ORS 244.025(3).....	1, 3, 4, 7, 13, 41, 48
ORS 244.025(4).....	1, 3, 4, 7, 13, 41, 48
ORS 244.040	1, 48
ORS 244.040(1)(b)	16
ORS 244.040(1)(c)	16
ORS 244.040(2).....	16
ORS 244.040(5).....	16
ORS 244.042	1, 2, 3, 4, 5, 24, 28, 45, 47
ORS 244.042(1).....	4, 7, 48
ORS 244.042(2).....	4, 7, 48
ORS 244.045	16

Constitutional Provisions

Or Const, Art I, § 20	29
Or Const, Art I, § 26	2, 4, 6, 10, 45, 46, 47
Or Const, Art I, § 8.....	2, 3, 5, 6, 8, 10, 11, 12, 13, 14, 18, 20, 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 35, 36, 39, 41, 42, 45, 46
U.S. Const., Amend. I.....	2, 3, 6, 29, 36, 40

I. STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought.

This is an action for declaratory relief under ORS 28.020 and injunctive relief. Plaintiffs Fred VanNatta and Center to Protect Free Speech seek a declaration that certain Oregon statutes imposing restrictions on gift, entertainment, and honorarium expenditures to public officials violate their free speech rights (and other constitutional rights) under the Oregon Constitution and the United States Constitution. Specifically, plaintiffs seek a declaration that ORS 244.025(1), (2), (3), and (4) and ORS 244.042 are unconstitutional.¹ Plaintiffs seek an award of attorney fees because they are seeking to vindicate important constitutional rights of Oregon citizens and under 42 USC § 1983.

B. Nature of the Judgment Sought to Be Reviewed.

The trial court granted the summary judgment motion of defendants Oregon Government Ethics Commission and the State of Oregon, denied plaintiffs' motion for summary judgment, and entered a General Judgment as follows:

“(1) The court declares that §§ 18(1), (2), (3), and (4) and 24(1) and (2) of SB 10 (2007) – now codified at ORS 244.025 and 244.042 – as well as the definition of a “gift” under 244.020(5) (as amended by SB 10) and the definition of a “legislative or administrative interest” under ORS 244.020(8), are valid and enforceable, contrary to plaintiffs’ allegations and arguments;

¹ In addition, to the extent that – in the absence of the statutory provisions challenged herein (ORS 244.025(1), (2), (3), and (4) and ORS 244.042) – ORS 244.040 would impose restrictions that are the same as or more stringent than the gift, entertainment, and honorarium restrictions contained in the challenged statutes, plaintiffs further seek a declaration that such restrictions imposed by ORS 244.040 are also unconstitutional.

- (2) plaintiffs' complaint is dismissed with prejudice, plaintiffs taking nothing thereby; and
- (3) defendants may recover their costs and disbursements incurred herein."

ER 25.

C. Statutory Basis for Appellate Jurisdiction.

This Court has jurisdiction over this appeal pursuant to ORS 19.205.

D. Timeliness of Appeal

The trial court entered the General Judgment on September 22, 2008.

Plaintiffs filed their notice of appeal on September 25, 2008, within the period prescribed by ORS 19.255.

E. Questions Presented on Appeal.

1. Do the restrictions in ORS 244.025 and 244.042 on gift, entertainment, and honorarium expenditures violate (a) the free speech protections of Article I, section 8, of the Oregon Constitution, or (b) Article I, section 26, of the Oregon Constitution?

2. Do the restrictions in ORS 244.025 on gift and entertainment expenditures impermissibly discriminate between different types of speech and different classifications of speakers and thereby violate Article I, section 8, of the Oregon Constitution or the First Amendment to the United States Constitution?

F. Summary of Argument.

Article I, section 8, of the Oregon Constitution prohibits the Legislative Assembly from adopting laws that restrain the right to speak freely. The Oregon Supreme Court has ruled that lobbying, which includes the act of obtaining the good will of a public official, is free speech that the Legislative Assembly may not restrict.

ORS 244.025 and ORS 244.042 restrain core lobbying activities by, among other things, prohibiting expenditures designed to facilitate dialogue with public officials and expenditures designed to obtain the good will of public officials. The lobbying restrictions in ORS 244.025 and 244.042 are directed at constitutionally protected expression, and not at some forbidden effects of such expression. Under the Article I, section 8, analysis, the restrictions are unconstitutional because they are not wholly confined within a historical exception and the incompatibility exception does not apply.

The gift and entertainment restrictions in ORS 244.025(1), (2), (3) and (4) are also unconstitutional under Article I, section 8, of the Oregon Constitution and under the First Amendment to the United States Constitution, as those restrictions impermissibly discriminate between different types of speech and different classifications of speakers. Specifically, the gift and entertainment restrictions prohibit certain expressive activity by persons with “economic interests” in matters before the public official, but do not restrict the same activities by persons with political interests other than economic interests (or economic interests that are also shared by the general public) in matters before the public official. In addition, the gift and entertainment restrictions also discriminate in favor of governmental entities, organizations of which a public body is a member, and certain not-for-profit corporations receiving less than five percent of funding from for-profit entities (to which the gift and entertainment restrictions do not apply for conventions, fact-finding missions or other meetings at which the public official participates).

Finally, the gift, entertainment and honorarium restrictions violate Article I,

section 26, of the Oregon Constitution, in that they impermissibly restrain plaintiffs' rights to instruct their representatives and apply to the Legislative Assembly for redress of grievances.

G. Summary of Material Facts.

The challenged restrictions were enacted by the Oregon Legislature as part of Senate Bill 10 (2007); the restrictions have since been codified into ORS 244.025 and 244.042. The restrictions imposed by Senate Bill 10 replaced less stringent restrictions. After the passage of Senate Bill 10, ORS 244.025(1), (2) and (3) now prohibit a person with a legislative or administrative interest from offering or giving gifts with an aggregate value of more than \$50 per year to a public official or candidate for public office (or the receipt of such gifts by a public official or candidate). ORS 244.025(4) now prohibits a person with a legislative or administrative interest from giving any gifts of entertainment to a public official or candidate for public office. ORS 244.042(1) and (2) prohibit a person from providing honorarium with a value of more than \$50 to a public official or candidate for public office in connection with the official duties of the public office.

This matter was decided in the trial court on the parties' cross-motions for summary judgment. Plaintiffs presented the facts summarized below. Plaintiff VanNatta is a registered lobbyist in the State of Oregon. He is registered to lobby on behalf of plaintiff Center to Protect Free Speech and other clients. VanNatta also is a managing member of a limited liability company that owns small woodlands property. The Oregon Legislative Assembly has or is expected to consider legislative proposals that will impact the economic interests of small woodland owners, including plaintiff

