IN THE SUPREME COURT OF THE STATE OF OREGON

NANCY L. POWELL, an individual, REMINGTON POWELL, a minor through his Guardian ad Litem NANCY L. POWELL, Plaintiffs-Appellants and Petitioners on Review, v. STAN BUNN, individually and as Superintendent of Public Instruction; PORTLAND PUBLIC SCHOOL DISTRICT No. 1J, Defendants-Respondents and Respondents on Review.	SC No. _____ CA No. A108090 Multnomah County Circuit Court No. 9805–03567

APPELLANTS' PETITION FOR REVIEW

Petition to Review the Decision of the Court of Appeals
Affirming the Judgment of the Circuit Court for Multnomah County
The Honorable Joseph Ceniceros, Judge

Date of Court of Appeals Opinion: December 11, 2002
Author of Opinion: Linder, J., joined by Haselton, P.J., and Wollheim, J.

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A. PRAYER FOR REVIEW

Plaintiffs-appellants Nancy Powell and Remington Powell petition for review of the Court of Appeals decision issued December 11, 2002. *Powell v. Bunn*, 185 Or App 334, 59 P3d 559 (2002). The Court of Appeals affirmed a judgment of the circuit court dismissing plaintiffs' appeal from an order of the Superintendent of Public Instruction and their claims for declaratory and injunctive relief against the Portland Public School District ("District").

B. QUESTIONS PRESENTED FOR REVIEW

1. In *Eugene Sand & Gravel v. City of Eugene*, 276 Or 1007, 1012-13, 558 P2d 338 (1976), this Court quoted a "test established by the Supreme Court of the United States for application in determining whether a law is constitutional under the First Amendment 'Establishment Clause,'" and held "that this same test is also appropriate for application in determining whether a law is constitutional under similar provisions of the Oregon Constitution." The Court identified Article I, sections 2, and 5, as the "similar provisions" to which it was referring. *Id*. at 1013 n 6. Did the Court err in holding that the meaning of these state constitutional provisions should be determined by reference to a "test" developed by the U.S. Supreme Court for deciding cases under the Establishment Clause of the First Amendment?

RULE OF LAW PROPOSED BY PETITIONERS: Article I, sections 2, 3, and 5, of the Oregon Constitution should be interpreted according to their specific wording, the case law surrounding them, and the historical circumstances that led to their creation.

2. Does an Oregon public school district violate Article I, sections 2, 3, and 5, when it allows its staff members, facilities, resources and property to be used to assist the Boy Scouts during a time of compulsory attendance in the school day in recruiting elementary students to join its organization, when the Scouts has a religious test for membership, bars atheists, requires members to avow to do their duty to God, declares itself

a religious organization and characterizes its recruitment activities in public school as "religious speech"?

RULE OF LAW PROPOSED BY PETITIONERS: Article I, section 5, bars public school districts in Oregon from spending taxpayer money to benefit a religious institution. Sections 2 and 3 of Article I bar such districts from interfering with the rights of students and their parents to exercise freedom of conscience in matters of religion. These sections prohibit Oregon school districts from allowing their staff members, facilities, resources, and property to be used during periods of compulsory attendance in the school day for the purpose of recruiting elementary school students to join, by an organization that imposes a religious test for membership and that excludes students who do not share its religious beliefs.

3. ORS 327.109 requires the Superintendent of Public Instruction to withhold state funding from a school district "that sponsors, financially supports or is actively involved with religious activity." Did the Court of Appeals err in concluding that the policy and practice of the District in allowing the Boy Scouts to enter its public schools during the school day to recruit students to join its organization does not violate that statutory requirement?

RULE OF LAW PROPOSED BY PETITIONER: When a public school district in Oregon permits an organization that restricts membership on the basis of religious belief to use school facilities, during periods of compulsory attendance in the school day, to recruit students to join the organization, the district "sponsors, financially supports or is actively involved with religious activity" within the meaning of ORS 327.109, and the Superintendent is obligated to withhold state funds from such a district.

C. REASONS FOR REVERSAL

1. This Court erred in *Eugene Sand & Gravel* when it held that it is appropriate to construe Article I, sections 2, 3, and 5, of the Oregon Constitution by applying a "test" developed by the U.S. Supreme Court for deciding cases brought under the Establishment Clause of the First Amendment. That holding departed from the Court's prior interpretation of Article I, section 5, and it is inconsistent with the methodology subsequently adopted by this Court for interpreting provisions of the original constitution. Provisions of the Oregon Constitution of 1857 must be interpreted by analyzing the text of those provisions and determining the intent of their authors, not by applying a formula created more than a century later by the U.S. Supreme Court for interpreting the very different wording of federal constitutional provisions.

When the meaning of Article I, sections 2, 3, and 5, is determined according to this Court's required methodology, it is clear that the District's practice of allowing a self-avowed religious organization to use its staff members, facilities, and property to recruit elementary school students to join its organization, while refusing admission to any student who does not accept the religious beliefs of the organization, violates the District's constitutional obligations (1) not to spend taxpayer money for the benefit of a religious institution and (2) not to interfere with the rights of conscience of its students and their parents.

2. In construing the provision in ORS 327.109 requiring the Superintendent to withhold state funding from a school district "that sponsors, financially supports or is actively involved with religious activity," the Court of Appeals was correct in concluding that the quoted text was taken directly from U.S. Supreme Court decisions construing the Establishment Clause of the First Amendment. However, the legislative history makes it clear that the legislature intended that the statute is to be interpreted against the backdrop of

the religion clauses of the Oregon Constitution as well as of the First Amendment. Moreover, the statute was adopted in 1985, Or Laws 1985, ch 584, § 2, and the Court of Appeals erred in applying U.S. Supreme Court decisions after that year in determining the meaning of the quoted text. ORS 327.109 must be interpreted according to the meaning of the quoted text *in 1985*, when the legislature adopted it, not according to later decisions of the U.S. Supreme Court that altered that Court's Establishment Clause jurisprudence. Under the controlling U.S. Supreme Court interpretation of the Establishment Clause as it stood in 1985, the District's policy and practices with respect to the Boy Scouts constitute sponsorship of religious activity, financial support of such activity, and active involvement with such activity, all in violation of ORS 327.109.

D. FACTS RELEVANT TO THE APPEAL

1. Events Giving Rise to this Litigation.

In the fall of 1996, plaintiff Remington Powell ("Remy") was a first grade student at Harvey Scott Elementary School, owned and operated by the District. In September of that year, a Harvey Scott teacher distributed a flyer to him in the classroom during school hours. The flyer promoted the Boy Scouts of America organization, and carried the legend, "Get in on the FUN. You Can Join Now! " It contained cartoon drawings of young boys engaged in a variety of sports, recreational, and arts activities, and it identified three levels of Scouting: "Tiger Cubs for First Graders," "Cub Scouts for 2nd & 3rd Graders," and "Webelos for 4th & 5th Graders." (CR 78, Ex. 1.)[1]

In October 1996, at a time when Remy and other students were required by the school to be present in the school cafeteria, a child development specialist on the staff of Harvey

[1] The documents in the trial court file that are cited in this petition are either exhibits to plaintiffs' summary judgment motion directed to the Superintendent, which were filed by the clerk under Clerk's Register No. 74, or exhibits to plaintiffs' separate summary judgment motion directed to the District, which were filed under Clerk's Register No. 78.

Scott named Elizabeth Christie "introduced" two Boy Scouts representatives to the students. The representatives told the students "that they were passing out some informational materials about a meeting and that anyone interested could volunteer to receive that information." (CR 78, Christie Depo. at 9.) Ms. Christie and the Scout representatives then placed a wristband on every boy who raised his hand, including Remy. As the Superintendent put it in his findings, "A district Child Development Specialist participated in the information session and assisted with placing the wrist bands on students." (CR 74, Ex. 1 at 4.)

The wristband was of the type commonly used in hospitals, and can be placed on a wrist, or removed therefrom, only with the help of another person. (CR 78, Otto Depo. at 158.) The wristband stated in part: "Come Join Cub Scout Pack 16! Round-Up For New Cub Scouts For Boys In Grades 1-5. Today from 7-8 p.m. (10-15-96). Scott Elementary School." (*Id*. at 12-13; CR 78 Ex. 3). Remy asked Ms. Christie if joining Scouts was fun, and she replied, "It is fun." (CR 78, Christie Depo. at 20.)

Plaintiff Nancy Powell ("Nancy") is Remy's mother, and a taxpayer in the District. Nancy and Remy do not believe in the God that theistic religions, such as Christianity, Judaism, and Islam, worship. They are atheists. (CR 74, Ex. 2 at 2; CR 78, Nancy Powell Aff., ¶ 2.) Persons who state that they are atheists or agnostics are not eligible to join the Boy Scouts at any level, including Cub Scouts. (CR 78, Otto Depo. at 50.)

Beginning in September 1996, Nancy complained about the District's practice and policy of allowing the Scouts to recruit students during times of compulsory student attendance in the public schools. She first complained to the principal of Harvey Scott, later to the District School Board, and eventually to the Superintendent of Public Instruction. At all times, the nature of her objection was, as she put it in her letter to the Superintendent dated August 5, 1997, that the Scouts were a "religious organization" and that the District

was violating the law by "allowing this discriminatory organization to solicit within the schools for its membership base." (CR 74, Ex. 2.) In her letter, she quoted a sentence from the Scouts' "Declaration of Religious Principles," that "The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God," and she stated that "No mother should ever again be put in the position of telling her sobbing 6 year old son on the steps of his own school that 'our kind', non-believers in the supernatural, are not welcome to join the group that solicited our membership. They just want those other boys." (*Id*.)

Lew Frederick, Director of Public Information for the District, testified that he had conversations with both Nancy and the Harvey Scott principal, that Nancy had expressed her concerns "about her son being an atheist or she being atheist" and "that she didn't want anything *** that was in any way connected with any sort of religious or quasi-religious aspect sent home with her son," and that the principal "said that he would not have that happen again." (CR 78, Frederick Depo. at 15-16.) Frederick told Nancy that when Ms. Christie, the Harvey Scott staff member, assisted in placing the Scout wristbands on the students during the October 1996 visit, Ms. Christie "was also working with the Boy Scouts at that particular time, talking about certain things, so that's - she knows now and so do the Scouts that they aren't supposed to do that in the schools. That was very clear. That's not allowed." (*Id*. at 71-75).

In the fall of 1997, a Scout representative again visited Harvey Scott students during the lunch hour to recruit membership. After Ms. Christie called the students to order, the Scout leader announced an upcoming Cub Scout meeting, described scouting activities, and placed wrist bracelets on the wrists of interested boys (CR 78, Christie Depo. at 37-38, 40). According to its attorney, the Scouts "employed wrist bands" at 14 schools in the District during 1998. (CR 74, Ex. 4.) So far as the record in this case reflects, the Boy Scouts is still

recruiting students in District schools during school hours. (CR 78, Otto Depo. at 73-75; CR 74, Abrams Depo. at 27.)

2. Religious Nature of the Scouts Organization.

The religious nature of the Boy Scouts is emphasized from the very beginning of a boy's scouting experience. The youngest level of Boy Scouts is the "Tiger Cub" organization for first grade boys; the "Tiger Cub Promise," as it appears on the membership application, reads as follows:

> "I promise to love God, my family, and my country, and to learn about the world." (CR 78, Ex. 2 at 13.)

Second and third grade boys are eligible to join the Cub Scouts; its promise reads:

> "I, (name), promise
>
> "To do my best
>
> "To do my duty to God and my country,
>
> "To help other people, and
>
> "To obey the Law of the Pack." (*Id*.)

The Boy Scout Oath reads as follows:

> "On my honor I will do my best
>
> "To do my duty to God and my country and to obey the Scout Law;
>
> "To help other people at all times;
>
> "To keep myself physically strong, mentally awake, and morally straight."[2]

The Boy Scouts requires members to avow a belief in a theistic God, and refuses membership to atheists, agnostics and others who do not subscribe to its theistic beliefs. (CR

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[2] The Boy Scout Oath can be found in many places, including CR 74, Ex. 2 at 40, and at official website of the National Council of the Boy Scouts of America, http://www.scouting.org/ (last visited 2/4/03), at the page headed "Boy Scout Oath, Law, Motto, and Slogan."

78, Otto Depo. at 50, 65-67, 86, 143.) The Boy Scouts has stated that "atheists, agnostics, practitioners of witchcraft, Satan worshipers and others who reject Scouting's religious principles" are not eligible for Scouting. (CR 78, Ex. 7 at 3.) In a document described by Larry Otto, Scout Executive for the Cascade Pacific Council of the Boy Scouts, as a "media document that was prepared *** to help us answer questions" (CR 78, Otto Depo. at 82), the Scouts state that "Some people would maintain that God is a tree, rock or a stream," and Otto testified that such a person "would not be eligible to be a member of Scouting." (*Id*. at 80-81.) The Boy Scouts "will only partner with those people that recognize a duty to God." (*Id.* at 58.) Members of the Universalist Unitarian Church, for example, may not join the Boy Scouts because they "cannot accept the [Scout's definition] of 'duty to God.'" (*Id.* at 62.) The Boy Scouts admits *only* those "who believe in God as the ruling and leading power of the universe." (*Id*. at 50, 56-57, 66; and CR 74, Ex. 2 at 40.)

The Scouts requires members to accept its Declaration of Religious Principles, which is prominently set forth in the Scouts' one-page application form:

> "The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, 'On my honor I will do my best to do my duty to God and my country and to obey the Scout Law.' *The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members***."**

(CR 74, Ex. 2, p. 13, emphasis added; CR 78, Otto Depo. at 143-44).

Otto testified that this "religious principle has been a basic ten[et] of [the Boy Scout] program" (CR 78, Otto Depo. at 23-24). The Boy Scout Law, as set out on the Scouts website (see footnote 2 on the preceding page) requires a boy to be "reverent," and states that "A Scout is reverent toward God. He is faithful in his religious duties. He respects the

beliefs of others." The Boy Scout Handbook explains that: "The word *reverence* refers to a profound respect for God. The wonders of the world remind us of our God's creative power *** ." (CR 78, Ex. 2 at 40.) The "Scoutmastership Fundamentals" training book for Scout leaders states: "Although the Boy Scouts is non-sectarian, *it is not nonreligious*" (CR 78, Ex. 8 at 3, emphasis added). Otto explained what the Boy Scouts mean by "non-sectarian": "[W]e're nonsectarian if you accept the definition—*our* definition of 'God.'" (CR 78, Otto Depo. at 57, emphasis added).

In pleadings and briefs filed in other jurisdictions, the Boy Scouts has consistently described itself as "a religious organization." Thus, in "proposed findings of fact" submitted to the District of Columbia Commission on Human Rights in 1998, the Scouts asserted that "The basic purpose of Scouting is and always has been the inculcation of moral and religious values in boys and young people." (CR 78, Ex. 14 at 3.) The Scouts continued:

> "Although the Boy Scouts of America is not a religious sect, it is religious, and while the Local Council is not a house of worship like a church or synagogue, *it is a religious organization*. *** The Scout Oath and Law begin and end with God. When reciting the Oath, a boy begins by pledging his duty to God, *even before his duty to his country and his family*." (*Id*. at 5; emphasis added.)

The Scouts went on to assert that "There are few religions in America which can boast of millions of youth who meet each week and openly affirm their belief in God" (*id*.), and that even their "outdoor program further reinforces the religious nature of the Scouting program." (*Id*. at 6.) In its proposed conclusions of law in that same proceeding, the Scouts stated:

> "Scouting maintains itself as a theistic movement by restricting adult membership to those who accept God 'as the ruling and leading power in the universe.'" (CR 78, Ex. 7 at 5.)

In its Brief on the Merits to the California Supreme Court in *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal4th 736, 952 P2d 261, 72 Cal Rptr 2d 453 (1998), the Scouts described itself as "a theistic association" (CR 78, Ex. 12 at 8), and in its

reply brief in that case, it asserted that "Scouting is Religious" and that "the Cub Scouting experience undeniably involves repeated activities designed to reinforce recognition of duty to God." (CR 78, Ex. 6 at 2.) "There is no question that Scouting's emphasis on God is made obvious to every parent enrolling his or [sic] son in Scouting." (*Id*. at 3).

During the trial of the *Randall* case, the Scouts submitted evidence to support those assertions. The California Supreme Court stated that the Scouts had "produced evidence intended to demonstrate that it does, in fact, have a religious message," 952 P2d at 264, and that it "introduced numerous formal declarations by the Boy Scouts of America to demonstrate the importance of religion, and the scout's duty to God, in its training of youth." *Id*. The Court continued:

> "Several witnesses testified that the religious affirmation contained in the Cub Scout Promise is reinforced through regular repetition of the promise at den and pack meetings. In the view of one council leader, a purpose of the Cub Scout program is to create a protective environment for instruction in religious principles. This witness also testified that other scouting values, such as trustworthiness, depend upon a belief in God.
>
> "Parents of Cub Scouts in plaintiffs' den and pack testified that they hoped certain values, including religious ones, would be instilled through the Cub Scout program, as promised by the parent handbook for new Cub Scouts. [The Scouts] also presented evidence that 50 percent of the dens within the regional council's territory are sponsored by religious organizations, and several leaders of religious organizations testified that they encourage their youth to participate in scouting because it reinforces the importance of religion in a boy's life.
>
> "Finally, [the Scouts] produced evidence intended to establish that requiring the inclusion of nonbelievers within the Cub Scouts would interfere with the organization's efforts to convey its religious message." *Id*. at 265.

In an Answer filed in a Kansas state court proceeding in 1992, the Scouts alleged that "Boy Scouts of America is a religious organization," and that Kansas law permitted it "to

limit the occupancy of its property *** to persons who believe in God or to give preference to persons who believe in God." (CR 78, Ex. 10 at 2.) In a later memorandum of law filed in that Kansas case, the Scouts asserted that "the requirement of acknowledging God is not merely a 'civic exercise of a "ceremonial deism"'" but is made in "an 'unquestionably religious' context." (CR 78, Ex. 11 at 2). In their Statement of Uncontraverted Facts in that case, the Scouts stated:

> **"**Reminders of duty to God are a regular feature of Scout activities; examples include repeating in unison the Boy Scout Oath at Patrol and Troop meetings, saying blessings as meals at camp, discussing one's duty to God at Scoutmaster Conferences and Boards of Review, attending prayer services, and relating God to the natural world informally on hikes and camping trips." (CR 78, Ex. 19 at 5.)

In their answer filed in a federal court case in Illinois in 1990, the Scouts stated:

> "Reverence toward God is an integral part of the Cub Scout program and forms a basic part of the advancement program in which Cub Scouts participate. ***
>
> "*** To require defendants to admit *** a boy who *** was not prepared to acknowledge an obligation to God would materially disrupt the advancement program and other aspects of the Cub Scout program and interfere with the transmission of the values of Scouting, including reverence toward God *** ." (CR 78, Ex. 9 at 2-3.)

E. ARGUMENT

1. The Court's Error in *Eugene Sand & Gravel*.

In *Lemon v. Kurtzman*, 403 US 602, 620, 91 S Ct 2105, 29 LEd2d 745 (1971), the U.S. Supreme Court stated a three-part test for use in evaluating claims under the Establishment Clause of the First Amendment. In *Eugene Sand & Gravel*, 276 Or at 1012-13, this Court held that the *Lemon* test is the "appropriate" test to apply "in determining whether a law is constitutional" under Article I, sections 2, 3, and 5, of the Oregon Constitution. That holding was erroneous.

Although this Court had sometimes, prior to its 1976 decision in *Eugene Sand & Gravel*, interpreted provisions of the Oregon Constitution independently of their federal constitutional analogues, it was not until the early 1980s that the Court began in earnest to develop a body of state constitutional law that is independent of federal constitutional law. See *State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (citing eight cases, all decided in 1982 or 1983, illustrating "the rule *** that all questions of state law be considered and disposed of" before reaching a federal constitutional claim). As a result of this "Oregon Constitutional Revolution *** [t]he primacy of our state's constitution, so long neglected, [became] accepted by all." *State v. Owens*, 302 Or 196, 208, 729 P2d 524 (1986) (Gillette, J., concurring).

As part of that revolution, this Court developed a methodology for deciding the meaning of the 1857 constitution, and it is now firmly established that Oregon courts "must" determine the meaning of a provision of that constitution by examining "'its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.'" *Neher v. Chartier*, 319 Or 417, 422, 879 P2d 156 (1994), quoting *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). Moreover, in construing a provision of the 1857 Constitution, a court's "focus must be on the intent of the enactors of the provision at issue," *Stranahan v. Fred Meyer, Inc*., 331 Or 38, 57 n 12, 11 P3d 228 (2000), with the goal of "'understand[ing] the wording [of the provision] in the light of the way that wording would have been understood and used by those who created the provision.'" *Smothers v. Gresham Transfer, Inc*., 332 Or 83, 90-91, 23 P3d 333 (2001) , quoting *Vannatta v. Keisling*, 324 Or 514, 530, 931 P2d 770 (1997).

None of those elements of Oregon constitutional jurisprudence is present in the *Eugene Sand & Gravel* opinion. If a student in any state constitutional law class in an Oregon law school were asked, on an exam, to describe the methodology that this Court

would use in interpreting Article I, sections 2, 3, and 5, and if the student were to answer that question by saying, "The Oregon Supreme Court would borrow a test developed by the U.S. Supreme Court for interpreting the Establishment Clause of the First Amendment, and it would not inquire into the specific wording of Article I, sections 2, 3, and 5, or into the intent of its framers," that student, with all respect, would receive an "F" on the exam. Yet that is exactly what this Court did in *Eugene Sand & Gravel*.

But even in the context of state constitutional jurisprudence as it stood in 1976, when *Eugene Sand & Gravel* was decided, the opinion in that case is curious. As noted above, even before the state constitutional revolution of the 1980s, this Court had construed some provisions of the Oregon Constitution independently of their federal analogues – and Article I, section 5, was one of those provisions. In *Dickman v. School Dist. No. 62 C*, 232 Or 238, 366 P2d 533 (1961), *cert den*, 371 US 823 (1962), the Court considered a challenge to a state statute that authorized public school districts to provide textbooks without charge to pupils in parochial schools. The Court held that the statute violated Article I, section 5, and that it was "unnecessary, therefore, to consider plaintiffs' contention that the statute violates also the First or Fourteenth Amendments to the United States Constitution." *Id*. at 246.

In response to the dissenting justice's assertion that the Court should "apply," "embrace[]," and "adhere to" a U.S. Supreme Court decision construing the Establishment Clause of the First Amendment, *id*. at 261, 266 (Rossman, J., dissenting), the Court in *Dickman* stressed that it had a "duty" to decide the state constitutional issue without being bound by federal court decisions:

> "A decision of the Supreme Court of the United States holding that certain legislation is not in violation of the federal constitution is not an adjudication of the constitutionality of the legislation under a state constitution. In such a case, it is not only within the power of the state courts, *it is their duty* to decide whether the state constitution has been violated. Our views on the policy or interpretation of a particular

> constitutional provision do not always coincide with those of the Supreme Court of the United States." *Id*. at 260-61 (emphasis added).

Despite this "declaration of independence" with respect to state constitutional adjudication, and despite the fact that this "declaration" came in a case construing the same section of the Oregon Constitution that was at issue in the case before it, the Court in *Eugene Sand & Gravel* did not even cite *Dickman*, let alone explain why it was now rejecting *Dickman*'s holding that the Court had a "duty" to construe the state constitution according to its own terms.

The opinion in *Eugene Sand & Gravel* thus falls squarely within the class of cases that this Court has said it is willing to reconsider:

> "[W]e remain willing to reconsider a previous ruling under 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. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question." *Stranahan*, 331 Or at 54.

In *Eugene Sand & Gravel*, this Court did not consider the text of Article I, sections 2, 3, and 5; it ignored *Dickman*, the principal prior precedent construing Section 5; and it did not consider the historical circumstances in which the section was adopted in 1857, or any evidence of the intent of the authors of that section. That was error, as the Court's more recent cases under the religion clauses make clear.

In 1985, the Court specifically abandoned deference to the U.S. Supreme Court's interpretation of the First Amendment when analyzing the corresponding religious provisions in Oregon's Constitution. In *Salem College & Academy, Inc. v. Employment Division*, 298 Or 471, 695 P2d 25 (1985), the Court rejected the contention that subjecting a private

religious school to the Unemployment Compensation Act would violate the school's rights under the First Amendment and under Article I, sections 2 and 3. In doing so, the Court criticized the Court of Appeals for failing to address the state constitutional issue separately:

> "The Court of Appeals held that the statutory distinction between church-supported and independent religious schools constitutes an establishment of religion forbidden by the First Amendment, and it stated that '[i]n view of our conclusion with respect to the federal Constitution, we need not, and do not, consider the Oregon Constitution.' *** *That approach departed from the judicial responsibility to determine the state's own law before deciding whether the state falls short of federal constitutional standards*." *Id*. at 484 (emphasis added).

A year later, in *Cooper v. Eugene School District No. 4J*, 301 Or 358, 723 P2d 298 (1986), *appeal dismissed*, 480 US 942 (1987), involving a challenge to the constitutionality of a statute that prohibited public school teachers from wearing religious dress while teaching, the Court once more stressed that questions under the religion clauses of the Oregon Constitution must be decided independently of the First Amendment:

> "This court sometimes has treated [Oregon's religion clauses] and the First Amendment's ban on laws prohibiting the free exercise of religion as 'identical in meaning,' *City of Portland v. Thornton*, 174 Or 508, 512, 149 P2d 972 (1942); but identity of 'meaning' or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourteenth Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses. *** Judicial formulas or 'factors' are not themselves the law but aids to analysis that a court from time to time may employ, rephrase, or replace with a better interpretation of their constitutional source." *Cooper*, 301 Or at 369-70 (footnote omitted).

The Court added that it had *already* interpreted the meaning of the guarantees in Article I, sections 2 through 7 of the Oregon Constitution "independently of the federal constitution, sometimes with results contrary to those reached by the United States Supreme Court." *Id*. at 371, citing, *inter alia*, *Salem College* and *Dickman*.

In *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995), the Court again stressed the differences between the religious freedom guarantees of the Oregon Constitution and those of the United States Constitution:

> "[Article I, sections 2 and 3] are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference. From our current vantage point of a society that is religiously diverse and *relatively* unconcerned about that diversity, it is difficult to fully appreciate why Oregon's pioneers approved these broad and adamant protections. However, the history of religious intolerance was fresh in the minds of those who settled Oregon, many of whom themselves represented relatively diverse religious beliefs." *Id*. at 146 (emphasis in original).

In none of these cases was *Eugene Sand & Gravel* even mentioned, let alone distinguished; indeed, this Court has never mentioned *Eugene Sand & Gravel* in any opinion since it was decided in 1976. The Court should grant review, therefore, to disavow both the mode of constitutional interpretation set out in *Eugene Sand & Gravel*, and the holding of that case that Article I, sections 2, 3, and 5, must be interpreted according to the federal Establishment Clause test. Only this Court has the authority to reexamine *Eugene Sand & Gravel*; the Court of Appeals specifically held in this case that because "the Supreme Court has never overruled *Eugene Sand & Gravel* [,] *** that case remains binding on this court." 185 Or App at 357. That case will thus remain binding on all lower Oregon courts unless and until this Court determines otherwise.

2. Analysis of Article I, sections 2, 3, and 5, Under Priest v. Pearce Factors

A. The Specific Wording.

Article I, section 2, reads as follows:

> "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences."

Article I, section 3, reads as follows:

> "No law shall in any case whatever control the free exercise, and enjoyment of religeous [*sic*] opinions, or interfere with the rights of conscience."

Article I, section 5, reads as follows:

> "No money shall be drawn from the Treasury for the benefit of any religeous [*sic*], or theological institution, nor shall any money be appropriated for the payment of any religeous [*sic*] services in either house of the Legislative Assembly."

This case involves application of sections 2 and 3 and the first 17 words of section 5, through and including the word "institution." With respect to sections 2 and 3, it is difficult to imagine language that could be *more* protective of the rights of individuals to choose for themselves what they wish to believe, free from governmental interference. Few would disagree with this Court's statement that these sections "are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-supported official faiths or modes of worship," *Cooper*, 301 Or at 371, or with its statement that they "are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference." *Meltebeke*, 322 Or at 146.

With respect to section 5, the first 17 words are remarkably clear. "No money" means "no money" – not a penny, not a sou. "Drawn from the Treasury" refers to the expenditure of public funds – that is, money paid to governmental taxing authorities by taxpayers. "Benefit" was defined in the leading American dictionary at the time of Oregon's

constitutional convention to mean "an act of kindness; a favor conferred" or "advantage; profit; a word of extensive use, and expressing whatever contributes to promote prosperity and personal happiness, or adds value to property." Noah Webster, *An American Dictionary of the English Language* (C. Goodrich revision, published by G. and C. Merriam, 1854).

As for "religeous" and "theological," both the dictionary and the wording of the Oregon Constitution itself indicate that those terms were understood broadly in 1857. "Religion," according to the 1854 dictionary, "comprehends the belief and worship of pagans and Muhammedans, as well as of Christians." *Id*. at 1113. That broad understanding of "religion" is reflected in Article I, sections 2 and 3, which acknowledge a "natural right" on the part of humans, prior to and independent of any social structure, to worship God "according to the dictates of their own consciences," and which bar government from interfering in any way with "the free exercise, and enjoyment of religious [*sic*] opinions" or "with the rights of conscience."

That leaves the word "institution." The 1854 dictionary contained these relevant definitions of the word:

> "2. Establishment; that which is appointed, prescribed, or founded by authority, and intended to be permanent. Thus we speak of the institutions of Moses or Lycurgus. We apply the word *institution* to laws, rites, and ceremonies, which are enjoined by authority as permanent rules of conduct or of government.
>
> "3. An organized society, established either by law or by the authority of individuals, for promoting any object, public or social. ****
>
> "4. A system of the elements or rules of any art or science." Noah Webster, *An American Dictionary of the English Language* 612 (italics in original).

Thus, at the time of the creation of Article I, section 5, in 1857, the word "institution" was understood to have a very broad meaning, including both organizations and belief systems.

B. Historical Circumstances.

The Court in *Eugene Sand & Gravel* made no inquiry into the historical circumstances out of which Article I, sections 2, 3, and 5, arose, and it made no effort to compare those circumstances with the circumstances that prevailed 66 years earlier, in 1791, when the First Amendment was adopted. Both the religious landscape and the constitutional landscape of the nation had changed considerably in those 66 years.

The last quarter of the eighteenth century was a period of relative religious calm in America; "the rationalism and Deism of the Age of Reason" had left their mark in American religious life, and many people had become

> "indifferent or even hostile to religion. Despite the growth of churches through immigration, a situation in which a steadily increasing segment of the population had no religious connections was spreading." W. Walker, *A History of the Christian Church* 436 (rev ed 1959).

"[C]hurch life was at a low ebb during the Revolutionary period, and at the opening of the [nineteenth] century less than ten percent of the population were church members." *Id*. at 507.

The situation soon changed. "Beginning at the very end of the eighteenth century, a mighty reawakening of religious interest swept the land." *Id*.

> "The first three decades of the nineteenth century were a time of intense religious fervor in America. The Second Great Awakening *** swept across the land. Camp meetings, revivals, [and] sectarian controversies *** were all part of the religious commitment." Stephen Beckman, "Oregon History," in *Oregon Blue Book 2001-2002*, at 347.

Revivalist fervor was so intense in upstate New York that it became known as the "burned-over" district, Walker at 516, and out of that district "a vast swarm of Yankee 'isms' descended on the West like a flight of grasshoppers." Samuel Eliot Morison, *The Oxford History of the American People* 518 (1965). The result, in Oregon, was a period of "ethnic-

religious bitterness in the Oregon Country," marked by conflicts between Jason Lee, the first Methodist missionary in the Oregon Territory, and John McLoughlin, the Chief Factor of the Hudson's Bay Company, which

> "[left] a lasting impression on politics and society, contributing to strains of anti-Catholicism as well as anti-(Protestant)-clericalism, magnifying ideological distinctions, and affecting the development of the local political culture long after the demise of its American-Protestant and English-Catholic antagonists." David A. Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* 49-50 (1992).

The delegates to the constitutional convention of 1857 were well aware of the diversity of religious belief that existed in the Oregon country, and of the political divisiveness that had accompanied it. During the first week of the convention, delegate Hector Campbell told the delegates that "[t]he clergy have been very severely and perhaps justly censured by the public journals for the course which they have pursued in reference to political affairs, and engaging in political strife." Charles A. Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, 113 (1926) (hereafter "Carey"). Later, in the debates over the wording of the religion clauses, Matthew Deady, president of the convention, noted that this country "contains persons of all religious denominations as well as nonbelievers," *id*. at 300, while Frederick Waymire stated: "The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazed fanatic to the unbelieving atheist." *Id.* at 301.

This was the setting in which the delegates to Oregon's constitutional convention assembled in Salem in August 1857. The debates during the convention demonstrate that a majority of delegates favored strong constitutional protections for this diversity of belief, and an equally strong constitutional separation of religion and government. During the first week of the convention, for example, Campbell urged the convention to consider employing a

chaplain; after making the comment quoted above concerning the criticism that had been leveled at some clergy for their political involvement, he argued that:

> "But, sir, it seems to me that here is a place, and this is an occasion where [clergy] may exercise the functions of their office without giving offense, and in a proper manner to the acceptance of all. It may be urged by some as a reason why the resolution should not be adopted – the danger of a union of church and state. But, sir, from present indications, I think there is no danger here or in the United States of that union being formed." *Id*. at 113.

The convention, however, apparently felt otherwise, and rejected the Campbell resolution, by a vote of 34 to 19. *Id*.

That vote was consistent with the views expressed earlier in that same week during the debate over the proposal to include a separate bill of rights in the constitution. From the first day of that debate, it was clear that a majority of the delegates believed that a state constitution in 1857 had to be more specific in its guarantees of religious liberty than earlier state constitutions had been. On August 18, 1857, when Delazon Smith moved to establish "a committee on a bill of rights," George Williams opposed it, saying that he "thought such committee unnecessary. A bill of rights was sort of a Fourth of July oration in a constitution ***." Carey at 79. Smith responded the next day, saying that "of all the constitutions of all the states," he was

> "best pleased, as a whole, with that of the state of Indiana ***. Its bill of rights I should hardly be disposed to dispense with. I should like their constitution much less if the bill of rights was stricken from it. It is gold refined; it is up with the progress of the age. *Many changes have taken place since our fathers first formed constitutions*." *Id*. at 101 (emphasis added).

One of those changes, Smith noted, was that in earlier days, a man who did not profess a recognized religion "was not to [be] believed upon oath." *Id*. at 102 (brackets in original). He continued:

> "And I remember a great many other things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon. And this preamble to the constitution of Indiana recognizes this progress, and thus recognizing embodies them in her bill of rights. She nobly reasserts what our fathers said about the natural rights of man to the pursuit of life, liberty and happiness, but she proceeds to assert the civil rights of the citizens as ascertained in those 70 years of progress." *Id*.

Erasmus Shattuck spoke in favor of Smith's motion, saying that "the history of the world teaches us that the majority may become fractious in their spirit and trample upon the rights of the minority; ***. Then, if the individual citizen is to be protected in this point in which he is endangered, there must be restrictions put into this constitution. *** For these reasons, then, I am in favor of all the essential principles of a bill of rights." *Id*.

The convention then approved Smith's motion for the appointment of a committee on the bill of rights. *Id*. at 104. Its members were appointed, along with the members of the convention's other standing committees, on August 20, 1857. *Id*. at 106. Lafayette Grover was named chairman. *Id*. at 29. The committee submitted its report just two days later, and proposed the following wording for Section 6:

> "No money shall be drawn from the treasury for the compensation of any religious services, or for the benefit of any theological institution." *Id*. at 119.

On September 8, 1857, the convention convened as a committee of the whole for the purpose of discussing the Bill of Rights. *Id*. at 296, 301. When it came time to consider Section 6, Campbell "moved to strike out that portion forbidding the drawing of money from the treasury for the compensation of religious services." *Id*. at 301. The basis of his opposition appeared to be the fact that the proposal would "prevent the employment of a chaplain by the legislature." *Id*. at 296. He complained that the proposal was an "innovation" that was "unprecedented" in any of the other existing state constitutions, and that it was "a disregard of the injunctions of the New Testament." *Id*. at 297.

Frederick Waymire, who had previously stated that he thought "the Indiana bill of rights would honor any constitution," *id*. at 105, now spoke in opposition to Campbell's motion to strike:

> "The people of this country were composed of every shade of opinion upon the subject of religion, from the half-crazy religious fanatic to the unbelieving atheist. And we had no right to compel by law the support of any from the pockets of all; that was what this would do.
>
> "Some ministers of the leading denominations would be selected as chaplains, and to perform other religious services, and all the smaller denominations, and all who professed no religion, and all who believed in none, would be taxed to pay them. Was this right? Manifestly it was not. It was a compulsory support of the church – at war with our institutions, and at war with civil and religious liberty. If legislators wished prayers he had no objection to their having them. But he did object to compelling any man against his will paying for them." *Id*. at 301-02.

Thomas Dryer then spoke in favor of Campbell's motion:

> "He believed that money should be drawn from the treasury to pay for religious services just as readily and as liberally as to pay for any other services. He was opposed to this constitution starting out in the world carrying upon its face features that are not attached to any other constitution in the United States." *Id*. at 298.

If the constitution with this "extraordinary provision" were presented to the people, Dryer said, it "is sure to be defeated, and deservedly so." *Id*. at 298-99.

W. H. Watkins agreed with Dryer; he said the provision was "intended as a slur, not at any particular denomination, but at religion itself." *Id*. at 299.

Lafayette Grover spoke against the Campbell motion. He noted that "Religious as well as civil liberty has been of progressive growth in our country since the time of the revolution." *Id*. at 302. He quoted a portion of the Massachusetts constitution that required the expenditure of public funds "for the institution of the public worship of God, and for the

support and maintenance of public, Protestant teachers of piety, religion and morality ***." *Id*. Grover objected to that clause, because:

> "to say that *** religion should be established and maintained by the government is to go back two centuries in the world's history. Under this clause great civil abuses and much tyranny grew up in Massachusetts. Laws were passed requiring that a certain portion of a man's annual income should be devoted to the support of a particular church called the 'standing order,' to the exclusions of all others. Citizens were compelled, under penalties, to attend once a quarter upon that church; a 'Church of England' was the favorite of the state." *Id*.

Grover noted that when Maine separated from Massachusetts and entered the Union in 1820, it rejected that clause in its new constitution, and that even the people of Massachusetts "since 1820 have gradually disregarded it themselves." *Id*. And then he commented on the developments in constitutional protections for religious liberty that had taken place since the first state constitutions and the First Amendment had been adopted:

> "The late constitutions of the western states have, step by step, tended to a more distinct separation of church and state, until the great state of Indiana, whose new constitution has been most recently framed, embraced very nearly the principle contained in this section, as reported, now under consideration.
>
> "It is true this constitution goes a step farther than other constitutions on this subject; but if that step is in the right direction, and consistent with the proper development of our institutions, I see no weight in the objection that it is new. *Let us take the step farther, and declare a complete divorce of church and state.*" *Id*. at 302-03 (emphasis added).

In France, Grover added, "for centuries previously the public mind had become demoralized by a union of church and state, promulgation and enforcing forms rather than faith, conventionalisms rather than true morality." *Id*. at 302. Grover hoped for something different in Oregon:

> "Our government is based upon absolute freedom of conscience, guaranteeing full toleration and protection of

> religious faith, but at the same time withholding state patronage and political place from the churches." *Id*.

William Farrar then spoke in favor of the Campbell motion, stating that the convention's earlier decision not to employ a chaplain for its own sessions "has aroused in the minds of not a few individuals in this territory a deep-seated feeling of prejudice against any constitution that this convention may send forth to the people for their adoption." *Id*. at 299. Turning to Campbell's present motion, Farrar criticized Grover's comments in opposition to it as "entirely inopportune. It is not, sir, a question whether we shall unite church and state, as he (Mr. Grover) declared. It has no relevancy to any such proposition – it does not point in that direction." He warned that if the Campbell amendment were not adopted, "nine-tenths of the professing Christians in Oregon *** will denounce your constitution because the action of this convention has cast indirectly a slur upon their religious faith and practices, or upon their creed." *Id*. at 299-300.

Matthew Deady, president of the convention, opposed Campbell's motion, and disagreed with Farrar's comments about public opinion. Deady said that there were "persons in this community" who would oppose the constitution if it barred payment for religious services, but that it was "equally true" that there were others who would oppose it if it did *not* contain such a prohibition.

> "But I am not here to adapt myself altogether to the opinions of either of these classes. I am here to determine upon correct principles what is right and what is wrong. I have great respect for [Mr. Campbell]. * * * With him, I believe that morality and private virtue and a proper sense of dependence upon an overruling Providence are the true foundation of a nation's greatness. But, sir, what is the theory of our government upon the subject? It is that the government shall be separated from churches, and the maintenance and administration of religion; that religious duties shall be no function of the government." *Id*. at 300.

Stephen Chadwick agreed with Deady; he favored the original committee report, stating that "He would have no connection of church and state." *Id*. at 305. He had been "taught to reverence prayer, and religious services," he said, but "he was also educated in the doctrine of the divorce of church and state ***." *Id*.

Reuben Boise stated that the original committee proposal went too far in prohibiting payment for all religious services, because "[i]t was the custom of all governments to employ chaplains in their penitentiaries and asylums; reformation was declared to be an object of punishment. The employment of chaplains was one mode of reformation." *Id*. George Williams agreed that the original proposal "went too far," but he was opposed to the payment of chaplains in the legislature, so he moved to modify the Campbell proposal by prohibiting "the drawing of money from the treasury for compensation of religious services in either branch of the legislature." *Id*. He asserted that "A man in this country had a right to be a Methodist, Baptist, Roman Catholic, or what else he chose, but no government had the moral right to tax all of these creeds and classes to inculcate directly or indirectly the tenets of any one of them." *Id*.

The committee of the whole rejected Williams's compromise proposal, and adopted the Campbell amendment by a vote of 24 to 16, so that at the end of the day on September 8, 1857, Section 6 read as follows: "No money shall be drawn from the state treasury for the benefit of any religious or theological institution." *Id*. at 301, 306.

But that was not the end of the debate. On September 11, the convention, still meeting as a committee of the whole, approved the amended version of Section 6 (although the Journal of the proceedings states that the last word in the section was "institutions" rather than "institution"; see *id*. at 327), but Williams then renewed his motion to add the following language to the section:

> "Nor shall any money be appropriated for the payment of any religious services, in either house of the legislative assembly." *Id*.

This time, the amendment was approved, on a vote of 26 to 21. *Id*. at 327-28. The delegates who had expressed the strongest sentiments in favor of strict separation of church and state (Grover, Waymire, Chadwick, and Deady) voted yes, and those who favored a more accommodating stance (Campbell, Farrar, and Logan) voted no. *Id*.

On October 10, the report of the committee of the whole came before the convention for final approval. Campbell "addressed the convention against the adoption of the anti-chaplain section," and David Logan "moved to recommit the bill with instructions to strike out" that section, but the motion to recommit failed, and the convention adopted the section as it was reported from the committee of the whole. The vote was 25 to 10, with the strict separationist delegates (Grover, Waymire, Chadwick, and Deady) voting yes, and the accommodationist delegates (Campbell, Farrar, and Logan) voting no, *id*. at 342, just as they had done on September 11.

The content of the debate on the original proposal for Section 6, and the votes on the various proposals to modify that section that led to the present wording of Article I, section 5, showed that the strict separationists prevailed at the 1857 convention. Thus, Hector Campbell, who had asserted at the beginning of the convention that there was "no danger" of a "union of church and state" in Oregon, *id*. at 113, lost on his proposal to employ a chaplain for the convention, and he lost in his proposal to eliminate all prohibitions on the payment for religious services. Dryer, who did not want the constitution to include provisions hostile to religion "that are not attached to any other constitution in the United States," *id*. at 298, and Watkins, who viewed the prohibition on taxpayer-supported religious services "as a slur *** at religion itself," *id*. at 299, and Farrar, who agreed with Watkins that the provision would be regarded as "a slur upon *** religious faith and practices," *id*. at 299-300 – these

delegates were on the losing end of the debate, and they all voted against the Bill of Rights because of it.

In contrast, Grover, who wanted the constitution to "declare a complete divorce of church and state," *id*. at 302-03, and Deady, who believed that "the theory of our government" was that "the government shall be separated from churches, and the maintenance and administration of religion; that religious duties shall be no function of the government," *id*. at 300, and Chadwick, who favored "no connection of church and state," *id*. at 305, and Waymire, who believed that government "had no right to compel by law the support of any [religion] from the pockets of all [people]," *id*. at 301 – these delegates were on the prevailing side of the debate, and they all voted in favor of the Bill of Rights because of it. Although the delegates had rejected the prohibition on "the compensation of any religious services" (probably because there were enough delegates who agreed with Boise that paying for chaplains in the prisons would serve the cause of reformation, which the delegates had declared, in Article I, section 15, to be the foundational purpose of all of Oregon's criminal laws), they had included a prohibition on the payment of public money for religious services in the legislature. The majority thus did what Grover had urged them to do: "to take the step farther" than any previous constitution had gone in guaranteeing "a more distinct separation of church and state." *Id*. at 302-03.

This history shows that a majority of the members of the constitutional convention favored a more explicit separation of church and state than could be found in any other state constitution of the time. The "declarations of rights" in the constitutions of the original 13 states often did nothing to "separate" church from state; indeed, some states had "persisted" long after the Revolution "in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups." *Everson v. Board of Education*, 330 US 1, 14, 67 S Ct 504, 91 LEd 711 (1947). The North Carolina Constitution, for example,

"forbade office holders to 'deny * * * the truth of the Protestant religion,'" and "Maryland permitted taxation for support of the Christian religion and limited civil office to Christians until 1818." *Id* at 14 n 17. The Massachusetts constitution declared that it was "the duty of all men *** to worship the Supreme Being," Mass. Dec. of Rights, art. 3, quoted in *Colo v. Treasurer and Receiver General*, 392 NE2d 1195, 1196 n 4 (Mass 1979), and direct public support of religion did not end in that state until 1833. *Id*. at 199 n 10.

The delegates to the Oregon constitutional convention completely rejected those older patterns of constitutionally authorized (and even mandated) public support for religion. "Many changes have taken place since our fathers first formed constitutions," Delazon Smith told the convention, *id*. at 101, and the evangelical revivals and sectarian strife along the frontiers in the first half of the nineteenth century were part of those changes. By the time the delegates gathered in Salem in August 1857, there was a strong feeling that states needed *more* protection against the incursion of religious and sectarian bodies into the fabric of state government than had been the case in 1791. The delegates were very much aware of the diversity of religious opinion in Oregon, and it was clear that they meant to prevent the State from interfering with it.

This history demonstrates that the Court erred, in *Eugene Sand & Gravel*, in adopting the *Lemon* test as the "appropriate" test for determining the meaning of the religion clauses of the Oregon Constitution. It may be subject to debate, in any given case, whether the expenditure of public money in support of a religious cause violates the First Amendment, for the "primary effect" of a particular expenditure (to take just one of the three prongs of the *Lemon* test as an example) is often in the eyes of the beholder. However, there can be no such debate under Article I, sections 2, 3, and 5: those sections "permanently secure[d] the *** religious rights of the citizen generally, [and left] the rights of conscience untouched" (that is, untouched by the hand of government), as Smith put it on the last day of the

convention. Carey at 387. The Bill of Rights, he said, "leaves religion to achieve its conquests under the voluntary system," *id*. at 388 – that is, without the "benefit" of governmental support. Sections 2 and 3 were thus intended to bar government from interfering in *any* way with the citizens' rights of conscience, and Section 5 was intended to be a flat prohibition on the expenditure of *any* public funds for the benefit of any religious or theological institution. "No money" means "no money," and by using that language, the authors of Section 5 carried out what Lafayette Grover proposed: "a complete divorce of church and state."

C. Case Law.

Several of the Court's recent decisions under the religion clauses of the Oregon Constitution have been discussed earlier in this petition; one other case should be mentioned, because of its significance in determining the meaning of the phrase "religious or theological institution" in Article I, section 5. In *Lowe v. City of Eugene*, 254 Or 518, 451 P2d 117, 459 P2d 222, 463 P2d 360 (1969), *cert den*, 397 US 1042, *reh den* 398 US 944 (1970), the Court did not discuss the meaning of the word "institution" as it would have been understood by the framers in 1857, but the Court's application of Article I, section 5, in that case shows that it understood the meaning of the word in the same broad fashion reflected in the 1854 dictionary quoted earlier.

The plaintiffs in *Lowe* challenged the maintenance, at taxpayer expense, of a lighted cross in a city park, asserting that governmental support of the cross constituted both an "establishment of religion" in violation of the First Amendment and an expenditure of "money from the Treasury for the benefit of a religious institution" in violation of Article I, section 5. In its first opinion in the case, this Court held, on a 4-3 vote, that the City's action in maintaining the cross did not violate the First Amendment or Article I, section 5.

However, the majority did not question the assumption that was a necessary predicate for the plaintiffs' challenge: namely, that the expenditure of municipal funds to pay for the maintenance of the cross was an expenditure for the benefit of a religious "institution." Rather, the majority concluded that this particular cross was not "religious." The majority stated that "[t]he evidence indicates that to many people the cross *** carries connotations that are not essentially religious in character and to such people it has primarily secular meanings," 254 Or at 528, and held that maintenance of the cross was not "a religious activity." *Id*. at 529.

The three dissenting justices used similar terminology, referring to the "display of the lighted cross" as "a religious activity" and "a popular religious display." *Id*. at 532, 533 (Goodwin, J., dissenting). On rehearing, the original dissenting opinion was adopted as the opinion of the Court. *Id*. at 539. On second rehearing, the Court made it clear that its decision was "grounded *** in part upon state as well as federal constitutional concepts." *Id*. at 548. The Court held that this particular cross was "a testimonial to a religious faith," *id*. at 546, that the expenditure of public funds to maintain it constituted "the use of public funds to support [a] preferred religious institution," *id*. at 547, and that "the enlistment of the hand of government to erect the religious emblem *** offends the [state and federal] constitutions." *Id*. at 548. Further, the Court noted that proponents of the cross contended that Article I, section 5, "in limiting its expression to a proscription against spending public 'money' on religious institutions, by implication approved of turning over public land to them," and it squarely rejected that contention as a "mechanistic interpretation of the state constitution." *Id*. at 547-48.

Thus, the Court in *Lowe* recognized that the word "institution" in Article I, section 5, must be given a broad meaning, in keeping with the intent of the framers "not *** to permit the state to sponsor any particular religion." *Id*. at 547. *Lowe* stands for the proposition that

taxpayer support of the symbol of a particular religion constitutes "benefit" to a religious "institution," within the meaning of Article I, section 5. That conclusion was correct, for it would be disingenuous to conclude that the state could appropriate money from the public treasury to erect symbols of particular religious faiths without violating Article I, section 5, simply because no specific "institution," in the narrow sense of the word, was benefited. Erection of Latin crosses at 10-mile intervals along Oregon's highways by the Department of Transportation would "benefit" the religious "institution" of Christianity, even though it would be impossible to trace any particular financial benefit to any particular church flowing from such state-sponsored crosses. Similarly, the legislature would violate Article I, section 5, if it appropriated money to erect a billboard on the Capitol grounds, or anywhere else, containing the unadorned message "Believe in God," or indeed the even simpler message, "Have faith." Article I, section 5, was intended to prohibit the State to favor religion over non-religion, and the State would violate that section if it spent money to encourage people to "have faith" just as it would if it spent money to encourage people to "Reject supernatural beliefs: Embrace rationality."

3. The District's Actions With Respect to the Boy Scouts Violated Plaintiffs' Rights Under Article I, Sections 2, 3, and 5.

As noted above, this Court has stated that Sections 2 and 3 of Article I "are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference." *Meltebeke*, 322 Or at 146. It has said that "the wall of separation in this state must *** be kept 'high and impregnable' to meet the demands of Article I, § 5." *Dickman*, 232 Or at 259. And it has said:

> "The religion clauses of Oregon's Bill of Rights, Article I, sections 2, 3, 4, 5, 6 and 7, are more than a code. They are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and

> freedom from state-supported official faiths or modes of worship. The cumulation of guarantees, more numerous and more concrete than the opening clause of the First Amendment, reinforces the significance of the separate guarantees." *Cooper*, 301 Or at 371.

Thus, this Court has, with the notable exception of *Eugene Sand & Gravel*, applied a consistently strict interpretation of Article I, sections 2, 3 and 5, reinforcing the "adamancy" with which they protect individual rights of conscience and the absolute nature of the constitutional prohibition on state support of religion. And the rigor of this Court's interpretation has been at its zenith in cases involving the entanglement of religion and public education. The Court has observed that "[t]he main battleground" in the controversies over religious liberty and separation of church and state in our country "has been the public schools," *Cooper*, 301 Or at 376, and in its own cases involving that battleground, the Court has recognized the unique power of teachers and school personnel over impressionable children.

Thus, in *Dickman*, the Court held that Article I, section 5 prohibited a school district from loaning public school books to a religious school. It declined to follow establishment clause decisions from other jurisdictions, including the U.S. Supreme Court, because they were based on constitutional language and historical contexts that differed from those of Article I, section 5. *Dickman*, 232 Or at 248-49. The Court expressly refused to depart from "strict notions" of separation of church and state that guided the members of the Oregon constitutional convention, *id*. at 258; on the contrary, the twin dangers of controversy among religious denominations seeking public funds and of state interference with religious instruction, *id*. at 259, convinced the Court to adhere to those "strict notions."

Noting that "books are an integral part of the educational process," *id*. at 258, the Court said that it "attach[ed] no significance to the fact that the books are loaned to the pupil or school rather than given outright; in either event a substantial benefit is conferred upon the

recipient." *Id*. (footnote omitted). The same rationale applies here: school buildings, teachers, and staff are an integral part of the educational process and their use during school hours to aid the Boy Scouts in their recruitment impermissibly confers a substantial benefit on an organization whose first principle is the inculcation of the proposition that its members have a "duty to God," and which expressly excludes from membership any boy who cannot subscribe to its religious doctrine. The District's support of the Boy Scouts confers a benefit on that organization, and its religious teaching, in violation of Article 1, section 5.

Like *Dickman*, *Cooper* also involved the issue of the influence of religion on public school students. In *Cooper*, the Court concluded that a statute prohibiting teachers from wearing religious dress while teaching did not violate the teacher's rights under Article I, sections 2 and 3, because the legislature could permissibly conclude that wearing such dress while teaching is incompatible with the performance of a teacher's duty to maintain religious neutrality and avoid imposing on students' religious beliefs. "[A] rule against such religious dress is permissible to avoid the *appearance* of sectarian influence, favoritism, or official approval in the public school." *Cooper*, 301 Or at 373 (emphasis added). In adopting that rule, the Court said, the legislature acted permissibly "to maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group and perhaps finds that of others less worthy." *Id*.

In this case, the District failed to maintain such neutrality. By allowing the Boy Scouts to have access to students during a period of mandatory attendance during the school day and by allowing staff members to distribute Boy Scout fliers in the classroom, introduce Boy Scout troop leaders to a captive audience of children to recruit new members, place wristbands on boys' wrists with a Boy Scout recruitment message, and respond affirmatively to student questions about the value of the Boy Scouts, the District gave the impression that it

approves and shares the religious commitment of the Boy Scouts and finds atheists, who are barred from joining, "less worthy" than those children whose religious beliefs allow them to join. The District actively assists the Scouts in soliciting first grade boys to join its organization, and then stands by, without objection, when the Scouts say to some of those boys: "But not you – we won't let you join our organization because of your religious beliefs." The Scouts may be entirely within their rights to make that statement, but the District violates Article I, sections 2, 3, and 5 when it assists the Scouts in doing so.

And it was not only Remington Powell's rights that were violated. The District's actions also interfered with free exercise rights of Nancy Powell, her enjoyment of religious opinion, her right to raise her child as an atheist, and her right to teach her own child that it is acceptable *not* to worship God. "[T]he 'liberty' specially protected by the Due Process Clause [of the Fourteenth Amendment] includes the right[] *** to direct the education and upbringing of one's children ***." *Washington v. Glucksberg*, 521 US 702, 720, 117 S Ct 2258, 138 LEd2d 772 (1997). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 US 205, 232, 92 S Ct 1526, 32 LEd2d 15 (1972).

Public schools act *in loco parentis* during school day, and parents rely (and have the right to rely) on the fact that public schools are not religious schools and will not be advocating for or against particular religious beliefs.

> "Parents and lawmakers may and do assume that the hours, days, and years spent in school are the time and the place when a young person is most impressionable by the expressed and implicit orthodoxies of the adult community and most sensitive of being perceived as different from the majority of his or her peers; famous constitutional cases have involved this

> socializing rather than intellectual function of the schools." *Cooper*, 301 Or at 377.

In the setting of the public schools (and particularly the first grade of the public schools), the wisdom of the constitutional command of government neutrality is particularly apparent: "[P]ersons who do not share [the favored] beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of [government's endorsement]." *Lowe*, 254 Or at 544.

> "While government can foster education in the history and cultural contributions of religions generally, and can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige, or property at the disposal of private persons or groups either to aid or oppose any religion." *Id*. at 545.

The District violated that trust here. As Nancy stated in her letter to the Superintendent: "No mother should ever again be put in the position of telling her sobbing 6 year old on the steps of his own school that 'our kind', non-believers in the super natural, are not welcome to join the group that solicited our membership *** even though school employees told you how fun it is in Boy Scouts *** ." (CR 74, Ex. 2 at 2). The District violated the constitutional command of religious neutrality in the public schools by giving its imprimatur to an organization that favors children who believe in God over children who do not. By allowing its staff and property to be used by an organization to recruit students who have the "correct" religious beliefs, while excluding other students whose religious beliefs do not meet the organization's standards, the District places its power, prestige and property at the disposal of an organization that has a religious test for membership. Its actions violate Article I, sections 2, 3, and 5.

4. The Wording of ORS 327.109 Must Be Construed According to Federal and State Constitutional Standards as They Existed in 1985. Under Those Standards, the District's Actions Violate the Statute.

ORS 327.109 provides that the Superintendent of Public Instruction may deny state funds to any school district that "sponsors, financially supports, or is actively involved with religious activity." The Court of Appeals here gave no independent consideration to the meaning of that provision. Instead, it simply held that since "[t]he terms [of the statute] and their phrasing are taken directly from the United States Supreme Court's jurisprudence," 185 Or App at 358-59, "the analysis under the statute should be substantially the same as that under the constitutional provision." *Id*. at 359. The Court therefore proceeded directly to the three-prong *Lemon* test adopted in *Eugene Sand & Gravel*, with no consideration as to whether the meaning of the statute should also be guided by state constitutional factors.

That was error. ORS 327.109 was adopted in 1985. Or Laws 1985, ch 584, § 2. Its legislative history shows that it was enacted in response to the takeover of a school district in Wasco County by the Rajneesh New Sannyas International Commune. (App. Br., App-20 to App-33.)[3] The Attorney General had advised the Superintendent of Public Instruction to withhold state funds from the school district if he found that the district was using funds to benefit a religious organization. (*Id*., App-31.) However, existing laws did not "address[] how funds were to be withheld for a failure to meet 'legal requirements'" (*id*., App-21 to App-22), and the statute was intended to provide the Superintendent with a means for withholding state funds in a manner that complied with constitutional standards.

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[3] Four documents from the legislative history are reproduced in the Appendix to the Appellants' Brief in the Court of Appeals in this case: a letter dated March 15, 1985, from Attorney General Frohnmayer to Superintendent of Public Instruction Duncan; a memorandum dated March 15, 1985, from Duncan regarding "Basic School Support Payment to Wasco County School District 50J"; a letter dated May 3, 1985, from Duncan to the House Education Committee; and a letter dated May 3, 1985 to the committee from Assistant Attorney General Pamela Abernethy.

The record is clear that the statute was drafted with *both* state and federal constitutional standards in mind. Thus, Assistant Attorney General Abernethy told the House Education Committee that under the proposed bill that became ORS 327.109, the Superintendent would "follow the tests delineated by the Oregon and U.S. Supreme Court in interpreting the Article I, section 5 of the Oregon Constitution and the Establishment Clause of the U.S. Constitution." (App. Br., App-24.) In addition, Attorney General Frohnmayer's letter to the Superintendent, which was also part of the record before the legislature, began with an analysis of whether it was permissible under Article I, section 5, of the Oregon Constitution to distribute state funds to the Wasco County district. (*Id*., App-28 and App-29.) The Attorney General quoted the language of Article I, section 5, and then stated:

> "The courts of this state have construed Article I, section 5 as prohibiting state aid where 'the benefit accrues to religious institutions in their functions as religious institutions.'" (App. Br., App-29, citing *Dickman*, *supra*.)

After discussing the facts of the Rajneesh involvement in the school district, the Attorney General stated:

> "Under these facts, distribution of the funds to the school district would violate Article I, sections 2, 3, 4 and 5 of the Oregon Constitution and the Establishment Clause of the United States Constitution. The *state constitutional provisions* that prohibit the establishment of religion are at least as demanding as the Establishment Clause of the United States Constitution and *perhaps more stringent*." (*Id*. at App-30, emphasis added.)

By 1985, when the legislature considered these submissions from the Department of Justice and adopted what became ORS 327.109, this Court had already decided both *Dickman*, cited by the Attorney General, and *Salem College.* The latter case was decided on January 15, 1985, more than three months before the legislative hearings on ORS 327.109, and it was part of Oregon law at the time of the hearings and on the effective date of the statute. Therefore, if ORS 327.109 incorporates the standards of the Oregon Constitution as

of April and May, 1985, as set forth above, the opinion in *Salem College* already required the Superintendent to construe and apply those provisions to the District's conduct independently from, and without deference to, their counterparts in the federal constitution.

But even if ORS 327.109 were to be interpreted solely on the basis of federal constitutional standards, that interpretation would have to be based on those standards as they existed in 1985, not on later changes in those standards. The legislature may not, even if it wanted to, incorporate future statutes or court decisions into any statute. *Seale v. McKennon*, 215 Or 562, 571-72, 336 P2d 340 (1959) (so holding). The Court of Appeals here relied in part on *Good News Club v. Milford Central School*, 533 US 98, 121 S Ct 2093, 150 LEd2d 151 (2001) (see 185 Or App at 363-64), but that case was decided long after ORS 327.109 was enacted, and statements of the U.S. Supreme Court in 2001 are of no assistance in determining the intent of members of the Oregon legislature in 1985.

Furthermore, there has been a significant change in attitude on the part of the U.S. Supreme Court toward the Establishment Clause since 1985; for example, *Wolman v. Walter*, 433 US 229, 97 S Ct 2593, 53 LEd2d 714 (1977), and *Meek v. Pittenger*, 421 US 349, 95 S Ct 1753, 44 LEd2d 217 (1975), were overruled by *Mitchell v. Helms*, 530 US 793, 120 S Ct 2530, 147 LEd2d 660 (2000), while *School Dist. of Grand Rapids v. Ball*, 473 US 373, 105 S Ct 3216, 87 LEd2d 267 (1985), was overruled in part, and *Aguilar v. Felton*, 473 US 402, 105 S Ct 3232, 87 LEd2d 290 (1985), was overruled *in toto*, by *Agostini v. Felton*, 521 US 203, 117 S Ct 1997, 138 LEd2d 391 (1997). *Cf. Zelman v. Simmons-Harris*, __ US __, 122 S Ct 2460, 153 LEd2d 604 (2002) (Souter, J., dissenting) (where majority upheld voucher program against Establishment Clause challenge, "doctrinal bankruptcy has been reached today"). In short, the shifting sands of federal court interpretations of the Establishment Clause do not provide any guidance as to the meaning of ORS 327.109.

The meaning of that statute must instead be determined with reference both to the religion clauses of the Oregon Constitution and to the religion clauses of the First Amendment, as they were understood in 1985. Since the statute incorporates state constitutional standards, the District's actions should be held to violate the statute for the same reason that they violate Article I, sections 2, 3, and 5, as set out above. Such a conclusion makes it unnecessary to inquire into the meaning of the Establishment Clause of the First Amendment as it was understood in 1985. However, if the Court concludes that it is necessary to consult federal Establishment Clause jurisprudence in order to determine the meaning of the statute, it should be noted that as of 1985, the U.S. Supreme Court was still stressing the importance of a high wall of separation between church and state in the context of public school education.

For example, both *McCollum v. Board of Education*, 333 US 203, 68 S Ct 461, 92 LEd 649 (1948), and *Zorach v. Clauson*, 343 US 306, 72 S Ct 679, 96 LEd 954 (1952), dealt with "released time" programs in which public school students were given instruction in particular religions. An Establishment Clause challenge to these programs was sustained in *McCollum* but rejected in *Zorach*. The defining distinction between the two cases was that the religious instruction in *McCollum* took place *in the public school*, whereas the state law upheld in *Zorach* permitted public school students to leave school grounds to receive religious instruction in a place not supported and maintained by the taxpayers.

The U.S. Supreme Court's diligence in enforcing the Establishment Clause in the public school context prior to 1985 was also evident in the decisions striking down a variety of religious practices in the public schools. *Engel v. Vitale*, 370 US 421, 82 S Ct 1261, 8 LEd2d 601 (1962) (prayer in classrooms); *Abington School Dist. v. Schempp*, 374 US 203, 83 S Ct 1560, 10 LEd2d 844 (1963) (Bible readings); *Stone v. Graham*, 449 US 39, 101 S Ct 192, 66 LEd2d 199 (Ten Commandments in classrooms); *Epperson v. Arkansas*, 393 US 97,

89 S Ct 266, 21 LEd2d 228 (1968) (prohibition on teaching evolution in public school). It is cases such as these, not later U.S. Supreme Court opinions that reflect a more accommodationist approach to Establishment Clause questions, that determine the meaning of ORS 327.109 as that meaning was understood and intended by Oregon's legislators in 1985.

F. REASONS WHY THE ISSUES PRESENTED HAVE IMPORTANCE BEYOND THIS PARTICULAR CASE

This case meets several of the "criteria for granting discretionary review" set out in ORAP 9.07.

A. There are several significant issues of law, ORAP 9.07(1), that only this Court can resolve:

> 1. Should the methodology applied by the Court in *Eugene Sand & Gravel* for interpreting Article I, sections 2, 3, and 5, be disavowed?
>
> 2. Does the methodology for constitutional interpretation prescribed in *Priest v. Pearce* apply to Article I, sections 2, 3, and 5?
>
> 3. If the *Priest v. Pearce* methodology is applicable to Article I, sections 2, 3, and 5, how should those sections be applied to the facts of this case?
>
> 4. What are the standards for determining the meaning of ORS 327.109? Do the actions of the Portland School District violate that statute?

B. The "consequence of the decision is important to the public." ORAP 9.07(3). The relationship between government and religion was the subject of a great deal of debate in the constitutional convention of 1857, and it remains an important issue a century and a half later. The question of whether, and to what extent, public agencies, and the public schools in particular, may be used to promote the religious views of one group or another is a controversial and recurring one. A decision in this case will help clarify the extent to which

Article I, sections 2, 3, and 5, limit the power of public agencies to provide benefits to religious organizations or to support particular religious belief systems.

C. The legal issue is one of Oregon state law. ORAP 9.07(4).

D. The constitutional issue presented by this case is, in the most important sense, an issue "of first impression for the Supreme Court," ORAP 9.07(5), for the Court has never decided whether its *Priest v. Pearce* methodology, which the Court has said "must" be followed in constitutional cases, applies to Article I, sections 2, 3, and 5.

E. The legal issue has been properly preserved, and the record here does, in fact, present the issue. ORAP 9.07(7) and (8).

F. The Court of Appeals published a written opinion in the case, ORAP 9.07(11), but that opinion provides no guidance regarding the meaning of Article I, sections 2, 3, and 5, when analyzed according to the *Priest v. Pearce* methodology, because that Court held that it was bound by the completely different methodology in *Eugene Sand & Gravel*.

G. CONCLUSION.

Petitioners Nancy Powell and Remington Powell urge the Court to grant their petition for review in order to address the important question of the proper interpretation of Article I, sections 2, 3, and 5, and to determine whether the District's actions in this case violated those sections or ORS 327.109.

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Respectfully submitted,

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