



March 2nd, 2021

Senate Committee on Judiciary and Ballot Measure 110
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in Support of SB 398¹: Intimidation by Display of Noose

Chair Prozanski, Vice Chair Thatcher and members of the committee,

My name is Andrea Valderrama, and I am here representing the American Civil Liberties Union of Oregon (ACLU of Oregon). We are a nonpartisan, nonprofit organization dedicated to the preservation and enhancement of civil liberties and civil rights, with more than 28,415 members statewide. We are here today in support of SB 398.

The ACLU of Oregon was instrumental in rewriting Oregon's hate crime law in 1983, known as "Intimidation." We believe that SB 398, as is currently written, may trigger a constitutional vagueness challenge based on the undefined term "intimidate" being used to define the crime of "intimidation. We offer a few amendments to help strengthen the intention of this bill so that it can provide the much needed relief people of color and especially Black community members deserve and in a manner that is likely to be recognized as consistent with speech protections under the U.S. and Oregon Constitutions.

I. To make sure that SB 398 doesn't criminalize constitutionally protected free speech and gets at the issue of imminent violence, we recommend the following language:

(1) A person commits the crime of intimidation by display of a noose if:

(a) The person, with the intent to ~~intimidate another person or~~ place another person in fear of bodily harm, knowingly places a noose:

(A) On public property; or

(B) On private property without the written consent of the property owner;

(b) The other person is ~~intimidated or~~ placed in fear of bodily harm by the display; and

(c) A reasonable person would be ~~intimidated or~~ placed in fear of bodily harm by the display.

II. Ensure "reasonable person" in Section 1.(1)(c) can account for a person's race and membership in other protected classes. The "reasonable person" standard as is currently written is colorblind, and this may affect the effectiveness of SB 398 by failing to account for different perceptions about a noose and imminent harm by Black, Indigneous, people of color, women and other protected classes. A recent Fourth Amendment case in South Carolina, *State v. Spears*, reflects the contentious relationship

¹<https://olis.leg.state.or.us/liz/2021R1/Downloads/MeasureDocument/SB398/Introduced>



between reasonableness, the reasonable person, the criminal law, and race.² South Carolina Supreme Court Chief Justice Donald Beatty stated in their dissent, “Given the interests at stake, one would expect our criminal justice system to forcefully resist marginalizing the experiences of people of color by insisting on a ‘color-blind’ reasonable person standard.” We believe this standard should be considered in this legislation as well. A reasonable person who identifies as white is likely to have a different reaction to a noose than a reasonable person who identifies as Black, who has ancestors who were hanged by similar nooses, and who may have experienced other race-based discrimination or intimidation. These differences in experiences should not be ignored. There is precedent for the use of a particular type of reasonable person standard in cases that require recognition of the experiences of a particular group of people. In sexual harassment cases, some jurisdictions use the reasonable woman standard instead of the reasonable person standard to determine whether sexual harassment occurred, in order to account for the different perceptions between men and women regarding words or actions of a sexual nature.

- III. Move forward with the -1 amendment³ of clarifying the definition of “noose.”** We believe this amendment provides a clearer definition of noose by removing lines 14-16 from the bill as introduced.
- IV. Ensure a racial justice lens in the creation of new crimes.** We support this bill’s intention, and we remain open to additional conversations about the impact of creating new crimes in our criminal justice system.

For these reasons, the ACLU of Oregon urges you to support SB 398 with these amendments .

Thank you,

Andrea Valderrama
Policy Director
ACLU of Oregon

² Op. No. 27975 (S.C. Sup. Ct. filed February 12, 2020). <https://www.sccourts.org/opinions/HTMLFiles/SC/27945.pdf/>

³ <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/ProposedAmendment/18326>