IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MARK N. BABSON, Defendant-Appellant, Petitioner on Review.	Marion County Circuit Court Nos. 09C41582, 09C41583, 09C41584, 09C41593, 09C41594, 09C41581 A144037 (Control) A144038, A144039, A144042, A144043, A144345 S060610
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MICHELE C. DARR, Defendant-Appellant, Petitioner on Review.	
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. TERESA L. GOOCH, Defendant-Appellant, Petitioner on Review.	

(*Continued* …)
January 2013

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

MARGARET M. MORTON,

Defendant-Appellant,
Petitioner on Review.

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

GEORGE C. MEEK,

Defendant-Appellant,
Petitioner on Review.

STATE OF OREGON,

Plaintiff-Respondent,

v.

GREGORY CLELAND,

Defendant-Appellant.

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW BABSON, DARR, GOOCH, MORTON AND MEEK

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Marion County, Honorable Jamese Lou Rhoades, Judge

(*Continued …*)

Opinion Filed: April 11, 2012
Author of Opinion: Schuman, P.J.
Concurring Judges: Wollheim, Judge, and Nakamoto, Judge

Timothy R. Volpert, OSB #814074
Alan J. Galloway, OSB #083290
Tim Cunningham, OSB #100906
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
timvolpert@dwt.com
alangalloway@dwt.com
timcunningham@dwt.com

Michael E. Swaim, OSB #780920
MICHAEL E. SWAIM, P.C.
270 Cottage Street NE
Salem, Oregon 97301
Telephone: (503) 363-0063
mswaimlaw@aol.com

Attorneys For Petitioners on Review
Darr, Babson, Gooch, Meek and Morton, on Behalf of the ACLU Foundation of Oregon, Inc.

Jossi K. Davidson, OSB #771521
104 South Water Street
PO Box 565
Silverton, Oregon 97381
Telephone: (503) 873-5368
jossi@silvertonlaw.com

Attorney for Appellant Cleland, on Behalf of the ACLU Foundation of Oregon, Inc.

Anna Marie Joyce, OSB # 013112
DOJ Appellate Division
1162 Court Street NE
Salem, Oregon 97301
Telephone: (503) 378-4402
anna.joyce@doj.state.or.us

Attorney for Respondent on Review

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A. Nature of Proceeding

This case is a consolidated prosecution of each of the six individual petitioners for the offense of criminal trespass II (ORS 164.245), charged as a violation (161.566). The case was tried to the court on November 30 and December 1, 2009. Individual judgments were entered convicting defendants for trespass in the second degree (violation) on December 3, 2009.

B. Questions on Review

1. First Question Presented on Review

Is a rule that obviously (or even purposefully) restricts protected expression, in that the restriction of expression is foreseeable and traceable to its terms, necessarily immune from facial overbreadth analysis merely because it avoids "expressly" restricting protected expression?

2. First Proposed Rule of Law

An overbreadth analysis is required under Article I, section 8 when a rule expressly or obviously proscribes protected expression. A rule obviously proscribes expression where the impact on speech is foreseeable, *i.e.*, traceable to the express terms of the rule.

3. Second Question Presented on Review

Is a rule properly deemed "speech-neutral" where it avoids "expressly" implicating speech by using broad language, but proscription of protected expression is nevertheless foreseeable.

4. Second Proposed Rule of Law

A rule is not "speech neutral" if examination of the text, context, and relevant legislative history shows that it foreseeably proscribes protected expression.

5. Third Question Presented on Review

Must the breadth of, and burden imposed by, content-neutral time, place, and manner restrictions be analyzed under Article I, section 8.

6. Third Proposed Rule of Law

The breadth of, and burden imposed by, content-neutral time, place, and manner restrictions must be analyzed under Article I, section 8.

7. Fourth Question Presented on Review

Where an as-applied Article I, section 8 or Article I, section 26, challenge hinges on the motives of state actors, are questions about statements made by such actors that are probative of such motives (those of the declarant and the witness) properly excluded as hearsay?

8. Fourth Proposed Rule of Law

Where an as-applied Article I, section 8 or Article I, section 26, challenge hinges on the motives of state actors, questions about statements made by such actors that are probative of such motives are not properly excluded as hearsay.

9. Fifth Question Presented on Review

Under the "first things first" doctrine, if the remedy under the Oregon Constitution requires further trial proceedings, should a court determine if the United States Constitution offers a remedy that would dispose of the case?

10. Fifth Proposed Rule of Law

Fourteenth Amendment Due Process concerns, justice, and efficiency require addressing federal constitutional remedies where state law provides only possible relief after further proceedings.

11. Sixth Question Presented on Review

Can a committee rule enacted outside the constitutionally-defined legislative process, and outside the safeguards of the Oregon Administrative Procedures Act, restrict constitutionally protected expression in a public space?

12. Sixth Proposed Rule of Law

A committee rule enacted outside both the constitutionally-defined legislative process, and outside the safeguards of the Oregon Administrative Procedures Act, cannot restrict constitutionally protected expression in a public space.

C. Summary of Facts

Defendants' offer these facts in background and as legislative history to the committee rule that forms the sole basis for defendants' arrests.

1. The protest.

On November 1, 2008, defendant Michele Darr began a protest to prevent the impending deployment of Oregon National Guard troops to Iraq and Afghanistan. Tr 136-37, 139, 174-75, 179-80, 196-97, 205-06; DCR 25, Ex. 3, ¶ 2. The protesters were also trying to get the Governor to meet with several members of the Oregon National Guard and their families, which the Governor had refused to do when the protest began. Tr 139. The protesters also were trying to persuade the Oregon legislature to act to prevent the deployment. Tr 163.

Darr was joined from the outset by Teresa Gooch, who gave up a job in Corvallis to join the protest. Tr 174-76. Defendant Cleland joined the protest later in November. Tr 158. Defendant Babson, who Ms. Darr met while speaking at a Fellowship of Reconciliation meeting about the protest and troop deployment, joined the protest in January 2009. *Id*. Defendant Morton, who had participated in previous anti-war protests with Darr, also participated. Tr 205-06. The sixth defendant, George Meek, regularly observed and photographed the protest from November 2008 until his arrest in February 2009. Tr 159, 188-90, 195.

The protest occurred on the two-tiered, concrete plaza outside the north door of the State Capitol (hereinafter the "Capitol steps"). The protesters never

obstructed the ability to enter or exit the Capitol building. DCR 25, Ex. 3, ¶ 8.[1] Michele Darr located her protest on the Capitol steps because it is "the seat of the state government where decisions are made -- life and death decisions in this case, particularly in regards to the Oregon National Guard." Tr 137. She also chose that location because "it was a very public place" and it was "where the Governor is, and the Governor is the one whom we were addressing first and foremost." *Id.* *See* DCR 25, Ex. 3, ¶¶ 3, 4, and 12.

The protest involved a 24-hour vigil, display of signs, candlelight and prayer. The group holding the vigil with Ms. Darr averaged two or three people per night, and at most numbered eight or nine people. DCR 25, Ex. 3, ¶ 9. Ms. Darr also conducted a water, tea and coffee fast for the first 40 days of the protest, which she ended after the Governor agreed to meet with members of the National Guard and their families. Tr 138, 143.

Ms. Darr chose the around-the-clock vigil as part of the protest "to underscore the sacrifices being made by the Guard troops and their families specifically." Tr 140. Teresa Gooch explained why it was important to her to hold a vigil that lasted 24 hours a day, seven days a week, as follows:

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[1] References to trial court records are as follows:
BCR = *State v. Babson*, Marion County Circuit Court No. 09C41582.
DCR = *State v. Darr*, Marion County Circuit Court No. 09C41583.
GCR = *State v. Gooch*, Marion County Circuit Court No. 09C41584.
MeCR = *State v. Meek*, Marion County Circuit Court No. 09C41594.
MoCR = *State v. Morton*, Marion County Circuit Court No. 09C41593.
CCR = *State v. Cleland*, Marion County Circuit Court No. 09C41581.

> "A. Well, I felt that the families were losing their husbands and wives and the children were losing their parents and they were suffering, and I figure if they can go through that, I could sit through a foot of ice and snow and miss all the holidays and sacrifice myself."

Tr 175. Peg Morton explained her views in this regard as follows:

> "A. I feel that the impact is huge when somebody is willing to be out there 24/7, you know, knowing that they're not out there the whole time, but the vigil is out there 24/7 and one person or more -- preferably more, but -- are out there. The public responds to that."

Tr 207.

From their location on the Capitol steps, the protesters had daily occasions to discuss the issues underlying their protest with the public. Tr 144. They also came into contact with veterans and current members of the Oregon National Guard, who tended to come to the Capitol steps to speak with the protesters under the cover of darkness, between 11:00 p.m. and 7:00 a.m. Tr 145, 148-49.

Ms. Darr's goal was to remain on the steps 24 hours per day, seven days per week. Tr 138. She remained on the steps "most of the time" during the protest, which lasted until mid-March 2009. *Id.*

2. The Capitol steps "Guideline" in effect at the beginning of the Darr protest and its enforcement.

When the protest began, a Legislative Administration Committee ("LAC") "Guideline" provided that activity on the Capitol steps "shall be held

between 7:00 am and 11:00 pm, unless otherwise authorized by the Legislative Administrator. No overnight use." DCR 20, p. 7. The LAC Administrator routinely allowed overnight gatherings on the Capitol steps before Michele Darr began her protest. For example, for seven consecutive years prior to the Darr protest, Bible readers were allowed around-the-clock access to the Capitol steps to participate in the "Salem Bible Reading Marathon." DCR 20, ¶ 5; Tr 243, 245-49. Basketball players were allowed around-the-clock access to those steps for several years running to participate in a basketball event called "Hoopla!" Tr 246-47. There is no evidence that any person or entity was ever denied overnight access to the Capitol steps before this protest began.

3. The LAC's instruction to disallow all overnight use.

The Darr protest met disapproval by public officials shortly after it began, and plans were made behind the scenes to end it. The LAC Administrator, Scott Burgess, talked with Senate President Courtney and employees of the Governor about the protesters' presence on the steps. Tr 257-58, 261. The LAC Administrator then made plans for the LAC to take action against the protesters at a LAC meeting he called for November 13, 2008. He invited several participants in the 24 hour Bible Reading Marathon and Hoopla! to attend the November meeting. Tr 279. He also sent certain "interested parties" a packet including the meeting agenda and related materials. Tr 323-

24. The LAC Administrator did not, however, inform Ms. Darr or her fellow protesters of the meeting. Tr 324, 352-53.

The LAC Administrator issued a public notice of the November 13 meeting on November 10, 2008. The notice said that there would be a "Public Hearing and Possible Work Session**"** concerning "LAC Policy - Consideration of Amendments to the Building Use Policies Relating to Exhibits, Holiday Displays, Appliances, and Updates/Corrections" and a "Work Session" on "LAC Policy - Consideration of Amendments to Building Use Policies Relating to Furniture and Wall Use in the Wings." MeCR 23, ¶ 5, Ex. 4.

During November's LAC meeting, Senate President Courtney and the LAC Administrator said repeatedly that the original overnight guideline disallowed overnight use of the Capitol steps, without the qualification that the guideline vested discretion in the administrator to allow overnight use. For example, the LAC Administrator said that "what's on the steps now" -- the Darr protest -- "does violate existing policy as I read it." Trial Ex. 105, Ex. 1, p. 6. Similarly, Senate President Courtney said:

> "* * * we basically are now saying to the Bible reading, which heretofore we have allowed to go 24/7, that that was in conflict with the policy. They have every right to be there and do Bible reading on the Capitol steps from 7:00 in the morning until 11:00 at night, and then it's over. So I hope everybody -- that's exactly it. That has been the policy, that for whatever reason has not been enforced."

Id., p. 7. Then, Senate President Courtney, who knew that Michele Darr was protesting on the Capitol steps when the meeting was occurring, Tr 252, said:

> "*That is one of the reasons we're struggling right now, my fellow legis--with the situation out on the steps, if I may say so, if you all understand what I'm talking about*. So the question is, you know, what is the policy on the steps?"

Id. (emphasis added).

The LAC Administrator did not express any concerns at the November meeting about fire risk, building security or litter concerning overnight use of the Capitol steps. The only reference at the November meeting to any such concerns surrounding the protest was made by Representative Hannah:

> "Given the current use, as Senator Ferrioli mentioned, and this is purely I believe a public safety issue, the use of fire, candles, unchecked heating devices might also be included. It does make me a bit nervous to see fire and plastic and sleeping bags and all those elements mixed together, and I don't know if that's inclusive or not."

Id., p. 6. The LAC Administrator responded by noting that such issues could be addressed by enforcing existing laws.

> "There is also language which is not new -- it's just moved around -- activities on the Capitol steps must comply with the laws regarding public access and safety. So if we found an unsafe situation, we could enforce it in that sense. That's not new language; it's actually just rearranged."

Id. The LAC then voted to "reaffirm the existing policy," which the LAC Administrator interpreted to mean that "we should consistently say no to use after 11:00." Tr 283-84.

4. The first arrest and the district attorney's refusal to prosecute.

On November 13, within hours after the November LAC meeting, the Legislative administrator dispatched the Oregon State Police to the Capitol steps to arrest Darr and Gooch. Tr 231-32. On November 13, they were booked on charges of criminal trespass in the second degree and released. On November 15, they were again cited for trespass, but this time placed into police custody, booked at the County jail and released. They returned to the Capitol steps. Attorneys for Darr and Gooch then wrote a letter to the Legislative Administrator and the Marion County District Attorney, pointing out that the arrests were violations of the Oregon and United States Constitutions. Trial Ex. 110. The district attorney then refused to prosecute the protesters and dismissed all charges before entry of pleas. Tr 278.

5. Further efforts to end the protest.

The Capitol steps protest continued. However, beginning in December or early January, the LAC Administrator again discussed the subject and substance of the protest with the chiefs of staff for the Senate President and House Speaker. Tr 310-11; 318-19. There were "lots of discussions going on in terms of how did this fit the policy," and those discussions "would have included

those individuals as well." Tr 311. The LAC administrator also discussed the protest with attorneys from the Office of Legislative Counsel, who drafted an amendment that stripped the LAC Administrator's authority to allow citizen presence on the steps at night. Tr 234-36. A public notice of a January 9, 2009 LAC meeting was prepared by the LAC Administrator, approved by the Office of Legislative Counsel and issued on January 5, 2009. Tr 235; MeCR 23, Ex. 5.

When he issued the meeting notice, the LAC Administrator knew the overnight guideline would likely be considered at the January 9 meeting. Tr 226. The notice provided that there would be a "Public Hearing and Possible Work Session" on **"**Building Use Policy - Consideration of a Building Use Policy Relating to Animals," and a "Work Session**"** on **"**Building Use Policy - Other." MeCR 23, ¶ 5, Ex. 5. The notice does not reference the overnight guideline or the possibility that the LAC would consider amending it at the meeting. Tr 239; MeCR 23, ¶ 5, Ex. 5. The LAC Administrator did not notify the protesters or the attorneys who had interceded on their behalf only a month before the meeting was held. Tr 353.

6. The formal amendment to the Capitol steps policy.

At the January 9 meeting, Senate President Courtney acknowledged that the existing guideline gave the LAC Administrator the discretion to allow overnight use and said that a formal amendment to the guideline was being proposed to take that discretion away. Tr Ex. 105, Ex. 2, p. 3. After brief

discussion, during which the LAC Administrator apologized for not having circulated copies of the proposed revision in advance, the LAC voted to adopt the amendment. The revised guideline provides:

> "2. Overnight use of the steps is prohibited, and activities on the steps may be conducted only between 7:00 am and 11:00 pm, or during the hours between 11:00 pm and 7:00 am when legislative hearings or floor sessions are taking place."

ER 37.

The revised guideline retains provisions found in the prior version, such as those: (1) requiring that activity on the steps "comply with the laws regarding public access and safety"; (2) regulating the volume of amplification devices; (3) preventing banners, placards, signs or other materials from being attached to the building, steps, or surrounding area; (4) requiring the use of candle wax protectors; and (5) requiring that the area be left in a neat and clean condition; (6) barring alcohol from the steps. *Id.*

7. The second series of arrests.

On February 11, 2009, shortly after 11:00 p.m., Darr, Cleland, Gooch, and Babson were cited on the Capitol steps for the offense of criminal trespass in the second degree. Tr 44-45. On February 14, 2009, at approximately 11:45 p.m., Senior Trooper Peter Arnautov found Meek on the Capitol steps and told him he could not be there. Meek walked to the sidewalk. On February 15, 2009, at approximately 12:45 a.m., Trooper Arnautov returned and found Meek

on the Capitol steps and again told him he had to leave. Trooper Arnautov then cited Meek for criminal trespass in the second degree. Tr 99-103. Defendant Morton was cited for the same offense on February 26. Tr 52-53.

Trooper Adams testified that, other than defendants, he had never arrested anyone for trespass anywhere on the Capitol grounds. Tr 71. There is no evidence of previous arrests for trespass on the Capitol steps. The sole justification for defendants' citation was their violation of the revised overnight guideline. Tr 69.

8. "The situation out on the steps" in general.

There is no evidence that there has ever been a fire on the concrete plaza, adjacent to the marble façade of the building, where the protest took place.[2] Tr 346. Except for one very cold night, the protesters did not use any heater. Tr 141. The heater used on that one night was not an open flame heater. Tr 141-42. Except for candles, no other open flames were used. Tr 149. When the protesters used candles, they "tried to keep little plates underneath the candles," as required by the revised overnight guidelines. Tr 142. The protesters did not cook meals on the steps. Tr 141. In the course of the protest, the protesters encountered "some of the heaviest [weather conditions] that Oregon's seen in a

[2] The Decision misstated the evidence of past fires. *State v. Babson*, 249 Or App 278, 291, 279 P3d 222 (2012). Mr. Burgess stated that there have been three fires on the Capitol grounds in history, not three fires in recent times. Tr 345-47.

very long time." Tr 141. To protect themselves from the elements, including snow and ice, the protesters made some "very minor shelter arrangements, sleeping bags and warm gear and tents at night." *Id.* The protesters removed their personal belongings -- such as sleeping bags and blankets -- from the Capitol steps early each morning. Tr 114. If candle wax dripped onto the concrete, the protesters "would make sure to get it right off immediately." Tr 142. The protesters also "scrubbed the steps regularly and swept it and kept it really clean and neat," which Ms. Darr said, "was very important to us for presentation." *Id.* The protesters used "Porta-Johns" located across the street from the State Library. Tr 84-85.

Police patrol the Capitol building and Mall 24 hours a day, seven days a week. Tr 39, 256. There is a Capitol Patrol Office of the State Police in the basement of the Capitol building. It is generally staffed from 5:30 a.m. to 1:00 a.m. Tr 116-17. There is a closed circuit surveillance camera "right as you walk in the revolving doors," which could be monitored from the State Police office, in the basement of the Capitol, or from an offsite location, and was used "to determine what the status of security of the building was." Tr 60.

There is no evidence that anyone had been injured in conjunction with the Darr protest as of the time of the February arrests. Tr 61. Ms. Darr was never physically assaulted. Tr 64, 145-46. There were never even any heated discussions. Tr 146. The closest the state could come to showing "serious"

security concerns was a single incident of a drunken individual who approached Ms. Darr in a "threatening way." *Id.* The incident was reported, and the police responded in a timely manner and arrested the individual. Tr 147.

9. What the arresting officers observed during February arrests.

Patrolmen from the Capitol Patrol Office, who made the February arrests, described the scene on the steps the night the arrests were made. Everyone present was acting peaceably. Tr 70. There were no fires and, if there had been, the person responsible could have been cited for creating a fire hazard. Tr 61-62. There was no evidence that protesters were cooking their meals on the Capitol steps. Tr 90, 108. Trooper Arnautov testified that there was no unusual litter at the protest site when the arrests were made in February. Tr 111. If the protesters had engaged in littering, they could have been cited for offensive littering. Tr 63-64. No such citations were given. *Id.* On February 14, there had been a large public celebration of Oregon statehood in the area, attended by thousands of people. Tr 111. Trooper Arnautov saw some of the defendants cleaning up litter remaining from that event. Tr 112. It was cold when the February arrests were made and the arresting officers found the sleeping bags defendants used to keep the protesters warm. Tr 41. It is not illegal to have sleeping bags, blankets or tents on the Capitol steps. Tr 68, 115. Trooper Adams was across the street from the protest site in advance of the February 11,

2009 arrests. In his examination of the area, he had no security concerns with respect to the Capitol. Tr 68-69.

10. Reasons given by the state for forbidding citizen presence on the Capitol steps from 11:00 p.m. to 7:00 a.m.

The revised overnight guideline does not reference any "concerns" motivating the absolute prohibition on overnight presence on the Capitol steps. The transcripts of the two LAC meetings contain only one reference to such concerns -- Representative Hannah's reference to the use of "fire, candles, [and] unchecked heating devices." But the list of purported justifications grew longer as the case progressed. By the time the state filed its opposition to the motions to dismiss, the list included security of the building, keeping the Capitol steps clean and litter free and keeping homeless and other "undesirable" people away from the seat of state government. DCR 20, ¶ 3. The State reiterated those same concerns at trial. Tr 341-43.

D. Summary of the Argument

State v. Robertson, 293 Or 402, 649 P2d 569 (1982), properly interpreted Article I, section 8 as a restraint on legislative overreach, precluding *passage* of any law where either (1) the actual focus was on speech, or (2) the law burdens speech and the harm addressed is absent. *Robertson* explained a legislative duty to eliminate all such burdens except those that are "marginal and unforeseeable." Where the legislature fails in that duty, the resulting laws are invalid when "passed."

Under *Robertson*, courts adjudicate the "unforeseeable" applications through as-applied challenges. But courts also perform the even more important function of holding the legislature to its obligation to pass only valid laws. To do that, Courts first must determine -- as a matter of legislative intent -- both the actual "focus" of a law (what it "targets") and the scope of the law's restrictions. Doing so roots out invalid laws that focus on speech, or unproven harms of speech, as opposed to legitimate harms.

More is required, however, to identify the other kind of law that shall not "be passed" under Article I, section 8 -- laws that burdens speech more than necessary to target a harm. Accordingly, where a challenged law has applications to speech that would have been obvious to the legislature, under *Robertson*, courts analyze for overbreadth, measuring the scope of the restrictions against the harms targeted, and either narrowing or invalidating a law that has unnecessary application to speech. To be faithful to Article I, section 8's mandate that no law restraining or restricting speech "shall be passed," courts cannot leave laws with an overbroad scope to as-applied challenges.

The Decision of the Court of Appeals ("Decision") declined to engage in that overbreadth analysis, holding that cases after *Robertson* preclude courts from even analyzing a statute for overbreadth if the legislature has managed to avoid "expressly" referring to speech. *State v. Illig-Renn*, 341 Or 228, 142 P3d

62 (2006), itself promised that the courts will not deny overbreadth challenges where a law "obviously" restricts speech, but the Decision held that "obviously" has no meaning. *Babson*, 249 Or App at 287 n 4. Defendants ask this court to hold that the LAC Guideline must at least be *analyzed* to determine whether it is overbroad here, where the LAC did nothing to eliminate obvious impacts on speech (and, indeed, where the legislative history suggests that Darr's protest may have been the target of the LAC Guideline).

With respect to the third question, consistent with the holding in *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Or 275, 132 P3d 5 (2006), time, place and manner restrictions will often survive *Robertson* analysis, since such restrictions are typically imposed where a specific harm is targeted (rather than speech), and typically reflect a legislative effort to eliminate the "most apparent" impact on speech insofar as it can reasonably do so (leaving only "marginal and unforeseen" applications) by limiting the restrictions to certain times, places, or manners that are tied to the targeted harm. But *Outdoor Media* does not logically imply that such restrictions never focus on speech, or do not require overbreadth analysis. Defendants' interpret *Outdoor Media* as implicitly conducting that analysis. *Outdoor Media* does not replace *Robertson*'s with a separate analysis preventing only content-based discrimination in restraining speech.

With respect to the fourth question, questions about what LAC members told the LAC Administrator about the Darr protest were plainly not hearsay, and in any case making a second offer of proof was impossible where the trial court had denied defendants' previous attempt to make an offer of proof.

With respect to question five, if the court limits Article I, section 8's prohibition that "no law shall be passed" to legislation that expressly restricts speech, and holds that the only remedy state law offers is an "as-applied" challenge, requiring further time-consuming trial court proceedings, the court should consider whether defendants' convictions are invalid as a matter of law under the First Amendment.

With respect to question six, the LAC should not be allowed impose rules that impinge on the public's constitutional rights, because: (1) its existence violates separation of powers; (2) it is exempt from essential administrative procedure safeguards, particularly judicial review of rulemakings; and (3) any accountability to the voters is hopelessly attenuated.

E. Combined Argument on First and Second Questions.

The Guideline at issue here -- enacted while defendants' 24-hour vigil was underway on the Capitol Steps -- prohibits "overnight use" and activities on those steps between 11 p.m. and 7 a.m. unless legislative hearings or floor sessions are taking place. The Decision holds, *inter alia*, that the guideline cannot be challenged facially under Article I, section 8 because *it does not*

"expressly" regulate speech or communication.[3] The Decision is based largely on statements in *State v. Illig-Renn*, 341 Or 228, 142 P3d 62 (2006). Either the Decision misreads *Illig-Renn*, or *Illig-Renn* should be clarified to establish that legislative bodies enacting laws that obviously limit speech cannot preclude courts from analyzing the facial validity of laws by avoiding express references to speech. However, to explain where this Court should go, it is necessary to revisit the basic principles established by this Court's Article I, section 8 cases.

Article I, section 8 imposes a sweeping prohibition on passing legislation that restrains speech, thus safeguarding individuals' right to speak, write, or print freely. Article I, section 8 states:

> *"No law shall be passed* restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Or Const, Art I, § 8 (emphasis added).

Interpreting Article I, section 8, *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), distinguished between laws focused on suppression of speech or writing, and those focused on preventing harms, or forbidden results:

> "[A]rticle I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is

[3] The Decision actually uses the words "expressly or obviously." *Babson*, 249 Or App at 287. As explained below, however, the Decision essentially holds that "obviously" has no independent meaning. 249 Or App at 287 n 4.

> deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * [L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end."

293 Or 402, 416-17, 649 P2d 569 (1982).

Robertson describes Article I, section 8 as prohibiting legislation targeting "suppression of speech or writing," *id*. at 416-17, *and* as presumptively "foreclose[ing] the enactment of any law written in terms directed to the substance of any `opinion' or any 'subject' of communication * * *," *id.* at 412, *and* as "prohibit[ing] lawmakers from enacting restrictions that focus on the content of speech or writing." *Id.* at 416. That is, *Robertson* implies that Article I, section 8 prohibits laws that target any of the following: (a) speech itself; (b) the subject matter of speech; or (c) the specific content of speech.

Robertson made a second distinction between laws whose application to expression is "apparent" (including those that apply expressly), and those whose effect on expression is "marginal and unforeseeable." *Robertson*, 293 Or at 437. *Robertson* explained:

> "It is, * * * in the first instance a legislative responsibility to narrow and clarify the coverage of a statute so as to eliminate most apparent applications to free speech or writing, leaving only marginal and unforeseeable instances of unconstitutional applications to judicial exclusion."

Robertson, 293 Or at 43. *Robertson's* distinctions imply three categories: (1) laws that focus on speech; (2) laws with obvious application to speech; and (3) laws with only marginal and unforeseeable application to speech.

Plowman subsequently characterized those categories:

> "* * * *Robertson* * * * established a framework for evaluating whether a law violates Article I, section 8. First, the court recognized a distinction between laws that focus on the *content* of speech or writing and laws that focus on the pursuit or accomplishment of *forbidden results.* This court reasoned that a law of the former type, a law `written in terms directed to the substance of any "opinion" or any "subject" of communication,' [presumptively] violates Article I, section 8."
>
> "* * *"
>
> "Laws of the latter type, which focus on forbidden results, can be divided further into two categories. The first category focuses on forbidden effects, but expressly prohibits expression used to achieve those effects. * * * Such laws are analyzed for overbreadth:
>
> "* * *"
>
> "The second kind of law also focuses on forbidden effects, but without referring to expression at all."

Plowman, 314 Or 157, 163-64, 838 P2d 558, *cert den*, 508 US 974 (1993) (emphasis in original, brackets added, citations omitted).[4]

[4] Subsequent cases have cited the *Plowman* language. *See e.g.*, *State v. Illig-Renn*, 341 Or 228, 234-35, 142 P2d 62 (2006) (citing *Plowman*); *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994) (citing *Plowman*); *State v. Moyer*, 348 Or 220, 228-230, 230 P3d 7 (2010) (citing *Plowman*).

By characterizing the *Robertson* principles in that manner, *Plowman* obscured, perhaps inadvertently, the fundamental distinctions. *Plowman*'s oft-quoted statement that overbreadth analysis is for a law that "*expressly* prohibits expression," 314 Or at 164, appears to be a departure from *Robertson*'s concern with eliminating the "most apparent applications" to speech (as opposed to "marginal and unforeseeable" applications). Later, *Illig-Renn* stated that "our prior cases * * * foreclose the possibility of a facial challenge under Article I, section 8, to a 'speech-neutral' statute." *Illig-Renn*, 341 Or at 234. If, in that context, "speech-neutral" were to mean merely avoiding express reference to speech, this would eliminate the availability of overbreadth analysis where restraint on speech is not "express," yet is "apparent" (the word used in *Robertson*) or "obvious" (the word used in *Illig-Renn*) based on the *meaning* of the law's terms.

Reading *Robertson* as concerned *only* with a category of laws that "refer to" or "expressly" burden speech creates the incongruous principle that the broader a law prohibiting expression is, the less likely it will be subject to overbreadth analysis.[5] The Decision reflects the consequences of such an approach. It holds that the Guideline, which obviously outlawed speech, cannot

[5] *City of Eugene v. Miller*, 318 Or 480, 490, 871 P2d 454 (1994). *Miller* declined to conduct overbreadth analysis on a law because it did not "refer to expression," but held that it was invalid as-applied. That approach may have let an invalid law stand, forcing future defendants to assert as-applied challenges.

be analyzed for facial overbreadth because it does not "expressly" regulate speech. *Babson*, 249 Or App at 287. As the following explanation of how the *Robertson* framework is applied demonstrates, this Court's cases preceding *Illig-Renn* conflict with that approach, and *Illig-Renn* did not preclude overbreadth analysis where restrictions on speech are obvious.

1. Step One: determine the "focus" (sometimes called the "gravamen" or "target" or "policy choice") of a law.

The fundamental principle of *Robertson*'s first category is that, whatever else Article I, section 8 prohibits, it wholly withdraws any legislative authority to pass a law where the legislature's main purpose (or "focus") is restraining speech -- no matter how cleverly drafted. *Robertson*, 293 Or at 416-17. Therefore, the first step in determining if passage of a law violates Article I, section 8, is to determine whether the law has an impermissible "focus" on speech, or a permissible "focus" on harms. *See Plowman*, 314 Or at 164-65. Understanding the substance of the restriction is crucial to prevent restrictions that actually target speech from going unchallenged. Under *Robertson*, laws that are directed at the restraint of speech, whether based on the legislature's disapproval of the speaker or the speech, or on a perception that the speech is harmful, are presumptively forbidden. Therefore, the first step in applying *Robertson* is to determine if the law has an impermissible focus on speech, or a permissible focus on harms.

Discerning the "focus" (sometimes called the "gravamen" or "target" or "policy choice") of a law is a question of legislative intent for the court to decide using the framework established in *PGE v. BOLI*, 317 Or 606, 610-12, 859 P2d 1143 (1993) ("*PGE*"), *as modified by State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). *See, e.g., Moyer*, 348 Or at 231 ("*Stoneman* correctly states that a statute should not be read in isolation, and that the legislature's policy choice (the harm that is the target of the criminal prohibition) in some cases may be determined not only from the statute's text, but also from its context."); *State v. Stoneman*, 323 Or 536, 546, 920 P3d 535 (1996) ("An examination of the *context* of a statute, as well as of its wording, is necessary to an understanding of *the policy that the legislative choice embodies*.") (second emphasis added).

The question is "whether the *actual focus* of the enactment is on an *effect* or *harm* that may be proscribed, rather than on the substance of the communication itself." *Stoneman*, 323 Or at 543. In *Stoneman*, the challenged statute "forbade commerce in certain forms of expression -- films, videotapes, and the like in terms of their content." *Id* at 545-46. The court inferred from the context of the statute that it was aimed at preventing the "harm to children" inherent in producing the banned material (even though, on a formal view, looking only at the words, the law expressly banned speech "in terms"). *Id.*

Any inquiry as to focus must be informed by a law's apparent application. *Cf. Stoneman*, 323 Or at 543; *State v. Chakerian*, 325 Or 370, 376, 938 P2d 756 (1997). Restricting public access to areas that are associated with expression, such as libraries, theaters, churches, or the Capitol steps, is far different than restricting access to places such as freeways, timber groves, or private residences. A curfew closing all theaters at 6:00 p.m. would apply to speech in a way that closing gravel pits at 6:00 p.m. would not. A rule stating that no one may stand in a given area has no foreseeable application to speech when that area is the middle of the freeway, but has an obvious application when that area is a theatrical stage. The application of a rule requiring all businesses on the northern 1000 block of West Burnside Street in Portland to close at 7:00 p.m. is not obvious from its face, but context and legislative history reveal that the only business to which it would apply is Powell's Books.

"To be valid as a law that focuses on a harmful effect of speech, the law must specify expressly or by clear inference what serious and imminent effects it is designed to prevent." *Moser v. Frohnmayer*, 315 Or 372, 379, 845 P2d 1284 (1993) (internal quotation marks and citation omitted). In most cases, the initial step in determining the focus is looking at the harmful effects identified in the operative text of the statute, such as "the effect of frightening another person into a nonobligatory and undesired course of conduct." *Robertson*, 293 Or at 417. When the government claims that the purpose of a regulation

limiting expression is to prohibit "adverse effects," the regulation must specify those adverse effects in its text. *City of Portland v. Tidyman*, 306 Or 174, 185, 759 P2d 242 (1988) ("It is the operative text of the legislation, not prefatory findings, that people must obey and that administrators and judges enforce."). Where the operative text does not identify a harm, the law will generally be invalid. *See Tidyman*, 306 Or at 185 ("In short, the problem with the city's asserted 'concern with the effect of speech,' is that the operative text of the ordinance does not specify adverse effects * * *.")

Justice Linde pointed out in *Tidyman*:

> "Our cases under Article I, section 8, preclude using apprehension of unproven effects as a cover for suppression of undesired expression, because they require regulation to address the effects rather than the expression as such."

306 Or at 188. Consistent with Justice Linde's concern, the court should be vigilant in rooting out pretextual harms, whether identified in the text or, as here, identified only later in the defense of the law. It is particularly important to determine the *actual focus* because this court has recently made limited exceptions to *Tidyman*'s bright-line mandate to legislatures to identify harms. This is not a case where the court can clearly infer the actual harm targeted, such as the exploitation of children in *Stoneman*, 323 Or at 545-49 (applying principle in context of child pornography ban to discover targeted harm); *cf. Moser* 315 Or at 379 ("* * * by clear inference * * *.").

If the actual focus is on speech (whether speech itself, the substance of speech, or the content of a particular message), then the law is invalid unless it falls within a historical exception. If the focus is on harm, the inquiry proceeds.

2. Step Two: if the actual "focus" of a law is to target a real harm, (1) determine if the law has apparent applications to speech, and if so, (2) analyze for overbreadth to ensure that no more speech is burdened than necessary to target the harm.

A law that burdens speech may do so incidentally to regulating a harm, where the focus of the law is neither on speech itself nor the content of speech, but on preventing a harmful effect or forbidden result. *See Robertson,* 293 Or at 416*; Moser,* 315 Or at 379*; Plowman*, 314 Or at 164. The legislature is permitted to regulate "damaging conduct or the harmful effects that may result from assembly or speech," even though it is forbidden from restraining speech itself. *State v. Ausmus*, 336 Or 493, 507, 85 P3d 864 (2003).

In doing so, the legislature has a duty to tread carefully, to make sure -- to the extent it is apparent at the time a law is enacted -- that the law's application to speech is only incidental to the regulation of the harm, and that there is no obvious application to speech except as needed to target the harm. *Robertson* explained:

> "It is, * * * in the first instance a legislative responsibility to narrow and clarify the coverage of a statute so as to eliminate *most apparent applications* to free speech or writing, leaving only *marginal and unforeseeable instances* of unconstitutional applications to judicial exclusion."

Robertson, 293 Or at 437 (emphasis added). The legislature need not eliminate every imaginable application to speech. But where it is "most apparent" -- that is, obvious -- that a law directed at a harm will be applied to limit speech, the legislature has a duty to eliminate the "most apparent applications."

The first task in doing so is to consider whether a law has "only marginal and unforeseeable application" to speech, or application to speech that would have been apparent to the legislature. Where the legislature could not have foreseen any obvious application to speech, the inquiry is over. Such laws are not of the kind that Article I, section 8, prohibits from being "passed."

Second, if the law obviously applies to speech, it must be tested for overbreadth to determine whether the restriction goes beyond the harm that the statute purports to target. *Robertson*, 293 Or at 410. "When the proscribed means include speech or writing, however, even a law written to focus on a forbidden effect * * * must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" *Id.* at 417-18.

Overbreadth analysis measures the breadth of restrictions against the harm that is the "focus" of the law. *See Robertson*, 293 Or at 410. A law focused on harm may limit speech only where an actual harm requires it. *Ausmus*, 336 Or at 507-08. "It is the range of the conduct that the statute

criminalizes that must be tested against the constitutional rights of assembly and speech." *Id.* at 506.

This Court has applied overbreadth analysis where a law had obvious applications to speech. *See, e.g.*, *Robertson*, 293 Or at 435-36 (invalidating coercion statute because threats were restricted, in some circumstances, where the harm targeted did not materialize); *City of Hillsboro v. Purcell*, 306 Or 547, 550 n 1, 556, 761 P2d 510 (1988) (invalidating ordinance restricting peddlers as overbroad because of obvious application to religious callers); *Tidyman*, 306 Or at 188-91 (invalidating restrictions on adult bookstores whose application limited marketing of the proscribed material, irrespective of harmful effects of such marketing); *Ausmus*, 336 Or at 501 (invalidating criminalization of "disobey[ing] a lawful order of the police to disperse," explaining that it could apply where a person was exercising protected speech or assembly). *See also Plowman*, 314 Or at 165-67, 838 P2d at 563-64 (allowing intimidation statute where the focus/legislative intent was limited to actual harms); *State v. Moyle*, 299 Or 691, 705, 705 P2d 740 (1985) (saving ban on alarming another person by threats only by interpreting it to require genuine threats that are objectively likely to be followed by unlawful breaches of the peace).

Crucially, a law is not necessarily overbroad merely because a court analyses it for overbreadth. In some cases, the law survives.[6] Even where a law is overbroad, in some cases judicial narrowing may save it from facial invalidation. *See Moyle*, 299 Or at 703-06. But denying even overbreadth *analysis* because a rule is so *broad* that it does not *expressly* mention "speech" is inconsistent with both *Robertson* and Article I, section 8.

3. *Illig-Renn* is consistent with *Robertson*.

While certain statements in *Illig-Renn* appear to limit the availability of overbreadth analysis to laws "expressly" restricting speech, properly construed, the holding is consistent with *Robertson*. As discussed above, where a law focuses on harm, the availability of overbreadth analysis turns on whether it has an obvious foreseeable impact on speech, or only marginal and unforeseen application. As recognized in *Illig-Renn*:

> "In *Robertson*, this court repeatedly signaled that a statute is subject to a facial challenge only if it *expressly or obviously* proscribes expression; * * *."

Illig-Renn, 341 Or at 234 (emphasis added). While the court also stated that overbreadth analysis is limited to laws that "by their terms" have application to speech, the context in which it did so suggests consistency with *Robertson*'s rule that legislatures eliminate the "most apparent applications" to speech of a

[6] *E.g.*, *State v. Moyle*, 299 Or 691, 702-05, 705 P2d 740 (1985) (upholding harassment statute), and *State v. Garcias*, 296 Or 688, 698-700, 679 P2d 1354 (1984) (upholding menacing statute).

law targeting a harm (that is, the applications to speech that "expressly or obviously" result). *Illig-Renn* stated:

> "In summary, the state is correct that only statutes that *by their terms* proscribe the exercise of the constitutionally protected rights of assembly or expression are susceptible to a facial overbreadth challenge under Article I, sections 8 and 26. Of course, the state may apply statutes that do not *expressly or obviously* refer to assembly or expression in a way that restricts the rights guaranteed by sections 8 and 26 in some circumstances, but challengers must attack those applications of the statutes, and not the statutes themselves."

Id. at 236-37 (emphasis added). The "expressly or obviously" test harkens back to *Robertson*'s observation that Article I, section 8 is directed at legislators. *See Robertson*, 293 Or at 412. It is initially a legislative responsibility to minimize obvious applications to speech. *Robertson*, 293 Or at 437. It would be unreasonable for the legislature to hypothesize about every possible application of proposed laws that do not foreseeably impact or restrict speech. The legislature need not be omniscient. However, nor can the legislature be blind. It has a duty to avoid passing laws that foreseeably impact speech. Assuming that duty is fulfilled, courts are left to deal with "marginal and unforeseeable" applications to speech (if they arise) on an "as-applied" basis.

The statute in *Illig-Renn*, which made it a crime to knowingly "refuse[] to obey a lawful order by [a] peace officer," had "marginal and unforeseeable" applications to speech. 341 Or at 230. Although the court speculated that a

person could conceivably intend to communicate a message through refusal to obey an order, it would be unreasonable for the legislature to foresee that marginal possibility. In typical cases, such refusal would be non-communicative, *e.g.*, an attempt to flee.

Illig-Renn did state that "our prior cases * * * foreclose the possibility of a facial challenge under Article I, section 8, to a 'speech- neutral' statute." *Id.* at 234. *Illig-Renn* did not formally define "speech-neutral," but it equated speech-neutral statutes with those "that do not *by their terms* forbid particular forms of expression." *Id.* at 233 (emphasis added). It then indicated that the phrase "by their terms" means "expressly or obviously." *Id.* at 237. Presumably, determining whether a law is "speech-neutral" requires careful, substance-over-form analysis under *PGE/Gaines* and *Stoneman.* Even a statute that avoids express references to speech or expression is not "speech-neutral" if it foreseeably curtails a significant amount of protected speech. *Cf. State v. Chakerian*, 325 Or 370, 376, 938 P2d 756 (1997) ("[T]he statute does not itself use the word 'threats' at all. Rather, we must consider whether, by proscribing 'tumultuous and violent conduct,' the legislature intended to proscribe acts that could constitute protected expression under Article I, section 8, of the Oregon Constitution.").

Illig-Renn concluded its Article I, section 8 analysis by reiterating a "rule" that non-express restrictions *may* be considered for facial overbreadth:

> "The foregoing does not mean that we will ignore a clear case of facial unconstitutionality or overbreadth *merely because the statute manages to avoid any direct reference to speech or expression*. * * * But, *in general*, we will not consider a facial challenge to a statute on overbreadth grounds if the statute's application to protected speech is not *traceable to the statute's express terms*. The state is correct insofar as it invokes *that rule*. The Court of Appeals erred in declining to follow *that rule*."

Illig-Renn, 341 Or at 235-36 (emphasis added). Thus, *Illig-Renn* clearly articulated *two* circumstances where a facial overbreadth challenge is available. The first is where the law "expressly" restricts rights guaranteed in Article I, section 8. The second is where the "statute manages to avoid any direct reference to speech or expression," but the application to expression or speech is nonetheless "obvious" or "traceable to the statute's express terms."

4. The Decision misinterprets *Illig-Renn*.

The Decision improperly reads the "or obviously" language out of *Illig-Renn*, relegating to a footnote *Illig-Renn*'s key rule that overbreadth analysis is appropriate where a law "obviously" restricts expression. While that rule is firmly rooted in *Robertson*, the Decision says it was made "in passing" and was not a "significant qualification" of the holding. *Babson*, 249 Or App at 287 n 4.. Under the Decision's reading of *Illig-Renn*, a *broader* restriction barring all overnight "use" (speech, walking, knitting, etc.) is not even *subject* to an overbreadth analysis. It would run counter to *Robertson* and to the purpose of overbreath analysis if a law could be rendered "speech-neutral" -- and therefore

not subject to overbreadth analysis -- merely by using *broader* terms like "use" instead of "protest" or "speak." *See Robertson*, 293 Or at 416 ("The challenge under article I, section 8, therefore cannot be dismissed simply by saying that the statute forbids an 'act' rather than 'speech.'"); *State v. Blair*, 287 Or 519, 523, 601 P2d 766, 768 (1979) ("A statute that does not in its own terms forbid speech or other communication still would require sensitive confinement within constitutional limits, but it is *less vulnerable* to constitutional attack on its face.") (Linde, J.) (emphasis added).

The Decision's interpretation also undermines an important purpose of facial overbreadth challenges in creating "breathing space" for protected expression.

> "[O]pinion and assembly * * * rights have been termed the 'cornerstone of democracy' and so important as to require 'breathing space' and protection even from the 'chilling effect' of overbroad and ambiguous statutory restrictions."

Deras v. Myers, 272 Or 47, 55, 535 P2d 541 (1975). If broader restrictions are immune from facial challenges, then overly broad restrictions will remain on the books and chill future speech. Speakers would risk arrest and trial each time they exercised protected rights impinged by such restrictions.

5. Courts need the flexibility to facially analyze (and sometimes invalidate) laws obviously restricting speech because the violation of Article I, section 8 occurs when the legislation is "passed."

The state may argue that where a law "obviously" restricts expression, those instances can be addressed adequately by as-applied challenges. That is not consistent with the language of Article I, section 8. That section begins "[n]o law shall be passed * * *." The Framers thus expressly phrased the rights in Article I, including section 8, as prohibitions directed at the legislature. *Robertson* warned that the courts must not avoid facial invalidation of statutes in favor of as-applied limitations, grounding that warning in the language of Article I, section 8:

> "Such an implied limitation not only trades overbreadth for vagueness; *it abandons scrutiny of the statute altogether for case-by-case adjudication, contrary to the command that no law restricting this right 'shall be passed.'*"

Id. at 436-37 (emphasis added).

In essence, requiring facial analysis honors the "command" of Article I, section 8, that no restriction on speech "shall be passed." Overbreadth analysis ferrets out laws passed that impose unnecessarily broad restrictions on speech, and strikes them down (or in some cases retains the portion that actually targets the harm, through judicial narrowing). As-applied challenges to invalid laws are inherently inadequate, as *Robertson* states, because they leave invalid laws

on the books. Foreclosing facial analysis would preclude that necessary facial remedy, violating the constitutional command recognized in *Robertson*.

6. The trial court's "findings" are not legislative history, and not binding.

Importantly, the Court of Appeals erred in holding that it was bound by the trial court's "finding" made in denying pre-trial motions to dismiss, that the guideline was enacted to address public safety concerns. *Babson*, 249 Or App at 290. In analyzing the legislative history of the Guideline, this court need not give *any* deference to the "findings" of the trial court. Statutory interpretation is an inquiry for the court, not the fact-finder, and is a question of law. *See Jankowski/Fleming v. Board of Parole*, 349 Or 432, 439, 245 P3d 1270 (2010) (en banc) (statutory interpretation is an effort to discern the intent of the legislature enacting it); *James v. Carnation Co.*, 278 Or 65, 72, 562 P2d 1192 (1977) (statutory interpretation is a matter of law). The transcripts and proceedings of the LAC, and the circumstances surrounding the enactment of the Guideline, are relevant legislative history to which the Court should give appropriate weight, unfettered by the interpretations of the trial court or the Court of Appeals. *See State v. Gaines*, 346 Or 160, 166-67 & n 3, 206 P3d 1042 (2009) (legislative history includes minutes and transcripts of hearings).

Moreover, "in determining the meaning of a term in the constitution, or in analyzing the constitutionality of a law, the court may take judicial notice of certain facts. When a court does so, however, the court is taking judicial notice

of legislative facts, which are facts utilized in determining what the law -- statutory, decisional, or constitutional -- is or should be." *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n*, 318 Or 551, 558, 871 P2d 106 (1994). "Legislative facts * * * are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court *or in the enactment of a legislative body*." *Chartrand v. Coos Bay Tavern, Inc.*, 298 Or 689, 694, 696 P2d 513 (1985).

Similarly, in the First Amendment context, the court gives *de novo* review to *constitutional facts*. *Post v. Oregonian Pub. Co.*, 268 Or 214, 222 & 222 n 7, 519 P2d 1258 (1974) ("It must be borne in mind at the outset that it is for the court, and not the jury, to decide where the line is to be drawn between a protected and an unprotected defamatory publication.") (citing *Rosenbloom v. Metromedia*, 403 US 29, 54-55, 91 S Ct 1811, 1825, 29 L Ed 2d 296, 318 (1971) ("* * * 'This Court cannot avoid making an independent constitutional judgment on the facts of the case.' * * * The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review. * * *.")). The facts that were available to the LAC at the time of passage are legislative or constitutional facts, and appellate courts should not be bound by the trial court's interpretation of them. *Cf. Ecumenical Ministries*, 318 Or at 559 n 8.

Finally, the "findings" that the Court of Appeals assumed were binding were taken from the trial court's ruling on a *pre-trial motion to dismiss*. ER 19. There was no evidentiary hearing. Evidence was presented by declaration. Witnesses were not called and there was no cross-examination. This is not a situation where the state appealed based on a pre-trial ruling. *Cf.* ORS 138.060. In this case, evidence was adduced *at trial*, and the trial court's "findings," if any, should have been based on that evidence, not the pre-trial submissions. Because the "findings" relied on by the Court of Appeals were not facts "tried by a jury" or the court (and therefore were not supported by testimony subject to cross examination), deference is not required. *See* Or Const, Art VII (Amended), § 3; ORS 19.415 (1). It would be a perverse result for this Court to hold that an individual's Article I, section 8 rights turn on a trial court's pretrial findings as to the focus of a restriction on speech and such findings were binding in any appellate review.

7. The Guideline merits facial overbreadth analysis.

Under the principles of *Robertson*, and reflected in *Illig-Renn*'s "expressly or obviously" standard, the Guideline must at least be *analyzed* for overbreadth. The Guideline provides that "[o]vernight use of the steps is prohibited, and activities on the steps may be conducted only between 7:00 am and 11:00 pm * * *." ER 37. Assuming, for the moment, that the rule targets some harm, any ban on "use" or "activities" on the Capitol steps has an obvious

and foreseeable application to speech. The prohibition of protests -- and specifically overnight vigils like defendants' -- plainly is not the type of "marginal and unforeseen" effect that may be relegated to an as-applied challenge. *Illig-Renn*, 341 Or at 234. Indeed, had the legislature replaced the words "use" and "activities" with a list of the activities that are banned between 11:00 p.m. and 7:00 a.m. (*e.g.*, … sewing, sitting, sleeping, speaking, standing, etc.), that list would necessarily, and expressly, include speech.

An obvious impact of the Guideline is to eliminate 24-hour vigils from the steps (raising the question of where, if anywhere, the Oregon Constitution would protect such a vigil). Breaking up a 24-hour vigil into, say, three 8-hour stints does not carry the same meaning. As protestor Peg Morton explained, "[T]he impact is huge when somebody is willing to be out there 24/7, you know, knowing that they're not out there the whole time, but the vigil is out there 24/7 * * *. The public responds to that." Tr 207.

It was apparent and obviously foreseeable to legislators that the Guideline would end defendants' protest and prevent future protests. The Capitol steps is the preeminent stage for communicating grievances to the Legislature. The "situation out on the steps" was discussed at length by the LAC members before the Guideline was amended. Trial Ex. 105, Ex. 1, p. 7. The LAC members discussed how they were "struggling" with that "situation." *Id*. The LAC even invited representatives of groups like the Bible Reading

Marathon and Hoopla! (although not Darr's group, standing just outside on the Steps) to their November meeting to discuss "re-affirming" a ban on overnight use and warned them that their speech and assembly would be curtailed. It was not only "obvious" that banning overnight activities would bar speech. The LAC *knew* that it would do so. The state has never denied this. Therefore, under *Robertson*, the Guideline is subject to overbreadth analysis.

8. The Guideline is facially overbroad.

When analyzed for overbreadth, the Guideline clearly is invalid. First, the Guideline fails to specify in its text any adverse effects it purportedly targets, leaving the court with no harm to measure the restrictions on speech against. The operative text that "Overnight use of the steps is prohibited" except "during hours between 11:00 pm and 7:00 am when legislative hearings or floor sessions are taking place" certainly does not specify the adverse effects that the LAC Administrator identified *later*, *i.e.*, fire danger, litter, attracting undesirable people and the like. DCR 20, pp. 1-2. *See Tidyman*, 306 Or at 189. The requirement to specify a harm is "central to the constitutional freedom of expression." *Id*. (Linde, J.).

Second, the Guideline is so broad that the legislators would themselves violate it if they crossed the steps when exiting the building after the legislative session concludes (*e.g.*, by leaving their offices, or a meeting of the LAC). If one infers that "fires" were the concern, the breadth of the overnight ban is

unreasonable when compared to the harm targeted. Banning all use of the steps during certain hours is plainly unnecessary to prevent fires.

The only harm even discussed by the LAC prior to enacting the Guideline was fire. *See* Trial Ex. 105, Ex. 1, p. 6. The LAC Administrator explained to Mr. Hannah that that concern was addressed by *pre-existing* rules that governed safety hazards. *See* Trial Ex. 105, Ex. 1, p. 6. In any case, fire could have been addressed by enacting more narrowly targeted rules, such as "no open flames on the Steps," or "no open flames on the Steps between 11:00 p.m. and 7:00 a.m. unless the legislature is in session."

9. The Guideline fails under *Robertson* category one.

If ending the Darr protest (or even ending all protests) was the "focus," or "policy choice," then the Guideline was invalid upon passage under *Robertson* category one. As explained above, the Guideline identifies no harm or forbidden effect in its operative text. Therefore it is invalid under the holding of *Tidyman*. *See* 306 Or at 189. This is not the exceptional case where one can clearly infer a legitimate targeted harm. Certainly, a ban on all use or activities for eight hours per night, except for when the legislature is in session, does not exhibit an obvious relationship to risk of fires -- unless the presence of legislators in the building somehow lessens that risk. It does, however, bear an obvious relationship to protests directed at the legislature. *See* Tr 163.

Examination of the text, context, and legislative history of the Guideline demonstrates that the "focus" was on ending protests and especially the "situation out on the steps," (the Darr protest), rather than actually focusing on targeting a harm, *e.g.*, the risk of fires on the nonflammable steps.

The beginning of the protest sparked a rather sudden "about face" by the LAC in enforcement of the overnight guideline. No one seemed concerned about overnight presence on the Capitol steps while the Bible was being read or basketball was being played. Tr 254-56. No concern was expressed for the safety of the participants, fire risk, litter or attracting "undesirables." But for some reason, just 10 days after the beginning of the Darr protest, the LAC rather suddenly began, to use Senate President Courtney's words, "struggling * * * with the situation out on the steps." Trial Ex. 105, Ex. 1, p. 7.

The first signs of the "struggle" to end the protest are found in the transcript of the November 13 LAC meeting. The LAC Administrator issued a notice that made no reference to discussion of the Guideline. He invited several overnight Bible readers and basketball players to the November 13 meeting to discuss the overnight guideline, but didn't say a word to Darr or Gooch, who were then protesting on the Capitol steps, about the meeting. At that meeting, Mr. Burgess expressed no safety, security or litter concerns with the protest. But Senator Courtney and Mr. Burgess stated repeatedly and inaccurately at the November 13 meeting that the existing overnight guideline prohibited overnight

use outright, that the protest was plainly in violation of the rule, and that by essentially instructing Mr. Burgess to end the 24 hour vigil, the LAC was merely "reaffirming" the existing policy, not changing it.

The LAC later amended the Guideline with minimal public scrutiny, issuing a public notice of the January 9, 2009 meeting which said nothing about amending the Guideline. The notice described a "Public Meeting and Possible Work Session on **"**Building Use Policy - Consideration of a Building Use Policy Relating to Animals," and a "Work Session**"** on **"**Building Use Policy - Other." MeCR 23, ¶ 5, Ex. 5.

The LAC articulated no harms except for fire prior to enacting the Guideline. But in response to defendants' motion to dismiss, Mr. Burgess filed an affidavit expressing concerns about building security, risk of fire (*i.e.*, candles, electric coffee pots, space heaters, and flammable items), attracting homeless people and "at least one sex offender" and concerns about cleanliness and litter. DCR 20, pp. 1-2. However, under the *PGE/Gaines* framework, the *post hoc* justifications offered by the state for the Guideline are not evidence of the legislative intent, as relevant legislative history includes only events up to the time of enactment. *See Arken v. City of Portland*, 351 Or 113, 134 n 5, 263 P3d 975 (2011) ("[T]he relevant inquiry is addressed to the intent of the legislature at the time that it enacted the Statute in question."). Nor does an enactment *actually* target a harm if the reason that it employs broad language is

an attempt to suppress protest(s) while avoiding unconstitutionality; that is simply not the type of "forbidden effect" *Robertson* envisions.

But under *PGE/Gaines*, the other sections of the LAC rules *are* relevant context. Those provisions directly address all of the harms later offered by the state -- whenever they occur (day or night). The LAC rules included distinct provisions: (1) requiring that activity on the steps "comply with the laws regarding public access and safety"; (2) regulating the volume of amplification devices; (3) preventing banners, signs or other materials from being attached to the building, or steps or surrounding area; (4) requiring the use of candle wax protectors; (5) requiring that the area be left in a neat and clean condition; and (6) barring alcohol from the steps. ER 37. The LAC members knew that existing safety regulations addressed those concerns, when they enacted the Guidelines: the LAC Administrator told them that in November. Tr 283-84. Accordingly, there are *no* harms that the Guideline *itself* addresses outside of mere assembly or speech on the steps. In total, the context and legislative history of the Guideline demonstrate that it is focused on speech.

F. Argument on Third Question on Review

1. Even if the overnight rule is considered a "time, place and manner restriction," overbreadth is required under *Robertson*, and the Guideline may not target speech.

Consistent with the provisions upheld in *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 Or 275, 132 P3d 5 (2006), time, place and

manner restrictions will often survive *Robertson* analysis. Such restrictions are typically imposed where the "focus" is targeting a harm (rather than speech). They typically reflect a legislative effort to eliminate the "most apparent applications" to speech, leaving only "marginal and unforeseen" applications, by carefully limiting restrictions to times, places, or manners that are *tied to the targeted harm*. *Outdoor Media*'s holding, while largely phrased in terms of evaluating "time, place and manner" restrictions, *Outdoor Media*, 340 Or at 288-90, is functionally consistent with the *Robertson* framework that remains the test for facial validity of any legislation passed that is challenged under Article I, section 8.

The holdings in *Outdoor Media* do not imply that the "focus" of time, place and manner restriction is *always* harm rather than speech. Nor does *Outdoor Media* imply that all such restrictions always survive overbreadth analysis required by category two.

Outdoor Media employed a different vocabulary, but its key holdings and analysis are consistent with *Robertson*. It relies on *Robertson*, *Outdoor Media*, at 293-296, *Tidyman*, *Id*. at 289, and *Purcell*, *Id*. at 289, for the proposition that *Robertson* does not foreclose reasonable time, place and manner restrictions, demonstrating that *Outdoor Media* retains *Robertson*'s core principles. With respect to the permit and fee requirements that *Outdoor Media* upheld, the court examined whether they targeted speech, or a regulable harm, and found the

latter. This is evident from the holding that the permit scheme was not directed at suppressing "the subject or content of speech," *id*. at 290, or directed at prohibiting billboards or any other form of expression, *id*. at 291-92, and is reflected in the statement that the law "does not effectuate government censorship of speech." *Id*. at 290. In fact, *Outdoor Media* acknowledged that the sign law there looked like a category two law, and noted the focus was on forbidden results (public safety and aesthetics). *Id*. at 288. Thus, under *Outdoor Media*, a regulation must address *harm*. Enacting a content-neutral restriction on expression does not convert it into a restriction aimed at preventing harm.

With respect to overbreadth, it appears that the court concluded, without saying so expressly, that there were no obvious applications to speech that the legislature could have eliminated to reduce the breadth while addressing the targeted problem. This may be because the legislature could not extricate the problem (distracting signs) from the incidentally impacted speech (distracting signs). Here, by contrast, the state's purported harms (fires, or crime) could be (and had been) addressed with no apparent application to speech at all. Again consistent with *Robertson*, once the court determined that the law permits and fees were facially valid, it conducted an as-applied analysis.

With respect to on-premises versus off-premises signs, like the court in *Robertson*, the court took the time to analyze the substantive impact of the

statute, and thereby discovered an apparent burden it imposed on off-premise sign owners. 340 Or at 292-99; *Cf. Robertson*, 293 Or at 432-36 (analyzing statute to see that it could apply in absence of harm). The court held that the on-premises exception was part of regulating the harm of highway distractions, but held that the distinction at issue actually focused on the content of that speech. *Id*. at 297. *Outdoor Media*'s rejection of that distinction is consistent with category one, but the holding is also consistent with category two overbreadth analysis. That is, the legislature imposed a burden on speech (discrimination against off-premise signs) that it could have avoided in targeting the harm, had it not created the exemption for on-premise signs (which still caused the same harm). Consistent with *Robertson*, the court eliminated this unnecessary burden passed by the legislature (ultimately by striking the permit fees imposed by the statute). The discussion of remedies reflects the principle that while the court may sometimes narrow a law in order to save it, there are limits on the courts' flexibility in doing so. *See Id*. at 301-02.

The court should avoid adopting any separate time place and manner analysis that is divorced from *Robertson*. Justice Marshall's dissent in *Clark v. Community for Creative Non-Violence*, observes two key problems with the federal approach, that counsel against a separate time, place and manner framework under the Oregon Constitution:

> "The disposition of this case impels me to make two additional observations. First, in this case, as in some others involving time, place, and manner restrictions, the Court has dramatically lowered its scrutiny of governmental regulations once it has determined that such regulations are content-neutral. The result has been the creation of a two-tiered approach to First Amendment cases: while regulations that turn on the content of the expression are subjected to a strict form of judicial review, regulations that are aimed at matters other than expression receive only a minimal level of scrutiny. The minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection. By narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity. * * * The Court, however, has transformed the ban against content distinctions from a floor that offers all persons at least equal liberty under the First Amendment into a ceiling that restricts persons to the protection of First Amendment equality -- but nothing more. The consistent imposition of silence upon all may fulfill the dictates of an even handed content-neutrality. But it offends our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"

468 US 288, 312-14, 104 S Ct 3065, 82 L Ed 221 (1984) (Marshall, J., dissenting) (footnotes and internal citation omitted). Here, denying the use of the Capitol steps to all overnight activity does not adequately protect against "an unfortunate diminution" of Article I, section 8 protections. Marshall continued:

> "Second, the disposition of this case reveals a mistaken assumption regarding the motives and

> behavior of government officials who create and administer content-neutral regulations. The Court's salutary skepticism of Governmental decisionmaking in First Amendment matters suddenly dissipates once it determines that a restriction is not content-based. The Court evidently assumes that the balance struck by officials is deserving of deference so long as it does not appear to be tainted by content discrimination. What the Court fails to recognize is that public officials have strong incentives to overregulate even in the absence of an intent to censor particular views. This incentive stems from the fact that of the two groups whose interests officials must accommodate -- on the one hand, the interests of the general public and, on the other, the interests of those who seek to use a particular forum for First Amendment activity -- the political power of the former is likely to be far greater than that of the latter."

Id. at 314-15 (Marshall, J., dissenting) (footnotes and internal citation omitted).

Scholarship indicates that in the 20 years after Justice Marshall penned that dissent, legislatures indeed exploited the loophole in First Amendment protection that he identifies, employing unnecessarily broad -- but content-neutral -- restrictions as a way of evading scrutiny. *See* Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*., 31 Harv C R - C L L Rev 31, 51 (2003) (concluding that while legislation was ostensibly "content-neutral," in fact "the sole concern of the legislation was the activity of anti-abortion protestors").

No legislative body should be able to evade meaningful overbreadth review by enacting a broad ban, with obvious impact on speech, as a means to

suppress the targeted speaker or message. Drafting something as content-neutral must not immunize a law from *Robertson*'s inquiry into the *actual* focus. *Any* law focused on speech falls under category one. Nor should the use of content-neutral language excuse legislative bodies from the responsibility to eliminate obvious applications to speech, leaving only "marginal and unforeseeable applications" under *Robertson*. The Guideline should not evade meaningful overbreadth review on the ground that is a *broad* ban that equally *denies* overnight use to *all*.

G. Argument on Fourth Question on Review

1. Questions regarding statements made by the LAC members were not excludable hearsay, and any offer of proof was futile after the trial court previously refused to take a similar offer.

If defendants are limited to an as-applied challenge to the enforcement of the Guideline against them, an essential question is whether that enforcement was motivated by a desire to censor their speech. *Babson*, 249 Or App at 281, 290-91, 308; *see also City of Eugene v. Lincoln*, 183 Or App 36, 43, 50 P3d 1253 (2002). To elicit information regarding the LAC's motivation for enforcing the rule, defendants sought to examine Mr. Burgess regarding what LAC members told him about their motivations for enforcing the rule.

> Q. So what Legislators told you that they were concerned about people being on the steps for 24 hours straight?
>
> "* * * * *

> "THE WITNESS: Again, it's not a personal recollection in terms of actual individuals, and, you know, obviously it was over a large -- long period of time. Certainly -- you've raised Senator Courtney. He may have -- he probably asked me. I think Representative Gelser spoke to me about it. I'm sure there are others.
>
> "BY MR. VOLPERT: (Continuing)
>
> "Q. And what did Representative Gelser say to you about it?
>
> "MR. ABRAMS: Objection; hearsay.
>
> "THE COURT: Sustained.
>
> "MR. VOLPERT: Your Honor, that is not offered to prove the truth. Go ahead -- no, don't go ahead.
>
> "THE COURT: I sustained the objection.
>
> "BY MR. VOLPERT: (Continuing)
>
> "Q. I'm going to ask the same question; what did Representative Courtney say about --
>
> "MR. ABRAMS: Same --
>
> "THE COURT: Sustained."

Tr pp. 248-50.

Questions to Mr. Burgess about what members of the LAC told him regarding enforcement of the Guideline do *not* solicit hearsay. OEC 801(3). Mr. Burgess's answers would not be used to prove the truth of the statements -- but simply that the statements were said by the declarant. *Marr v. Putnam*, 213 Or 17, 25, 321 P2d 1061 (1958) Even if Mr. Burgess's answers

were hearsay, they would be admissible under OEC 803(3) because they reflected the declarant's state of mind, intent, motive or plan.

The Court of Appeals affirmed the exclusion of the testimony because defendants failed to make an offer of proof. *Babson*, 249 Or App at 304. The problem with that is that the trial court had already announced that it would not entertaining any offers of proof regarding the substance of evidence that it considered hearsay. Any offer of proof was futile.

Prior to the examination of Mr. Burgess, defendants first asked Officer Adams what other state actors had said about the protest. Defendants' counsel asked: "Officer, Mr. Swaim was asking you questions about whether you knew there was a permit. You said there was a lot of talk up to that date; what were you referring to?" Tr 76. The state objected and the trial court immediately sustained the objection. Defendant then asked to make an offer of proof, which the trial court allowed -- *until* the questions started to zero in on what legislators said about defendants' protest:

> "Q. Now, did any of them tell you why someone wanted these Defendants to be off the steps?
>
> "A. No. Just that that was a safety -- that somebody shouldn't be on there from 11:00 p. to 7 a.
>
> "Q. Who told you that?
>
> "A. It was during conversation. I don't remember the --
>
> "Q. Let's take our time. Who told you --

> "THE COURT: That's why hearsay's objectionable. And I'm going to sustain it. **We're not going to keep going with an offer of proof that's going to get into things that are very, very clearly hearsay**."

Tr 80 (emphasis added).

An offer of proof is excused, and prejudicial error occurred, where a trial court refuses to accept the offer or where making of an offer of proof is otherwise futile. The "requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *State v. George*, 337 Or 329, 339, 97 P3d 656 (2004); *see also State v. Olmstead*, 310 Or 455, 459-60, 800 P2d 277 (1990) (characterizing an offer of proof as a preservation requirement). The questions subsequently presented to Burgess were on the exact same subject and offered for the exact same purpose as those presented to Adams. The trial court had already announced that further offers of proof would not be allowed because the questions sought responses that "are very, very clearly hearsay." Under the circumstances, asking for an offer of proof should not be required.

While normally the exclusion of evidence is "not presumed to be prejudicial," OEC 103(1), the exclusion of evidence is prejudicial if "the excluded evidence has some likelihood of affecting the jury's result." *Jennings v. Baxter Healthcare Corp.*, 152 Or App 421, 430, 954 P2d 829 (1998), *affirmed*, 331 Or 285, 14 P3d 596 (2000). Normally, the proponent of evidence

demonstrates the prejudicial effect of exclusion by making an offer of proof. Here, however, the trial court had made abundantly clear that it would not entertain any offers of proof of matters that it considered hearsay.

Moreover, being denied the opportunity to make an offer of proof was prejudicial. Wrongly preventing defendants from even *establishing* prejudice is itself prejudicial; because the trial court erroneously prevented defendants from even making an offer of proof, they were unable to demonstrate that the solicited evidence would have a likelihood of swaying the fact finder, thwarting their prospects on appeal.[7] *See O'Brien v. Dunigan*, 187 Or 227, 234, 210 P2d 567 (1949) ("In the absence of an offer of proof, an appellate court can not say that the challenged ruling affected adversely the substantial rights of the appellant, and generally can not determine whether or not the ruling was, in fact, erroneous.").

Because the solicited evidence was not hearsay, and because defendants were prevented from making an offer of proof, this court should hold that the trial court erred and reverse and remand with instructions to allow the testimony, or, at the very least, to allow defendants to make an offer of proof that would allow for meaningful review.

---

[7] At a minimum, the trial court's failure to allow the questioning or an offer of proof constitutes plain error. OEC 103(4). Of course, defendants cannot establish prejudice on this record, precisely because they were prevented from making an offer of proof.

H. Argument on Fifth Question on Review

1. First things first, second things if justice requires.

When Oregon adopted "first things first," a federal constitutional violation was not deemed complete if state law gave a remedy. *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (Linde, J.) ("[T]he state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."); *see also* Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U Balt L Rev 379, 383 (1980). The U.S. Supreme Court subsequently stated that certain violations of the Bill of Rights are complete upon the occurrence of the underlying conduct (*e.g.*, an arrest). *Zinermon v. Burch*, 494 US 113, 125, 110 S Ct 975, 108 L Ed 2d 100 (1990) (so stating in context of 42 USC § 1983 claims). *See State v. Stoudamire*, 198 Or App 399, 417-18, 108 P3d 615 (2005) (Landau, J.) (concurring) ("[I]t is perhaps no longer tenable to suggest that state courts are without authority to reach federal law issues if state law affords relief"); *Babson*, 249 Or App at 307 n 6 (noting the issue).

This change raises federal Due Process concerns about denying an available remedy under the First Amendment to a defendant whose injury is complete, but is not afforded complete relief under state law. Affording an injured defendant only partial state remedies, such as a new trial when her activities are arguably *fully* protected by the First Amendment, is itself a

potential violation of her First and Fourteenth Amendment rights. Unnecessary trial proceedings and the resulting uncertainty chill future speech and offend fundamental principles of Due Process.

Accordingly, if the court affirms the Court of Appeals, it should consider whether, after the Court of Appeals addressed state law *fully*, it should have analyzed whether the overnight rule violated the First Amendment as argued by defendants. *See* Brief of Appellants, at 30-37; Reply Br. at 8-11.

I. Sixth Question on Review

1. The authority of the LAC to restrict constitutionally protected expression on the steps and plaza outside the capitol building remains uncertain.

The Oregon Constitution provides one mechanism by which the Legislative Assembly can enact statutes. It requires passage by both houses and presentment to the Governor. Or Const, Art IV, § 25, Art V, § 15b. Although the Legislative Assembly may delegate authority to enact rules, subject to judicial review under the Oregon Administrative Procedures Act, ORS 183.310, *et seq*., the LAC operates outside any such safeguards. *See* ORS 173.770(2) ("Rules adopted under authority of this section are not rules within the meaning of ORS chapter 183 and are not subject to review under ORS 183.710 to 183.725."). The court should be circumspect in allowing *sui generis* bodies such as the LAC to make rules, immune from administrative review, that restrict constitutional expression in a unique public space. Additional argument

on this point is available in Appellants' briefing at the Court of Appeals. *See* Brief of Appellants at 40-41.

J. Conclusion

For the reasons stated above, the Decision of the Court of Appeals should be reversed and judgment should be entered in favor of defendants. Alternatively, the court should remand the case for further discovery and trial.

Dated this 24th day of January, 2013.

Respectfully submitted,

s/ Timothy R. Volpert
Timothy R. Volpert, OSB #814074
Alan J. Galloway, OSB #083290
Tim Cunningham, OSB #100906
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201
Telephone: (503) 241-2300
Facsimile: (503) 778-5299
timvolpert@dwt.com
alangalloway@dwt.com
timcunningham@dwt.com

Michael E. Swaim, OSB #780920
MICHAEL E. SWAIM, P.C.
270 Cottage Street NE
Salem, Oregon 97301
Telephone: (503) 363-0063
mswaimlaw@aol.com

Attorneys For Petitioners on Review
Darr, Babson, Gooch, Meek and Morton, on Behalf of the ACLU Foundation of Oregon, Inc.

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

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 13,988 words.

Type Size

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

Dated: January 24, 2013.

s/ Timothy R. Volpert
Timothy R. Volpert, OSB #814074

Of Attorneys for Petitioners on Review
Babson, Darr, Gooch, Meek and Morton

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 24th day of January, 2013, I filed the original of the foregoing **BRIEF ON THE MERITS OF PETITIONERS ON REVIEW BABSON, DARR, GOOCH, MORTON AND MEEK** by using the court's electronic filing system; and that I served the same on:

Anna Marie Joyce, OSB # 013112
DOJ Appellate Division
1162 Court Street NE
Salem, Oregon 97301
Telephone: (503) 378-4402
anna.joyce@doj.state.or.us

by electronic means through the Oregon Judicial Department's eFiling system on January 24, 2013.

s/ Timothy R. Volpert
Timothy R. Volpert, OSB #814074

Of Attorneys for Defendants-Appellants
Babson, Darr, Gooch, Meek and Morton