

IN THE SUPREME COURT OF THE STATE OF OREGON

KEITH KENDON OGLE, SR.)	
)	Malheur County Circuit
Petitioner-Appellant,)	Court Case No. 10108394P
Respondent on Review,)	
)	CA No. A148493
v.)	
)	SC No. S061162
MARK NOOTH, Superintendent,)	
Snake River Correctional Institution,)	
)	
Defendant-Respondent,)	
Petitioner on Review.)	
)	

AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC.’S
BRIEF IN SUPPORT OF
PETITIONER-APPELLANT KEITH KENDON OGLE, SR.

Review of the Decision of the Court of Appeals on
Appeal from a Judgment of the Circuit Court for Malheur County
Honorable J. Burdette Pratt, Circuit Court Judge

Court of Appeals Decision Filed:	January 30, 2013
Before:	Duncan, J.

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AMICUS CURIAE
AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC.’S
BRIEF IN SUPPORT OF PETITIONER-APPELLANT

Amicus curiae American Civil Liberties Union of Oregon, Inc. (ACLU) is a nonprofit, nonpartisan, corporation dedicated to maintaining civil rights and liberties guaranteed or reserved to the people by the Oregon and United States constitutions.

The case calls upon the Court, as a matter of first impression, to interpret the meaning of the “attachment” requirement of ORS 138.580, a provision of the Post Conviction Hearing Act (PCHA). The “statutory right to post-conviction relief derives from Article I, section 23, of the Oregon Constitution.” *Bryant v. Thompson*, 324 Or. 140, 141, 922 P.2d 1219 (1996). Accordingly, proper interpretation of PCHA provisions is important to ensure that the constitutional rights of persons convicted of crimes are respected.

The Court of Appeals held that ORS 138.580 “requires a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove.” *Ogle v. Nooth*, 254 Or. App. 665, 672, 298 P.3d 32 (2013). The attached evidence need not be admissible at the post-conviction hearing, but must simply “tend to prove or disprove the existence of an alleged fact.” *Id.* at 671. The Court of Appeals’ interpretation is

both consistent with the text of ORS 138.580 in context *and* constitutional. In contrast, defendant's proffered interpretation of the statute violates both Oregon and United States constitutions. For that reason, the ACLU urges this Court to affirm the Court of Appeals' decision.

LEGAL QUESTIONS PRESENTED ON REVIEW AND PROPOSED RULES OF LAW

The legal questions presented by this case and the rules of law the ACLU proposes should be established are as follows:

Question Presented: What must a petitioner do, with respect to the filing of a petition for post-conviction relief, to comply with the requirement in ORS 138.580 that "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition"?

Proposed Rule of Law: To comply with ORS 138.580, "the attachment provision requires a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove." *Ogle v. Nooth*, 254 Or. App. 665, 672, 298 P.3d 32 (2013). The attached evidence need not be admissible at the post-conviction hearing, but must simply "tend to prove or disprove the existence of an alleged fact." *Id.* at 671.

Question Presented: Can a petitioner satisfy the attachment requirement by submitting his own affidavit?

Proposed Rule of Law: Yes. To provide convicted criminal defendants with an adequate and effective collateral remedy, a post-conviction petitioner must be permitted to satisfy ORS 138.580's attachment requirement through a personal affidavit that, through its sworn assertions, "tend[s] to prove or disprove the existence of an alleged fact." *Ogle*, 254 Or. App. at 671.

STATEMENT OF THE CASE

Petitioner—an inmate at Snake River Correctional Institution—was convicted of second degree assault constituting domestic violence, possession of methamphetamine, and endangering the welfare of a minor. *Ogle*, 254 Or. App. at 666.

He filed a *pro se* petition for post-conviction relief in Malheur County Circuit Court. *Id.* The trial court appointed counsel, who filed a formal petition for post-conviction relief alleging four grounds of ineffective assistance of counsel under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. *Id.* Petitioner attached the indictment, judgment, and trial transcripts to his formal petition. Upon the filing of a motion to dismiss pursuant to ORS 138.580, petitioner attached two affidavits in support of the petition. *Id.* at 667.

The trial court granted the state's motion to dismiss petitioner's petition for failing to comply with ORS 138.580's requirement that "[a]ffidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition."

The Court of Appeals reversed. *Ogle*, 254 Or. App. at 675. It held that the attachment provision "requires a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove." *Id.* at 672. As to each claim, the Court concluded petitioner's affidavits in support had sufficiently supported it:

The petitioner's first claim was that counsel had failed to meet with a key defense witness before trial. The petitioner's affidavit supported that claim by explaining that, if counsel had met with the witness and reviewed her statements in the police reports with her, she would have testified to the events in chronological order, which would have helped petitioner prove that he had acted in self-defense. The petitioner's second and third claims alleged that counsel had failed to appropriately investigate the victim's medical history or present that evidence to the jury. The petitioner's affidavit supported those allegations because it stated that the victim's medical records showed that she had an abscessed tooth, not a fracture, and that counsel had failed to present that fact to the jury. The petitioner's fourth claim was that trial counsel had failed to cross-examine the state's medical expert regarding the victim's tooth. In his affidavit, the petitioner suggested additional cross-examination of the medical expert that would tend to cast doubt on whether the victim's injury was actually caused by the petitioner. Consequently, the affidavit supported the petitioner's allegation that his trial counsel had been ineffective and inadequate by failing to cross-examine the medical expert regarding the victim's tooth. Thus, we held that the documentary

evidence that the petitioner had attached satisfied the requirements of ORS 138.580. *Ogle*, 254 Or. App. at 675[.]

Ross v. Franke, 254 Or. App. 650, 653-54, 297 P.3d 486 (2013).

The Court of Appeals reversed the trial court and remanded for further proceedings.

This Court accepted review of the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

The Court of Appeals' interpretation of ORS 138.580's attachment provision properly interprets the statute considering its text and context. Significantly, that interpretation does not raise doubts about the statute's constitutionality.

In contrast, defendant's proffered interpretation of the statute unduly and unreasonably burdens a post-conviction petitioner's ability to bring a claim under the Post-Conviction Hearing Act (PCHA), raising significant questions about the statute's constitutionality under both the Oregon and United States constitutions.

Nothing in the legislative history, either when the provision was enacted or amended, suggests that the legislature intended to infringe on petitioners' constitutional rights. To the contrary, the legislature intended for the PCHA to be "as broad as habeas corpus relief" precisely so that it would "avoid

constitutional problems” created by it being the exclusive means for relief in this context. *Atkeson v. Cupp*, 68 Or. App. 196, 199, 680 P.2d 722 (1984); *Adams v. Nooth*, 239 Or. App. 613, 245 P.3d 173 (2010) (same). The constitutional doubts created by defendant’s interpretation of ORS 138.580—doubts avoided by the Court of Appeals’ interpretation of the statute—provide another basis for this Court to adopt the Court of Appeals’ interpretation of ORS 138.580.

ARGUMENT

This Court should adopt the Court of Appeals’ Interpretation of ORS 138.580’s Attachment Requirement.

Since the beginning of Oregon statehood, the constitutional right to the writ of habeas corpus has been made available through a statutory grant. *See, e.g.*, Act of October 11, 1862, section 597, Oregon General Laws 1862, *codified at* ORS 34.310. The Post-Conviction Hearing Act was enacted in 1959 as “a statutory substitute for habeas corpus.” *Bryant v. Thompson*, 324 Or. 141, 150, 922 P.2d 1219 (1996). For a prisoner alleging his trial counsel rendered ineffective assistance of counsel under either the Sixth Amendment to the United States Constitution or Article I, section 11, of the Oregon Constitution, a post-conviction petition filed pursuant to the PCHA is the exclusive means by which a petitioner can challenge the criminal judgment entered against him.

See ORS 138.540(1) (post-conviction relief “shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings on which it is based.”). In that sense, PCHA itself vindicates critical constitutional rights.

Because the Court of Appeals’ interpretation of ORS 138.580’s attachment provision places a significant, but not undue, burden on a petitioner’s ability to bring a claim for post-conviction relief, the constitutional implications of its interpretation are not immediately clear, nor are they referenced by that Court. Defendant’s interpretation of the statute, however, presents grave constitutional concerns. To aid the Court’s analysis, the ACLU outlines for the Court the constitutional underpinnings of the PCHA, as well as the constitutional doubts created by defendant’s proffered interpretation of ORS 138.580’s attachment provision.

A. The Writ of Habeas Corpus.

Article I, section 9, clause 2, of the United States Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The United States Supreme Court has held that “the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention does not constitute a suspension of the writ of habeas

corpus.” *Swain v. Pressley*, 430 U.S. 372, 379 (1977). To state the proposition affirmatively, if a collateral remedy is adequate and effective to test the legality of a person’s detention, the availability of that remedy satisfies the constitutional imperative of the Suspension Clause.

Article I, section 23, of the Oregon Constitution provides:

The privilege of the writ of *habeas corpus* shall not be suspended unless in case of rebellion, or invasion the public safety require it.

(Emphasis in original.)

This Court has explained:

The institution of habeas corpus consists of the power of the courts to inquire into the legality of a detention. *See Fay v. Noia*, 372 U.S. 391, 400-07, 83 S. Ct. 822, 828-31, 9 L. Ed.2d 837 (1963) (so explaining). It is that *system* of judicial inquiry that may not be suspended (interrupted or discontinued), except in cases of rebellion or invasion. Any legal system, including habeas corpus, requires procedures to implement it. So long as those procedures are not tantamount to a suspension of the system of habeas corpus—that is, *so long as those procedures are reasonable for persons who seek redress*—they do not offend the state constitutional ban on suspending habeas corpus.

Bartz v. State of Oregon, 314 Or. 353, 364, 839 P.2d 217 (1992) (emphasis added). Thus, procedural provisions of the PCHA are constitutional so long as the procedures are “reasonable for persons who seek redress” and are “a reasonable substitute for the writ of habeas corpus.” *Id.* (holding the creation of

a statute of limitations under the PCHA does not violate either the state or federal constitution).

In discussing this “reasonableness” standard, this Court referenced several cases that emphasized that statutory post-conviction procedures cannot impede a petitioner’s “meaningful opportunity” to bring a collateral challenge to one’s conviction or “materially impair” one’s ability to do so. *Bartz*, 314 Or. at 365 (citing *People v. Germany*, 674 P.2d 345 (Colo. 1983) (“state may impose reasonable restrictions on collateral challenges to allegedly unconstitutional convictions, so long as a ‘meaningful opportunity’ to conduct that challenge is preserved.”); *Davis v. State*, 443 N.W.2d 707, 709 (Iowa 1989) (“legislature may impose reasonable restrictions on exercise of state constitutional right to post-conviction relief so long as that right is not ‘materially impaired.’”)).

B. Due Process of Law.

“The due process clause of the Fourteenth Amendment protects the rights of a defendant who is charged with a crime in a state court.”¹ *Bartz*, 314 Or. at 367. In evaluating whether the PCHA’s 120-day statute of limitation

¹ The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

for filing a post-conviction claim violated due process, this Court applied the test first articulated in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968): “the test for whether the Fourteenth Amendment guarantees a right is whether the right is ‘fundamental to the American scheme of justice’ and ‘essential for preventing miscarriages of justice.’” *Bartz*, 314 Or. at 367; *see also State v. Tucker*, 315 Or. 321, 845 P.2d 904 (1993) (applying the test). The Court concluded the statute of limitation did not violate due process:

Due process—that is, the use of procedures that are fundamentally fair and essential for preventing miscarriages of justice—does not preclude a state from attaching a reasonable time limitation to the assertion of constitutional claims. *Michel v. Louisiana*, 350 U.S. 91, 97, 76 S. Ct. 158, 162, 100 L.Ed. 83 (1955). The choice of a particular time limitation is always arbitrary to some degree. *Due process requires only that the time limitation be reasonable.* The 120-day limitation in ORS 138.510(2), coupled with the exception for the late filing of a petition when the court finds that the ground for relief asserted could not reasonably have been raised within 120 days, provides a reasonable opportunity for convicted persons to consider what theories of post-conviction relief may be available to them and to assert those theories. We find nothing fundamentally unfair about ORS 138.510(2); no additional procedure is essential for preventing miscarriages of justice.

Bartz, 314 Or. at 368 (emphasis added).

C. This Court Must Interpret ORS 138.580's Attachment Requirement in a Manner that is Consistent with Its Text and Context but Also Avoids Constitutional Doubts.

Because the Court of Appeals provides a detailed explanation for its interpretation of ORS 138.580's attachment requirement, which will surely be echoed and supplemented by petitioner and the Office of Public Defense Services' *amicus* submission, the ACLU will not reiterate that analysis here. *See Ogle*, 254 Or. App. at 670-74. It suffices to say that, for the reasons articulated by the Court of Appeals, its interpretation of the statute is correct.

In its brief on the merits, defendant proffers an alternative interpretation of the attachment requirement. In so doing, defendant acknowledges a post-conviction petition is the only mechanism by which a petitioner can bring a claim alleging his trial counsel rendered ineffective assistance of counsel in violation of Article I, section 11, of the Oregon Constitution, and the Sixth Amendment to the United States Constitution. Defendant fails, however, to acknowledge the constitutional underpinnings of the PCHA itself. Consequently, it proffers an interpretation of the ORS 138.580 that renders the statute unconstitutional. This Court must reject defendant's interpretation of ORS 138.580.

Post-conviction proceedings in Oregon are initiated by the filing of a petition. Under ORS 138.590, "[t]he petitioner, not his subsequently appointed

counsel, has the duty to file the petition” in a post-conviction case. *McClure v. Maass*, 110 Or. App. 119, 124, 821 P.2d 1105, *rev. den.*, 313 Or. 74 (1971).

The petitioner, not counsel, is also responsible for raising all issues in a post-conviction proceeding. *Church v. Gladden*, 244 Or. 308, 311, 417 P.2d 993 (1966); *see also McClure*, 110 Or. App. at 123 (“*Church* establishes that a post-conviction petitioner has the responsibility to see that all issues that he wants raised in the post-conviction proceeding are brought to the court’s attention”). Therefore, “[i]t is petitioner’s duty, when filing the first petition, to select the issues that he wants to litigate.” *Temple v. Zenon*, 124 Or. App. 388, 392, 862 P.2d 585 (1993); *see also McClure*, 110 Or. App. at 124 (“Concomitant with the duty to file the petition is the duty to select the issues that the petitioner wants to litigate”).

By its plain terms, it is also petitioner’s duty to comply with ORS 138.580 when he files his initial *pro se* petition seeking post-conviction relief. ORS 138.580 provides, in relevant part:

The *petition* shall be certified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. * * * The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be certified as heretofore provided in this section. *Affidavits, records or other*

documentary evidence supporting the allegations of the petition shall be attached to the petition. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.

(Emphasis added.)

While some, perhaps even most, petitioners eventually obtain court-appointed counsel, the impact that *future* appointment might have on a petitioner's ability to bring himself into compliance with ORS 138.580 cannot justify elevating the requirements of ORS 138.580 in the first instance.

ORS 138.580 itself makes no reference to an amended petition. The availability of an amended petition does not inform this Court's interpretation of ORS 138.580's attachment provision.

The question that must be resolved is: what pleading requirement did the legislature intend to impose on a *pro se*—very often incarcerated—litigant?

The Court of Appeals answered that question in a manner that is consistent with the plain language of the statute *and* imposes a reasonable—and thus constitutional—burden on a petitioner's ability to seek post-conviction relief. It interpreted the emphasized “attachment provision” as “requir[ing] a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove.” *Ogle*, 654 Or. App. at 672. That is consistent with the plain language of the statute,

which requires only that the petitioner attach “[a]ffidavits, records or other documentary evidence supporting the allegations of the petition * * *.”

ORS 138.580.

ORS 138.580 serves the legislative interest in preventing groundless and invalid claims by requiring that “[f]acts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct.”

This requirement imparts a level of trustworthiness to the statements made by a petitioner in an affidavit, as the petitioner is subject to criminal liability for false swearing under ORS 162.075.

The omission of any burden of proof at this initial stage of the post-conviction proceeding should not be ignored. ORS 138.620 sets forth the rules governing the last stage of the proceedings: the hearing. It provides in part:

If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.

ORS 138.620(2). It is only at this later stage that the legislature intended to require the petitioner to produce “competent evidence” and to satisfy a burden of proof with regard to the allegations in the petition.

In filing the petition, the legislature imposed no such burden. The petitioner must file his post-conviction petition outlining all of the issues that he wants to litigate. *McClure*, 110 Or. App. at 123; ORS 138.580. He must, personally, *certify* the petition. ORS 138.580. He must attach to it “[a]ffidavits, records or other documentary evidence supporting the allegations of the petition.” *Id.* Such attachments must “tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove.” *Ogle*, 254 Or. App. at 672. If the attachments are drawn from the petitioner’s personal belief, the petitioner cannot simply attach a memorandum so stating but must submit an affidavit expressly noting that the source of the assertion is the petitioner himself: “All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be certified as heretofore provided in this section.” ORS 138.580.

If the petitioner meets those requirements, he has complied with ORS 138.580. He can then proceed with discovery and a hearing. *See Ogle*, 254 Or. App. at 675; ORCP 39 (a party may seek discovery after an action commences); ORCP 40 (same); ORCP 43 (same); *Young v. Hill*, 347 Or. 165, 171, 218 P.3d 125 (2009) (Oregon Rules of Civil Procedure apply to post-conviction relief proceedings unless the post-conviction statute provides otherwise).

To prevail at hearing, the petitioner must establish his claims by a preponderance of the evidence. ORS 138.620(2). What was attached to the petition is, at hearing, irrelevant. To prevail, petitioner must affirmatively move to admit (and the court must admit) “competent evidence”—“affidavits, depositions, oral testimony or other competent evidence”—establishing petitioner’s claims. ORS 138.620(2). While the attachments to the petition *may* be a part of that admissible evidence, until they are admitted at the hearing, they are not evidence at all. Nor are they required to be.

The above-referenced statutory scheme is consistent with the plain language of the PCHA statutes *and* imposes a significant, but not undue, burden on post-conviction petitioners. That is to say, it is constitutional.

This stands in stark contrast to a scheme incorporating defendant’s interpretation of ORS 138.580’s attachment requirement. Defendant would require a petitioner—upon the filing of his initial petition—to attach reliable and trustworthy evidence sufficient to establish a *prima facie* case; *i.e.*, evidence that would prove, not just support, the claims asserted in the petition.²

² Defendant’s interpretation conflicts with the statutory maxim requiring courts to “not insert what has been omitted.” ORS 174.010. The attachment provision of ORS 138.580 does not state that the attached evidence must satisfy a particular burden of proof, or even that it constitute sufficient proof of the allegations in the petition. Rather, the statute requires only that there is some evidence submitted *supporting* the allegations in the petition. ORS 138.580.

Defendant maintains that this evidence must be, under most circumstances, admissible and, so, a petitioner cannot satisfy the requirement by attaching his own affidavit in support of the allegations made in the petition.

Such an interpretation would unconstitutionally abrogate the right of many *pro se* petitioners (and even many represented petitioners) to seek post-conviction relief. For, until the initial petition is filed, most petitioners cannot engage in the type of discovery that will produce the attachments defendant asserts are required. Some examples illustrate the point:

An inmate may have a legitimate basis to believe that the alleged victim's mother, physician or friend would have acknowledged certain facts about the victim had he or she been asked particular questions at trial. Prior to initiating a proceeding, however, the petitioner has very few realistic ways to obtain competent evidence establishing that fact. A letter asking such a person to confirm via affidavit an earlier conversation, even if requesting only that the witness tell the truth, is simply not realistic. On the other hand, a subpoena compelling that person to a deposition or trial, might well generate a conversation that leads to the creation of such an affidavit.

Likewise, a letter from an inmate requesting otherwise discoverable physical evidence is, very often, going to be ignored in a way that a subpoena cannot be.

There are statutory hurdles to a petitioner's ability to meet the type of requirement defendant would impose. For instance, an inmate who has reason to believe that his attorney rendered ineffective assistance in connection with jury selection cannot request information relating to said jury until *after* a petition has been filed. ORS 138.585.

There are financial hurdles. For instance, a *pro se* petitioner may have a realistic reason for alleging that trial counsel was ineffective for failing to hire a particular expert. However, until he initiates the post-conviction proceeding, he may not have any mechanism to retain an appropriate expert to establish a *prima facie* claim.

Indeed, for a variety of reasons (both good and bad), a petitioner's prior counsel very often will not communicate with the petitioner about his allegations of ineffective assistance until *after* a petition for post-conviction relief has been filed.

In all of these circumstances, and countless others, there will often be no way for a petitioner to support his initial claim of ineffectiveness aside from a sworn statement explaining why he personally believes the claim is valid. It cannot be that such a sworn statement is inadequate to permit a petitioner to advance past the initial pleading stage.

Yet that is precisely the impact of defendant's interpretation of the attachment requirement. Defendant's interpretation goes far beyond eliminating groundless post-conviction claims; it would effectively eliminate numerous valid claims. Such a provision unreasonably deprives countless petitioners of a meaningful opportunity to bring a post-conviction claim. Because a scheme in which this requirement is in place provides neither an adequate or effective mechanism to test the legality of a petitioner's detention, it is unconstitutional. *See Swain v. Pressley*, 430 U.S. 372, 379 (1977). It violates the Suspension Clause of both Article I, section 23, of the Oregon Constitution, and Article I, section 9, clause 2, of the United States Constitution. And it violates the Due Process Clause of the Fourteenth Amendment.

This unconstitutional burden cannot be alleviated by an assurance that the *pro se* petitioner who is obliged to comply with ORS 138.580 can request appointment of counsel who can then bring the petition into compliance. Nor can it be remedied by the implicit assurance that defendants will not file motions to dismiss until such counsel has exercised the opportunity to amend. The statute must be constitutional as written. Under defendant's interpretation of the statute, it is not.

Fortunately, for the reasons articulated by the Court of Appeals, defendant's interpretation of the attachment provision is incorrect. The Court of

Appeals has adopted an interpretation of ORS 138.580's attachment requirement that is consistent with the text, in context. It requires a petitioner to make only those claims that he can articulate support for in separate attachments, but does not materially impede a petitioner's right to bring a post-conviction claim at all. Its interpretation of the statute is consistent with legislative history, which reflects that the legislature intended for the PCHA to be "as broad as habeas corpus relief" precisely so that it would "avoid constitutional problems." *Atkeson v. Cupp*, 68 Or. App. 196, 199, 680 P.2d 722 (1984); *Adams v. Nooth*, 239 Or. App. 613, 245 P.3d 173 (2010) (same). And, it avoids those constitutional problems, interpreting the provision in a manner that vindicates a convicted criminal defendant's state and federal constitutional rights to seek collateral review of his conviction.

This Court has explained:

Statutes should be interpreted and administered to be consistent with constitutional standards before attributing a policy of doubtful constitutionality to the political policymakers, unless their expressed intentions leave no room for doubt.

Salem College & Academy, Inc. v. Employment Div., 298 Or. 471, 481, 695 P.2d 25 (1985). The Court of Appeals' interpretation of ORS 138.580 properly interprets the statute while avoiding the constitutional questions raised

by defendant's interpretation. The ACLU urges this Court to affirm the Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, and the reasons discussed in petitioner's briefs filed before this Court and the Court of Appeals, the ACLU urges this Court to affirm the Court of Appeals' interpretation of ORS 138.580.

Respectfully submitted this 26th day of September, 2013.

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

Brief length

I certify that:

(1) this brief complies with the word-count limitation placed on Petitions for review in ORAP 5.05(2)(b) and ORAP 9.05(3); and

(2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,509 words.

Type size

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

Dated this 26th day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that on September 26, 2013, I directed the original *AMICUS CURIAE* ACLU OF OREGON, INC.'S BRIEF IN SUPPORT OF PETITIONER-APPELLANT KEITH KENDON OGLE, SR. to be electronically filed with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97301-2563, by using the Court's electronic filing system.

I further certify that on September 26, 2013, I directed the foregoing *AMICUS CURIAE* ACLU OF OREGON, INC.'S BRIEF IN SUPPORT OF PETITIONER-APPELLANT KEITH KENDON OGLE, SR. to be electronically served upon the following attorneys by using the Court's electronic filing system:

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