

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JANE DOE,

Plaintiff-Appellant,

v.

MEDFORD SCHOOL DISTRICT 549C,

Defendant-Respondent.

Court of Appeals  
No. A137804

Jackson County Circuit Court  
No. 073765E2

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**BRIEF OF AMICI CURIAE PORTLAND PUBLIC  
SCHOOL DISTRICT NO. 1J AND PORTLAND  
COMMUNITY COLLEGE DISTRICT**

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Appeal from the Judgment of the Circuit Court of Oregon,  
for the County of Jackson  
The Honorable G. Philip Arnold, Judge

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Bruce L. Campbell, OSB 925377  
Jeffrey G. Condit, OSB 822238  
Michael Porter, OSB 003560  
MILLER NASH LLP  
3400 U.S. Bancorp Tower  
111 S.W. Fifth Avenue  
Portland, Oregon 97204-3699  
Telephone: (503) 224-5858

Attorneys for Amici Curiae  
Portland Public School District  
No. 1J and Portland Community  
College District

James E. Leuenberger, OSB 891542  
JAMES E. LEUENBERGER, P.C.  
4800 S.W. Meadows, Suite 300  
Lake Oswego, Oregon 97035  
Telephone: (503) 542-7433

Attorney for Plaintiff-Appellant

Timothy C. Gerking, OSB 792345  
BROPHY MILLS SCHMOR  
GERKING BROPHY & PARADIS, LLP  
201 W. Main Street, Fifth Floor  
Medford, Oregon 97501  
Telephone: (541) 772-7123

Attorneys for Defendant-Respondent

June 2008

Rebekah R. Cook, OSB No. 063024  
OREGON SCHOOL BOARDS ASSOC.  
1201 Court Street N.E., Suite 400  
Salem, Oregon 97301  
Telephone: (503) 588-2800, ext. 243

Amicus Curiae on behalf of  
Oregon School Board Association

Hardy Myers, OSB No. 640776  
Attorney General  
Mary H. Williams, OSB No. 911241  
Solicitor General  
Anna M. Joyce, OSB No. 013112  
Assistant Attorney General  
1162 Court Street N.E.  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402

Attorneys for Amicus Curiae  
State of Oregon

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## INTRODUCTION

Amici curiae Portland Public School District No. 1J ("PPS") and Portland Community College District ("PCC") join respondent Medford School District 549C in requesting that the Court affirm the judgment of the trial court. The trial court correctly concluded that the firearms preemption statute, ORS 166.170, does not prevent a school district from enacting personnel policies that prohibit employees from possessing weapons on school property.

PPS and PCC, however, appear as amici to point out that the statute leaves room for governmental entities to not only enact workplace policies, but also to engage in other non-regulatory functions without running afoul of ORS 166.170. Both PPS and PCC have adopted policies that prohibit anyone from possessing weapons on school property. Like the Medford personnel policy at issue on appeal, these policies are the product of a school district acting in its proprietary capacity to manage its operations. The policies do not extend beyond the districts' own property and do not involve the exercise of police or other regulatory power that ORS 166.170 was designed to address. As a consequence, PPS and PCC respectfully request that the Court affirm the judgment of the trial court and that, in doing so, it emphasize that ORS 166.170 does not prohibit a governmental entity from adopting policies that are not regulatory in nature.

## ARGUMENT

### I. PPS and PCC Weapons Policies.

PPS and PCC are charged with maintaining the safety of their schools for students, teachers, and others. *See, e.g.*, ORS 339.312-.377 (school safety statutes). To help fulfill these obligations, PPS and PCC have adopted policies prohibiting weapons on school property. PPS Board Policy 3.40.014-P provides, in part, that "[n]o person except a Peace Officer shall have or enable another to have a weapon [or replica of a weapon] on

district property. 'Weapon' for purposes of this policy \* \* \* includes [a] 'dangerous weapon,' 'deadly weapon,' 'firearm,' and 'destructive device.'" App. 1-2.

PCC's Security Policies also contain a provision prohibiting weapons on its property: "The possession of any dangerous weapons on college property is prohibited unless possessed by a certified law enforcement or public safety officer." App. 5. As explained below, PPS's and PCC's weapons policies are not proscribed by ORS 166.170.

## II. Proprietary Versus Regulatory Activities.

Federal and state courts have consistently held that governmental agencies have greater latitude when acting in a proprietary capacity than when exercising regulatory authority. *See, e.g., Engquist v. Oregon Dep't. of Agriculture*, No. 07-474, 2008 WL 2329768, at \*5 (US June 9, 2008) (distinguishing between "the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation,'" ) (quoting *Cafeteria Workers v. McElroy*, 367 US 886, 896, 81 S Ct 1743, 6 L Ed 2d 1230 (1961)); *McMann v. City of Tucson*, 47 P3d 672, 676 (Ariz Ct App 2002) ("When engaging in business activities, a city is presumed to act under the same restrictions as a private person."); *Great Western v. County of Los Angeles*, 44 P3d 120, 130 (Cal 2002) (county's power to "'manage' [its own] property must necessarily include the fundamental decision as to how the property will be used").<sup>1</sup>

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<sup>1</sup> In *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291, 302, 711 P2d 119 (1985), the Oregon Supreme Court "conclude[d] that the governmental/proprietary distinction is \* \* \* unworkable, untenable and unhelpful in deciding mass transit/utility relocation cases." Although *Northwest Natural Gas* and other authorities have criticized the distinction as an unhelpful tool in classifying municipal functions involving mass transit, utilities, or other public works, the distinction between proprietary and regulatory actions is helpful in differentiating between a governmental entity's management of its operations and its external regulatory activities. And, as illustrated by the United States Supreme Court's recent decision in *Engquist*, the proprietary versus regulatory distinction remains viable.

It is well established that a government acts in its proprietary capacity when it enacts rules regarding its workforce. See *Waters v. Churchill*, 511 US 661, 671, 114 S Ct 1878, 128 L Ed 2d 686 (1994) ("the government as employer indeed has far broader powers than does the government as sovereign"); *Cherry v. Municipality of Metro. Seattle*, 808 P2d 746, 748 (Wash 1991) (distinguishing internal employment rules from regulatory activity). Similarly, when a government adopts rules regarding its own property, it is not engaging in a regulatory function. *McMann*, 47 P3d at 676-77; *Great Western*, 44 P3d at 130.

**III. ORS 166.170 Does Not Restrict Government Bodies From Engaging in Proprietary Functions Such as Managing Their Employees or Property.**

ORS 166.170 provides:

"(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

"(2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to, zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void."

To determine the meaning of the statute, the court follows the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993). Under *PGE*, the court begins by examining the text of the statute in context to determine whether the statute is ambiguous. If the legislature's intent is clear from the text and context, no further inquiry is necessary. If, however, the statute is ambiguous, the court examines the legislative history, together with the text and context, to resolve

the ambiguity. If ambiguity remains after reviewing the legislative history, the court resorts to maxims of statutory construction to aid resolution of the remaining ambiguity.

- A. **ORS 166.170's text in context reveals that the legislature intended to prevent conflicting local firearms regulation and was not concerned with a local government's operational rules.**

In this case, an analysis of ORS 166.170's text in context reveals that the Legislative Assembly did not intend to restrict government entities from enacting policies regarding their employees or property. Instead, the legislature designed the statute to prevent a patchwork of local firearms regulations by cities, counties, and other governmental units, and to allow the state to occupy the field of firearms regulation.

Beginning with the text of the statute, ORS 166.170(1) provides that the state retains the authority to "regulate" the "sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms," while ORS 166.170(2) prohibits counties, cities, municipal corporations, or districts from enacting "civil or criminal ordinances" that "regulate" the "sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms." Thus, the operative term in both subsections of ORS 166.170 is "regulate."

Because "regulate" is a term of common usage, it is appropriate to look to its dictionary definition to determine its ordinary meaning. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006). *Webster's Third New Int'l Dictionary* 1913 (unabridged ed 2002) defines "regulate" as "to govern or direct according to rule <laws which ~ the succession of seasons>; *usu* : to bring under the control of law or constituted authority : make regulations for or concerning <~ the industries of a country>."

The ordinary meaning of "regulate" suggests that the legislature did not intend to restrict governmental agencies in managing their internal operations. By prohibiting local governments from "regulating" firearms, the legislature appears to have been concerned with local governments enacting laws that regulate or control firearms—

in other words, ordinances that impose criminal or civil penalties and have the force of law. There is simply nothing in the statute to suggest that the legislature intended to interfere with the ability of local governments to manage their workforces or to control their own property.

The context of ORS 166.170 underscores that conclusion. The legislature placed the statute in the Oregon Criminal Code, which suggests that the legislature was concerned with local laws that criminalize or otherwise regulate firearms generally, rather than with a local government's policies concerning its workforce or property. *Cf. McMann*, 47 P3d at 677 (placement of firearms preemption statute in criminal code "strongly suggests that the legislature only intended to preempt municipalities from enacting local criminal ordinances relating to firearms"); *Federation of Oregon Parole & Probation Officers v. Washington County*, 19 PECBR 411, 420 (2001) (noting placement of ORS 166.170 in criminal code and concluding that statute did not apply to county's authority to prohibit employees from carrying firearms on county property).

The statutes accompanying ORS 166.170 provide additional contextual support. *See State v. Carr*, 319 Or 408, 411-12, 877 P2d 1192 (1994) ("Context includes other related statutes."). ORS 166.171(1) and ORS 166.172(1) provide that a county or city "may adopt ordinances to regulate, restrict or prohibit the discharge of firearms within [its] boundaries." ORS 166.173(1) states that a "city or county" may adopt ordinances to "regulate, restrict or prohibit the possession of loaded firearms in public places." When read in tandem with ORS 166.170, the statutes show that the legislature was concerned with local governments attempting to regulate firearms across their jurisdictional reach. ORS 166.171-.173 operate as exceptions to the broad prohibition against local firearms regulation established in ORS 166.170. In each of those statutes, cities or counties are permitted—subject to certain specified exceptions—to regulate the discharge of firearms (ORS 166.171-.172) or the possession of loaded firearms on public property (ORS 166.173) throughout their jurisdictions. The scope and substance of these

exceptions to the general rule prohibiting local regulation of firearms suggest that the legislature had in mind broad territorial restrictions on firearms, rather than governmental control of its employees or property, when it enacted ORS 166.170.

ORS 166.174 confirms the conclusion that ORS 166.170 does not apply to a local government's control of its own property. ORS 166.174 provides that a "city, county or other municipal corporation or district may not adopt ordinances that regulate, restrict or prohibit the possession or sale of firearms in a public building that is rented or leased to a person during the term of the lease." If, as plaintiff contends, ORS 166.170 prohibits any and all firearms restrictions adopted by a local government, whether regulatory or proprietary in nature, then ORS 166.174 would be mere surplusage because it would prohibit restrictions already proscribed by ORS 166.170. *See State v. Stamper*, 197 Or App 413, 418, 106 P3d 172, *rev denied*, 339 Or 230 (2005) ("As a general rule, we assume that the legislature did not intend any portion of its enactments to be meaningless surplusage."). Additionally, the legislature's singling out of public buildings "rented or leased" to another suggests that a public entity may restrict firearms on its property that has not been rented or leased. Had the legislature intended to prohibit a local government from restricting firearms on its own premises, it presumably would have not crafted ORS 166.174 so narrowly to apply only to public buildings that are rented or leased to another.

**B. The legislative history confirms that ORS 166.170 was not intended to interfere with a local government's operational rules regarding its employees or property.**

Even if ORS 166.170 remained ambiguous after examining its text in context, the legislative history reveals that the statute was not designed to prohibit local government bodies from controlling their operations by restricting firearms on their property or among their employees. Instead, the legislative history evinces a clear legislative intent that ORS 166.170 was designed to avoid a patchwork of firearms

regulations by local jurisdictions in favor of uniform regulation by the state. For example, during a work session on HB 2784 before the House Committee on Judiciary, Representative Tiernan commented:

"There are unique problems when there are different laws all over the state \* \* \*. There is problems with having different laws concerning different kinds of guns, loaded or unloaded, when traveling around the state. We need to have one rule so that people can carry their weapon with the insurance that they won't violate different jurisdiction laws." Minutes, House Committee on Judiciary, Mar. 23, 1995, at 7.

Chair Parks echoed these comments in a subsequent work session, noting that the bill "gives gun control *regulation* to the state of Oregon rather than local jurisdictions," and that "[t]he intent of the bill is to recognize the constitutional rights of lawful owner of firearms and to regulate them in a uniform manner throughout the state." Minutes, House Committee on Judiciary, Apr. 3, 1995, at 4 (emphasis added).

During a public hearing on the bill, Representative Markham commented that "[g]un law must protect gun owners as they travel throughout the state." Minutes, Senate Rules and Elections, May 17, 1995, at 3. The minutes also reflect the testimony of D. Patrick Whitcomb, an Oregon citizen, on the following points: "—Travels though numerous counties and cities with a gun club. — Notes impossibility of tracking local ordinances on gun control. — Calls for uniform standards set at the state level." *Id.* Finally, in a position statement on behalf of the National Rifle Association, Rod Harder wrote as follows:

"Preemption is designed to prevent a 'patchwork' of local restrictions on the rights of law abiding citizens to keep and bear arms across the state. Without this protection and the necessary clarifications made in this bill, honest citizens who choose to own and use a firearm for self-defense, or hunters, competitive shooters and collectors who travel through various parts of the state to participate in perfectly legal activities all run the risk of arrest and confiscation of their firearms, not to mention costly litigation, for unwitting violations of obscure local ordinances.


"By providing for a uniform set of state firearms laws, preemption assures all law-abiding citizens equal protection of the rights guaranteed them by the state constitution. It also prevents local governments from enacting future arbitrary infringements on those rights." Senate Rules and Elections, Ex. D, May 17, 1995.

Thus, the legislative history makes it clear that ORS 166.170 was designed to ensure uniformity of civil and criminal firearms ordinances throughout the state.<sup>2</sup> The text, context, and legislative history underlying ORS 166.170 do not reveal any indication that the statute was intended to prohibit local government bodies from restricting firearms on their property or among their workforce.

### CONCLUSION

ORS 166.170 does not prevent a school district from prohibiting its employees or others from possessing firearms on school property. Accordingly, PPS and PCC respectfully request that the Court affirm the judgment of the trial court.

MILLER NASH LLP

  
\_\_\_\_\_  
Bruce L. Campbell, OSB 92537  
Jeffrey G. Condit, OSB 82223  
Michael Porter, OSB 00356

Attorneys for Amici Curiae  
Portland Public School District No. 1J and  
Portland Community College District

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<sup>2</sup> *Cf. McMann*, 47 P3d at 677 (concluding that legislative history of Arizona firearms preemption statute "was to ensure that conduct legal in one municipality is not illegal in another and that citizens have access to firearms for protection, not to prevent cities from determining how to use their commercial property").

**APPENDIX**

### 3.40.014-P Weapons, Explosives And Fire Bombs



- (1) No person except a Peace Officer shall have or enable another to have a weapon [or replica of a weapon] on district property. "Weapon" for purposes of this policy, and as defined by state and federal law, includes:
  - (a) "Dangerous weapon" - any weapon, device, instrument, material or substance, which under the circumstances in which it is used, attempted to be used or threatened to be used is readily capable of causing death or serious physical injury;
  - (b) "Deadly weapon" - any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury;
  - (c) "Firearm" - any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive, frame or receiver of any such weapon, any firearm muffler or silencer or any other destructive device as defined by federal law.
  - (d) "Destructive device" - any device with an explosive, incendiary or poison gas component or any combination of parts either designed or intended for use in converting any device into any destructive device or from which a destructive device may be readily assembled. A destructive device does not include any device, which is designed primarily or redesigned primarily for use as a signaling, pyrotechnic, line throwing, safety or similar device.
- (2) No person except a Peace Officer shall have or enable another to have an explosive or fire bomb on district property. "Explosive" includes a device, which by heat, impact, friction or detonation will explode with such force as to injure a person or damage property. "Fire bomb" means a breakable vessel containing a substance with a flash point below 151 degrees Fahrenheit that includes a device for its intentional ignition.
- (3) No student shall bring, possess, conceal or use a weapon on or at activities under the jurisdiction of the district or interscholastic activities administered by a voluntary organization approved by the State Board of Education.
- (4) The superintendent or designee may, as provided by law, authorize other persons to possess weapons for courses, programs and activities approved by the district and conducted on district property.

3.40.014-P

# 3.40.014-P Weapons, Explosives And Fire Bombs

Legal References: ORS 161.015; OAR 581-021-0050 to -0075; ORS 166.210 - 166.370; OAR 581-053-0010 (5); ORS 332.107; OAR 581-053-0015 (7)(k); ORS 339.115; OAR 581-053-0545 (4)(c),(w); ORS 339.240; OAR 581-053-0550 (5)(y); ORS 339.250; ORS 339.260; ORS 809.060; ORS 809.260

History: Adpt 2/14/91; Amd 9/9/02; BA 2419

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## Security Policies

### Alcohol and/or Drugs on PCC Property

The PCC Alcohol and Drug Policy prohibits the use of, or being under the influence of alcoholic beverage on any property owned or controlled by the college. Any person drinking or under the influence of alcohol on college property will be escorted off the property by a DPS officer and may face disciplinary action.

PCC policy also prohibits the use, possession, sales or distribution of any illegal substance or drug on any property owned or controlled by the college. Any individual found to be using, possessing, selling or distributing such illegal substances may be subject to being escorted off campus by a PSO, college disciplinary action and/or arrest in accordance with Oregon State or Federal laws.

### Bomb Threats and Suspicious Packages

A bomb threat may be received by anyone. Vital information that may save lives and property can be gained from the caller. If you or a staff member receives a bomb threat:

- Be calm and courteous and listen carefully.
- Take notes, if possible, without becoming distracted from what the caller is saying.
- Do not interrupt; do not place the caller on hold or attempt to transfer the call.
- If possible, quietly attract the attention of someone nearby, indicate the nature of the call and have that person notify Public Safety Dispatch, or call 911 from another phone.
- Inform the caller that detonation could cause serious injury or loss of life.

If caller is agreeable to further conversation, or after the call is over, complete the Bomb Threat Call Checklist [\[pdf\]](#).

Notify Public Safety dispatch ext. 4444 or local law enforcement 911 immediately. Ask for guidance as to whether to evacuate the facility prior to Public Safety or law enforcement arrival on scene.

If requested to do so by Public Safety or law enforcement, search your immediate work area. If you locate a suspicious article, **do not touch it!!!** Leave the area immediately and notify Public Safety or law enforcement.

Be aware and wary of out-of-place containers or receptacles. If a suspicious article is found, supervisory personnel and Public Safety or law enforcement will determine if the building should be evacuated and if standard evacuation procedures should be followed.

Public access areas are the most vulnerable because of ease of access, i.e., restrooms, lobby areas, etc.

Never handle a suspicious item, leave it alone and call Public Safety or law enforcement.

When dealing with letters, parcels or unusual packages, the following factors may indicate a bomb or hazardous device. You should be suspicious of:

- Protruding wires or tinfoil
- Excessive security material such as tape, string, etc.
- Rigid, lopsided or uneven envelopes
- Markings such as "confidential," "personal," etc.
- Excessive postage or weight
- Oily stains or discoloration
- Foreign mail, air mail and special deliveries
- Hand written or poorly typed addresses or no return addresses
- Incorrect title or a title with no name
- Misspellings of common words
- Visual distractions
- Vapors or odors

### **Sexual Misconduct or Abuse on Campuses**

Sexual misconduct is clearly inconsistent with the purposes of an academic community, and is a violation of the Students Code of Conduct, as well as a violation of State and Federal laws. Sexual misconduct includes, but is not limited to:

- Unwanted verbal contact (including telephonic and voice mail), written (including electronic mail), pictorial or physical contact of a sexual nature which a reasonable person would consider intimidating, hostile, offensive and/or which adversely affects the learning environment on any campus.
- Unwanted forceful sexual contact. The use of force may include, but is not limited to, the use of body weight, pushing, hitting, coercion, or threats. Resistance may be verbal, physical or both.
- Sexual intercourse within the legal definition of statutory rape, or when this victim is incapable of consent by reason of mental incapacitation or physical helplessness, whether the use of force is present or not.

DPS should be notified as soon as possible of any incident of sexual misconduct on campus. The well being of the victim is the primary concern of the department, and an active victim's referral program is available. The department will offer guidance to assist in evidence preservation and will also notify the proper law enforcement agency to respond.

In addition to criminal proceedings on a charge of sexual misconduct by a student, disciplinary proceedings will be processed through the office of the Dean of Students. Portland Community College will attempt to prevent the disclosure of the identities of the victim(s) and the accused throughout the process until a final determination has been made.

Both the victim and the accused are entitled to the same opportunities during the proceedings, and both will be informed of the outcome of such proceedings. The college considers sexual misconduct an act of violence which may be addressed by suspension, dismissal from classes, or other disciplinary actions.

In the case of an allegations of sexual misconduct on the part of a staff member, the disciplinary review could result in required counseling, suspension, and/or termination of employment.

PCC provides a variety of educational programs and materials which address rape/acquaintance rape awareness and prevention information as well as other self-protection programs. These programs are offered through DPS and are available upon request to extension 4902.

Please also refer to the **Campus Sex Crimes Prevention Act**.

### **Weapons on PCC Property**

The possession of any dangerous weapons on college property is prohibited unless possessed by a certified law enforcement or public safety officer.

Any individual in possession of dangerous weapons on college property is subject to being escorted off campus by a Public Safety Officer, college disciplinary action and/or arrest in accordance with state and federal laws, ORS 166.370.

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#### **Related Pages**

Public Safety, Campus Sex Crimes Prevention Act

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on the 25<sup>th</sup> day of June, 2008, I served the Brief of Amici Portland Public School District No. 1J and Portland Community College District on:

James E. Leuenberger  
JAMES E. LEUENBERGER, P.C.  
4800 S.W. Meadows, Suite 300  
Lake Oswego, Oregon 97035

Attorney for Plaintiff-Appellant

Timothy C. Gerking  
BROPHY MILLS SCHMOR  
GERKING BROPHY & PARADIS, LLP  
201 W. Main, Suite 5  
Medford, Oregon 97501

Attorney for Defendant-Respondent

Rebekah R. Cook  
OREGON SCHOOL BOARDS ASSOC.  
1201 Court Street N.E., Suite 400  
Salem, Oregon 97301

Amicus Curiae on behalf of Oregon School Board Association

Hardy Myers  
Attorney General  
Mary H. Williams  
Solicitor General  
Anna M. Joyce  
Assistant Attorney General  
1162 Court Street N.E.  
Salem, Oregon 97301-4096

Attorneys for Amicus Curiae State of Oregon

by mailing to the above attorneys two full, true, and correct copies thereof, by certified mail, return receipt requested. I further certify that the copies were contained in sealed envelopes addressed as above stated, the last-known addresses of the attorneys, and deposited with the United States Postal Service at Portland, Oregon.

I further certify that on the 25<sup>th</sup> day of June, 2008, I filed the original and 20 copy of the Brief of Amici Portland Public School District No. 1J and Portland Community College District by mailing the original and copies to:

State Court Administrator  
Appellate Courts Records Section  
Supreme Court Building  
1163 State Street  
Salem, Oregon 97301-2563

by certified mail, return receipt requested.

  
\_\_\_\_\_  
Bruce L. Campbell

Of Attorneys for Amici Curiae  
Portland Public School District No. 1J and  
Portland Community College District