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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHANNON MAE HICKMAN, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court Case No. CR1001094 A150127 S061896 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DALE RYAN HICKMAN, Defendant-Appellant, Petitioner on Review.	A150126 S061902

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION OF OREGON

Petition for Review of the Decision of the Court of Appeals on Appeal from a judgment of the Circuit Court for Clackamas County;
Honorable Robert D. Herndon, Judge

Summarily Affirmed: August 20, 2013
Before: James W. Nass, Appellate Commissioner

May 2014

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INTEREST OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OREGON

The American Civil Liberties Union of Oregon ("ACLU") sought and received permission to appear as *amicus curiae* to present a position as to the correct rules of law in this case. The position does not present or affect a private interest of the ACLU. The position presented is neutral as it relates to the parties in this matter.

The 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 the freedom of religion and rights of conscience protected by Article I, sections 2 and 3, of the Oregon Constitution. In particular, the ACLU would like to provide the Court with helpful information and analysis regarding the extent of these protections and their interplay with other fundamental and constitutional rights. The ACLU believes that the outcome of this case will have a substantial impact on future cases under Article I, sections 2 and 3.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

First Question Presented

Can parents invoke Article I, sections 2 and 3, as a valid defense to the uniform and neutral application of ORS 163.125 (Second Degree Manslaughter) when the parents have failed to act in the best interests of their child and such failure to act resulted in the death of the child?

First Proposed Rule of Law

No. Article I, sections 2 and 3, do not allow parents to harm their children in the name of religion. Article I, sections 2 and 3, do not provide a valid defense to the uniform and neutral application of ORS 163.125 (Second Degree Manslaughter) to parents who have failed to act in the best interests of their child. The contours of parental rights are limited by the state's authority to protect children from physical harm and abuse, regardless of the parents' claim of religious freedom.

Second Question Presented

Under *Meltebeke v. Bureau of Labor & Indus.*, 322 Or 132, 903 P2d 351 (1995), does the Oregon Constitution require a minimal "knowing" mental state in a prosecution for Second Degree Manslaughter when a parent has failed to act in the best interests of their child and such failure to act resulted in the death of the child?

Second Proposed Rule of Law

No. *Meltebeke* does not apply to criminal prosecutions for Second Degree Manslaughter based on the failure of a parent to act in the best interests of a child. In addition, *Meltebeke's* problematic distinction between conduct motivated by belief and religious practices, along with its imposition of a knowing mental state on sanctions for conduct constituting a religious practice, are not general rules applicable to all claims under Article I, sections 2 and 3.

SUMMARY OF THE ARGUMENT[1]

This case concerns the intersection of religious freedom and the state's right to protect the best interests of a child, and whether *Meltebeke* is applicable in the context of such an intersection of rights. The correct rules of law do not provide a defense to--or impose a knowing mental state on--Second Degree Manslaughter based on the failure of parents to act in the best interests of a child.

While this position may at first glance appear to support the position of the state in this case, *amicus* takes a neutral position because it is not prepared to endorse the jury's verdict or the imposition of 72 month sentences on the defendants.[2]

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

[2] *Amicus* is first concerned about the prosecution's focus on the defendants' decision to home birth their child and their lack of prenatal care. Many women

ARGUMENT ON THE FIRST QUESTION PRESENTED

The text, context, historical circumstances, and case law surrounding the Oregon Constitution indicate that claims of parental rights related to acts or omissions that cause the death of children are not bolstered by claims of religious freedom under Article I, sections 2 and 3. Instead, parental rights are properly limited by the state's protection of the best interests of the child, regardless of a parent's religious motivations for action or inaction that causes harm to their children. The Oregon framers and voters in 1857 understood that the best interests of the child override parental rights.

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in Oregon choose to give birth at home, and many women--particularly poor women--do not receive or seek prenatal care. The decision to home birth is a private reproductive choice. Whether to seek particular types of prenatal care is also a reproductive choice, which is often influenced or determined by the parents' income, wealth, location, and education. Allowing a conviction to depend upon these particular facts could set dangerous precedent. Thus, to the degree that the disposition of these cases was dependent upon the defendants' decision to home birth and their lack of prenatal care, *amicus* does not support the convictions and sentences.

Amicus is also concerned about the prosecution's theory of the case, which suggests that parents must take action and conduct Internet searches to seek medical information within a particularly short time frame in order to avoid criminal liability for injury to their children. Internet access is not universal and is particularly lacking in the homes of poor families. In addition, when events occur quickly--such as the 5-10 minutes that passed between the moment appeared to be "fading" and his death--reasonable individuals may not immediately call 911 or search the Internet for information due to shock, distress, and confusion. Again, *amicus* is concerned about the precedent a conviction based upon these particular facts may set for future prosecutions.

A. When Article I, sections 2 and 3, were adopted, it was well-established that parental rights must yield to the best interests of the child

The right of the state to intervene in order to protect the best interests of children, often invoked under the doctrine of *parens patriae*, has deep historical roots in our legal system. In 1774, Lord Mansfield explained that in matters related to the welfare of children, the public (through the state) has the right to take actions based on "what shall appear *best for the child*" notwithstanding the "natural right" of the father. *Blisset's Case*, 1 Lofft 748, 749, 98 Eng Rep 899 (KB 1774) (emphasis added) (custody dispute involving mistreatment of a child). The power of the state to take actions which impose limits on parental rights, as was done in *Blisset's Case*, stems from the doctrine of *parens patriae*, a legal principle dating back as early as medieval English chancery courts.[3] Shawn F. Peters, *When Prayer Fails* 69 (2008).

The "best interests of the child" doctrine from *Blisset's Case*, which was decided prior to the American Revolution, was widely adopted by American courts as part of the common law. *See McKim v. McKim*, 12 RI 462, 464 (1879) (discussing the general adoption of *Blisset's Case's* best interests of the child doctrine by American courts in cases predating and contemporary with the

[3] Although the doctrine of *parens patriae* initially related to the English monarchy's interest in resolving feudal property disputes, the doctrine evolved to focus on the best interests of children prior to its adoption by American courts. Peters, *When Prayer Fails* 69.

adoption of Oregon's Constitution).[4] So, framers and voters in 1857 would have understood that parental rights are circumscribed by the state's authority to protect the best interests of a child. The claim that parental rights are somehow bolstered by the religious freedom guaranteed by Article I, sections 2 and 3, fails. Religious freedom was not intended to change the overriding concern with the best interests of the child.

Further evidence that the Oregon framers and voters accepted and understood that the state has authority to act in the best interests of a child is found in Deady's Laws, which is the first "complete compilation of 'all the general laws of Oregon'" in effect and adopted very close in time to the Oregon Constitution's adoption in 1857. General Laws of Oregon, Preface, p 3 (Deady 1845-1864). Under Oregon law, the state was authorized to remove children from their parents' custody and place them with adoptive parents *without parental consent* if parents "willfully deserted and neglected to provide proper care and maintenance for the child * * *." *Id.* at ch XII, title IV, § 62, p 692. The state was also given authority to, "in its discretion, provide by order * * * [f]or the care, custody and maintenance of the minor children" in divorce

[4] Although *amicus* did not locate any cases from the Oregon territory prior to the adoption of the Oregon Constitution discussing the best interests of the child, Oregon cases dating back as early as 1888 indicate that Oregon courts embraced the best interests of the child doctrine, without any indication that this was a new concept in Oregon's common law. *See, e.g.*, *Lambert v. Lambert*, 16 Or 485, 19 P 459 (1888) (awarding custody to a grandfather over the competing claims of the child's parents because "[t]he most important consideration in such a case is the best interests of the child").

proceedings, *notwithstanding parental rights*. *Id.* at Crim Code, ch V, title VII, §§ 496, 497, p 271-72.

The fact that all of these laws existed at or very shortly after the Oregon Constitution's adoption indicates that the Oregon framers and voters understood that the state has authority to limit parental rights to protect the best interests of a child, notwithstanding claims of religious freedom.[5] If religious freedom bolstered parental authority to harm children, these common-sense provisions would be unconstitutional. But they are not. The state's authority to protect the best interests of children by limiting physical harm that results in death is not trumped by a parent's claim of religious freedom, and no exemptions are constitutionally mandated simply because mistreatment of a child is motivated by religious belief.

B. The text of Article I, sections 2 and 3, indicates that the religious freedom guaranteed under the Oregon Constitution is an individual and personal right which does not include a right to cause serious physical harm to children

Article I, section 2, secures the right of individuals to worship "according to the dictates of their *own* consciences." Or Const, Art I, § 2 (emphasis added).

[5] In other contexts, this Court has looked to see if there laws in effect at the time of adoption which regulated the conduct at issue (sometimes referred to as "conventional crimes") which the framers did not evidence an intent to abolish by crafting a provision in Oregon's bill of rights. *State v. Ciancanelli*, 339 Or 282, 285, 121 P3d 613 (2005), citing *State v. Robertson*, 293 Or 402, 433 (1982). For example, while the framers evidenced an intent for Article I, section 8, to abolish criminal laws prohibiting criticism of the government, such as seditious libel, the framers did not evidence an intent to abolish longstanding verbal crimes, such as solicitation. *Id.*

Article I, section 3, similarly protects the "rights of conscience" and religious "opinion." *Id.* at § 3. "Conscience," as understood by the Oregon framers, meant "*[i]nternal or self*-knowledge, or judgment of right and wrong," as well as "the moral sense," or "the general principle of moral approbation or disapprobation, applied to *ones [sic] own conduct* * * *." Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis added), *available at* http://webstersdictionary1828.com/.

The use of the words "conscience" and "opinion" indicates that the protections afforded by Article I, sections 2 and 3, relate to a person's internal judgment and personal actions based on such judgment. Nothing in the text indicates that these personal and individual rights include judgments made *for another person* without that other person's consent, or allow conduct which causes the death of another person, such as the religiously-motivated action or inaction of a parent which harms or causes the death of their child.

In particular, Article I, sections 2 and 3, would be violated if a parent's exercise of individual religious liberty was allowed to eliminate a child's right to reach the age where the child may hold and act on the child's own religious opinions. As the US Supreme Court said in *Prince v. Massachusetts*:

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

321 US 158, 170 (1944) (interpreting the First Amendment); *see also Matter of Jensen*, 54 Or App 1, 7, 633 P2d 1302 (1981) (adopting *Prince's* reasoning as applicable to Article I, sections 2 and 3).

C. *Parens patriae* trumps parental rights when necessary to protect children's lives from endangerment, regardless of claims of religious freedom

In *Matter of Jensen*, 54 Or App 1, 3, 633 P2d 1302 (1981), the Court of Appeals faced the question of whether the juvenile court could place a child in the legal and physical custody of the Children's Services Division ("CSD") in order to provide the child with treatment (including a low-risk surgery) for hydrocephalus, a condition involving the excessive accumulation of fluid in the brain which causes "severe mental and physical effects," including intellectual disability. The child's parents challenged the custody order, claiming a violation of their right to freely practice their religion under the First Amendment and Article I, sections 2 and 3. *Id.* at 7.

Rather than concluding that a claim of religious freedom somehow bolsters parental rights, the Court of Appeals instead focused on the doctrine of *parens patriae* and its impact on parental rights, regardless of claims of religious freedom. *Id.* at 8 ("The parents acknowledge that their religious rights would have to 'defer to *parens patriae* doctrine when life is endangered.' * * * [I]n this case * * * the most basic quality of the child's life is endangered by the course the parents wish to follow. Their rights must yield.").

Viewed this way, a parent's right to custody and to care for their child is properly considered a parental right, which includes such things as religious training and moral guidance. *Id.* at 7 (referring to the right to provide "religious foundation" for children as a "parental right"). Parental rights are not, however, somehow made stronger when a parent has religious motivation for the manner in which they wish to care for their child. Atheists and agnostics have as much right to provide training and moral guidance to children as do religious believers. And when a child's life is endangered by a parent's conduct, religiously motivated or not, "[t]heir rights must yield" to the state's authority under the doctrine of *parens patriae*. *Id.* at 8.

ARGUMENT ON THE SECOND QUESTION PRESENTED

Meltebeke relates to religious freedom and not to parental rights. Nothing in *Meltebeke* indicates an intention to craft a rule impacting parental rights or suggests that parental rights may be bolstered by claims of religious freedom. Thus, this courts evaluation of the intersection of parental rights and religious freedom should be unaffected by *Meltebeke.*

If *Meltebeke* does somehow apply to cases such as the one presented here, it would be limited to that portion of the opinion where the court discusses the test for determining whether a law is facially constitutional under Article I, sections 2 and 3--which correctly states many principles from this Court's current religious freedom jurisprudence.

In contrast, *Meltebeke's* statements distinguishing religious practices and conduct motivated by belief are problematic and should be abandoned by this Court. Further, *Meltebeke's* imposition of a knowing mental state on BOLI's employment regulations appears to only be intended as a narrow exemption under Article I, sections 2 and 3, that is properly limited to the specific facts in that individual case, rather than a statement of a general rule broadly applicable beyond the facts and issues presented there.

A. *Meltebeke's* statements distinguishing religious practices and conduct motivated by belief is problematic and should be abandoned by this Court

Meltebeke stated that "[c]onduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice." *Meltebeke v. Bureau of Labor & Indus.*, 322 Or 132, 153 n 19, 903 P2d 351 (1995). After evaluating the conduct at issue, the court concluded that proselytizing constitutes a religious practice and was therefore subject to a different standard from mere conduct motivated by belief. *Id.* at 151-52. *Meltebeke* is an outlier in this regard, and for good reason. Any attempt to distinguish religious practices from other types of conduct motivated by belief is problematic and unnecessary for resolving claims under Article I, sections 2 and 3. *Meltebeke's* distinction is misguided dicta that should be repudiated, not extended.

1. Application of *Meltebeke's* religious practices versus conduct motivated by belief distinction would force courts to impermissibly evaluate religion

The inquiry into what constitutes a religious practice would impermissibly place Oregon courts in the position of evaluating and interpreting religion. While a variety of types of conduct motivated by belief may be burdened by laws under Article I, sections 2 and 3, determining if such conduct is motivated by belief only requires the court to inquire into whether a belief is sincerely held. This type of inquiry is constitutionally permissible. *See Employment Division v. Smith*, 494 US 872, 906-07 (1990).

In contrast, setting "religious practices" apart as deserving a different level of constitutional scrutiny would necessarily involve the evaluation of what constitutes a "religious practice" in the particular belief system involved. How would this be done? By calling a religious leader to the stand to testify? By examining the religion's texts? Regardless of how a court approached the issue, it would necessarily be required to assess the tenets of a religion in order to determine whether particular types of conduct fall within its "religious practices."

These sorts of inquiries are absolutely prohibited by the Oregon Constitution and First Amendment's prohibition on state entanglement with religion. *See Employment Division v. Smith*, 494 US 872, 906-07 (1990) (broadly prohibiting judicial resolution of religious questions); *Maryland &*

Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc., 396 US 367, 368 (1970) (courts may not engage in "consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith"); *Jones v. Wolf*, 443 US 595, 603 (1978) (courts may make "no inquiry into religious doctrine"); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 US 440, 449 (1969) (prohibition on judicial "interpretation of particular church doctrines and the importance of those doctrines to the religion").

In order to avoid this constitutionally impermissible inquiry, this Court should abandon the religious practices versus conduct motivated by belief distinction articulated in *Meltebeke*, and simply employ this Court's usual method of analysis, which merely requires a determination of whether conduct is motivated by a sincerely-held belief.

2. *Meltebeke's* distinction has no basis in the text, context, historical circumstances, and case law surrounding Article I, sections 2 and 3

Nowhere in Article I, sections 2 and 3, or the surrounding text of the Oregon Constitution is there any mention of "practices" or "religious practices." Nor is there any indication that "religious practices" should be given elevated status over other types of conduct motivated by belief. Section 3 does refer to the "exercise" of religion, which was defined at the time of adoption as "[p]ractice; performance; as the exercise of religion," as well as "[a]ct of divine

worship." Noah Webster, *An American Dictionary of the English Language* (1828), *available at* http://webstersdictionary1828.com/. While this definition encompasses practices, it is clearly broader, as it includes both "performance" and "acts." More importantly, "exercise" is listed alongside "enjoyment of religeous [sic] opinions" and "rights of conscience," with no indication that each of these things should be treated differently.

Amicus has been unable to locate calls for the differential treatment of "religious practices" under the law in any treatise from the late 18th and early 19th centuries, in the libertarian philosophy popular among the Oregon framers and voters, or in Oregon's constitutional debates. *Amicus* has also been unable to locate even a single reference in Oregon case law, beyond the statements in *Meltebeke*, to the supposed need to distinguish between "religious practices" and other types of conduct motivated by belief when analyzing claims of religious freedom.

In fact, case law examining Oregon's constitution indicates that "religious practices" must be treated the same as conduct motivated by religious belief. *See, e.g.*, *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 723 P2d 298 (1986) (utilizing the terms "religious practice" and "religiously motivated conduct" without distinguishing between the two). Beyond *Meltebeke*, *amicus* has not identified a single Oregon case that even discusses particular conduct

being identified as a "religious practice" and set apart for differential treatment.[6]

Meltebeke claims that the distinction between religious practices and conduct motivated by belief is commanded by the reasoning of *Smith v. Employment Div., Dep't of Human Res.*, 301 Or 209, 721 P2d 445 (1986), *vacated on other grounds by Employment Div., Dep't of Human Res. of State of Or. v. Smith*, 485 US 660, 108 S Ct 1444, 99 L Ed 2d 753 (1988). *Meltebeke*, 322 Or at 149-50. *Meltebeke* relies the following statement from *Smith*:

> "As long as disqualification by reason of the *religiously based conduct* is peculiar to the particular employment and most other jobs remain open to the worker, we do not believe that the state is denying the worker a vital necessity in applying the 'misconduct' exception of the unemployment compensation law."

Meltebeke, 322 Or at 149 (emphasis added), *quoting Smith*, 301 Or at 216.

Aside from this single quotation, which makes no mention of "religious practices" and instead utilizes the term "religiously based conduct," the only

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[6] Although *amicus* notes that there are some cases from other jurisdictions which attempt to define what a "religious practice" is, these cases involve inquiry into the legislative intent behind laws specifically using the term and are not relevant here. *See, e.g., Heller v. EBB Auto Co.*, 8 F3d 1433 (9th Cir 1993) (interpreting Title VII). The interpretation of a term in a statute should have little, if any, impact on constitutional law, particularly where the statute was enacted long after a constitutional provision which does not even contain the statute's analyzed terminology. In addition, because determining whether particular religiously motivated conduct is mandated by a religion is constitutionally prohibited, such interpretations of "religious practice" are essentially synonymous with the analysis of what constitutes religiously motivated conduct. *Id.* at 1438 (interpreting "religious practice" broadly so as to avoid an impermissible inquiry into the tenets of a religion).

other evidence cited by *Meltebeke* to support its "religious practices" distinction is its statement that Smith asserted that his use of peyote was a "religious practice." *Meltebeke*, 322 Or at 149-50. No such assertion was made in *Smith*. Instead, Smith claimed that his "right to worship as he sees fit" was burdened when he was penalized for participating in a religious ceremony. *Smith*, 301 Or at 215. Nothing in *Smith* indicates that Smith himself or this Court attempted to characterize the smoking of peyote as a religious *practice*, as distinguished from religiously based *conduct*.

3. *Meltebeke's* distinction is unworkable and subjective

Meltebeke's practices versus conduct distinction is a "conundrum." *State v. Beagley*, 257 Or App 220, 225-26, 305 P3d 147 (2013) ("We find it difficult to understand this distinction between religious conduct and religious practice."). The problem stems from the fact that the word "practices" has a particularly broad meaning which significantly overlaps with the meaning of "conduct." *See Webster's Third New Int'l Dictionary* 473-74, 1780 (unabridged ed 2002) (defining "conduct" as "a mode or standard of personal behavior based on moral principles," and "practice" as "a mode of acting or proceeding"). At the same time, "religious practice" has connotations in the English language indicating something with special religious significance. Yet this significance is likely to be viewed differently depending on one's familiarity with the alleged practice, religion, or belief system; whether one

engages in and how one views the particular conduct or action; and whether one has a vested interest in the outcome of the question. The categorization is also likely to be impacted by whether one views practices to include both passive and active conduct, and whether a practice must be commanded by the tenets of a religion or may be based on personal beliefs.

While individuals (or even the members of this Court) may hold strong feelings as to whether particular conduct, such as the withholding of medical care from children, constitutes either a religious practice or religiously motivated conduct, *amicus* urges the Court not to resolve what may seem to be a simple question in this particular case in a way that leaves this troublesome distinction intact.

4. *Meltebeke's* distinction improperly discriminates between religions and between individuals with different religious and nonreligious beliefs

The creation of a constitutional rule exempting only those individuals who engage in "religious practices" from generally applicable laws would be discriminatory because it would treat the very same conduct engaged in by various people differently, despite the fact that each person firmly believes that he or she is following the dictates of his or her conscience. This type of impermissible discrimination is analogous to the discrimination ruled unconstitutional in *Newport Church of Nazarene v. Hensley*, 335 Or 1, 56 P3d 386 (2002), where this Court held that under Article I, sections 2, 3, and 20, "it

is impermissible for a statute to draw a distinction between churches and nonchurch religious organizations."

Any objective test for distinguishing religious practices from other types of conduct motivated by belief would also impermissibly discriminate between different types of religions, as well as between individuals with different religious and nonreligious beliefs. Some religions and belief systems do not have set practices but do provide moral and spiritual guidance to their followers. Other religions may similarly encourage their members to engage in regular conduct that each individual believes is mandated by a higher power.

Finally, atheists and agnostics do not engage in conduct or practices mandated by a particular religion, but do hold sincere beliefs and make decisions about how to act based on those beliefs and their own consciences. They may also belong to secular organizations that promulgate codes of conduct ascribed to and followed by their members. Prioritizing the ethical obligations of people of one faith against people of another, or against people of no faith, is constitutionally impermissible.

5. Distinguishing religious practices from conduct motivated by belief was not necessary for the resolution of *Meltebeke* and is therefore best viewed as dicta

Resolution of *Meltebeke* did not require the court to distinguish religious practices from other types of conduct motivated by belief. Although such a distinction may have seemed, at the time, to be a convenient mechanism for

explaining the court's decision to craft a religious exemption from BOLI's rule, the court could have instead stated that BOLI's rule imposed too great a burden on the employer's rights of conscience or on his ability to take actions based on his deeply-held religious beliefs. The court perhaps hints at the unimportance of the religious practices distinction by relegating its explanation to a footnote. This Court should similarly relegate *Meltebeke's* religious practices distinction to a mere footnote in Oregon's constitutional history.

B. *Meltebeke's* imposition of a knowing mental state on sanctions for conduct which constitutes a religious practice is not a general rule applicable to all claims under Article I, sections 2 and 3

Meltebeke examined an employment regulation promulgated by BOLI for facial and as-applied constitutionality under Article I, sections 2 and 3. *Meltebeke*, 322 Or at 145-53. First, the court properly concluded that BOLI's rule was facially constitutional. *Id.* at 150. Next, the court examined the regulation as applied, and held that Article I, sections 2 and 3, were violated by the particular application of BOLI's rule to the employer's conduct in that case. *Id.* at 152. In order to remedy this apparent violation, the court imposed a knowledge standard on BOLI's rule. *Id.* Although the court used fairly broad language when describing its imposed standard, *Meltebeke* cannot be squared with this Court's religious freedom jurisprudence without viewing the knowledge standard as a limited exemption applicable to the very specific facts found in *Meltebeke*.

1. Claims under Article I, sections 2 and 3 are evaluated by first evaluating a law's neutrality, and then determining whether an as-applied exemption is required

Under this Court's contemporary religious freedom jurisprudence, claims under Article I, sections 2 and 3, are evaluated by first determining whether a law is facially neutral and has been uniformly applied.[7] Government must be

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[7] Although *amicus* discusses Article I, sections 2 and 3, simultaneously throughout this brief, the Oregon framers and voters likely intended for the provisions to have separate meanings. While Article I, section 3, prohibits "laws" from infringing the rights of conscience, section 2 states that individuals "shall be secure[d]" from interference with those rights. *See* Burton & Glade, *A Legislative History of the Oregon Constitution*, 37 Willamette L Rev at 493 (indicating that the appearance of the word "secure" in the enrolled version of section 2 is likely a typo, as "secured" was used in every other version, including the version distributed to Oregon voters).

To be "secured," as understood by the Oregon framers, was to be "[e]ffectually guarded or protected." Noah Webster, *An American Dictionary of the English Language* (1828) (emphasis added), *available at* http://webstersdictionary1828.com/. Thus, the words of Article I, section 2, command the state to guard and protect the right to worship from outside interference, rather than limiting state action. Although the differences between sections 2 and 3, were not discussed at Oregon's constitutional convention, delegates at Indiana's convention in 1850 explained that:

> "We intended by this that they should be so secured, and it will be the duty of the Legislature to enact such laws as will prevent any and every society from being disturbed in their worship.
>
> "* * * For example, if their meetings should be wantonly disturbed, that the creating of such a disturbance should be regarded as a criminal offence, and punished accordingly. The object of the provision is, that the law should recognize the right and protect it by proper legislation; that is all. * * *"

Claudia Burton and Andrew Glade, *A Legislative History of the Oregon Constitution of 1857 – Part I (Articles I & II)*, 37 Willamette L Rev 469 (2001),

neutral towards religion, and thus laws must be neutral both on their face and in their policy. *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 368, 723 P2d 298 (1986)[8]; *see also Salem Coll. & Acad. Inc. v. Employment Div.*, 298 Or 471, 489, 695 P2d 25 (1985) (financial burden discriminating between churches and nonchurch organizations amounts to religious compulsion and is thus unconstitutional). This principle is correctly stated in *Meltebeke*. 322 Or at 149 (holding a law facially neutral if it "is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions").

Once a law is evaluated for neutrality, the particular facts of the case are evaluated to determine if an as-applied exemption is mandated by Article I, sections 2 and 3. *See State v. Brumwell*, 350 Or 93, 108, 249 P3d 965 (2011) ("[W]hen faced with a challenge to the application of a general rule that [is] 'neutral toward religion on its face and in its policy' to religiously motivated conduct, the only issues [are] the statutory authority to make such a regulation * * * and an individual claim to exemption on religious grounds.") (internal quotations omitted); *Cooper*, 301 Or at 368-69 (acknowledging that facially

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quoting 1 Report on the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 965 (1850).

[8] A minor caveat to the facial neutrality requirement is found in *Cooper*, 301 Or at 375 (law targeting religion may be constitutionally permissible if the overarching policy of the law is to create neutrality in narrow circumstances related to Establishment Clause concerns).

neutral laws are subject to "claims to exemption on religious grounds"); *see also Salem College*, 298 Or at 486 n 11 (noting that some courts have held certain religious activities immune from regulation).

While this Court has repeatedly acknowledged that neutral laws are subject to as-applied claims for exemption, there is no definitive test for when exemptions are appropriate. Nonetheless, this Court has provided some limited guidance by indicating that a claim for exemption fails unless a law actually or incidentally burdens the freedom of conscience. For example, *Salem College* suggests that "common financial exactions" do not burden freedom of conscience.[9] *Salem College*, 298 Or at 485-86 (indicating that unemployment taxes may burden a religious organization in its role as an employer, yet general financial obligations imposed on religious employers do not burden their freedom of religion; also acknowledging that some courts have held certain taxes on "religious activities," such as the distribution of books or other literature, to be a significant enough burden to warrant exemption).

In addition, this Court's cases indicate that claims for exemption should not be dismissed simply because the burden claimed relates to conduct rather

[9] In *Employment Div., Dept. of Human Res. v. Rogue Valley Youth for Christ*, this Court similarly expressed doubt that the imposition of a generally applied unemployment tax would constitute a burden on freedom of belief or worship. 307 Or 490, 498, 770 P2d 588 (1989). However, this case is of limited value. The very short opinion barely analyzes Article I, section 3. Instead, it simply applied the First Amendment's balancing test to its particular facts and is an outlier in post-*Salem College* cases in that regard. *Id.* at 489.

than belief. As acknowledged by this Court, some burdens on conduct compel changes in belief. *Cooper*, 301 Or at 371-72 ("[T]he present law cannot be sustained simply on grounds that it does not interfere with the free exercise of religion because it regulates conduct rather than religious beliefs or verbal expression of opinion and worship [because certain types of conduct] may be essential to an adherent's sense of religious identity").

Under this framework, *Meltebeke* is best viewed as an example of the carving out of a limited exemption applicable to particular facts. While BOLI's rule was deemed to be neutral and uniformly applied, the court was clearly concerned that the application of the rule *in the particular context of that cas*e impermissibly infringed the employer's religious freedom. To alleviate the court's concerns, the court imposed a knowledge standard. Perhaps that concern was due to the fact that the employee in that case never affirmatively expressed his discomfort or disagreement to his employer. In any event, that standard should be limited to the specific facts it addressed. To view it in any other way would be a drastic departure from this Court's contemporary jurisprudence as set forth above, injecting a novel requirement into Oregon constitutional law with no basis for its inclusion.

2. The text, context, historical circumstances, and case law surrounding Article I, sections 2 and 3, do not require the imposition of a knowing mental state on sanctions for conduct which constitutes a religious practice

Nowhere in Article I, sections 2 and 3, is there a mention of "knowledge," a "knowing mental state," or anything indicating that a subjective component must be incorporated into neutral laws impacting religious belief or conduct. Nor is there any such reference in the surrounding text of the Oregon Constitution, including each of the additional provisions addressing religion. Moreover, *amicus* has been unable to locate any suggestion or call for the imposition of a knowing mental state or any other subjective component on sanctions applied to any type of religiously-motivated conduct in writings from the late 18th and early 19th centuries or in Oregon's constitutional debates.

Oregon cases similarly lack any reference to a subjective component requirement in its Article I, sections 2 and 3, jurisprudence.[10] Although *Meltebeke* claims that *Smith* commands such a requirement, *Meltebeke* acknowledges that it is reading something into *Smith* which is not actually

[10] *Amicus* has reviewed the entirety of Oregon's Article I, sections 2 and 3, jurisprudence, both before and after *Meltebeke*, and has not located a single case embracing the knowledge requirement set forth in *Meltebeke.* Only two appeals court cases subsequent to *Meltebeke* mention its knowledge requirement, yet neither evaluates the standard. *See State v. Worthington*, 251 Or App 110, 115, 282 P3d 24 (2012) (stating that the applicability of *Meltebeke's* knowledge requirement is "an issue we do not decide"); *Beagley*, 257 Or App at 225-26 (not reaching the issue of *Meltebeke's* knowledge requirement because the conduct at issue was deemed not to be a religious practice).

stated in the case. *Meltebeke*, 322 Or at 151 ("*Smith* contains an additional--if less explicit--requirement * * *.").

Meltebeke's only support for its claim that *Smith* mandates a knowledge requirement is its assertion that *Smith* noted Smith's knowledge and "regarded it as significant." *Meltebeke*, 322 Or at 151, citing *Smith*, 301 Or at 211–12, 215–16. While *Meltebeke* acknowledges that it is drawing conclusions based on an inference, *Meltebeke* fails to understand why *Smith* mentioned Smith's knowledge at all. An examination of *Smith*, however, explains why. And it has nothing to do with Article I, sections 2 and 3.

Smith mentions knowledge in two places. First, when reciting the case facts, the court notes that Smith was warned that he could be discharged for using peyote, his employer issued a memorandum explaining its prohibition of drug use, and Smith told his employer he intended to ingest peyote. It is no wonder that *Smith* mentions these facts, as they are simply the facts relevant to the underlying employment proceeding. The applicable law in *Smith* required that an employee's conduct be *willful* in order to trigger the denial of unemployment benefits. Thus, the facts are simply "significant" because they state facts relevant to the elements of the unemployment statute, and not because they mandate that willfulness or any other subjective mental state be incorporated into laws challenged under Article I, sections 2 and 3.

Second, *Smith* mentions again that Smith "willfully violated his employer's orders" when examining the unemployment statute's neutrality. Here, the court necessarily mentions willfulness when quoting the statute's text. Yet there is nothing in the opinion that indicates that "willfulness" or the statute's subjective component has anything to do with its constitutionality under Article I, sections 2 and 3. Instead, the court's conclusion that the statute meets constitutional scrutiny is based exclusively on its neutrality towards religion.[11]

3. Claims for exemption from the uniform application of neutral laws will need to be evaluated as those cases arise

Extending *Meltebeke's* knowledge standard as a general rule applicable to all claims under Article I, sections 2 and 3, could potentially impact a broad swath of cases, including cases of civil negligence, other areas of criminal law employing a negligence or reckless standard, and strict liability cases in both civil and criminal law. This Court would be ill-advised to adopt such a novel standard as a general rule without fully considering its potentially far-reaching implications.

Further, whether to grant exemptions from generally applicable laws based on claims of religious freedom is thorny question at best. Courts and

[11] While *amicus* agrees that the statute in *Smith* was neutral, *amicus* takes issue with a different aspect of *Smith*: its conclusion that Smith did not have a valid claim for exemption from the application of the unemployment law under Article I, sections 2 and 3.

commentators have been wrestling with the issues for many years, with very little agreed upon in the way of broad general rules. *See* Douglas Laycock, *The Religious Exemption Debate*, 11 Rutgers JL & Religion 140 (2009);

This Court need not decide the general contours of such exemptions, if any, in this case. However, if this Court does decide to establish a test applicable to claims for exemption in this or future cases, it should keep the following principles in mind. First, any exemption granted should not provide heightened protection to religiously-motivated harm to children. While it is true that the Oregon framers' and voters' intended for religious freedom and the rights of conscience to be vigorously protected, they did not intend for the exercise of those rights to curtail the fundamental rights, or lives, of others. This concern is necessarily heightened when those to be protected are particularly vulnerable. Therefore, when analyzing claims for exemption under Article I, sections 2 and 3, this Court should show great solicitude for the liberty of those unable to protect their own interests due to youth or other factors.

Second, any exemption granted must itself be neutral towards religion. The firm command of government neutrality in Oregon's Constitution, combined with this Court's recognition that statutory exemptions from generally applicable laws must be neutral, indicates that any exemption granted under Article I, sections 2 and 3, must also be neutral. *See Salem College*, 298 Or at 490 (prohibiting statutory exemption which applied only to churches and

not nonchurch organizations); *see also Kay v. David Douglas Sch. Dist. No. 40*, 79 Or App 384, 392, 719 P2d 875 (1986) (government may not cross "the line from the accommodation of religion to an impermissible appearance of sponsorship"). In addition, this Court, the United States Supreme Court, and other state courts have acknowledged the impermissible inequality created when privileges are granted to *religious* groups but not to similar *secular* organizations. *Salem College*, 298 Or at 491 n 15 (surveying federal and state cases indicating that religious organizations must not be singled out for "special preference").

Finally, this Court should not succumb to the temptation to adopt formulations based on the First Amendment. Article I, sections 2 and 3, have been interpreted independently from the First Amendment for nearly 30 years. *See Salem College*, 298 Or at 484 (1985) (declaring this Court's "judicial responsibility to determine the state's own law" before analyzing claims under the First Amendment). Separate interpretation is wise considering that Oregon's religious freedom provisions are quite different from the First Amendment. *Meltebeke* got this right. 322 Or at 146 ("These provisions are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference.").

Prior to *Salem College*, religious freedom cases, in the absence of historical analysis of the Oregon Constitution's distinct provisions, echoed First Amendment formulations. Those cases merely required that generally applicable and neutral laws that burdened religion must be "reasonable" and within the state's broad police powers. *See City of Portland v. Thornton*, 174 Or 508, 149 P2d 972 (1944) (prohibition on children selling periodicals on the street); *Baer v. City of Bend*, 206 Or 221, 292 P2d 134 (1956) (fluoridation of water); *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or 281, 330 P2d 5 (1958) (denial of permit to build church in residential zone). While many of these cases involved the prevention of harm to others, such as laws designed to protect health and safety, language in some cases suggested very broad police powers. *Mullen*, 214 Or at 317 (citing federal jurisprudence for the proposition that government can burden religion in order to "safeguard the peace, good order *and comfort of the community"*). The early cases employed a First Amendment balancing test, under which a sufficient state interest could easily outweigh freedom of religion and conscience. *Mullen*, 214 Or at 320.

These old formulations have been abandoned by this Court, and for good reason. The state's police powers are extremely broad. Merely requiring the exercise of such powers to be reasonable when burdening fundamental rights is an easy way to eliminate rights altogether. Balancing tests can similarly balance away fundamental rights, which is why they have been abandoned by this Court

in the context of a variety of fundamental rights, including those protected by Article I, sections 2 and 3. *See State v. Ciancanelli*, 339 Or 282, 285, 121 P3d 613 (2005) (categorically rejecting a balancing test under Article I, section 8); *Eckles v. State*, 306 Or 380, 399, 760 P2d 846 (1988) ("[T]he state cannot avoid a constitutional command by "balancing" it against another of the state's interests or obligations * * *."); *Salem College*, 298 Or at 492 (rejecting the balancing of "compelling" interests against the commands of Article I, sections 2, 3, and 20).

CONCLUSION

Applying the principles above, Article I, sections 2 and 3, do not mandate exemption from ORS 163.125 (Second Degree Manslaughter) for religiously-motivated harm to children.[12] First and foremost, religious freedom is not burdened by the requirement that parents care for their children or by the state's protection of the best interests of a child. *See Beagley*, 257 Or App at 226 ("Imposing a sanction for negligently [allowing a child to die for lack of life-saving medical care] does not interfere with protected religious expression.").

[12] *Amicus* reiterates its concern about the degree to which the defendants' convictions and sentences were based upon their decision to home birth their child and their lack of prenatal care. *Amicus* is also concerned about the statement of a rule that parents must take action and conduct Internet searches to seek medical information within a particularly short time frame in order to avoid criminal liability for injury to their children. *Amicus'* concerns center on the importance of protecting private reproductive choices, ensuring the equal protection of individuals living in poverty, and reserving felony convictions and incarceration for situations where parental actions are clearly unreasonable in light of the circumstances.

Were the Court to view sanctions imposed for the negligent death of children as a burden on religion, however, the creation of a rule giving preferential treatment to religiously-motivated harm to children over harm motivated by deeply-held non-religious belief would violate the Oregon Constitution's guarantees of neutrality towards religion. Further, such an exemption would impermissibly favor the religious freedom of parents over the fundamental rights of our most vulnerable citizens.[13] *See State v. Hays*, 155 Or App 41, 964 P2d 1042 (1998) (rejecting a call for exemption from criminally negligent homicide under a "combination of rights," including religious freedom, because of the need to protect the lives of children).

Dated this 15th day of May, 2014.

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[13] *Amicus* does not intend to suggest, by the use of this language, that the fundamental rights of children impact in any way the reproductive freedom guaranteed under the US and Oregon constitutions.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,802 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).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 15th day of May, 2014, I filed the original of the foregoing Brief *Amicus Curiae* Of The American Civil Liberties Union of Oregon by using the court's electronic filing system; I served the same on:

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