IN THE SUPREME COURT OF THE STATE OF OREGON

GARY D. HAUGEN, Plaintiff-Respondent, v. JOHN KITZHABER, Governor of the State of Oregon, Defendant-Appellant.	Marion County Circuit Court Case No. 12C16560 CA A152412 SC S060761

BRIEF OF AMICI CURIAE ACLU OF OREGON, INC., OREGON JUSTICE RESOURCE CENTER, AND OREGON CAPITAL RESOURCE CENTER

Appeal from the Judgment of the Circuit Court of Oregon,
for the County of Marion
The Honorable Timothy P. Alexander

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INTRODUCTION

Amici Curiae ACLU of Oregon, Inc., Oregon Justice Resource Center, and Oregon Capital Resource Center submit this brief to urge this Court to reverse the circuit court's decision by holding that a death-row prisoner's acceptance is not required for the Governor's reprieve of all death sentences to be effective.

STATEMENT OF FACTS

In May 2007, Gary Haugen received the death penalty for his crimes. After this Court affirmed Mr. Haugen's conviction and sentence, Mr. Haugen chose not to pursue any further appeals. His death warrant was issued by the circuit court, with his execution to occur on December 6, 2011. On November 22, 2011, Governor Kitzhaber issued a temporary reprieve of Mr. Haugen's execution, to expire no sooner than the end of his term as Governor. At the time of issuing Mr. Haugen's reprieve, Governor Kitzhaber stated that he would not allow any executions to occur while he is Governor, based on his belief that the current system is broken.

Mr. Haugen rejected Governor Kitzhaber's reprieve and sued to have the death sentence carried out. On August 3, 2012, Senior Circuit Court Judge Alexander declared the reprieve invalid as it applied to Mr. Haugen. Judge Alexander concluded that under the Oregon Constitution a prisoner must accept a reprieve in order for it to be valid. This appeal followed.

SUMMARY OF ARGUMENT

Article V, Section 14, of the Oregon Constitution grants extensive power to the Governor to grant clemency through pardons, commutations, or reprieves. But that power has limitations. In certain scenarios, other constitutional considerations may trump the Governor's right to grant clemency. The question before the Court, however, is whether an unconditional reprieve of a *death*

sentence must be accepted in order to be effective. In this specific situation, the answer is no.[1] Under the Oregon Constitution, the purpose for the Governor's power to grant clemency is to promote the public welfare. The public welfare is therefore the guiding principle in any determination of the limits of the Governor's power to grant a temporary reprieve.

Governor Kitzhaber used his power under Article V, Section 14, to allow the citizens of this state to reexamine a "compromised and inequitable system."[2] By doing so, Governor Kitzhaber promoted the public welfare by preventing the State from continuing to inflict irreparable harm on its citizens. The harm that would result in the continuing application of the current death-penalty system extends beyond harm to the individual; it also damages the trust and faith in the entire judicial process. At the very least, the Governor's temporary reprieve allows for an updated and more thorough discussion of the death penalty's role in Oregon. Therefore, the Governor's grant of a reprieve of all death sentences is valid without regard to acceptance by the prisoner because it conforms to the purpose and intent of the clemency power. Accordingly, the circuit court's ruling should be reversed.

ARGUMENT

There are two competing interpretations of the constitutional power of clemency: the acceptance theory and the public-welfare theory. Under the acceptance theory, exercise of the clemency power is viewed as a private "act of

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[1] The amici do not support the State's position that acceptance is never required for an unconditional pardon, commutation or reprieve. In the question presented before the Court, however, acceptance is not required because a grant of clemency in a death-penalty case is distinct from other uses of the clemency power.

[2] Press Release, Governor John Kitzhaber, Governor Kitzhaber Statement on Capital Punishment (Nov. 22, 2011).

grace," which requires acceptance in order to be valid. *United States v. Wilson*, 32 US 150, 160-61, 8 L Ed 640 (1833). Under the public-welfare theory, the clemency power is viewed as an executive tool exercised for the public welfare. *Biddle v. Perovich*, 274 US 480, 47 S Ct 664, 71 L Ed 1161 (1927). In the few cases addressing the Governor's clemency power, Oregon courts have applied the acceptance theory based on the U.S. Supreme Court's decision in *Wilson*. *See Carpenter v. Lord*, 88 Or 128, 137, 171 P 577 (1918) (quoting the language in *Wilson*, 32 US at 161, that the pardon is "'a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance'").

Wilson's interpretation of the clemency power, however, was later superseded by *Biddle*. The public-welfare theory is also more consistent with the intent of the framers of the Oregon Constitution. Therefore, the public-welfare theory is the proper interpretation of the Oregon Constitution. Under the public-welfare theory, Governor Kitzhaber's reprieve of all death sentences is valid regardless of the prisoner's rejection.

I. Legal Standard.

Article V, Section 14, of the Oregon Constitution vests the Governor with broad power to grant clemency: "He shall have power to grant reprieves, commutations, and pardons, after conviction, for all offences [sic] except treason, subject to such regulations as may be provided by law." The amici adopt Governor Kitzhaber's position that there is no precedent that governs the question presented to the Court.[3] Accordingly, this is a case of first impression, and the Court should look at the purpose of the clemency power under the Oregon Constitution to

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[3] *See* Brief on the Merits of Appellant, John Kitzhaber, Governor of the State of Oregon at 28 (Dec. 21, 2012) ("Although early Oregon case law in some instances discusses general principles of clemency, each has done so in a starkly different context than the one presented here.").

determine whether an individual prisoner must accept the Governor's reprieve from a death sentence.

If, however, the Court views the earlier line of Oregon cases addressing the clemency power as precedent governing the question presented here, then the amici also contend that the standard for overturning prior case law is met. This Court will revisit earlier decisions interpreting the Oregon Constitution "whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). "Similarly, this court is willing to reconsider cases when the legal or factual context has changed in such a way as to seriously undermine the reasoning or result of earlier cases." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011).

This Court's prior decisions applying the acceptance theory should be overturned because those decisions did not properly interpret the clemency power. Furthermore, circumstances have changed since the time those decisions were handed down, most notably regarding the interpretation of the federal clemency power. Therefore, stare decisis is not appropriate, and the Court should take this opportunity to reconsider the proper interpretation of the Governor's constitutional clemency power.

II. The Oregon Cases Adopting the Acceptance Theory Relied on a Misinterpretation of the Federal Constitutional Clemency Power.

The interpretation of the clemency power in *Wilson*, on which the Oregon courts relied, was incomplete and has since been replaced by the U.S. Supreme Court with an approach that fully encompasses the purpose of the power to grant clemency. In practice, the act of exercising the clemency power provides the individual recipient with a private act of grace. Behind every

individual act of grace, however, there is a broader scheme at work, a scheme designed to maintain the credibility of the justice system. The authority provided by Article II, Section 2, of the U.S. Constitution therefore acts as an executive safeguard that is designed to preserve the public faith in the fairness of the application of the nation's laws. Accordingly, it is the public welfare that determines the scope of the President's clemency power under the U.S. Constitution. This is the proper interpretation of the federal clemency power because: (1) the U.S. Supreme Court has concluded that clemency power is used for the public welfare; (2) the Framers intended for the public-welfare theory to apply to the clemency power; and (3) Presidents have used the clemency power for the public welfare. Therefore, the public welfare, not the desire of the prisoner, should be the guiding principle in determining the scope of the executive's clemency power.

A. The U.S. Supreme Court interprets Article II, Section 2, of the U.S. Constitution as a power entrusted to the President to be used for the public welfare.

The most recent U.S. Supreme Court case regarding the President's clemency power holds that the public welfare, not individual consent, governs the scope of the power. In prior cases, the Court had viewed a grant of clemency as an "act of grace" and a "private, though official, act of the executive." *Wilson*, 32 US at 160. Based on that view, the Court developed the rule that a grant of clemency was valid only if the prisoner consented. In *Biddle*, however, the Court specifically abandoned that approach, stating that a grant of clemency "is not a private act of grace from an individual happening to possess power. [Rather,] [i]t is a part of the Constitutional scheme." 274 US at 486. By shifting the focus from the specific acts of clemency to the general purpose behind the power, the Court properly redefined the limits on the power.

In *Biddle*, the prisoner received a death sentence. President Taft commuted the prisoner's sentence to life imprisonment. The prisoner filed for a writ of habeas corpus, claiming that the President could not alter his sentence without his consent. *Biddle*, 274 US at 485. The Court rejected the prisoner's argument, noting that

> "[w]hen granted [the commutation] is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent[,] determines what shall be done." *Biddle*, 274 US at 486 (citation omitted).

The Court provided two main principles why the prisoner's consent should not be considered. First, the prisoner could not force the President to hang him. Second, the prisoner should not be allowed to prevent the President from acting in the public's best interest. *Biddle*, 274 US at 487. For those reasons, the Court concluded that acceptance is not required when the clemency power is used to prevent the carrying out of a death sentence.

B. The Framers of the U.S. Constitution intended that the power provided by Article II, Section 2, be used to promote the public welfare.

The drafters of the U.S. Constitution incorporated the clemency power as a vehicle for curing miscarriages of justice. That power has no greater role than in death-penalty cases, in which the severity and finality of the punishment requires a mechanism for curing defects in the application of justice. As a result, the *Biddle* case represents an accurate interpretation of how the power was originally intended to be used.

The Framers of the Constitution purposefully deviated from the King's application of the clemency power in England. In England, a grant of clemency from the King was a private act of grace because a crime was an affront to the

King himself. Conversely, the Framers viewed a crime in the new country as an offense against the people. Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* 25 (1989). Because the crime was considered to be against the people as a whole, an act of clemency is appropriate only when it serves the public interest.

Despite little history on the integration of Article II, Section 2, into the U.S. Constitution, several of the Framers acknowledged that the provision should be used to benefit the public welfare. Alexander Hamilton wrote that "in seasons of insurrection or rebellion there are critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth * * *." Hamilton also recognized that the President would be in the best position to "attend to the force of the motives which might plead for a mitigation of the rigor of the law" in order to ensure that justice would not "wear a countenance too sanguinary and cruel." Alexander Hamilton, *The Military and Pardoning Powers of the President*, in *The Federalist* 487-89 (2009).

Similarly, John Jay, one of the Founding Fathers and Governor of New York, recognized that exercising his clemency power as Governor depended on whether it was in the best interests of the public, rather than his own personal opinion. "'To pardon or not to pardon does not depend on my will, but on my judgment; and for the impartial and discrete exercise of this authority I am and ought to be highly responsible.'" Moore, *supra*, at 63. Therefore, the presidential clemency power was never intended to be a private act of grace, based on the personal feelings of the President. Rather, the power was intended to be used as a mechanism for promoting the public welfare.

C. Presidents invoke the clemency power under Article II, Section 2, of the Constitution when necessary for the public welfare.

Historically, Presidents exercise the power to grant clemency as a tool to maintain the public order. In the early stages of this nation's history, the power prevented continuing upheaval and hostilities. For example, in 1795, President Washington granted an unconditional pardon to participants in the Pennsylvania Whiskey Rebellion as part of an agreement reached with the rebels. 20 Op Att'y Gen 330, 339 (1892). Similarly, on December 25, 1868, President Andrew Johnson granted an unconditional pardon to all Civil War rebels because it was "'wisest for the public interest.'" *United States v. Klein*, 80 US 128, 140, 20 L Ed 519 (1871). These sweeping pardons cured feelings of oppression and stopped a cycle of retaliation. Neither of these applications of the clemency power, which were essential to the nation's survival, would have been successful in preventing further unrest if the clemency could have been rejected by the intended recipients.

In addition to bringing an end to violent hostilities, Presidents use the clemency power to heal the nation from traumatic events. On September 8, 1974, President Gerald Ford pardoned former President Richard Nixon based on his conclusion "that the public interest required positive steps to end the divisions caused by Watergate." *Murphy v. Ford*, 390 F Supp 1372, 1374 (WD Mich 1975). Similarly, on January 21, 1977, President Jimmy Carter granted unconditional pardons to hundreds of thousands of men who had evaded the draft during the Vietnam War in order to "start[] to heal our country and get[] us to move beyond the Vietnam War to better things." Interview by Brian Williams with President Jimmy Carter (Mar. 11, 2006) (transcript available at http://www.archives.gov/presidential-libraries/events/vietnam/presentations.html). Most recently, on December 24, 1992, President George H.W. Bush pardoned six

government officials involved in the Iran-Contra affair because "'it was time for the country to move on.'" Walter Pincus, *Bush Pardons Weinberger in Iran-Contra Affair*, Washington Post, Dec. 25, 1992. These examples demonstrate the executive branch's use of the clemency power when it has been necessary for the public welfare to allow the country to heal after a crisis.

Finally, the President may invoke the clemency power to highlight social or political problems. In 2001, President William Clinton pardoned several men and women convicted of violating federal drug laws and sentenced under the mandatory minimum sentencing guidelines. President Clinton was motivated to grant these pardons in part because he felt that "they had served long enough." William Jefferson Clinton, *My Reasons for the Pardons*, NY Times, Feb. 18, 2001. President Clinton recognized the injustice in the mandatory minimum sentencing guidelines, noting that "[m]any of these [prisoners] were first-time nonviolent offenders with no previous criminal records; in some cases, codefendants had received significantly shorter sentences." *Id.* In this example, the clemency power was used as a "policy tool, to signal the desirability of particular changes in the law." *Presidential Pardon Power: Hearing Before the Subcomm. on the Constitution*, 107th Cong 67 (Feb. 28, 2001) (statement of Margaret Colgate Love).

The common thread between these various uses of the clemency power is that in each case the target of the grant of clemency was not the primary beneficiary. The prisoners may have, in practice, received a "private act of grace," but the act of clemency was designed to achieve a greater social good. The public-welfare approach is therefore consistent with the Framer's intent, *Biddle*, and the historic use of the clemency power. And under the public-welfare approach, a prisoner who has been sentenced to death cannot reject a reprieve, temporary or otherwise.

III. The Current Federal Public-Welfare Interpretation Is Consistent With the Intent of the Drafters of the Oregon Constitution.

The public-welfare approach to the clemency power in the federal system should extend to Governor Kitzhaber's use of the clemency power under the Oregon Constitution in death-penalty cases. As noted in Section I of this brief, the conclusion in *Wilson* did not properly assess the Framers' intent. As a result, the public-welfare approach adopted in *Biddle* has superseded the acceptance theory.

While Oregon courts are not required to follow the changes in federal doctrine in interpreting the language of the state constitution,[4] this Court should do so here. First, this case provides a unique set of facts highlighting the flaws of the acceptance theory, which were not present in prior Oregon decisions. Second, the public-welfare approach is more consistent with the original intent of the drafters of the Oregon Constitution. Therefore, this Court should adopt the public-welfare approach and hold that Governor Kitzhaber's reprieve of Mr. Haugen's death sentence is valid despite Mr. Haugen's rejection.

A. Oregon courts have not had the opportunity to address the scope of the clemency power as applied to the death penalty.

As noted in the Governor's brief on the merits, no applicable Oregon precedent exists. Furthermore, the unique facts of this case demonstrate that the acceptance theory is inherently flawed. In *Wilson*, and in all the previous Oregon cases addressing the Governor's clemency power, the defendant questioned the authority of the President or Governor because the defendant had violated a

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[4] *See State v. Caraher*, 293 Or 741, 749, 653 P2d 942 (1982) ("When this court gives Oregon law an interpretation corresponding to a federal opinion, our decision remains the Oregon law even when federal doctrine later changes.").

condition of the pardon, commutation, or reprieve.[5] Those courts adopted the acceptance theory out of concern that the President or Governor could unilaterally impose greater or different penalties on prisoners without their consent. Thus, without some limitation on the President or Governor's clemency power, the safeguards of due process were believed to be in jeopardy.[6]

In *Biddle*, however, the prisoner would have been subject to the death penalty had the President not issued a commutation. Due process was not a concern because there was no greater punishment that could be imposed. With that inequitable result no longer possible, the Court recognized the flaw in the acceptance theory. The Court held that permitting the prisoner to accept or reject the grant of clemency provided the prisoner with too much control. The prisoner could prevent the President from using the clemency power for its intended purpose, to lessen an otherwise unjust punishment for the sake of the common good. The acceptance theory would allow a prisoner to force the State to kill him,

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[5] In most cases the prisoner had accepted a conditional pardon, which he later violated. The prisoner then challenged the power of the Governor to impose new or different penalties. The courts applied the acceptance theory as a way to demonstrate that the executive cannot single-handedly impose harsher penalties unless the prisoner had accepted the benefit of the pardon, commutation, or reprieve. *See Ex Parte Houghton*, 49 Or 232, 234-35, 89 P 801 (1907) (upholding the Governor's grant of a conditional commutation of the prisoner's sentence because it was accepted by the prisoner); *In re Petition of Dormitzer*, 119 Or 336, 340, 249 P 639 (1926) (upholding the Governor's grant of a reprieve, regardless of whether it was within the Governor's authority, because it was accepted by the prisoner); *Anderson v. Alexander*, 191 Or 409, 435-36, 229 P2d 633, 230 P2d 770 (1951) (upholding the conviction of the parole violation because the prisoner had accepted the conditions).

[6] To the extent that earlier cases were concerned that the clemency power would be used to impose greater or different punishment, that concern is addressed by the Due Process Clauses of the Fifth and Fourteenth Amendments, which would likely supersede the clemency power.

even though the executive had determined that the public was better served by stopping the execution. Permitting the prisoner to reject the grant of clemency "would deprive [the President] of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole." *Biddle*, 274 US at 487. Therefore, the nature of the death penalty as the most severe form of punishment demonstrates that use of the acceptance theory would allow the prisoner to nullify the clemency power.

Oregon courts have yet to address the clemency power in death-penalty cases. This Court may have appeared to reaffirm the acceptance theory, even after *Biddle* was decided, but it has never done so as it relates to the death penalty. In *Fredericks v. Gladden*, 211 Or 312, 315 P2d 1010 (1957), the Governor signed the prisoner's release in accordance with a statute that mandated early release for good conduct. 211 Or at 314. In fact, the prisoner had been released early because of a clerical error. After the prisoner's release, the error was uncovered and the prisoner was apprehended and required to serve the remaining amount of time required by the statute. *Fredericks*, 211 Or at 314-15. The prisoner filed a writ of habeas corpus, claiming that he had been released under the Governor's constitutional clemency power and that therefore his early release could not be revoked.

This Court concluded that the good-conduct statute was not an extension of the Governor's constitutional clemency power; rather, it was a separate statutory power. *Fredericks*, 211 Or at 324. In recognizing this distinction, this Court noted that one difference between the constitutional clemency power and the statutory power was that the constitutional power required consent by the prisoner. *Fredericks*, 211 Or at 323. The issue presented to the

Fredericks Court did not necessitate a full and thorough comparison of the acceptance theory against the public-welfare approach adopted in *Biddle*. In fact, the entire discussion of the acceptance theory was collateral to the issue confronting the Court. Therefore, *Fredericks* should not be viewed as a reaffirmation of the acceptance theory.

Oregon courts have not been provided with the proper lens from which to evaluate this issue, until now. This case presents unique facts, as in *Biddle*, that demonstrate that the acceptance theory eviscerates the Governor's clemency power. Therefore, this Court should recognize that in death-penalty cases, the prisoner's consent is not required to validate the Governor's grant of clemency.

B. The federal interpretation is more consistent with the intent of the drafters of the Oregon Constitution.

The Oregon Constitution contains several provisions not found in the federal Constitution that indicate that the drafters intended the Governor to be accountable to the public for every exercise of the clemency power. The Oregon clemency power is subject to "such regulations as may be provided by law," and the Governor is required to "report to the Legislative Assembly at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same." Or Const art V, § 14. Additionally, ORS 144.660 requires that the Governor's report include information about the crime, victim statements, photos, and the autopsy report, if applicable.

These provisions suggest that the legislature wanted to prevent the Governor from providing private "acts of grace." Instead, the legislature intended to reserve the clemency power for those instances in which the public welfare is served. Based on these additional provisions, the public-welfare approach advanced in *Biddle* is more consistent with the Oregon Constitution than the

acceptance theory established in *Wilson*. Therefore, this Court should reject the acceptance theory and validate Governor Kitzhaber's reprieve of all death sentences because it promotes the public welfare.

IV. Governor Kitzhaber's Reprieve of all Death Sentence Promotes the Public Welfare Because It Provides the Public With the Opportunity to Reassess the Current Death-Penalty System.

In 2000, Illinois Governor George Ryan placed a moratorium on capital punishment because he believed that innocent people were on death row. *See* Press Release, *Governor Ryan Declares Moratorium on Executions, Will Appoint Commission to Review Capital Punishment System* (Jan. 31, 2000) (available at http://www3.illinois.gov) ("'I now favor a moratorium, because I have grave concerns about our state's shameful record of convicting innocent people and putting them on death row.'"). Governor Ryan appointed a commission to conduct a review of the death penalty, stating, "'As Governor, I am ultimately responsible, and * * * I believe that a public dialogue must begin on the question of the fairness of the application of the death penalty in Illinois.'" *Id.* Three years later, after the commission had completed its review of the system, Governor Ryan commuted the sentences of all of the state's death-row inmates to life without parole because "[o]ur capital system is haunted by the demon of error, error in determining guilt, and error in determining who among the guilty deserves to die." Governor George Ryan, Address at Northwestern University College of Law (Jan. 11, 2003) (transcript available at http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html). Eight years later, Illinois abolished the death penalty through legislation. Ariane De Vogue & Barbara Pinto*, Illinois Abolishes Death Penalty; 16th State to End Executions*, ABC News, Mar. 9, 2011.

Governor Ryan promoted the public welfare by preventing a broken system from executing innocent people in the name of the State. In *Madigan v.*

Snyder, 804 NE2d 546, 560 (Ill 2004), the Illinois Supreme Court validated Governor Ryan's exercise of the clemency power. The petitioners claimed that the Governor did not have the authority to commute the sentences of inmates who had not consented to having a petition filed on their behalf. *Madigan*, 804 NE2d at 552. The court rejected the petitioners' argument because the prisoners' failure to consent to filing an application for clemency did not invalidate the Governor's commutation. *Madigan*, 804 NE2d at 553-54. The court took judicial notice of Governor Ryan's public statements that he believed the death-penalty system was broken and, as a result, "the failure of certain inmates to consent to their petitions was irrelevant to the Governor." *Madigan*, 804 NE2d at 554. The court stated further that "clemency is the historic remedy employed to prevent a miscarriage of justice where the judicial process has been exhausted." *Madigan*, 804 NE2d at 560.

Governor Kitzhaber's reprieve mirrors Governor Ryan's moratorium. Both acts of executive power were designed to prevent further executions until the public had the opportunity to properly debate and assess the current system. In Illinois, Governor Ryan's moratorium promoted the public welfare because it provided the citizens of Illinois the opportunity to examine a death-penalty system that was ultimately determined to be seriously flawed and in need of abolishment. Similarly, Governor Kitzhaber's reprieve promotes the public welfare because it allows voters the opportunity to reexamine the flaws in the current death-penalty system before another execution occurs.

A. The current death-penalty system practiced in Oregon fails to achieve its intended objectives and fails to protect against the wrongful imposition of the death penalty.

Two general principles guided the establishment of the death penalty in Oregon in 1984. First, proponents of amending the Oregon Constitution to

permit the death penalty believed that it would deter violent crime. *See* Official 1984 General Election Voters' Pamphlet 33 (arguing in favor of Measure 7 because "the deterrent value of capital punishment in Oregon should save lives of all of our citizens, particularly those at high risk") (available at http://library.state.or.us/repository). Second, proponents believed that the death penalty was a less expensive form of punishment. *See* William R. Long, *Death Penalty*, Oregon Encyclopedia (noting that proponents of the death penalty "argued that the death penalty would be less expensive and quicker alternative than other judicial options") (available at http://www.oregonencyclopedia.org). Oregon's death penalty fails to accomplish either goal.[7]

Oregon has a lengthy history of abolishing and reinstating the death penalty. Oregon abolished the death penalty most recently in 1964. Voters reinstated the death penalty in 1978. This Court held that statute unconstitutional in 1981. *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981). No one was executed under the 1978 statute.

In 1984, Oregonians approved a new death-penalty scheme, modeled on the Texas death-penalty statute. In over 28 years of continuous operation, not a single person has been involuntarily executed. Two men abandoned their appeals and were executed—one in 1996 and one in 1997. The last time Oregon "involuntarily" executed a prisoner was in 1962. A death-penalty system that

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[7] The amici recognize that the constitutionality of the death penalty is not at issue in this case. The amici, however, believe it important to express their views that the death penalty, in all circumstances, is cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution. The death penalty denies equal protection of the laws and removes the guarantees of due process of law. The death penalty is so inconsistent with the underlying values of our democratic system—the pursuit of life, liberty, and happiness—that the imposition of the death penalty for any crime is a denial of civil liberties.

executes only volunteers, some of whom suffer from serious mental infirmities, has little to no deterrent value. *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich L Rev 939 (2005) (discussing the prevalence of mental illness and the impact of conditions of confinement on death row for individuals who abandon their appeals).

It is also indisputable that the death penalty costs more than imprisoning a person for life without the possibility of parole.[8] Since reinstating the death penalty in 1978, Californians have spent roughly $4 billion to fund a death-penalty system that has carried out 13 executions. In that same period, Oregonians have funded a death-penalty system that has carried out only two executions. The total cost per execution in Oregon will likely increase dramatically over time given the amount of time that inmates spend on Oregon's death row and the number of reversals and retrials.

An overwhelming percentage of Oregon death-penalty convictions and death sentences have been reversed because of serious and harmful errors. In fact, from 1973 to 1995, Oregon had the second-highest state-court reversal rate in the nation for death-penalty cases, according to the extensive study of death-penalty reversal rates in *A Broken System II* led by Professor James Liebman of Columbia Law School, http://www2.law.columbia.edu/brokensystem2/report.pdf.

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[8] Every cost study conducted has concluded that the cost of the death penalty far exceeds the cost of a life-in-prison sentence. *See, e.g.*, Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy LA L Rev S41 (2011); *Final Report of the Death Penalty Sub-Committee* (adopted by the Wash State Bar on Apr. 13, 2007); T. Miethe, *Estimates of Time Spent in Capital and Non-Capital Murder Cases: A Statistical Analysis of Survey Data From Clark County Defense Attorneys*, Dep't of Criminal Justice, University of Nevada, Las Vegas (Feb. 21, 2012). Although there is no cost study for Oregon, there is also no reason to conclude that Oregon is any different.

That study concluded that because several Oregon counties impose death sentences at a high rate, there is a corresponding high risk of error. On the one hand, this reversal rate demonstrates that Oregon courts have carefully reviewed capital cases for error. On the other hand, it also demonstrates that capital trials are overwhelmingly infected with unfairness. It remains to be seen whether the federal courts will find additional harmful constitutional errors in Oregon capital cases because not a single capital case has yet been decided through a writ of habeas corpus.

The current death penalty is also problematic because there are no provisions in Oregon law to guard against racial discrimination, disproportionality, or executing an innocent person. In Illinois, Governor Ryan acknowledged the racial and geographical disparities in the use of the death penalty, and also that 17 death-row inmates had been exonerated. In his words, the system was "nothing short of a catastrophic failure." Governor George Ryan, Address at Northwestern University College of Law, *supra*. There is strong evidence that several innocent men have been executed under the Texas death-penalty statute, on which the Oregon statute is modeled. *See* James S. Liebman et al., *Los Tocayos Carlos*, 43 Columbia Hum Rts L Rev 711 (2012) (detailing an extensive analysis of the investigation and trial of Carlos DeLuna, who was executed by the State of Texas in 1989 and may have been innocent of the crime for which he was executed); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, New Yorker, Sept. 7, 2009. These wrongful executions cause grave concerns regarding the potential for our current death-penalty system to execute an innocent person. Governor Kitzhaber felt that it was in the public's best interest to examine those concerns before the State continued administering capital punishment. Therefore, he was well within his authority to issue the reprieve of Mr. Haugen's death

sentence and declare his intent to grant clemency to prevent further executions for the duration of his term.

Since Governor Kitzhaber declared a moratorium on executions over 13 months ago, not a single Oregon jury has returned a death sentence. During that same period, five death sentences have been reversed. In each of those reversals, the court concluded that the system had failed to protect against error and ensure a fair trial. Shortly after the late Judge Alexander ruled in this case, he reversed Travis Gibson's death sentence, finding that trial counsel had "failed to hire a mitigation expert, failed to locate and interview witnesses helpful to petitioner's case, failed to pursue expert testimony, and generally appeared to surrender after the verdict of guilty." Judge Alexander, who was sitting as the trial judge in a postconviction proceeding, concluded that trial counsel had "failed to demonstrate a true understanding of how to defend his client at the penalty phase." *Gibson v. Belleque*, No. 06C10344, Op & Order at 4 (Marion Cnty Cir Ct).

The Oregon death penalty in operation is not the death penalty that was promised to Oregon voters in 1984, which is precisely why Governor Kitzhaber stated that it is the "current system itself which compromises the will of the voters." Governor Kitzhaber Statement on Capital Punishment, *supra*.

B. Governor Kitzhaber's reprieve provides Oregon voters with the opportunity to reassess the current death-penalty system.

The Governor's reprieve of all death sentences creates an opportunity for the Oregon Legislature and voters to reevaluate the current death-penalty system in Oregon. The Governor could have chosen to commute the sentences of all current death-row inmates, as Governor Ryan did. Instead, he chose to grant a temporary reprieve so that the citizens of the State, not the Governor, could decide

how to proceed in light of new evidence:[9] "[T]he policy of this state on capital punishment is not mine alone to decide. It is a matter for all Oregonians to decide. * * * [M]y intention [is] that my action today will bring about a long overdue reevaluation of our current policy and our system of capital punishment." Governor Kitzhaber Statement on Capital Punishment, *supra*. Since the Governor's reprieve, the death penalty has reemerged as a legislative issue, and the voters may soon have the opportunity to fulfill the Governor's goal of having the death penalty reexamined by the people of this state.[10]

CONCLUSION

This Court should rule that the Governor's reprieve is effective despite Mr. Haugen's rejection because the reprieve is designed to promote the public welfare. Governor Kitzhaber used the power granted to him by the Oregon Constitution to suspend executions until there has been a reexamination of a system that has many flaws and inconsistencies. Governor Kitzhaber's reprieve precisely accomplishes the clemency power's intent. Allowing Mr. Haugen to block that action by his rejection of the reprieve would serve to undermine that power. Mr. Haugen alone does not and should not have the power to prevent

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[9] In addition to new evidence that the current death-penalty system is flawed, there is considerable evidence that public opinion has changed since the death penalty was reinstated in 1984. In the past five years, New York, New Jersey, Connecticut, Illinois and New Mexico have all abandoned the death penalty. This trend further demonstrates that the Governor's reprieve, which affords an opportunity for a renewed debate regarding the death penalty in Oregon, serves the public welfare.

[10] Since the Governor's press release, at least one state representative has considered legislative action to put the death-penalty to a vote. *See* Helen Jung, *Oregon Legislator Prepares Death-Penalty Repeal Bill, as Anniversary of Execution Moratorium Approaches*, Oregonian, Nov. 20, 2012 (reporting that Representative Mitch Greenlick intended to introduce a bill that would propose a constitutional amendment to repeal the death penalty).

Oregonians from the opportunity to review the death-penalty system to determine whether it is still necessary or desirable before the State executes another person in the people's name. For these reasons, the judgment of the circuit court should be reversed.

DATED this 28th day of December, 2012.

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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 5,557 words.

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