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IN THE SUPREME COURT OF THE STATE OF OREGON

MARQUIS COUEY, an individual,

Plaintiff-Appellant,
Petitioner on Review,

vs.

KATE BROWN, in her official capacity as Secretary of State for the State of Oregon,

Defendant-Respondent,
Respondent on Review.

Marion County Circuit Court
Case No. 10C14484

CA A148473

S061650

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 Circuit Court for Marion County
Honorable Claudia Burton, Judge

Opinion Filed: July 10, 2013
Author of Opening: Schuman, P.J.
Concurring Judges: Wolheim, Judge and Nakamoto, Judge

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I. STATEMENT OF *AMICUS'* INTEREST.

Amicus Curiae Robert M. Atkinson has no personal interest in this case beyond an abstract interest in what he views as two significant jurisprudential questions.

II. PRESERVATION.

Central to petitioner's claim is the assertion that the statute in question is "overbroad." *Amicus* raises a jurisprudential question about overbreadth analysis and a corollary question about statutory construction. Neither was preserved by the parties. That they are unpreserved does not prevent this court from considering them because those issues can be resolved only by this court. *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 jurisprudential questions such as those presented here has not, to the best of *amicus'* knowledge, been resolved. *Amicus* respectfully submits, however, that the court might not wish to allow the choices of the parties to force it into a jurisprudentially questionable result involving the scope of the judicial power as granted by the constitution.

III. SUMMARY OF ARGUMENT.

This brief is in many ways similar to *amicus'* submission in *State v. Christian*, 354 Or 22, 307 P3d 429 (2013). As that brief did, it addresses the

judicial power to declare statutes unconstitutional. Here, both petitioner and *amicus* ACLU assert that the statute in question is "overbroad" because it has the potential to "chill" constitutionally protected expression. At the risk of becoming a tiresome and unwelcome repeat visitor, *amicus* repeats portions of that prior submission and briefly expands upon them.

This court recently concluded that overbreadth analysis is limited to cases involving freedom of expression because other constitutional rights are not subject to "chilling." *Amicus* respectfully disagrees and asserts that all laws that encroach on constitutionally protected rights have the capacity to deter the exercise of those rights by causing people to avoid the costs and risks inherent in having to defend themselves against governmental efforts to enforce that law.

The reason for broadened standing in overbreadth cases is not that government cannot deter the exercise of rights other than the right of free expression, but, rather, the judicial conclusion that speech has unique social and political value. To give expression "breathing room," courts have created unique methods for deciding speech cases. *Amicus* submits that those methods lack support in either the text or the history of the constitution, but are, rather, based on judicial policy decisions. That the result is undoubtedly beneficial does not demonstrate that it properly comes within the scope of the judicial power.

If the court concludes that the law is unconstitutional as written, the court may then have to decide whether and to what extent it will construe it to avoid that unconstitutionality. Although it was once unquestioned that the court had a duty to make every reasonably possible effort to save a statute from unconstitutionality, recent cases create doubt about that proposition. *Amicus* submits that the judicial power does not authorize the court to strike down any portion of a statute that is capable of constitutional application even in the case of laws addressing expression.

IV. ARGUMENT

A. "Overbreadth" analysis based on the capacity of laws to "chill" free speech has no basis in the text or history of the Oregon Constitution.

The following discussion begins by restating a point about the authority of courts to "declare" statutes unconstitutional, and then turns to the specific application of that authority in the overbreadth context.

The power of courts to "declare" statutes unconstitutional is not explicit in the text of either the state or federal charter. Rather, that power is deemed implicit in the judicial responsibility to decide cases and the supremacy of the constitutions. As Chief Justice Marshall famously explained:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must

> determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Marbury v. Madison, 5 US (1 Cranch) 137, 178 (1803). In other words, when deciding a particular case to which both a statute and the constitution apply, a court that finds a conflict between the two must give primacy to the constitution, thereby determining—implicitly or explicitly—that applying the statute under those circumstances would violate the constitutional rights of one of the parties. The statute is, therefore, said to be "unconstitutional" as applied to that person in that case.

But this rationale for refusing to enforce a statute's express terms applies only to "as applied" constitutional challenges. Neither by its terms nor by necessary implication does it support challenges asserting that the statute is unconstitutional as to persons, facts, and circumstances not presented by the "particular case" before the court. That is, Marshall's analysis proceeds from the constitutional grant of judicial power to decide specific cases and the supremacy of the constitution, not from explicit constitutional text or some freestanding source of judicial power. Thus, to the extent that a court goes beyond the application of the constitution to the specific statute at issue in the particular case before it, the court must find some other source of authority to

do so. Here, petitioner and the ACLU rely on "overbreadth" and the metaphor of "chilling effect" to provide that authority.

This court recently held that overbreadth analysis applies only to cases involving freedom of expression. *State v. Christian*, 354 Or 22, 307 P3d 429 (2013). In *Christian*, this court concluded that persons charged under laws that arguably impinged on the right to bear arms under Article I, section 27, of the Oregon Constitution could not assert an "overbreadth" challenge. Rather, the court held, those persons could assert only an "as applied" challenge." That is, they must demonstrate that the statute, if applied to the specific conduct alleged in the complaint or indictment, would infringe upon their constitutional right to bear arms.

The court contrasted the right to bear arms with the right of free expression, stating:

> Unlike [cases involving] 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.

Christian, 354 Or at 39. In reaching that conclusion, the court discussed United States Supreme Court First Amendment cases, and then quoted a lower federal court:

> 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. No analogous arguments obtain in the Second Amendment context."

United States v. Chester, 628 F3d 673, 688 (4th Cir 2010). *Christian*, at 38 (ellipses and bracketed material by the *Christian* court).

As this statement suggests, the "chilling effect" metaphor rests on the proposition that people will choose to avoid constitutionally protected but statutorily proscribed speech rather than risk the cost of litigation and the possibility of criminal or civil sanction. *See Christian*, at 37, *quoting Virginia v. Hicks*, 539 US 113, 119, 123 S Ct 2191, 156 L Ed 2d 148 (2003): ("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").

But neither this court nor the Fourth Circuit explained why the right to bear arms could not be "chilled."[1] And it seems more than reasonable to assert

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[1] *Chester* suggests that the right to bear arms cannot be chilled because "advocates of a robust individual right to bear arms will continue to challenge all firearm regulations[.]" *Id.* But the same is obviously true of free speech, where advocates like the ACLU are vigilant, willing, and able to litigate challenges to laws like this one. And how that vigilance and ability might

that a law absolutely prohibiting the possession or of firearms, although unconstitutional, would deter some from exercising that right, perhaps in the hope that someone else would challenge the law. Similarly, recurring litigation arises when the government's obligation to protect children intersects with religiously motivated child-rearing practices, thereby creating a risk that some believers will avoid the margins of their constitutional right of free exercise rather than risk entanglement with social service agencies. *Amicus* respectfully submits that the very existence of any law, administrative rule, or other regulation in any area where constitutional protections exist carries with it the inherent risk of "chilling" protected conduct.

Amicus therefore submits that courts apply and restrict chilling effect analysis to speech cases, not because other constitutional rights cannot be chilled, but because speech is special. That is, courts have concluded *on policy grounds* that speech needs and therefore must have special constitutional status. To complete the quote from *Christian* and *Hicks* excerpted above, when people abstain from expression out of fear of possible sanctions, it "harm[s] not only themselves but society as a whole, which is deprived of the uninhibited marketplace of ideas." *Christian*, at 37. A clearer statement of the policy basis

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demonstrate that those regulations will not deter some, even if only the more cautious, from constitutionally protected conduct as they wait for litigation to be completed is far from obvious.

for applying the chilling metaphor only in speech cases would be difficult to imagine.[2]

To be sure, most Oregonians, *amicus* among them, would agree on the exceptional value of free speech. Nevertheless, social and political value neither automatically translate into constitutional command nor confer expanded judicial authority. Just as not all bad governmental ideas are unconstitutional, not all good ones are constitutionally mandated. And while Oregon courts undoubtedly continue to have the historically exercised power to make and apply policy-based choices in areas traditionally governed by the common law, whether that same authority extends to constitutional interpretation is not a matter that should be assumed or acted upon *sub silentio*.

This court has stated that, in construing the Oregon Constitution, it seeks to determine the meaning of constitutional text by examining the wording of the constitutional provision at issue, the case law surrounding it, and the historical

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[2] This court reemphasized the same point, *quoting Broadrick v. Oklahoma*, 413 US 601, 611, 93 S Ct 2908, 37 L Ed 2d 830 (1973):

> "It has long been recognized that the First Amendment needs breathing space . . . Litigants, 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.*"

Christian, at 38 (emphasis added).

circumstances leading to its adoption in a principled search for the intentions of the enactors. *State v. Ciancanelli*, 339 Or 282, 289, 121 P3d 613 (2005); *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992).[3] Presumably, the same rules apply to the construction of the constitutional text granting the judicial power. To the best of *amicus*'s knowledge, the court has not attempted to ground the application of either overbreadth or chilling in the text of the constitutional grant of the judicial power, in the text of Article I, section 8, or in the history of either of those provisions.[4] Nor, again to the best of *amicus's* knowledge, do any cases contemporaneous with the enactment of the Oregon Constitution apply overbreadth or chilling effect analysis to any provision of that charter.

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[3] Whether the "originalist" view of constitutional construction described in, for example, *Stranahan v. Fred Meyer*, 331 Or 38, 11 P3d 228 (2000), continues to command majority support on the court may be open to debate.

[4] It might be argued that the opening words of section 8, "No law shall be passed...," authorize treating cases arising under that section differently than those addressing other constitutional provisions. But that would mandate similar treatment for cases arising under Article I, section 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.") and, arguably, Article I, section 3 ("No law shall in any case whatsoever control the free exercise, and enjoyment of religeous [*sic*] opinions..."). Finally, the court has never identified anything in the history of the Indiana Constitution, from which section 8 was copied, that would support that specialized reading of the section's text.

Obviously, the views asserted above represent a drastically more limited version of the judicial power in constitutional decision-making than that which courts and lawyers of the 21st century sometimes reflexively assume. *Amicus* acknowledges that this ship may not just have left port, but have sailed over the horizon and completely out of sight. By virtue of *stare decisis*, if nothing else, the court may be unwilling to reexamine whether the constitution authorizes courts to rely on overbreadth or chilling effect to consider claims that a statute is unconstitutional as applied to persons, facts, or circumstance not present in the particular case under consideration. Nevertheless, the members of this court inherited the unique overbreadth methodology at issue here and, at the risk of hectoring, *amicus* respectfully submits that if they continue to apply it, they should do so consciously and intentionally.

B. If the court finds any constitutional defect in the law, does the court have the authority to strike down any portion of the statute that is capable of constitutional application?

Once again, *amicus* begins by restating points asserted in *Christian*, before briefly addressing construction of statutes that may be unconstitutional in part.

If the court concludes that the statute in question is unconstitutional to any degree, the court must also decide what, if any, efforts it will make to preserve it. For many decades this court stated and acted on the principle that it had an unquestioned duty to find a construction that would pass constitutional

muster if that reasonably could be done. *E.g.*, *State v. Collis*, 243 Or 222, 231, 413 P2d 53 (1966) (court "must seek a construction which will avoid unconstitutionality."); *State v. Anthony,* 179 Or 282, 300, 169 P2d 587 (1946) (it is the court's "duty to seek a construction" that avoids unconstitutionality). And in *State v. Moyle*, 299 Or 691, 705 P2d 740 (1985), the court undertook what the concurring opinion described as "heroic measures" to save a statute from a claim of unconstitutionality. *Id.* at 709 (Linde, J., concurring).

State v. Johnson, 345 Or 190, 191 P3d 665 (2008), appears to present a stark and unexplained contrast. There, the court considered challenges strikingly similar to those raised in *Moyle* to a statute that was strikingly similar to the statute at issue in *Moyle*. But the *Johnson* court merely listed the statute's alleged defects, *id.* at195, which were, again, remarkably similar to those construed away in *Moyle*, and declared the statute facially unconstitutional. The court took no steps, heroic or otherwise, to save the statute and neither mentioned the duty to do so, nor explained why that duty might not apply in that case.

Marshall's rationale for the judicial authority to statutes obviously does not provide any basis for a court to invalidate a constitutional statute. What then of a statute that may be unconstitutional in part? The court provided an answer to that question in cases not involving speech when it stated that only laws that are incapable of constitutional application may be struck down "on

their face." *E.g.*, *State v. Chakerian* 325 Or 370, 381-82, 375, 938 P2d 756 (1997). That conclusion respects the source of the court's authority to declare a statute unconstitutional by restricting the declaration of unconstitutionality to the parts of a statute at issue in the specific case under consideration. That the court has apparently departed from that limitation in cases involving speech raises the same issues addressed in part **A**, above. That is, rather than limiting its consideration to the actual issues presented by the parties to litigation, the court has created special rules for expression that allow it to go beyond those actual issues. And in the case of statutes that are unconstitutional only in part, facial invalidation may invalidate portions of the statute that are capable of constitutional application. By so doing, the court appears to exceed its constitutional grant of power. Stated differently, the constitution, by necessary implication, authorizes the court to refuse to apply a statute where doing so would violate a litigant's constitutional rights, but it does not authorize invalidating a statue—or, *amicus* submits—part of a statute unless and until it does so.

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IV. CONCLUSION.

Neither the text nor the history of the Oregon Constitution provides express or implied support the unique overbreadth rules the court has created for cases involving expression.

Respectfully submitted this 1 day of May, 2014

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3722 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 May 1, 2014, I caused to be filed the foregoing **BRIEF OF *AMICUS CURIAE*** with the Appellate Court Administrator by mailing the original and fifteen (15) copies, via First Class Mail, postage prepaid, to the following:

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