Case No. S071340
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, *Plaintiff-Respondent*, v. ADRIAN FERNANDEZ, *Defendant-Appellant*.	Lane County Circuit Court Case No. 21CR40459 Court of Appeals Case No. A179207 Supreme Court Case No. S071340

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OREGON IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the federal and state Constitutions and our nation's civil rights laws. The American Civil Liberties Union of Oregon ("ACLU of Oregon") is the Oregon state affiliate of the national ACLU, with more than 39,000 members. Amici frequently appear before state and federal courts in cases involving the constitutional rights of people convicted of crimes and in cases regarding the scope of court authority to review constitutional claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Adrian Fernandez seeks to appeal a decision rejecting a state constitutional challenge to the length of his criminal sentence. The court of appeals held that it could not review his challenge, which rests on the proportionality guarantee in the Oregon Constitution's Article I, section 16, because under ORS 138.105(8)(a)(A) the court "has no authority to review . . . [a] sentence" that, like Fernandez's, is "within the presumptive sentence prescribed by" Oregon Criminal

Justice Commission ("OCJC") guidelines. Excerpts ("ER") 3 (quoting ORS 138.105(8)(a)(A)).

Fernandez argues that the court of appeals incorrectly interpreted the text of the statutes at issue. Amici write separately to argue that the Oregon Constitution provides yet further reason to reverse the court of appeals. Interpreting ORS 138.105(8)(a)(A) (hereinafter "the appellate-review bar") to preclude review of Fernandez's Article I, section 16 challenge would raise grave constitutional concerns for at least two reasons.

First, allowing the Legislature to prohibit appellate review of constitutional challenges to a sentence runs counter to the state Constitution's separation-of-powers guarantee, as this Court has interpreted it. Other state high courts have confronted this issue in the context of schemes similar to Oregon's, and they have rejected their legislatures' ability to cut off judicial review of alleged constitutional infirmity in sentencing.

Second, reading the appellate-review bar to foreclose Fernandez's appeal would raise substantial concerns under Article I, section 20 of the Oregon Constitution, the state privileges-and-

immunities provision. Under *State v. Althouse*, 359 Or 668, 375 P3d 475 (2016), and *State v. Davidson*, 360 Or 370, 380 P3d 963 (2016), state appellate courts retain authority to review within-range felony sentences that are *not* set in reliance on OCJC's presumptive sentence grid blocks, and are instead based on presumptive sentences set by the Legislature. If the appellate-review bar were interpreted to apply here, its distinction between defendants like Fernandez on one hand, and defendants like those in *Davidson* and *Althouse* on the other, would be incongruent with any conceivable legislative interest and could not survive constitutional review.

Given these serious constitutional concerns, the Court should if possible interpret ORS 138.105(8)(a)(A) to permit Fernandez's appeal and thus preserve the statute's constitutionality. And if the Court concludes the statute does not admit of such an interpretation, it should hold the appellate-review bar unconstitutional, at least as applied to appeals involving constitutional challenges.

BACKGROUND

A. Statutory Background

In 1985, the Oregon Legislature created the OCJC to "develop recommendations for providing greater uniformity in sentencing." *State v. Speedis*, 350 Or 424, 427, 256 P3d 1061 (2011). The OCJC produced administrative rules setting out "a sentencing guidelines grid that calculates a defendant's sentence on the basis of two factors: the seriousness of the crime of conviction and the defendant's criminal history." *State v. Dilts*, 336 Or 158, 161, 82 P3d 593 (2003), *overruled on other grounds*, 542 US 934 (2004). The Legislature, which by statute must approve the OCJC's guidelines for them to take effect, *see* ORS 137.667(2), approved them in 1989, "giving them the force of statutory law," *State v. Davidson*, 369 Or 480, 485 n.2, 507 P3d 246 (2022) (citing Or Laws 1989, ch 790, § 87).

Under the guidelines, which are mandatory, *see* ORS 137.669, a sentencing judge may impose an upward or downward departure from the presumptive sentence only after finding "substantial and compelling reasons" that justify the divergence, *id.* 137.671; *see also Dilts*, 336 Or at 162 (discussing this authority). The rules identify a

"nonexclusive list of mitigating and aggravating factors" that a sentencing judge may consider in determining whether substantial and compelling reasons exist to impose a departure sentence. OAR 213–008–0002; *see also Dilts*, 336 Or at 162.

Where the Legislature has, by statute, adopted a mandatory minimum sentence for a particular offense, the court generally cannot apply a sentence, even within the presumptive range, that goes below this mandatory minimum. *But see* ORS 137.712 (discussing narrow exception). At the other end of the spectrum, a "judge may not impose a departure sentence that exceeds more than twice the maximum duration of the presumptive sentence or that exceeds [a] statutory maximum" sentence set out elsewhere in the code. *Dilts*, 336 Or at 162 (citing OAR 213–008–0003(2)).

By statute, the Legislature has set forth an exclusive regime for the appellate review of a criminal judgment or order, including challenges to length of a defendant's sentence. ORS 138.010 (noting abolition of writs of error and of certiorari in criminal matters); *see also id.* 138.035. However, pursuant to this regime, the Legislature

has crafted certain bars to appellate review, subject to limited exceptions. *See generally id.* 138.105(5)–(6), (8)–(9).

B. Relevant Facts

Fernandez pleaded guilty to a first-degree felony and received a sentence of 20 months' incarceration along with a period of post-prison supervision. ER 3. This sentence is within the presumptive range called for by the OCJC's felony sentencing guidelines. However, Fernandez argues that his within-range sentence violates Article I, section 16 of the Oregon Constitution, which guarantees that all "penalties shall be proportioned to the offense." *Id.*

The circuit court considered Fernandez's Article I, section 16 challenge but ultimately found no constitutional infirmity in his sentence. *Id.* The court of appeals, on the other hand, held as a threshold matter that it had no authority to review the lower court's ruling as to Article I, section 16. It pointed to ORS 138.105(8)(a)(A) (the "appellate-review bar"), which provides that an "appellate court has no authority to review . . . [a] sentence that is within the presumptive sentence prescribed by the [OCJC's] rules." ER 3 (quoting ORS 138.105(8)(a)(A)).

The court of appeals also rejected Fernandez's argument that his constitutional challenge was reviewable under ORS 138.105(8)(c)(A), an exception to the appellate-review bar. ER 10. As relevant here, that exception allows an appellate court "to review whether the sentencing court erred . . . [i]n ranking the crime seriousness classification of the current crime." ORS 138.105(8)(c)(A). The court of appeals concluded that this exception covers only those instances where a lower court "misapplies the rules of the [OCJC] regarding the crime seriousness scale that are part of the felony sentencing guidelines." ER 9. In the court of appeals' view, Fernandez was "really challenging [] not [a] misranking by the sentencing court but, instead, the constitutionality of the [OCJC's] crime seriousness scale" as applied to his offense, so appellate review was impermissible. *Id.*

Fernandez sought review from this Court on two questions: first, whether the exception to the appellate-review bar in ORS 138.105(8)(c) allows a reviewing court to consider a constitutional challenge to a sentence as disproportional when the trial court imposes a sentence within the presumptive sentencing guidelines, and second, whether the crime seriousness category assigned to his offense

violates the proportionality principle of Article I, section 16. The court granted review only on the first question and "reframed" it to ask whether "ORS 138.105(8)(A) den[ies] an appellate court authority to review an Article 1, section 16, proportionality challenge to a sentence." Order Allowing Rev. at 1, *State v. Fernandez,* No. S071340 (Or S Ct Dec. 5, 2024).

ARGUMENT

It is a well-settled maxim of statutory construction that when the text of a law is ambiguous and one interpretation "may well" violate the state or federal Constitution, Oregon courts should interpret the law to "avoid any serious constitutional difficulty." *State v. Duggan*, 290 Or 369, 373, 622 P2d 316 (1981) (citing *Tharalson v. Dep't of Revenue*, 281 Or 9, 13, 573 P2d 298 (1978)); *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996); *see also, e.g.*, *State v. Lanig*, 154 Or App 665, 674, 963 P2d 58 (1998) (rejecting interpretation that "likely would set [a] measure on a collision course" with constitution).

If the Court concludes that the appellate-review bar is ambiguous in its application to Fernandez's Article I, section 16 challenge, it should apply this canon of constitutional avoidance to

permit appeal. And if the Court concludes that the statute does not permit such a reading, and would otherwise bar appellate review, it should hold the appellate-review bar unconstitutional as applied here because cutting off review violates both the Oregon Constitution's separation-of-powers and privileges-and-immunities guarantees.

I. Barring review of Fernandez's constitutional argument raises grave separation-of-powers concerns under the Oregon Constitution.

A. The separation-of-powers guarantee bars laws that unduly burden or hamper the judicial function.

Article III, section 1 of the Oregon Constitution guarantees that "[t]he powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial." Under this separation-of-powers provision, "no person charged with official duties under one of these branches[] shall exercise any of the functions of another." Or Const, Art I, § 3. The state Constitution likewise confirms that the "judicial power of the state shall be *vested in one supreme court* and in such other courts as [created by law]." Or Const, Art VII (Amended), § 1 (emphasis added). Accordingly, under the separation-of-powers doctrine, Oregon courts, not the Legislature, have authority "to determine what the law is."

Pendleton Sch. Dist. 16R v. State, 345 Or 596, 609, 200 P3d 133 (2009) (citing *Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803)).

On numerous occasions, this Court has considered separation-of-powers challenges to laws involving the availability or nature of judicial review. Under that precedent, where "the challenged legislation . . . interferes with the judiciary in a manner which prevents or obstructs the performance of its irreducible constitutional task [of] adjudication," the legislation is unconstitutional. *Cir. Ct. v. AFSCME Local 502-A*, 295 Or 542, 549–50, 669 P2d 314 (1983); *see also id.* at 550–51 (compiling cases).

This court has struck down or refused to follow numerous laws that were "serious incursion[s] into the exclusive domain of this court." *Ramstead v. Morgan*, 219 Or 383, 400, 347 P2d 594 (1959); *see, e.g.*, *City of Damascus v. State ex rel. Brown*, 367 Or 41, 68, 472 P3d 741 (2020) (refusing statutory directive "to decide the issues in a specific case in a particular order" based in part on separation-of-powers concerns); *In re Ballot Title*, 247 Or 488, 431 P2d 1 (1967) (refusing legislative directive to review ballot title in absence of case brought by a party or other judicial process, given that such a

ruling would be advisory); *State ex rel. Bushman v. Vandenberg*, 203 Or 326, 341, 276 P2d 432 (1954) (striking down a law that allowed a party to disqualify a judge without a showing of bias or prejudice); *Ramstead*, 219 Or at 400 (striking down a law that protected attorneys who initiated attorney disciplinary proceedings).

In contrast, this Court has upheld legislation against separation-of-power challenges where it creates only "general institutional inconvenience," *AFSCME Local 502-A*, 295 Or at 551, or "requires the courts to follow certain procedures . . . [that] do not unduly burden or interfere with" the judicial function. *City of Damascus*, 367 Or at 68.

So, for example, in *State ex rel. Emerald PUD v. Joseph*, 292 Or 357, 640 P2d 1011 (1982), this Court held that a statute requiring the court of appeals to decide certain cases within three months of filing was not facially unconstitutional. *Id.* at 362. In addition, this Court has concluded that general legislation does not offend the separation of powers when it creates new rights that courts must then adjudicate, including "new rights to appeal." *City of Damascus*, 367 Or at 72.

B. Barring appellate review of a criminal defendant's constitutional claims would substantially burden courts' adjudicative function.

This Court has long recognized that it "is the ultimate interpreter of state constitutional provisions—subject only to constitutional amendment by the people." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 697, 261 P3d 1 (2011). The centrality of this role applies with special force in cases involving deprivations of liberty, where those who are detained have had a long and unbroken right to challenge the legality of their detention in court. *E.g.*, Or Const, Art VII (Amended), § 2 (authorizing original jurisdiction in this Court in habeas actions); Or Const, Art VII (Original) (same in circuit courts).

To the extent that ORS 138.105(8)(a)(A) were interpreted to preclude appellate review of Fernandez's constitutional argument, it would substantially interfere with the Oregon judiciary's adjudicative role and thus violate the state's separation-of-powers doctrine. It is one thing for the Legislature to create a right and decide how that right can be adjudicated. *See, e.g.*, *Matter of DeMary's Estate*, 294 Or 650, 653, 661 P2d 931 (1983). But it is quite another to hand the Legislature complete control over the enforcement of rights that exist

independently of any legislative action at all. *Cf. City of Boerne v. Flores*, 521 US 507, 519–20 (1997) (holding that Congress cannot pass a law that "alters the meaning" of the Constitution).

Here, Oregon courts have an obligation to impose sentences that are not disproportionate to the offense, Or Const, Art I, § 16, and that otherwise comply with state and federal law, *e.g.*, *United States v. Booker*, 543 US 220 (2005). Yet by permitting appeal of within-guidelines sentences only on enumerated (and narrow) statutory grounds, ORS 138.105(8)(a)(A) would effectively eliminate appellate consideration of the constitutional constraints that likewise apply to any sentence. At the very least where constitutional rights are at stake, appellate review is constitutionally required. *Cf.* Or Const, Art VII (Amended), § 1 ("[T]he judicial power of the state *shall be vested in one supreme court* and in such other courts as may from time to time be created by law." (emphasis added)).

This conclusion is consistent with the Court's other case law in this area, *see supra* Part I.A, including decisions upholding limitations on appellate review that—at first blush—may appear similar to the issue here. In *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 932 P2d

1145 (1997), for example, the Court suggested that the state would not have been able to appeal a within-guidelines sentence under a former version of the appellate-review bar, but it left undecided whether a *defendant* could have challenged the same sentence as unconstitutional. *See id.* at 607–08.

And *State v. Colgrove*, 370 Or 474, 521 P3d 456 (2022), in which the Court enforced ORS 138.105(5), a subsection that bars appellate review of "the validity of [a] defendant's plea of guilty or no contest," is readily distinguishable. The defendant in *Colgrove* sought to challenge the validity of his conviction after stipulating to it, and the law is clear that criminal defendants can waive even constitutional rights where they do so knowingly and without coercion. *See State v. King*, 361 Or. 646, 666, 398 P.3d 336 (2017).

Here, although Fernandez pleaded guilty to the offense, he never stipulated to the sentence he now challenges on constitutional grounds. *Cf. State v. McLaughlin*, 326 Or App 296, 298, at *1, *review denied*, 371 Or. 332, 534 P.3d 1073, (2023); 371 Or. 476, 537 P.3d 934 (2023) (holding ORS 138.105(5) barred review of defendant's challenge to conviction based on plea agreement but proceeding to consider

defendant's separate challenge to a restitution order). In any event, *Colgrove* did not specifically consider the concern amici raise here: whether the application of ORS 138.105(5) would be constitutionally permissible as applied to bar constitutional arguments. 370 Or at 499.

C. Other jurisdictions have likewise recognized that legislatures cannot eliminate appellate review of constitutional rights in sentencing.

Ensuring that ORS 138.105(8)(a)(A) does not serve as a bar to appellate review of constitutional challenges in sentencing is also echoed by rulings in several other states. For example, the Supreme Court of Washington has repeatedly confirmed that defendants can bring constitutional challenges to standard-range sentences, notwithstanding a limitation on sentencing reviewability very similar to Oregon's. *See, e.g., State v. Osman*, 157 Wash 2d 474, 481–82, 139 P3d 334 (2006) ("A defendant may appeal a standard range sentence if the sentencing court failed to comply with procedural requirements of the [governing statute] or constitutional requirements."); *State v. Herzog*, 112 Wash 2d 419, 423, 771 P2d 739 (1989) ("assum[ing] without deciding" that "even were the statutory prohibition [on reviewability] absolute, a challenge based on constitutional grounds

should defeat the statute"); *State v. Mail*, 121 Wash 2d 707, 712, 854 P2d 1042 (1993) (noting that a "possible limitation on the judge's discretion might be found in the provisions of our state and federal constitutions").

Similarly, in *People v. Posey*, 512 Mich 317, 1 NW3d 101 (2023), the Michigan Supreme Court struck down a state law requiring appellate courts to affirm criminal sentences that were within the range provided by state sentencing guidelines. *Id.* at 352. The high court emphasized that the state's constitutional proportionality test "asks 'whether [a] sentence is proportionate to the seriousness of the matter, not [merely] whether it departs from or adheres to the guidelines' recommended range.'" *Id.* at 355 (quoting *People v. Steanhouse*, 500 Mich 453, 475, 902 NW2d 327 (Mich. 2017)). As it recognized, simply by adhering to the sentencing guidelines, trial courts could use them "as a shield against appellate review" of this constitutional requirement. *Id*. The court ultimately concluded that this limitation on the scope of appellate review would effectively amount to a mandatory sentencing regime that is federally

unconstitutional under *United State v. Booker*. *Id.* at 352–53 (citing *Booker*, 543 U.S. at 266–67).

And finally, in *State v. Losh*, 721 NW2d 886, 890–91 (Minn. 2006), the Minnesota Supreme Court relied on the Minnesota Constitution's separation-of-powers guarantee to strike down a procedural limitation on criminal sentencing appeals. The Court treated the limitation as effectively cutting off appellate review and held that, at least with respect to non-statutory arguments, "the legislature cannot 'prohibit or require this court to exercise its appellate jurisdiction.'" *Id.* at 892 & n.8 (quoting *State v. Wingo*, 266 NW2d 508, 511 (Minn. 1978)).

II. Barring review of Fernandez's constitutional argument raises serious concerns under Article I, section 20 of the Oregon Constitution.

Article I, section 20 of the Oregon Constitution provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." This provision "require[s] government to treat similarly situated people the same," *State v. Savastano*, 354 Or 64, 96, 309 P3d 1083 (2013), and it "applies whenever a person is

denied some advantage to which he or she would be entitled but for a choice made by a government authority," *Kramer v. City of Lake Oswego*, 365 Or 422, 453, 446 P.3d 1, *opinion adh'd to as modified on recons.,* 365 Or 691, 455 P3d 922 (2019) (internal quotation omitted). A classification scheme subject to Article I, section 20 review cannot survive unless there is at least "a reasonable relationship between the classification and the legitimate legislative purpose that it serves." *Id.*; *see also City of Salem v. Bruner*, 299 Or. 262, 270, 702 P.2d 70 (1985) (recognizing that availability of an appellate route is a "privilege" under Article I, section 20 that "must be made by defensible criteria").

Interpreting ORS 138.105(8)(a)(A) to bar appellate review of Fernandez's constitutional sentencing challenge would create serious constitutional concerns under this equality guarantee in the Oregon Constitution. That is so because the Court has already held that the appellate-review bar does *not* apply to appeals that challenge the constitutionality of presumptive sentences set by the *Legislature*, as opposed to the OCJC. There is no rational ground for conditioning appellate review on such a slim distinction.

A. *State v. Althouse* allows appellate review of constitutional challenges from defendants similarly situated to Fernandez.

In *State v. Althouse*, 359 Or 668, 375 P3d 475 (2016), a criminal defendant argued that his sentence violated the Eighth Amendment and Article I, section 16 of the Oregon Constitution. The Court considered whether appellate review was precluded by an earlier and near identical version of the appellate-review bar at issue here. *Althouse*, 359 Or at 676 (quoting ORS 138.222(2)(a)). Rather than find that the appellate-review bar foreclosed review of those claims, the Court held that the statute applied only to "sentence[s] that come[] within the range of presumptive sentences *prescribed by a sentencing guidelines grid block*," i.e., a presumptive sentence set by the OCJC. *Id.* (emphasis added). The Court acknowledged that this rule left several other types of sentences beyond the scope of the appellate-review bar, namely any "presumptive sentence that is *not* contained within a grid block." *Id.* This included sentences imposed purely by the Legislature, rather than by the OCJC. *Id.*

The Court again applied this rule to permit appellate review in *State v. Davidson*, 360 Or 370, 380 P3d 963 (2016), which involved a

defendant whose within-range presumptive sentence was set by the Legislature, not the OCJC. And in *Davidson*, as was true in *Althouse*, the Court went on to consider the merits of each defendant's constitutional arguments, including that their sentences violated Article I, section 16's proportionality requirement. *See Althouse*, 359 Or at 678; *Davidson*, 360 Or at 385.

B. Extending appellate review only to defendants whose presumptive sentences are set by the Legislature, as opposed to the OCJC, is unjustifiable.

Given the rule established in *Althouse* and applied in *Davidson*—that within-range sentences based on presumptive sentences prescribed by the Legislature *are* subject to judicial review—applying the appellate-review bar to Fernandez's appeal would raise serious constitutional concerns under Article I, section 20.

In that scenario, two defendants could receive sentences based on convictions for comparable and/or related crimes, one of which is consistent with the presumptive sentence set by the OCJC's guidelines and one of which is consistent with a presumptive sentence set by the Legislature in the first instance. The respective sentences may even be identical, with the only difference being how the presumptive

sentences were established: by the OCJC or by the Legislature. Yet only the latter defendant would be allowed to appeal the sentence and obtain review of constitutional claims.

Making recourse available to a defendant hinge entirely on this procedural line, even for nearly identical substantive crimes or sentences, is arbitrary and could not survive Article I, section 20 review. This Court should, if possible, interpret ORS 138.105(8)(a)(A) to avoid this disparity, which inexplicably offers one category of defendants like those in *Althouse* and *Davidson* the benefit of appellate review, while eliminating that benefit for Fernandez and others like him whose presumptive sentences were prescribed by the OCJC. And if the statute is not susceptible to this saving construction, the Court should conclude that Article I, section 20 precludes the appellate-review bar's application here.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed and the case remanded to it for consideration on the merits of Fernandez's sentencing appeal.