IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHANNON MAE HICKMAN, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court Case No. CR1001094 CA 150127 SC S061896 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DALE RYAN HICKMAN, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court Case No. CA 150126 SC S061902

PETITIONER'S CORRECTED BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from a Judgment
Of the Circuit Court for Clackamas County
Honorable Robert D. Herndon, Judge

Summarily Affirmed: August 20, 2013
Before: James W. Nass, Appellate Commissioner
Reconsideration Denied: December 18, 2013

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STATEMENT OF THE CASE

In this criminal case, the state charged Dale and Shannon Hickman, both members of the Followers of Christ Church, with Second Degree Manslaughter, under a reckless theory, in the homebirth death of the their son.[1] This case presents the question of whether a religious practice, in this case faith healing, can be criminally sanctioned on less than a knowing mental state pursuant to this Court's holding in *Meltebeke v. BOLI*.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

First Question Presented

Is the holding of *Meltebeke v. BOLI* that the state cannot sanction religious practices unless the person knows the unlawful result will occur still good law?

First Proposed Rule of Law

Yes, *Meltebeke* employed the full *Priest v. Pearce* methodology in construing Article I, sections 2 & 3 and *stare decisis* compels adherence to *Meltebeke.*

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[1] These cases have been consolidated for argument, but not briefing. For this Court's reference, the briefing in *State v. Dale Hickman*, and *State v. Shannon Hickman* is identical. Often the briefing uses the term Petitioners, in the plural.

Second Question Presented

Does the holding of *Meltebeke* apply to criminal sanctions?

Second Proposed Rules of Law

Yes, nothing in the text, history, or caselaw surrounding Article I, sections 2 & 3 supports an interpretation that the framers sought to protect against civil sanctions of religious practice, while permitting criminal sanctions.

Third Question Presented

Is the distinction in *Meltebeke* between "religious practice" and "acts motivated by belief" part of the holding, such that it has *stare decisis* effect?

Third Proposed Rule of Law

No, the distinction is dicta, and this court can rework that distinction if it finds it unhelpful.

Fourth Question Presented

Assuming this Court keeps the "religious practice" distinction, how should this court define the term?

Fourth Proposed Rule of Law

Acknowledging that any definition of the term is problematic and unsatisfactory, counsel offers his best suggestion to be:

> "A religious practice is an act of obligation, obedience, or expression of reverence towards the divine."

Fifth Question Presented

Is faith healing a religious practice?

Fifth Proposed Rule of Law

Yes, under any definition faith healing is a religious practice.

SUMMARY OF THE ARGUMENT

In *Meltebeke v. BOLI* this Court held that a person against whom a sanction is to be imposed for conduct that constitutes a religious practice must *know* that the conduct causes an effect forbidden by law. State sanctions under a reckless standard are not permitted.

In this case, the state sought a criminal sanction against Petitioners under a reckless theory. The state did not plead nor prove that Petitioners *knew* their son would die. Rather, just as in *Meltebeke,* the state relied on the argument that Petitioners s*hould have known*. *Meltebeke* requires more.

This brief begins by examining the holding of *Meltebeke* and placing it in the wider context of this Court's Article I, sections 2 & 3 jurisprudence. *Meltebeke* employed the full *Priest v. Pearce* methodology, and its conclusions are reasonable in light of the constitutional text, the historical context, and this Court's caselaw. *Stare decisis* compels continued adherence to its holding.

Next, Petitioners turn to the question of whether *Meltebeke* applies to criminal sanctions, or merely civil sanctions. Nothing in the constitutional text, or the history of religious persecution prompting its adoption, supports protections for civil penalties while permitting criminal sanction by the state. Limiting *Meltebeke* to civil sanctions should be seen as an attempt to insert a balancing test into Article I, section 2 & 3 analysis. Because the text of Oregon's religious freedom clauses is absolute, a balancing test should be rejected.

The brief then addresses the question of whether faith healing is a religious practice. *Meltebeke* failed to define the term, and Petitioners offer this Court a potentially workable definition, while recognizing that the distinction between "religious practice" versus an "act motivated by belief" may be philosophically unsound.

Under any definition, however, faith healing is a religious practice. It has deep historical roots in the Christian tradition, and exemplifies an act of obedience to divine will. As such, *Meltebeke* requires that before the state can sanction a person for faith healing, the state must show that the person knew an unlawful result would occur.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Dale and Shannon Hickman are members of the Followers of Christ church, in Oregon City, Oregon. They were born into the church, following their parents, and their grandparents. Tr 303; 2061-62; 2101. The Followers of Christ have, as a tenant of faith, a form of determinism. As Dale Hickman explained at trial, "Everything that happens, whether it be good or bad, is God's will. If it wasn't God's will, it wouldn't be done." Tr 2087. As a result of this belief, members of the church often eschew modern medicine in favor of prayer, and confidence that divine providence will inevitably prevail.

Dale and Shannon were married in 2003. Tr 300. In 2004, a daughter, was born. Tr 300. Dale worked and Shannon stayed home with their daughter. They lived normal law-abiding, religiously centered lives. As the prosecutor noted in his opening, "They are relatively normal folks just like anybody else. They are law-abiding citizens. They are good people to the best we can determine." Tr 300.

After Dale and Shannon tried to conceive another child, but unfortunately miscarried. Tr 301. Eventually, Shannon became pregnant a third time. Tr 301. The Hickman's treated this pregnancy in accordance with their custom, anticipating a home birth. Home births are popular in

Oregon, and not uncommon. Roughly 1200 to 1500 births occur each year in the state at home. Tr 2005.

Shannon did not see a medical doctor during the course of her pregnancy, nor have an ultrasound, so she did not know her exact due date. She estimated her due date by counting from her the first day of her last menstrual cycle. Tr 2118. However, because her last cycle had been very irregular, she could only determine a date range. Tr 2118. By her calculations her due date could be anywhere between early November to late December. Tr 2118. She split the difference and called her date November. Tr 302; 2118.

Over the course of the pregnancy Shannon took steps to ensure a healthy child. She did not smoke or drink. Tr 2121. She took care to eat a healthy diet rich in iron and other essential vitamins. Tr 2122. For her first pregnancy with she had read the book "What to Expect When You're Expecting" and she reread the sections on diet for this pregnancy. Tr 2122; 2156.

The pregnancy felt good, similar to her pregnancy with and not at all like her miscarriage. Tr 2123. The baby was active and moved, unlike the miscarriage pregnancy. Tr 2123. All appeared normal.

In late September Shannon began experiencing pain in her lower back. Tr 303; 2125. The pain continued overnight, but eased by morning. Tr 2125. Then, mid-morning back pain resumed. Tr 2125. By mid-afternoon the back pain and started to transform into abdominal cramping. Tr 2125. Shannon called Dale and he came home from work. Tr 2125. Shannon thought she should "stay in bed" and things would get better. Tr 2125. Later that day however she noticed that she was spotting. Tr 2125-26. At that point Shannon and Dale decided to go to her mother's house, as it was family custom to have home births at the expectant mother's home. Tr 2107. Sometime around that point midwives were summoned. Tr 331.

After they arrived at Shannon's parent's home, things became "a whirlwind." Tr 2126. Roughly 10-20 family members and members of the church gathered at the home to provide support. Tr 1414. As Shannon described at trial:

> "[SHANNON HICKMAN]: What I remember is just being in a lot of pain, people setting up the maternity bed and the midwives asking how I was doing and checking on me and asked me, when I was ready, I could get up on the bed.
>
> "So I -- I got up on the bed, and it wasn't very long and was born. And I was still in a lot of pain, but I could hear him cry. And I was so happy. I just never expected to give birth that day. And I was so glad that everything was okay. I was still in a lot of pain. I

> don't know even remember seeing him after he was born. I don't even remember seeing him until after his bath."

Tr 2126.

Present in the bedroom were Shannon, Dale, Shannon's mother, Dale's mother, and three church midwives. was the midwife who delivered the child. Tr 1457. The delivery was quick, but in Shannon's comparison was similar to Tr 2127. At roughly 5:41 pm on Saturday, Dale and Shannon's son, was born. Tr 305. He was two months premature, and weighed 3lbs 7oz. Tr 317-18. As the prosecutor described, " came out strong, crying, pumping his arms, looking ever so tiny, but kind of normal. You are going to get to see a video of that was taken early after his birth when he is vital and vigorous, and besides being really tiny, looking pretty cute." Tr 312-13.

Following the birth, was wrapped in warm blankets. He was cared for throughout the night and held and watched by the community who had gathered at the house. Tr 1418-20; " Shannon's father, testified that from the time of the child's birth near 6:00pm until he went to bed, around 11:00pm, the child appeared healthy. Tr 1120.

Dale's mother, held throughout much of the evening. She testified that he appeared healthy, "very pink," was breathing and crying, and moving his hands. Tr 1459-60. He appeared strong and active, often

trying to kick off his blankets. Tr 1481. She fed mother's milk from a spoon. Tr 1460. The baby ate well and vigorously. Tr 1461. The three midwives present expressed no concern for the baby's health. Tr 1484. Around midnight Hickman returned to her own house, leaving the child in the care of the other adults who remained in the home: Shannon's parents, and and three aunts and Tr 1464. testified that around midnight she took over watching the infant, along with another aunt while the family including Dale and Shannon slept. Tr 1576; 1581-82. The aunts and the child were in the back bedroom, separate from where Dale and Shannon slept. Tr 1582. The child continued to appear healthy in color, and was moving and behaving normally. Tr 1576. Warm towels continued to be changed around the baby, and during those times she observed his body continued to be pink, and he was breathing normally. Tr 1578-79.

also cared for the infant with She too observed the baby as being healthy, pink, and moving and sounding normal. Tr 1632-33. As testified, "[h]e cried for a little while, and then he got settled down and fed, and it was like taking care of any other baby I had taken care of. I have taken care of lots of babies." Tr 1634.

At some uncertain point, and noticed that a change had come over the infant, a "fading." described it as "[j]ust a different look in his face." Tr 1587. called out for Shannon's mother who was in the next room. Tr 1590. The women were concerned. Tr 1590. The child was "fading" rapidly, and was either asleep or unconscious. Tr 1592. According to testimony, the infant "was going quickly." Tr 1593.

testified about the moments immediately after when and woke her:

> "[When they got me up, and I went in the bedroom and I watched him for a little bit. If God didn't take a hand in it, I didn't think he was going to make it.
>
> "[PROSECUTOR]: And do you understand approximately how much before his passing that realization came to you?
>
> "[No, I don't know.
>
> "[PROSECUTOR]: Was it five minutes?
>
> "[I don't know.
>
> "[PROSECUTOR]: Was it 15 minutes?
>
> "[It wasn't very long, because it wasn't very long, and he was gone.
>
> "[PROSECUTOR]: Do you know how much before?
>
> "[Maybe 15 minutes. I don't know when my realization -- I thought --

> "[PROSECUTOR]: Well, what happened in that period of time once you came to the realization that he was leaving you? What did you do?
>
> "[It was my opinion that he might.
>
> "[PROSECUTOR]: What did you do at that time?
>
> "[I prayed."

Tr 1166-67.

entered Dale and Shannon's bedroom and woke Dale. He left the bedroom then came back in a short time later holding Tr 2132.

testified that Dale and Shannon held their child, and that he "was already going." Tr 1594-95. testified that she left Dale and Shannon's room shortly thereafter and she could not be certain if the infant was already deceased when she left, or whether the death occurred after. Tr 1596.

Dale Hickman testified that from the moment the women woke him and he took the infant in their arms, 5 or 10 minutes or less passed until it was obvious that had died. Tr 2099. Shannon testified:

> "[SHANNON HICKMAN]: And I don't know if anybody said anything, but he sat down in the chair. And I sat up at that point with my feet on the ground and looked at the baby and he was pale. He was pale, and he didn't look like the baby I had seen a couple of hours before. And I think I heard him breathe once or twice before he died, and still, I was just waiting for him to take another breath. I had no

> idea that he was going to die. I could only sit up for a couple of seconds, and I had to lay back down. It was really hard it to do."

Tr 2132-33. Shannon estimated that from the time Dale came into the room until it was obvious that was dead was no more than five minutes. Tr 2133.

The county medical examiner, Clifford Nelson, listed the manner of death as "natural," and the specific cause attributed to "staphylococcus pneumonia," a bacterial infection of the lungs, with other contributing factors being "pulmonary immaturity and chorioamnionitis." Tr 1017-18. Nelson explained chorioamnionitis:

> "[NELSON]: Well, it is not the most common -- one of the most common causes of premature labor. It is also -- when somebody does have a chorioamnionitis, it is very common for whatever organism that is causing the infection to get into the baby's blood stream and/or into the amnionic fluid and then either give them pneumonia or a sepsis. So it can cause -- it can lead -- the infection of the membranes of the placenta, before it is born, or during the birthing process, can lead to an infection that happens then in the baby after it is born.
>
> "[PROSECUTOR]: So when I asked you earlier if there was any other infection other than staph pneumonia, you said 'not in body,' and this is what you were referring to?
>
> "[NELSON]: That's correct.
>
> "[PROSECUTOR]: Because you found evidence of this infection in the placenta?
>
> "[NELSON]: Correct."

Tr 1023-24.

The state called a neonatologist expert, Dr. Kaempf who testified about the available emergency treatment for newborns:

> "[KAEMPF]: When there is a 911 call for a newborn, then a newborn transport team would go. It is a very sophisticated system in the Tri-County area where if there is a 911 call for a newborn or a child, there a specific emergency mobile transport team. OHSU has one, Legacy Emanuel has one. So we have two complete teams in the city. Those teams are mobile intensive care units. They literally can do almost everything in the field that we do in the hospital.
>
> "[PROSECUTOR]: So what is it equipped with?
>
> "[KAEMPF]: Everything: IV, fluids, warmers, medicines, CPAP devices, ventilators, surfactant.
>
> "[PROSECUTOR]: Who goes in that kind of a transport?
>
> "[KAEMPF]: Specialized trained respiratory therapists and nurses. Occasionally physicians go. But usually expert pediatric neonatal respiratory therapists and nurses go. There is always minimally two to three people on those transport calls.
>
> "[PROSECUTOR]: And had they been called and gone out to Oregon City, however long it took from the call to get there, what would they be doing right away?
>
> "[KAEMPF]: They would assess the baby just the way we would in a hospital: Vital signs, respiratory condition, temperature, blood sugar levels, general state of the baby, physical exam, the clinical circumstances, the history. They can do that within minutes. They can provide all of the respiratory support, the medicines, incubation, incubators, temperature support. Everything that we do in the hospital they can provide within minutes.
>
> "[PROSECUTOR]: So had this call been made and that team arrived, what would prognosis have been?

> "[KAEMPF]: Excellent. Again, his survival chance is at least 99 percent. Our transport teams are superb, both at OHSU and at Legacy Emanuel, and they respond very quickly in the Tri-County area, within minutes to transport calls.
>
> "[PROSECUTOR]: Are you saying that, in your opinion, that had that call been made, he would have lived?
>
> "[KAEMPF]: Yes."

Tr 941-42.

The prosecution's theory of the case was that Dale and Shannon were guilty of manslaughter through two keys acts: (1) a failure to call 911 and/or (2) a failure to do internet research about symptoms in the few minutes after he was brought to them in a distressed state. As the prosecutor stated in opening: "Two months before [the due date], no call to 911. No call to a nurse. No internet research. Nothing was done." Tr 303.

The heart of the case, however, turned on the religious beliefs of the Follows of Christ Church. The concept of faith healing was extensively discussed in voir dire. In his opening statement, the prosecutor squarely asserted that it was because of the religion of the Hickmans that no medical care was provided the infant:

> "[PROSECUTOR]: These are fellow members of the Followers of Christ Church. The Followers of Christ Church does not believe in medical care. The Followers of Christ Church does not train its midwives in medical care. And even if they did, the faith of the

> Followers of Christ Church would not allow the midwives to practice that medicine because they don't believe in it."

Tr. 312.

And then again, later in opening statements, the prosecutor anticipated the testimony of the Hickman's:

> "[PROSECUTOR]: Dale Hickman will admit: We don't believe that we need to go and see physicians. God will keep us in good health if it is his will. * * * He was asked: 'Is it your feeling that it was God's will for your baby to pass away today?' His answer was 'yeah.'"

Tr. 320-21.

Finally, the prosecutor concluded his opening with:

> "[PROSECUTOR]: That the defendants are good people. On this, I want to pause. I am sure that the Hickmans do not like what I am saying right now, but I do sincerely, and Mr. Wentworth joins me, believe that we are not going to prove that they are bad people. I think we will prove that they are law-abiding citizens who *in the name of God* committed a wrongful act. *In the name of God* many losses have happened in our society."

Tr. 323-24 (emphasis added).

Every non-expert fact witness was questioned, at length, about their relationship to the church and their beliefs on medical treatment. The prosecution made a point to draw a connection between Shannon Hickman's genealogy and the founders of the church.

And lest there be any doubt that the prosecution believed this was a case of misguided religious practice, the prosecutor hammered home that point in his final rebuttal closing:

> "[PROSECUTOR]: It is a tragedy, but a tragedy, as in Shakespeare, there is always that character with the fatal flaw, and the fatal flaw here is that those persons who were surrounding who had the power and ability to save his life, believed in a religion that didn't allow them to exercise that care.
>
> "I can go as far as to say that there were people in this trial that I respect for their honesty. I respect Mr. He probably doesn't want me to say that. I'm sure he does not respect me. But I think Mr. spoke the truth when he acknowledged that it would be a reflection on him that would made if he were to seek medical care or his daughter were to seek medical care.
>
> "I respect Dale Hickman when he, from the very beginning of this case, said it was in God's hands; it was God's will that he passed away.
>
> "I respect when she says the same thing. What would you do as a midwife? I would anoint him. It is God's job to heal. When other witnesses said that you can't tell me that a doctor would have saved his life; only God can do that.
>
> "I respect that. But it is wrong. And it is illegal. Religion has taught us all perhaps -- I don't remember all of your individual background -- but my memory is that most of you come from a religious background of some sort. We have all been taught things in our faith that were so engrained to believe that they are irrefutable for us.
>
> "There is no question that if you are born into the Followers of Christ Church, it is a core fundamental belief that you do not seek medical care. Well, we have these examples of eyeglasses and dentists and driver's license, where it is different than that. Well, how do you reconcile that? Well, we know how you reconcile that. When you get

> your teeth cleaned, there is no life-or-death situation. When you get your driver's license, there is no life-and-death situation. When you go to an eye doctor, there is no life at risk in that moment.
>
> "But it is obvious from the testimony of all of these witnesses in this case that there is a moment in this faith when your faith is most tested. That is the moment of life-or-death decisions. Those are different than eyeglasses and teeth. God doesn't care about that apparently, and I'm not mocking that. I think that's obvious. But in these moments where father's have strokes, where your grandma dies and where children are born two months premature, that is when God is most scrutinizing your faith. It is a test of your faith in those moments.
>
> "Everyone that was here was there on September 26 and 27th, to guarantee that no one would flinch, that there would be no disruption in the faith. The reason no one panicked was because they felt no panic. They were at peace with what was going to happen."

Tr 2345-47.

The state charged both Dale and Shannon Hickman with a single count of Manslaughter in the Second Degree, ORS 163.125(a). That statutes provides that "criminal homicide constitutes manslaughter in the second degree when * * * [i]t is committed recklessly." Under ORS 161.085 "Recklessly" is defined as:

> "Recklessly, when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

At trial, Petitioners moved for a judgment of acquittal, arguing that under *Meltebeke v. BOLI* religious conduct could not be sanctioned by the state under a reckless theory. The trial court denied the motion, and defense counsel indicated he would re-raise in the issue in the form of a jury instruction. Petitioners requested the following special jury instruction:

> "In order to find Mr. or Mrs. Hickman guilty of Manslaughter in the Second Degree, the State must prove that Mr. or Mrs. Hickman acted with knowledge that his or her act or failure to act would bring about the death of Knowledge requires an awareness on the part of the accused that the death of would occur as a result of the Mr. or Mrs. Hickman's act or failure to act."

The court denied the instruction, and Petitioners excepted to the denial of the special instruction, and the instructions actually given. Tr. 2374.

After filing the opening brief in the Hickman cases, the Court of Appeals released *State v. Beagley*, another prosecution arising from the faith healing practiced of the Followers of Christ Church. There, the Court of Appeals directly addressed *Meltebeke*, holding:

> "We need not resolve this conundrum here, however, for two reasons. First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct "that may be motivated by one's religious beliefs." Second, *Meltebeke* involves civil sanctions; nothing in that opinion leads us to believe that the holding would apply to

> criminal law. Imposing a sanction for negligently engaging in that conduct does not interfere with protected religious expression.

State v. Beagley, 257 Or App. 220, 226, 305 P3d 147 (2013).

In light of *Beagley*, and after consultation with the Attorney General's Office, both Dale and Shannon Hickman moved to dismiss their other assignments of error before the Court of Appeals, and the state moved for summary affirmance on the *Meltebeke* issue. All parties proceeded in this way after concluding that further litigation before the Court of Appeals was futile in light of *Beagley*, and that final resolution of the legal issue before this Court was the proper course.

ARGUMENT

I. In Meltebeke this court held that Article I, sections 2 & 3 of the Oregon Constitution require that for the state to sanction religious conduct, the state must show that the person knew an unlawful result would occur.

In *Meltebeke v. BOLI*, the employer was an evangelical Christian. 322 Or 132, 132-33, 903 P2d 351 (1995). He believed that he had "a religious duty to tell others, especially non-Christians, about God and sinful conduct." *Id*. As this Court noted, that duty included "'preaching' or 'witnessing' even when 'an individual doesn't want to hear.' It also include[d] denouncing sin by telling others that they are sinners * * *." *Id*.

BOLI found that the employer had engaged in religious discrimination through that preaching. And while this Court agreed that the employer's conduct violated the rule in question, this Court was troubled by the lack of knowledge. As this Court noted:

> "Complainant never informed Employer that he felt offended, harassed, or intimidated by anything that Employer said to him or to anyone else. He did not ask Employer to cease. Employer 'did not know that his comments were unwelcome or offensive to Complainant,' the agency found as fact. Employer did not 'criticize[ ] any religion by name' to Complainant or apply any 'religious slur' to Complainant or otherwise."

Id. at 134-35.

BOLI had expressly rejected an affirmative defense arising from the employer's lack of such knowledge. And before this Court, the state argued against a scienter requirement, asserting that:

> "[An] 'intent' requirement would not preserve more religious freedom for the employer. No evidence suggest that witnessing with intent to create a hostile work environment is any less acceptable to (or compelled by) the employer's religion than witnesses while knowing (or while a reasonable person should know) of the hostility of the work environment. * * *
>
> "Moreover, an 'intent' requirement would reduce the protection against workplace discrimination. It would allow the creation of a religiously hostile work environment so long as the employer did not subjectively intend to create such an environment. That rule would not fully serve the state's purpose of preventing workplace discrimination * * *."

Meltebeke v. BOLI, Pet Br at 26.

However, this Court held that knowledge was an essential component of the analysis:

> "*Smith* contains an additional—if less explicit—requirement: A person against whom a sanction is to be imposed for conduct that constitutes a religious practice must *know* that the conduct causes an effect forbidden by law. In *Smith,* this court regarded it as significant that Smith had received a memorandum from his employer stating its policy against employees' use of drugs and had been told by his employer that ingestion of peyote would result in his termination as a drug counselor. 301 Or at 211–12, 721 P.2d 445. The court noted that Smith knew that he was ingesting peyote and knew that he was violating his employer's work rule (although there is no indication whether he knew that his conduct had a particular legal significance under the unemployment compensation law)."

Meltebeke 322 Or at 151 (emphasis in original).

This Court rejected the state's contention "that state constitutional religious values are adequately protected by using a reasonable person's perspective and reaction to the activity." *Id.* at 152. This Court held that a "should have known" standard insufficiently guaranteed the protections of Article I, sections 2 & 3:

> "BOLI's objective standard imposes liability when an employer *should have known* that its conduct causes a specified forbidden effect, whether or not the employer actually did know. Under the reasoning of *Smith,* more is required. When a person engages in a religious practice, the state may not restrict that person's activity unless it first demonstrates that the person is *consciously aware that the conduct has an effect forbidden by the law that is being enforced*.

Id. (emphasis added).

In requiring scienter to adequately protect the free expression of religion, *Meltebeke* is entirely in line with the philosophical treatment of free expression of speech by other courts. As scholars have noted, "[t]he importance of scienter in First Amendment cases may be traced to Justice Holmes's famous dissent in *Abrams v. United States*, which is the modern well-spring of protection for freedom of expression." Wilson Huhn, *Scienter, Causation, and Harm in Freedom of Expression Analysis: The Right Hand Side of the Constitutional Calculus*, 13 Wm. & Mary Bill Rts. J. 125, 180 (2004). *See also Smith v. People of the State of California*, 361 US 147, 150, 80 S Ct 215, 217, 4 L Ed 2d 205 (1959) (Noting the important function scienter plays in state sanctioning of expression).

As recently as 2003 the United States Supreme Court reiterated the important role of scienter in free expression analysis:

> "The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

Virginia v. Black, 538 US 343, 365, 123 S Ct 1536, 155 L Ed 2d 535 (2003).

Meltebeke's rejection of a "reasonable person" test in favor of subjective knowledge by the person is in keeping with the related treatment by the United States Supreme Court in defining "actual malice" for purposes of free speech litigation:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

St. Amant v. Thompson, 390 US 727, 731, 88 S Ct 1323, 1325, 20 L Ed 2d 262 (1968).

In the context of religious expression, dispensing with a scienter requirement would render religious protections illusory. The religious freedom clauses are a product of 18th and 19th century thinking. At the center of that thinking was that religion was the ultimate reality, and that duty and obligations to god were real and preeminent:

> "For Madison and others, religious obligations were paramount. Defining the proper relation between religion and civil government meant drawing a jurisdictional boundary between two potentially competing authorities, one spiritual and the other political. That line was drawn with the understanding that duty to God, as perceived within the individual conscience, is superior to political, legal, or social obligations. Religion thus posited an ultimate limit on the power of the state. In this sense, the First Amendment was intended to function as a sort of religious "supremacy clause" which presumes

> that God exists and makes claims on human beings and that those claims are first in both time and importance to the claims of the state.

E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 Penn St. L. Rev. 485, 490 (2009).

At the time of the enactment of either the First Amendment, or Article I, sections 2 & 3, the philosophy of the time said that a citizen owed a duty to God first, and country second. Both masters would be served, but God took precedence, and obedience to God would be prohibited only when it clearly conflicted with the state.

Meltebeke's scienter requirement captures that historical intent. The state cannot sanction religion where there is merely a risk to the state's interest. Doing so places the state above the individual dictates of conscience. The framers of both the United States and Oregon Constitutions codified an opposite paradigm. Personal conscience is paramount, and only when it is clear that it conflicts with the state – *when the person knows the result is unlawful* – can the state sanction the act. *Meltebeke's* requirement that a person *know* their religious acts will result in an unlawful result is the only way to properly give effect to the text and history of the religious freedom clauses.

A. Stare decisis compels adherence to *Meltebeke*

In construing the Oregon Constitution's religious freedom clauses, this Court's jurisprudence has evolved. At one time this Court pronounced the state and federal religious guarantees identical. *City of Portland v. Thornton*, 174 Or 508, 512, 149 P2d 972 (1944); *Baer v. City of Bend,* 206 Or 221, 223, 292 P2d 134 (1956); *Jehovah's Witnesses v. Mullen,* 214 Or 281, 291, 330 P2d 5 (1958), *appeal dismissed* 359 US 436, 79 S Ct 940, 3 L Ed 2d 932 (1959).

That changed over time however, with this court beginning to interpret Oregon's religious freedom clauses independently of their federal counterparts. *See e.g. Dickman v. Sch. Dist. No. 62C, Oregon City, Clackamas Cnty.*, 232 Or 238, 246, 366 P2d 533 (1961) ("Resolving the issue under Article I, section 5 as opposed to the First Amendment.") In *Salem College* this Court noted the textual distinction between the state and federal provisions:

> "Article I, sections 2 and 3 do not speak of religion in the singular; nor do they refer to churches. They speak of men's rights to worship "according to the dictates of their own consciences" and the "enjoyment of religious opinions" in the plural.

Salem Coll. & Acad., Inc. v. Employment Div., 298 Or 471, 489, 695 P2d 25, 36 (1985).

Closely following *Salem College*, this court held a year later in *Cooper* that the historical practice of interpreting Article I sections 2 & 3 in lockstep with the First Amendment was methodologically flawed:

> "[I]dentity of 'meaning' or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourteenth Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses."

Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 369, 723 P2d 298 (1986). *See also Employment Div., Dep't of Human Res. v. Rogue Valley Youth for Christ,* 307 Or 490, 498, 770 P2d 588 (1989) (continuing the criticism began in *Cooper*).

In 1992 this Court adopted the now familiar *Priest v. Pearce* method for analysis of state constitutional provisions. 314 Or 411, 415-16, 840 P2d 65 (1992). As this Court has repeatedly emphasized, that methodology "requires an examination of the text of the provision, the history of the provision, and the case law concerning the provision." *Clarke v. Oregon Health Sciences Univ.,* 343 Or 581, 590, 175 P3d 418 (2007).

Meltebeke was this Court's first post-*Pierce* examination of Article I, sections 2 & 3. This Court began by noting that the text of Oregon's provisions "are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with

which rights of conscience are to be protected from governmental interference." *Meltebeke,* 322 Or at 146.

Based on the text alone, it is clear that Article I of the Oregon Constitution establishes a Bill of Rights that provides far more expansive religious protections than the First Amendment. The Oregon Constitution sets forth multiple sections addressing religious freedom:

> **"Section 1. Natural rights inherent in people.** We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.
>
> **Section 2. Freedom of worship.** All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> **Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.
>
> **Section 4. No religious qualification for office.** No religious test shall be required as a qualification for any office of trust or profit.
>
> **Section 5. No money to be appropriated for religion.** No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly.
>
> **Section 6. No religious test for witnesses or jurors.** No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.

> **Section 7. Manner of administering oath or affirmation.** The mode of administering an oath, or affirmation shall be such as may be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered."

This Court then turned to historical context of the constitutional provision, citing with approval some of the historical commentary previously set out in *Salem College*:

> "Religious pluralism is at the historic core of American guarantees of religious freedom. This pluralism was expressed at Oregon's constitutional convention as the main reason for separating the state from churches and religion. The Academy quotes Judge Matthew P. Deady, president of the convention, defending the separation between the state and churches (and the proscription of employing a chaplain, Or. Const., Art. I, § 5) '[b]ecause the country contains persons of all religious denominations, as well as nonbelievers,' and delegate Waymire: 'The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazed fanatic to the unbelieving atheist.' Carey, A History of The Oregon Constitution, 300–301 (1926)"

Salem College, 298 Or at 489.

Meltebeke went further, noting the importance Oregon's founders placed on religious pluralism:

> "From our current vantage point of a society that is religiously diverse and *relatively* unconcerned about that diversity, it is difficult to fully appreciate why Oregon's pioneers approved these broad and adamant protections. However, the history of religious intolerance was fresh in the minds of those who settled Oregon, many of whom themselves represented relatively diverse religious beliefs. Reporting on 300 years of governmental intolerance enforced by criminal laws in England, Judge Stephen summarized:

> 'I may observe in general that all opinions except those which were regarded as strictly correct, were pretty impartially punished. It was as dangerous to believe too much as not to believe enough—to be a Roman Catholic priest as to be a publisher of fanatical pamphlets.' Sir James Fitzjames Stephen, II *History of the Criminal Law of England,* 426 (Macmillan ed 1883).
>
> Under the criminal laws reported by Stephen, a person was fined for *not* attending the 'Established Church' and imprisoned for attending 'conventicles,' or meetings, of any other persuasion. The last of these governmental acts of intolerance were not repealed until 1844, well into Queen Victoria's reign, *id.* at 483, just two years before the Oregon country became territory of the United States by an 1846 treaty between England and the United States. In fact, the law imposing a fine for failing to attend the 'Established Church' was not repealed until 1846. *Ibid."*
>
> *Meltebeke,* 322 Or at 146.

Finally, in accordance with the *Priest* methodology, the *Meltebeke* court examined the case history surrounding Article I, section 2 & 3, paying particular attention to *Salem College* and *Smith v. Employment Div.,* 301 Or 209, 721 P2d 445 (1986), *vacated and remanded on other, unrelated grounds,* 485 US 660, 108 S Ct 1444, 99 L Ed 2d 753 (1988).

Stare decisis serves the "undeniable importance of stability in legal rules and decisions" *Stranahan v. Fred Meyer, Inc.,* 331 Or 38, 53, 11 P3d 228 (2000). And nowhere is that stability more important than "the arena of constitutional rights and responsibilities, because the Oregon Constitution is

the fundamental document of this state and, as such, should be stable and reliable." *Id*.

Although this court will revisit a settled constitutional holding, it will not do so lightly, and only upon a showing that the previous opinion was in error, and "the need to correct past errors * * * outweigh the importance of stability when the application of the court's interpretive analysis in *Priest* demonstrates that the earlier case or cases find little or no support in the text or history of a disputed constitutional provision." *State v. Mills*, 354 Or 350, 370, 312 P3d 515 (2013).

Meltebeke held that knowledge of the unlawful result was a necessary component before the state could sanction religious practices. It has been settled law for nearly two decades. In reaching that holding, *Meltebeke* applied the full *Priest* methodology to Article I, sections 2 & 3 through analysis of both the constitutional text, the historical context, and this Court's prior caselaw. *Meltebeke* did not "go beyond" prior cases but merely reiterated them. It is grounded in the text of the Oregon Constitution, and subsequent caselaw has not eroded its holding. *State v. Savastano*, 354 Or 64, 96, 309 P3d 1083 (2013) ("In our view, however, application of the court's methodology in *Priest* for interpreting constitutional provisions persuades us that *Freeland* went beyond the cases that preceded it, and

Freeland's holding finds little support in the text or history of Article I, section 20. Moreover, the cases that have followed *Freeland* have eroded its precedential value and effectively returned to the more limited and historically grounded principle stated in *Clark.")*.

Even if this Court might not have reached the same result, *Meltebeke* cannot be said to be "wrongly considered or wrongly decided." *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 694, 261 P3d 1 (2011). This Court will not abandon well-reasoned precedent based solely on changing "normative values." *State v. Backstrand*, 354 Or 392, 400, 313 P3d 1084 (2013). *Stare decisis* compels this Court to adhere to *Meltebeke*.

II. *Meltebeke* applies to criminal sanctions

In *Beagley*, the Court of Appeals dismissed *Meltebeke's* applicability, stating:

> "*Meltebeke* involves civil sanctions; nothing in that opinion leads us to believe that the holding would apply to criminal law. Imposing a sanction for negligently engaging in that conduct does not interfere with protected religious expression."

Beagley, 257 Or App at 226.

At the outset, nothing in Article I section 2 or 3 makes any distinction between civil and criminal penalties. In fact, the language is explicitly to the contrary. Article I, section 3 states:

> "*No law* shall in *any case whatever* control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

The constitutional text is clear and explicit on its face. *No law* shall control. And the prohibited degree of control is "*in any case whatever*." Be it civil control, or criminal control, the Constitution makes no distinction. The Court of Appeal's interpretation impermissibly "inserts what has been omitted," while ignoring the plain text before it. *Owens v. Maass*, 323 Or 430, 435, 918 P2d 808 (1996) ("Court may not 'insert what has been omitted' nor 'omit what has been inserted.'").

Second, nothing in the history of Oregon's religious freedom clauses supports the proposition that the framers intended only to protect against civil sanctions for religious conduct, while countenancing criminal sanctions. In fact, history shows precisely the opposite concern.

The history of religious persecution in England shows that criminal penalties were the dominant form of state sanction. Escaping these criminal penalties was a principle reason why colonists departed for America:

> "The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind[17]—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding 'unlawful

> (religious) meetings * * * to the great disturbance and distraction of the good subjects of this kingdom * * *.'[18]

Engel v. Vitale, 370 U.S. 421, 432-33, 82 S. Ct. 1261, 1267-68, 8 L. Ed. 2d 601 (1962).

Colonists did not depart for America because they feared civil censure, or a fine. They fled English persecution that included jails, torture, and execution:

> "The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. * * * In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 8-9, 67 S. Ct. 504, 508, 91 L. Ed. 711 (1947).

And there is nothing in Oregon's history indicating that the framers of Oregon Constitution sought to create a divide between civil and criminal sanctions for religion. As this Court has noted:

> "[T]he history of religious intolerance was fresh in the minds of those who settled Oregon, many of whom themselves represented relatively diverse religious beliefs.
>
> " * * * *
>
> "Under the criminal laws reported by Stephen, a person was fined for *not* attending the "Established Church" and imprisoned for attending

> "conventicles," or meetings, of any other persuasion. The last of these governmental acts of intolerance were not repealed until 1844, well into Queen Victoria's reign, *id.* at 483, just two years before the Oregon country became territory of the United States by an 1846 treaty between England and the United States."

Meltebeke, 322 Or at 146.

Finally, the Court of Appeal's interpretation runs entirely counter to the well-established notion that constitutional protections achieve increasing scrutiny when criminal sanctions are at play. This is seen most commonly in vagueness and over breadth challenges. *See e.g., Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948), ("[W]here a statute imposes criminal penalties, the standard of certainty is higher."); *Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1859, 75 L. Ed. 2d 903 (1983) (Noting higher scrutiny of criminal sanctions). *City of Chicago v. Morales*, 527 U.S. 41, 42, 119 S. Ct. 1849, 1852, 144 L. Ed. 2d 67 (1999) (Noting increased scrutiny due to criminal penalties).

In short, there is no textual, historical, or caselaw support for the Court of Appeal's decision to limit Article I, section 2 & 3 to civil sanctions. Ungrounded on constitutional principles, the holding can only be seen as a disguised attempt to insert a *parens patriae* balancing test into Article I, section 2 & 3 analysis.

The state has made multiple attempts to convince this Court to adopt a *parens patriae* balancing test over the past few decades. The closest example to this case is *State v. Stoneman* where the state argued that the explicit protections of Article I, section 8 must be balanced against the general duty of the state to protect children. This Court soundly rejected that approach:

> "The state first argues that, because the welfare of children is at stake, we should apply a different, and less stringent, rule than the one stated above. In particular, the state urges us to follow federal constitutional jurisprudence by balancing the state's strong interest in protecting children against the relatively insignificant burden that the statute imposes on free expression. * * *
>
> "We think, however, that the balancing approach for which the state contends is so contrary to the principles that have guided this court's jurisprudence respecting freedom of expression issues under Article I, section 8, that it cannot be countenanced. It is axiomatic that, among the various interests that the government of this state seeks to protect and promote, the interests represented by the state constitution are paramount to legislative ones. Consequently, a state legislative interest, no matter how important, cannot trump a state constitutional command. *See Oregonian Publishing Co. v. O'Leary,* 303 Or. 297, 305, 736 P.2d 173 (1987) ("The government cannot avoid a [n unqualified] constitutional command by 'balancing' it against another of its obligations."); *see also Deras v. Myers,* 272 Or. 47, 54 n. 6, 535 P.2d 541 (1975) (suggesting that balancing approach is incompatible with Oregon's freedom of expression guarantee). Article I, section 8, *does* guarantee freedom of expression without qualification—"*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*" (emphasis added)—and is, consequently, incompatible with a balancing approach.

> "We reject the state's suggestion that we abandon the rule that the court traditionally has employed in resolving Article I, section 8, issues, in recognition of the particular importance of the legislative objective at issue here. We must, and will, apply that rule to resolve the free speech issue that is now before us."

State v. Stoneman, 323 Or 536, 542-43, 920 P2d 535 (1996).

This court has repeatedly rejected balancing test approaches when the constitutional text is clear. See e.g. *Libertarian Party of Oregon v. Roberts*, 305 Or. 238, 246, 750 P.2d 1147, 1151 (1988); *City of Portland v. Tidyman*, 306 Or. 174, 185, 759 P.2d 242, 247-48 (1988). In doing so, this Court has noted the inherent problem in such balancing:

> "The difficulty with this balance-of-interests argument is that it assumes that a court can and should attach values to the conflicting interests asserted, aggregate the resulting values and then compare the aggregates to arrive at a decision concerning the constitutionality of the statutes. A court, however, cannot divine the relative importance of interests absent reference to the constitution itself; it is in the constitution that competing interests are balanced. A court's proper function is not to balance interests but to determine what the specific provisions of the constitution require and to apply those requirements to the case before it.

Libertarian Party, 305 Or at 246.

Also, balancing explicit constitutional provisions against a general state interest to protect welfare has no basis in history:

> "Perhaps most notably, there is no evidence of any body of thought in nineteenth century America to the effect that the values involved in the concept of freedom of expression involved a balancing of the interests of the government against the individual's interest. Nineteenth century legal thought, one scholar writes, 'was

> overwhelmingly dominated by categorical thinking.' Morton J. Horwitz, *The Transformation of American Law, 1870–1960* 17 (1992). The modern legal notion of balancing, including the idea of balancing in the area of free speech, did not appear until around 1910."

State v. Ciancanelli, 339 Or 282, 308, n19, 121 P3d 613 (2005).

Much like speech, religious freedom was enacted in absolute terms. And like speech, arguments seeking to balance constitutional protections against governmental welfare interests did not arise until later. For instance, the earliest known prosecution for faith healing did not arise in the United States until 1903. *People v. Pierson*, 176 N.Y. 201, 204, 68 N.E. 243, 244 (1903).

Finally, even scholars who may advocate the value of balancing tests in certain constitutional questions acknowledge that balancing may be inappropriate when the constitutional text is absolute:

> "A balancing approach that considers multiple factors or interests may be appropriate--or even textually mandated--when interpreting constitutional provisions that require comparison and context or that defy precise definition. As noted, both article I, section 9, of the Oregon Constitution and the Fourth Amendment to the U.S. Constitution require the court to decide what searches or seizures are "unreasonable," a word that lends itself to interpretation using balancing and case-by-case determinations.
>
> "* * * *
>
> "In contrast, some constitutional provisions are, in fact, written in absolute terms, and a categorical approach may help illuminate the distinctions drawn in the text. As noted, article I, section 8 of the Oregon Constitution provides that "[n]o law shall be passed

> restraining . . . free expression . . . but every person shall be responsible for the abuse of this right."[182] Relying solely on the text, speech can be categorized either as an "abuse" of the right to free expression, as protected expression, or as expression that would otherwise be protected but that is unprotected because it comes within an historical exception.[183] Similarly, article I, section 10 provides, in part, that "[n]o court shall be secret, but justice shall be administered, openly and without purchase."[184] The text of that provision suggests that courts secretly administering justice violate the constitution, but courts openly administering justice do not. At least when considering the text standing alone, a categorical approach may be a useful--and perhaps accurate-- way to understand a constitutional provision."

Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Alb L Rev 2027, 2057 (2013).

III. The protections of Article I, sections 2 & 3 apply to faith healing

In footnote to its decision, the *Meltebeke* court noted

> "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play * * *."

Meltebeke, 322 Or at 153.

In the remainder of this brief, Petitioners will address whether that practice/act distinction is binding, and if so how it should be defined. Finally, Petitioners will show that under any definition, faith healing will qualify for the *Meltebeke* protections.

A. The distinction between religious practice versus acts motivated by belief is suspect

The distinction between practice and acts motivated by belief is dicta, and *Meltebeke* offers no explanation for the distinction, nor any definition for the categories. As the Court of Appeals noted, the distinction is not helpful:

> "We find it difficult to understand this distinction between religious conduct and religious practice. Perhaps it draws a line between conduct that is directly mandated by a religion and would not be performed except for that mandate—for example, praying, making the sign of the cross, wearing prescribed clothing (a yarmulke)—and ordinary conduct that a person might engage in for reasons unrelated to religion, but, in some circumstances, might engage in as the result of religious teaching—for example, abstaining from alcohol, 'turning the other cheek,' giving to charity, slaughtering chickens. Perhaps, under *Meltebeke,* the former are religious practices and the latter are conduct that 'may be motivated by one's religious beliefs.' *Id.* That formulation, however, is not completely satisfactory. The practice of abstaining from alcohol, for example, is *both* directly mandated by some religions, and it is also frequently observed by nonadherents for nonreligious reasons."

Beagley, 257 Or App at 225-26.

The distinction is certainly not expressed in the text of the Oregon Constitution itself. Article I, section 2 references the dictates of conscience. And section 3 references religious "opinions" and "rights of conscience". Nothing indicates an indication to philosophically divide the protections between practices and acts motivated by belief.

It is worth note that this distinction between practice and acts motivated by belief is not present in the academic study of religion. Academic religion recognizes a distinction between orthopraxis religions, i.e. "correct conduct" versus orthodoxis religions, i.e. "correct belief." Judaism for example is a classic orthopraxis religion, whereas Catholicism is a classic orthodoxy. But in neither instance is the line of distinction bright and absolute. Judaic acts, such as the Shabbat are still tied to underlying religious beliefs in obedience to God. Likewise the Nicean creed is an articulation of orthodoxic belief, but that belief is expressed through ritualized sacraments such as baptism and communion.

Several courts have struggled with defining religious practice, with the attempts quickly bogging down at preliminary hurdles of determining what is "religious" in the first place. *See e.g. Wisconsin v. Yoder*, 406 US 205, 215, 92 S Ct 1526, 32 L Ed 2d 15 (1972) ("[A] determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question * * *."); *State v. Brashear*, 593 P2d 63, 68, 92 NM 622 (1979) ("Definitions of a religious practice or religious conduct are difficult.").

In reviewing this issue, appellate counsel has been unable to find clear definitions of religious practice in the law. One of the few attempts comes

from 42 U.S.C. § 2000e(j) and 29 C.F.R. § 1605.1 which state that "religious practices ... include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."

In *Heller v. EBB Auto Co*., 8 F3d 1433 (9th Cir. 1993), the Ninth Circuit Court of Appeals held that the Jewish conversion ceremony was a religious practice entitled to protection. *Id.* Noting that Title VII protects "more than the observance of Sabbath or practices specifically mandated by an employee's religion," the court stated:

> Title VII's protections clearly encompass Heller's participation in the conversion ceremony. [Heller's Rabbi] testified that the ceremony, and the role of the father and husband in it, are part of the basic teachings of Judaism. By sacrificing his job to attend, Heller demonstrated that he attached the utmost religious significance to the ceremony. Either fact is sufficient to invoke the statute. [Emphasis added.]

Id. at 1438-1439.

In a concurring opinion in *Minnesota v. Tenerelli*, 598 NW2d 668 (1999), the Minnesota Supreme Court examined whether or not the Hu Plig ceremony was a "religious practice," Justice Anderson noted that the key to determining whether or not conduct qualifies as a "religious practice" depends on "the nature of the beliefs of the individual for whom the [activity] is conducted." *Id.* at 675.

The above cases showcase the problem. Few if any courts have been able to craft a workable definition of religious practice that is separate from the belief underlying it. See e.g, *United States v. Lundquist*, 932 F Supp 1237, 1240 (D Or 1996) (Defining practices as central to * * * religious beliefs."). Because religious practices are always built upon belief, creating a workable definition that distinguishes practices from "acts motivated by belief" is slicing incredibly thin.

In light of the logical problems, coupled with of its placement in a footnote in *Meltebeke*, and this Court acknowledging that the issue was never squarely addressed, the distinction between practice and acts motivated by belief need not have a *stare decisis* effect on this court. *Mastriano v. Board of Parole*, 342 Or 684, 692 n 8, 159 P3d 1151 (2007) (When the court's prior construction is mere *dictum,* however, it has no such precedential effect.").

Continued adherence to that distinction does not serve to illuminate the law, but to cloud it. How is the average person supposed to judge whether they are engaged in a protected religious practice versus an unprotected act based on belief? Is it a legal question, a theological question, or an anthropological question? And in practicality, isn't the

distinction merely a convenient euphemism for selecting certain religious actions in preference above others?

B. Defining religious practice

If this Court intends to keep the practice/act distinction set forth in *Meltebeke*, then this court should define what constitutes a religious practice. In crafting such, counsel would suggest that this Court begin with the definition of religion articulated by the United States Supreme Court:

> "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."

Davis v. Beason, 133 US 333, 342, 10 S Ct 299, 300, 33 L Ed 637 (1890) *abrogated by Romer v. Evans*, 517 US 620, 116 S Ct 1620, 134 L Ed 2d 855 (1996).

The notion of a "creator" is highly Judeo-Christian, and might be better termed "the divine." This Court could define a religious practice as "an act of obligation, obedience, or expression of reverence towards the divine." Under that definition, Catholic communion is an act of both obligation and obedience, and also an expression of reverence. It would therefore be a religious practice. In contrast, removing one's child from science class because of a belief in creationism would not normally be a religious practice. While many evangelical sects do not believe in evolution,

counsel is unaware of any sects that view listening to a lecture on evolution as an act of disobedience to god.

Counsel readily acknowledges that the definition offered is not perfect. The false dichotomy of the question compels the unsatisfactory answer. Nevertheless, in whatever manner this Court defines a religious practice, the question for this case is whether faith healing qualifies.

In *Beagley*, the Court of Appeals held:

> "A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct 'that may be motivated by one's religious beliefs.'

Beagley, 257 Or App at 226.

With respect to the Court of Appeals, its opinion falsely sets forth the question. The issue is not whether knowingly allowing a child to die is a religious practice. The question is whether engaging in the act of faith healing is a religious practice, and whether as a religious practice the state must prove that a practitioner knows that an unlawful result will occur. As discussed below, faith healing is a religious practice under any definition.

C. Faith healing has ancient roots and is present throughout western religious tradition

Healing through faith is a widespread religious practice in America, both today, and in the nation's history. As scholars have noted, "Spiritual-

healing practices are so pervasive in the United States in part because they are so deeply rooted in the traditions of many Christian faiths. References to spiritual healing are common in the New Testament, which frequently depicts Jesus and the apostles healing the sick through prayer." Shawn Francis Peters, *When Prayer Fails: Faith Healing, Children, and the Law* (Kindle Locations 293-296). Kindle Edition.

The most direct biblical command for the practice of faith healing is James 5:13-15:

> "Is anyone among you suffering? Let him pray. Is anyone cheerful? Let him sing praise. **14** Is anyone among you sick? Let him call for the elders of the church, and let them pray over him, anointing him with oil in the name of the Lord. **15** And the prayer of faith will save the one who is sick, and the Lord will raise him up. And if he has committed sins, he will be forgiven."

But to truly appreciate the place of faith healing in Christian theology, it must be recognized as a facet of the historical debate over divine determinism. The polar end of the determinism debate, exemplified by the philosophy of fatalism, or hard determinism, created contention in the church as early as the second century. In his response to Celsus, Christian theologian Origin of Alexandria who wrote:

> "If it is decreed that you should recover from your disease, you will recover whether you call in a physician or not; but if it is decreed that you should not recover, you will not recover whether you call in a physician or no. But it is certainly decreed either that you should

> recover, or that you should not recover; and therefore it is in vain that you call in a physician."

Origin, Contra Celsus Book II, Ch 20.

The role of determinism in Christian theology and practice continued throughout Church history, as evidenced by the fifth century debate between Augustine of Hippo and Pelagius and the writings of Thomas Aquinas. But it is perhaps best exemplified by the sixteenth century conflict between John Calvin and Desiderius Erasmus. *See e.g.* Rupp & Watson, Eds., *Luther and Erasmus Free Will and Salvation* (1969).

The Protestantism that grew out of the reformation traditions of Calvin, Luther, and Erasmus, continued this determinism debate. Protestantism struggled with questions about whether the divine will predetermined the universe, and if so, whether that submission to the divine will was a necessary act of religious obedience. This crystallized around the subject of medicine. "Traditionally, Christians had enjoyed a fluid and unsettled relationship with physicians. While some had embraced medicine as a temporal manifestation of God's desire to conquer sickness, others had been more dismissive, perceiving it as a tepid substitute for prayer as a means of physical healing." Shawn Francis Peters, *When Prayer Fails: Faith Healing, Children, and the Law* (Kindle Locations 499-512). Kindle Edition.

American Pentecostal and Holiness movements in particular viewed medicine as antithetical to the teachings of the scriptures and argued that Christians should repudiate it altogether in favor of exclusive reliance on prayer. This rejection fit into a broader pattern of "renunciative behavior" found among many evangelical Protestants. Numbers and Amundsen, Eds., *Caring and Curing*: *Health and Medicine in the Western Religious Traditions* 524-525 (1968). Some Pentecostals turned their backs on medicine as an act of obedience to god in much the same way that they abandoned such other purportedly sinful practices as dancing, drinking, and smoking. *Id*.

Sermons from the mid-Nineteenth century exemplify this view of a renunciation of medicine as necessary submission to divine will:

> "If we would do the most good, we must feel the most passive in the hands of our heavenly Father. We must be like a musical instrument in the hands of a skillful performer. Shall the instrument say to him that performs upon it, Why do you play thus? Or shall the law say to him that speaketh it, Why dost thou use me thus?"

A Discourse by Elder Erastus Snow, Delivered in the Tabernacle, Great Salt Lake City, January 5, 1860.[2]

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[2] Available at: http://jod.mrm.org/7/351

When seen in the context of determinism, faith healing is simply an act of submission to divine will. It is an act of obedience like other acts such as keeping the Sabbath or renouncing the flesh. And as an act of obedience to a higher power it stands at the very heart of what the American colonists sought to protect:

> "[The right of religious conscience] is unalienable . . . because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent, both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign."

James Madison, A Memorial And Remonstrance Against Religious Assessments P 1 (June 20, 1785), reprinted in Philip B. Kurland & Ralph Learner Eds. *The Founders' Constitution*, 82 (1987).

D. Faith healing is recognized as a religious practice in multiple jurisdictions

Multiple appellate courts have assumed, without directly addressing the issue presented in *Meltebeke*, that faith healing constitutes a religious practice. For example, in *In Re Milton*, 29 Ohio St 3d 20, 24 (1987), the Supreme Court of Ohio stated that "[w]hile there may be a variety of

opinions as to the efficacy of spiritual healing through faith, the courts below acknowledged that it is a form of religious belief and practice."

In a suit against the Christian Science Church, the Court of Appeals of Minnesota implicitly accepted that faith healing was a religious practice:

> "* * *[W]e agree that Minnesota statutes include some accommodation to the Christian Science religion, the statutes should not be read as authorizing reliance on prayer as a sole treatment for seriously-ill children under *all* circumstances or (by implication) as proscribing civil lawsuits. The statutes simply indicate the legislature's willingness to tolerate this religious practice—up to a point."

Lundman v. McKown, 530 NW 2d 807, 818 (Minn Ct App 1995).

Similarly, in a case involving the prosecution of a member of the Church of Christ, Scientist, the California Supreme Court found faith healing a religious practice:

> "California's statutory scheme reflects not an endorsement of the efficacy or reasonableness of prayer treatment for children battling life-threatening diseases but rather a willingness to accommodate religious practice when children do not face serious physical harm

Walker v. Superior Court, 47 Cal 3d 112, 138, 763 P2d 852 (1988).

Of interest in *Walker* is that while according faith healing the status of "religious practice" the Church appeared as *amicus* to clarify that faith healing was not a compulsion in the faith, and the California Supreme Court noted the marginal role it played:

> "We note, however, that resort to medicine does not constitute 'sin' for a Christian Scientist (Schneider, *Christian Science and the Law:*

> *Room for Compromise?, supra*, 1 Colum. J.L. & Soc. Probs. at pp. 87-88), does not subject a church member to stigmatization (Talbot, *The Position of the Christian Science Church, supra*, 26 N.E. Med. J. at p. 1642), does not result in divine retribution (Schneider, *op. cit. supra*, at pp. 87-88), and, according to the Church's amicus curiae brief, is not a matter of church compulsion.

Id. at 139.

In contrast, the state in this case made no equivocation in portraying faith healing as a core element of the church:

> "[PROSECUTOR]: There is no question that if you are born into the Followers of Christ Church, it is a core fundamental belief that you do not seek medical care."

Tr 2345.

And the state emphasized that a failure to abide by faith healing carried social stigma within the church, and that the presence of all the people at major event was to ensure adherence to the faith:

> "But it is obvious from the testimony of all of these witnesses in this case that there is a moment in this faith when your faith is most tested. That is the moment of life-or-death decisions. Those are different than eyeglasses and teeth. God doesn't care about that apparently, and I'm not mocking that. I think that's obvious. But in these moments where father's have strokes, where your grandma dies and where children are born two months premature, that is when God is most scrutinizing your faith. It is a test of your faith in those moments.
>
> "Everyone that was here was there on September 26 and 27th, to guarantee that no one would flinch, that there would be no disruption in the faith."

Tr 2346-47.

Various state laws provide certain protections for faith-healing, something one would only expect if faith-healing were recognized as a religious practice. For example, Oklahoma provides a faith healing defense when the child is not at risk of permanent physical damage. 21 Okl. St. Ann. § 852(C) provides that "Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent…in good faith, sections and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination * * *."

Similarly, Indiana's Emergency Management and Disaster Law states that it will not be construed to compel a parent to submit her child for medical treatment if the parent "relies in good faith on spiritual means or prayer to prevent or cure disease or suffering and objects to the treatment in writing." Ind. Code. Ann. § 10-14-23 (West). Thus, multiple states construe faith healing as more than just a mere failure to provide medical care, but rather as a religious practice that substitutes spiritual treatment for medical treatment.

Finally, it is worth noting the incredibly wide array of activities that courts have implicitly recognized as a religious practice. *See, e.g., Edina Community Lutheran Church v. State*, 745 NW2d 194, 209 (2008)

(assuming that the banning of weapons from church property and activities is a religious practice); *State v. Bontrager,* 114 Ohio App 3d 367, 371 (1996) (discussing the Amish practice of refraining from wearing fashionable or brightly colored clothing); *Mitchell County v. Zimmerman,* 810 NW 2d 1, 3-5 (2012) (discussing the Mennonite practice of refusing to drive tractors that do not have steel wheels); *Engstrom v. Kinney System, Inc.,* 661 NYS 2d 610 (NY App Div 1997) (construing an employee's refusal to wear a bow tie as a "general religious practice.") *EEOC v. Abercrombie & Fitch Stores, Inc.* 798 F Supp 2d 1272, 1285 (ND Okla 2011) (noting that "the Muslim practice of wearing a head scarf is neither new nor uncommon."). There is no logical basis to classify the wearing of drab clothing as a religious practice but conclude that faith healing is not.

In sum, faith healing has a basis in biblical tradition. It is part of a theological debate that has existed in Christian tradition for over two thousand years, and is part of a movement that heavily influenced early American Protestantism. It is implicitly recognized as a religious practice in a variety of jurisdictions, and is logically indistinguishable from the array of other acts recognized as religious practices. Under any definition, faith healing is a religious practice.

CONCLUSION

For the foregoing reasons Petitioners could not be convicted of Second Degree Manslaughter under a reckless theory when they were engaged in the religious practice of faith healing. The state was required to prove that they knew the unlawful result would occur. As such, the trial court and the Court of Appeals erred. Petitioners respectfully pray this court reverse the decisions, vacate the convictions, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 12,791 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Corrected Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 15, 2014.

I further certify that I directed the Petitioner's Corrected Brief on the Merits to be served upon Cecil A. Reniche-Smith, attorney for Plaintiff-Respondent, on May 15, 2014, by having the document electronically delivered to:

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