IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. RHONDA COLGROVE, Defendant-Appellant, Petitioner on Review.	Umatilla County Circuit Court No. 17CR57106 CA A169952 SC S068372

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Umatilla County
Honorable PAUL G. CROWLEY, Judge
and DANIEL J. HILL, Judge

Opinion Filed: January 6, 2021
Author of Opinion: AOYAGI, J.
Before: Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge

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Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Under the statutes that govern "diversion" in driving-under-the-influence (DUII) cases, the trial court granted defendant's petition to plead guilty and to enter a diversion agreement. That agreement provided defendant with tremendous potential benefits: If she satisfied the diversion agreement's conditions before the agreement expired, the trial court would be required to dismiss the DUII charge with prejudice, and the state would be unable to use defendant's guilty plea against her in future cases.

Although the diversion agreement required defendant to attend a victim-impact panel, she failed to do so before the agreement ended. She also made no effort to seek an extension of the one-year diversion period, although the diversion statutes provide a mechanism for doing so. Due to defendant's failure to attend the victim-impact panel before the diversion agreement expired, the trial court terminated diversion and—based on defendant's earlier guilty plea—entered a DUII conviction.

Defendant argues that the trial court erred by concluding that her failure to timely attend the victim-impact panel required entry of the conviction. She seeks reversal of that conviction. Her appeal presents the following questions, and the state asks this court to adopt the proposed rules that appear below:

First question presented: Under ORS 138.105(5), an appellate court "has no authority to review the validity of the defendant's plea of guilty or no contest, or a conviction based on the defendant's plea of guilty or no contest," except under circumstances that do not apply here. Does ORS 138.105(5) preclude review of defendant's claim that the trial court erred by terminating diversion and entering a DUII conviction?

First proposed rule of law: Yes. Because a defendant who enters diversion pleads guilty, ORS 138.105(5) precludes appellate review. In precluding review, ORS 138.105(5) does not violate Article VII (Amended), sections 1 and 3, of the Oregon Constitution, or any equal protection or due process principles.

Second question presented: When a trial court makes attendance at a victim-impact panel a condition of DUII diversion, and when the defendant fails to fulfill the condition before the diversion agreement ends, do the diversion statutes require the trial court to enter a DUII conviction?

Second proposed rule of law: Yes. Under ORS 813.230, ORS 813.225, and ORS 813.255, failure to fulfill such a condition before a diversion agreement ends requires entry of a DUII conviction.

SUMMARY OF ARGUMENT

ORS 138.105(5) precludes appellate review

Defendant argues that she is entitled to reversal of her DUII conviction, a conviction that was based on her guilty plea. But the plain text of ORS 138.105(5)—which provides that appellate courts have "no authority to review the validity of * * * a conviction based on the defendant's plea of guilty or no contest"—precludes review of that argument.

Legislative history further supports that conclusion. Although the pertinent wording was enacted in 2017 as part of a significant reorganization of the statutes governing appellate jurisdiction and review, that wording was

intended to "restate" existing reviewability principles. In turn, those principles precluded appellate review when a defendant pleaded guilty or no contest as part of a diversion agreement, was later convicted, and then challenged the conviction on appeal.

By precluding review, ORS 138.105(5) comports with the state and federal constitutions

By precluding review, ORS 138.105(5) does not violate Article VII (Amended), sections 1 or 3. Because the Legislative Assembly has plenary authority, it may limit appellate review unless something in the Oregon Constitution expressly says otherwise. Yet nothing in Article VII (Amended), section 3, or in section 1, prohibits the legislature from limiting appellate review, or authorizes the courts to ignore such limits.

Defendant argues that ORS 138.105(5) violates federal equal protection principles because it deprives her of appellate review even though the state may appeal when a trial court, in a diversion case, dismisses the DUII charge. That purported disparity does not implicate the Equal Protection Clause, because it does not involve disparate treatment by the state toward different "classes of individuals." And even if the disparity that defendant alludes to implicated equal protection principles, it would survive equal protection scrutiny because it is a reasonable part of an equitable statutory scheme. Although the scheme grants the state certain appellate rights that diversion defendants do not possess,

it provides special benefits to those defendants while depriving the state of opportunities it possesses in other cases involving guilty or no contest pleas.

Defendant also claims that the purported disparity in diversion cases between a defendant's appellate review rights and the state's rights violates the Due Process Clause. Yet despite ORS 138.105(5)'s limits on review, the diversion statutes satisfy procedural due process requirements. And, as noted above, ORS 138.105(5) is equitable and fundamentally fair when viewed in conjunction with the diversion statutes. The statutory scheme gives defendants who enter diversion potential benefits that other defendants do not receive and, when diversion is successful, precludes the state from making future use of the defendant's guilty or no contest plea. Read in conjunction with the diversion statutes, ORS 138.105(5) comports with due process requirements.

Defendant's failure to attend a victim-impact panel before the diversion agreement ended required entry of the DUII conviction

Defendant argues that, although her diversion agreement required her to attend a victim-impact panel, and although she failed to do so before the agreement ended, the diversion statutes entitled the trial court to "waive" the attendance requirement even after the agreement expired. But the diversion statutes—including ORS 813.230(3) (limiting diversion agreements to one year absent an extension), ORS 813.255(3)(b) (requiring entry of a DUII conviction if the defendant failed to fulfill diversion conditions), and ORS 813.225(8)(b)

(requiring entry of conviction if the defendant obtained an extension but failed "to comply with the diversion agreement within the extended diversion period")—show otherwise. Moreover, ORS 813.252 and ORS 813.255, which permit a defendant to pay diversion-related fees after an agreement expires, show that when the legislature intends to permit "late compliance," it says so explicitly. That the legislature created no similar exception for other conditions (including victim-impact-panel requirements) is telling. It shows that defendant's failure to attend a victim-impact panel before her agreement ended required entry of the DUII conviction.

Finally, although defendant claims that her particular diversion agreement did not require attendance at the victim-impact panel before the agreement ended, the record refutes the claim. Defendant signed a plea petition stating that "[i]f I fail to comply with the diversion agreement *within the diversion period*, the court will enter a judgment of conviction on the charge." (Emphasis added.) Similarly, the diversion agreement that she signed stated that she had read the attachments, which in turn stated that "If * * * you fail to fulfill the terms of the agreement *by the end of the diversion period*, the court will sentence you without a trial." (Emphasis added.)

ARGUMENT

The state charged defendant with misdemeanor DUII. (App Br, ER-1). Defendant petitioned the trial court to let her enter a diversion program under

ORS 813.225 and simultaneously submitted a petition to plead guilty to DUII. (SER-1, 5). The trial court granted the diversion petition and, as required by ORS 813.230(1)(a), accepted the guilty plea at the same time. (Tr 4).

In part, the diversion agreement required defendant to attend a victim-impact panel by October 18, 2018, which marked the end of the one-year diversion period. (SER-5, diversion agreement, stating that "I agree to * * * [a]ttend a victim impact panel"; SER-2, Plea Petition, stating that "[i]f I fail to comply with the diversion agreement within the diversion period, the court will enter a judgment of conviction on the charge"; Tr 5, showing that trial court granted petition on October 17, 2017, and told defendant that "[y]our diversion starts today and will end in one year" and "will expire on October 18th of next year"). Defendant failed, however, to attend a victim-impact panel before the diversion period ended. She also made no effort to extend the period.

On October 24, 2018 (six days after the diversion agreement ended), the trial court issued an order requiring defendant to show cause why diversion should not be terminated. (OECI 10/24/2018, Show Cause Order). Defendant attended a victim-impact panel on November 13, 2018 (App Br ER-4), but at the show-cause hearing held January 4, 2019, the trial court terminated diversion based on defendant's failure to attend the panel before the diversion agreement ended, and it entered a DUII conviction. (Tr 41-42; App Br ER-12, Judgment).

Defendant appealed. She argued that the trial court erred by concluding that failure to attend the victim-impact panel before diversion ended required entry of a conviction. *State v. Colgrove*, 308 Or App 441, 444, 480 P3d 1026, *rev allowed*, 368 Or 347 (2021). The Court of Appeals affirmed. It did not address the state's argument that ORS 138.105(5) precluded appellate review and instead held that the trial court correctly terminated diversion and entered the DUII conviction. *Colgrove*, 308 Or App at 444. In subsequent cases, however, the Court of Appeals has agreed with the state that ORS 138.105(5) precludes review in a case such as this. *State v. Redick*, 312 Or App 260, 262, 491 P3d 87 (2021); *State v. Merrill*, 311 Or App 487, 496, 492 P3d 722 (2021).

Defendant asks this court to reverse her DUII conviction, based on the same arguments she made below. But because defendant pleaded guilty, ORS 138.105(5) precludes review. In any event, the trial court correctly terminated diversion and convicted defendant of DUII.

A. ORS 138.105(5) precludes appellate review of defendant's argument.

ORS 138.105(5) precludes review when a defendant is convicted of DUII after pleading guilty and being placed on diversion, and when the defendant argues that the trial court erred by entering the conviction. Statutory text, context, and legislative history support that conclusion. *See State v. Cloutier*, 351 Or 68, 75, 261 P3d 1234 (2011) (when construing a statute, "[w]e ascertain the legislature's intentions by examining the text of the statute in its context,

along with relevant legislative history, and, if necessary, canons of construction").

1. Statutory text and context supports that conclusion.

If a defendant pleads guilty, ORS 138.105(5) precludes an appellate court from reviewing the "validity of" the conviction. Because defendant pleaded guilty, her challenge to her conviction is unreviewable.

ORS 138.105(5) provides that appellate courts have "no authority to review the validity of * * * a conviction based on [a] defendant's plea of guilty," except under certain limited circumstances that—as defendant agrees—do not apply here :

> *The appellate court has no authority to review the validity of* the defendant's plea of guilty or no contest, or *a conviction based on the defendant's plea of guilty or no contest,* except that:
>
> (a) The appellate court has authority to review the trial court's adverse determination of a pretrial motion reserved in a conditional plea of guilty or no contest under ORS 135.335.
>
> (b) The appellate court has authority to review whether the trial erred by not merging determinations of guilt of two or more offenses, unless the entry of separate convictions results from an agreement between the state and the defendant.

(Emphasis added.) ORS 138.105(5)'s text—by precluding appellate review of "the validity of * * * a conviction based on the defendant's plea of guilty"—plainly precludes review in this case.

Defendant urges a contrary result by relying on an overly narrow construction of "conviction," as used in ORS 138.105(5). In her view, "conviction" refers only to "a finding of guilt" but *not* to a "judgment of conviction." (Pet Br 7). She thus argues that ORS 138.105(5) would preclude review only if she were challenging her "factual guilt"—the trial court's "determination that the guilty or no-contest plea provides a sufficient factual basis for guilt." (Pet Br 8). From that premise, she argues that ORS 138.105(5) allows her to argue that the trial court misunderstood the diversion statutes when entering her DUII conviction. (Pet Br 8). Pertinent text and context do not support that assertion.

As defendant acknowledges, "conviction" connotes both a factual finding of guilt *and* a "judgment of conviction." (*See* Pet Br 25, quoting statement in *Vasquez v. Courtney*, 272 Or 477, 479-80, 537 P2d 536 (1975), that "conviction" can "refer[] to a finding of guilt by a plea or verdict" *and* "to the final judgment entered on a plea or verdict of guilt"). Nothing in ORS 138.105, however, states that the legislature intended "conviction" to refer *only* to a "finding of guilt," and not to a judgment of conviction. As the Court of Appeals commented in *Merrill*, 311 Or App at 492, "if the legislature had intended to preclude review in such a limited way, it would have said so explicitly."

Defendant argues that if the state's proposed construction is correct, and if ORS 138.105(5)—by barring review of the validity of "a conviction based on the defendant's plea of guilty or no contest"—generally bars review of any challenge to the "*judgment* of conviction," there would be no need for ORS 138.105(5) to also bar review of "the validity of the defendant's plea of guilty or no contest." (Pet Br 27-28).

This court has noted, however, "that a proposed interpretation of a statute creates some measure of redundancy is not, by itself, necessarily fatal." *Cloutier*, 351 Or at 97. Indeed, "legal terminology often is redundant, sometimes for clarity, sometimes for emphasis." *Id.* at 98 (internal quote marks omitted). Here, the legislature—in precluding review of a challenge to "the validity of [a] plea of guilty * * * or a conviction based on the defendant's plea of guilty"—likely meant to emphasize that it intended ORS 138.105(5) to preclude challenges to a trial court's initial acceptance of a guilty plea (*e.g.*, a claim that the plea was involuntary or based on insufficient facts) *and* challenges to the judgment of conviction resulting from the plea (*e.g.*, a claim that the trial court ruled erroneously at some point after accepting the plea).

Moreover, it is far from obvious that, if the bar on challenges to the validity of a "conviction" is construed as barring challenges to a "judgment of conviction," it necessarily would bar challenges to the "validity of [a] plea of guilty" (thus rendering that latter phrase superfluous). If ORS 138.105(5)'s text

barred review of the "validity of a *judgment of conviction* based on a defendant's guilty plea," but said nothing more, defendants likely would argue that such a bar kept them from arguing that the judgment of conviction was erroneous on its face but *permitted* them to challenge the underlying plea's validity.

In any event, defendant's proposed construction suffers from the same defect that she ascribes to the state's construction—it renders part of ORS 138.105(5) redundant. In defendant's view, the bar on review of "validity of * * * a conviction based on the plea of guilty" merely "bars defendants from disputing the court's finding of guilt based on the plea." (*See* Pet Br 28). But if that is true, the phrase "conviction based on the plea of guilty" is unnecessary, because the preceding portion of ORS 138.105(5) already precludes review of the "validity of the defendant's plea of guilty." That phrase already precludes a challenge to the factual basis for the plea, or to the "finding of guilt" embodied by the court's initial acceptance of the plea.

Similarly, if ORS 138.105(5)'s bar on challenging the validity of a "conviction" based on a guilty plea precluded review of "findings of guilt" alone, ORS 138.105(5)(b)—which expressly *authorizes* review of a refusal to "merg[e] determinations of guilt of two or more offenses"—would be unnecessary. Defendant reads the statutory text that precedes subsection (5)(b) as precluding review only when a defendant argues that a guilty or no contest

plea was involuntary or when the defendant "disput[es] the court's finding of guilt based on the plea." (Pet Br 28). She argues that the text preceding (5)(b) permits review of all other challenges to the trial court's rulings. But if that is correct, the text preceding (5)(b) *already* permits appellate court review of decisions not to merge multiple "determinations of guilt"—because a defendant who argues that such determinations should merge does not challenge the "findings of guilt" themselves, but argues that even if she is guilty of *committing* multiple offenses, she should not be separately *punished* for each of them. *See* ORS 161.067(1), (2) (defining criteria that courts use to determine how many "separately *punishable* offenses" a defendant committed; emphasis added). If defendant's construction of ORS 138.105(5)'s first paragraph is correct, it already authorizes review of a failure to merge, and ORS 138.105(5)(b) is superfluous.

When a defendant pleads guilty or no contest, ORS 138.105(5)'s plain text precludes an appellate court (with exceptions that do not apply here) from reviewing the "validity of * * * a conviction based on the plea of guilty or no contest." Because defendant pleaded guilty, ORS 138.105(5) precludes review of her argument here, which asks this court to invalidate the resulting conviction.

2. Legislative history supports that conclusion.

Even if statutory text and context were ambiguous, legislative history confirms that the legislative intended the following: If a defendant pleads guilty when entering DUII diversion, and if the trial court later terminates diversion and enters a DUII conviction, appellate courts may not review a challenge to the DUII conviction's validity (unless an exception in ORS 138.105(5)(a) or (b) applies).

The statutory text at issue was adopted by the 2017 Legislature, which simultaneously repealed *former* ORS 138.050. Or Laws 2017, ch 529, §§ 13, 26. Legislative history shows that the legislature intended to "restate" existing limits on appellate review that applied when a defendant pleaded guilty or no contest. Those existing limits precluded a DUII defendant who entered diversion, but who ultimately was convicted, from challenging a trial court decision to terminate diversion and enter a conviction.

The 2017 legislation (Senate Bill 896) was drafted by the Oregon Law Commission's Direct Criminal Appeals Work Group as part of a comprehensive overhaul of Oregon's criminal appeal statutes. The work group submitted a report to the legislature that appears as Exhibit 37, Senate Judiciary Committee, SB 896, April 6, 2017. In part, the bill repealed *former* ORS 138.050 and enacted a provision—section 13, subsection (5), of SB 896—

that is now codified at ORS 138.105(5). The Oregon Law Commission Report explained that subsection (5)(a) of section 13

> *is intended to restate the principle currently found in ORS 138.050(1)(a) that where the defendant pleaded guilty or no contest to the offense of which the defendant was convicted, on appeal, the appellate court may not review the validity of the plea or the conviction*, except when the defendant, under ORS 135.335, has reserved in writing an adverse pre-trial court ruling for appeal.

Report at 21 (emphasis added).[1] The Report noted that under existing law, "if the defendant has pled guilty or no contest to a crime, the Legislature has disallowed appellate court review of the trial court's decision to enter a judgment of conviction for that crime." Report at 6.

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[1] Between 2001 and 2017, ORS 138.050 (2001) provided:

> (1) * * * [A] defendant who has pleaded guilty or no contest may take an appeal from a judgment or order described in ORS 138.053 [setting out the form and content of an appealable judgment or order] only when the defendant makes a colorable showing that the disposition:
>
> (a) Exceeds the maximum allowable by law; or
>
> (b) Is unconstitutionally cruel and unusual.
>
> * * * * *
>
> (3) On appeal under subsection (1) of this section, the appellate court shall consider only whether the disposition:
>
> (a) Exceeds the maximum allowable by law; or
>
> (b) Is unconstitutionally cruel and unusual.

Or Laws 2001, ch 644, § 1.

Notably, the Report's reference to existing law as precluding review of "the validity of the [guilty or no contest] plea or the conviction"—rather than mirroring *former* ORS 138.050's text—mirrored the Court of Appeals' construction of that text. In *State v. Landahl*, 254 Or App 46, 59, 292 P3d 646 (2012), *rev den*, 353 Or 788 (2013), the Court of Appeals had reaffirmed its prior holdings that "*the validity of a conviction* may not be challenged" due to *former* ORS 138.050. (Emphasis added.) In *State v. Herrera*, 280 Or App 830, 832-33, 839-41, 383 P3d 301 (2016), *rev den*, 360 Or 852 (2017), the court described the defendant's appeal as a "challenge to *the validity of [his] convictions*," and held that because he pleaded guilty when receiving probation and a conditional discharge, *former* ORS 138.050 precluded review of his argument that the trial court erred by revoking probation and enter a conviction. (Emphasis added.)[2]

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[2] The Report does not itself cite *Landahl* or *Herrera*, but memoranda appended to the Report cite and discuss those decisions. *See* Appendices to Report: June 7, 2016 memorandum on "Dispositions and Sentences" at 1-2 (discussing *Landahl*); September 12, 2016 memorandum on "Reviewability of Denials of Motions in Arrest of Judgment" (discussing *Herrera*); September 20, 2016 memorandum on "Scope of Review of Corrected Judgments" at 3 (discussing *Herrera*). Although statements in the memoranda do not "reflect the views of the Oregon Law Commission" or of the work group (Report at p 29; bold omitted), the memoranda reflect that work group members were familiar with *Landahl* and *Herrera*.

In expressing an intent to "restate" and retain existing limits on review, the Oregon Law Commission Report thereby expressed an intent to reaffirm the limits articulated by the Court of Appeals when construing *former* ORS 138.050. Significantly, the Court of Appeals—in *Landahl*—had construed *former* ORS 138.050 as precluding review in a case such as this.[3] In *Landahl*, the defendant pleaded no contest to DUII and entered diversion; the trial court subsequently granted the defendant's motion to terminate diversion and dismiss the DUII charge, based on an understanding that he had "successfully completed the diversion requirements." *Landahl*, 254 Or App at 48. But after learning that the defendant had driven under the influence of intoxicants before filing the motion to terminate diversion, the trial court set aside the judgment of dismissal and entered a DUII conviction. *Id.* at 48-49.

The defendant appealed, arguing that the trial court exceeded its authority by entering the DUII conviction after it had already dismissed the charge. *Landahl*, 254 Or App at 49-50. The Court of Appeals deemed the defendant's

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[3] In *Mastriano v. Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007), this court explained that "we generally presume that the legislature enacts statutes in light of existing judicial decisions that have a direct bearing on those statutes." *See also Cloutier*, 351 Or at 100 ("[o]ur analysis of ORS 138.050(1)(a) is also informed by this court's prior construction of that statute or its predecessors").

argument unreviewable; it held that "[i]n light of the legislative history [behind *former* ORS 138.050 and ORS 138.053] and the statutory analysis set out in *Cloutier* [by this court], we are convinced that our cases holding that the validity of a conviction may not be challenged in an appeal pursuant to ORS 138.050 are sound." *Landahl*, 254 Or App at 59.[4] "Because the gravamen of [the] defendant's argument here concerns whether any conviction should have been entered," "his appeal must be dismissed." *Id*.

In short, the 2017 history shows that the legislature intended to "restate" the limits on review created by *former* ORS 138.050, as construed by the Court of Appeals. And the Court of Appeals had held that *former* ORS 138.050 precluded review when a defendant pleaded guilty or no contest while entering diversion, was subsequently convicted of DUII, and argued that the trial court erred by terminating diversion and entering the conviction. Legislative history confirms that ORS 138.105(5) precludes review of defendant's argument in this case.

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[4] In *Cloutier*, the defendant's appeal challenged the constitutionality of a fine imposed after he pleaded no contest, entered diversion, and was subsequently terminated from diversion and convicted of DUII. This court held that whether the fine violated due process principles was not "cognizable under ORS 138.050" because the defendant had not asserted that it exceeded a "maximum [sentence] expressed by means of legislation" or that the fine constituted cruel and unusual punishment. *Cloutier*, 351 Or at 70, 104.

Defendant quotes statements from memoranda that were written by individual work group members and appended to the Oregon Law Commission Report. (Pet Br 43-45). The Report expressly declares, however, that statements in those memoranda do not represent the official viewpoint of the Oregon Law Commission or the work group. As the "[d]isclaimer" to the Report's Appendices explains, "Any legal analysis or expression of opinion is that of the author of the memorandum and do[es] not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole, or its members." (Report at p 29; bold omitted). Nothing in the Report (or elsewhere in the legislative history) suggests that the 2017 Legislature meant to adopt or agree with the statements that defendant cites.

Defendant notes that much of the discussion in the 2017 Legislature "focused on the fact that the bill would expand appellate review in misdemeanor cases," and she quotes a state senator's statement that "[t]he number of appeals will increase" as a result of the bill. (Pet Br 41). Notably, the bill that the legislature adopted—Senate Bill 896—contained far more than the text codified in ORS 138.105(5). *See* Or Laws 2017, ch 529, § 13 (containing text codified at ORS 138.105(5)); Or Laws 2017, ch 529, §§ 1-26 (amending 14 statutes, repealing14 statutes, and enacting seven sections to be made part of ORS 138.010-138.310); Oregon Law Commission Report at 5, describing SB 896 as intended to "clarify the procedural law governing appeals

by defendants and the State from circuit court to the Court of Appeals or Supreme Court in criminal cases"). Although the discussion that defendant describes refers to one aspect of the bill, nothing in that discussion suggested that legislators intended or expected to increase the scope of appellate review in cases involving guilty or no contest pleas. (Pet Br 41).

Instead, the history that does address such cases—the portion of the Oregon Law Commission Report that addresses the wording found in ORS 138.105(5)—shows that the intent behind the pertinent wording was to "restate" and retain existing limits on review when an appellant pleaded guilty or no contest. In identifying those existing limits, the Report used wording from Court of Appeals case law construing *former* ORS 138.050. Those limits precluded review when—as in this case—a defendant in a DUII diversion case argued that the trial court erroneously terminated diversion and erroneously entered a conviction. Legislative history confirms that ORS 138.105(5) precludes review of defendant's argument.

3. Maxims of construction cannot assist defendant.

If the meaning of a statute is unclear after consideration of text, context, and legislative history, courts "may resort to general maxims of statutory construction" to help determine legislative intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612, 859 P2d 1143 (1993). Defendant argues that if ORS 138.105(5) precludes review of her argument for reversal, it violates

various state and federal constitutional provisions, and that any such construction—under maxims of construction—is disfavored. (Pet Br 45-62). But as recounted above, text, context, and legislative history are unambiguous: They show that the legislature intended ORS 138.105(5) to preclude review here. As a result, the maxim of construction that defendant invokes cannot assist her.

In any event, and as discussed in the next sections of this brief, ORS 138.105(5)—in precluding review here—comports with constitutional principles.

B. Construing ORS 138.105(5) as precluding review comports with the Oregon Constitution.

1. Construing ORS 138.105(5) as precluding review does not violate Article VII (Amended), section 3, of the Oregon Constitution.

Defendant argues that if ORS 138.105(5) precludes review, it violates Article VII (Amended), section 3, of the Oregon Constitution. (Pet Br 61). In fact, constitutional text, existing case law, and the history behind the provision show that the legislature has authority to limit appellate reviewability. *See State v. Lane*, 357 Or 619, 624-25, 355 P3d 914 (2015) ("[i]n construing the constitution, we examine the text of the disputed provision in its historical context, along with relevant cases interpreting it"; "[i]n the case of provisions adopted * * * by initiative * * * , the focus is on the meaning understood by the voters who adopted them").

a. The Oregon Constitution gives "plenary" authority to the legislature, and nothing in Article VII (Amended), section 3 deprives it of authority to limit reviewability.

"With respect to a state law, * * * it is elementary that the legislature has plenary authority except for such limits as may be found in the constitution or in federal law." *City of La Grande v. Public Employes Retirement Bd.*, 281 Or 137, 142, 576 P2d 1204 (1978); *State v. Moyle*, 299 Or 691, 699, 705 P2d 740 (1985) ("legislative power to select the objectives of legislation is plenary, except as it is limited by the state and federal constitutions"). As this court explained 85 years ago, "the people, in adopting" the Oregon Constitution,

> committed to the legislature the whole lawmaking power of the state, which they did not expressly or impliedly withhold. Plenary power in the legislature, for all purposes of civil government, is the rule, and a prohibition to exercise a particular power is an exception.

Jory v. Martin, 153 Or 278, 284-85, 56 P2d 1093 (1936).[5]

That means that ORS 138.105(5), in precluding appellate review of defendant's argument, reflects a valid exercise of legislative authority under the Oregon Constitution *unless* something in the state constitution says otherwise.

Defendant concedes that the legislature has the authority to determine appealability—to dictate when a party has a right to appeal, and to dictate when

[5] *See also* Or Const, Art IV, § 1 ("[t]he legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly").

a party may *not* appeal. (Pet Br 49-50); *see, e.g.*, *Waybrant v. Bernstein*, 294 Or 650, 653, 661 P2d 931 (1983) ("the right to appeal is wholly statutory"). She argues, however, that once the legislature has determined that a party has the right to appeal from a particular type of judgment or order, Article VII (Amended), section 3, prohibits it from limiting appellate court ability to review particular issues that might have been litigated during the underlying case. Yet nothing in Article VII (Amended), section 3, generally prohibits the legislature from limiting reviewability, or expressly authorizes courts to ignore such limits. Moreover, the provision's history (discussed in the next section of this brief) shows that section 3 was not intended to restrict the legislature's ability to limit review.

The voters adopted Article VII (Amended), section 3, in 1910. The provision is four sentences long, and those sentences are laid out below (with extra space between them to aid readability):

> In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.
>
> Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal.
>
> If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed

> from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court.
>
> Provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court.

Under Article VII (Amended), section 3, the legislature may not prohibit the Supreme Court from reviewing a harmless-error argument or affirming on harmless-error grounds. But section 3 does not limit legislative authority to govern appellate review in any other way. Section 3 does not declare that the legislature, although free to identify when a party may appeal, is not generally free to limit review. And section 3 does not declare that courts are generally free to ignore legislative limits on review.

An instructive contrast can be found in Article XI, section 2,of the Oregon Constitution, a provision enacted by the voters in 1906. *See City of La Grande*, 281 Or at 140 (discussing history of Article XI, section 2). Article XI, section 2, expressly prohibits the legislature from taking certain enumerated actions: "The Legislative Assembly *shall not* enact, amend or repeal any charter or act of incorporation for any municipality,

city or town." (Emphasis added.) No similar wording exists in Article VII (Amended), section 3. Nothing in Article VII (Amended), section 3, states that the legislature "shall not" limit the issues that an appellate court may review in an appealable case.

Defendant nonetheless argues that the second and third sentences in section 3 show that the legislature determines appealability and that the courts are the final word on reviewability. The constitutional text does not support that assertion. Defendant argues that section 3's second sentence "governs how a party may take an appeal," and that its use of the phrase "[u]ntil otherwise provided by law" suggests that "it authorizes the legislature to alter that process." (Pet Br 48-49). Defendant then describes section 3's third sentence as part of "reviewability provisions" that "govern[] the appellate court's powers and duties," noting that "[t]hat sentence does *not* include the phrase 'until otherwise provided by law.'" (Pet Br 49). According to defendant, that "indicates that the reviewability provisions of section 3 are not subject to legislative modification." (Pet Br 49). The wording defendant quotes does not support her argument.

As a starting point, section 3's second sentence does not address or discuss appealability in general, or the legislature's authority to determine when an appeal may be taken. Instead, that sentence merely

authorizes the parties to attach certain things to a bill of exceptions *if* a right to appeal exists (a party may do so "upon appeal of any case to the supreme court") while implicitly authorizing the legislature (by using the phrase "[u]ntil otherwise provided by law") to say otherwise.

Section 3's second sentence, in other words, *presupposes* the existence of an appeal (along with the appellant's right to pursue an appeal). It cannot fairly be characterized as an attempt to describe the legislature's constitutional power to determine whether a case is appealable. The second sentence does not support defendant's claim that it governs appealability, or support her efforts to contrast that "appealability" provision with the third sentence's supposed references to "reviewability."

Next, nothing in section 3's third sentence grants the judiciary the power to determine, in a case in which a party has the right to appeal, whether to review a particular ruling. Rather than authorizing appellate courts to review whichever lower court rulings that they wish to review, that sentence merely identifies some of the *remedies* that an appellate court may prescribe when resolving issues that are properly before it. The third sentence requires an appellate court to affirm on harmless-error grounds (if the judgment entered "was such as should have been rendered * * * notwithstanding any error committed during the trial"), and also permits the court to direct that the

"judgment appealed from should be changed" if the court "can determine what judgment should have been entered in the court below."

Article VII (Amended), section 3's text does not authorize appellate courts to determine which issues to review in an appealable case, or authorize courts to ignore legislative limits on reviewability.

b. Case law shows that the legislature has constitutional authority to determine reviewability.

Existing case law supports the conclusion that the legislature acted within its authority by limiting reviewability via ORS 138.105(5).

In *State v. Nix*, 356 Or 768, 772, 345 P3d 416 (2016), this court stated "[t]hat there is no inherent right to an appeal," *and* that "[t]he statute authorizing an appeal may include limitations on the issues that may be reviewed on appeal." Elsewhere, this court has repeatedly stated the legislature is generally entitled to impose limits on appellate litigation and on appellate court authority. *See In re Logsdon*, 234 Or 66, 70, 380 P2d 111 (1963) ("[t]he right to appeal is * * * subject to any limitations imposed by the statute conferring the right"); *McGargar v. Moore*, 89 Or 597, 599, 175 P 77 (1918) (a court "cannot acquire authority to act except in the manner provided by statute * * * and can exercise only power expressly conferred upon it by statute"); *Knight v. Beyers*, 70 Or 413, 419, 134 P 787 (1913) ("an appellant who would

otherwise be without remedy must exercise such privilege subject to such conditions as may be imposed by the Constitution or statues").

It also is worth noting that if defendant is correct, and if the legislature may govern appealability but may not impose limits on an appellate court's review of rulings made in an appealable case, the legislature would—presumably—also be powerless to impose procedural requirements in such a case. Yet this court has deemed valid (despite a challenge under Article VII (Amended), section 1) a statute requiring the Court of Appeals to review and resolve particular appeals "within three months from the time of taking the appeal." *State ex rel Emerald People's Utility Dist. v. Joseph*, 292 Or 357, 362-63, 640 P2d 1011 (1982).

In short, existing case law supports the conclusion that Article VII (Amended), section 3, permits the legislature to limit appellate review.

c. The history behind Article VII (Amended), section 3, shows that the legislature has authority to determine reviewability.

The voters adopted Article VII (Amended) in 1910. As Article VII (Amended), section 2, explains, the voters intended Article VII (Amended) to alter existing or "present" law *only* to the extent that it did so "expressly":

> The courts, jurisdiction, and judicial system of Oregon, except so far as *expressly* changed by this amendment, shall remain as at present constituted until otherwise provided by law.

Art VII (Amended), § 2 (emphasis added).

That is significant because when voters adopted Article VII (Amended), section 3, "present" Oregon constitutional principles recognized that the legislature was authorized to determine appellate reviewability. First, statutes enacted close in time to the Oregon Constitution's 1857 creation reflected an understanding that the legislature possessed authority to determine appealability *and* reviewability. *See State v. Hirsch/Friend*, 338 Or 622, 650-52, 114 P3d 1104 (2013) (examining "statutes enacted by the Oregon territorial legislature or by the Legislative Assembly soon after statehood" in determining framers' intent in adopting Article I, section 27, right to bear arms). As this court observed in *Cloutier*, "[t]he Oregon Legislature first conferred appellate jurisdiction to review a judgment entered in a criminal case in 1864." *Cloutier*, 351 Or at 76. Significantly, that statute addressed both appealability and reviewability:

> An appeal to the supreme court may be taken by the defendant, from a judgment on a conviction in a circuit court; and *upon the appeal, any actual decision of the court, in an intermediate order or proceeding forming a part of the judgment roll*, as prescribed by section 192, *may be reviewed*.

Cloutier, 351 Or at 76-77, quoting General Laws of Oregon, Crim. Code, ch XXIII, § 226, p. 480 (Deady 1845-64) (emphasis added).

Second, this court's case law, as of 1910, confirmed that the legislature possessed constitutional authority to limit reviewability. In *Kadderly v. City of Portland*, 44 Or 118, 123-24, 126, 155-57, 74 P 710 (1903), this court rejected a

state constitutional challenge to a state statute; the statute approved the City of Portland's incorporation and authorized property owners to appeal city council findings reassessing property values, but provided that on appeal "the circuit court is limited to a determination of the amount of special benefits equitably to be assessed against the property."[6]

The plaintiffs argued that the legislatively approved charter, in limiting review in that manner, violated Article VII, section 9, of the Oregon Constitution. *Kadderly*, 44 Or at 155-56. Article VII, section 9, provided that "All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals." *Kadderly*, 44 Or at 156. This court rejected the argument, holding that the legislature acted constitutionally when it "limited [circuit court authority on appeal] to a determination of the amount of special benefits

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[6] The challenged provision of law in *Kadderly* was section 401 of the city charter, but that provision was legislatively created. See Sp. Laws 1903, p. 3, cited by *Kadderly*, 44 Or at 123 (creating provision at issue); *cf. City of Portland v. Gaston*, 38 Or 533, 534, 536, 63 P 1051 (1901) (addressing portions of City of Portland charter adopted by state legislature and construing what "the legislature intended" in adopting "[t]he language of the charter").

equitably to be assessed against the property." *Id.* at 155-57. The court explained that

> [w]hile [Article VII, section 9,] confers upon the circuit courts appellate jurisdiction, it leaves the regulation of the mode of proceedings on an appeal and the limitation of the cases wherein an appeal may be taken to be provided by statute. Whenever the Legislature determines this question, and fixes the rule in any particular case, the question is thereby settled * * * .

Kadderly, 44 Or at 156-57.

As of 1910, this court thus recognized the legislature's constitutional authority to limit review in appealable cases. And although Article VII (Amended) was intended to alter existing law only where it did so "expressly." nothing in Article VII (Amended), section 3, expressly declares an intent to deprive the legislature of its plenary authority to govern reviewability. The history behind Article VII (Amended) shows that it was *not* intended to deprive the legislature of that authority, or to let courts disregard legislative limits on reviewability.

Defendant claims that the argument supporting Article VII (Amended), section 3, in the 1910 Voters' Pamphlet shows that "the second and third sentences of section 3 were intended to give the appellate court new powers and duties." (Pet Br 50). Yet the passage that defendant quotes reflects no intent to let appellate courts determine what might be reviewable on appeal, or to ignore legislative restrictions. The passage that defendant quotes shows that section

3's supporters hoped to increase judicial efficiency by reducing the number of new trials that might result from appellate review, a goal which (as discussed below) undermines defendant's argument. The quoted passage asserted that the proposed provision was intended

> to simplify procedure on appeals to the Supreme Court and remove the pretext for new trials in those cases in which substantial justice is done by the verdict and judgment, but in which the trial court may have made a technical mistake; or if the verdict is just and the judgment is not, to make it the duty of the Supreme Court to enter the proper judgment, if that can be done, instead of sending the case back for a new trial * * * .

Official Voters' Pamphlet, General Election, November 8, 1910, p 177.

The stated goal of reducing the number of new trials undermines defendant's argument, which claims that courts are entitled to review whatever rulings they wish to review, and without regard to legislative limits. If defendant is correct, section 3's passage entitled appellate courts to ignore existing statutory limits on review, and to thereby increase the number of appeals that potentially could result in remand and new trials. Yet such a result runs counter to the goal stated by section 3's proponents—to "simplify" the appellate procedure and reduce the number of new trials that the appellate system produced.

Article VII (Amended), section 3's history shows that it did not grant appellate courts the authority to determine whether to review a lower court ruling. With respect to reviewability, the voters intended that Article VII

(Amended), section 3, would not alter existing law, which recognized the legislature's authority to govern reviewability.

2. Construing ORS 138.105(5) as precluding review here does not violate Article VII (Amended), section 1.

Defendant argues that if ORS 138.105(5) precludes review, it conflicts with separation-of-powers principles, and she relies on the following portion of Article VII (Amended), section 1: "The 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." (Pet Br 52-54).

But as this court has explained when discussing Article VII (Amended), section 1, "[t]here can be no question that the legislature may enact laws prescribing the exercise of judicial powers." *Circuit Court v. AFSCME*, 295 Or 542, 547, 669 P2d 314 (1983). Indeed, "[o]nly an outright hindrance of a court's ability to adjudicate a case * * * or the substantial destruction of the exercise of a power essential to the adjudicatory function, * * * will prompt an article VII, section 1 violation." *AFSCME*, 295 Or at 551. Under this court's case law, the legislature violates Article VII (Amended), section 1, if it unduly interferes with a court's efforts to *resolve* an issue that is properly before it, or with a court's efforts to determine the procedures that it follows when resolving a legal issue. For example, the legislature may not dictate the ultimate result that a court must reach, unduly impinge upon a court's ability to assign

particular judges to a case, or unduly limit court authority to govern litigants' in-court behavior. This court's case law further suggests that the legislature should not try to dictate the analytical order in which a court proceeds when deciding an issue.

The legislature may, however, do what it did in ORS 138.105(5): It may limit the issues that an appellate court may review. Because such limits do not tell appellate courts how to decide or "adjudicate" the issues that are before them, those limits do not violate Article VII (Amended), section 1.

a. ORS 138.105(5) does not dictate the result that a court must reach, impinge upon courts' ability to assign a judge to a particular case, or impinge upon court ability to govern litigants' behavior.

The legislature hinders a court's ability to "adjudicate," or interferes with powers "essential to the adjudicatory function," if it dictates the actual result that a court must reach when addressing an issue before it. *See City of Damascus v. State*, 367 Or 41, 68, 472 P3d 741 (2020) (noting that statute at issue does not "tell us what result we should reach in deciding the case, which we likely would view as a clear interference with the judicial function"). *Webster's Third New Int'l Dictionary* (unabridged ed 1993) at 27 (defining "adjudicate," in definition **1a**, as "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised"); www.merriam-webster.com (defining "adjudicate" as "to make an official decision about who

is right (in a dispute): to settle judicially"). ORS 138.105(5) does not, however, dictate the result that courts should reach on the merits of any particular ruling.

The legislature also may not unduly burden courts' ability to determine which of their judges should preside over a particular case, but ORS 138.105(5) does not violate that principle either. ORS 138.105(5) thus is unlike the statute at issue in *State ex rel Bushman v. Vandenberg*, 203 Or 326, 276 P2d 432, 280 P2d 344 (1955), which *AFSCME* cited as an example of an "outright hindrance of a court's ability to adjudicate a case." *AFSCME*, 295 Or at 551. Rather than limiting appealability or reviewability, the statute in *Bushman* entitled a litigant to disqualify a judge from sitting on the litigant's case "by merely filing an application for a change of judge," and without alleging any prejudice on the judge's part. *Bushman*, 203 Or at 331. This court deemed the statute unconstitutional. *Bushman*, 203 Or at 337.[7] ORS 138.105(5), in contrast, does not limit appellate court ability to assign judges, or otherwise interfere with the courts' internal workings, once an appeal is properly commenced.

In addition, the legislature may not impinge upon an appellate court's power to govern the behavior of litigants who appear before it, but nothing in ORS 138.105(5) runs afoul of that principle. ORS 138.105(5) is therefore

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[7] *Bushman* held that the statute violated Article III, section 1. *Bushman*, 203 Or at 341. *AFSCME*, however, viewed the statue as an example of an Article VII (Amended), section 1 violation. *AFSCME*, 295 Or at 551.

unlike the statute at issue in *State ex rel Oregon State Bar v. Lenske*, 243 Or 477, 405 P2d 510, 407 P2d 250 (1966), which *AFSCME* cited as an example of "substantial destruction of the exercise of a power essential to the adjudicatory function." *AFSCME*, 295 Or at 551. In *Lenske*, the legislature acted unconstitutionally by generally prohibiting this court from imposing a fine of over $100 for contempt; it thus "substantially destroy[ed] this court's power to enforce its lawful orders and decrees." *Lenske*, 243 Or at 495-96.[8] But unlike the statute in *Lenske*, ORS 138.105(5) places no limit on appellate courts' power to govern litigants' behavior.

b. ORS 138.105(5) does not dictate the analytical order in which appellate courts proceed when resolving issues properly presented to them.

Finally, ORS 138.105(5) is unlike the statute discussed in *City of Damascus*. Although defendant cites *City of Damascus* as "standing for the proposition that the judicial power gives a court discretion to disregard legislative limits on judicial review" (Pet Br 54), *City of Damascus* does not support that assertion. It does not suggest that the legislature is powerless to limit review, or that the judiciary may ignore legislative restrictions on reviewability. At most, *City of Damascus* suggests that the legislature should

[8] *Lenske* held that the legislature violated Article III, section 1. *Lenske*, 243 Or at 495-96. *AFSCME*, however, viewed the statue as an example of an Article VII (Amended), section 1 violation. *AFSCME*, 295 Or at 551.

not dictate the analytical order in which a court proceeds when resolving multiple issues that are properly presented to it. ORS 138.105(5) does not violate that principle.

The statute at issue in *City of Damascus* provided two independent alternative mechanisms for ratifying an election that disincorporated the City of Damascus, and it entitled any interested or aggrieved person to have this court review the statute's validity. *City of Damascus*, 367 Or at 43, 46. The statute *also* required this court to first determine whether section 1 of the statute (identifying one of the two "mechanisms for ratifying" the disincorporation result) was valid, and directed this court to address the validity of sections 2 and 3 (identifying the second mechanism) "only if" the court first deemed section 1 invalid. *City of Damascus*, 367 Or at 46, 48.

This court, however, held that sections 2 and 3 were valid without addressing section 1's validity, while noting a "potential constitutional issue of whether the legislative's instruction"—the instruction about the analytical order in which the court should proceed—"itself violates the separation of powers provision of the Oregon Constitution, Article III, section 1, because it unduly interferes with or burdens our exercise of the judicial function." *City of Damascus*, 367 Or at 71, 68.

Defendant acknowledges that *City of Damascus* cited Article III, section 1, but asserts that "the concern it expressed is more consistent with Article VII

(Amended), section 1." (Pet Br 54 n 15).[9] But even if *City of Damascus* had held that the statute at issue violated Article VII (Amended), section 1,[10] nothing about such a holding would suggest that ORS 138.105(5) is unconstitutional. Significantly, the statute at issue in *City of Damascus* did not purport to limit appellate court review. In fact, the statute identified both (1) the validity of section 1 *and* (2) the validity of sections 2 and 3 as issues that this court *could* review.

Rather, the statute tried to dictate the *analytical order* in which this court should proceed when addressing issues that were properly before it, even though—as a matter of logic—the statute could be deemed valid without

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[9] Article III, section 1, provides:

> The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.

Defendant does not argue that ORS 138.105(5) would violate that provision by precluding appellate review.

[10] As defendant acknowledges, *City of Damascus* did not actually "decide the constitutionality of the reviewability provisions in SB 226," even under Article III, section 1. (Pet Br 54); *see City of Damascus*, 367 Or at 69 (stating that the court is "not inclined to issue a definitive ruling on the constitutional separation of powers question whether is proper for the legislature to decide the order in which we may consider alternative arguments in a specific case").

following that order. In fact, because sections 2 and 3 were constitutional, this court held that the statute was "valid" and gave "effect" to the disincorporation vote, and the court did so without addressing address section 1's validity. *City of Damascus*, 367 Or at 43, 71.

Rather than limiting the issues that this court could review, the offending portion of the statute in *City of Damascus* tried to dictate the manner in which this court set out to resolve those issues. That is the way in which this court suggested that the statute potentially "burden[ed] [its] exercise of the judicial function"—by trying to influence *how* the court addressed and resolved the issues properly presented to it. In that sense, the statute potentially interfered with this court's adjudicatory function.

In contrast, ORS 138.105(5) does not dictate the analytical order in which an appellate court must resolve the issues presented to it. It does not require a court to opine on an issue that is not essential to resolution of an appeal, dictate how a court must go about addressing or adjudicating issues properly before it, or dictate the result an appellate court must reach.

By limiting review in cases in which a defendant pleaded guilty or no contest, ORS 138.105(5) does not violate Article VII (Amended), section 1. It reflects a valid exercise of the Legislative Assembly's plenary authority.

C. Construing ORS 138.105(5) as precluding review complies with the federal constitution.

Defendant argues that if ORS 138.105(5) precludes review of her argument, it violates equal protection and due process principles found in the Fourteenth Amendment to the United States Constitution. (Pet Br 62-70). Defendant relies on the following portion of the Fourteenth Amendment: "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Pet Br 61). Yet ORS 138.105(5), in precluding review, violates neither the Equal Protection nor the Due Process Clause.

1. Construing the provision as precluding review does not violate equal protection principles.

a. The Equal Protection Clause does not require the state and a defendant to share reciprocal appellate rights.

Defendant claims that if ORS 138.105(5) precludes review, it violates equal protection principles because it fails to give a defendant in a DUII diversion case the same appellate rights as the state: That is, although the state may appeal when a trial court terminates diversion and dismisses a DUII charge, a defendant may not challenge a DUII conviction that is based on a finding that she violated diversion conditions. (Pet Br 61-66). Yet the Equal Protection Clause does not require the type of parity between the state and criminal defendants that defendant insists upon.

The Equal Protection Clause prohibits a state from depriving "any person" from the equal protection of the laws. As the United States Supreme Court has explained, while "'Due Process' emphasizes fairness between the State and the individual dealing with the State," "'Equal Protection' * * * emphasizes disparity in treatment by a State *between classes of individuals* whose situations are arguably indistinguishable." *Evitts v. Lucey*, 469 US 387, 405, 105 S Ct 830, 83 L Ed 2d 821 (1985) (internal quote marks omitted). As the Court of Appeals put it in *Merrill*, 311 Or App at 495, the Equal Protection Clause thus "addresses and limits unequal treatment by *the state* of similarly situated '*person[s]* within its jurisdiction,'" but "does not address the differential treatment of the state versus individuals (or any others who qualify as persons)." Defendant, however, makes no claim that ORS 138.105(5) treats "classes of individuals" unequally—she claims that the statute treats *the state* differently from individuals such as herself. As a result, defendant's argument does not implicate the Equal Protection Clause.

b. In any event, a rational basis exists for the disparity that defendant focuses on.

Even if defendant's argument implicated equal protection principles, ORS 138.105(5)'s limits on review do not violate those principles. If a statute does not guarantee "like treatment to all persons similarly situated," it is unconstitutional "only when such attempted classification is arbitrary and

unreasonable." *City of Klamath Falls v. Winters*, 289 Or 757, 776, 619 P2d 217 (1980). Although defendant suggests that the pertinent statutory schemes "arbitrarily let one party appeal but not the other party," and that no rational basis justifies that fact (Pet Br 8), she is mistaken.

The legislature has acted rationally and non-arbitrarily by adopting the statutory scheme at issue, which includes both ORS 138.105(5) and the diversion statutes. When a defendant pleads guilty to DUII as part of a diversion agreement, Oregon statutes give the defendant certain opportunities that other criminal defendants do not receive, and they deprive the state of certain opportunities that it would possess in other cases in which a defendant pleads guilty or no contest. In exchange, those statutes require that the defendant not burden the state or the judiciary by challenging her conviction in the event that diversion is unsuccessful.

If the defendant pleads guilty but successfully completes diversion, she obtains dismissal of the DUII charge with prejudice under ORS 813.255(5). Because the charge is dismissed, the state sacrifices certain rights that it would possess under other circumstances involving guilty pleas. The necessary result is that the state will not be able to use the guilty plea against the defendant in future proceedings, even though the defendant admitted to driving while intoxicated and violating ORS 813.010. If the defendant commits another DUII offense, the state will not be able to invoke the earlier guilty plea as a basis to

charge felony DUII instead of misdemeanor DUII. *See* ORS 813.010(5) (defining DUII as a felony if the defendant was "convicted" of DUII three times in the prior decade). If the defendant commits a future felony, the state will not be entitled to use the earlier guilty plea to enhance her sentence under the state sentencing guidelines, as it did not result in a conviction. *See* OAR 213-004-0001 and OAR 213-004-0006 (using misdemeanor convictions to increase criminal history rankings and presumptive sentences under sentencing guidelines).

But in exchange for the benefits that the diversion scheme provides for defendants (and for the limits that it places on the state) when diversion is successful), the scheme requires a defendant who chooses diversion—in the event that diversion is unsuccessful and a conviction is entered—to forgo the opportunity to challenge the conviction on direct appeal. Because the diversion scheme requires the defendant to plead guilty or no contest, ORS 138.105(5) precludes the defendant from challenging the validity of any resulting conviction on appeal. In essence, the legislative scheme provides certain benefits and trade-offs to defendants and to the state; although it limits a defendant's appellate options, it provides corresponding potential benefits to defendants while limiting the state's options if diversion is successful. In that

sense, the legislative scheme can be described as rational, and as ensuring a type of broadly "equal" treatment.[11]

It also is worth noting that ORS 138.105(5) deprives a DUII defendant of the ability to challenge the validity of her conviction *only* if she voluntarily chooses to plead guilty or no contest. In that sense also, the inability to obtain review of that conviction cannot be described as an "arbitrary" outcome. It is triggered only if the defendant has decided for herself that a guilty or no contest plea, under all the circumstances, is preferable to proceeding to trial.

c. None of the decisions that defendant cites suggests that the statutory scheme at issue violates the Equal Protection Clause.

In claiming that Oregon's statutory scheme must give DUII defendants the same right to appeal that the state receives in diversion cases, defendant relies on *The Sydney v. Providence Washington Ins. Co.*, 139 US 331, 336, 11 S Ct 620, 35 L Ed 177 (1891). (Pet Br 65). In *The Sydney*, the Supreme Court stated that "[t]he right of appeal must be reciprocal," but did not explain why or

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[11] It also should be remembered that Oregon statutes place more restrictions on the state's right to appeal in criminal cases than they impose on defendants. *See* ORS 138.045 (governing state's ability to appeal); ORS 138.035 (governing defendant's right). If a case goes to trial and results in an acquittal, for example, the state is not free to challenge evidentiary or other rulings made during the trial. But if a defendant is convicted following trial, the defendant is free to challenge evidentiary and other rulings made during trial.

refer to any constitutional provision. 139 US at 336.[12] In any event, *The Sydney* involved a dispute between private parties, and thus cannot reflect that a criminal defendant's right to appellate review must be equivalent to the *state's* right in a given case. *Id.* at 332.

Defendant also relies on *Lindsey v. Normet*, 405 US 56, 77, 92 S Ct 862, 31 L Ed 2d 36 (1972). (Pet Br 62-63). Yet *Lindsey*, at most, reflects that equal protection principles require the state to treat similarly situated individuals similarly. *See Lindsey*, 405 US at 74-78 (holding that Oregon statute violated the Equal Protection Clause because it imposed a greater financial burden on those "appealing an FED action" compared to other civil litigants who wish to appeal). Nothing in *Lindsey* suggests that the Equal Protection Clause requires that the *state's* appellate review rights must be no greater than other litigants' rights.

Defendant cites *Shortridge v. State*, 478 NW2d 613, 615 (Iowa 1991), as well, in which the Iowa Supreme Court stated that "so long as the State is still afforded a right of direct appeal from prison disciplinary decisions, that right must extend to prisoners as well." (Pet Br 63). For three reasons, that decision

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[12] *The Sydney*, 139 US at 336, cited *Hilton v. Dickinson*, 108 US 165, 2 S Ct 424 (1883), and *Starin v. The Jessie Williamson, Jr.*, 108 US 305, 311, 2 S Ct 669 (1883), in making the quoted statement. Yet neither decision refers to the Equal Protection Clause (or to any other constitutional provision). *Hilton*, 108 US at 166-76; *The Jessie Williamson*, 108 US at 308-11.

cannot assist defendant. First, it is not clear from the decision that the Iowa Supreme Court was relying on the federal Equal Protection Clause and not some state provision of law. Second, if the decision does suggest that equal protection principles require statutes to treat the state and its citizens equally, it is at odds with Supreme Court's explanation in *Evitts* that the Equal Protection Clause merely requires the state to avoid treating classes of *individuals* disparately. Third, and in any event, nothing in *Shortridge* suggests that the statutory scheme at issue was truly analogous to the scheme at issue here. The scheme at issue here provides that, when a defendant pleads guilty and enters diversion, the defendant and the state both receive certain potential benefits, and both sacrifice certain potential opportunities that they might otherwise have. The scheme can be described as providing for a type of broadly equal treatment, and can be described as rational. In contrast, the scheme discussed in *Shortridge* deprived inmates of the right to appeal prison disciplinary appeals but does not appear to have required any roughly equivalent sacrifices from the state. *Shortridge*, 478 NW2d at 614-16.[13]

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[13] Defendant also cites *In re City of Rochester*, 224 NY 386, 397, 121 NE 102, 105 (1918), in which the New York Court of Appeals held that a statute violated equal protection principles by granting the city, but not landowners, the right to appeal certain decisions. (Pet Br 64). As with *Shortridge*, that decision is at odds with the *Evitts* Court's explanation that equal protection principles apply when the state is treating different "classes of individuals" disparately.

The case law that defendant relies on does not demonstrate that the statutes at issue violated the Equal Protection Clause.

2. Construing ORS 138.105(5) as precluding review does not violate due process principles.

Construing ORS 138.105(5) as precluding review also does not violate due process principles.

a. Due process principles do not require that a DUII defendant who enters diversion possess the same appellate review rights as the state.

Defendant argues that due process principles require a that a DUII defendant in a diversion case possess an equivalent right to appeal compared to the state. Yet the statutory scheme at issue fully complies with due process requirements.

In part, due process principles emphasize "fundamental fairness." "'Due Process' emphasizes fairness between the State and the individual dealing with the State." *Evitts*, 469 US at 405. Due process principles also require that before the state deprives a citizen of a constitutionally cognizable liberty or property interest, it must provide certain procedural protections. For example, because probation revocations can result in loss of liberty, the Due Process Clause requires that a probationer first receive written notice of the alleged violation, disclosure of the evidence that the allegation is based on, an opportunity to be heard and to present evidence disputing the allegation, an opportunity to confront and cross-examine adverse witnesses, and a written

decision by a "neutral and detached hearing body." *Gagnon v. Scarpelli*, 411 US 778, 786, 93 S Ct 1756, 36 L Ed 2d 656 (1973) (internal quotes omitted).

The statutory scheme at issue satisfies fundamental-fairness principles and satisfies procedural due process requirements. Oregon statutes ensure that a DUII defendant who enters diversion will be terminated only after receiving notice of that possibility, only after receiving an opportunity to refute the evidence offered against her at a court hearing, only after receiving an opportunity to present her own evidence, and only after a judge makes any necessary factual determinations and legal rulings. ORS 813.255; ORS 813.225. The statutory scheme provides a mandatory process that requires judicial adjudication and is designed to prevent erroneous or extra-judicial deprivations of liberty.

Moreover, a first-time DUII defendant is not required to plead guilty or no contest and enter diversion. Whether to do so, and to forgo the right to challenge the validity of any resulting conviction, is up to the defendant. And as discussed already, although a defendant who enters diversion does not possess the same appellate review rights as the state, the diversion scheme provides benefits to defendants who enter diversion that other defendants do not receive, while requiring the state to potentially forgo certain opportunities that the state would retain in other cases in which a defendant pleads guilty or no

contest. Those facts are significant. They show that the statutes that govern diversion are not one-sided and, taken together, are fundamentally fair.

Defendant cites *Wardius v. Oregon*, 412 US 470, 93 S Ct 2208, 37 L Ed 2d 82 (1973), to support her assertion that due process principles require that a DUII defendant in a diversion case must possess the same appellate rights as the state. (Pet Br 64). *Wardius* does not, however, support that assertion. *Wardius* held that Oregon statutes governing discovery in criminal trials violated the Due Process Clause because they required defendants to divulge an alibi defense prior to trial (including details of the alibi and names and addresses of any alibi witnesses) but "made no provision for reciprocal discovery." *Wardius*, 412 US at 471-72 and n 3, 475. The statutes thus "require[d] a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 476. That disparity violated due process principles. *Id.* at 472.

The scheme at issue in *Wardius*, however, differed dramatically from the scheme at issue here. The statutory scheme in *Wardius* struck at the heart of a criminal defendant's ability to defend herself against a criminal charge, by preventing a defendant from presenting an alibi defense if she violated her discovery obligation to the state. *Wardius*, 412 US at 471-72. Moreover, the scheme was one-sided—although it gave the state the right to discover the

details of an alibi defense before trial, it did not require "reciprocal discovery" rights to the defendant, or otherwise provide a defendant with some other right that could be said to help "balance the scales."

The statutory scheme at issue here does not implicate fundamental fairness concerns in the same way. First, the scheme at issue does not impinge upon a defendant's ability to dispute a criminal charge. Instead, the scheme is triggered only if a defendant *chooses* to enter a guilty or no contest plea and enter diversion. Second, and as recounted already, the scheme does provide benefits and trade-offs for both defendants and the state.

The statutory scheme at issue does not resemble the scheme deemed invalid in *Wardius*. That scheme comports with due process notions of fairness and complies with procedural due process requirements.

b. ORS 138.105(5) does not violate due process principles by eliminating a "traditional protection" against erroneous deprivations of liberty.

Defendant argues that if ORS 138.105(5) precludes review of the trial court's decision to terminate diversion and enter a DUII conviction, it eliminates a "traditional protection" against the erroneous deprivation of liberty, and violates the Due Process Clause in that way as well. (App Br 67-70). Here, too, defendant is mistaken.

The Supreme Court has never held that a state statute violates due process requirements if it limits appellate review for a criminal defendant who

pleaded guilty or no contest. *Cf. Redick*, 312 Or App at 261 ("[n]one of the cases defendant relies on * * * holds that a state statute limiting the scope of a criminal appeal for a defendant that pleaded guilty or no contest violates due process"). As defendant conceded in the Court of Appeals, "[d]ue process does not require criminal appeals" at all. (App Br 26). Nor do due process principles require a state to provide a "diversion" option for first-time DUII (or other) offenders, or any other option that would allow a person who pleads guilty or no contest to nonetheless avoid a conviction.

Defendant suggests that *Class v. United States*, ___ US ___, 138 S Ct 798, 803-04, 200 L Ed 2d 37 (2018) "shows that appellate review after a guilty plea is a traditional protection of liberty, which can become part of due process." (Pet Br 69). Defendant reads too much into *Class*. *Class* did not involve a statutory scheme that limited appellate review in cases involving guilty or no contest pleas. Instead, the issue in *Class* was whether the defendant's guilty plea precluded him from challenging, on appeal in federal court, the constitutionality of the statute under which he was charged. *Class*, 138 S Ct at 803. The Court held that, absent any evidence that the guilty plea was intended to bar the appeal, "a guilty plea by itself does not bar the appeal." *Id*. at 801-02. The Court did not, however, suggest that all defendants who plead guilty possess a *due process* right to bring such an appeal. It also did not announce that due process principles would preclude Congress, or a state

legislature, from limiting the issues that may be reviewed on appeal when a defendant pleads guilty or no contest.

Defendant asserts that one "issue that a guilty plea traditionally does not waive is a court's decision to terminate diversion." (Pet Br 69). Notably, DUII diversion has only existed in Oregon only since the 1980s. And as defendant acknowledges, at least since 2003 Oregon law has "required a guilty plea to enter diversion and eliminated a defendant's ability to obtain appellate review of" a ruling that terminates diversion. (Pet Br 70). That history undermines any claim that the right to contest the validity of a conviction on appeal, following a guilty plea in a case in which the defendant entered diversion, reflects a "traditional protection."[14]

In asserting that ORS 138.105(5) eliminates a traditional protection against erroneous deprivations of liberty, defendant cites *Honda Motor Co. v. Oberg*, 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994). (Pet Br 67). But *Honda* does not support her argument. As the Court of Appeals observed in

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[14] Defendant quotes the statement in *State v. Brookman*, 460 Md 291, 321-22 (2018), that "the promise of due process protections" in a diversion program "may be of little comfort without the availability of an appellate process to review whether that promise is kept." (Pet Br 69-70). Yet *Brookman* did not hold that appellate review in a diversion case is constitutionally required, or cite any decisions holding that such review is constitutionally required; it merely noted that "Maryland law provides such a process." *Brookman*, 460 Md at 321-22.

Redick, *Honda* held that a state-law provision violated due process principles because it "completely deprived a party subject to punitive damages *any judicial review* of" punitive damages awarded by a jury. *See Redick*, 312 Or App at 261 (emphasis added); *Honda*, 512 US at 432 (holding that the statutory provision violated Due Process Clause). In contrast, nothing in the statutory scheme at issue here deprived defendant of any and all judicial review. Instead, ORS 813.225 and ORS 813.255 provided that diversion could be terminated, and a DUII conviction entered, *only* if a trial court judge made particular findings.

By precluding review in this case, ORS 138.105(5) does not eliminate a "traditional" protection against an erroneous deprivation of liberty. The statutes at issue ensure that a diversion defendant receives procedural due process protections, including adjudication by a trial court judge, before diversion is terminated.

ORS 138.105(5)'s plain text precluded appellate review in this case, and nothing about that conclusion conflicts with the state or federal constitution.

D. The trial court correctly concluded that defendant's failure to attend a victim-impact panel within the one-year diversion period required the court to terminate diversion and convict defendant of DUII.

Even if defendant's challenge to her DUII conviction is reviewable, she identifies no basis for reversal.

Defendant's diversion period ended on October 18, 2018. (*See* Tr 5, at which trial court—on October 17, 2017—told defendant that "diversion * * * will end in one year" and "will expire on October 18th of next year"). Although the diversion agreement required defendant to attend a victim-impact panel, it is undisputed that she failed to attend such a panel until some weeks *after* the diversion period ended. It also is undisputed that defendant never asked the trial court to extend the diversion period. Although defendant argues that the trial court erred by concluding that her failure to attend the victim-impact panel required entry of the DUII conviction, the trial court ruled correctly.

1. If a diversion agreement requires attendance at a victim-impact panel, and if the defendant fails to fulfill the condition before diversion ends, the trial court must enter a DUII conviction.

Defendant claims that the diversion statutes permitted the trial court to waive the victim-impact-panel requirement even "after the diversion period ha[d] ended." (Pet Br 7). In fact, the trial court correctly concluded that if a diversion agreement requires attendance at a victim-impact panel, and if the defendant fails to fulfill the condition before diversion ends, the court must terminate diversion and enter a conviction.

a. Statutory text and context show that failure to fulfill such a condition within the diversion period requires entry of a DUII conviction.

Various provisions within the diversion statutes show that defendant's failure to attend the victim-impact panel within the diversion period required entry of the DUII conviction.

ORS 813.230(3), for example, provides that a "diversion agreement" "shall be for a period of one year after the date the court allows the petition." That provision shows that when the one-year period ends, the diversion agreement no longer exists, assuming that no extension was sought. Because the agreement no longer exists, the opportunity to comply with its terms has vanished (with the exception of a failure to pay required fees, discussed further below).

ORS 813.255 and ORS 813.225 further confirm that, with the exception of a failure to pay required fees, failure to fulfill a diversion agreement's terms before the agreement ends requires entry of a DUII conviction. If the court holds a show-cause hearing on an alleged violation of diversion conditions, as occurred here (Tr 19), and if the defendant "failed to fulfill the terms of the diversion agreement," ORS 813.255(3)(b) requires that the court "*shall* terminate the diversion agreement and enter the guilty plea or no contest plea." (Emphasis added.) And under ORS 813.225(8)(b), if the court had extended diversion but "finds that the defendant *failed to comply* with the diversion

agreement *within the extended diversion period*, the court *shall* enter the guilty or no contest plea filed as part of the petition for a diversion agreement, shall enter a judgment of conviction and shall sentence the defendant." (Emphasis added.)

ORS 813.230(3), ORS 813.255(3)(b), and ORS 813.225(8)(b) thereby show that because defendant failed to attend the victim-impact panel before her diversion period ended, the trial court was required to convict her of DUII. And contrary to defendant's suggestion that the trial court had discretion to "waive" the victim-impact-panel requirement after diversion ended, the diversion statutes nowhere authorize a trial court to take such a step.

The only time that a court may excuse a failure to comply with a condition, and may do so even after the diversion agreement ended, is when a defendant has failed to pay required fees. If a defendant "owes $500 or less of the fees required" but has otherwise "complied with and performed all of the conditions of the diversion agreement," ORS 813.252(1) authorizes the defendant to move for dismissal of the DUII charge up to 180 days "*after* the conclusion of the period of a * * * diversion agreement." (Emphasis added.) ORS 813.252(3) provides that if the defendant then pays the balance "by 5 p.m. on the day the hearing [on the motion to dismiss] is held," the court "shall dismiss" the DUII charge. ORS 813.255(5) similarly provides that, following a show-cause hearing on allegations that a defendant failed to comply with a

diversion agreement, the court "shall dismiss" the DUII charge if the defendant (1) "complied with and performed all of the conditions of the diversion agreement except that the defendant owes $500 or less of the fees required" and (2) pays the balance by 5:00 p.m. on the day of the hearing.

In ORS 813.252 and ORS 813.255(5), the legislature expressly recognized a single circumstance—one that does not apply here—in which a defendant may fulfill a diversion condition by acting *after* the diversion agreement has ended. Those provisions show that when the legislature intends to permit a defendant to fulfill a condition after diversion ends, it says so explicitly. The legislature, however, created no other exceptions that might excuse the untimely fulfillment of a condition, and did not authorize a trial court to otherwise "waive" any conditions after a diversion agreement has expired. That refutes defendant's argument that the trial court was entitled to waive the victim-impact-panel requirement after diversion ended.

Finally, it is significant that, although the legislature authorizes a defendant to move to extend diversion before the agreement expires, defendant made no effort to do so. ORS 813.225(1)(a), ORS 813.225(5), and ORS 813.225(4) entitled defendant to move to extend the diversion period for up to six months, so long as she filed her motion "[w]ithin 30 days prior to the end of the diversion period." *See also* ORS 813.225(5)-(7) (authorizing court to grant just one extension of up to 180 days, but permitting court to grant further

and longer extensions for defendants in the armed forces). Defendant filed no such motion. And nothing in the diversion statutes authorizes a trial court to retroactively extend a diversion period after it has expired.

The statutory scheme required defendant to act *before* the one-year diversion period ended—either by attending the victim-impact panel or by moving for an extension. The statutes further required the trial court, in the event that defendant failed to exercise either option, to enter the DUII conviction.

b. Defendant identifies no basis for concluding that the legislature intended to let trial courts excuse a failure such as hers.

Defendant suggests that had the legislature intended to require compliance before the end of the diversion period, it would have adopted wording akin to the wording in ORS 813.210(2)-(4) or 813.200(4). (Pet Br 13). Those provisions, however, do not assist her.

First, ORS 813.210(2)-(4) are consistent with the conclusion that the statutory scheme requires a defendant to fulfill a diversion agreement's terms before the agreement expires unless the legislature has indicated otherwise. ORS 813.210(2) requires a defendant to pay a filing fee "at the time of filing a [diversion] petition." ORS 813.210(3) requires a defendant to pay for a screening interview (to determine under ORS 813.200(4)(b) if she has an alcohol or drug abuse problem) "at the time the petition is allowed."

ORS 813.210(4)(a) requires a defendant to pay court-appointed attorney fees "prior to the end of the diversion period" (although ORS 813.252 permits a defendant who owes $500 or less to pay later). None of those provisions suggests that a defendant generally may obtain dismissal of a DUII charge by complying with diversion conditions *after* the diversion period ends.

Those provisions instead support the conclusion that the legislature intended to require defendants to comply with diversion conditions before the agreement expired *unless* something in the diversion statutes (a) required compliance even sooner, as in ORS 813.210(2) or (3); or (b) expressly authorized a defendant to comply after the agreement expires, as in ORS 813.252's exception for those owing $500 or less in fees.

ORS 813.200(4)(d) also does not assist defendant. ORS 813.200(4)(d) requires a defendant, in petitioning for diversion, to agree "to not use intoxicants during the diversion period." Defendant argues that because the provisions requiring a defendant to satisfy conditions of diversion do not similarly use the phrase "during the diversion period," they implicitly permit a defendant to satisfy conditions after diversion ends. Here, too, defendant is mistaken. With respect to conditions of diversion, ORS 813.230, ORS 813.255, and ORS 813.225—as discussed above—alert defendants that they must fulfill those conditions (with the exception of fee-related conditions) before diversion ends. ORS 813.200(4)(d) does not alter that conclusion, because it does not

describe a condition of a diversion agreement or how to comply with an agreement's conditions. ORS 813.200(4)(d) instead describes a promise that a defendant must make when *petitioning* for diversion; it describes the temporal nature of that promise because no other statutes do so. It does not suggest that a defendant may fulfill the conditions of a diversion *agreement* even after the agreement ends.

Defendant suggests that 1987 legislative history shows that if financial hardship affects a defendant's ability to pay for a victim-impact panel fee, the trial court possesses discretion to waive the panel-attendance requirement after diversion ends. (Pet Br 14-15). As defendant acknowledges, however, the 1987 legislature did not actually "address the question here—what would happen if a defendant attended the panel after the diversion period ended." (Pet Br 15). In any event, concerns about defendants' ability to pay did *not* prompt the 1987 Legislature to let courts "waive" a victim-impact-panel requirement after a diversion period ends. Those concerns instead resulted in the legislature's decision to make victim-impact programs and fees discretionary. *See* ORS 813.235 (providing that "a court *may* require * * * that the defendant attend a victim impact treatment session," and "*may* require the defendant * * * to pay a reasonable fee to the victim impact program" not to exceed $50; emphasis added), adopted by Or Laws 1987, ch 830, § 2.

Finally, defendant suggests that the 1987 Legislature was concerned about the constitutionality of convicting an indigent defendant based on a failure to pay fees. (Pet Br 16). She argues that those concerns show that the legislature intended to give courts "discretion to excuse a defendant's belated attendance" if financial difficulties played a role, and she seems to suggest that financial difficulties played a role in her failure to timely attend the victim-impact panel. (Pet Br 17, 4). But nothing in the legislative history contains affirmative evidence that legislators meant to give trial courts general discretion to waive diversion conditions, based on financial difficulties, after a diversion agreement ends. The legislature instead adopted a much narrower approach, by providing that if a defendant fails to pay required *fees* before the diversion agreement ends, the defendant may still pay the balance and obtain dismissal of the DUII charge. ORS 813.255(5)(a).[15]

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[15] In any event, although defendant suggests that she was unable to attend the victim-impact panel due to financial difficulties, nothing in the record supports that assertion. (*See* Pet Br 4, asserting that defendant "testified [at the show-cause hearing] that she did not attend the victim impact panel during the diversion period" in part "because she was a single working mother of five young children"). At the show-cause hearing, defendant did not testify that financial difficulties impeded her ability to attend the victim-impact panel before the year-long diversion agreement expired. She instead testified that she did not understand that she was *required* to attend the victim-impact panel within the year. (*See* Tr 31, containing her testimony that "I did not do the victim's panel—I thought I had enough time"; Tr 32, at which she testified "[a]bsolutely" when asked, "if you had understood that you only had one year to do this, would you have completed the requirement?"). Similarly, defense

Footnote continued…

The trial court correctly concluded that, because defendant failed to attend the victim-impact panel before her diversion agreement ended, the court was required to terminate diversion and enter a DUII conviction.

2. Defendant's diversion agreement made it clear that she needed to attend the victim-impact panel before the diversion period ended.

Defendant appears to acknowledge that even if the diversion statutes did not require her to fulfill conditions of diversion before the agreement ended, a diversion agreement validly can impose such a requirement. (*See* Pet Br 17, stating that because—in defendant's view—the statues give courts "discretion to excuse a defendant's belated attendance," "[t]he next question * * * is whether the diversion agreement in this case imposed some additional timing requirement"). Defendant claims that "the text of the [diversion] agreement shows that it did not require [her] to attend the victim impact panel at any particular time." (Pet Br 18). In fact, the diversion agreement required defendant to attend the panel before the agreement expired.

Defendant, in pleading guilty, submitted (1) a "Petition to Plead Guilty or No Contest" (SER-1) and (2) a separate document titled "PETITION AND

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counsel argued at the show-cause hearing not that financial difficulties played a role, but that defendant had not understood that she needed to either attend the panel or obtain an extension before the year expired. (*See* Tr 36, containing argument that "had she been aware and known that all she had to do is request an extension, she would have been able to get that extension and to do the victim's impact panel and get it done in a timely manner").

AGREEMENT DUII Diversion." (SER-5; italics omitted). Both documents show that defendant understood and agreed that, if she failed to fulfill the diversion agreement's terms *within the diversion period*, a DUII conviction would be entered. By signing the "Petition to Plead Guilty," defendant agreed that "If I fail to comply with the diversion agreement *within the diversion period*, the court will enter a judgment of conviction on the charge and will sentence me." (SER-2, ¶ 12b, SER-3 (emphasis added); *see also* SER-2, Petition, stating that "I understand the charge against me *and the information in this petition*" (emphasis added)). Further, defendant's attorney signed a certificate stating that "I have personally examined this plea petition, explained all of its provisions to my client, and discussed fully with my client all matters described and referred to in the petition." (SER-4).

By also signing the "PETITION AND AGREEMENT DUII Diversion," defendant reiterated her understanding that she was required to fulfill diversion conditions before the diversion agreement ended. That document stated that "I have read and understand all of the information in the attached Explanation of Rights and DUII Diversion Agreement and I agree to * * * [a]ttend a victim impact panel." (SER-5; italics omitted). In turn, the attached "Explanation of Rights and DUII Diversion Agreement" informed defendant that "If * * * you fail to fulfill the terms of the agreement *by the end of the diversion period*, the court will sentence you without a trial." (SER-6; SER-8, ¶ t (emphasis added)).

The document also explained that "[y]ou may file a motion asking the court to extend the diversion period, but you must file the motion within the last 30 days of your scheduled diversion period." (SER-8, ¶ u; bold omitted).

The record further shows that defendant knew that the diversion agreement would end by October 18, 2018. At the hearing held on October 17, 2017, the trial court granted defendant's diversion petition, told her that "diversion starts today and will end in one year," and that "[i]t will expire on October 18th of next year." (Tr 5).

The written record alone shows that defendant knew that, if she did not attend a victim-impact panel before the diversion agreement expired, the trial court would enter a DUII conviction. But even if the plea petition or diversion agreement's terms were ambiguous, the trial court's oral instructions to defendant removed any ambiguity. The court told defendant that she needed to attend the victim-impact panel, or obtain an extension, *before* the diversion period ended:

> *You must complete the evaluation, treatment, victim's impact panel, all requirements within one year's time.* And so it's important that you get started right away, because you'll have to make sure that you've both completed the classes and paid for them or they won't give you your certificate of completion.
>
> *If for some reason something happens and you need more time, you have to request an extension of your diversion before it expires. It will expire on October 18th of next year.* So October 18th, 2018.

(Tr 5; emphasis added).

Defendant claims that the diversion agreement was, in essence, a "contract" between two parties—the court and defendant—and asserts that the court was free to let her violate its terms and to "excuse" any violations after the diversion period ended. (App Br 7, 22). That characterization is inaccurate. The diversion agreement does not represent an agreement between two private parties. It instead is an agreement that possesses legal meaning only because the legislature has authorized trial courts, in cases involving first-time DUII offenders, to let defendants enter a diversion agreement *subject to* ORS 813.200-.255's requirements. In the event that defendant failed to fulfill diversion conditions before the agreement expired, those provisions required entry of a DUII conviction (unless defendant's failure involved fees). The diversion agreement existed only by grace of the diversion statutes, and those statutes did not permit the court to "excuse" defendant's violation of the agreement. The trial court correctly convicted defendant of DUII.

CONCLUSION

Because defendant pleaded guilty as part of her diversion agreement, ORS 138.105(5) precludes appellate review of her argument on appeal, which urges this court to invalidate the conviction that is based on her guilty plea.

In any event, the trial court correctly concluded that because defendant failed to attend a victim-impact panel before her diversion agreement ended, the diversion statutes required the court to convict her of DUII.

Respectfully submitted,

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State of Oregon

SUPPLEMENTAL EXCERPT OF RECORD

SUPPLEMENTAL EXCERPT OF RECORD

Pursuant to ORAP 5.50, respondent submits the following, as indexed below.

INDEX

IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

PETITION TO PLEAD GUILTY OR NO CONTEST

Rhonda Colgrove
Defendant

1. My true name is *(first, middle, last)* Rhonda Colgrove

   I also am known as _____

2. I am 38 years old. The highest grade level of school I have completed is finishing high school

3. My physical and mental health are satisfactory. I am not under the influence of any drugs or intoxicants, except

4. The following statement best describes me:

   - ☐ I am able to read, write, and understand English, and I have read this petition completely
   - ☒ I am able to understand English, and this petition has been read aloud to me completely
   - ☐ I am unable to read English, and this petition has been read aloud to me completely in English
   - ☐ I am unable to read, write, or understand English, and this petition has been read aloud to me in the _____ language by _____, who is qualified to translate English into the _____ language

5. I ☑ am ☐ am not represented by a lawyer. I understand that I have the right to hire a lawyer or have the court appoint a lawyer to represent me if the court finds that I cannot afford to hire a lawyer.

   ☐ I choose to give up my right to a lawyer. I will represent myself. (_____) [*initial here*]

6. If represented by a lawyer, I have told my lawyer all the facts I know about the charge against me. My lawyer has advised me of the nature of the charge and the defenses, if any, that I have in this case. I am satisfied with the advice and help my lawyer has given me.

7. I understand that I have the following rights: a) the right to jury trial; b) the right to confront and question all witnesses who testify against me at trial; c) the right to remain silent about all facts of the case; d) the right to subpoena witnesses and evidence in my favor; e) the right to have my lawyer assist me at trial; f) the right to testify at trial; g) the right to have the jury told, if I decided not to testify at trial, that they cannot hold that decision against me; and h) the right to require the prosecutor to prove my guilt beyond a reasonable doubt.

8. I understand that I give up all of the rights listed in paragraph 7 when I plead guilty or no contest. I understand I give up: a) any defenses I may have to the charge; b) objections to evidence; and c) challenges to the accusatory instrument.

9. By this petition, I am pleading ☑ guilty ☐ no contest to the crime of driving under the influence of intoxicants (DUII) which is a Class A misdemeanor under Oregon law. The maximum penalties, applicable if I do not enter diversion or if I fail to comply with the conditions of diversion are one year in jail and a fine of $6,250 or $10,000 if the offense was committed in a motor vehicle and there was a passenger younger than 18 and at least three years younger than me. The minimum penalties are 48 hours of imprisonment or 80 hours of community service and a fine of:

   - $1,000 if this is my first conviction

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- $1,500 if this is my second conviction
- $2,000 if this is my third conviction and I am not sentenced to a term of imprisonment
- $2,000 if my blood alcohol level (BAC) was 0.15 percent or greater

If I do not enter diversion or if I fail to comply with the conditions of diversion, there will be a mandatory suspension of my driving privileges for:

- 1 year if this is my first conviction
- 3 years if this is my second conviction within 5 years
- my lifetime if this is my third or subsequent conviction

10. I understand that I will be required to pay all of the fees listed in the *Summary of DUII Diversion Fees*, unless the court finds me unable to pay and waives all or part of these fees. These fees include an alcohol or drug abuse assessment and any recommended treatment. The court may order me to attend a victim impact panel and pay a participation fee. I may be required to reimburse the state for the cost, if any, of a court-appointed attorney.

11. I am submitting this plea along with a petition to enter the diversion program under ORS 813.200 to 813.270. I understand that if the court grants the petition, the court will accept this plea but will not enter a judgment of conviction at this time.

12. I understand that:

    a. If I fully comply with the conditions of the diversion agreement within the period authorized by law and by the court, the court will dismiss the charge with prejudice under ORS 813.250. If the court does not have a policy of automatically dismissing the DUII charge at the end of one year, I will have to file a motion at the end of the diversion period requesting that the charge be dismissed.

    b. If I fail to comply with the diversion agreement within the diversion period, the court will enter a judgment of conviction on the charge and will sentence me

13. I understand that if the court enters judgment on this plea for failing to comply with the diversion agreement, it is the same as a conviction. This court can find me guilty of the crime of DUII based on this plea alone, without receiving any evidence.

14. I understand that if the court denies the diversion petition and I go to trial, nothing in this petition will be used against me

15. I understand that if I am not a U.S. citizen and the court enters judgment on this plea for failing to comply with the diversion agreement, it may result in my removal from this country, exclusion from admission to the United States, or denial of naturalization

16. This plea is based only on what is written on this petition. No promises have been made to me by my lawyer or any officer or agent of any branch of government (federal, state, or local) that I will receive a particular sentence or form of treatment from this or any other court, on these or any other charges, other than what is set forth in this petition.

17. ☐ I plead no contest *or*

    ☑ I plead guilty because in Umatilla County, Oregon, I did the following:

on or about August 26, 2017, did unlawfully drive a vehicle upon a highway or premises open to the public while under the influence of intoxicants, to wit: alcohol.

18. I ☐ am ☑ am not currently on probation, parole, or post-prison supervision. I know that if I am and the court enters judgment on this plea, my failure to comply with the conditions of the diversion agreement may cause my probation, parole, or post-prison supervision to be revoked and I may be required to serve jail or prison time in that case in addition to any sentence imposed in this case.

19. I understand the charge against me and the information in this petition. I am signing this petition and entering this plea voluntarily, intelligently, and knowingly.

20. I understand that if I fail to comply with the terms of the diversion and the court enters a judgment of conviction, I have the right to appeal the conviction. My right to an appeal will be explained to me when the court enters the judgment of conviction.

Certificate of Document Preparation. Check all that apply:
☐ I chose this form for myself and completed it without paid help
☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
☐ I paid (or will pay) _____ for help choosing, completing, or reviewing this form

Defendant's Signature	Rhonda Colgrove Defendant's Name (printed)	10/19/2017 Date

CERTIFICATE OF COUNSEL

I am the attorney for the defendant in this proceeding and I certify that:

1. I have fully explained to my client the charge and possible defenses that may apply in this case
2. I have personally examined this plea petition, explained all of its provisions to my client, and discussed fully with my client all matters described and referred to in the petition
3. I have explained to my client the maximum penalty and other consequences of entering a guilty or no contest plea, including possible immigration consequences
4. To the best of my knowledge and belief, my client's decision to enter this plea is made voluntarily, intelligently, and knowingly
5. I have told my client that if he or she is eligible for court-appointed counsel and wishes to pursue an appeal, I will transmit the information necessary to perfect the appeal to the Office of Public Defense Services

Signed by me in the presence of the above-named defendant/petitioner and after full discussion of the contents of the certificate with the defendant on *(date)* 10/7/17

Defendant's Attorney's Signature

Jacek Berka
Attorney Name (typed or printed)

160733
Bar Number

CERTIFICATE OF INTERPRETER

I, the undersigned interpreter, certify that I have read aloud the petition to the above defendant in the _____ language

Signed by me in the presence of the above-named defendant on *(date)*_____

Interpreter's Signature

Interpreter Name (printed)

IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon **Case No:** 17CR57106

v.

PETITION AND AGREEMENT

Rhonda Colgrove
Defendant

DUII Diversion

Date of DUII Offense: August 26, 2017

Defendant's Residence:			
30520 Joy Ln	Hermiston	OR	97838
Street	City	State	ZIP
Mailing Address (if different)			

Date of Birth:	Phone #:	Driver License:	SID# (if known):
4 / 29 / 1979		WA	17098373
Month Day Year		Number State	

DEFENDANT'S AGREEMENT AND WAIVER

I am the Defendant. I ask the court to grant a diversion under ORS 813.200 to 813.270 for the charge of driving under the influence of intoxicants (DUII). If the court allows this petition:

(1) I have read and understand all of the information in the attached *Explanation of Rights and DUII Diversion Agreement* and I agree to:
   a) Pay the required diversion fees and any restitution ordered
   b) Complete an alcohol and drug abuse assessment and any recommended treatment
   c) Attend a victim impact panel as ordered by the court
   d) Not use alcohol or other intoxicants except as allowed in the attached *Explanation of Rights and DUII Diversion Agreement*
   e) Install and use an approved Ignition Interlock Device (IID) if ordered by the court
   f) Keep the court advised of my current mailing address

2) I plead guilty or no contest to the DUII charge as shown in the *Petition to Plead Guilty or No Contest* submitted with this diversion petition

3) I waive (give up) the rights listed in the *Petition to Plead Guilty or No Contest*

4) I waive my former jeopardy rights under the federal or state constitutions and ORS 131.505 to 131.525 in any future action on the charge or any other offenses based on the same criminal incident

Certificate of Document Preparation. Check all that apply:
- ☐ I chose this form for myself and completed it without paid help
- ☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- ☐ I paid (or will pay) _____ for help choosing, completing, or reviewing this form

Rhonda Colgrove — Defendant's Signature

Rhonda Colgrove — Defendant's Name (typed or printed)

10/19/2017 — Date

NOTE: the *Defendant's Declaration of Eligibility*, and *Petition to Plead Guilty or No Contest* must be filed with this form and served on the district attorney or city attorney who filed the charge

RC

EXPLANATION OF RIGHTS AND DUII DIVERSION AGREEMENT

Read this entire form carefully. You are charged with driving under the influence of intoxicants (DUII). You can apply for the DUII Diversion Program, but you can enter the program only if you meet all eligibility requirements. The court will appoint a lawyer to help you if you ask for one and you are financially eligible.

ELIGIBILITY FOR DIVERSION PROGRAM

You are eligible to participate in the diversion program only if:

- you meet all requirements described in the attached *Defendant's Declaration of Eligibility* **and**
- you appeared in court on the date scheduled for your first appearance on the charge (unless the court finds good reason to excuse your failure to appear) **and**
- you file the *Petition and Agreement* with the court within thirty (30) days of your first appearance in court (unless the court finds there is good cause to allow a later date)

AGREEMENT WITH THE COURT

The *DUII Diversion Petition and Agreement* is your agreement with the court. To have the DUII charge dismissed, you must do all the following (if ordered by the court):

a. **Pay the required diversion fees** to the court. Fees are listed in Section 1 of the *Summary of DUII Diversion Fees*. If you cannot afford to pay these fees, tell the judge. The court may waive some of the fees or allow you to make payments over time, depending on your financial situation.

b. **Pay restitution** (See Section 1 of the *Summary of DUII Diversion Fees*)

c. **Complete an alcohol and drug abuse assessment**. The court will assign you to an agency for assessment. You must give the agency accurate and truthful information about your use of drugs and alcohol. You must pay fees to the agency. The agency will recommend a treatment program if they find that you need treatment.

d. **Complete the recommended treatment program.** You must pay the treatment provider directly. If you cannot pay the cost of treatment, tell the treatment provider. They may be able to waive certain costs or let you make payments over time.

e. **Attend a victim impact panel** and pay the participation fee

f. **Do not use <u>any</u> alcohol or other intoxicant** (includes marijuana) during the term of the diversion agreement. Comply with state laws that prohibit the use of intoxicants. You **can** use:
   - sacramental wine given or provided as part of a religious rite or service
   - alcohol or a controlled substance taken *as directed* with a valid prescription
   - a non-prescription drug that contains alcohol **if** you follow the directions for use that are printed on the label

h. **Keep the court advised of your current mailing address**

i. **Install and use an approved ignition interlock device (IID)** in all the vehicles you operate during the term of the diversion agreement when you have driving privileges, if ordered by the court

REQUIRED BOOKING

If the court grants your petition, you will have to be booked and fingerprinted on the DUII charge, if you have not already been book and fingerprinted.

INFORMATION ON IGNITION INTERLOCK DEVICES (IIDs)

j. You must install and use an approved ignition interlock device (IID) in all vehicles you operate during the term of the diversion period when you have driving privileges if:
   - Your Blood Alcohol Content (BAC) was 0.08 or above
   - You refused a breath/blood test when requested by the arresting officer
   - Your BAC was greater than 0.00 and less than 0.08 and your blood test showed the presence of cannabis, a controlled substance, or an inhalant, or
   - The court orders you to do so, if your BAC was less than 0.08

k. The IID requirement applies in all cases and to all vehicles you operate during the term of the diversion agreement when you have driving privileges, except:
   - If the court finds that you meet requirements for a medical exemption under the rules of the Oregon Department of Transportation
   - While operating an employer's vehicle in the course and scope of your employment (contact DMV for more information), or
   - If you submitted to a test of your blood, breath, or urine, and your BAC was less than 0.08, and the court does not order the installation and use of the IID

l. The IID requirements continue until you submit a certificate to the DMV from the IID provider. The certificate must state that the device did not record a negative report for the last 90 consecutive days of the required installation period.

m. After 6 months, you can apply for an order vacating (ending) the IID requirement as a condition of diversion if:
   - You provide the court with a certificate from the IID service provider stating that the device has not recorded a negative report for at least 6 consecutive months, ***and***
   - You have been in compliance with any treatment program you were ordered to participate in as a condition of your diversion agreement

ADDITIONAL INFORMATION AND WAIVER OF RIGHTS

n. The diversion agreement applies only to the DUII charge. If you are charged with other offenses arising from the same incident, the other charges will be prosecuted separately. By entering into a diversion agreement, you give up the right to have the DUII charge decided at the same time as your other charges (former jeopardy - which means the right not to be prosecuted twice for the same offense).

o. If you have a prior DUII conviction, the Interstate Compact for Adult Offender Supervision rules may prohibit you from leaving the state without permission during the diversion period

p. Prosecution of the DUII charge will be delayed during the diversion period

q. If you successfully complete the diversion agreement, the court may automatically dismiss the DUII charge at the end of one year. If you do not receive notice of dismissal, you must file a motion at the end of the diversion period asking the court to dismiss the DUII charge.

r. If the court finds that you violated the terms of the diversion agreement or that you were not eligible for diversion, the court will terminate the diversion agreement. The court may hold a hearing where you can "show cause" why the court should not terminate your diversion agreement. **The court will send notice of such hearings by regular mail. If you fail to appear in court, the court can terminate the diversion agreement and may issue a warrant for your arrest.**

s. The court will terminate the diversion agreement if at any time during the diversion period the court finds that you failed to fulfill all of the terms of the agreement. Among other things, a new DUII or breaking open container laws will violate the agreement.

t. If the court terminates your diversion agreement or you fail to fulfill the terms of the agreement by the end of the diversion period, the court will sentence you without a trial

u. You may file a motion asking the court to extend the diversion period, **but you must file the motion within the last 30 days of your scheduled diversion period.** The court may grant an extension if the court finds that you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. The court may grant an extension **only once** and for **not more than 180 days.**

v. If the court denies the diversion petition, the state cannot use your guilty or no contest plea (in the *Petition to Plead Guilty or No Contest*) when the state continues the prosecution

ADDITIONAL INFORMATION FOR ACTIVE MILITARY PERSONNEL
The following may apply if you are engaged in active military service:

w. The court may not deny your petition for a DUII diversion agreement solely because military service will impair your ability to complete the diversion program **if:**
   - You are a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States, or the National Guard **and**
   - You have been called to active duty

x. You may ask the court to allow you to participate in a comparable treatment program conducted by or authorized by a government entity in another jurisdiction

y. You may file a motion asking the court to extend the diversion period. The court may grant an extension if the court finds you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. **If you are serving on active duty, you must file the motion by the end of your scheduled diversion period.** The court may extend the diversion period as necessary to allow you complete the conditions of the diversion agreement.

IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

DEFENDANT'S DECLARATION OF ELIGIBILITY

DUII Diversion

Rhonda Colgrove
Defendant

I am eligible to participate in a driving under the influence of intoxicants (DUII) diversion program because:

1. I have never been convicted of a felony DUII offense in Oregon or any other place

2. On the date I sign the attached petition for a DUII diversion agreement:
   a. Except for the DUII charge in this case, there is no charge pending against me in Oregon or any other place for an offense involving operation of a vehicle while:
      - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
      - having a blood alcohol content above the allowable blood alcohol content

   b. I am not participating in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except:
      - a program I may have entered as a result of the DUII charge in this case, or
      - a charge for minor in possession of alcohol under ORS 471.430

   c. There is no charge of an offense pending against me in Oregon or any other place for any degree of aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle

3. During the fifteen (15) years before the date of the alleged DUII offense in this case and from the time between the alleged DUII offense and the date I sign the attached petition:
   a. I have not been convicted in Oregon or any other place for an offense involving the operation of a vehicle while:
      - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
      - having a blood alcohol content above the allowable blood alcohol content

   b. I have not participated in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except a program I may have entered as a result of a charge for minor in possession of alcohol under ORS 471.430

   c. I have not been convicted, in Oregon or any other place, on any charge of an offense in any degree for aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle, ***and***

d. If this is my second or subsequent diversion, I have not been convicted of any criminal offenses involving a motor vehicle

4. The DUII offense described in the attached petition did not involve any deaths or any physical injury to any other person *("physical injury" means impairment of physical condition or substantial pain)*

5. At the time of the alleged offense, I did not have commercial driving privileges

6. At the time of the alleged offense, I was not operating a commercial motor vehicle

Certificate of Document Preparation. Check all that apply:
☐ I chose this form for myself and completed it without paid help
☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
☐ I paid (or will pay)_____for help choosing, completing, or reviewing this form

I hereby declare that the above statement is true to the best of my knowledge and belief. I understand it is made for use as evidence in court and I am subject to penalty for perjury.

Rhonda Colgrove
Defendant's Signature

Rhonda Colgrove
Defendant's Name (printed)

10/19/2017
Date

NOTE: this declaration must be completed by Defendant and filed with DUII diversion *Petition and Agreement (with attached Explanation of Rights and DUII Diversion Agreement), Order re: DUII Diversion, Petition to Plead Guilty or No Contest,* and *Order on Petition to Plead Guilty or No Contest*

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 30, 2021, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kyle Krohn, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the 18,000 word limit that this court approved when it granted respondent's motion for leave to file an overlength brief; and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 15,574 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

/s/ Rolf C. Moan

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