

From the Desk of Senator Boquist

Supreme Court of Oregon, En Banc.

**STATE of Oregon, Petitioner–Respondent on Review, v. Mark N. BABSON,
Respondent–Petitioner on Review. ... et al.**

Decided: May 15, 2014

Timothy R. Volpert, Portland, on behalf of ACLU Foundation of Oregon, Inc., argued the cause and filed the briefs for respondent-petitioner on review Mark N. Babson, Michele C. Darr, Teresa L. Gooch, Margaret M. Morton, and George G. Meek. With him on the briefs were Alan J. Galloway, Tim Cunningham, and Michael E. Swaim. Jossi Davidson, Silverton, on behalf of ACLU Foundation of Oregon, Inc., argued the cause and filed the brief for respondent-petitioner on review Gregory J. Cleland. Carson L. Whitehead, Assistant Attorney General, and Anna M. Joyce, Solicitor General, argued the cause and filed the briefs for petitioner-respondent on review State of Oregon. **With them on the briefs was Ellen F. Rosenblum, Attorney General. Dexter A. Johnson, Legislative Counsel, Salem, filed a brief for amicus curiae Oregon Legislative Assembly in S060455.**

Defendants held an around-the-clock vigil on the steps of the state capitol building to protest the deployment of Oregon National Guard troops to Iraq and Afghanistan. During that vigil, the **state police** cited defendants for second-degree criminal trespass when they remained on the capitol steps after 11:00 p.m., in violation of a **Legislative Administration Committee (LAC)** guideline that prohibited “[o]vernight use” of the steps between 11:00 p.m. and 7:00 a.m., except in limited circumstances. Defendants challenged those citations, arguing that the LAC guideline was unconstitutional under Article I, section 8, and Article I, section 26, of the Oregon Constitution—the provisions protecting free expression and the right to assemble, instruct representatives, and apply for redress of grievances. Defendants also argued that the LAC guideline violated the First Amendment to the United States Constitution. The trial court rejected those arguments and found defendants guilty of second-degree criminal trespass. On appeal, the Court of Appeals similarly rejected defendants’ facial challenges to the guideline under the Oregon Constitution, but remanded defendants’ as-applied challenges to allow defendants to question the legislator co-chairs of the LAC about enforcement of the guideline. Because defendants’ state constitutional challenges were unresolved, the Court of Appeals did not reach defendants’ First Amendment argument. *State v. Babson*, 249 Or.App. 278, 307–08, 279 P3d 222 (2012).

On review, defendants renew their challenges to the guideline under Article I, section 8, and Article I, section 26, of the Oregon Constitution, as well as under the First Amendment. The state also sought review, arguing that the Court of Appeals erred when it determined that defendants could support their as-applied challenges under the Oregon Constitution by questioning the two legislator co-chairs of the LAC about “any instructions or other communications” that they might have given or had regarding enforcement of the guideline against defendants. *Id.* at 302. The state asserts that Article IV, section 9, of the Oregon Constitution—the Debate Clause—bars defendants from questioning those legislators.

For the reasons set out below, we affirm the Court of Appeals. We conclude that the LAC guideline, on its face, does not violate Article I, section 8, or Article I, section 26, of the Oregon Constitution. **To determine whether the LAC guideline was applied unconstitutionally to defendants’ expression and assembly, however, we must remand to permit defendants to question the legislator co-chairs of the LAC about their involvement, if any, in enforcement of the guideline against defendants. Taking that testimony into account, the trial court must determine whether enforcement of the guideline against defendants was an impermissible restriction on their protected activities or whether it was a reasonable restriction on the time, place, and manner of their expression and assembly. Because of our resolution of that issue, we do not reach defendants’ First Amendment argument.**

State v. Babson (2014) Extract

Justice Balmer Quotes:

The Oregon Constitution vests the legislative power of the state in the Legislative Assembly, and the executive power of the state in the Governor. Or Const, 1Art IV, § 1(1) ("The legislative power of the state * * * is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives."); Or Const, Art V, § 1 ("The chief [sic] executive power of the State, shall be vested in a Governor[.]"). **Not only does the constitution forbid members from one branch from exercising the functions of another branch, but to the extent that the legislature has enforcement powers, those powers are explicitly set forth in the constitution.** See Or Const, Art III, § 1 ("[N]o person charged with official duties under one of these [three] branches, shall exercise any of the functions of another, except as in this Constitution expressly provided."); Or Const, Art IV, § 16 (providing that either house, during its session, may "punish by imprisonment, any person, not a member, who shall have been guilty of disrespect to the house by disorderly or contemptuous [sic] behavior in its presence"). **Because enforcement is not generally part of the legislative function, extending the privilege to legislators' participation in some aspect of enforcement of a law would not serve the clause's purpose** of allowing legislators to perform their legislative role without interruption or fear of retribution. **We therefore conclude that legislative members who participate in or specifically direct enforcement of a law against particular individuals may be questioned about that conduct** because it is not protected under the Debate Clause of Article IV, section 9.13

13. The state does not appear to dispute that conclusion. The state argued in its brief that "had President Courtney and Representative Hunt reached out to any executive official or agency about the [guideline], for instance, by directly calling Oregon State Police to arrest defendants, those actions might not fall within Article IV, section 9's scope." The state argues that that conclusion does not control the outcome here, however, because there is no evidence that the legislators reached out to any executive agency and because any communications that they did have were with the Legislative Administrator, who "was simply an extension of the legislators." As an initial matter, defendants are not bound by the lack of evidence about whether the legislators reached out to an executive agency, where the testimony of the legislators might provide that missing evidence. **More importantly, the state's argument misconstrues the legislative function inquiry. The question is not who the legislators communicated with, but the function of the communication.** Many of the legislators' conversations with the Legislative Administrator would be protected by Article IV, section 9, to the extent that they related to the enactment or amendment of the guideline. **To the extent that the individual legislators directed the Legislative Administrator to direct the Oregon State Police to enforce the guideline in a particular way, however, that conversation would not be protected merely because the legislators used the Legislative Administrator as an intermediary in directing the executive agency to enforce the guideline in a particular way.**