



**Testimony of Kimberly McCullough, Legislative Director
In Support of HB 2704 A as amended by -A8
Senate Committee on Judiciary
June 2, 2015**

Chair Prozanski and Members of the Committee:

Thank you for the opportunity to submit comments in support of HB 2704 A, as amended by the -A8 amendments, which is essential for protecting the right to record on-duty peace officers in Oregon. We thank the bill sponsor for bringing this issue forward, each of the members who joined as sponsors this session, and the Chair for giving the bill a hearing.

It should not be a crime to pull out a phone, hold it up, and record an officer who is engaged in misconduct. As recent events have shown, bystander video can be a powerful tool for police accountability. Unfortunately, however, Oregon law currently criminalizes certain recordings of police officers—recordings which courts overwhelmingly agree are protected by the First Amendment.¹

Under current Oregon law, it is a crime to record a conversation without “specifically informing” the parties to the conversation (interpreted by Oregon courts as “unequivocal warning”). The problem with this is that sometimes it is not safe for a person to interrupt an officer to provide warning, such as:

- When an officer is engaged in a dangerous situation and may be distracted by the warning.
- When an officer is actively engaged in misconduct, and warning the officer may provoke additional misconduct directed at the person recording.

Many officers would also prefer that people quietly stand by while recording, rather than having to listen to warning upon warning in the middle of what may already be a tense situation. In addition, **because it is common knowledge that the public has a right to record on-duty police, people all over Oregon are unintentionally violating Oregon’s eavesdropping statute** when they openly record without a warning.²

¹ The number of court cases confirming the right to record police is vast. Rather than providing you with pages and pages of citations to case law, we would like to draw your attention to the two leading circuit court cases on this issue, both of which struck down state eavesdropping/wiretapping statutes as applied to the recording of on-duty police. *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), cert. denied, 133 S. Ct. 651 (2012) (Illinois); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (Massachusetts). The federal Department of Justice has also provided particularly helpful guidance on the right to record: http://www.justice.gov/crt/about/spl/documents/Sharp_ltr_5-14-12.pdf.

² The ACLU of Oregon believes (as do many courts around the nation) the First Amendment protects certain surreptitious recordings of on-duty police. While this bill does not address such recordings, which will remain criminal under Oregon law, HB 2704 takes a significant step toward protecting the right to record on duty police in Oregon.

HB 2704 A and the -A8 amendments fix the unconstitutionality of Oregon's eavesdropping statute by adding the following exemption:

“A person who openly and in plain view records a law enforcement officer speaking at a volume that is audible by normal unaided hearing while the officer is performing official duties and the person recording is in a place where the person lawfully may be.”

This exemption would simply change the requirement that an individual “specifically inform” the officer to a requirement that the individual record “openly and in plain view.” “Openly” commonly means “without concealment, deception, or prevarication, especially where these might be expected.” Because of concerns that the term “openly” may be ambiguous, despite its easily understandable definition, the -A8 amendments add the term “plain view,” which has an established meaning in criminal law as being something that is plainly observable to the officer.

Concerns have been raised that a person might “openly” record from a great distance, using a high-powered boom microphone, and pick up a whispered conversation between two officers in a public place. In such a situation, a person might fall within the exemption created by HB 2704 A, allowing them to lawfully obtain a conversation that officers intend to keep private by whispering amongst themselves. In order to address this potential issue, the -A8 amendments clarify that the conversation that is recorded must be “audible by normal unaided hearing.”

Concerns have also been raised that the exemption created by this bill may allow a person to record from a location where they are not otherwise authorized to be. In order to address this, the bill was amended in the House Judiciary Committee to require that a person be in a place open to the public in order to fall within the exemption. Under such a rule, however, a person would have less right to record in their own home than on the sidewalk in front of their home. In addition, the general consensus of court cases on this issue is that individuals have a right to record law enforcement from any place where they have a legal right to be. The -A8 amendments clarify that a person may record from any “place where the person lawfully may be,” while also indicating that this exemption does not authorize a person to trespass.

Similarly, in order to alleviate any concerns that HB 2704 A may authorize individuals to disobey lawful orders or to otherwise interfere with law enforcement, the -A8 amendments clarify that the exemption does not authorize a person to violate Oregon's interference statute.

HB 2704 A protects the right to record, but will not:

- Prevent officers from securing crime scenes or lawfully ordering people to step away from police activity.
- Give anyone special rights to trespass, harass or interfere with police.
- Allow secret recording of police.

Please support HB 2704 A and the -A8 amendments to clarify that the public cannot be punished for taking bystander videos of police encounters and to ensure Oregon law complies with the First Amendment.

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