IN THE SUPREME COURT OF THE STATE OF OREGON

MARQUIS COUEY, an individual, Plaintiff-Appellant, Petitioner on Review, v. KATE BROWN, in her official capacity as Secretary of State for the State of Oregon, Defendant-Respondent, Respondent on Review.	Marion County Circuit Court No. 10C14484 CA A148473 SC S061650

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION OF OREGON

On Review from the Decision of the Court of Appeals on Appeal from a judgment of the Circuit Court for Marion County; Honorable Claudia Burton, Judge

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Author of Opinion: Schuman, P.J.
Concurring Judges: Wollheim, Judge, and Nakamoto, Judge

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I. STATEMENT OF THE CASE

This Court's decision in *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004) mistakenly interpreted Article VII (Amended) of the Oregon Constitution as imposing a jurisdictional bar on deciding moot cases, even those that are capable of repetition, yet likely to evade judicial review. That holding is based on the fundamental misperception that the jurisdiction conferred by Article VII is analogous to the limited jurisdiction conferred on federal courts by the U.S. Constitution. It has no basis in the text or history of either Article VII (Amended) or the original Article VII. It conflicts with the Framers' likely understanding of mootness and judicial power generally, and it runs against the first century of Oregon cases on mootness. It also conflicts with the "prudential" view of justiciability offered by this Court in *Kellas v. Dept. of Corrections*, 341 Or 471, 145 P3d 139 (2006).

The approach to justiciability in *Yancy* also conflicts with a long line of Article I, section 8 cases—from *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) through *State v. Christian*, 354 Or 22, 307 P3d 429 (2013)—that recognize the necessity of overbreadth challenges to restrictions on free expression.

Amicus urges the Court to take this opportunity to correct a past mistake by overruling *Yancy* and abandoning its rigid, limiting view of judicial power.

II. INTEREST OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF OREGON

The American Civil Liberties Union of Oregon ("ACLU") is a statewide nonprofit, nonpartisan organization with more than 10,000 members dedicated to the principles of liberty and equality embodied in the Oregon Constitution, the federal constitution, and our civil rights laws. The ACLU and its members are deeply concerned about restrictions on free expression that, although prohibited by Article I, section 8 of the Oregon Constitution, may evade judicial review because they concern elections or other events that that conclude before an appellate decision can be rendered. The ACLU is concerned when challenges to restrictions on free expression are dismissed as moot, because such cases represent lost opportunities to clarify important rights, not just for the individual litigants, but for society. The dismissal of such cases, sometimes after years of litigation, is especially troubling in view of the many cases that are not brought at all, often because those burdened by restrictions on civil liberties lack the resources to vindicate their rights. The ACLU believes that the outcome of this case will have a substantial impact on the future abilities of Oregon courts to decide important public questions on the merits.

III. QUESTIONS PRESENTED

First Question Presented

Based on of the text of Article VII (Amended) of the Oregon Constitution, the text of original Article VII, the historical record concerning the Framers' intent, and this Court's jurisprudence on justiciability, does the Oregon Constitution deny Oregon courts the power to review cases that are otherwise moot but capable of repetition, yet evading review, as was held in *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004)?

First Proposed Rule of Law

No. Nothing in Article VII (Amended) of the Oregon Constitution limits the power of Oregon's courts of general jurisdiction to adjudicate moot cases, including those capable of repetition, yet evading review. The power to adjudicate moot cases, including those capable of repetition, yet evading review, derives from the common law of England, was among the expansive "power, authority and jurisdiction" granted to the courts of this State under sections 1 and 9 of original Article VII, and remained unchanged by Article VII (Amended).

Second Question Presented

Under Article I, section 8 and Article VII of the Oregon Constitution, does an overbreadth challenge to a statute restricting expression rights of Oregonians become moot based on facts specific to the litigant, although the statute may still have chilling effects on future expression?

Second Proposed Rule of Law

No. An overbreadth challenge to a restriction on expression or assembly becomes moot only when the overbroad statute can no longer have chilling effects, *e.g.*, when the statute has been invalidated, narrowed, amended or repealed.

IV. ARGUMENT ON FIRST QUESTION PRESENTED

A. Analysis of the *Mowry* factors requires reversing *Yancy v. Shatzer.*

Amicus respectfully asks this Court to overrule its holding in *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004). The factors identified in *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 261 P3d 1 (2011), all favor reversal. *Amicus* offers a principled argument herein why *Yancy* erred in holding that Article VII (Amended) imposes strict constitutional limits denying Oregon courts the power to adjudicate moot disputes even in the face of strong prudential concerns (such as questions of great public interest or issues likely to evade review). *Amicus* analyzes Article VII and its historical context as required by *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). *Amicus* also identifies a key misstep that has distorted this Court's justiciability cases, namely the misapprehension that Article VII's role with respect to Oregon's courts of general jurisdiction mirrors the role of Article III in our federal court system that, by design, has limited jurisdiction.

Drawing on scholarship and analysis from other state courts, including material not previously considered by this Court, *amicus* shows that Oregon courts have a discretionary power to adjudicate moot cases, stemming from the common law of England and not impaired by Article VII. *Yancy* erred in this regard, drawing its conception of judicial power almost entirely from sources analyzing the quite different—and limited—powers of Article III courts. As a result, *Yancy* imagined limits on state power with no textual or historical support.

Finally, the false limits imposed by *Yancy* threaten Oregonians' ability to vindicate important rights—including the freedom of expression—in state courts. *Yancy* has also resulted in tension and uncertainty in the case law, as it clashes with this Court's traditional prudential approach to justiciability, as reflected in *Kellas v. Dept. of Corrections*, 341 Or 471, 476, 145 P3d 139 (2006). Because it is less than ten years old and rarely relied upon because of its tension with other cases, *Yancy*'s reversal will not upset any important reliance interests.

B. Examination of original Article VII illuminates the scope of the "judicial power" referenced in Article VII (Amended).

Article VII (Amended) was adopted by referendum in 1910. Construing an amendment adopted by referendum begins with examining the text and context, and case law interpreting the provision. *See Stranahan v. Fred Meyer, Inc*. 331 Or 38, 56-61, 11 P3d 228 (2000). The original version of Article VII

is an essential part of the context of Article VII (Amended). *See id.* at 60 (examining prior version of provision); *Ecumenical Ministries of v. Oregon State Lottery Comm'n*, 318 Or 551, 871 P2d 106 (1994) (examining original version of constitutional provision as part of textual analysis); *cf. State v. Webb*, 324 Or 380, 927 P2d 79 (1996) (prior versions of statutes are contextual clues for interpreting current versions). Original Article VII is particularly important here, where there is no indication the public intended to diminish the power of the courts. *Cf. State v. Campbell*, 265 Or 82, 506 P2d 163 (1973) (interpreting Article IV, § 1 by reference to prior version absent intent to diminish referendum power of the people). Original Article VII analyzed under *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992), which requires examining: (1) the text in its context; (2) the historical circumstances of the adoption of the provision; and (3) the case law construing it. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). Here, the original Article VII and pre-1910 cases concerning mootness show the scope of judicial power under current Article VII (Amended).

1. Analysis of the text of Article VII and Article VII (Amended)

As originally drafted in 1857, Article VII, § 1 provides:

> "**Section 1. Courts in which judicial power vested.** The Judicial power of the State shall be vested in a Suprume [sic] Court, Circuits [sic] Courts, and County Courts, which shall be Courts of Record having general jurisdiction, to be defined, limited, and regulated by law in accordance with this

> Constitution.– Justices of the Peace may also be invested with limited Judicial powers, and Municipal Courts may be created to administer the regulations of incorporated towns, and cities.–"

Original Article VII was one of the few original articles drafted at the Oregon Constitutional Convention. *See* Claudia Burton, *A Legislative History of the Oregon Constitution of 1857: Part II*, 39 Willamette L Rev 245, 393-94 (2003). Despite extensive debate, Article VII hardly changed from the original draft. *See id.* at 395. None of the changes pertained to mootness or the scope of judicial power. Whereas the record of the drafting of Article III of the U.S. Constitution reveals a focus on imposing limits on federal judicial power, the records of the Oregon Constitutional Convention gives no indication that the drafters intended to impose similar limits on Oregon's state courts. *See id.* at 390-456.

Article VII, section 1, has three notable features with respect to mootness and judicial power. First, while judicial power is clearly vested in the courts, the text does not define or otherwise limit it. Second, there is no language limiting jurisdiction to "cases" or "controversies," nor similar federal-style constitutional limits on the power or jurisdiction of Oregon's courts. Third, the text grants the courts "general jurisdiction," which, as explained *infra*, stands in contrast to federal courts. *Id.*

The phrase judicial power also appears in original Article VII, section 9:

> "**Section 9. Jurisdiction of circuit courts**. All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts, Officers, and tribunals.–"

Section 9 (which is not mentioned in *Yancy*) provides additional context for the phrase "judicial power" in section 1, and evinces an intent to infuse Oregon courts with all possible power, authority, and jurisdiction. The determination to infuse Oregon courts with all possible jurisdiction (at least by default) stands in contrast to the careful limits imposed by Article III on federal courts.

The current version of Article VII (Amended) was adopted by referendum in 1910. The amended provision reduced the number of sections from twenty-one to nine, eliminating the original Article VII, § 9. The revised Article VII, § 1 read as follows:

> "Section 1. Courts; election of judges; term of office; compensation. The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law. The judges of the supreme and other courts shall be elected by the legal voters of the state or of their respective districts for a term of six years, and shall receive such compensation as may be provided by law, which compensation shall not be diminished during the term for which they are elected."

Nothing in this amended text suggests an intent to lessen, or even alter, the scope of "judicial power."

Examination of the official voter pamphlet confirms that the voters did not intend to change the scope of judicial power that then existed. *See Stranahan*, 331 Or at 65 (examining voters' pamphlet to discern voters intent). The description in the pamphlet (and on the ballot),[1] while noting an increase in this Court's jurisdiction, indicated no changes to the scope of judicial power:

> "For amendment to the Constitution of the State of Oregon, providing for verdict by three-fourths of jury in civil cases; authorizing grand juries to be summoned separate from the trial jury, permitting change of judicial by statute, prohibiting re-trial where any evidence to support verdict; providing for affirmance of judgment on appeal notwithstanding error committed in lower court, directing Supreme Court to enter such judgment as should have been entered in a lower court; fixing terms of Supreme Court; providing judges .of all Courts be elected for six years, and increasing jurisdiction of Supreme Court."

Frank W. Benson, Secretary of State, A Pamphlet Containing a Copy of All Measures "Referred to the People by the Legislative Assembly," "Referendum Ordered by Petition of the People," and "Proposed by Initiative Petition" (1910), reproduced as App-14. The only argument concerning Article VII touted accountability to the people, avoidance of hung juries by allowing three-fourths of a jury to render a civil verdict. App-12 - App-13.

Therefore, the voters that approved Article VII (Amended) would have intended no changes in the scope of the power of Oregon courts. Accordingly,

[1] *See* App-2.

that phrase "judicial power" in Article VII (Amended) should be construed as a voter in 1910 would have understood it. That understanding would be informed by the phrases' use sections 1 and 9 of original Article VII. It would also have been informed by the power exercised by the courts between 1859 and 1910, including cases concerning mootness and justiciability that evinced the common judicial understanding of judicial power. As noted in the special concurrence to *Yancy*, it is reasonable to suggest that

> "the voters who adopted Article VII (Amended) intended the phrase 'judicial power' to have the same meaning that it had in 1857 and that that meaning would be the one that, by 1910, many state and federal courts recognized as containing from inception the authority that is in question here. * * * [B]y 1910, state and federal courts did not think that the "judicial power" limited their authority to decide moot cases that raised issues capable of repetition, yet evading review."

Yancy, 337 Or at 370 (Balmer, J., specially concurring).

Therefore, in *amicus*' view, both the historical circumstances of 1857 and 1910 are relevant.

2. Historical Circumstances of Article VII's Adoption, and the 1910 Amendment

a. The Framers modeled Oregon courts after other state courts of general jurisdiction, not federal courts of limited jurisdiction.

Oregon courts were intended to be equal in power to other state courts of general jurisdiction, many of which pre-dated the U.S. Constitution. Such courts have far broader powers than the limited federal courts. It is a "well-

established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 US 1, 15, 96 S Ct 2413 (1976). This difference in nature has practical consequences on judicial power. As one commentator has described:

> "Expressed in such arcane terms as standing, mootness, and ripeness, justiciability doctrine affords federal judges opportunities for what Justice Brandeis called "not doing," on the view that federal courts "may exercise power only 'in the last resort, and as a necessity.'" Article III courts thus, for example, do not provide advisory opinions, do not resolve generalized complaints of taxpayers," do not decide moot disputes, and do not hear political questions. * * * State courts, however, are not bound by Article III, and judicial practice in some states differs—and differs radically—from the federal model. *Some state courts* issue advisory opinions, grant standing to taxpayers challenging misuse of public funds, and *decide important public questions even when federal courts would consider the disputes moot*."

Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv L Rev 1833 (2001) (emphases added). Justice Linde also commented on this key difference:

> "Cases" or "controversies," the words that are cited as restricting the jurisdiction of federal courts," do not appear in most state judicial articles. Some states have authorized advisory opinions by statute. Extensive scholarship shows that, historically, American state courts and their common law and chancery predecessors were not so narrowly confined."

Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Difference*!, 47 Wm Mary L Rev 1273, 1283 (2004-2005).[2]

The concept of judicial power in state courts is independent of, and predates, the U.S. Constitution. *See, e.g., Walkinshaw v. O'Brien*, 130 Conn 122, 127, 32 A2d 547 (1943) (noting establishment of state court of general jurisdiction in 1711). In 1911, the Massachusetts Supreme Judicial Court noted the broad powers of the state courts:

> "Our system of government has created the executive, the legislative and the judicial, as three independent and co-ordinate departments * * * The courts of general jurisdiction under such a Constitution have the inherent power to do whatever may be done under the general principles of jurisprudence to insure to the citizen a fair trial, whenever his life, liberty, property or character is at stake. *The possession of such power involves its exercise as a duty whenever public or private interests require*."

Crocker v. Justices of Superior Court, 208 Mass 162, 94 NE 369, 377 (1911) (emphasis added) (quoted approvingly in *State ex rel Ricco v. Biggs*, 198 Or 413, 430 255 P2d 1055 (1953)). The broad powers of state courts reflect the powers exercised by the common law courts of England.

The ratification of the U.S. Constitution did not reduce the powers of state courts to those of federal Article III courts. Instead, the U.S. Constitution

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[2] *See also* Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale LJ 227, 248 (1972) ("There are hardly any state analogues to the self-imposed constraints on justiciability, 'political questions,' and the like that occupy students of the Supreme Court.").

was intended to preserve the sovereignty of the states and the power of state courts. *See* Alexander Hamilton, Federalist No. 82, at 493 (opining that under the U.S. Constitution, "State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal.").

The contrast between the powers of state and federal courts was long-established by 1857. *See, e.g.*, *Mallow v. Hinde*, 25 US 193 (1827) (noting that "Courts of the United States" are not "[c]ourts of general jurisdiction," and have a "peculiar structure of…limited jurisdiction over persons."). *See Aldinger*, 427 US at 15. Therefore, the Framers of Article VII in 1857 would not have understood state judicial power as merely echoing the power of the federal courts (which were deliberately limited in comparison to those of the states). They would have naturally intended the after state courts of general jurisdiction, as stated in original Article VII, section 1, and to have been vested with all the powers that other state courts exercised, as indicated in original Article VII, section 9.

Accordingly, looking to the historically unique, limited jurisdiction courts created by Article III to understand the scope of state judicial power is a fundamental error. This Court must instead look at how state courts understood and exercised their powers, including with respect to mootness.

b. 19th-century state courts treated mootness as prudential doctrine, reflecting judicial restraint, not constitutional limits on judicial powers.

From the 19th century, during which original Article VII was drafted, through the early years of the twentieth century, courts treated mootness not as a limit on power or authority, but as a matter of prudence and discretion. As explained by one commentator:

> "*[N]ineteenth century decisions generally do not indicate that the court lacked authority to hear moot cases.* Rather, courts dismissed moot cases using language suggesting an exercise of discretion. The explanations given for declining to hear moot cases tended to focus not on constitutional text, but on instrumental concerns, such as conservation of judicial resources, preservation of judicial authority, the desire to ensure that issues are litigated by properly motivated parties, and the desire to prevent collusive cases.
>
> "By the same token, when federal courts in the nineteenth and early twentieth centuries decided to hear apparently moot cases, they also justified those decisions based on practical considerations. Thus, courts articulated both a general rule that moot cases should be dismissed and a series of exceptions to that general rule to permit consideration of moot cases where compelling reasons existed to hear them. These exceptions, like the rule itself, were justified based on practical considerations of judicial economy, avoidance of party gamesmanship, and *the desirability of resolving issues that were both substantively important and likely to recur*."

Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo Wash L Rev 562 (2009), at 569-570.

c. Even in federal courts, mootness was not considered a jurisdictional limit in either 1857 or 1910.

Federal courts have long applied the "capable of repetition, yet evading review" exception to mootness. While the exception is often traced to *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 US 498, 31 S Ct 279 (1911), the general principle that mootness allowed for exceptions was recognized earlier. Indeed, the roots of *Southern Pacific* were planted a decade earlier in *U.S. v. Trans-Missouri Freight Ass'n*, 166 US 290, 305, 17 S Ct 540 (1897). There, freight carriers sought dismissal of the case as moot, noting that they had dissolved the price-fixing association that was the subject of the lawsuit. *Id.* at 305. Refusing to dismiss, the Supreme Court cited the principal that private parties could not preclude adjudication where the rights of the public were also at stake:

> "Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. *Here, however, there has been no extinguishment of the rights (whatever they are) of the public* * * *. The defendants cannot foreclose those rights, nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of congress, by any such action as has been taken in this case."

Id. at 309.

A Ninth Circuit case, decided just prior to adoption of Article VII (Amended) in 1910, also suggests that the federal doctrine of mootness was understood as prudential, at least in part. *See Boise City Irr. & Land Co. v. Clark*, 131 F. 415, 418-19 (9th Cir 1904) ("It is contended on the part of the appellees that, as the period for which the rate in question was fixed has expired, the case has become but little, if any, more than a moot case; but the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.").

3. Oregon cases interpreting the original Article VII generally espouse a prudential view of mootness and justiciability.

There appear to be no pre-1910 Oregon cases that explicitly analyze the text of original Article VII. However, cases decided not long after the Constitutional Convention, namely *Burnett v. Douglas County*, 4 Or 388 (1873) and *David v. Portland Water Committee*, 14 Or 98, 104–05, 12 P 174 (1886), indicate that Oregon shared the 19th century understanding of mootness. Although *Yancy* touches on both cases, it misapprehends their significance. *Yancy*'s model for understanding judicial power was the limited jurisdiction of Article III courts. The majority did not seem to understand the fundamental difference between Article III courts having limited jurisdiction and Oregon

state courts vested with general jurisdiction. The *Yancy* decision fails to recognize that those Oregon cases evinced the principle that mootness is a *prudential* limitation—one that is within the sound discretion of courts to set aside in the face of prudential concerns.

David recognized that dismissal for mootness was inappropriate when a case presented issues of public importance. So did 19th-century decisions in many jurisdictions.[3] *Yancy* states that *David* "offered no substantial premise for

[3] Many state court cases from the late 19th century and the first decade of the 20th reveal courts exercising discretion to decide moot cases for prudential reasons typically involving, as in *David*, the importance of the questions presented. *See, e.g.*, *People ex rel. Press Pub. Co. v. Martin*, 142 NY 228, 234, 36 NE 885, 886 (NY1894) ("[W]hile the time has long since passed when any decision in this matter can have any practical, efficient operation, we will, in view of the public importance of the questions involved, overlook that circumstance, and proceed to the determination of the matter upon its merits, upon the facts as they appear in this record."); *In Re Madden*, 148 NY 136, 42 NE 534 (1895) ("The election having been held, the decision of the question is of no practical importance in the particular case. But the courts in the first and second departments have reached opposite conclusions upon the question, and a final decision seems to be required to prevent embarrassment in the future from conflicting judicial decisions."); *In re Cuddeback*, 3 AD 103, 39 NYS 388 (1896) ("It is urged that because the election has passed, this appeal should not be decided on the merits, but should be dismissed upon the ground that the question is no longer a practical one. * * * Whether courts will decide a case involving a question which has ceased to be of practical interest to the parties seems to depend upon whether the question involved is one of public importance."); *People ex rel. Spire v. Gen. Committee of Republican Party of Erie* County, 25 AD 339, 49 NYS 723 (NYAD 4 Dept. 1898) ("'Notwithstanding the fact that an election has been held, and a decision of the question involved cannot affect the result of that election, yet, where the point at issue is one of public interest, affecting the rights of all the electors of the state, the courts will determine it.' Following the doctrine there laid down, it seems that we ought not, in this case, to dismiss the appeal, because the question here involved is as much a matter of public interest as the question

its decision to decide a matter other than its importance," and faults the decision as therefore "of little assistance in determining the parameters of judicial power." But *David*'s silence on the limits of judicial power in a discussion of mootness is actually of great assistance. That silence is strong evidence that, less than thirty years after Article VII was drafted, this Court viewed mootness as a purely prudential doctrine in which the importance of issues was a determinative factor. Mootness was not viewed as a fixed limit on judicial power.[4]

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involved in the case from which the quotation has been made."); *State ex rel. Keltgen v. McMahon*, 94 Minn 532, 532, 103 NW 1133, 1133 (1905) ("Upon this appeal it appeared that the term of office in controversy had expired, so that the only question before this court concerned the correctness of the ruling of the trial court, in so far as the same affects the question of costs."); *Cuyahoga County Department State Sup'rs v. State ex rel. Green*, 1908 WL 568, 2 (Ohio Cir Ct 1908) ("The first two grounds suggest that any order this court might make now would be a *brutum fulmen*; that naught remains but an academic question. We do not think the point well taken. A proper interpretation of the election laws is of so much importance to all our citizens that the courts must answer questions with regard thereto when submitted to them, notwithstanding the fact that the rights of individuals are usually determined in such matters before the reviewing courts can pass upon them, by the holding of an election."); *People ex rel. Hummel v. Reardon*, 186 NY 164, 172, 78 NE 860, 862 (NY 1906) ("The fact has not been overlooked that a somewhat lengthy discussion has been given to a question which so far as this case is concerned has become academic. We have been assured, however, and readily have been able to see that the question here presented is an important one and liable to arise with much frequency, and under such circumstances it has been deemed wise to express our views in the case now presented for guidance in the future.").

[4] Even the language of cases dismissing actions for mootness indicates that such decisions were discretionary. *See State ex rel. Martin v. Sloan*, 1873 WL 2236, 1 (NC 1873) ("[T]he Wilmington, Charlotte and Rutherford Railroad having been sold, neither party has any interest in the case except as to cost. When that

The only early Oregon case that *Yancy* cites as discussing mootness in terms of judicial power, *Burnett*, also suggests a prudential view of mootness. The question before this Court in *Burnett* was simply whether the Circuit Court (which then had appellate jurisdiction and supervisory power over the County Courts) had erred in refusing a writ of review concerning an order regarding the redemption of certain warrants that were indorsed 'Special Appropriation,' before the County Court determined that no special tax was needed. *Burnett*, 4 Or at 391. This Court noted that the order "did not and cannot affect any particular person or class of persons, but operated and will continue to operate in a very general manner upon the entire body of the tax-payers of the county." It then stated the principle that, [i]n all cases where the proceeding sought to be reviewed involves a matter of *public interest* affecting a great number of persons, the allowance of the writ is in the *sound discretion of the court*," *id*. at 392 (emphasis added), and on that basis affirmed the Circuit Court's denial of the writ of review (but did not invalidate the issuance of the order).

To the extent that *Burnett* concerns mootness at all, it supports the view that mootness is a matter of discretion rather than limited judicial power. The discussion of discretion implies that, despite the fact that there were no "proper

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is the case we are *not in the habit* of deciding the case.") (emphasis added); *State v. Boyd*, 172 Ind 196, 87 NE 140 (1909) (suggesting discretion to decide a question of public interest, by explaining that "[t]he act which gave rise to this controversy . . . having been repealed, we are not warranted in assuming that the abstract question presented by this appeal is of general interest to the public.").

parties who [were] particularly affected by the order," but only a public interest shared by all taxpayers, the Circuit Court had discretion to accept the writ of review in its "sound discretion," and would have been affirmed if it had.[5]

In *Jacksonville School Dist. v. Crowell*, 33 Or 11, 52 P 693 (1898), this Court dismissed a non-adverse case, stating that such a case cannot be adjudicated—in the absence of statutory authority. The adversity issue in *Crowell* is one of standing or ripeness, not mootness, because it concerns the initiation of the lawsuit.[6] *Crowell* is consistent with this Court's holding in *Kellas* that the Legislative Assembly can confer standing through enactment of a statute. *See Crowell*, 33 Or at 13 ("The rule is general that an appellate court cannot, *without express statutory authority*, assume jurisdiction of, or express opinions which will be of any binding force upon, a disputed question of law,

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[5] There is yet another indication that *Burnett* does not stand for the proposition for which *Yancy* cites it. The author of this Court's opinion in *David* was William Wallace Thayer, who served as Governor of this state from 1878 to 1882 and went on to serve as Chief Justice from 1884-1890. Thayer also represented the appellant in *Burnett*. Since he was obviously aware of *Burnett* when later deciding *David*, he clearly did not believe that *Burnett* stood for the proposition that deciding moot cases went beyond the power of the court.

[6] The requirement that parties have adverse interests to initiate litigation is distinct from mootness, and has a long history. *See Lord v. Veazie*, 49 US (8 How) 251, 255 (1850) (dismissing case upon finding that there was "no real conflict," and that "plaintiff and defendant have the same interest * * * in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be"). The adversity requirement may also be of a prudential, rather than jurisdictional, nature. *See* Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo Wash L Rev 562, 568 n 21 (2009) (so arguing).

unless it is involved in a substantial controversy existing between adverse parties, and brought before such court for review in the manner prescribed by law.") (emphasis added).

A later Oregon case offers superficial support for a jurisdictional view of mootness. In *State ex rel. Lord v. Grand Jury of Multnomah County*, 37 Or 542, 543 (1900), this court stated:

> "An appellate court, like every other judicial tribunal, is empowered to decide actual controversies only, and not to give opinions upon mooted questions, or mere abstract propositions of law. The rule is general, therefore, that when an event occurs pending an appeal which renders it impossible for the court to grant the relief sought, it will not proceed to final judgment, but will dismiss the appeal."

37 Or at 543. However, *Lord* has scant value when interpreting the Framers' intent as to Article VII, for three reasons. First, the language above is drawn from a federal case concerning the power of the *federal* (Article III) courts. *See California v. San Pablo & T.R. Co.*, 149 US 308, 13 S Ct 876 (1893) .[7] Second, while *Lord* states that the "rule is general" that such cases will be dismissed, general rules often have exceptions. *Lord* does not repudiate the exceptions to that general rule previously set forth in *Burnett* and *David*. Third, although

[7] The language in the case cited by *Lord* may reflect a fault in commentary that persists today. "Although justiciability doctrine derives from the 'case or controversy' requirement of Article III, commentators nevertheless tend to discuss this conception of the judicial function in universal or essential terms, as if Article III courts represent the institutional possibilities of courts more generally." Hershkoff, *supra*, 114 Harv L Rev at 1836.

Lord does not identify the source of the "general rule," it certainly does not state that it is jurisdictional under Article VII (which it does not even mention).[8]

4. Although *Perry* was consistent with the prudential view of mootness, subsequent cases, culminating in *Yancy*, mistakenly constrained judicial power by drawing from cases analyzing the limited jurisdiction of Article III courts.

a. *Perry* reflected the historical conception that mootness is a prudential doctrine, based on judicial restraint and efficiency, not jurisdictional limits.

In *Perry v. Oregon Liquor Commission*, 180 Or 495, 177 P2d 406 (1947), this Court recognized the following exception to mootness:

> "Where the question is one involving the public welfare, and there is a likelihood of it being raised again in the future, a court in the exercise of its discretion may decide it for the guidance of an official administrative agency."

Perry, 180 Or at 498–99. *Perry* was consistent with the historical conception of mootness as a prudential doctrine, based on judicial restraint and efficiency, not jurisdictional limits. *Perry* cited several state cases setting forth numerous exceptions to mootness based on prudential or equitable concerns, *e.g.*, when mootness was caused by a voluntary act of the appellee. Perry's citation to *Southern Pacific* is consistent with that approach; nowhere in *Southern Pacific* does it state that mootness is jurisdictional, even for the federal courts.

[8] *Moores v. Moores*, 36 Or 261, 59 Pac 327 (1899), an additional Oregon case cited in *Lord*, simply stands for the proposition that disputes over costs, where litigation is otherwise resolved, do not bar dismissal of the action as moot, and has no particular bearing on whether mootness is jurisdictional or prudential.

It was not until well after *Perry* was decided that a jurisdictional view of mootness emerged from the Article III courts, beginning with dicta in a footnote in *Liner v. Jafco, Inc.*, 375 US 301, 306 n 3, 84 S Ct 391 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.").[9] Thus "[a]fter well over a century of consistent application as a discretionary doctrine, mootness was abruptly transfigured, in early January 1964, into a constitutionally mandated jurisdictional doctrine." Hall, *supra*, 77 Geo Wash L Rev at 571. If Article III is the source of an absolute jurisdictional bar to federal courts deciding moot cases, it is astonishing that this limitation went unnoticed for so long.

The holding of *Perry* was applied in at least seven subsequent cases. *See Yancy*, at 366 n 6 (Balmer, J., specially concurring) (listing cases). During this time, the exception to mootness for cases that are "capable of repetition, yet evading review" remained well-established in federal jurisprudence. *See Yancy*, 337 Or at 359-60. But even as the Court of Appeals continued to apply *Perry*,

[9] That statement is dicta, because *Liner* held that the case was not moot. *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harvard L Rev 603 (1992) ("The Supreme Court's first mention of Article III in connection with mootness came in a 1964 case found not to be moot at all."). The only authorities cited for the statement were law review materials, one of which was described by one commentator as "lightly-reasoned." *Liner*, 306 n 3; Hall, *supra*, 77 Geo Wash L Rev at 572.

this Court began a move towards understanding justiciability generally in terms of limits on constitutional authority, as stated in *Liner*.

b. *Brown v. Oregon State Bar* cloaked formerly prudential mootness in the language of constitutional limits, erroneously treating Article VII (Amended) as the analogue of federal Article III.

Brown v. Oregon State Bar, 293 Or 446, 449, 648 P2d 1289 (1982), was cited by *Yancy* for the general rule as to when a justiciable controversy exists. In *Brown*, this Court contrasted justiciable controversies and advisory opinions by stating that "a justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one." 293 Or at 449. But the Oregon case that *Brown* cited for that proposition, *Cummings Constr. v. School Distr. No. 9*, 242 Or 106, 408 P2d 80 (1965), had actually analyzed federal cases to define justiciability. Compounding that confusion of state and federal justiciability doctrines, *Brown* concluded that it "cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions." *Id.* at 449, citing *Oregon Creamery. Mfrs. Ass'n. v. White*, 159 Or 99, 109, 78 P2d 572, 576 (1938). *Oregon Creamery* concerned an issue of standing, not mootness, and includes no analysis of the Oregon Constitution whatsoever, never mentioning Article VII. *See* 159 Or at 107.

c. *Barcik* repudiated *Perry* but left the precise nature of mootness in relation to Article VII unclear.

At the time it decided *Barcik v. Kubiaczyk*, 321 Or 174, 895 P2d 765 (1995), this Court had significantly veered away from a century of case law construing mootness as prudential in nature. *Barcik* concerned a high-school student seeking both prospective and retrospective relief from school rules subjecting unofficial student newspapers to censorship. This Court determined that federal law on mootness should determine whether the student's claims under § 1983 were justiciable, and that state law on mootness applied to the student's state law claims. The court held that claims seeking *prospective* relief enjoining the school from enforcing the rules were nonjusticiable, reasoning that as a graduating Senior, "[he] cannot be affected by a declaration that future enforcement of the regulations is unconstitutional." *Barcik v. Kubiaczyk*, 321 Or at 192. In response to the student's arguments that the case fit the exception recognized in *Perry*, the court asserted that it had "repudiated" the doctrine in earlier cases. *Barcik* revisited cases where the Court had, in its discretion, declined to make exceptions for mootness, and reinterpreted those cases as standing for the proposition that the court had no ability to make such exceptions. *Barcik* did not expressly assert that the source of these limitations was a limited grant of "judicial power" under Article VII, but rooted the rejection of *Perry* in "regard for the constitution of this state," and its separation

of powers, without explaining how deciding a moot case could be construed as exercise of either the executive or legislative power. *Barcik*, at 189.

Barcik might have come to the same result on prudential grounds, and without rejecting *Perry*. The Court found that the matter was not capable of repetition, yet evading review, and neither plaintiff clearly raised the public interest. It appears that *Barcik* did not, however, seek to vindicate the rights of others. Instead, he sought prospective relief only for himself. Although he could have raised overbreadth claims with respect to the rule, or raise the issue of an important public interest in eliminating the rule, there is no indication he did. In those circumstances, the Court was certainly justified in not exercising discretion to hear a moot case. The principles *Barcik* announced are problematic, in view of the text, context, history, and case law surrounding mootness. Yet the result it reached—dismissing the case—is not. In *amicus*' view, *Barcik*'s comments about Perry are ultimately dicta, and, accordingly it need not be overruled.

5. *Yancy* identified mootness as a fixed constitutional limit, at odds with the Framers' intent in crafting Article VII and the context in which Article VII and Article VII (Amended) were created.

In *Yancy*, this Court held that the judicial power of the state, vested in the courts by Article VII (Amended) of the Oregon Constitution "does not extend to moot cases that are 'capable of repetition, yet evading review.'" *Yancy*, 337 Or at 363.

The decision in *Yancy* reflected the Court's embrace of the view that it had edged closer to in *Oregon Creamery*, *Brown*, and *Barcik*, in which all limits on justiciability of cases, including mootness, standing, and ripeness, are hard constitutional limits on the "judicial power" granted to Oregon courts under Article VII (Amended) of the Oregon Constitution. That view of justiciability extended to standing and ripeness as well, which *Yancy* characterized, along with mootness, as part of a "constellation of related issues" concerning justiciability. *See Yancy*, 337 Or at 349. *See also Brumnett v. PSRB*, 315 Or 402, 848 P2d 1194 1195 (1993) ("Determining mootness is one part of the broader question of whether a justiciable controversy exists.").

This Court's decision in *Yancy* was overtly based on the (mistaken) supposition that Article VII in the Oregon Constitution is analogous to Article III in the federal constitution. *Yancy* speculated that "the framers * * * [of the original Article VII] and those who later adopted that constitution, are most likely to have understood the grant of judicial power in the restrained sense espoused in the early [U.S.] Supreme Court cases—that is, an authority limited to the adjudication of an existing controversy." *Yancy*, 337 Or at 353, 362, 97 P3d at 1165-66, 1171 (alteration added). That speculative conclusion, however, is severely flawed for several reasons.

First, as explained, *supra*, Oregon's Article VII had a different purpose than the federal Article III, reflecting a fundamental difference between state

and federal courts. Oregon's courts—like other state courts—are courts of *general* jurisdiction, whereas by design the federal Article III courts are courts of limited jurisdiction. *Yancy* failed to recognize this difference. Second, although the judicial power of the federal courts is expressly limited by the so-called "case-or-controversy" clause of Article III, the framers inserted no such clause in either the original Article VII, or Article VII (Amended). *Yancy* failed to attend to this textual difference.

Yancy's analysis began, reasonably, by concluding that this Court should examine the original Article VII to understand the scope of Oregon courts' judicial power. *Yancy*, 337 Or at 353. *Yancy* also noted common law courts—which are analogous to state courts of general jurisdiction—had the power to render advisory opinions. *Id.* at 356. But the analysis went awry in concluding that "the basis for American concepts of justiciability and judicial power lies not in English precedents, but in the structure of government as set out in the U.S. Constitution." *Id.* With respect to American *federal* judicial power, that statement is true. But it is false as with respect to state judicial power, as demonstrated by the fact that the many states existed before the "structure of government as set out in the U.S. Constitution," which was adopted in 1787 and took effect only in 1789, at which time the courts of Massachusetts and Connecticut, for example, had been established for decades. *See Opinion of the Justices to the Governor*, 461 Mass 1205 (2012) (citing The History of the Law

in Massachusetts: The Supreme Judicial Court 1692-1992 (R.K. Osgood ed. 1992)); *Walkinshaw v. O'Brien*, 130 Conn at 127.

Yancy's mistake may be traceable in part to its focus on section 1 of the original Article VII, and failure to mention section 9. As explained above, section 9 ensured that the maximum possible judicial power, authority, and jurisdiction was included in the "judicial power" originally vested in Oregon courts. In the absence of any indication that the 1910 voters intended to diminish the judicial power, the scope of that judicial power, interpretation of "judicial power" in Article VII (Amended) should reflect both of those sections of the original Article VII.

Compounding the errors *Yancy* itself made is the uncertain view of mootness even in the federal courts. The U.S. Supreme Court has since backtracked on *Liner*'s dicta. It is a matter of debate whether, even for the federal courts, mootness represents a subconstitutional prudential limitation, or a jurisdictional limitation imposed by Article III.[10]

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[10] Chief Justice Rehnquist opined that mootness as a prudential doctrine, rather than a limit imposed by Article III:

> "The exception to mootness for cases which are 'capable of repetition, yet evading review,' was first stated by this Court in *Southern Pacific Terminal Co. v. ICC*, 219 US 498, 31 S Ct 279, 55 LEd. 310 (1911). There, the Court enunciated the exception in the light of obvious pragmatic considerations, with no mention of Art. III as the principle underlying the mootness doctrine."

In sum, the *Brown-Barzic-Yancy* strand of Oregon justiciability prudence is based on outdated federal analysis of a "case or controversy" clause that is in a provision, Article III, that is not found in the Oregon Constitution and serves a fundamentally different purpose than Article VII.

6. This Court's subsequent cases have rejected the foundation of *Yancy*, namely the view that justiciability reflects hard constitutional limits imposed by Article VII.

Yancy's view that justiciability reflects fundamental limits on the judicial power was consistent with *Utsey v. Coos County*, where the Court of Appeals held that the Legislative Assembly cannot confer standing because doing so would increase the power of the courts beyond constitutional limits, citing federal case law.[11] In *Utsey*, the issue was the validity of ORS 197.850(1), which stated that any party in a Land Use Board of Appeals proceeding could

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Honig v. Doe, 484 US 305, 330, 108 S Ct 592 (1988) (Rehnquist, C.J., concurring). *But see Honig*, 484 US at 339-42 (Scalia, J., dissenting) ("If it seems peculiar to the modern lawyer that our 19th-century mootness cases make no explicit mention of Art. III, that is a peculiarity shared with our 19th-century, and even our early 20th-century, standing cases.").

Later cases tend to confirm that the mootness is a prudential doctrine, not a hard limit on judicial power. *See Friends of Earth, Inc. v. Laidlaw Env. Svcs.*, 528 US 167, 190, 120 S Ct 693 (2000) (contrasting mootness with Article III standing, and noting that mootness were simply [Article III] 'standing set in a time frame,' the exception to mootness that arises when the defendant's allegedly unlawful activity is 'capable of repetition, yet evading review,' could not exist.") (alterations added). *See also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L.R. 563-64 (2009) ("The exceptions to mootness do not appear to be based on any interpretation of Article III's Case or Controversy Clause . . . . Rather, as articulated and applied, they are based on prudential considerations . . . .").

[11] *See Utsey v. Coos County*, 176 Or App 524, 32 P3d 933 (2001), *abrogated by Kellas v. Dept. of Corrections*, 341 Or 471, 476-77, 145 P3d 139 (2006).

seek judicial review of a final order.[12] The *Utsey* decision interpreted the statute as conferring a "right to obtain an advisory opinion," and held the legislature has no ability to confer such a right due to constitutional limitations.[13] The premise that justiciability reflects hard limits on "the judicial power" conferred on this Court by the Oregon Constitution was shared by both *Yancy* and *Utsey.*

But that premise was repudiated by this Court in *Kellas v. Department of Corrections*. There, this Court held that a statute conferring standing to challenge administrative rules on "any person" was consistent with the Oregon Constitution. In doing so, this Court carefully emphasized the fundamental difference between the scope of the judicial power granted by Article VII (Amended) and the federal judicial power set forth in Article III of the U.S. Constitution. Namely, while Article III, section 2 of the U.S. Constitution limits the power of federal courts to resolution of "cases" or "controversies," the Oregon Constitution contains no "cases" or "controversies" provision.

> "The Oregon Constitution contains no 'cases' or 'controversies' provision. Moreover, the United States Supreme Court has determined that 'the constraints of Article III do not apply to state courts * * *.' * * * For that reason, we cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon's charter of government."

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[12] *Id.* at 549.
[13] *Id.* at 595.

Kellas, at 478, 145 P3d at 143. This Court quoted Justice Linde, explaining that prudential concerns, not a strict constitutional constraint on "judicial power," underpin limits on justiciability:

> "In sum, rejecting premature or advisory litigation is good policy, but rigid tests of 'justiciability' breed evasions and legal fictions. It is prudent to keep judicial intervention within statutory or established equitable and common law remedies. It is not prudent to link a decision declining adjudication to non-textual, self-created constitutional barriers, and thereby to foreclose lawmakers from facilitating impartial, reasoned resolutions of legal disputes that affect people's public, rather than self-seeking, interests. Requirements that rest only on statutory interpretations can be altered to meet desired ends, but change becomes harder once interpretations are elevated into supposedly essential doctrines of 'justiciability.' * * *"

Id.at 478-79 (quoting Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 Wm & Mary L Rev 1273, 1287–88 (2005)).

Thus, in *Kellas*, this Court expressly rejected the *Utsey-Yancy* view of justiciability as an essential constitutional limit, and embraced the prudential view expressed by Justice Linde and by Chief Justice Balmer's special concurrence in *Yancy*. Specifically, *Kellas* held that the Oregon Legislative

Assembly could establish standing on a litigant, without violating any limit imposed by Article VII.[14]

Kellas' holding is a clear departure from the erroneous view that Article VII imposes strict requirements that litigants have a "personal stake" in a case or that the outcome have a practical effect on the parties' rights,[15] and suggests that standing and other justiciability doctrines are essentially prudential. Nonetheless, because *Kellas*' holding concerned standing, not mootness, it did not expressly overrule *Yancy*.[16]

Recently, in *State v. Hemenway*, this Court expressly recognized—but did not resolve—the tension between the jurisdictional approach of *Yancy* and cases that hold that the Court may make exceptions to mootness, such as where mootness results from the voluntary action of the party seeking to vacate a judgment as moot.

> "We recognize that our cases are in tension. *Yancy* and *Brown*, while not focusing on vacatur, unambiguously hold that Oregon courts are without jurisdiction to decide moot cases. In *Terhune*, however, this court applied the equitable principles discussed in *Kerr* and exercised its discretion to not

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[14] *See id.* at 478, 482, 145 P3d at 142 (discussing plenary power of legislature, including power to "deputize its citizens to challenge government action in the public interest").

[15] *See id.* at 484-86.

[16] *See Pendleton School Dist. 16R v. State* 220 Or App 56, 65-66, 185 P3d 471, 477 (2008) (concluding that "whatever the broader discussion in *Kellas* might otherwise suggest, *Yancy* remains good law"), *overruled on another point of law*, 345 Or 596, 200 P3d 133 (2009).

> vacate a decision issued in a case that was moot at the time of the decision."

State v. Hemenway, 353 Or 498, 504, 302 P3d 413 (2013) (citing *Terhune v. Myers*, 342 Or 376, 153 P3d 109 (2007) and *Kerr v. Bradbury*, 340 Or 241, 131 P3d 737 (2006). *Hemenway* did not resolve the tension, holding that in that case the jurisdictional approach yielded the same outcome as applying equitable considerations. And yet, by engaging in discussion of discretion and the equities of vacatur, the Court in *Hemenway* implicitly endorsed the "prudential" view of justiciability. If the Court truly lacked the power to decide moot cases, then there is no place to consider either the public interest or equitable concerns, because an action taken without jurisdiction is void. *See Pennoyer v. Neff*, 95 US 714 (1878).

The holdings in *Terhune* and *Kellas* show that this Court, despite *Yancy*, has not abandoned the prudential view of justiciability that it had in 1857, retained in 1910, and applied in *Perry*. Those cases are not compatible with the Article III-inspired rigidity of *Yancy*. In fact, *Kellas*' holding that the legislature can confer standing (an aspect of justiciability that *Yancy* posited was jurisdictional and constitutional) has opened a sinkhole under *Yancy* that has obliterated its intellectual foundation. But *Yancy* has remained good law in the absence of a case placing the issue before this Court. This is that case.

7. This Court should return to the prudential view of justiciability, consistent with Article VII, *Kellas*, and the principles of Justice Linde.

This Court can resolve the tension in its cases by correcting its error in *Yancy* and returning to a prudential view of mootness—tempered by a firm commitment to judicial restraint. This position would be consistent with Chief Justice Balmer's concurrence in *Yancy*.[17] It would also honor the Framers' intent concerning Article VII and the bulk of this Court's jurisprudence. In essence, it would return to the principles articulated by Justice Linde.

Justice Linde recognized that courts may often have good prudential reasons to decline to exercise their judicial power, yet retain that power and the flexibility to exercise it to resolve critical questions. *See id*. at 1285 ("Surely a court can distinguish between the disposition of moot appeals from an unreported trial court judgment that concerns only the parties and a disputed appellate opinion that restricts the constitutional powers of governments throughout the state.").[18]

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[17] In his special concurrence, Justice Balmer rejected the majority's rationale, arguing that the Court's refusal to decide moot cases rests on prudential considerations, and not constitutional limits of the judicial power:
"The majority is certainly correct that the mootness doctrine, and the exceptions to it, are closely related to the 'judicial power' as that term is used in Article VII (Amended), section 1. However, this court consistently has viewed the contours of mootness as a prudential, rather than a constitutional, matter."

[18] This approach would also be consistent with a number of other states that, recognizing essential differences between state and federal courts, also recognize the discretion to disregard prudential constraints on justiciability where a question is of great public interest. *See State ex rel. Distilled Spirits*

V. ARGUMENT ON SECOND QUESTION PRESENTED

A. An overbreadth challenge to a restriction on speech is moot only when the overbroad statute can no longer have chilling effects.

An overbreadth challenge to a restriction on expression or assembly is moot only when the overbroad statute can no longer have chilling effects, *e.g.*, when the statute has been invalidated, narrowed, amended or repealed. That is because the harm that overbreadth challenges seek to remedy is not harm limited to the individual litigant, but extends to all potential speakers whose expression is discouraged by an overbroad restriction on speech. Article I, section 8 provides litigants with standing to raise the chilling effects of a statute

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Inst., Inc. v. Kinnear, 80 Wash 2d 175, 178, 492 P2d 1012, 1014 (1972) ("Where the question is one of great public interest and has been brought to the court's attention in the action where it is adequately briefed and argued, and where it appears that an opinion of the court would be beneficial to the public and to the other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation."); *Matter of Lawrance*, 579 NE 2d 32, 37 (Ind 1991) ("[A]lthough moot cases are usually dismissed, Indiana courts have long recognized that a case may be decided on its merits under an exception to the general rule when the case involves questions of "great public interest."); *In re Geraghty*, 343 A2d 737, 738-39 (NJ 1975) ("[W]e have often recognized that courts may hear and decide cases which are technically moot where issues of great public importance are involved."). North Carolina, characterizes mootness as a matter of "judicial restraint" that lacks "constitutional jurisdictional underpinnings." *See N.C. Council of Churches v. State*, 461 S.E.2d 354, 357 (NC Ct App. 1995), *aff'd*, 468 SE 2d 58 (N.C. 1996); *Thomas v. N.C. Dep't of Human Res.*, 478 SE2d 816, 820 (NC Ct App 1996). This view of mootness in the state courts is reinforced by scholarship. *See* Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal L Rev 1385, 1412 & n 154 (1974) ("The common law limitation is the entire basis for the mootness doctrine in those jurisdictions which have no case or controversy limitation on judicial power.").

on others.[19] Because the litigant stands in the shoes of others and seeks to vindicate others' rights, it would make no sense for facts solely related to the individual litigant to render a case moot.

The question of whether a case is moot is essentially the question of whether litigation has occurred "too late." *See Kellas v. Department of Corrections*, 341 Or 471, 477 n 3, 145 P3d 139 (2006). The general rule is that "[c]ases that are otherwise justiciable, but in which a court's decision no longer will have a practical effect on or concerning the rights of the parties, will be dismissed as moot." *Brumnett*, 315 Or at 405-06; *Yancy*, 337 Or at 349 (same). For example, in *Kay v. David Douglas Sch. Dist. No. 40*, this Court determined that a suit for an injunction barring a prayer at a public school graduation was moot because the event had occurred. 303 Or 574, 738 P2d 1389 (1987), *cert. den.*, 484 US 1032, 108 S Ct 740 (1988) (no justiciable controversy over prayer at public school graduation). As described *supra*, Oregon has historically recognized a number of prudential exceptions to the general rule concerning mootness, including exceptions for questions of exceptional importance.

The general rule, that a case is moot when a decision no longer will have a practical effect on the rights of a *party*, should be modified with respect to

[19] As this Court has recognized, the requirements for standing depend on the statute in question. In this case, Article I, section 8 itself necessitates the availability of overbreadth challenges, which are required by the special nature of freedom of expression and the fact that, Article I, section 8's phrasing indicates, freedom of expression is harmed by the very existence of an overbroad statute.

overbreadth challenges to restrictions on free expression. As explained below, overbreadth challenges to restrictions on free expression are of a special nature because they seek primarily to vindicate not only the litigant's individual rights, but the rights of all whose speech is "chilled" by an overbroad statute. Thus, an overbreadth challenge raises the rights of, and has practical effects on, parties other than the individual litigant. Logically, such overbreadth challenges are moot only when the challenged statute no longer has potential to chill future speech. As explained below, that is the rule under federal law.

The goal of mootness, ensuring that courts generally decide cases with a "practical effect" rather than rendering mere "advisory opinions," would be well-served by the proposed modification to the general rule. Invalidation has an immediate practical effect on the duties of both those whose conduct is governed by a statute and those with the duty to enforce it. If a statute is invalidated, or a narrowing construction is applied that limits the statute's scope, then chilling effects on a range of speakers are eliminated—a practical effect that results in more certainty and more free speech. Invalidation also has the practical effect of precluding future enforcement, in this case by the Secretary of State. Moreover, given the significant impact a successful overbreadth challenge may have, such challenges are certainly not requests for mere "advisory opinions." *See Yancy v. Shatzer*, 337 Or at 371 (explaining that a ruling on the constitutionality of an ordinance was not "simply 'advisory'"

even if it had no effect on the particular incident that was the basis for petitioner's action because it would have indirect effects on persons other than the petitioner) (Balmer, J., specially concurring).

1. Overbreadth challenges under Article I, section 8 and the First Amendment vindicate the free expression rights of all persons against chilling effects, not only the litigant's individual rights.

While Article I, section 8 of the Oregon Constitution and the First Amendment to the U.S. Constitution differ in important ways, they are similar in three basic respects: (1) each bars legislators from restricting free expression, (2) each stems from a recognition that free expression is valuable not only to individuals, but to society as a whole, and (3) each is threatened where an overbroad statute deters speakers from exercising the right to express their opinion. This trio of basic characteristics makes overbreadth challenges essential to protecting both the First Amendment and Article I, section 8.

Giving full effect to these freedoms of expression requires that a litigant in a case involving an overbroad statute be able to raise the statute's chilling effects on others. Freedom of expression would be curtailed, or "chilled," if every unconstitutional application of a statute limiting speech had to be litigated separately. Without overbreadth challenges, that harm would occur because of (1) the time required to separately litigate each type of expression restricted by an overbroad statute; (2) the unwillingness of many to face arrest, fines, or litigation just to exercise free expression rights in defiance of an overbroad

statute; and, closely related, (3) the certainty that until an overbroad statute is held invalid, many will self-censor rather than face prosecution, resulting in less speech to the detriment of society. The diminishment of free expression rights that would result would be a great harm to our democratic society and all of its citizens.

The "overbreadth doctrine" recognized by this Court and the federal courts guards against that harm. Under the overbreadth doctrine, courts will invalidate or narrow a statute that significantly restricts constitutionally protected speech, even if the statute could be lawfully applied against many people (such as the person raising the challenge). An overbreadth challenge turns on the text of the statute, not the facts of an individual litigant's case. Therefore, there is no reason that later facts concerning the individual litigant should render the challenge moot. Mootness, in that case, would leave a potentially invalid statute untouched, allowing it to continue to improperly chill speech.

The United States Supreme Court has long recognized that overbreadth challenges are assertions of the rights of persons other than the individual litigant. As explained in *Broadrick v. Oklahoma*, "[l]itigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from

constitutionally protected speech or expression." 413 US 601, 612, 93 S Ct 2908 (1973). A litigant may raise an overbreadth challenge whether or not his own conduct was constitutionally protected, so long as the statute might affect others in the future. *See Lind v. Grimmer*, 30 F.3d 1115 (1994) (9th Cir 1994) (allowing overbreadth challenge even when statute was constitutional as-applied to challenger because it had other potentially unconstitutional applications).

Similarly, this Court recently recognized in *State v. Christian*54 Or 22, 307 P3d 429 (2013), that overbreadth challenges under Article I, section 8 and section 26 "determine the rights of parties who are not before the court." 354 Or at 39. The Court noted the unique importance of allowing such challenges in the area of free-expression, in contrast with the general rule against making allowances for overbreadth challenges in other contexts.

In *State v. Robertson*, 293 Or 402, 412 (1982), which established the analytical approach to Article I, section 8, this Court also recognized that the harms inherent in overbroad restrictions on expression transcend individual cases. As stated in *Robertson,* "If a law concerning free speech on its face violates [Article I, section 8], it is unconstitutional; *it is not necessary to consider what the conduct is in an individual case*." *Robertson*, 293 Or at 412 (emphasis added).

Robertson recognized that an attack on a law that violates Article I, section 8 through facial overbreadth is of a different kind than a challenge to the law "as applied" to the litigant. *See id*. at 412 ("If the law is not unconstitutional on its face, it nevertheless might be applied in a manner that would violate Art. I, § 8."). In essence, the facts giving rise to an overbreadth challenge are facts about the existence and scope of the statute, independent of the facts concerning the litigant, except that the litigant is in position to raise the challenge because his or her conduct was subject to the statute—at least at the outset of the case. But the challenge, if successful, vindicates the rights of all persons potentially subject to the invalid restriction.

In the vocabulary of the 19th century mootness cases, overbreadth attacks concern *public* interests rather than *private* ones. *See State v. Christian* at 37 (noting that the chilling of speech harms "society as a whole"). If a particularized private interest had to be maintained throughout litigation to avoid mootness, it would erode protection for these public interests. *Cf. Crocker*, 94 NE at 377 ("The possession of [judicial] power involves its exercise as a duty whenever *public or* private interests require."); *Trans-Missouri Freight Ass'n*, 166 US at 309 (private parties may not foreclose the rights of the public).

Robertson also highlights text in Article I, section 8 that provides an additional constitutional basis for allowing litigants to raise the free expression

rights of others in overbreadth challenges. As *Robertson* explained, Article I, section 8's opening words—"No law shall be passed"—provide "an additional element bearing on the review of statutes for 'overbreadth' under article I, section 8, as compared with some other guarantees such as article I, section 27." *Robertson*, at 412 n 10. Those words show that Article I, section 8 "is a prohibition expressly directed at lawmakers" and bars the *very enactment* of laws that restrain expression. *Id.* As the Court observed, that language "does not invite the enactment of such laws, leaving it to courts to protect freedom of expression in individual cases." *Id*.[20] The text of the First Amendment ("Congress shall make no law * * *") is similarly directed at legislators. Therefore, this "additional element," bearing on overbreadth review applies to the First Amendment as well. Because the ability to challenge the existence of the statute itself is built into the wording of Article I, section 8, an interpretation

[20] *See also State v. Blocker*, 291 Or 255, 261 (1981) ("[A]n overbroad law * * * is invalid as such without regard to the facts in the individual case."). *State v. Spencer* further illustrates the essential role of overbreadth in protecting Article I, section 8 rights. There, the Court struck down a statute barring "abusive or obscene language," challenged for both overbreadth and vagueness, concluding that the statute "makes the speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm was caused or threatened." *State v. Spencer* , 289 Or 225, 228-29, 611 P2d 1147 (1980). In essence, this Court held the statute was overbroad, and vindicated the rights of those whose expression was chilled by invalidating the statute. Although the statute might have survived as-applied in certain cases, the statute's flaw was not that it could *never* be validly applied; but that it was not *limited* to valid applications. As the Court explained, "[t]here may be types of 'expression' that would not be within the protection of Art. I, § 8 under any imaginable circumstances. But when the terms of a statute as written prohibit or restrain expression that does come within this protection, the statute is a law forbidden by Art. I, § 8." *Id.* at 230.

of Article VII that foreclosed overbreadth challenges would conflict with the plain scope of Article I, section 8 (and essentially the same argument would apply to the First Amendment). Freedoms of expression *require* a mechanism for raising the rights of all to be free from laws that chill speech.

2. Overbreadth challenges are essential to protecting free expression rights under both Article I, section 8 and the First Amendment.

In *State v. Christian*, this Court recently reiterated the "strong rationale" justifying overbreadth challenges to protect free expression rights. This Court noted that "the overbreadth doctrine has been characterized as the Supreme Court's "solution to this speech-specific problem [of a chilling effect on First Amendment rights]. * * * And as expression is, by its very nature, so mutable, overbroad regulations can easily encourage speakers to modify their speech, shifting it away from controversy." This Court further explained that

> "[w]e have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of the uninhibited marketplace of ideas."

State v. Christian, 354 Or at 37 (quoting *Virginia v. Hicks*, 539 US 113, 119, 123 S Ct 2191 (2003)). The issue in *Christian* was whether overbreadth

challenges were available to litigants in Article I, section 27 (right to bear arms) cases. This Court concluded that no special allowance for facial overbreadth challenge was merited there.[21] In explaining the contrast between expression and firearms, the Court recognized the ongoing necessity of the doctrine to protect the rights under Article I, section 8 and section 26:

> "*[U]nlike protected speech and assembly*, recognizing overbreadth challenges in Article I, section 27, cases is not necessary because the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or 'chill' conduct that that provision protects."

Thus, Oregon has recognized both that overbreadth challenges seek to vindicate the rights of parties not before the court, whose protected activities would be otherwise "chilled." And, while *State v. Christian* clarified that overbreadth challenges are not necessary to protect Article I, section 27 rights, it reiterated the reasons such challenges are vital to give practical effect to the freedoms of expression in Article I, section 8. *See Christian*, 354 Or at 38 ("[T]he

[21] As noted in *Christian*, in other contexts, facial challenges face an essentially insurmountable hurdle, namely proving that a law is incapable of lawful application. *See State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999) ("For a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, i.e., there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster."). After holding that overbreadth was unavailable, the Court applied the *Sutherland* test in *Christian*, with predictable results. The test, which mirrors that announced by the U.S. Supreme Court in *United States v. Salerno*, 481 US 739, 107 S Ct 2095 (1987) is essentially impossible to meet if actually applied. Justice Stevens described it as "draconian," and indicated that the Supreme Court should not, and does not, consistently apply it. *See Janklow v. Planned Parenthood*, 517 US 1174, 1175 (1996) (Stevens, J., respecting denial of cert.).

justification for recognizing overbreadth challenges in cases involving freedom of expression and peaceable assembly does not apply in the context of Article I, section 27, cases.").[22]

The United States Supreme Court similarly explained why overbreadth challenges are essential to protecting freedom of expression in *Dombrowski v. Pfister*. First, the justices explained that the nature of free expression rights is unique:

> "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—*of transcendent value to all society, and not merely to those exercising their rights*—might be the loser."

Dombrowski v. Pfister, 380 US 479, 486, 85 S Ct 1116, 1121 (1965). Having reviewed the nature of freedom of expression, the court went on to explain why freedom of expression requires special solicitude for facial attacks on overbroad restrictions:

> "[W]e have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. * * * We have fashioned this exception to the usual rules governing standing * * * because of the ". . . danger of tolerating, in the area of First Amendment freedoms, the existence of a

[22] *Christian* also held that "[t]o the extent that *Blocker* and *Hirsch/Friend* may provide authority for recognizing overbreadth challenges in Article I, section 27, cases, we overrule those cases. *Blocker* and *Hirsch/Friend* otherwise remain good law." *Christian*, 354 Or at 40.

> penal statute susceptible of sweeping and improper application." * * * If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. * * * By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

Dombrowski v. Pfister, 380 US 479, 486-87, 85 S Ct 1116 (1965) (citations omitted, emphasis added). As *Dombrowski* recognized, overbroad statutes threaten the existence of a meaningful constitutional right to free expression, threatening to transform the right into the mere "freedom" to express oneself and then suffer years of expensive litigation.

3. A free-expression overbreadth challenge is moot only if the statue can have no further chilling effects.

Because a party raising a free-expression overbreadth challenge is, in effect, litigating the chilling effects that injure others, a free-expression overbreadth challenge is moot only if the challenged statutory restriction can have no future chilling effects on anyone's constitutional rights of expression. The viability of an overbreadth challenge does not depend on whether the case will have further effect on the rights of the individual bringing the challenge.

Accordingly, an overbreadth challenge is moot only if the statutory restriction on expression has been effectively repealed (by the Legislative Assembly or by judicial action invaliding the statute or narrowing its construction to eliminate chilling effects).

a. Federal jurisprudence recognizes that a free-expression overbreadth challenge is moot only if the statue can have no further chilling effects.

The principle that an overbreadth challenge is moot only if the statutory restriction on expression has been effectively repealed is already established in federal overbreadth jurisprudence. Because overbreadth in Oregon similarly raises the rights of third parties to be free of chilling effects, the principle should also apply to Article I, section 8.

Only once has a majority of the United States Supreme Court held that a First Amendment overbreadth challenge was moot. *See Bigelow v. Virginia*, 421 US 809, 95 S Ct 2222 (1975). That case is the proverbial exception that proves the rule. In *Bigelow*, appellant was convicted in 1971 under a statute that made it a misdemeanor to encourage or prompt the procuring of an abortion. In 1972, the statute was amended "in such a way as 'effectively to repeal' its prior application." The Supreme Court concluded, under those circumstances, that "there is no possibility now that the statute's pre-1972 will be applied again to appellant or will chill the rights of others." *Id.* at 818. In those unique circumstances, the Court concluded that "[a]s a practical matter,

the issue of its overbreadth has become moot for the future." The Court proceeded to analyze whether the statute was unconstitutional as applied to *Bigelow*, and held that it was. The fact that the overbreadth challenge in *Bigelow* was moot when the as-applied challenge was not moot (and was, in fact, successful) illustrates how the rule of mootness for First Amendment overbreadth challenges differs from the rule in ordinary cases.[23]

b. With the possible exception of *Yancy*, no Oregon case suggests that mootness of overbreadth challenges turns on facts concerning the individual litigant.

It appears this Court has never before considered when an overbreadth challenge becomes moot, or whether overbreadth constitutes an exception to the holding of *Yancy*. Aside from *Yancy* itself, discussed *infra*, no Oregon case suggests that mootness of overbreadth challenges turns on facts concerning the individual litigant.

[23] In *Massachusetts v. Oakes*, 491 US 576, 109 S Ct 2633 (1989), the U.S. Supreme Court split on whether amendment pending appeal eliminated an overbreadth challenge. Three justices opined that "*Bigelow* stands for the proposition that overbreadth analysis is inappropriate if the statute being challenged has been amended or repealed," *id.* at 582 (O'Connor, J.), while five justices objected to such a limitation of overbreadth. *Id. at 587(*"Even if one were of the view that some of the uses of the overbreadth doctrine have been excessive, this would not be a legitimate manner in which to rein it in."). In any case, *Oakes* is consistent with the principle that mootness of an overbreadth challenge depends on the possibility that future litigants' speech could be chilled by the challenged law, not on the effect on the party bringing the challenge. After rejecting an overbreadth challenge, the court remanded to the Massachusetts Supreme Court to conduct an as-applied challenge.

Barcik v. Kubiaczyk does not foreclose the proposed standard for the mootness of overbreadth challenges. In *Barcik*, this Court held that a high-school student's claims seeking *prospective* relief against enforcement of school restrictions requiring censorship of unofficial student newspapers were nonjusticiable on the basis that as a graduating Senior, "[he] cannot be affected by a declaration that future enforcement of the regulations is unconstitutional." *Barcik v. Kubiaczyk*, 321 Or 174, 192, 895 P2d 765 (1995). *Barcik* did not, however, seek to vindicate the rights of others. Instead, he sought prospective relief only for himself. Although he could have raised overbreadth claims, there is no indication he did, or that the mootness of overbreadth claims was an issue before this Court.

While *Barcik* did state that a case is not moot "only when it can affect *in the present* some rights between the parties," *Barcik v. Kubiaczyk*, 321 Or at 188 (emphasis in original), that threshold is met where persons have to comply with a statute that is presently "on the books," or face arrest, fines, loss of licenses, or other administrative penalties.

TKVO v. Howland also has no bearing on the mootness of overbreadth challenges. There, the decision of the Oregon Tax Court does not mention "overbreadth" or characterize the challenge as "facial." *TKVO v. Howland*, 335 Or 527, 73 P3d 905 (2003). This court noted that Plaintiff sought to characterize the challenge below as "facial," but gave no indication that *TKVO*

raised an overbreadth challenge or sought to vindicate any rights but its own. While *TKVO* cautioned that justiciable controversies cannot be based on contingent or hypothetical events, that is not the case with an overbreadth challenge to a statute restricting expression. First, it is crucial to understand that clarifying the application of mootness to overbreadth challenges does not require elimination of the separate requirement of standing. The law may still require a litigant to have a stake in the outcome to initially get through the courtroom door, eliminating challenges which are entirely hypothetical or contingent from the start.

Second, there is nothing "hypothetical" or "contingent" about a statute on the books which limits speech. The chilling effects of such a statute on present speakers is not contingent on future events. As federal courts have recognized, the present threat of prosecution is enough to deter speech (even where there is a likelihood prosecution would be unsuccessful). Article I, section 8 is violated the moment a law restricting the expression of opinion is enacted by the Legislative Assembly.

Third, a rule of law under which challenges to invalid statutes can be dismissed as hypothetical would ignore the right of every Oregonian to be governed only by valid statutes, and have only valid statutes enforced against him/her. *See Bond v. U.S.*, 131 S Ct 2355, 2367 (2011) (Ginsburg, J., concurring) (asserting existence of a "personal right not to be convicted under a

constitutionally invalid law"); *see also* See Henry P. Monaghan, *Third Party Standing*, 84 Colum L Rev 277(1984) at 4-14, n 132-136.

VI. CONCLUSION

For the reasons explained herein, *Yancy* should be overruled. The holding of *Yancy* is technically narrow, but it cast a long shadow. The language in which it eliminated the historically-recognized "capable of repetition, yet evading review" exception improvidently drew from analysis of Article III courts' far more limited powers—powers that were deliberately crafted so as to not usurp the powers of the state court. Importing restrictions of federal courts into state courts of general jurisdiction makes no sense. Interpreting prudential limits on justiciability as rigid constitutional limits on judicial power will hobble this Court in its ability to resolve important questions of great public interest, including those pertaining to individual rights under Article I, section 8. *Yancy* has unnecessarily created a murky divide within the case law as to whether justiciability is a prudential, pragmatic doctrine or a constitutional limit.

Second, this case presents the issue of whether this Court should—for the reasons federal courts have done so with respect to the First Amendment—adopt a special mootness rule for overbreadth cases. Arguably, such a rule would be inconsistent with *Yancy*'s impoverished view of this Court's power to decide moot cases. Yet as explained above, Article I, section 8 requires

overbreadth challenges to be effective, while *Yancy* insists that Article VII limits jurisdiction in a way that, if true, would impede such challenges.

For the foregoing reasons, *amicus* respectfully requests that *Yancy* be reversed.

Dated this 21st day of March, 2014.

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I hereby certify that on the 21st day of March, 2014, I filed the original of the foregoing **BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION OF OREGON** by using the court's electronic filing system; I served the same on:

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