IN THE SUPREME COURT FOR THE STATE OF OREGON

INQUIRY CONCERNING A JUDGE

Re: The Honorable Vance D. Day, Respondent

Commission on Judicial Fitness and Disability

12139, 1486

Commission on Judicial Fitness and Disability

12139

SO63844

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Continued on next page

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TABLE OF CONTENTS

Interest of the Amicus 1

Summary of Argument... 2

I. Solemnizing Marriages is Not a Judicial Function 4

II. Neither the Oath of Office Prescribed by ORS 1.212, nor Rule 3.3(B) of the Oregon Code of Judicial Conduct, Requires a Judge to Solemnize Marriages, or Limits their Discretion to Refuse to Do So. 8

III. Because the Function of the Officiant is to "Solemnize" the Marriage Contracted Between the Parties, No Person Authorized to Perform Marriages May Be Compelled to Solemnize any Marriage to which He or She has a Religious, Conscientious or Other Personal Objection..... 11

IV. The Commission's Report that Judge Day is Unfit for Judicial Office Because His Firmly-Held Christian Beliefs Do Not Permit Him to Solemnize Same-Sex Marriage Recommends that this Court Impose a Religious Test for Judicial Office Forbidden by Article I §§ 4 and 6 of the Oregon Constitution. 14

TABLE OF AUTHORITIES

Cases

Alons v. Iowa Dist. Court, 698 N.W.2d 858, 872 (Iowa, 2005) 12
Craft v. Jachetti, 47 N.J.L. 205 (N.J. Sup. Ct. 885 12
Cramer v. Commonwealth, 214 Va. 561, 202 S.E. 2d 911 (1974) 6
Cummings v. Smith, 368 Ill. 94, 104, 13 N.E. 2d 69, 74 (1937) 7
Friar v. Roberts, 346 Ark. 432, 57 S.W.2d 727, 731 (2001) 11
Holmes v. Holmes, 1 Sawy. 99, 1 Abb. (U. S.) 525, Fed. Cas. No. 6638 (Circuit Court, D. Oregon, 1870) 6
Huard v. McTeigh, 113 Or. 279, 294, 232 P. 658, 663 (1925) 6
In re Oregon Laws 1967, Chapter 364, Section 4, Ballot Title, 247 Or. 488, 492–94, 431 P.2d 1, 2–3 (1967) 4, 10
I*nhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 7 Tyng. 48, 1810 Mass. LEXIS 99 (1810) 12
Kellogg v. Kellogg, 122 Misc. 734 (N.Y. Supr. Court, 5th Dist., 1924) 12
Marconi v. Guardian Mgmt. Corp., 149 Or. App. 541, 945 P.2d 86 (1997) 16
McDaniel v. Paty, 435 US 618 (1978) 14
Mississippi Comm'n on Jud. Performance v. Hopkins, 590 So.2d 857 (Miss. 1991) 14
Payne v. Payne, 54 App. D.C. 149, 295 F. 970 (D.C. Ct. App. 1924) 6
Praggastis v. Clackamas County, 305 Or. 419, 752 P2d 302 (1988) 15
Shaw v. Moon, 117 Or. 558, 245 P. 319 (1926) 4, 8
State ex rel Barclay's Bank PLC v. Hamilton County Court of Common Pleas, 74 Ohio St. 3d 536, 542, 660 N.E. 2d 458, 463, 1996-Ohio-286(1996) 10, 13

Statutes

2015 ORS 1.210 (West) 4
Code Or. 783 6
ORS 1.212 8
ORS 106.120 ..... 4, 7, 11
ORS 106.150 ..... 5, 7
ORS 106.170 5
Or. Rev. Stat. Ann. 106.120 (West) 5

Other Authorities

Ohio Board of Professional Conduct, Advisory Opinion 2015-1
http://www.supremecourt.ohio.gov/Boards/BOC/
Advisory_Opinions/2015/Op_15-001.pdf (accessed January 16, 2016)..... 12

Oregon Code of Judicial Conduct, Rule 3.3(B).....8, 9, 16

Constitutional Provisions

U.S. Const., Article VI, cl. 3.....3, 14, 17
Ohio Constitution, Section 4(B), Article IV 13
Oregon Constitution Article I §4.....3, 14, 16
Oregon Constitution Article I §6.....2, 14, 16
Oregon Constitution Article III §1 .....4, 11

INTEREST OF THE AMICUS CURIAE

This *amicus* brief is a petition for redress of grievances submitted on behalf of the Christian Legal Society ("CLS"), an association of Christian attorneys, law students, law professors and others, and its members in the State of Oregon who are now, or may aspire to be, judges. In the course of its investigation of the Honorable Vance D. Day for alleged misconduct in office, the Commission on Judicial Fitness and Disability saw fit to rest its unanimous report on Count Twelve on its "finding" that Judge Day is "a Christian[,] whose firmly held religious beliefs include defining marriage as only between a woman and a man". By holding, erroneously, that performing marriages is a judicial function governed by Oregon Rule of Professional Conduct 3.3(B), it has given notice to every Oregon judge or aspirant to Oregon judicial office that those who would decline, for reasons of conscience or any other personal objection, to solemnize or otherwise participate in a specific marriage ceremony are unfit for judicial service.

Over the years since its founding, CLS has focused its advocacy on the unassailable proposition that pluralism is essential not only to the maintenance of a free society, but also to the guarantee that each of its members is entitled to equal protection of the laws. Every American must be protected, regardless of the current popularity of his or her beliefs, the content of their speech, or the purposes for which

they assemble or petition for a redress of grievances. This is so, not simply because the Constitutions of Oregon and the United States demand it, but because there is no other way to operationalize our common belief that all are "created equal".

SUMMARY OF ARGUMENT

In its zeal to warn Oregon judges and candidates for judicial office that moral dissent on the issue of same-sex marriage will not be tolerated, the Commission on Judicial Fitness and Disability has committed both legal and constitutional error.

1. Solemnizing marriages is not a judicial function under the law of Oregon or of any other state. An Oregon judge therefore has no duty, constitutional or otherwise, to solemnize marriages, and cannot be disciplined under the Oregon Code of Judicial Conduct for refusing to entertain such requests.

2. Because the function of the officiant is to "solemnize" the marriage contracted between the parties, no person authorized to perform marriages in Oregon may be compelled to solemnize any relationship to which he or she has a religious, conscientious or other personal objection.

3. The Commission on Judicial Fitness and Disability's consideration of Judge Day's identity as "a Christian whose firmly held religious beliefs include defining marriage as only between a woman and a man" is, itself,

> a violation of Oregon Code of Judicial Conduct Rule 3.3(B) because it imposes a religious test forbidden by Article I §4 and §6 of the Oregon Constitution and U.S. Constitution, Art. VI, cl.3. It is also a clear warning to other judges (or those who aspire to the bench) in Oregon that "Christian[s] whose firmly held religious beliefs include defining marriage as only between a woman and a man" are ineligible to serve.

In sum, *amici* submit that the Commission on Judicial Fitness and Disability's unanimous opinion on Count Twelve that Judge Day's refusal to solemnize same-sex marriages renders him unfit for judicial office is contrary to law in *at least* three (3) ways: First, it exceeds the scope of the Commission's statutory authority; second, it is an advisory opinion that has no support in either fact or law; and third, when the evidence is viewed as a whole under the "clear and convincing evidence" standard applicable to this case, there is at least a colorable case that the Commission's own motives are suspect.

Because the Commission explicitly made reference to Judge Day's Christian beliefs on the subject of same-sex marriage, its recommendation is not only forbidden by the no religious test guarantees of the Oregon Constitution, Article I §§ 4, 6 and U.S. Constitution, Art. VI, cl.3, its report on this point is arguably a

violation of Rule 3.3 of the Oregon Code of Judicial Conduct on the part of every member of the Commission who voted to recommend Count Twelve to this Court.

ARGUMENT

I. SOLEMNIZING MARRIAGES IS NOT A JUDICIAL FUNCTION.

The essence of the judicial function in Oregon is "the deciding of cases and controversies". *Shaw v. Moon*, 117 Or. 558, 245 P. 319 (1926) (judicial immunity does not extend to an ex officio justice of the peace who "acted entirely without jurisdiction and for the wrongful and unlawful purpose of injuring the plaintiff"). By its nature, the judicial function is limited to "determin[ing] controversies between litigants." *In re Oregon Laws 1967, Chapter 364, Section 4, Ballot Title*, 247 Or. 488, 492–94, 431 P.2d 1, 2–3 (1967) (declining to render an advisory opinion). It follows from these points, and from Article III §1 of the Oregon Constitution, that the judicial power can be exercised *only* by a "judicial officer" who is "authorized to act as a judge in a court of justice." 2015 ORS 1.210 (West).

ORS 106.120 implicitly recognizes that the role of the officiant at a wedding is different in both form and function from the exercise of the judicial function. It expressly permits persons other than judges to bear witness on behalf of the State to the formation of a marriage contract:

> (2) Marriages may be solemnized by:
> (a) A judicial officer;

(b) A county clerk;
(c) Religious congregations or organizations as indicated in ORS 106.150 (2); or
(d) A clergyperson of any religious congregation or organization who is authorized by the congregation or organization to solemnize marriages.

See also Or. Rev. Stat. Ann. 106.120 (West) (exempting the "charging and accepting of a personal payment by a judicial officer of this state or a county clerk under subsection (5) of this section" from "the provisions of ORS chapter 244").

Persons other than judges may "solemnize" weddings in Oregon and other states because marriage is a contract between the parties. The requirement that marriages be solemnized before a person authorized to officiate, and before two witnesses, is the means by which the state seeks to ensure that the parties have freely assented to the formation of the marriage contract. It is also the means by which the State ensures that the appropriate forms are delivered to the county clerk. ORS 106.150 ("... no particular form is required except that the parties thereto shall assent or declare in the presence of the clergyperson, county clerk or judicial officer solemnizing the marriage and in the presence of at least two witnesses, that they take each other to be spouses in a marriage."); ORS 106.170 ("... complete the original application, license and record of marriage form and deliver the form to the county clerk who issued the marriage license.") This has been the law in Oregon since at least 1870:

> "In the solemnization of marriage no particular form is required, except that the parties thereto shall assent or declare in the presence of the minister,

> priest, or judicial officer solemnizing the same, and in the presence of at least two attending witnesses, that they take each other to be husband and wife." Code Or. 783.
>
> Consent to become husband and wife--the contract out of which arises the relation--must be given as herein prescribed, before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the states of Oregon and California, particularly the former.

Holmes v. Holmes, 1 Sawy. 99, 1 Abb. (U. S.) 525, Fed. Cas. No. 6638 (Circuit Court, D. Oregon, 1870), quoted in *Huard v. McTeigh*, 113 Or. 279, 294, 232 P. 658, 663 (1925).

Writing in *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E. 2d 911 (1974), the Virginia Supreme Court described the officiant's role as both the primary witness to the contract of marriage, and as the clerk who bears responsibility for reporting and memorializing the marriage in the State's records:

> ... that the marriage contract itself be memorialized in writing and by a person of responsibility and integrity and by one possessed of some educational qualifications. Ministers, as a profession, class or group, are persons of integrity and responsibility, and are persons qualified to perform a marriage in a proper manner, execute the necessary forms required by the state, and report the contract of marriage between two people within the time prescribed.

Cramer v. Commonwealth, 214 Va. at 565, 202 S.E.2d at 914. *Accord Payne v. Payne*, 54 App. D.C. 149, 295 F. 970 (D.C. Ct. App. 1924) ("The minister of the gospel who married the couple ... was under no obligation to do anything more than

to satisfy himself that the [license] document was in proper form and duly authenticated.").

The Illinois Supreme Court's opinion in *Cummings v. Smith*, 368 Ill. 94, 104, 13 N.E. 2d 69, 74 (1937), not only confirms this reading, but also emphatically rejects the proposition that performing marriages bears any relationship to the judicial function:

> Under our statute a judge of any court of record is included among those authorized to celebrate a marriage. There is no statute imposing that function upon him as a duty and no fee for such service is provided by law. He may, at his pleasure, perform such a ceremony or refuse to do so. If he officiates at a marriage it is his voluntary act. It is not a part of, nor in any way connected with, his judicial duties, but is merely the exercise of a privilege conferred by the statute.

In sum, the solemnization of weddings is emphatically *not* a "judicial duty". It is, rather, a discretionary authority or privilege conferred on, among other individuals, judicial officers, county clerks, "religious congregations or organizations as indicated in ORS 106.150 (2), or a clergyperson of any religious congregation or organization who is authorized by the congregation or organization to solemnize marriages." ORS 106.120.

II. NEITHER THE OATH OF OFFICE PRESCRIBED BY ORS 1.212, NOR RULE 3.3(B) OF THE OREGON CODE OF JUDICIAL CONDUCT, REQUIRES A JUDGE TO SOLEMNIZE MARRIAGES, OR LIMITS THEIR DISCRETION TO REFUSE TO DO SO.

Count Twelve of the report by the Commission on Judicial Fitness and Disability declares that Judge Day violated both his oath of office, ORS 1.212, and Rule 3.3 of the Oregon Code of Judicial Conduct by informing his staff that he was "unavailable" to perform same-sex marriages. *Amici* respectfully submit that the plain language of both the oath of office and Rule 3.3(B) render the report of the Commission on Count Twelve erroneous as a matter of law.

The oath of office prescribed by ORS 1.212(2) requires that a person state that he or she does

> ... solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Oregon, and that I will faithfully and impartially discharge *the duties of a judge* of the _____ (court), according to the best of my ability. (emphasis added)

Canon 3.3(B) of the Oregon Code of Judicial Conduct provides that:

> (B) A judge shall not, *in the performance of judicial duties*, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so. (emphasis added)

Solemnization of marriage is not – nor can it be stretched to be – a function even remotely related to "the deciding of cases and controversies". *Shaw v. Moon*, 117

Or. 558, 245 P. 319 (1926). Neither the oath of office, nor Canon 3.3(B), provide the rule of decision for this case.

When Judge Day told his staff that he would be "unavailable" to solemnize same-sex marriages, and later took his name off the roster of judges willing to solemnize marriages, he neither "discriminated" against any person in the performance of a judicial function, nor instructed his staff to engage in any such act ancillary to the exercise of a judicial function. The evidence shows that only one same-sex couple sought out Judge Day to officiate at their wedding, and that his unavailability at the time was attributable to being out of town. The Commission concedes that no other same-sex couple ever sought to have him solemnize their wedding.

Neither his staff nor the Commission, therefore, had any factual basis whatsoever for deciding that Judge Day had engaged in a public or private act of "discrimination". Judge Day's staff members were, at best, legally mistaken, about their view of his judicial duties, but they were, most certainly, disdainful of this religious beliefs and sensibilities.

The members of the Commission, by contrast, should know better. The Commission's authority is to marshal *evidence* relevant to otherwise legitimate complaints. There is no such evidence here. The real gravamen of the *Commission's*

complaint is its members' personal, but legally unsupported, beliefs that Judge Day's Christian beliefs concerning the nature of marriage render him unfit for public office.

Amici respectfully submit that the members of the Commission are, in this regard, guilty of their own acts of discrimination on the basis of religion.

Because no act of "discrimination" took place, this Court must dismiss Count Twelve. Neither the Commission, nor this Court upon review of the record it has produced, has authority to render an advisory opinion on this or any other issue. *In re Oregon Laws 1967, Chapter 364, Section 4, Ballot Title*, 247 Or. 488, 492–94, 431 P.2d 1, 2–3 (1967).

In *State ex rel Barclay's Bank PLC v. Hamilton County Court of Common Pleas*, 74 Ohio St. 3d 536, 542, 660 N.E. 2d 458, 463, 1996-Ohio-286(1996), the Ohio Supreme Court addressed precisely the situation we have here: a case in which the only party with an *actual* adverse interest to the parties – in that case, the beneficiary of a letter of credit – was not before the Court.

> Actual controversies are presented only when the plaintiff sues an adverse party. This means not merely a party in sharp and acrimonious disagreement with the plaintiff, but a party from whose adverse conduct or adverse property interest the plaintiff properly claims the protection of the law. Thus, we hold that the presence of a disagreement, however sharp and acrimonious it may be, is insufficient to create an actual controversy if the parties to the action do not have adverse legal interests.

The Commission has made it clear that it *unanimously* disagrees with Judge Day's firmly-held religious views on same-sex marriage, and that it finds them legally (if not morally) repugnant. As a body authorized by statute to assist in the exercise of this Court's judicial functions, however, it must keep such opinions to itself unless and until a party with standing to raise a discrimination claim does so. Until that time, the Commission's findings on Count Twelve suggest that this Court issue a forbidden advisory opinion. Oregon Const. Article III §1.

III. BECAUSE THE FUNCTION OF THE OFFICIANT IS TO "SOLEMNIZE" THE MARRIAGE CONTRACTED BETWEEN THE PARTIES, NO PERSON AUTHORIZED TO PERFORM MARRIAGES MAY BE COMPELLED TO SOLEMNIZE ANY MARRIAGE TO WHICH HE OR SHE HAS A RELIGIOUS, CONSCIENTIOUS OR OTHER PERSONAL OBJECTION.

Because the Commission on Judicial Fitness and Disability has held that solemnizing marriages is a judicial function, it has held, in effect, that Oregon judges are obligated to solemnize marriages whenever someone with a valid marriage license asks them to do so. This is not the law of Oregon. While it is true that the State *authorizes* judges and others to solemnize marriages, there is no statutory authority for imposing a duty on them to do so. ORS 106.120 provides that "[t]he following persons *may* solemnize marriages ..."; it does not require them to do so.

Nor, to *amici's* knowledge, does any state impose such a duty. *See, e.g., Friar v. Roberts*, 346 Ark. 432, 57 S.W.2d 727, 731 (2001) (distinguishing between the

licensing and the solemnization of marriages); *Inhabitants of Milford v. Inhabitants of Worcester*, 7 Mass. 48, 7 Tyng. 48, 1810 Mass. LEXIS 99 (1810) (invalidating a marriage where the magistrate alleged to have officiated denied an intent do act in that capacity); *Craft v. Jachetti*, 47 N.J.L. 205 (N.J. Sup. Ct. 885) (noting that, in the case of a minor, "the clergyman or officer may refuse to solemnize his marriage contract" if the required consents are not obtained); *Alons v. Iowa Dist. Court*, 698 N.W.2d 858, 872 (Iowa, 2005) (noting that a pastor "is under no duty to solemnize any marriage"); *Kellogg v. Kellogg*, 122 Misc. 734 (N.Y. Supr. Court, 5th Dist., 1924) (acknowledging "that some ministers in some denominations absolutely refuse to solemnize a marriage contract unless they know at least one of the contracting parties, and in some instances a minister will refuse to solemnize the marriage contract unless at least one of the parties is of his parish" and recognizing the power of a church to refuse to solemnize a marriage, although a license had been issued).

In fact, the only authority the Commission cited in support of its view that Oregon judges are required to solemnize weddings is an advisory opinion of the Ohio Board of Professional Conduct, Advisory Opinion 2015-1 http://www.supremecourt.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf (accessed January 16, 2016). Unlike the Commission below, however, the

Ohio Board of Professional Conduct explicitly conceded that it had no authority to decide the legal issue:

> Whether judges are mandated or authorized by the Ohio Revised Code to perform civil marriages is a legal question and beyond the scope of the advisory opinion authority granted to the Board by the Supreme Court of Ohio.

Id. at p. 2.

Like the Commission below, the Ohio Board of Professional Conduct was determined to use whatever persuasive authority it may have to make a political statement. In its zeal to advise the Ohio Supreme Court that the Board believes that Ohio judges must choose between their First Amendment right to decline to solemnize any marital relationship to which they have a sincerely-held objection (whether religious or simply personal), the Ohio Board of Professional Conduct overstepped its authority and ignored settled Ohio constitutional law.

Like the Oregon Constitution, Article IV § 4(B), Article IV of the Ohio Constitution requires the existence and resolution of "actual controversies between parties legitimately affected by specific facts" before the judicial function may be exercised. *State ex rel Barclay's Bank PLC v. Hamilton County Court of Common Pleas*, 74 Ohio St. 3d 536, 542, 660 N.E. 2d 458, 463, 1996-Ohio-286(1996)[1]. And,

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[1] The only other authority cited by the Commission for the proposition that a judge has no discretion to refuse to solemnize a marriage upon request is a Mississippi case

just as in Oregon, there is no judicial authority in Ohio on which to base the argument that "[w]hen a judge performs a civil marriage ceremony, ... the judge is performing a judicial duty ...."

IV. THE COMMISSION'S REPORT THAT JUDGE DAY IS UNFIT FOR JUDICIAL OFFICE BECAUSE HIS FIRMLY-HELD CHRISTIAN BELIEFS DO NOT PERMIT HIM TO SOLEMNIZE SAME-SEX MARRIAGE RECOMMENDS THAT THIS COURT IMPOSE A RELIGIOUS TEST FOR JUDICIAL OFFICE FORBIDDEN BY ARTICLE I §§ 4 AND 6 OF THE OREGON CONSTITUTION AND ARTICLE VI, CL. 3 OF THE UNITED STATES CONSTITUTION.

In its zeal to warn Oregon judges and candidates for judicial office that moral dissent on the issue of same-sex marriage will not be tolerated, the Commission on Judicial Fitness and Disability has, without authority, created and enforced a religious test forbidden by Article 1 §4 of the Oregon Constitution: "No religious test shall be required as a qualification for any office of trust or profit." *See also* U.S. Const., Art. VI, cl.3; *McDaniel v. Paty*, 435 US 618 (1978). If there were any doubt that the Commission's holding on Count Twelve is a religious test based on his "firmly held [Christian] religious beliefs [that] include defining marriage as only between a woman and a man", it is dispelled by Article I §6, which also applies to those who participate in judicial proceedings: witnesses and jurors:

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that has nothing whatever to do with solemnizing marriages: *Mississippi Comm'n on Jud. Performance v. Hopkins*, 590 So.2d 857 (Miss. 1991) (removing a judge found to have taken bribes, to have used his office to gain pecuniary benefits for himself, and to have engaged in the obstruction of justice by ticket-fixing).

> No person shall be rendered incompetent as a witness, or juror in consequence of his opinions on matters of religeon [sic]; nor be questioned in any Court of Justice touching his religeous [sic] belief to affect the weight of his testimony.

Because the decision of this Court to remove or retain Judge Day will resolve a present legal controversy over his fitness for office, *these* proceedings are unquestionably "judicial" in character, and are thus limited in their scope to matters properly within the State's competence. Neither Judge Day's religious beliefs, nor his religiously-based decision to instruct his staff that he would be "unavailable" to perform same-sex marriages, is a matter that can "be questioned in any Court of Justice".

Review of Count Twelve will inevitably require this court to question Judge Day's beliefs on the morality of same-sex marriage. In its review of the evidence pursuant to the statutory and constitutional procedure for the removal of Oregon judges, the Commission on Judicial Fitness and Disability explicitly did so. The Commission's consideration of his religious beliefs was, therefore, "judicial" in character, and forbidden by the Oregon Constitution. *See Praggastis v. Clackamas County*, 305 Or. 419, 752 P2d 302 (1988) (immunity for judicial acts extends to judges and, to some degree, to officials who are performing acts associated with the judicial function).

The Commission's inquiry into Judge Day's religious beliefs *per se* underscores the outsize role they have played in this case. Where, as here, there is evidence of "mixed motive" in the Commission's recommendations, this Court must satisfy itself that they were untainted by evidence violating Article I §§4, 6. *See, e.g., Marconi v. Guardian Mgmt. Corp.,* 149 Or. App. 541, 945 P.2d 86 (1997) (permitting proof in a mixed-motive case that the ostensibly valid reasons for terminating the employee were, in fact, a sham).

CONCLUSION

The solemnization of marriages is not a judicial function, and no judicial officer can constitutionally be required to solemnize marriages contrary to their schedule, will or firmly-held religious beliefs. Moreover, neither this Court, nor the Commission, has any authority to inquire into or evaluate Judge Day's firmly-held religious beliefs, nor to opine that a judge's decision to remove himself from the rolls of judges willing to solemnize weddings because of those beliefs, renders him unfit for judicial service.

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In so doing, the Commission itself violated not only Article I, § 4 of the Oregon Constitution and Article VI, cl. 3 of the United States Constitution, but also Rule 3.3(B) of the Oregon Rules of Judicial Conduct.

Respectfully submitted,

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I hereby certify that I served the foregoing BRIEF OF AMICUS CURIAE CHRISTIAN LEGAL SOCIETY AND PROFESSOR MARK DAVID HALL on the following via the indicated method(s) of service:

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__X____ **ELECTRONIC FILING** utilizing the Court's electronic filing system

_____ **EMAILING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known email address(es) on the date set forth below.

_____ **HAND DELIVERING** certified full, true and correct copies thereof to the attorney(s) shown above at their last known office address(es), on the date set forth below.

_____ **OVERNIGHT COURIER** mailing of certified full, true and correct copies thereof in a sealed, prepaid envelope, addressed to the attorney(s) shown above at their last known office address(es), on the date set forth below.

DATED this 24th day of January, 2017.

s/ HERBERT G. GREY

Herbert G. Grey, OSB #810250
Of Attorneys for *Amicus Curiae* CHRISTIAN LEGAL SOCIETY and PROFESSOR MARK DAVID HALL