IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

MARK REED,

Plaintiff,

vs.

STATE OF OREGON, by and through the OREGON STATE BOARD OF GEOLOGIST EXAMINERS; HARDY MYERS, in his official capacity as Attorney General of the State of Oregon; SUSANNA KNIGHT, Administrator of the Oregon State Board of Geologist Examiners; and the following members of the Board: JOHN BEAULIEU (ex officio member), CHARLES W. HESTER, DAVID MICHAEL, WILLIAM ORR, GARY PETERSON, and EILEEN WEBB,

Defendants.

Case No. 16-02-23430

MOTION FOR ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT BE ENTERED

MOTION

Plaintiff Mark Reed moves the Court for an Order requiring Defendants to show cause why they should not be enjoined from enforcing ORS 672.525 and Oregon Administrative Rule 809-050-0030 against Plaintiff Mark Reed; that the hearing on the Motion for Show Cause be held Tuesday, November 26, 2002 at 10:00 a.m.; and that the Court waive any requirement for bond.

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ORCP 82A(6). This motion is based upon ORCP 79, the Affidavit of Plaintiff Mark Reed attached hereto as Exhibit 2, the Complaint on file herein, and the following points and authorities.

POINTS AND AUTHORITIES

Introduction

Plaintiff Mark Reed is a professor of geology. Mr. Reed testified at public meetings of the Lane County Board of Commissioners and Lane County Planning Commission on an issue of public importance and of importance to him; the siting of an industrial gravel mine and related development on 575 acres of farm land along the Willamette River near his home. Mr. Reed spoke as an informed citizen, using information gleaned from public documents, applying knowledge that he possesses as a teacher and scholar of geology at the University of Oregon. Mr. Reed testified solely on his own behalf. He was not retained by nor did he speak on behalf of any other person or group. He did not seek nor did he obtain any compensation. He did not hold himself out as a geologist for hire and at no time did he state or imply that he was registered or certified by the Oregon State Board of Geologist Examiners (OSBGE). On the contrary, he testified that he was not a registered geologist.

In retaliation, the OSBGE has threatened civil and criminal penalties against Mr. Reed for engaging in the public practice of geology without being registered in violation of ORS 672.525 and OAR 809-050-0030. Mr. Reed has been advised that his case will be before the OSBGE at its December 3, 2002 meeting. Defendants construe those statutes and rules to make it a crime for a citizen to offer informed opinions about geologic issues in a public proceeding without being a registered geologist, even though the individual clearly states that he is not a registered geologist.

Plaintiff Reed desires to exercise his constitutional rights to express himself and to petition the government for redress of his grievances and is barred from doing so under Defendants' threat of enforcing these statutes and rules against him. Defendants' acts and threats of prosecution violate Professor Reed's rights and chill his and the public's right of free speech and causes

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immediate and irreparable injury to Professor Reed. Constitutional violations cause ipso facto immediate and irreparable injury to the individual affected and to our social fabric.

Statement of Facts

Professor Reed maintains no practice of geology within the meaning of ORS 672.505. Professor Reed is and has been a Professor of Geology at the University of Oregon since 1979, and has done extensive research and writing in economic geology. (Exhibit 1, Curriculum Vitae of Mark Reed).

In July of 1999 Eugene Sand and Gravel, Inc. (ESG), filed a land-use application with Lane County to rezone 575 acres of land presently zoned for exclusive farm use. The purpose of the zoning change was to permit the development of an industrial gravel mine, asphalt plant, concrete batch plant, crushing/screening plant, truck and equipment maintenance shop, an office, scales, and a recycling plant. The application and the supporting geologic reports maintained that the geologic resources at the site met state standards for the land use zone change. (Exhibit 2, Affidavit of Plaintiff Mark Reed).

Plaintiff Reed and his wife live within about one mile of the proposed industrial gravel mine. After reviewing the land-use application and supporting geologic reports, Plaintiff Reed became concerned that the proposed mine would cause extensive environmental damage to precious agricultural land, would diminish the value of nearby property, and would harm the beauty and quality of life in the area. Because he found serious errors in the ESG petition, Mr. Reed chose to testify in opposition to the application before the Lane County Board of Commissioners and the Lane County Planning Commission. (Exhibit 2, Affidavit of Plaintiff Mark Reed).

Plaintiff Reed contacted the OSBGE and asked whether his uncompensated participation in public land-use proceedings, on behalf of himself only, would run afoul of OSBGE regulations. The Board's representatives assured Plaintiff Reed orally that individual participation as a private citizen raised no questions of "unlawful practice of geology" within the meaning of the statute. So

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reassured, Plaintiff Reed testified and submitted his informed written assessment of the ESG application to the Board and wrote an opinion piece for a local newspaper questioning the wisdom of the proposed industrial gravel mine. (Exhibit 2, Affidavit of Plaintiff Mark Reed).

At no time did Plaintiff Reed speak or act professionally on behalf of any other citizen or group, provide individual advice or counseling on geological matters to any other citizen or group, or receive any compensation from any other citizen or group. At no time did he state or imply that he was certified by the Oregon State Board of Geologist Examiners (OSBGE), nor that he was in the "public practice of geology" within the meaning of ORS 675.525, nor that he was available to the public for hire as a geologist of any kind. At all relevant times, Plaintiff Reed acted as a citizen asking local government to act to protect his home and property rights.

ESG responded to Plaintiff Reed's civic participation by formally complaining to the OSBGE that his participation amounted to "unlawful practice of geology," charging him with forty-nine (49) separate offenses. (Exhibit 3, Letter from ESG to OSBGE) The text of the letter made clear that it was being sent in retaliation for Plaintiff Reed's public opposition to ESG's proposal, and that they objected to Plaintiff Reed's testimony because it differed from their own paid geologists, and thus called the ESG geologists' credibility into question. Significantly, the letter did not allege that Plaintiff Reed had misrepresented any specific facts, and subsequently admitted that his testimony had caught ESG geologists in "mistakes" that tended to support approval of the project.

At about the same time, OSBGE was sent a copy of Professor Reed's article published in the Register Guard. OSBGE sent Plaintiff Reed letters indicating an intent to investigate and the risk of imposition of sanctions for both his testimony and his published opinion. (Exhibit 4, Letter from Susanna Knight to "Mark Read" (sic), February 13, 2002 (demanding information about newspaper article); Exhibit 5, Letter from Susanna Knight to Mark Reed, March 22, 2002 (requesting response

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and suggesting that "[f]ailure to respond . . . could result in the evaluation of this complaint using the available evidence").[1]

Plaintiff Reed timely responded by letter dated May 3, 2002 (Exhibit 6, Letter from Reed to OSBGE), and on May 28, 2002, he attended a meeting of the OSBGE Compliance Committee in Salem to discuss the issues raised by the Board's claim of disciplinary jurisdiction over him. This meeting, with the knowledge and approval of the Committee, was taped by Plaintiff Reed's wife and subsequently transcribed by her.

David Michael, OSBGE member and committee technical reviewer, readily conceded that contrary to the charges by ESG, "we don't think you pretended to be a registered geologist," establishing that Plaintiff Reed's testimony was not misleading as to his credentials. (Exhibit 7, Transcript of Compliance Committee Hearing). Michael also made clear that the Board was not basing any threatened discipline on allegations that Plaintiff Reed's comments were geologically erroneous or misleading. (Exhibit 7, Transcript at 19) ("we are taking no technical exception to anything we saw you do.") Finally, Assistant Attorney General Christine Chute, OSBGE's legal adviser, conceded that "there's not an imminent danger to the public safety" in Plaintiff Reed's activity, leading the OSBGE to take a slower approach to enforcement. (Exhibit 7, Transcript at 13). In fact, Michael made clear that the only reason that the Board was considering discipline was because "the things that you did for very respectable reasons are going into the decision making for public welfare." (Exhibit 7, Transcript at 8). Thus OSBGE at all relevant times has conceded that Plaintiff Reed's speech was not false or misleading and that it posed no danger to the public.

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[1] Remarkably enough, Ms. Knight's February 13 letter demanded that Mr. Reed submit all the sources upon which he had relied in his opinion article, information clearly protected from disclosure by ORS 44.520. Plaintiff Reed does not advance any argument based on ORS 44.520; however, the audacity of the demand reinforces the general impression that OBGE believes the First Amendment, Art. I § 8, and indeed specific protective statutes simply do not apply to them.

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The Compliance Committee presented Plaintiff Reed with a Consent Order stating that the Board was prepared to issue a notice of proposed action alleging that he had engaged in the public practice of geology while not registered, but that if he would agree not to testify in the future without first becoming registered, or would only testify after a registered geologist appeared and stamped my testimony, they would dismiss the charges against him. (Exhibit 8, Consent Order). Plaintiff Reed has not signed the Consent Order. (Exhibit 2, Affidavit of Mark Reed).

Plaintiff Reed has repeatedly requested the OSBGE and the Oregon Department of Justice to state that no enforcement action will be taken against him on the basis of his speech activities relative to the ESG petition. (Exhibit 2, Affidavit of Mark Reed). No such assurance has yet been forthcoming, and the threat of Board discipline or criminal prosecution for a Class A misdemeanor, which can involve a fine of $5,000 and up to one year in jail for each count, is ongoing. ORS 672.991(3); ORS 161.615 and 161.635. The Board is scheduled to consider the Mark Reed case again at its next regularly scheduled meeting December 3, 2002. (Exhibit 2, Affidavit of Mark Reed).

Summary of Argument

Plaintiff Reed faces the threat of criminal prosecution if he continues to take part in public discussion concerning land-use decisions in his own neighborhood. The disciplinary proceedings so far, and the threat of further action, give him standing to sue the Board under the applicable rules of standing. Further, the OSBGE's action preventing him from exercising his rights to free speech and to petition for redress of grievances constitutes a substantial and irreparable injury justifying injunctive relief and the issuance of a preliminary injunction.

Insofar as it attempts to regulate and punish uncompensated, individual political speech by a citizen on matters of public interest before a government body, OSBGE's action is in violation of law because (1) it is *ultra vires* and (2) it violates Article I §§8 and 26 of the Oregon Constitution and the First and Fourteenth Amendments to the United States Constitution.

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ARGUMENT

1. Because the Board's threatened action against Plaintiff Reed chills his ability to participate in matters of civic importance, he has standing to sue, and his ongoing irreparable injury entitles him to injunctive relief and waiver of any bond.

1.1 Because the Board's enforcement action chills both Plaintiff Reed's speech and that of the public, Plaintiff Reed has standing to maintain a facial challenge.

Plaintiff Reed challenges the action of the Board as it violates Plaintiff's rights under the state and federal constitutions. Under Oregon law, a party has standing to seek a declaratory judgment and injunctive relief if their rights, status or other legal relations are affected by the legislative enactment, and if they have a direct, substantial interest in the controversy. ORS 28.020; *Marks v. City of Roseburg*, 65 Or App 102 (1983); *Gaffey v. Babb*, 50 Or App 617 (1981). A controversy is justiciable if the parties are adversaries in their views of the enactment's constitutionality and if a judgment as to the facial validity of the enactment will settle the controversy. *Marks*, 65 Or App at 105. In *Marks*, plaintiffs challenged an ordinance prohibiting palmistry for a profit within the Roseburg city limits. Plaintiffs had rented a dwelling where they intended to engage in palmistry for profit, but were told by city officials that such conduct was prohibited. Plaintiffs moved their business outside the city limits and then challenged the ordinance as facially unconstitutional. The court held that plaintiffs had standing to seek declaratory and injunctive relief against the prospective enforcement of the ordinance. *Id.*

Similarly, a plaintiff who had closed a "head shop" to avoid violating a Brookings city ordinance could still challenge the ordinance on its face without having to violate it and face criminal prosecution. *Gaffey v. Babb*, 50 Or App 617, 620-21 (1981), *rev. den.*, 291 Or 117 (1981).

> "This case does not involve a request for an advisory opinion emanating from friendly litigants who merely seek a construction of the ordinance. There is a genuine controversy. The defendants, who are, respectively, the chief of police and the city attorney of Brookings, are charged with enforcement of the ordinance. They argue in support of the ordinance. Petitioner owns the only "head shop" in Brookings, and through that enterprise markets items that could subject him to prosecution under the ordinance. Both parties are adversaries in their views of the ordinance's constitutional validity. A

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> judgment as to the facial validity of the enactment will settle this actual controversy."

Id. at 623.

A claim that an agency's action will cause irreparable harm or that the agency lacks probable cause to proceed may be heard in Circuit Court. ORS 183.480(3); *Oregon Health Care Ass'n v. Health Division*, 329 Or 480 (1999). An agency's decision to investigate an individual for an ethics violation is ripe for review by the Circuit Court pursuant to ORS 183.480(3). *Brian v. Oregon Government Ethics Commission*, 320 Or 676 (1995).

Plaintiff Reed's injury in fact is much more particularized than that alleged by the plaintiffs in either *Marks* or *Gaffey*. He has been told by a government bureaucracy that he has already violated a statute carrying heavy fines and criminal penalties, and that the agency may or may not proceed against him for past violation even if he remains silent now. At any rate, like the plaintiff in *Gaffey*, he will face discipline if he defies the Board's silencing order in the future. Plaintiff Reed and the Board are in no sense friendly litigants, and a ruling that the enactments are facially unconstitutional, or unconstitutional as applied will resolve the legal controversy between the parties, leaving only the question of remedy.

Plaintiff Reed also has standing to challenge the enactments under applicable federal law. "The irreducible constitutional minimum of standing contains three requirements: plaintiffs must establish that (1) they have suffered an actual or imminent, concrete injury in fact, (2) there is a causal connection between the alleged injury and the conduct complained of, and (3) it is likely that a favorable decision will redress plaintiffs' injury." *Vannatta v. Keisling*, 899 F Supp 488, 492-93 (D Or 1995), *aff'd*, 151 F3d 1215 (9th Cir 1998), quoting *Lujan v. Defenders of Wildlife*, 504 US 555 (1992); *Am.-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F2d 501, 506, 510 (9th Cir 1991). Prudential bars to standing to bring a facial challenge have less force in the context of free speech litigation: "when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the

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statute challenged." Secretary of State, Md. v. J.H. Munson Co., 467 US 947, 956 (1984.) That is so because "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant but for the benefit of society to prevent the statute from chilling the First Amendment rights of other parties not before the court. " Id. at 958. Accord see Tennison v. Paulus, 144 F3d 1285, 1287 (9th Cir 1998).

Plaintiff Reed's injury in fact is supplied by the threat of criminal enforcement, *see* Gooding v. Wilson, 405 US 518, 520-21 (1972). This threat emanates from the Board's actions in beginning an investigation and would be redressed completely by an injunction preventing the Board from taking adverse action against him on the basis of his protected expression.

1.2 Because public deliberation about land-use planning is time-sensitive and because freedom of expression is historically of paramount constitutional significance, the ongoing restraint against Plaintiff Reed's speech on matters of public importance constitutes irreparable injury justifying the issuance of a preliminary injunction and waiver of any bond.

ORCP 79 governs the issuance of preliminary injunctions. A preliminary injunction may be allowed when it appears that a party is entitled to relief demanded in a pleading and such relief, or any part thereof, consists of restraining the commission or continuance of some act which during the litigation would produce injury to the party seeking relief. ORCP 79(A)(1)(a).

These prerequisites are clearly met in the current case: the Board's ongoing attempt to silence Plaintiff Reed and prevent him from participating in public debate constitutes an ongoing violation of his rights under Article I § 8 of the Oregon Constitution and the First and Fourteenth Amendments to the United States Constitution. The United States Supreme Court has often said that the loss of constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *See e.g.*, New York Times Co. v. United States, 403 US 713 (1971) (alleged First Amendment violations); *See also* Paulsen v. County of Nassau, 925 F2d 65, 68 (2d Cir 1991) ("our historical commitment to expressive liberties dictates that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,'" quoting Elrod v. Burns, 427 US 347, 373, (1976).

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The Court may waive any bond upon a "showing of good cause and on such terms as may be just and equitable." ORCP 82A(6). Good cause exists to waive a bond in this matter because Plaintiff Reed is of moderate means, representation is being provided pro bono solely to protect the constitutional rights of Plaintiff and other Oregon residents, no injury to Defendants will result from issuance of the preliminary injunction, and the public good will be advanced.

2. The board's construction of its enabling statute as granting it censorial power over any geologically trained citizen who wishes to participate in public affairs is not justified by the statutory language and violates established canons of statutory construction designed to avoid constitutional conflicts.

Examination of the Board's governing statute reveals that the action exceeds its authority as the Board is not empowered by statute to censor all public debate on matters of geology. Without proper legislative authority, the Board lacks probable cause to proceed in this action against Mr. Reed. ORS 180.480(3). Under ORS 672.505 *et seq.*, the Board is created for the purpose, *inter alia*, of regulating "the public practice of geology," which "means the performance of geological service or work *for the general public.*" ORS 672.525 (emphasis added). The Legislature's purpose in enacting the regulatory scheme was "to safeguard the health and welfare and property of the people of Oregon." ORS 672.515. An individual comes within the purview of the board who "practices any branch of the profession of geology," who "purports to be a registered geologist," who "implies that the person is a registered geologist," or who "offers to perform any geological services or work recognized as geology for a fee or other compensation." ORS 672.505(7). The statute should not construed to permit regulation of an individual "engaged in teaching and conducting research in the science of geology at an accredited college or university" who does not otherwise engage in the public practice of geology. ORS 672.535(1).

Such a statutory definition does not support any asserted authority to regulate and punish all persons in the State who possess geological knowledge and who discuss their knowledge and their

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personal concerns about public policy with elected or appointed officials without any compensation, without representing any other individual and without claiming registered geologist status. In fact, it is noteworthy that not one word in the applicable statutes mentions public testimony specifically or indicates a legislative intent to regulate it. The Board claims to have jurisdiction over "a person who presents public testimony on geologic issues if:

> "(a) The testimony is related to public welfare or safeguarding of life, health, property and the environment; and
> (b) The person performs any consultation, investigation, surveys, evaluation, planning, mapping, or inspection of geologic work; and
> (c) The person uses the title 'geologist' or any title or description tending to convey the impression that the person is a geologist."

As applied in this case, the Board apparently asserts that any citizen with geological training must register before discussing his or her personal views before a public body. The Board has read into the statute a censorial authority over all informed discussion of geological matters before government agencies, whether or not such discussion is misleading, whether or not an individual represents only himself, and whether or not the individual is compensated. No person may discuss geological matters with any public authority unless (1) he or she is approved by the Board or (2) he or she possesses so little geological training that his or her testimony will be of little assistance to the officials addressed.

"In interpreting a statute, the court's task is to discern the intent of the legislature. To do that, the court examines both the text and context of the statute. In this first level of analysis, the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent." *Portland Gen. Elec. Co. v Bureau of Lab & Indus.*, 317 Or 606, 610 (1993) (citations omitted). There is no evidence at all that the Legislature intended to grant the Board monopoly control over geologic discussion in public land-use matters. The statute empowers the Board to protect consumers against misrepresentation, not to decide what knowledge government and the public may acquire.

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Even if the wording of the statute could be stretched to permit the Board's action, such a construction would violate well established canons of construction that dictate that statutes should, if possible, be interpreted to avoid raising serious constitutional questions, both under the Oregon Constitution, *see, e.g.*, State v. Kitzman, 323 Or 589, 602 (1996); State v. Smyth, 286 Or 293, 296 (1979) and the United States Constitution, *see, e.g.*, Jones v. United States, 526 US 227 (1999); Edward J. Bartolo Corp. v. Florida Gulf Coast Bldg & Const. Trades Council, 485 US 568. If the statute is interpreted to give the Board such censorial authority, then the statute, as applied to Mr. Reed, violates both the United States and Oregon Constitutions.

4. By requiring a licensing fee for the privilege of speaking to government officials on matters of public importance and by threatening criminal prosecution for non-compliance, the board has burdened Plaintiff Reed's rights to "to speak, write, or print freely on any subject whatever" and to "apply to the Legislature for redress of grievances" as guaranteed by the Oregon Constitution.

The Oregon Courts have interpreted the free-speech guarantee of Article I § 8 to prevent state licensing boards from regulating "speech qua speech," and to allow only regulation of "speech in the context of a putatively professional relationship." Oregon State Bar v. Smith, 149 Or App 171, 188 (1997), rev. den. 326 Or 62 (1997). Thus, in order not to "impermissibly burden protected expression," such regulations may reach only "conduct, including communication, that pertains to representing and counseling persons with regard to their particular legal matters." Id. Government regulation of professional speech is permissible only when the communication occurs in the context of a fiduciary relationship, a relationship in which trust and confidence are reposed by one person in the integrity and fidelity of another.

In this case, the Board has sought to regulate one who is not subject to its jurisdiction and to penalize him for engaging in truthful, non-misleading speech on a matter of public importance before a public meeting of a governmental body. Imposition of a mandatory fee of any size upon citizens who wish to speak to government about matters of public importance, whether or not such

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persons are compensated by or acting on behalf of others in a professional capacity, violates the Oregon Constitution as construed by the Oregon Supreme Court. *Fidanque v. Oregon Government Standards and Practices Commission*, 328 Or 1, 9 (1996).

Fidanque was a challenge to a mandatory fee demanded by the Oregon Government Standards and Practices Commission of all persons who wished to engage in "lobbying" the Legislature. The State argued that the fee did not violate Article I § 8 because it "applie[d] to lobbyists as a professional group, and not to the act of lobbying as itself." *Id.* at 7. The Court rejected this distinction and held that the regulation impermissibly restricted political speech:

> "[a]t some point, there may be so little to distinguish between the saying of a thing and the 'profession' of saying it that permitting a regulation on the theory that it is directed at the profession, rather than at the statement, would represent a triumph of form over substance. 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 invalidated the fee requirement even though the petitioners were paid lobbyists and had not challenged the statute's requirement of registration. *Id.* at 3, 5.

Where, as in Plaintiff Reed's case, the individual whom the Board seeks to punish and censor is in fact not a paid geologist within the meaning of the statute, but rather a private citizen stating his opinion in a public hearing, the attempt to apply mandatory fees and penalties to him is an even more egregious violation of Article I § 8 than was the regulation at stake in *Fidanque.*

The Court in *Fidanque* used the familiar methodology for analyzing free-speech issues, first enunciated in *State v. Robertson*, 293 Or 402 (1982), and systematized in *State v. Plowman*, 314 Or 157, 163-64 (1992). *See Fidanque*, 328 Or at 5, invoking *Robertson* and *Plowman*. Under *Robertson*, a reviewing court asks first whether a challenged government enactment is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication, unless 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. If so, the governmental enactment is unconstitutional on its face, regardless of the conduct of the individual

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in question. *Id.* If not, the court is then to ask whether the statute is directed "in terms against the pursuit of a forbidden effect and not . . . against forbidden speech as such." *Id.* at 415.

Even if a statute avoids facial invalidation under *Robertson*, its focus on forbidden effects can be divided further into two sub-categories. The first sub-category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. The second also focuses on forbidden effects but without referring to expression at all. *Fidanque*, 328 Or at 6, citing *Plowman*, 314 Or at 164.

Applying *Fidanque*, *Plowman* and *Robertson* to the Board's attempted silencing of Plaintiff Reed, it is apparent that ORS 672.505 and 525 and OAR 809-050-0030 are "written in terms directed to the substance of any 'opinion' or any 'subject' of communication," *Fidanque*, 328 Or 6, quoting *Robertson*, 293 Or at 412. The statute at issue in *Fidanque* imposed a fee on those engaged in "lobbying," which the court found to be "an activity that is primarily expressive." *Fidanque*, 328 Or at 7. In Plaintiff Reed's case, the enactments he is accused of violating are directed *entirely* to expression: public testimony on geologic issues under certain conditions not relating to professional employment. *See* OAR 809-050-0030 (claiming enforcement jurisdiction over "a person who presents public testimony on geologic issues related to public welfare or safeguarding of life, health, property and the environment" if the person performs any geological analysis in preparation for the testimony and gives information, even if truthful, about his or her qualifications to analyze geological questions). As interpreted by the Board, then, its regulation of Plaintiff Reed's freedom to speak is *solely* directed at expressive activity, and is facially invalid unless "unless 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.

It is apparent that regulation of geologists as a class was not a well established exception to free speech at the time of the framing of the Oregon Bill of Rights, as geologists were not registered

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at all until 1977. *See* ORS 672.515 (expressing new state policy of "introducting qualified criteria in a previously unregulated professional field.") Even regulation of the expression of professions whose comprehensively licensed nature was clear at the time of the framing faces constitutional difficulty, as is made clear by *Oregon State Bar v. Smith*, 149 Or App 171, 176 (1997), which noted that "[d]uring territorial times and for the first 60 years of Oregon's statehood, restrictions on the practice of law were minimal" and "pertained solely to litigation practice." *Id.*

In this case, the only client Plaintiff Reed claimed to represent was himself, and the only individual needs he claimed to address were his own as a citizen. To permit the Board to punish him for addressing the government of which he is a sovereign member, and to prohibit him from doing so again, would be akin to forbidding individuals from representing themselves before the courts. Indeed, the Board's action is constitutionally more egregious than that, because it does not bar participation in a specialized form of proceeding for which training is arguably necessary, but bars any expression of his opinion on the subject of geology to his elected representatives at proceedings that are open to any citizen. It is, in other words, akin to permitting ordinary litigants to represent themselves, but barring any lay person whose knowledge of law might be sufficient to render such representation effective. Such an extravagant restriction of the right to express opinion on "any subject whatever" is justified neither by the text of Article I § 8 nor by the case law interpreting it.

7. The Board's action also directly violate's Plaintiff Reed's "cognate rights of free speech and petition" as guaranteed by the First Amendment to the United States Constitution as construed by recent Supreme Court precedent.

The Board's claim of censorial power over Plaintiff Reed's civic participation faces a very high presumption of invalidity under the First Amendment. "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm. of N.Y.*, 447 US 530, 540 (1980).

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The State interests in this case are those cited in the Board's enabling statute--"to safeguard the health and welfare and property of the people of Oregon." ORS 672.515. But the record is devoid not only of evidence but of any allegation that Plaintiff Reed's speech imperiled those interests. As noted above, he was careful not to represent himself as a registered geologist, and he did not misrepresent his own education and training. Nor has the Board alleged that the geological concepts and conclusions embodied in Plaintiff Reed's testimony and documentary submissions were untruthful or misleading. Absent a showing that Plaintiff Reed's speech was in some way misleading or untruthful, the State's interest in professional regulation cannot overcome his First Amendment right to speak to the government on matters of personal and public interest.

Even in professional regulation cases, "[w]here political expression or association is at issue, [the Supreme] Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs." *In re Primus*, 436 US 412, 434 (1978). Thus the State could not sustain discipline against a lawyer engaged in advocacy on important social issues because "[t]he record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy *actually occurred* in this case." *Id.* at 434-35 (emphasis added). *Accord see Ibanez v. Florida Dep't of Bus & Prof. Reg.*, 512 US 136, 138-39 (overturning State professional licensing agency discipline because state had "not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 US 91,144-45 (1990) (rejecting State lawyer discipline because record showed that an attorney's use of the designation "Certified Civil Trial Specialist By the National Board of Trial Advocacy" was neither actually nor inherently misleading).

As noted above, the record suggests that the Board seeks to restrain and penalize Plaintiff Reed's speech out of fear that the public or governmental decision-makers may find it credible and convincing. It is clear from the record that the original complaint to the Board expressed a concern

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that, unless Professor Reed could be silenced, the paid geologists retained by ESG might not receive the credence their employer desired them to have. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 US 1, 48-49 (1976). In the professional regulation context, it raises very substantial First Amendment questions for a State to seek to proscribe the speech of a specific class of speaker because of a fear that the public will *hear and believe* what they say. That kind of subject-matter discrimination is impermissible without a much stronger interest than a generalized concern with possible fraud. "What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Virginia State Board of Pharm. v. Virginia Citizens Consumer Council*, 425 US 748, 773 (1976). In *Virginia Pharmacy*, the Court concluded that "the answer . . . is in the negative" even though the speech at issue was commercial advertising undertaken for profit. *Id.* In this case, where the speech is non-commercial speech on a subject of public interest undertaken without compensation or misrepresentation, the answer, a fortiori, must also be no.

While "[t]he States enjoy broad power to 'regulate the practice of professions within their boundaries,'" *Primus*, 436 US at 422, quoting *Goldfarb v. Virginia State Bar*, 421 US 773, 792 (1975), the United States Supreme Court has made clear that the First Amendment requires that "'broad rules framed to protect the public . . . ' must not work a significant impairment of 'the value of associational freedoms.'" *Primus*, 436 US at 426, quoting *United Mine Workers v. Illinois Bar Ass'n*, 389 US 217, 222 (1967).

Imposing a mandatory registration and licensing requirement upon those who seek to speak about matters of public policy before a lawful assembly—even if the requirement is part of an otherwise valid scheme of professional regulation—violates the First Amendment to the U.S. Constitution as interpreted by the United States Supreme Court in precedent reaffirmed as recently as the 2001 Term. *Watchtower Bible & Tract Soc'y of N.Y. v. Stratton*, 122 SCt 2080 (2002);

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Thomas v. Collins, 32 US 516 (1945); *See also* *Rosen v. Port of Portland*, 641 F2d 1243, 1247 (9th Cir 1981) (relying on *Thomas* to hold that "persons desiring to exercise their free speech rights may not be required to give advance notice to the state").

The *Stratton* Court relied on and reaffirmed *Thomas v. Collins*, 32 US 516 (1945), which is directly relevant to Plaintiff Reed's case. In *Thomas*, appellant was a professional labor organizer who had violated a Texas State statute by failing to register with the Secretary of State an application for an "organizer's card" to be displayed whenever the registrant engaged in "soliciting members." *Id* at 519. Thomas posed directly the conflict between the State's

> "well-settled right reasonably to regulate the pursuit of a vocation, including -- we may assume -- the occupation of labor organizer [and] the equally clear proposition that Texas may not interfere with the right of any person peaceably and freely to address a lawful assemblage . . . ."

Id. at 544 (Jackson, J., concurring). Even though Thomas fell within the ambit of the statute and had deliberately violated its terms, the Court held, 5-4, that his conviction must be set aside because the statute and the injunction violated the First Amendment. The Court first noted that the statute was justified by the State as a means of "safeguarding laborers from imposture when approached by an alleged organizer." *Id.* at 525. The State's justification of the statute was as a regulation of "business practices, like selling insurance, dealing in securities, acting as commission merchant, pawnbroking, etc." *Id.* at 526. The Court conceded the State's right to regulate labor organizers, *Id.* at 532, but it held that the interest in prevention of fraud was insufficient to outweigh the petitioner's right to speak in public—and the right of willing audience members to hear him address a matter of public importance:

> "whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people *peaceably to assemble and to petition for redress of grievances.*

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> All these, though not identical, are inseparable. They are cognate rights . . . and therefore are united in the First Article's assurance."

Id. at 530 (emphasis added)(citations omitted).

The Court noted that the regulation would require self-censorship on the part of speakers seeking not to run afoul of its restrictions. *Id.* at 535. The Court was particularly struck by the fact that the prosecution arose from remarks made in a public meeting:

> "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers."

Id. at 539. The Court added that "[w]e think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.* at 540. For this reason, Thomas's conviction was reversed. *Id.* at 543.

Justice Jackson, one of the fathers of modern free-speech theory, concurred specially to note that when the state's interest in regulating professions conflicts with the underlying values of the First Amendment, professional regulation under the police power must accord ample room for free speech.

> "A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicenced person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union."

Id. at 543-44 (Jackson, J., concurring).

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Plaintiff Reed's speech went considerably less far than Thomas's: he simply represented himself truthfully as a knowledgeable public citizen who had made an independent study of the public issue under consideration, and gave his opinion. Because of the reach the Board seeks to give to its statute, it is apparent that Plaintiff Reed's only lawful choice would have been either to give his opinion but omit any of the reasons why he reached it, thus depriving the audience of truthful information needed to assess his words, or to remain silent altogether, thus depriving him completely of his right to petition for redress of grievances. Such a rule is not justified by the statute, and even if it were, it would be "quite incompatible with the First Amendment." *Thomas*, 323 US at 540.

CONCLUSION

Plaintiff Mark Reed for the foregoing reasons respectfully requests that the Court enter an order requiring Defendants to show cause why they should not be enjoined from enforcing ORS 672.525 against him in respect to the facts and circumstances alleged in the complaint.

DATED this 26th day of November, 2002.

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