

# Oregon Department of Justice

Office of the Attorney General

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## Secret Recordings Technical Fix (HB 2129)

### Background

Under Oregon law, recording a communication between two or more people is sometimes legal, and sometimes illegal (depending on whether it is a telephone call, video conference or in-person conversation, and whether any required notice was given). Additionally, ORS 165.540(1)(d) and (e) prohibit the distribution of an illegally recorded communication.

However, the U.S. Supreme Court has held that the First Amendment bars the government from prohibiting the distribution of an illegal recording when (a) the distributor played no part in the illegal recording and (b) the subject matter of the conversation is a matter of public concern. *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001). Thus, Oregon's prohibition on distribution of illegal recordings cannot be constitutionally enforced against a person who played no part in creating the illegal recording.

Amending our law to address this constitutional issue will help to avoid unnecessary litigation, clarify the state of the law for prosecutors and the public, and take this unenforceable law off the books.

### Concept

HB 2129 amends Oregon's secret recording law to conform to the requirements of the First Amendment. It does so by specifically stating that the prohibitions in ORS 165.540(1)(d) and (e) do not apply to persons who did not participate in illegally recording a conversation if the conversation is regarding a matter of public concern.

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