IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Appellant,<br>Respondent on Review,<br><br>v.<br><br>VANESSA AMADA GONZALEZ,<br><br>Defendant-Respondent,<br>Petitioner on Review. | Marion County Circuit Court<br>Case No. 17CR78352<br><br>CA A173971<br><br>SC S070433<br><br>**REDACTED BRIEF UNDER ORS 192.355(2)(a) AND ORAP 5.95** |

# PETITIONER'S REDACTED BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Marion County
Honorable Audrey J. Broyles, Judge

Opinion Filed: June 28, 2023
Author of Opinion: Lagesen, C.J.
Before Powers, Presiding Judge, and Lagesen, Chief Judge, and Hellman, Judge.

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## PETITIONER'S REDACTED BRIEF ON THE BRIEF

## STATEMENT OF THE CASE

The state appealed the trial court's refusal to impose a 90-month prison sentence for first-degree arson that the court concluded was unconstitutional, and the Court of Appeals reversed. *State v. Gonzalez*, 326 Or App 587, 534 P3d 289 (2023). Relying primarily on the concurring opinion in *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017), the Court of Appeals concluded that this court had "carve[d] out a narrow exception" for sentencing courts to consider when evaluating a defendant's personal circumstances during a proportionality assessment, *i.e.*, "whether an offender's intellectual disability, brain injury, or the like, effectively means that the offender's 'age-specific intellectual capacity fell below the minimum level of criminal responsibility for a child.'" *Gonzalez*, 326 Or App at 600 (quoting *Ryan*, 361 Or at 625-26); *see also id.* at 599-600 (quoting *Ryan*, 361 Or at 628 (Balmer, C.J., concurring)).

Defendant experienced multiple years of physical and emotional trauma that resulted in her suffering from mental illnesses, of which she was generally predisposed. In the weeks leading up to committing the arson, she tried to kill herself multiple times, she was evicted from her apartment, her electricity was shut off, her cousin died from a drug overdose, and her children were removed from her home. Defendant used methamphetamine, which affects people with mental illness differently, and it triggered psychosis in defendant. During her

psychotic state of mind, she attempted to kill herself by setting her apartment building on fire. She recklessly placed others in the building of serious physical injury, and one occupant suffered serious physical injury from the fire that she set.

Defendant received mental health treatment that greatly improved her condition during the two and one-half years that she waited for trial. After a bench trial, the trial court acquitted defendant of five counts of attempted first-degree murder and two counts of second-degree assault, having found that defendant did not intend to harm or kill the other residents of the building. The trial court found defendant guilty of first-degree arson and third-degree assault, which has a reckless mental state. Based on the circumstances leading up to the arson, defendant's mental illness, her lack of criminal history, and her amenability and progress with mental health treatment, the court concluded that the mandatory 90-month prison sentence for arson was unconstitutionally disproportionate as applied to defendant.

This court should affirm the trial court and reverse the Court of Appeals. The Court of Appeals read *Ryan* too narrowly. *Ryan* did not purport to limit the "personal characteristics" consideration to only intellectual disability in adult defendants where the disability renders them childlike. Those were the circumstances of that case, not a limiting principle. This court should hold that when a defendant advances a proportionality challenge with evidence of

characteristics—like intellectual disabilities and mental illnesses—that influence conduct and reduce, but not eliminate, the defendant's moral culpability, the sentencing court must consider those case-specific factors when comparing the gravity of the defendant's particular conduct against the severity of the penalty.

## Question Presented

In considering the personal characteristics of a defendant to determine whether a sentence is unconstitutionally disproportionate, may sentencing courts consider only whether the defendant has an intellectual disability or brain injury that renders the defendant's mental capacity akin to that of a child?

## Proposed Rule of Law

No. For as-applied proportionality challenges, sentencing courts may consider a defendant's personal characteristics that influenced the defendant's conduct and reduced culpability, such as a defendant's mental illness, suicidal ideation, and drug-induced psychosis, as well as the defendant's response to treatment, in its comparison of the gravity of the offense against the severity of the penalty.

## Summary of Argument

Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution each protect against sentences that are disproportionate to the offense. This court's framework for analyzing

proportionality requires consideration of a defendant's personal characteristics that influence conduct and reduce culpability when weighing the gravity of the crime against the severity of the sentence.

A defendant's mental illness is a characteristic that influences conduct and reduces culpability. A mentally ill defendant generally deserves less punishment than defendants whose conduct, decision-making, and perception of threats are not similarly encumbered. Mentally ill defendants who commit crimes can be treated to avoid such behavior. Consequently, when a defendant raises a proportionality challenge to the defendant's sentence and presents evidence that the defendant suffers from mental illness, sentencing courts must consider that evidence.

Additionally, many factors go into mental illness diagnoses, including a defendant's history of trauma, abuse, drug-induced psychosis, suicidal ideation and behavior, and stressors that trigger that behavior. Thus, trial courts must be able to consider those factors in determining whether the mental illness renders the sentence unconstitutionally disproportionate.

Courts must also consider a defendant's criminal history in determining whether a sentence is constitutionally disproportionate to determine whether the defendant remains a danger to others, whether the defendant is incorrigible, and whether past sentences have failed to deter further criminal conduct. Those underlying principles demonstrate that, when a record is developed to show that

the defendant has received and benefited from treatment such that the defendant no longer poses a threat to society, courts must also consider that evidence in making its proportionality decision.

Here, the trial court correctly concluded that defendant's 90-month sentence was disproportionate as applied to defendant. The court properly considered defendant's "psychological paradigm," including the factors that influenced her mental health. Defendant's mental illness when combined with her history of methamphetamine use triggered a psychosis, but defendant was not under the influence of methamphetamine when she committed her crimes. The court found instead that defendant was suffering from a psychological break that lowered her inhibitions, impaired her judgment, and distorted her perceptions of reality.

The court also considered defendant's lack of criminal history coupled with evidence that she received and benefited from substantial treatment while awaiting trial, which showed that she is reformable and not a danger to others. Weighing those factors against the indisputable egregious nature of the crime itself, the court found this was a rare case and that the 90-month prison sentence was unconstitutional as applied to defendant. The trial court's ruling was correct.

## Summary of Facts[1]

### I. In the weeks leading up to the November 24, 2017, arson, defendant's life was unraveling, and she tried to kill herself on multiple occasions.

In early November 2017, defendant's mother telephoned Darla Dunham, defendant's grandmother, to say that defendant was repeatedly calling and hanging up and could be heard crying over the telephone. Tr 391. Dunham went to defendant's apartment to check on her. Tr 391. Defendant had received notice that she had been evicted and her power was turned off. Tr 392. Defendant was nervous and crying, she reported not feeling safe, and she got frustrated with Dunham and told her to leave. Tr 391. Defendant walked into a room, followed by her four-year-old child. Tr 391. Dunham went to investigate after seeing the child crying in the doorway and noticed defendant's body hanging in a closet. Tr 392. Dunham lifted defendant's body, thwarting defendant's suicide attempt. Tr 392. The Department of Human Services (DHS) removed defendant's children from the home after learning of defendant's actions. Tr 392.

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[1] The trial court reached the ruling that is the subject of this court's review after hearing trial testimony from the state's witnesses (Tr 92-355) defense witnesses (Tr 384-477), as well as Dr. Phillips' evaluation and the parties' memoranda, which were submitted for sentencing. App Br ER 10-23. To aid this court's review of that ruling, defendant provides a chronological account of the event leading up to the November 24, 2017, arson and its aftermath, as established at trial, followed by procedural facts and Dr. Phillips' evaluation that was presented at the sentencing hearing.

On November 14, 2017, Officer Steven Mayberry responded to a midday car accident. Tr 396. Defendant had been driving her aunt's van behind another car, the other car slowed down, and defendant intentionally rearended it, deploying both vehicles' airbags. Tr 397.

Mayberry spoke with defendant and thought she was suffering from a mental health problem. Tr 396. Her demeanor appeared "off," but Mayberry neither thought defendant was under the influence of any intoxicant nor investigated her for driving under the influence of intoxicants. Tr 398. Defendant looked at the ground and was quiet and noncommunicative with him and the medics, and she would not directly answer Mayberry's questions when he tried to identify her. Tr 398, 401-02. Mayberry had been an officer since 1995, and to him, defendant's behavior was unlike others who had been caught with a stolen vehicle or who were trying to avoid discovery by law enforcement. Tr 396, 402.

Mayberry arrested defendant because the van had been reported stolen. Tr 399. When defendant complained of shortness of breath, Mayberry took her to the hospital to be medically cleared. Tr 399. A nurse told Mayberry that the hospital was placing a four-hour hold on defendant due to her mental health condition and that she needed further medical testing. Tr 400. Mayberry did not take her to jail, and she left the hospital. Tr 401, 404.

Later that day, Officer Joseph Scott was called to an incident where defendant was trying to run into traffic. Tr 405, 525. When Scott took control over the situation, defendant's cousin and cousin's friend were holding onto defendant. Tr 405. Defendant initially said that she was trying to get some food, but eventually admitted that she was trying to harm herself. Tr 405. Scott took her to the hospital because defendant was an immediate danger to herself. Tr 405-06. Hospital staff moved defendant to a solitary room and restrained her because defendant was uncooperative. Tr 406. Defendant was sad and crying. Tr 406.

A few days before the arson, Pablo Morales went to defendant's apartment. Tr 425. He was "kind of weirded out" because the apartment door was open, and it looked like someone had tried to break in. Tr 425. Morales entered the apartment and saw defendant sleeping on the couch. Tr 425. Defendant had placed lit candles around her apartment because she did not have electricity. Tr 426. Morales thought defendant was in emotional turmoil and not functioning because her children had been taken. Tr 426-27.

## II. On the morning of the incident, defendant reported to the post office for work, despite having resigned from that position two months prior.

Sarah Jane Briski was the customer service supervisor at the post office. Tr 434. She had worked with defendant until defendant resigned in September 2017. Tr 434-35. Two employees had told Briski that defendant had been

physically and emotionally abused. Tr 436. When defendant resigned, Briski talked to defendant about the Employee Assistance Program, which gives federal employees free counseling and therapy. Tr 435.

On November 24, 2017, the morning of the arson, Debra Luke was working at the main post office in Salem. Tr 412. The post office had been hiring new people for help during the holidays. Tr 413. Defendant arrived at the post office, and she was shaky, nervous, and scared. Tr 413-14. Luke assumed that defendant was a new hire and brought her to a supervisor. Tr 414. The supervisor recognized defendant as a former employee. Tr 414. Defendant went into the restroom for 20 minutes and came out saying she "couldn't do it anymore." Tr 438. Briski learned about this and was concerned that defendant had been abused and perhaps beaten into not remembering that she had resigned two months prior. Tr 438.

Luke thought something was wrong with defendant because defendant had come into work, but no longer worked there. Tr 414, 418. After defendant left, she and other postal workers called the police for a welfare check on defendant. Tr 416. The police were not able to locate defendant, which further concerned Luke. Tr 439.

## III. On the evening of November 24, 2017, defendant set fire to her apartment complex in a suicide attempt.

Defendant lived in a fourplex apartment complex. She lived in the upper-left apartment, Fernando Morales-Oregel and Jose Chavez lived in the upper-right apartment, and the Pacheco family lived in the lower-left apartment (directly below defendant).[2]

Prior to the fire, around 4:00 or 5:00 p.m., Morales (who had visited defendant a few days prior) again visited defendant at her apartment. Tr 429-30. He was there for about an hour. Tr 428. He claimed that they had not been arguing when he left. Tr 430. Defendant seemed tired and like she wanted to sleep. Tr 431. Defendant had not been using drugs. Tr 431.

Lourdes Pacheco was watching television with her daughters, S and C, who were 13 and 17 years old, respectively. Tr 125, 138. Pacheco's boyfriend was in the backyard. Tr 126. They heard a man stomp out of defendant's apartment and walk downstairs. Tr 153. They heard defendant screaming and moving furniture around. Tr 128.

Budd Cheney lived across the street from defendant's apartment complex. Tr 170. He noticed a small fire flicker in the stairwell and walked over to put it out. Tr 171-72. The stairwell was full of household items,

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[2] The record does not show who, if anyone, lived in the lower right apartment.

including a dresser, clothing, and other random items. Tr 172. He smacked the fire with his sweater but ended up spreading the flames. Tr 174. He went downstairs and notified the Pacheco family about the fire and urged them to leave the apartment building.

The Pacheco family left their apartment, and defendant screamed at them from her apartment window and called Pacheco a bitch. Tr 134, 161. Defendant yell at them to go back inside and that she wanted them to burn and die with her. Tr 161.

Neighbors tried to help defendant out of the apartment, but she refused help. Tr 145. Defendant was "hanging out the far window" and "acting frantic." Tr 177. Rebecca Carsner, who lived near defendant, saw the fire and defendant seated in the windowsill. Tr 385-86. Defendant did not seem like herself; she was saying things that shocked Carsner. Tr 386.

Morales-Oregel and Chavez were in their apartment, and Morales-Oregel smelled smoke. Tr 96. Morales-Oregel told Chavez that he believed that defendant "set something on fire." Tr 97. Chavez jumped out the second-story window unscathed. Tr 116. Morales-Oregel tried to leave through the front door, but the fire spread into his apartment and seriously burned him when he opened the door. He also escaped by jumping out of a window. Tr 122. To treat his burns, Morales-Oregel was hospitalized for three months and participated in physical therapy for two months. Tr 103-04.

Wyatt Lance Davis was a member of the fire department who responded to the scene. Tr 409. He placed a ladder near defendant's window and told defendant to get on the ladder. Tr 410. Defendant refused at first, but she eventually complied. Tr 410. Defendant kept reaching up and holding on to the rungs of the ladder, but Davis ultimately brought her down to safety. Tr 409, 401. Davis heard defendant cussing afterward. Tr 411.

Despite the cold weather, defendant was wearing only a tank top and underwear, and she was covered in soot. Tr 184-85, 186. Officer Darron Mumey asked defendant if she wanted a blanket or something for cover, and defendant "randomly started laughing" and said that was "not necessary." Tr 186. When defendant started walking toward the road, Mumey told Officer Michelle Pratt to stop her. Tr 187.

Pratt had defendant sit on the curb and asked if she was okay. Tr 190. Defendant responded, but she was not clear; her answers were nonresponsive to Pratt's questions. Tr 190. At some point defendant said, "You should have let me die." Tr 194. Defendant stood up several times and tried to walk away. Tr 190. Pratt had defendant sit in the patrol car. Tr 190.

Pratt knew that defendant had children and asked if they were in her apartment. Tr 191. Defendant said that DHS had taken them. Tr 191. While Pratt called DHS to confirm, defendant reached her arm out the window,

through the steel bars, and opened the patrol car. Tr 192. She took off running. Tr 192.

Officer Adams saw defendant running down the street and told her to stop. Tr 283. She was "kind of flailing around a little bit, bouncing her head up and down, pulling her hair." Tr 284. Defendant was frantic and told Adams that he should have just let her die. Tr 284-85.

Police recaptured defendant and took her to the police station. Tr 196. Detective Adam Bello interrogated defendant and thought that he was able to converse with defendant appropriately. Tr 199, 207.

Deputy Fire Marshal Sarah Jane Poet investigated the fire. Tr 212. She believed that the fire had been started in the hall because that was where the heaviest amount of damage occurred. Tr 216. Poet did not believe the fire was started accidentally. Tr 253. Poet noticed "Kills" was written on defendant's apartment window and that there were numerous empty pill bottles in defendant's apartment. Tr 259.

Defendant was taken into custody and housed at Marion County jail. On June 1, 2018, defendant spoke on the phone with her husband, Michael Gonzalez. Tr 320. Gonzalez tried to convince defendant to lie about the fire, but defendant refused. Tr 320-44.

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

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[redacted]

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difficulties; and more appropriately oriented to the future while

[redacted]

## V. The trial court found the mandatory 90-month prison sentence disproportionate given defendant's mental illness leading up to and during the arson, her improved mental health, and her unlikelihood of reoffending.

[redacted]

[redacted]

[redacted]

[redacted]

The court explained that this case is different than other cases where the defendant "simply has a substance abuse addiction":

> "[THE COURT:] The Court looks at this case differently than an individual who simply has a substance abuse addiction for the reasons that I've stated. This is more than just a person who was out of their mind on controlled substances and committed an offense. [Defendant] had no prior [criminal] history, not even a traffic violation. She never had shown disregard for social order, she was the mother of three young children, she was the victim of domestic violence, she is remorseful, even in a recorded jail call between her husband and herself when he repeatedly wanted her to lie, she refused to lie, she said she did it, she was going to tell the truth. She served two years in and out of custody [pending trial and sentencing] without incident."

Tr 565-66.

The court concluded that sentencing defendant to 90 months in prison "would constitute cruel and unusual punishment and be disproportionate as applied." Tr 566. The court did not "come upon this decision lightly," noting that "this has been probably the most difficult case that [the court has] had." Tr 566. The court found it "unconscionable to follow legislation in a vacuum and without context," and stated that this was "one of the rare cases that would shock the conscience of reasonable people." Tr 566.

The court sentenced defendant to 60 months of supervised probation with general and special conditions, including that defendant continue to engage in mental health treatment and participate in mental health court.[4] Tr 566-67.

The court concluded by explaining that "this is a fair and just sentence under the totality of the circumstances and the unique issues that this particular case presented." Tr 568. The trial court did not "did not take this [decision] lightly" and noted that this case "is a rare circumstance." Tr 569.

The state appealed the sentence, and the Court of Appeals reversed. This court allowed defendant's petition for review from that decision.

## Argument

### I. Article I, section 16, requires proportionate sentences.

Article I, section 16, of the Oregon Constitution prohibits cruel and unusual punishments and requires that all penalties are proportioned to the offense:

> "Excessive bail shall not be required nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but *all penalties shall be proportioned to the offense*."

(Emphasis added.) In *State v. Wheeler*, this court construed Article I, section 16's proportionality provision, first noting that the provision requires a

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[4] Defendant graduated from Mental Health Court on September 8, 2022. OECI, Specialty Court – Graduated, Created September 12, 2022, State v. Gonzalez (17CR78352).

"comparative relationship" between punishments and the offenses for which they are imposed:

> "The term 'proportion' indicates a comparative relationship between at least two things. *See, e.g.*, 2 Noah Webster, *An American Dictionary of the English Language* 45 (1828) ("proportion" indicates a "comparative relation"). Here, the two things being related are "penalties" and "the offense," and the provision requires that the penalties for each particular offense be "proportioned"—that is, comparatively related—to that offense. *The strong implication of that requirement is that a greater or more severe penalty should be imposed for a greater or more severe offense and, conversely, that a less severe penalty should be imposed for a less severe offense*."

*State v. Wheeler*, 343 Or 652, 655-56, 175 P3d 438 (2007) (emphasis added).

This court also observed that "Blackstone's *Commentaries* were an important influence on reformers," and that proportionality provisions in state constitutions, including Oregon's, "reflect Blackstone's concern with proportionality in sentencing." *Id.* at 662, 665.

Blackstone set forth a number of proportionality principles, including imposing rational punishments, "rather than the indiscriminate application of harsh punishments[.]" *Id.* Blackstone urged that punishments "should take into account the manifold complexities of aggravating and extenuating circumstances, including a weighing of the effectiveness of a particular penalty in preventing future crimes." *Id.* (quoting 4 Blackstone, *Commentaries on the Laws of England* 15-16 (1769)).

Prior to *Wheeler*, this court's had applied two tests under Article I, section 16. This court had applied a "rational basis" test, which required courts to give deference to the legislature in establishing punishments for violating criminal statutes:

> "It is province of the legislature to establish the penalties for the violation of various criminal statutes and if the penalties are founded upon an arguably rational basis we have no authority to hold that they are invalid."

*Id.* at 669 (quoting *Jensen v. Gladden*, 231 Or 141, 145-46, 372 P2d 183 (1962)); *see also State v. Isom*, 313 Or 391, 837 P2d 491 (1992) (applying rational basis test to the defendant's death sentence for aggravated murder committed after escaping from prison).

This court also applied a "shocks the moral sense" test to proportionality inquiries. *Wheeler*, 343 Or at 680. That test was first articulated as follows:

> "In order to justify the court in declaring punishment cruel and unusual with reference to its *duration*, the punishment must be so proportioned to the offense committed as to *shock the moral sense* of all reasonable men as to what is right and proper under the circumstances."

*Id.* (quoting *Sustar v. County Court of Marion Co.*, 101 Or 657, 665, 201 P 445 (1921) (emphasis in *Wheeler*)); *see also State v. Rogers*, 313 Or 356, 380, 836 P2d 1308 (1992) (holding death sentence for a defendant who committed intentional murder while attempting to commit first-degree sexual abuse did not violate Article I, section 16, because the sentence "would not shock the moral sense of reasonable people"); *State v. Teague*, 215 Or 609, 611, 336 P2d 338

(1959) (holding same, 15-year prison sentence for a defendant who committed two forgery crimes).

The "shocks the moral sense" test, however, is not meant to be applied literally. *Wheeler*, 343 Or at 670. That is, in order to conclude that a punishment was proportionate, this court never expected a survey of all reasonable people to determine whether "a single 'reasonable person' could be found whose moral sense was not 'shocked' by that penalty." *Id.* The standard was articulated, instead, to illustrate that a penalty is disproportionate "only in rare circumstances." *Id.*

In *Wheeler*, this court reconciled the two tests and concluded that the "rational basis" test was not a separate proportionality test, but rather part of the "shocks the moral sense" test. *Id.* The "rational basis" test merely sets forth a consideration that legislative enactments of the particular penalty at issue can serve as "an external source of law to assist in determining whether those penalties would shock the moral sense of reasonable people." *Id.* at 670-71.

Thus, even though this court emphasized that the legislature's role is to establish penalties for violations of criminal statutes and that courts must give deference to that role, courts must also ensure "that constitutional standards are met." *Id.* at 672. Indeed, it is the court's role to determine whether penalties set by the legislature exceed constitutional limits. *State v. Bartol*, 368 Or 598, 620, 496 P3d 1013 (2021).

The test for making proportionality determinations has "at least three factors" to consider, including: "(1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant." *State v. Rodriguez/Buck*, 347 Or 46, 58, 58 n 6, 217 P3d 659 (2009) (adopting test similar to one used in Eighth Amendment jurisprudence, citing *Solem v. Helm*, 463 US 277, 292, 103 S Ct 3001, 77 L Ed 2d 637 (1983)).

### A. Sentencing courts may consider case-specific factors, including a defendant's personal characteristics, in determining whether the sentence is disproportionate as applied to the defendant.

Sentencing courts must consider characteristics of a defendant that are relevant to determining whether a sentence, as applied to the defendant, is unconstitutionally disproportionate. Those characteristics are pertinent to the "gravity of the offense" portion of the first *Rodriguez/Buck* factor:

> "[A] defendant's 'offense,' for purposes of Article I, section 16, is the specific defendant's particular conduct toward the victim that constituted the crime, as well as the general definition of the crime in the statute. In considering a defendant's claim that a penalty is constitutionally disproportionate as applied to that defendant, then, a court may consider, among other things, the specific circumstances and facts of the defendant's conduct that come within the statutory definition of the offense, as well as other *case-specific factors,* such as *characteristics of the defendant* and the victim, the harm to the victim, and the relationship between the defendant and the victim."

*Id.* at 62 (emphasis added); *see also* Blackstone, 4 *Commentaries* at 13 ("But, in general, the difference of persons, place, time, provocation, or other

circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice."). Moreover, current societal standards must inform a sentencing court's assessment of a defendant's conduct for proportionality purposes. *Bartol*, 368 Or at 613.

In *Bartol*, this court held that the defendant's death sentence violated Article I, section 16, because the legislature had changed the law to redefine which forms of murder qualify for that sentence. *Id.* at 600. In so concluding, this court explained that proportionality requirements are interpreted based on current societal standards:

> "Like the Eighth Amendment's proportionality requirement, Article I, section 16's proportionality requirement must be interpreted based on current societal standards. It is not static; it evolves as societal standards change. When determining whether a punishment is disproportionate, courts apply the standards that currently prevail. And finally, while it is the role of the legislature to establish penalties for criminal statutory violations, it is the role of the courts to give effect to the constitutional proportionality requirement—by setting aside punishments that, under prevailing societal standards, are disproportionate to the offenses for which they are imposed."

*Id.* at 621. Based on evolving standards of decency, the legislature passed Senate Bill 1013 to narrow the definition of "aggravated murder" so that the death penalty would be limited to the "worst of the worst" conduct. *Id.* at 623. Although the legislature added a retroactivity provision—and did not make it apply to the defendant's case—this court concluded that the change in law was evidence of evolving societal standards:

> "Legislative enactments are strong indicators of [current societal standards], and the enactment of SB 1013 shows that the legislature had determined that, regardless of when it was committed, conduct that was previously classified as 'aggravated murder' but is now classified as 'murder in the first degree' does not fall within the narrow category of crime for which the death penalty can be imposed. Importantly, that moral judgment stands apart from the question of retroactivity. Although the legislature did not make SB 1013 retroactive as to the sentences imposed before its effective date, the enactment of the bill itself reflects a judgment that conduct that was previously classified as 'aggravated murder' does not fall within the narrow category of conduct that can be punished by death, as opposed to lesser sentences, including life imprisonment."

*Id.* at 625.

Therefore, this court reversed the defendant's death sentence and remanded for resentencing, because upholding that sentence would otherwise violate the proportionality requirements of Article I, section 16. *Id.* at 625.

In *Ryan*, this court considered current societal standards in deciding whether sentencing courts must consider how a defendant's intellectual disability figured into the assessment of a defendant's conduct when determining proportionality. 361 Or at 604. There, the defendant pleaded guilty to first-degree sexual abuse, which carried a mandatory 75-month prison sentence. *Ryan*, 361 Or at 604. The conduct at issue involved the defendant touching the sexual intimate parts of nine- and fourteen-year-old victims. *Id.* at 605. The defendant argued that his sentence was unconstitutional as applied to

him and that, in considering the first *Rodriguez/Buck* factor, the trial court should consider his intellectual disability.[5]

In determining whether a defendant's intellectual disability is a characteristic that should be considered in evaluating the gravity of the offense, this court looked to current societal standards and relied on relevant cases from the United States Supreme Court, primarily *Atkins v. Virginia*, 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002). *Ryan*, 361 Or at 617. In *Atkins*, the Court categorically excluded those with intellectual disabilities from the death penalty. 536 US at 316. The basis for that decision was that the death penalty's retributive- and deterrence-based rationales did not apply with equal force to the intellectually disabled. *Id.* at 321. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306-07.

Although *Atkins* set forth a categorical rule that excludes persons with intellectual disabilities from the death penalty, this court did not hesitate to rely on that case in holding that intellectual disabilities must be considered in proportionality analyses for non-capital cases. *Id.* at 619 (so noting, even in

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[5] The defendant also argued that the court should have considered the availability of treatment in deciding whether the sentence was unconstitutionally disproportionate. This court did not reach that argument.

light of other courts "faced with *Atkins*-based challenges" holding "that *Atkins* applies only to offenders otherwise subject to death penalty sentences").

This court understood that it was applying the rule in *Atkins* beyond capital sentencing but explained that its expansion was justified because the rationale behind that case is that "mentally disabled defendants [are] less culpable than others." *Id.* (quoting Paul Marcus, *Does Atkins Make a Difference in Non-Capital Case? Should It?*, 23 Wm & Marry Bill Rts J 431, 465 (2014)).

To be sure, this court did not adopt a categorical rule that any mandatory prison sentence is unconstitutional when imposed on a person with an intellectual disability, but intellectual disability is at least a factor that must be considered. Intellectual disabilities can vary significantly and can "reduce, but not erase, a person's responsibility for [the person's] crimes." *Id.* at 621. Thus, "a one-size-fits-all approach is not appropriate." *Id.* In applying that factor to a proportionality analysis, "a sentencing court's findings, among other factual considerations, as to an intellectually disabled offender's level of understanding of the nature and consequence of his or her conduct and ability to conform his or her behavior to the law, will be relevant to the ultimate legal question as to the proportionality—as applied to the offender of a mandatory prison sentence." *Id.* (citing *Atkins*, 536 US at 319). The sentencing court must also consider the

"length of the prescribed prison sentence" in determining the severity of the punishment. *Id.*

Therefore, even though "legislative enactments are strong indicators of current societal standards, [they] are not dispositive of whether a sentence comports with those standards." *Bartol*, 368 Or at 613. *Bartol* and *Ryan* also illustrate that to determine whether evolving standards of decency require that a defendant's characteristic should be considered in determining the constitutionality of a sentence, this court looks to various sources, including, but not limited to, the United States Supreme Court, law review articles, legislation, and the American Bar Association journals. *See Bartol*, 368 Or at 622-24 (relying on United States Supreme Court cases and current legislation); *Ryan*, 361 Or at 620 (relying on all the listed resources).

### B. Mental illness, like intellectual disability, is a factor that should be considered in determining whether a sentence is proportionate.

Like intellectual disability, mental illness is a factor that should be considered in determining whether a sentence is proportionate, because like persons with intellectual disabilities, persons with mental illnesses are less culpable than others. This court can find support in resources similar to those relied on in *Ryan*, *i.e.*, Supreme Court opinions, law review articles, legislation and the American Bar Association journals, each of which reflect evolving societal standards regarding conduct influenced by mental illness.

For example, in the death penalty context, the Court has held that jurors must be instructed on mitigating evidence about a person's mental health, because "evidence about the defendant's background and character is relevant because of the belief, *long held by this society*, that defendants who commit criminal acts that are attributable to a disadvantaged background, *or to emotional and mental problems*, maybe less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 US 302, 319, 109 S Ct 2934, 106 L Ed 2d 256 (1989). The Court has also held that trial counsel provided ineffective assistance of counsel by failing to investigate the petitioner's mental health, among other mitigating factors, for mitigation purposes, because it failed to allow the judge and jury "to accurately gauge his moral culpability." *Porter v. McCollum*, 558 US 30, 41, 130 S Ct 447, 175 L Ed 2d 398 (2009).

In other contexts, the United States Supreme Court has required additional protections for people suffering from mental illness who become entangled in the legal system:

- In *Jackson v. Indiana*, the Court required that detention of a mentally incompetent defendant be limited to a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity [to stand trial] in the foreseeable future." 406 US 715, 738, 92 S Ct 1845, 32 L Ed 2d 435 (1972).

- In *O'Connor v. Donaldson*, the Court held that, in the context of civil commitment for mental illness, even if "involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed." 422 US 563, 575, 95 S Ct 2486, 45 L Ed 2d 396 (1975).

- In *Addington v. Texas*, the Court held that, to support commitment of mentally ill persons acquitted by reason of insanity, the civil proceedings must establish by clear and convincing evidence that hospitalization is required for the protection of the individual and others, and periodic review of dangerousness is required. 441 US 418, 432, 99 S Ct 1804, 60 L Ed 2d 323 (1979).

- In *Ford v. Wainright*, the Court held that the Eighth Amendment prohibits executing a person who is insane. 477 US 399, 405, 106 S Ct 2595, 91 L Ed 2d 335 (1986).

- In *Foucha v. Louisiana*, the Court held that continued confinement of persons acquitted by reason of insanity violated due process unless the state shows by clear and convincing evidence that the individual is mentally ill and dangerous. 504 US 71, 77, 112 S Ct 1780, 118 L Ed 2d 437 (1992).

- In *Kansas v. Hendricks*, the Court approved civil commitment of persons designated as "sexually violent predators" by clear and convincing evidence as a danger to self or others, with periodic reviews, assessments of changed circumstances, and detainee-initiated requests for review. 521 US 346, 353, 117 S Ct 2072, 138 L Ed 2d 501 (1997).

Defendant acknowledges that those cases do not specifically hold that mental illness is a characteristic that must be considered for proportionality purposes in non-capital cases. But like *Ryan*, the underlying rationale from those cases still holds true: Mentally ill people are less morally culpable than others.

Part of the *Ryan* court's analysis relied on the *Atkins* Court's determination that sentencing goals are not served when executing a mentally disabled defendant. *See Ryan*, 361 Or at 618 (quoting *Atkins*, 536 US at 306, as providing that intellectually disabled offenders have reduced abilities "'to

understand and process information, to learn from experience, to engage in logical reasoning, and to control impulses,'" they "'do not act with the same level of moral culpability that characterizes the most serious adult criminal conduct.'"). And that analysis applies with equal force to defendants with mental illnesses.[6]

One commentator has explained that mental illness parallels intellectual disability (and juvenile status) in that "severe mental illness impact[s] the offender's blameworthiness and deterrability" in the same way. Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 785, 814 (2009) (relying on the ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L Rep 668 (2006)). Relying on the American Bar Association's Task Force Study, the commentator explained:

> "Mental illness is similar to mental retardation and juvenile status because it may diminish both individual culpability and deterrability. Defendants may suffer from severe mental illness, yet be able to appreciate the wrongfulness of their conduct, thereby failing to satisfy the standard for the legal insanity defense. Yet when severe mental illness impairs judgment, rationality, and the ability to foresee consequences and control behavior, similar to

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[6] Article I, section 15, of the Oregon Constitution sets the permissible legislative purpose in setting punishments: "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."

> mental retardation and juvenile status, it is similarly less justifiable to impose the death penalty as retribution for past crimes or as a deterrent to future ones."

*Id.*; *see also* E. Michael Mullan, *How Should Mental Illness be Relevant to Sentencing?*, 88 Miss Law J 255, 267-68 (2019) (explaining that "[p]eople with mental illness may lack the same culpability as those without mental illness, and their sentences should reflect this.").

Additionally, the advent of mental health courts throughout Oregon, a subset of specialty courts, is evidence of evolving standards of decency that support defendant's argument that mental illness should be considered in proportionality analyses. *See* ORS 137.680 (standards for specialty court). Specialty courts "began three decades ago when a Florida judge grew weary of seeing repeat offenders before him who were afflicted with mental health and substance use issues." *A Non-Adversarial Approach*, 80 Jan 2020 Oregon State Bar Bulletin, at 30. For at least the past two decades, Oregon courts have been running their own specialty courts, including mental health court, to help "individuals make progress toward recovery and exit from the criminal justice system." *Id.* at 32-33. Specialty courts provide an alternative to better serve, and hold accountable, individuals who end up in the criminal system because of mental illness. *Id.* Specialty courts offer a different model than a typical criminal case docket, because instead of emphasizing punishment, it focuses on "behavior modification and use[s] a non-adversarial approach in court." *Id.* at

33. "The objective of mental health court is to get appropriate people into treatment before they commit more serious crimes" "by targeting defendants who got involved in the criminal justice system in part because of mental health and addiction issues." *Id.* The implementation of mental health courts throughout the state over the past two decades further supports defendant's position that evolving standards of decency suggest that societal standards view mentally ill people as less culpable than those without mental illness and thus courts must consider a defendant's mental wellbeing in making sentence proportionality determinations. *See also* OAR 213-008-0002(1)(C) (listing defendant's diminished mental capacity as mitigating circumstance, "excluding diminished capacity due to voluntary drug or alcohol abuse") (relied on in *Ryan* to support position that evolving standards of decency require considering intellectual disabilities).

Just like intellectual disabilities, mental illness is a factor that, based on evolving standards of decency, should be considered in deciding sentence proportionality. To be sure, not all mental illnesses will require a finding that a lengthy mandatory prison sentence is unconstitutional, because like people with intellectual disabilities, not all people with mental illness "will be so impaired as to fall within the range of mentally [ill] offenders" who are deemed less morally culpable than those with no excuse. *Atkins*, 536 US at 317. But

sentencing courts are well-equipped with making that type of determination in deciding a proportionality challenge, like it did in this case.

## II. The 90-month mandatory sentence was unconstitutionally disproportionate as applied to defendant.

Here, defendant's unlawful conduct was a direct result of her mental illness that not only can be improved and controlled through treatment but had been controlled through treatment prior to sentencing. Thus, the trial court correctly applied the *Rodriguez/Buck* factors, including considering defendant's mental illness, in determining that defendant's 90-month prison sentence was unconstitutionally disproportionate as applied to her.

### A. The trial court correctly considered defendant's mental health paradigm in concluding that a comparison of the severity of the penalty and the gravity of the crime weighed toward finding the 90-month sentence unconstitutional.

Evaluation of the first *Rodriguez/Buck* factor requires this court to compare the severity of the penalty and gravity of the crime, which itself requires consideration of defendant's personal characteristics. The court found defendant guilty of first-degree arson as defined in ORS 164.325, with a threat of serious physical injury. Thus, the severity of the punishment at issue is a mandatory 90-month prison sentence under ORS 137.700(2)(b)(A).

As to the gravity of the offense, this court must consider the facts surrounding the offense as well as defendant's personal characteristics. *See Rodriguez/Buck*, 347 Or at 58 (so requiring). In reviewing the facts and

circumstances surrounding defendant's conduct that made up the offense, this court considers both the range of conduct prohibited by the statute defining the offense and the particular conduct of the defendant in committing the offense. 347 Or at 69.

As noted, the state charged defendant with first-degree arson under ORS 164.325:

> "(1) A person commits the crime of arson in the first degree if:
>
> "(a) By starting a fire or causing an explosion, the person intentionally damages:
>
> "* * * * *
>
> "(B) Any property, whether the property of the person or the property of another person, such act recklessly placed another person in danger of physical injury or protected property of another in danger of damage[.]"

To qualify defendant's sentence as a mandatory sentence under ORS 137.700, the state further alleged that defendant's conduct "represented a threat of serious physical injury." App Br ER 2-3.

Defendant does not dispute the specific circumstances and facts of defendant's conduct surrounding the crime fell squarely within the conduct prohibited by ORS 164.325: She set fire to an occupied building that resulted in physical injuries to one of the occupants and emotional issues to the survivors who were not burned. *See* Tr 559 (trial court stating, "There is no disputing that this conduct was egregious, it involved a volitional setting of a

[redacted]

[redacted] Tr 563. The court further found that the record lacked evidence that she was under the influence of anything at the time of the crime and that people who observed her during that time thought instead that she was in mental distress:

> "Throughout her contacts with law enforcement and other parties – or not parties, but other acquaintances, the testimony was that they did not perceive her during this time as under the influence, and particularly the law enforcement officers, but they thought that she was in mental distress."

Tr 563.

The court further observed that this case is different than a case where a person is addicted to drugs or just "out of their mind on controlled substances and committed an offense":

> "The Court looks at this differently than an individual who simply has a substance abuse addiction for the reasons that I've stated. This is more than just a person who was out of their mind on controlled substances and committed an offense."

Tr 565.

Based on the court's findings, supported by Dr. Phillips' testimony and report, defendant's mental illnesses reduced her culpability for her criminal conduct.

### B. Defendant does not rely on a comparison of other related crimes to show that the sentence is disproportionate.

Regarding the second *Rodriguez/Buck* factor, defendant does not argue that her conduct at issue weighs toward finding the sentence disproportionate. Defendant's conduct was not at the "outer edge" of conduct that violates ORS 164.325. *Cf. Rodriguez-Buck*, 347 Or at 75 (holding that the defendants' conduct in those cases was at the "outer edge" of "sexual contact" where the defendants briefly touching was brief and over clothing). Thus, defendant does not attempt to argue that comparing her sentence to others for similar conduct that violates related offenses will support finding disproportionality.

### C. The trial court correctly concluded that defendant's criminal history and the unlikelihood that she would reoffend weighed in favor of finding the sentence unconstitutional.

The third *Rodriguez/Buck* factor requires this court to consider defendant's criminal history, which is concerned with whether sentences in the past have failed to deter the defendant from further criminal activity.

This court focused on this factor when considering whether the application of a recidivist statute violates Article I, section 16. In that context, this court has been most concerned with whether the defendant's criminal history shows that the defendant is a danger to others, incorrigible, or that past sentences have failed to deter further criminal conduct. *See, e.g.*, *State v. Sokell*, 360 Or 392, 398, 380 P3d 975 (2016) (concluding, "[c]ontrary to [the] defendant's view," "that his criminal history and the circumstances of his current crime indicate that he would pose a significant danger to children in the community if he is not segregated from society"); *State v. Althouse*, 359 Or 668, 686, 375 P2d 475 (2016) (concluding that, "[g]iven the seriousness of [the] defendant's repeated sexual misconduct and the danger that it forecasts for others, we cannot say that imposing a presumptive life sentence in response to [the] defendant's pattern of criminal behavior violated Article I, section 16."); *Wheeler*, 343 Or at 678 (noting that "the legislature may protect society from those who cannot or will not conform their behavior to criminal statutes by imposing more severe sentences on repeat offenders); *but see State v. Davidson*, 360 Or 370, 372, 380 P3d 963 (2016) (overturning life sentence without possibility of parole where the defendant had not been deterred by prior sentences and his criminal history was extensive, but did not involve physical force).

Although this court has addressed this factor more often in evaluating recidivist sentences, the factor still applies to determining whether the penalty of a single offense is disproportionate. Indeed, this court applied this factor in *Rodriguez/Buck*, and stated that the same concern—whether the defendant's criminal history shows that the defendant has not been deterred from further criminal conduct—exits: "a defendant who previously has been convicted of and served sentences for other crimes has demonstrated, by committing additional crimes, that the previously imposed sentences were insufficient to prevent the defendant from returning to his or her criminal behavior." *Rodriguez/Buck*, 347 Or at 77.

In *Rodriguez/Buck*, this court explained that "[t]raditional understandings of proportionality as well as this court's cases, require[d it] to consider whether a defendant is a repeat offender by considering previous criminal convictions and whether there is evidence of multiple instances of uncharged wrongful conduct." *Id.* at 78. The defendants in that case had a clean record, "no prior criminal charges, arrests, or reported police contact." *Id.* at 77. Thus, the record lacked evidence that the defendants were a danger to others, incorrigible, or that prior sentences had failed to deter them.

Here, defendant had no criminal history, and her contacts with police all occurred during her November 2017, when she had her mental breakdown:

> "Despite the challenges and obstacles that [defendant] endured, she went through her life without any criminal justice interaction, until after three suicide attempts, an eviction notice, lost children, her husband's continued attempts to control her and harass her, the maelstrom existed that caused her to snap."

Tr 564. The court further found that defendant "had no prior criminal history, not even a traffic violation. She never had shown disregard for social order[.]" Tr 565.

Moreover, the record in this case is unusual in that defendant was incarcerated for two years pending trial and sentencing and released to the community for six months pretrial. During that time, she received extensive treatment which resulted in the trial court finding that "her relapse risk was low." Tr 565. Defendant improved greatly from her treatment and no longer posed a threat to society. Thus, her lack of criminal history coupled with the evidence that she received and benefited from substantial treatment while awaiting trial show that she is not a danger to others, she is reformable, and that prior sanctions have not failed to deter her—instead, the criminal justice system's interaction with her has had a profound beneficial effect.

### D. The trial court correctly concluded that, when viewing the *Rodriguez/Buck* factors together, a 90-month sentence was unconstitutionally disproportionate, as applied to defendant.

The trial court correctly found that this is a rare case and that a 90-month prison sentence, without earned time or programs, is unconstitutional as applied to defendant. The court weighed the three *Rodriguez/Buck* factors and also

considered "the psychological paradigm of defendant" in coming to its decision. Tr 560. The court summarized its ruling as a difficult decision that it came to after considering all the relevant factors described above:

> "The Court looks at this differently than an individual who simply has a substance abuse addiction for the reasons that I've stated. This is more than just a person who was out of their mind on controlled substances and committed an offense. [Defendant] had no prior history, not even a traffic violation. She never had shown disregard for social order, she was the mother of three young children, she was the victim of domestic violence, she is remorseful, even in a recorded jail call between her husband and herself when he repeatedly wanted her to lie, she refused to lie, she said she did it, she was going to tell the truth. She served two years in and out of custody without incident.
>
> "In conclusion, the – I find that this is a very complex case, it is not a simple case. On its face it is a Ballot Measure 11 offense with a 90-month presumptive prison sentence. However, for the reasons that I have stated and view of other facts surrounding [defendant's] life, I am led to the conclusion that a 90-month sentence would constitute cruel and unusual punishment and be disproportionate as applied. I don't come upon this decision lightly, I have considered and reconsidered case law, arguments, evidence. I have – this has been probably the most difficult case that I have had, but I do find it unconscionable to follow legislation in a vacuum and without context. This is a case that calls for an incisive departure and I do find that it is one of the rare cases that would shock the conscience of reasonable people, giving all the reasons that I have indicated."

Tr 565-66. The trial court did not err in so concluding, and this court should hold that a 90-month prison sentence, as applied to defendant, is unconstitutionally disproportionate.

## III. Defendant's sentence is unconstitutionally disproportionate under the Eighth Amendment.

Defendant's proportionality challenges under Article I, section 16, and the Eighth Amendment are similar. The Eighth Amendment provides, "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments afflicted." Although the amendment does not include an express proportionality requirement like Article I, section 16, the United States Supreme Court has held that the amendment prohibits disproportionate sentencing. *Weems v. United States*, 217 US 349, 367, 30 S Ct 544, 54 L Ed 793 (1910) ("[I]t is a precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.").

The Court considers a multitude of factors in determining whether a sentence constitutes disproportionate punishment to a crime,

> "including how many jurisdictions authorize the sentence for the crime at issue, how frequently the sentence is actually imposed and carried out for the crime, whether the gravity of the crime corresponds to the severity of the sentence imposed for other crimes, and whether the severity of the sentence is justified by legitimate penological purposes."

*Bartol*, 368 Or 616 (summarizing factors under the Eighth Amendment; citations omitted). Defendant relies on the factors and reasons described above to support her Eighth Amendment challenge, or, in the alternative, if this court disagrees with her Article I, section 16, argument, that the court reverse and

remand to the trial court to consider whether the sentence violates the Eighth Amendment.

## CONCLUSION

For the above reasons, this court should reverse the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

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***Signed***
By Kali Montague at 5:29 pm, Feb 06, 2024

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# REDACTED EXCERPT OF RECORD INDEX

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 13,008 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Redacted Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 6, 2024.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Redacted Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, and Jonathan N. Schildt #151674, Assistant Attorney General, attorneys for Respondent on Review, and Brittney Plesser #154030, Oregon Justice Resource Center, attorney for *Amicus Curiae.*

Respectfully submitted,

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