

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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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

VanNatta. If not prohibited by statute, VanNatta would seek to engage in the following lobbying activities on behalf of his clients and to protect his own interests:

(1) giving gifts with an aggregate value of more than \$50 in a calendar year to a public official or candidate for public office, including meals, lodging, and travel expenses for legislators to witness the impacts of legislative proposals on small woodlands and their owners; (2) giving gifts of entertainment to a public official or candidate for public office; and (3) providing honorarium with a value of over \$50 to a public official or candidate for public office in connection with official duties.

Because of the recently enacted restrictions in ORS 244.025 and 244.042, plaintiffs and some (but not all) other lobbyists in Oregon are prevented from engaging in the activities described above.

II. ASSIGNMENT OF ERROR

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.

A. Preservation of Error.

Plaintiffs filed a motion for preliminary injunction, seeking to enjoin defendants from enforcing the gift, entertainment and honorarium expenditure restrictions. In a letter opinion dated December 20, 2007, the trial court found that the activities restricted by ORS 244.025 and 244.042 are protected forms of expression under Article I, section 8, of the Oregon Constitution. ER 4. However, the trial court held that the "incompatibility exception" applied and, accordingly, denied plaintiffs'

motion for preliminary injunction. ER 5.

On February 22, 2008, plaintiffs filed a motion for summary judgment on all claims. ER 14. Defendants filed a cross-motion for summary judgment on all claims. ER 17. In a letter opinion dated August 26, 2008, the trial court denied plaintiffs' summary judgment motion and granted defendants' motion. ER 19. In its letter opinion, the trial court adhered to its prior determinations on plaintiffs' motion for preliminary injunction and, in addition, ruled in defendants favor on all other claims, including claims by plaintiffs that the challenged restrictions are unconstitutional under Article I, section 8, and the First Amendment because they discriminate among speakers and that the challenged restrictions violate Article I, section 26, of the Oregon Constitution. ER 19-23. Based on the letter opinion, the trial court filed an order on September 19, 2008, granting defendants' motion for summary judgment and denying plaintiffs' motion for summary judgment. ER 24. On September 22, 2008, the trial court entered a General Judgment that included the provisions set forth above on pages 1-2. ER 25.

B. Standard of Review.

The issues raised in this appeal involve questions of law, which are reviewable by this Court for "errors of law" without deference to the trial court's decision.

Oregonians For Sound Econ. Policy, Inc. v. SAIF, 218 Or App 31, 42, 178 P3d 286

(2008). The trial court's decision was made on the parties' cross-motions for summary judgment. This Court has previously stated:

"On appeal, plaintiff assigns error both to the entry of summary judgment in favor of defendants and to the denial of plaintiff's cross-motion. Because the parties

have stipulated to the facts, the only issues are legal. Accordingly, we review the trial court's entry of summary judgment to determine whether the record establishes that defendants were entitled to judgment as a matter of law."

Johnson v. SAIF, 202 Or App 264, 270, 122 P3d 66 (2005), *adh'd to on recons*, 205 Or App 41 (2006), *aff'd*, 343 Or 139 (2007).

III. ARGUMENT

Plaintiffs challenge the constitutionality of the recently enacted restrictions on gifts (ORS 244.025(1), (2) and (3)), entertainment (ORS 244.025(4)) and honoraria (ORS 244.042(1) and (2)). Throughout this brief, these statutory restrictions will be referred to separately as the gift, entertainment and honorarium restrictions, or collectively as the "lobbying restrictions."

If their arguments on appeal follow their arguments in the trial court, the parties will suggest contrasting lenses through which to view the constitutional issues presented in this case. Defendants have previously framed the issue as whether plaintiffs enjoy an affirmative constitutional right to make *unlimited* gift, entertainment, and honorarium expenditures to public officials. Defendants provided imaginative and extreme examples of presumably corrupt and corrupting gifts (including gifts of "new automobiles," "a new home," "vacation homes" and "six-figure cash") as part of an apparent argument that, because such extreme examples should not enjoy constitutional protection, the Oregon Constitution should therefore allow the legislature to enact a \$50.00 statutory limit on gifts and honoraria and an outright prohibition on entertainment.

Plaintiffs, on the other hand, argue that the imaginative examples raised by defendants are likely already covered by bribery statutes and, in any event, are

entirely irrelevant to the legal issues presented in this case, since the constitutionality of a statutory restriction on expression hinges on whether it impermissibly restrains constitutional activity and not on whether it might also conceivably restrain some other activity that is not protected. That is, the free expression guarantees do not allow the legislature to proscribe broad categories of speech (*e.g.*, all statements made in the presence of a large crowd of people) simply because such laws might conceivably reach some activities that enjoy little or no constitutional protection (*e.g.*, shouts of “fire” or comments intended to incite violence). Instead, the focus in this case properly belongs on the expressive activities that are prohibited by the lobbying restrictions and whether such restrictions run afoul of the applicable constitutional protections. Examples of these lobbying activities include the following that were highlighted in the trial court arguments:

- An expenditure of \$51.00 by a coalition of farmers to pay for a legislator’s travel expenses to a drought-stricken part of the state for the purpose of ascertaining the need for certain public works projects.
- The payment of a \$100 honorarium for a legislator to prepare and give a speech to an association, where preparation of the speech is likely to require hours of research and the speech is to be delivered hours away from the legislator’s district.
- A \$15 ticket to a college theatre production given by a private college (which has other matters before the legislature) to a legislator who has been supportive of higher education to witness private college participation in the arts.

Plaintiffs submit that, for the reasons discussed herein, the lobbying restrictions cannot withstand scrutiny under Article I, section 8.

In addition, the gift and entertainment restrictions also impair protected

expression in a discriminatory manner by restraining some types of speech but not others. For example, the restrictions only apply to those with “legislative or administrative interests,” defined as “an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official.” ORS 244.020(8). Thus, an environmental group advocating the passage of a bill (but with no “economic interest” therein) can make unlimited lobbying expenditures (*e.g.*, gifts or entertainment to legislators) and thereby speak to an unlimited extent, but the industry group that would be subject to regulation may not provide any gift in excess of \$50 or any entertainment. Similarly, a person (such as plaintiff VanNatta) lobbying the legislature for a \$10 reduction in an industry specific licensing fee would be subject to the lobbying restrictions, but a person seeking a general tax rate reduction (which might substantially reduce her own income taxes) would not be subject to such restrictions on her right of expression.

Also, as noted above, the gift and entertainment restrictions have different applications depending on who the speaker is. For instance, a non-profit corporation receiving less than 5% of its funding from for-profit entities is not subject to the gift and entertainment restrictions when paying expenses for a public official’s attendance at a convention or fact-finding mission (*see* ORS 244.020(5)(b)(F)), while a for-profit corporation and a non-profit corporation receiving 6% of its funding from for-profit corporations would be subject to the restrictions on these forms of political expression.

While plaintiffs disagree with the trial court’s ultimate decision and appeal

therefrom, plaintiffs do agree with some of the intermediate portions of the trial court's analysis. Mostly notably, the trial court correctly held that the lobbying restrictions involve protected expression under Article I, section 8. Moreover, while plaintiffs challenge the trial court's determination that the "incompatibility exception" applies and therefore the lobbying restrictions are constitutional, plaintiffs agree with the trial court's (perhaps implicit) finding that the lobbying restrictions are "category one" laws under the framework set out by the Oregon Supreme Court in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982).²

Plaintiffs take issue with the remainder of the trial court's analysis. In assessing plaintiffs' claims that the restrictions unconstitutionally discriminate against different types of speech and different classes of speakers, the trial court erred in finding that the restrictions, in this context, were category two laws and that the restrictions regulate in a "content neutral manner" and are therefore constitutionally permissible. ER 21. Finally, the trial court erred in ruling against plaintiffs' challenge under Article I, section 26, which the trial court apparently rejected because the text of that constitutional provision does not *specifically* address gift, entertainment, and honorarium expenditures to public officials. ER 22-23.

A. The Lobbying Restrictions Are Impermissible Infringements on Free Speech.

Article I, section 8, of the Oregon Constitution provides:

² As discussed herein, the "incompatibility exception" only applies to category one laws under the *Robertson* analysis.

“No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.”

In *Robertson*, the Oregon Supreme Court established a basic framework for determining whether a law violates Article I, section 8. Laws that restrain protected expression are grouped into three categories. As a threshold matter, laws that focus on the speech itself are distinguished from those focusing on forbidden results. Laws of the first type, ones “written in terms directed to * * * any ‘subject’ of communication,”³ are category one laws. With two exceptions, these “category one” laws violate Article I, section 8. First is the historical exception, which applies where the “scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Robertson*, 293 Or at 412. Second is the incompatibility exception, which applies where the proscribed speech is incompatible with a public servant’s “official function.” *In re Schenck*, 318 Or 402, 430, 870 P2d 185 (1994).

Laws that address forbidden results are further separated into two additional categories. One category includes laws focusing “on forbidden effects, but [which] expressly prohibit[] expression used to achieve those effects.” *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992). These “category two” laws are analyzed for overbreadth. *Id.* The last category “also focuses on forbidden effects, but without

³ *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992)(quoting *Robertson*).

referring to expression at all.” *Id.* These “category three” laws are vulnerable only to an as-applied challenge. *Id.*

As will be shown, the activities restrained by the lobbying restrictions constitute protected expression, thus triggering the Article I, section 8, analysis. The lobbying restrictions are category one laws, as they focus on the protected speech itself and not on any forbidden effect. Neither the historical exception nor the incompatibility exception is applicable. The lobbying restrictions are, therefore, unconstitutional under Article I, section 8.

1. As the trial court correctly concluded, the conduct regulated by the lobbying restrictions constitutes protected expression.

In its opinion on the parties’ summary judgment motions, the trial court adopted and restated its prior determination that the “lobbying expenditures” limited by the lobbying restrictions “are forms of constitutionally protected expression.” ER 19. The trial court was correct in this determination.

Oregon law defines “lobbying” as:

“influencing, or attempting to influence, legislative action through oral or written communication with legislative officials; solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.”

ORS 171.725(7). The restrictions on gift and entertainment expenditures to members of the Legislative Assembly restrain activities that are clearly designed to attempt to influence legislative action or, at a minimum, to attempt to “obtain the good will” of a legislative official. Indeed, the gift and entertainment restrictions only apply where the expenditures are made by persons with a “legislative or administrative interest.”

ORS 244.025(1), (2), (3), and (4). That is, these expenditures are only restricted if there is some *political advocacy* associated with the expenditure. A gift that has no connection to legislative activity (*e.g.*, a gift given by a public official's friend who does not have a "legislative or administrative interest") is not covered by the lobbying restrictions.

Oregon courts have previously stated that lobbying is protected expression under Article I, section 8. *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or 1, 8, 969 P2d 376 (1998). In *Fidanque*, the Oregon Supreme Court struck down a \$50 lobbyist registration fee under Article I, section 8. The court stated, "Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects." *Id.* at 7. The court noted that obtaining the good will of legislative officials is "bound up closely with the essentially expressive nature of the profession" and held that "[l]obbying is expression [] for the purposes of the first *Robertson* category." *Id.* at 8.

There can be little doubt that the activities restricted by ORS 244.025 involve "lobbying." For example, a \$51 expenditure by plaintiff VanNatta to fund a fact-finding mission so that legislators can directly observe the impact that legislative proposals would have on small woodlands in Oregon is, without question, a form of lobbying. Such activity would not only constitute a direct exchange of information between lobbyist and legislator, it would also constitute the type of goodwill building activity referenced in *Fidanque*. Efforts by plaintiff VanNatta and others to establish themselves as a reliable information sources to legislators constitute core lobbying

activity.⁴

Moreover, there is a strong connection between gift, entertainment, and honorarium expenditures to members of the legislature and political campaign contributions, which have already been determined to be protected expression under Article I, section 8. *See Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). Both lobbying expenditures and campaign contributions are expressions of support made for political reasons. In *Vannatta*, the court concluded that “many – probably most –” contributions to political campaigns and candidates are a form of expression under Article I, section 8. 324 Or. at 522. The court stated that political contributions are:

“Protected as an expression by the contributor[.] [T]he contribution, in and of itself, is *the contributor’s expression of support for the candidate or cause* – an act of expression that is completed by the act of giving and that depends in no way on the ultimate use to which the contribution is put.”

324 Or at 522 (emphasis in original).

Plaintiffs do not contend that Article I, section 8, prevents the legislature from prohibiting *any* gifts to legislators. As noted by the *Vannatta* court, the legislature “may prohibit certain forms of contributions such as giving bribes.” 324 Or at 524. Further, after stating that “many – probably most –” contributions to political campaigns and candidates are a form of expression under Article I, section 8, the

⁴ Other courts have reached the same conclusion. For example, in *U.S. v. Sawyer*, 85 F3d 713 (1st Cir 1996), the First Circuit addressed a lobbyist’s alleged violations of a similar Massachusetts gift statute. The court said that endeavors by a lobbyist to develop contacts with legislators, including goodwill entertaining with the goal of persuading and influencing legislators to benefit certain interests, are protected by the First Amendment. 85 F3d at 731.

court stated:

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

Id. at 522, n 10.

The lobbying restrictions, however, are certainly not targeted only at expenditures that have no expressive content or only at expenditures that flow from transactions that may otherwise be regulated. Instead, the restrictions cover *all* expenditures by persons with a legislative or administrative interest. The lobbying restrictions limit both those (at least theoretical) gifts, such as bribes, that do not involve protected expression and also those core lobbying expenditures (such as travel expenses, business meals and associated entertainment) that involve a political message and that are protected expression.

Defendants argued below that the lobbying restrictions do not involve expression because there “is no particularized message inherent or even common in the making of a gift.” Rec. 31. The Oregon Supreme Court has already rejected a remarkably similar argument in the context of campaign contributions: “Neither do we perceive any useful constitutional purpose to be served by purporting to gauge

whether contributions constitute ‘general,’ rather than ‘specific’ or ‘particularized,’ support for a candidate or measure.” *Vannatta*, 324 Or at 522. Moreover, there is no constitutional distinction between the degree of expressive content inherent in a lobbying expenditure and in a campaign contribution.⁵ If anything, the lobbying expenditure examples referenced above⁶ contain even greater expressive content than a standard campaign contribution. In the case of a campaign contribution, a check is written to the candidate’s campaign committee, which uses the money for a host of campaign activities, including general overhead expenses. As noted in *Vannatta*,

⁵ In fact, the state has previously argued to the Oregon Supreme Court that there is no discernible constitutional difference between campaign contributions and gifts to public officials. In its brief in *Vannatta v. Keisling*, the state argued:

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

Respondent’s brief, pg. 30, n. 31.

⁶ The expenditure examples referenced previously are a \$51 expenditure on travel expenses for a fact-finding mission for a legislator to obtain first-hand knowledge on a legislative matter, a \$15 expenditure for a legislator to watch a theater production by a private college to observe the college’s contributions to the arts, and a payment of a \$100 honorarium for a legislator to prepare, research, travel and give a speech to an association.

however, it is the mere act of contributing that constitutes the expression, irrespective of the use the monies are later put to by the candidate. Thus, the mere undifferentiated support that inheres in a campaign check is constitutionally protected expression. The fact-finding missions (and other examples previously provided) not only signify some measure of “support” for the public official’s function, but go much further and actually involve a flow of information and advocacy (and the accumulation of goodwill as a reliable information source) between the lobbyist and public official.

Moreover, it is difficult to understand just how, for example, a fact-finding mission could be said to lack any “particularized message.” If plaintiff VanNatta were to expend \$51 for a fact-finding mission to advocate for or against certain legislation relating to small woodlands, the message is certainly no less substantive than other forms of political expression.

Defendants acknowledged that “picking up a dinner check” may “facilitate” lobbying, but argued in the trial court that it is not in itself lobbying because the gift is not an attempt to say anything. Rec. 31. However, the very statutory definition of “lobbying” specifically includes “attempting to obtain the goodwill of legislative officials.” ORS 171.725(8). *See also Fidanque*, 328 Or at 8. Moreover, even as defendants contend in this case that the gift and entertainment expenditures restricted by ORS 244.025 are not “lobbying,” defendants’ official forms directly contradict this position. For instance, defendants’ “Lobbyist Quarterly Expenditure Report” form instructs registered lobbyists as follows: “List the total amount of all moneys expended for food, refreshments and entertainment *for the purpose of lobbying.*”

App. 1. This reporting form, which was last revised in March 2008, further requires lobbyists to state, under penalty of false affirmation, that the listed food, refreshments, and entertainment expenditures constitute all moneys expended by the signatory “for the purpose of lobbying.” *Id.*

For all these reasons, the trial court was correct in finding that the activities restrained by the lobbying restrictions are protected expression under Article I, section 8.

2. The lobbying restrictions are category one laws under *Robertson* because they are directed at the subject of political speech, not at a claimed forbidden effect.

In considering a challenge under Article I, section 8, Oregon courts first determine whether the challenged provision is written in “terms that are directed to the substance of an opinion or subject of communication” or whether it instead “is written in terms that are directed at a harm that may be proscribed.” *Vannatta*, 324 Or at 784. In *State v. Rich*, 218 Or App 642, 180 P3d 744 (2008), this Court recently provided a helpful summary of the three categories under the *Robertson* framework:

Category One: “laws that explicitly and in terms prohibit speech itself, regardless of whether the speech causes or is an attempt to cause harm[.]” *Id.* at 646. An example is a statute prohibiting obscenity. *Id.*

Category Two: “laws that prohibit the accomplishment of, or attempt to accomplish, harm and specify that one way that the harm might be caused is by speech[.]” *Id.* An example is a “statute prohibiting one person from using a verbal threat to coerce another into doing something she does not want to do.” *Id.*

Category Three: “laws that, without reference to or specification of speech, prohibit the accomplishment of, or attempt to accomplish, harm that, in some circumstances, could be caused by speech.” *Id.* An example is a

“trespass statute that, although it does not mention expressive activity, could be enforced against political protestors engaging in political expression.” *Id.*

The lobbying restrictions directly prohibit certain persons (those with legislative or administrative interests) from engaging in certain forms of constitutionally protected speech. For the restrictions to be category two or three laws, the laws must instead be focused directly on “forbidden effects.” *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994). That is, to be a category two or three law the statute must be written such that the restriction can only apply when the harms are shown to exist. *See, e.g., City of Portland v. Tidyman*, 306 Or 174, 759 P2d 242 (1988)(finding that zoning ordinance was directed at expression, not harm, where harms did not have to be shown for the zoning ordinance to be applied).

The policy underpinnings for the lobbying restrictions are not clear from the statutory text (or from any other provision in ORS Chapter 244). Defendants maintained below that the perceived harms sought to be addressed by the lobbying restrictions are corruption and the appearance thereof. It should first be noted that corruption in the form of bribery is already prohibited by statute⁷ and the nebulous “appearance of corruption” rationale has been criticized by the *VanNatta* court. 324 Or at 538-539 (concluding that the freedom of expression “cannot be limited whenever it may be said that elimination of a particular form of expression might make the electorate feel more optimistic about the integrity of the political process”).

However, even if the bribery harm was not elsewhere addressed and even if the

⁷ *See* ORS 162.015 and 162.025.

“appearance of corruption” harm was both sufficiently clear and legally permissible, the lobbying restrictions are clearly not directed at such harms under the *Robertson* framework. For the lobbying restrictions to apply, there need only be a gift or honorarium expenditure that is in excess of \$50, or an entertainment expenditure of any amount. The lobbying restrictions do not contain as an additional element that the purported harm must also be present. That is, any lobbying activity that involves, for example, a payment of \$51 for transportation expenses, or \$1 in entertainment, is prohibited by ORS 244.025 without any showing that it actually causes corruption or the appearance thereof.⁸ For all such lobbying restrictions, an expenditure above the stated amount is, by itself, sufficient to constitute a violation, without any showing that some forbidden harm actually occurred in each such instance.

Because the lobbying restrictions are category one laws, they are invalid, unless they fit “within an historical exception or can be justified under the ‘incompatibility’ exception to Article I, section 8.” *Vannatta*, 324 Or at 784.

3. The historical exception does not apply.

Under the historical exception, a category one law may withstand Article I,

⁸ Both the lack of any identifiable “harms” in the statute and the mechanical way in which the statute is to be applied produce absurd results. Because the prohibitions and limits only apply to those with “legislative or administrative interests” (defined as “an economic interest, distinct from that of the general public, in one or more bills, resolutions, regulations, proposals or other matters subject to the action or vote of a person acting in the capacity of a public official”), 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 permit lobbying expenditures in any amount from environmental groups, yet proscribe, *e.g.*, \$51 meals by the industry opposing the regulation sought by the environmental group.

section 8, scrutiny if it is “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” *Robertson*, 293 Or at 412. Under the *Robertson* framework, the “party opposing a claim of constitutional privilege has the burden of demonstrating that a restriction on speech falls within an historical exception.” *Moser v. Frohnmayer*, 315 Or 372, 376, 845 P2d 1284 (1993)(quoting *State v. Henry*, 302 Or 510, 521, 732 P2d 9 (1987)). “This is a heavy burden.” *Id.*

Defendants have advanced no serious argument that the lobbying restrictions trigger the historical exception. Despite the “heavy burden” imposed on them, defendants presented their historical exception argument in the trial court only by way of footnote, in which they argued that the existence of bribery statutes at the time of the adoption of the Oregon Constitution means that there must “surely [be] a point when the size of a gift and its circumstances render it ‘corrupt’ even without actual proof of a *quid pro quo* understanding.” Rec. 12. Again turning the constitutional analysis on its head, defendants concluded that the absence of lobbying expenditure limitations would “likely have been foreign to the framers of Oregon’s constitution.” *Id.* This entirely misses the mark.

The court in *Vannatta* readily disposed of the historical exception argument with respect to campaign contribution limitations. “At the time of statehood and the adoption of Article I, section 8, there was no established tradition of enacting laws to limit campaign contributions.” 324 Or at 538. Similarly, defendants in this case have not met their burden of showing that there was some “established tradition” at the

time the Oregon Constitution was adopted to restrict lobbying expenditures.⁹ The existence of bribery statutes merely indicates an historical exception for bribery. Just as there was no historical antecedent for campaign contribution limits, there is no historical exception to Article I, section 8, for restrictions on gift, entertainment, honorarium expenditures.

Moreover, to satisfy the historical exception, the restrictions on speech must be “wholly confined” within the historical exception. *Robertson*, 293 Or at 412. Even if some portion of the conduct proscribed by the lobbying restrictions (*e.g.*, a *quid pro quo* payment to a public official) might find some kindred historical prohibition (on bribery), defendants still must show that all other expression proscribed by the lobbying restrictions was likewise prohibited at the time of statehood. The suggestion that the lobbying restrictions can survive simply because of the assertion that the absence of these lobbying restrictions “would likely have been foreign” to the framers is inconsistent with the sweeping terms of Article I, section 8, and the Oregon Supreme Court’s interpretations thereof. The court’s analysis in Article I, section 8, cases has not hinged on (or even considered) whether the Victorian-era adopters of the Oregon Constitution would have disapproved of, for example, nude dancing (*City of Nyssa v. Dufloth*, 339 Or 330, 121 P2d 639 (2005)), adult businesses (*Tidyman*), or live public sex shows (*State v. Ciancanelli*, 339 Or 282, 121 P3d 613 (2005)). The

⁹ While defendants made no attempt to establish the existence of some historical exception, plaintiffs pointed the trial court to the diaries of Judge Mathew Deady, which illustrated that meals, transportation, and other things of value were commonly furnished by interested persons to public officials around the time the Oregon Constitution was adopted. Tr. 11-14.

appropriate analysis is instead whether, at the time of the Oregon Constitution, such forms of expression were specifically restricted (and, if so, whether the current restriction are “wholly confined” within such historical restrictions). Defendants did not and cannot make the requisite showing.

4. The incompatibility exception does not apply.

Under the “incompatibility exception,” expression that would otherwise be constitutionally protected may be restrained if it is shown to be incompatible with the performance of a public official’s special role or function. *See, e.g., In re Lasswell*, 296 Or 121, 673 P2d 855 (1983) and *In re Fadeley*, 310 Or 548, 802 P2d 31 (1990). This incompatibility exception has rarely been invoked. Courts have only used the exception to validate speech restrictions in three cases, one involving the *solicitation* (not receipt) of campaign contributions by judges (*Fadeley*), one involving prejudicial statements by a prosecutor about pending criminal proceedings (*Lasswell*), and one involving published statements by a judge about pending cases and litigants (*In re Schenck*, 318 Or 402, 870 P2d 185 (1994)).

In its ruling on plaintiffs’ motion for preliminary injunction, the trial court held that “the giving of *unlimited gifts* to public officials and candidates is incompatible with their official duties” and, therefore, the lobbying restrictions do not run afoul of Article I, section 8. ER 5 (emphasis added). The trial court expressly adopted this ruling in its opinion on the parties’ summary judgment motions. ER 19. In finding that the incompatibility exception applied, the trial court erred as a matter of law.

The trial court’s decision was likely shaped by defendants’ arguments that the lobbying restrictions were necessary to protect against certain examples of outrageous

gifts (cars, houses, etc). That is, the trial court likely believed that “unlimited gifts” might, in some cases, be incompatible with a public official’s function. However, as will be shown below, for the incompatibility exception to apply, the state must show that it would be incompatible for a public official to receive any lobbying expenditures prohibited by ORS 244.025 and 244.042. That is, the incompatibility exception can only apply if it is shown by defendants that it is *always* incompatible for a legislator to accept even the examples cited above (on page 8) or, in monetary terms, any gift or honorarium of \$51 and any entertainment of \$1. As such expenditures are not, in all cases, incompatible with the public official’s function, the exception does not apply and the lobbying restrictions cannot survive scrutiny under Article I, section 8.

The Oregon Supreme Court has analyzed the incompatibility exception in two types of cases. In one type of case, a party subject to professional disciplinary proceedings has challenged the regulation at issue (*e.g.*, the attorney disciplinary rules in *Lasswell* or the Code of Judicial Conduct in *Fadeley*). In such cases, the court has stated that the incompatibility exception applies where the expression at issue in the particular case is “highly likely” to vitiate the performance of an official function. *See Lasswell*, 296 Or at 126. The Oregon Supreme Court has also interpreted the incompatibility exception in a case like the present one, in which a party brings a facial challenge to statutory restrictions on expression. *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770 (1997). In that case, the court stated that, for the incompatibility exception to apply, the regulated expression in question must be incompatible “in all cases.” *Id.* at 541 (“it cannot be contended that the expression in question

(contributions) actually impairs performance of, *e.g.*, legislative functions in all cases”).

In *Vannatta*, the court rejected arguments that are substantially similar to those advanced by defendants in this action. The court in *Vannatta* held that campaign contribution limitations were unconstitutional under Article I, section 8, despite the state’s claims that “unlimited” contributions would lead to corruption and the appearance of corruption. The Oregon Supreme Court declared that such arguments were “not well taken”:

“[A]n underlying assumption of the American electoral system always has been that, in spite of the temptations that contributions may create from time to time, those who are elected will put aside personal advantage and vote honestly and in the public interest. The political history of the nation has vindicated that assumption time and again. The periodic appearance on the political scene of knaves and blackguards cannot, so far as we know, be tied to contributions more than to other forms of expression. There is no necessary incompatibility between seeking political office and the giving and accepting of campaign contributions.”

324 Or at 541. This is the best indication of how the Oregon Supreme Court would dispose of defendants’ arguments that the “appearance of corruption” rationale justifies the lobbying restrictions. Defendants have neither established, nor cited to any persuasive authority, that the expenditures prohibited by the lobbying restrictions would be incompatible with a legislator’s official duties in all cases.

This distinction between incompatibility in all cases and incompatibility in some conceivable situation is a significant one. A prohibition on a judge’s *receipt* of campaign contributions (whether or not they were solicited by the judge) would not

have been permissible under the *Fadeley* analysis, even though such a restriction would have included some “incompatible” conduct. A prohibition on all public statements by a prosecutor (whether or not the prosecutor knows or should know them to be prejudicial to a pending case) would not have survived scrutiny under *Lasswell*, even though it would also have included some “incompatible” conduct. In both cases, the prohibited conduct (soliciting contributions in *Fadeley* and making likely prejudicial statements in *Lasswell*) must “always” be incompatible for the exception to apply.

The lobbying restrictions prohibit countless expressive activities that are in no way “incompatible” with a legislator’s functions. There has been no showing, nor can defendants now show, that every receipt by every public official of any expenditure over \$50 (or any entertainment) is, in every instance, incompatible with the public official’s performance. Indeed, as illustrated by the examples above, the receipt of such lobbying expenditures in many cases actually *further*s a public official’s performance (*e.g.*, acquiring information on matters before the public official, disseminating information to constituents, etc.). It would belie reality to suggest that participation in a fact-finding mission organized by Mr. VanNatta to observe small woodland operations would be incompatible with a legislator’s function. Rather, participation in such an activity would go to the very core function of a legislator considering legislation on that subject.

In addition, the recent passage of Senate Bill 10 means that certain lobbying expenditures that were permissible during the 2007 legislative session (*e.g.*, \$51 for travel expenditures or for honorarium, or \$1 of entertainment) are now suddenly

impermissible. Defendants have not demonstrated any dramatic change in social conditions (or some very recent change in the value of money) to now make the receipt of these lobbying expenditures suddenly “incompatible.”

Moreover, the incompatibility exception has never been extended to legislators and there is nothing in *Fadeley* or the other incompatibility cases (all of which applied to judicial officers) that suggests it should be. Legislative office is inherently more political than judicial office and legislative processes are entirely different than judicial processes. Justice Unis, in his dissent in *Fadeley*, discussed some of the significant differences between judicial and non-judicial elected offices:

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

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

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

310 Or at 589-90.

The trial court's “incompatibility exception” ruling suffers additional shortcomings and inconsistencies. For instance, ORS 244.025 does not completely prohibit *all* gifts, so gifts themselves are apparently not inherently incompatible. Instead, an arbitrary line has been drawn to demarcate “compatible” gifts of \$50 and “incompatible” gifts of \$51. Moreover, as noted above, certain persons lobbying the legislature without an actual “economic” interest can give to a legislator unlimited gifts (even the egregious gift examples previously cited by defendants, including new cars and vacation houses) and such unlimited gifts would evidently be “compatible” with the legislator's function, while a \$51 gift from a person with an economic interest would somehow be “incompatible.” Each of these absurdities reveals the problems inherent in defendants' incompatibility arguments, as well as the danger inherent in any Article I, section 8, inquiry that is improperly focused on only the most unsavory speech prohibited by a law and not the most innocuous (and, indeed, salutary) speech that would also be restrained under the law.

In sum, the incompatibility exception does not apply to save the lobbying restrictions in ORS 244.025 and 244.042, because the gift, entertainment and

