IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Petitioner on Review,

vs.

ROMAN LANCE SUPPAH,

Defendant-Appellant,
Respondent on Review.

Sherman County Circuit Court
Case No. 100016CT

CA A149412

S062648

BRIEF OF *AMICUS CURIAE* ROBERT M. ATKINSON

On Review of the Decision of the Court of Appeals on an appeal from a judgment of the District Court for Sherman County
Honorable Thomas M. Hull, Judge

Opinion Filed: August 6, 2014
Author of Opinion: Duncan, J.
Joined by: Haselton, Chief Judge, and Armstrong, Wollheim, Ortega, Sercombe, Nakamoto, Egan, DeVore, Tookey, Garrett, JJ, and Schuman, SJ
Dissenting: Hadlock, J.

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March, 2015

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STATEMENT OF *AMICUS*' INTEREST

Amicus Curiae Robert M. Atkinson has no personal interest in this case.

PRESERVATION

A majority of the Court of Appeals held that the search at issue in this case violated defendant's constitutional rights under Article I, section 9, of the Oregon Constitution. *State v. Suppah*, 264 Or App 510, 512, __ P3d __ (2014). That claim was preserved. This brief addresses how this court goes about determining the meaning of constitutional provisions, including section 9. That is not preserved. This court may nevertheless consider it because only this court can resolve the issue *amicus* presents. *Stranahan v. Fred Meyer*, 331 Or 38, 47, n6, 11 P3d 228 (2000).

Amicus believes that this court generally is unwilling to consider issues raised only by *amici* and not by the parties. Whether that unwillingness extends to questions of constitutional construction has not, to the best of *amicus*' knowledge, been resolved. How the court construes the constitution, however, appears to be implicit in any case raising a constitutional claim and, again, only this court can resolve those questions.

SUMMARY OF ARGUMENT

Stranahan stated that "it long has been the practice of this court to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it" when construing a disputed provision of the state constitution. 331 Or at 54 (internal quotation marks omitted; bracketed addition by the court). This brief addresses some of what *amicus* views as necessary but undesirable implications of that "originalism." In doing so, however, *amicus* may be beating a dead horse. A brief examination of this court's recent constitutional cases reveals little, if any, reliance on the *Stranahan* formulation. And other cases suggest a more nuanced methodology. *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011) ("[The purpose of historical analysis] is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.") Nonetheless, the court has not disavowed what it stated in *Stranahan* and *amicus* therefore proceeds as if that case continues to state a principle by which this court may choose to abide.

Justice Landau recently showed that there is little support in the text or history of the constitution for *Stranahan*'s statement. *State v. Hemenway*,

353 Or 129, 154, 295 P3d 617, *opinion vacated*, 353 Or 498, 302 P3d 413 (2013) (Landau, J. concurring). Rather than replowing that ground, *amicus* offers a practical caution, pointing to some of the effects that would follow from a principled and consistent application of *Stranahan*'s originalism. Simply put, truly "giving effect" to the intentions of those who enacted the Oregon Constitution would shrink many civil liberties Oregonians currently enjoy and narrow this court's scope for reviewing legislation that might infringe on those liberties. Because *amicus* deems it unlikely that the court will do that, he respectfully submits that the court should drop the pretense that *Stranahan* remains an authoritative precedent.

ARGUMENT

Stranahan's embrace of originalism came, of course, as a surprise to those who had followed the flowering of Oregon constitutional law in the period after Justice Linde "rediscovered" the state charter. Landmark cases decided during that period did not suggest that they were based upon "original intent." *E.g.*, *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982). Justice Landau provides additional examples. *Hemenway*, 353 Or at 155. And *Stranahan*'s citation of a case more than 70 years old at the time to support its assertion, 331 Or at 54 (*citing Jones v. Hoss*, 132 Or 175, 285 P 205 (1930)), suggests that the court, if not largely ignoring the recent,

rapidly evolving direction of Oregon's constitutional law, was, at a minimum, uncomfortable with (or unwilling to explain) how its claim of longstanding adherence to originalism could be reconciled with that progress.

That evolution produced a significant growth of civil liberties and constitutional protections for the citizens of Oregon. To pick the most obvious example, Oregon is today far more protective of expression than it was a few decades ago. *Compare State v. Ciancanelli,* 339 Or 282, 121 P3d 613 (2005) (live sex show is protected expression) *with State v. Jackson*, 224 Or 337, 356 P2d 495 (1960) ("obscene" speech not protected by the Oregon Constitution). But those liberties may not survive a principled and consistent originalism. In briefs to this court, the State of Oregon alluded to some potential conflicts. *E.g.*, State of Oregon's briefs in *Jensen v. Whitlow*, 334 Or 412, 51 P3d 599 (2002), and *Ciancanelli.* And *amicus* has noted some jurisprudential implications of strict historicism in his briefs in *State v. Christian*, 354 Or 22, 307 P3d 429 (2013), and *Couey v. Brown*, S061650. Here, *amicus* briefly notes *some* of originalism's implications for Oregon law and jurisprudence, beginning with two legal issues.

Pertinent to this case, Article I, section 9, of the Oregon Constitution creates a right to be free from unreasonable searches and seizures. Today, that right is secured in criminal cases by the exclusionary rule: evidence

seized in violation of section 9 cannot be introduced in the trial of one whose rights were violated by the search that produced that evidence. But suppression of evidence for violation of search and seizure rights was unknown in Oregon in 1859. This court traced the history of suppression under section 9, demonstrating that it is a twentieth century creation. *State v. Davis*, 295 Or 227, 231, 666 P2d 802 (1983) (*citing*, *inter alia, State v. Laundy,* 103 Or 443, 204 P 958, 206 P 290 (1922) (first case to order suppression for violation of Article I, section 9); and *State v. McDaniel,* 39 Or 161, 65 P 520 (1901) (no right to return or suppression of unlawfully seized property). Simply stated, history demonstrates that the enactors understood, and therefore likely intended, that evidence seized in violation of section 9 would be admitted against the party whose rights were violated. Without new discoveries about Oregon constitutional history, suppression cannot be said to "give effect" to those intentions. To the contrary, it is demonstrably inconsistent with what we can know of them.

Article I, section 20, of the Oregon Constitution guarantees equality of privileges and immunities. But the original constitution contained provisions expressly discriminating against women, African-Americans, "mulatto[es]," and "chinam[e]n." Article I, sections 31 and 35, Article II sections 2 and 6, of the (original) Oregon Constitution. Those provisions

raise obvious questions about whether the enactors intended Article I, section 20 to grant *any* right of equality to citizens in those groups. And while those provisions have been repealed, that can mean no more than that the specific disabilities they imposed—relating, for example, to voting—were removed. To suggest that repeal of those sections was intended to grant full equality under section 20 in addition to removing those specific disabilities would violate this court's construction of the "separate vote" provision of Article XVII, section 1, of the Oregon Constitution by amending more than one constitutional provision in a single measure.

Somewhat more difficult, in *amicus'* view, are some of the jurisprudential issues *Stranahan* appears to create. For example, early decisions upheld the constitutionality of duly enacted laws unless the challenger demonstrated their unconstitutionality beyond reasonable doubt. *See, e.g., Cline v. Newsome,* 10 Or 230, 241 (1882); *King v. City of Portland,* 2 Or 147, 153 (1865). A similar degree of deference flowed from the now discredited—at least in Oregon—"police power" approach to statutory review. The label "police power" is misleading, inasmuch as it suggests something separate from the plenary legislative authority. In practice, however, the invocation of the police power expressed a degree of deference to legislative enactments much like the "reasonable doubt" standard

described above. In terms distinctly similar to those used to this day in the exceedingly deferential "rational basis" test in equal protection cases, this court held that the police power insulated legislative action relating to the health, welfare, peace, morals, or good order of the community from constitutional challenge so long as the court could discern any legitimate basis for the law. *E.g.*, *State v. Bunting*, 71 Or 259, 263, 139 P 731 (1914); *accord Union Fisherman's Co. v. Shoemaker*, 98 Or 659, 675, 193 P 476, 194 P 854 (1921) (under police power analysis, law survived constitutional challenge so long as judiciary found it "reasonable").

That extreme deference to legislative judgment was the standard most likely known to the enactors. Thus, it appears more than reasonable to assert that the enactors intended to incorporate it into the grants of both the legislative and judicial powers. That is, the enactors probably intended to grant the legislature the power to enact virtually any "reasonable" law related to health, welfare, good order, etc., that a rational legislator could endorse, and to grant the judiciary no authority to strike down such a law. Describing the modern court's greater willingness to invalidate statutes on constitutional grounds as "giving effect" to the more limited intentions of the enactors is, therefore, questionable at best.

And as *amicus* noted in his *Christian* and *Couey* briefs, neither "overbreadth" nor "facial" unconstitutionality can be squared with mid-nineteenth century understandings of the judicial power in constitutional adjudication.

But the greatest danger *amicus* perceives is for the court itself. *Amicus* does not believe that this court will unravel the net of constitutional protections Oregonians now enjoy as the result of the judiciary's expansion of those safeguards from their more limited beginnings. Attempting to maintain those protections while preserving the appearance of adhering to *Stranahan*, therefore, must inevitably compromise the court's decision making. The recent failure to cite or apply *Stranahan* according to its terms suggests that the court knows as much.

Amicus's point is straightforward: a *principled* and *consistent* originalist interpretation of the Oregon Constitution is demonstrably incompatible with today's civil liberties and protections from legislative overreaching. Consequently, *amicus* respectfully submits, maintaining those liberties and protections while continuing to give lip-service to *Stranahan* will force the court to dissemble at best and misrepresent at worst.

Moreover, the promise originalism holds out—consistent and objectively based constitutional construction—is deceptive. First, of course,

history, no less than precedent, can be overlooked or twisted to serve a result-oriented end. And, of course, the history of the Oregon Constitution is distinctly ambiguous. All anyone can say with certainty about Article I of the Oregon Constitution is that a small group of white men went into a room with the Indiana Constitution's Bill of Rights and came out with a slightly modified version. Thus, cases purporting to find a specific, identifiable intent tend to be leaning towers of inference based on what people other than the enactors said at other times and in other places. And if our knowledge of the drafters' intentions is sketchy, our understanding of the enactors' intentions—the meanings attributed to the constitutional text by the voters who actually adopted it—is non-existent. Consequently, originalism's promise of a firmly based and objective source for constitutional meaning is illusory: the dangers, however, are real.

CONCLUSION

This court should disavow *Stranahan*'s originalism.

Respectfully submitted this 16 day of March, 2015

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

I certify that (1) this brief complies with the wordcount limitation in ORAP 5.05(2)(b), and (2) the wordcount of this brief (as described in ORAP 5.05(2)(a)) is 1,864 words.

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).

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CERTIFICATE OF FILING AND SERVICE

I certify that on March 16, 2015, I caused to be filed the foregoing **BRIEF OF *AMICUS CURIAE*** with the Appellate Court Administrator by mailing the original, via First Class Mail, postage prepaid, to the following:

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