IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

State of Oregon, Plaintiff, v. Teresa Lynn Raiford, Defendant.	Case No. 15-CR-33805 **BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON**

DWT 28584728v6 0200767-000004

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INTRODUCTION

Based on events arising from a Black Lives Matter protest, Defendant Teressa[1] Lynn Raiford has been charged with disorderly conduct in the second degree under ORS 166.025—a statute that has yet to be fully construed even four decades after its enactment. The misapplication of ORS 166.025 threatens the civil liberties of all Oregonians. Accordingly, the American Civil Liberties Union Foundation of Oregon ("ACLU Foundation") seeks to assist the Court in interpreting ORS 166.025 by analyzing its text, context, and legislative history in order to ensure that the statute is applied in a manner consistent with the Legislative Assembly's intent to limit interference with constitutionally-protected speech and assembly.

This analysis demonstrates that the legislature intended to protect civil liberties by limiting the scope of ORS 166.025(1)(d) to conduct threatening to cause substantial disturbances amounting to a "breach of the peace"—a serious offense at common law characterized as terrifying the king's subjects.[2] The legislature's intent, along with longstanding precedent, makes clear that the "disorderly conduct" forbidden by ORS 166.025 requires making a public way effectively impassable. Moreover, in order to violate the statute, this obstruction must be intentional and must involve either the conscious objective to cause, or the conscious disregard of a substantial and unjustifiable risk of causing, a breach of the peace.

STATUTORY INTERPRETATION STANDARD

When interpreting a statute, a court's task is to pursue the intent of the legislature. *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); ORS 174.020. Oregon statutory interpretation begins with an analysis of the text and context of the statute. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). Courts first look to the words themselves, applying statutory definitions if provided, *see State v. Couch*, 341

[1] The ACLU Foundation understands that Ms. Raiford spells her name "Teressa," and it appears that the name is misspelled in the docket.

[2] See section I.A., *infra*.

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Or 610, 619, 147 P3d 322 (2007), and determining the meaning from context if not, *see State v. Glushko*, 351 Or 297, 311-312, 266 P3d 50 (2011) ("Dictionaries * * * do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used.") (internal citation and quotation marks omitted). Context includes other provisions of the same statute, related statutes and model acts, the preexisting common law, and even the broader historical context surrounding the statute's enactment. *See, e.g.*, *State v. Pipkin*, 354 Or 513, 526, 316 P3d 255 (2013); *Fresk v. Kraemer*, 337 Or 513, 520-21, 99 P3d 282 (2004).

Courts must also consider the legislative history offered by a party, although the "evaluative weight," if any, given to that evidence is a matter of judicial discretion. *Gaines*, 346 Or at 171-72. For statutes enacted during the 1971 revision of Oregon's Criminal Code, such as ORS 166.025, the "[c]arefully kept records of the proceedings of the Criminal Law Revision Commission * * * provide a rich source for determination of the drafter's intent." *State v. Garcia*, 288 Or 413, 416, 605 P2d 671 (1980).

Finally, if the legislature's intent remains ambiguous after examining the text, context, and legislative history, the court proceeds to the third and final step, where it "resort[s] to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or at 172. For example, courts must "choose the interpretation which will avoid any serious constitutional difficulty." *State v. Lanig*, 154 Or App 665, 674, 963 P2d 58, 63 (1998); *see also Westwood Homeowners Ass'n, Inc. v. Lane Cty.*, 318 Or 146, 160, 864 P2d 350, 359 (1993) *opinion adh'd to as modified on recons*, 318 Or 327, 866 P2d 463 (1994) (rejecting interpretation that "arguably would infringe on * * * constitutional rights").

ARGUMENT

Here, Ms. Raiford is charged with disorderly conduct in the second degree, as prohibited by ORS 166.025. That statute provides, in relevant part:

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> "(1) A person commits the crime of disorderly conduct in the second degree if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person:
>
> "* * * * *
>
> "(d) Obstructs vehicular or pedestrian traffic on a public way"

ORS 166.025.

The most recent Oregon Supreme Court case construing ORS 166.025 determined that the statute prohibits a person from engaging in the particular types of "conduct" described only if the person acts "with the conscious objective to cause, or with the awareness and conscious disregard of the substantial and unjustified risk of causing, public inconvenience, annoyance, or alarm * * *." *State v. Ausmus*, 336 Or 493, 501, 85 P3d 864 (2003) (citing ORS 161.085).[3]

The Oregon Supreme Court has interpreted neither the phrase "public inconvenience, annoyance or alarm" nor "[o]bstructs vehicular or pedestrian traffic on a public way." However, additional Supreme Court guidance on those phrases is unnecessary. Disorderly conduct's statutory siblings and common law ancestors reveal the meaning of both phrases. These authorities show that ORS 166.025(1)(d) prohibits intentionally rendering a public way effectively impassable with the conscious objective to cause, or conscious disregard for the risk

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[3] ORS 161.085 provides, in relevant part:

> "(7): "'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.
> "* * * * *
> "(9): 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

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of causing, a breach of the peace. This narrow construction effectuates the legislature's intent "to protect the general public from conduct that threatens to erode the community's sense of safety and security" while also preserving those civil liberties now recognized as essential. *State v. Love*, 271 Or App 545, 553-54, 351 P3d 780 (2015).

I. "Public inconvenience, annoyance or alarm" refers to causing serious disturbances amounting to a "breach of the peace" at common law.

As stated in *Ausmus*, a person violates ORS 166.025 only if that person engages in conduct proscribed by one of the subsections "with the conscious objective to cause, or with the awareness and conscious disregard of the substantial and unjustified risk of causing, *public inconvenience, annoyance, or alarm* * * *." *Ausmus*, 336 Or at 504 (citing ORS 161.085) (emphasis added). By including that phrase, the legislature indicated that obstructing traffic alone would not violate ORS 166.025(1)(d); the obstruction must be intentionally or recklessly directed toward causing the result of "public inconvenience, annoyance or alarm." The long history of that phrase confirms that ORS 166.025 applies only to conduct creating a substantial risk of a serious disturbance to the public.

A. The text and context demonstrate that "public inconvenience, annoyance or alarm" refers to causing injury, nuisance, or terror to the public at large.

As part of the comprehensive revision of the criminal code in 1971, the legislature created the "nominally * * * new" crimes of disorderly conduct and harassment "to replace laws classified as disturbing the peace." *State v. Moyle*, 299 Or 691, 700, 705 P2d 740 (1985) (quotation marks omitted). At common law, violent and threatening behavior, "reflected in such offenses as 'affray' and 'riding or going armed with dangerous or unusual weapons'" were "proscribed because of their 'tendency to disturb the peace and tranquility of the community' and 'to terrify the king's subjects.'" *Moyle*, 299 Or at 701 n 10 (citing Perkins, Criminal Law 401, 425 (2d ed 1969)). The legislature divided these breach of the peace offenses into two categories; offenses "creating alarm or annoyance for an *individual*" fell under the harassment

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statute, whereas "the disorderly conduct statute was intended to prohibit disturbances of general or public impact." *Moyle*, 299 Or at 700. (quotation marks omitted; emphasis in original).[4]

"Alarm," as used in the harassment statute, means "fear or terror resulting from a sudden sense of danger," an interpretation "implied from [the statute's] common law breach of the peace origins." *Moyle*, 299 Or at 703-04. This understanding of "alarm" reflects the purpose of breach of the peace offenses and their modern corollaries: to protect "a sense of personal security among the citizenry" and avoid the "emotional harms" caused by the collapse of public order. *Moyle*, 299 Or at 700-01; *see also State v. Love*, 271 Or App 545, 554, 351 P3d 780 (2015) ("[T]he fundamental purpose of the crime of disorderly conduct is to protect the general public from conduct that threatens to erode the community's sense of safety and security.").

Likewise, the riot statute refers to "public alarm," which "has the same content as in *Moyle*—'fear or terror resulting from a sudden sense of danger.'"[5] *State v. Chakerian*, 135 Or App 368, 378-79, 900 P2d 511 (1995) *aff'd*, 325 Or 370 (1997). Yet, "alarm" and "public alarm" are not quite synonymous. The court in *Chakerian* emphasized that the riot statute sought to protect the community at large: "*Public* alarm is collective and communal, rather than individual and innately idiosyncratic." *Chakerian*, 135 Or App at 379-80 (emphasis in original).

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[4] The harassment statute interpreted in *Moyle* provided, in relevant part:

> "(1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, the actor: * * * (d) Subjects another to alarm by conveying a telephonic or written threat * * *, which threat reasonably would be expected to cause alarm"

ORS 166.065.

[5] The riot statute, also part of the Oregon Criminal Code of 1971, provides in relevant part:

> "(1) A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm."

ORS 166.015.

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As used in the disorderly conduct statute, "public * * * alarm" signifies the "collective and communal" sense of "fear or terror" noted in *Chakerian*. *See Chakerian*, 135 Or App; *see also State v. Clemente-Perez*, 357 Or 745, 765, 359 P3d 232 (2015) ("Of course, dictionaries are only the starting point * * *. We must consider the statutory words in context to determine which of multiple definitions is the one that the legislature intended."). The riot and disorderly conduct statutes "were enacted in 1971 as closely associated parts of the same act * * *. They are related statutes concerned with public disturbances." *State v. Chakerian*, 325 Or at 379. Indeed, the riot statute is intended "[t]o provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming." Proposed Oregon Criminal Code art 26, § 3 cmt A (Tentative Draft 1970). These statutes—derived from the same common law principles, drafted by the same committee, and directed toward the same "public disturbances"—should be interpreted consistently. *See Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 611, 859 P2d 1143 (1993) ("[U]se of the same term throughout a statute indicates that the term has the same meaning throughout the statute * * *.") (citation omitted).

Due to this collective and communal nature, "public inconvenience, annoyance or alarm" must "affect not just specific individuals, but the public in general." *State v. Love*, 271 Or App 545, 552, 351 P3d 780 (2015). It is not enough that the conduct "occur in a public place" or cause subjective alarm to "[l]aw enforcement officers responding to a call," the conduct must "threaten[] to erode the community's sense of safety and security." *Love*, 271 Or App at 552-54, 555 n 2; *accord Moyle*, 299 Or at 700; *Chakerian*, 325 Or at 379.

Given this context, "public inconvenience" refers to "an injury esp[ecially] when general or public" and "annoyance" evokes the legal concept of "nuisance." *Webster's Third New Int'l Dictionary* 87-88, 1145 (unabridged ed 2002); *see also Black's Law Dictionary* 104 (9th ed 2009) ("Annoyance. See nuisance (1)"). For the purposes of the disorderly conduct statute, "inconvenience" refers to "the same type of conduct which is described by the words 'annoyance' and 'alarm.'" *State v. Marker*, 21 Or App 671, 675, 536 P2d 1273 (1975) (citing

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State v. Sallinger, 11 Or App 592, 595, 504 P2d 1383 (1972) ("[T]hese terms relate to the * * * invasion of the sanctity of [another's] person or an invasion of his peace of mind.")). All three terms are meant in a "collective and communal sense" and share a similarly serious nature. "[W]ords in a series share the same quality." *Johnson v. Employment Dep't*, 187 Or App 441, 450 n 4, 67 P3d 984 (2003); *see also King City Rehab, LLC v. Clackamas County*, 214 Or App 333, 341, 164 P3d 1190 (2007) ("[T]erms in a list are interpreted in light of the common characteristics of other terms in the same list."). Thus, "public inconvenience" and "annoyance" refer to those public injuries or nuisances that would "terrify the king's subjects" or "erode the community's sense of safety and security."

B. The legislative history confirms that "public inconvenience, annoyance or alarm" refers to causing breaches of the peace.

The disorderly conduct statute is limited to conduct intended to cause, or creating a substantial and unjustifiable risk of causing, a breach of the peace. The legislature incorporated this limitation by borrowing ORS 166.025 nearly verbatim from New York's criminal code. "When Oregon adopts a statute modeled after another jurisdiction, an interpretation of that statute by that jurisdiction's highest court rendered before the adoption of the statute by Oregon is considered the interpretation of the adopted statute that the Oregon legislature intended." *State v. Lewis*, 352 Or 626, 638 n 5, 290 P3d 288 (2012) (emphasis omitted). ORS 166.025 is "derived from New York Revised Penal Law § 240.20 and Michigan Revised Criminal Code § 5525." Proposed Oregon Criminal Code: Final Draft and Report 214 (1970) ("Commentary"). Shortly before the Oregon legislature adopted ORS 166.025, New York's highest court construed New York Revised Penal Law § 240.20:

> "The proscription of the statute * * * is limited to that type of conduct which involves a genuine intent or tendency to provoke a 'breach of the peace' or, to use the revision's more modern phraseology, 'to cause public inconvenience, annoyance or alarm' * * *."

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People v. Pritchard, 27 NY2d 246, 248-49, 265 NE2d 532 (1970). ORS 166.025 is subject to the same limits.

The Commentary to the Proposed Oregon Criminal Code reinforces this conclusion: "This section is directed at conduct causing what the common law termed a breach of the peace." Commentary at 214. This Commentary, along with other "[c]arefully kept records" of the Criminal Law Revision Commission that drafted the Oregon Criminal Code of 1971, "provide a rich source for determination of the drafters' intent." *State v. Garcia*, 288 Or 413, 416, 605 P2d 671, 673 (1980); *see also State v. Wolleat*, 338 Or 469, 475-76, 111 P3d 1131 (discussing *Garcia* and analyzing Commission reports).

According to the Commentary, the disorderly conduct statute was "designed to replace much of the existing law presently classified as 'vagrancy' and 'disturbing the peace.'" Commentary at 214. The Commentary describes the various provisions as proscribing conduct constituting "common law breach of the peace" or "a public nuisance." Among the statutes superseded by ORS 166.025, the Commentary focuses primarily on the "Nuisance Act," *former* ORS 161.310, which prohibited "acts which grossly disturb the public peace or outrage the public decency and are injurious to public morals." Commentary at 214. Other replaced statutes also prohibited serious disturbances such as dueling, permitting vicious animals to roam at large, and shooting at motor vehicles.[6] Proposed Oregon Criminal Code art 26, § 5 cmt C (Tentative Draft 1970).

Thus, the text, context, and legislative history of ORS 166.025 demonstrate that the legislature intended "public inconvenience, annoyance or alarm" to refer to substantial disturbances amounting to a "breach of the peace." The disorderly conduct statute therefore proscribes certain forms of conduct intended to cause, or recklessly creating a risk of causing, injury, nuisance or terror to the community in general.

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[6] *See former* ORS 166.010 – 166.030 (dueling); *former* ORS 166.150 (vicious animals); *former* ORS 166.530 (shooting at motor vehicles).

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C. The legislative history demonstrates that disorderly conduct includes only serious disturbances in order to protect civil liberties.

The Commission limited the scope of the disorderly conduct statute in order to "ensure that [the statute] did not infringe on * * * constitutional guarantees" of due process and free speech. *State v. Robison*, 202 Or App 237, 243, 120 P3d 1285 (2005).

ORS 166.025 was derived in part from the Model Penal Code's (MPC) disorderly conduct provision. Proposed Oregon Criminal Code art 26, § 4 cmt B (Preliminary Draft No 2 1969) (citing Model Penal Code § 250.2 (Proposed Official Draft 1962)). The drafters of the MPC provision sought to "to safeguard civil liberty by careful definition of offenses so that they do not cover, for example, arguing with a policeman, peaceful picketing, disseminating religious or political views." Model Penal Code art 250 cmt (Tentative Draft No 13 1961). Specifying a mental state and enumerating categories of proscribed conduct would "eliminate[] many abusive applications to which older disorderly conduct statutes were susceptible." Model Penal Code and Commentaries § 250.2 cmt 2 (1980).

Inspired by the MPC, the Commission eliminated status offenses like vagrancy, "exclude[d] activities which are not likely to disturb public order," and gave "careful recognition to the protection of fundamental First Amendment freedoms." *Robison*, 202 Or App at 243 (citing Minutes, House Committee on Judiciary, Apr 26 1971) (emphasis omitted). Conduct not threatening to cause public inconvenience, annoyance, or alarm "was regarded as constitutionally protected." *Robison*, 202 at 242. The Commission indicated that it intended the disorderly conduct statute to stop well short of interfering with constitutional rights:

> "If conduct is protected by the 1st amendment to the Federal Constitution—freedom of speech, religion, press and assembly—it cannot be the basis of a conviction for disorderly conduct. . . . If 1st amendment protections are not applicable, then judges should require due process specificity, allow convictions only for conduct which really disturbs and amounts to a breach of the peace, and guard against backing up the personal feelings of the police or giving vent to their own notions of what is offensive and disquieting."

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Proposed Oregon Criminal Code art 26, § 4 cmt A (Preliminary Draft No 2 1969) (quoting Robert B. Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 Wm & Mary L Rev 349, 356-57 (1967)).

The Commission reports also cite an article containing "[a]n excellent analysis" of the "identical" proposed Michigan Revised Criminal Code section on disorderly conduct. Proposed Oregon Criminal Code art 26, § 4 cmt A (Preliminary Draft No 2 1969) (citing David D. Jozwiak, *Michigan Revised Criminal Code and Offenses Against Public Order*, 14 Wayne L Rev 986 (1968)). That article states that the statute excludes activities that "do not disturb or are not likely to disturb public order. Thus, only conduct violent in nature or likely to provoke violence is treated * * *." Jozwiak, 14 Wayne L Rev at 987-88. Furthermore, the statute's scope was "narrower than current holdings enunciated by the Supreme Court with respect to regulation of speech"—that is, the statute afforded greater protections for speakers than the United States constitution required. Jozwiak, 14 Wayne L Rev at 992. These constraints were necessary because "allow[ing] greater discretion to police officers would allow punishment for the utterance of unpopular views." Jozwiak, 14 Wayne L Rev at 992.

II. Obstructing traffic refers to rendering a public way effectively impassable.

In order to violate ORS 166.025(1)(d), a person must "[o]bstruct[] vehicular or pedestrian traffic on a public way." ORS 166.025. The statute does not specify what conduct amounts to obstruction, but the context and legislative history demonstrate that "obstructs" means "renders impassable without unreasonable inconvenience or hazard."

A. The text and context demonstrate that "obstructs" refers to rendering a public way "impassable" or "dangerous."

Over a century of precedent shows that "obstruct" refers to rendering a public way "impassable" or "dangerous to the public." *Linn Cty. v. Calapooia Lumber Co.*, 61 Or 98, 99, 121 P 4 (1912). "Obstructs" carries this meaning in dozens of public nuisance cases, typically referring to the blocking of a street by a structure or large object. Fences were the most frequent

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transgressors, although entire buildings sprang up in the street with some regularity. *See, e.g., City of Molalla v. Coover*, 192 Or 233, 235, 235 P2d 142 (1951) ("It is alleged that defendants have constructed fences and a small outbuilding in the street * * * and that the plaintiff has demanded the removal of the obstructions"); *Moore v. Fowler*, 58 Or 292, 294, 114 P 472 (1911) ("[P]laintiff and her predecessors maintained a fence in and upon a street or highway * * * [and defendants] removed said fence which so obstructed said public street and public highway as to prevent the same from being used by the public"); *Luhrs v. Sturtevant*, 10 Or 170, 171 (1882) ("[T]he defendant obstructed said highway by building fences across it, so that the plaintiff and the traveling public generally, could not pass over it in the manner they had been accustomed to do"). *Waltz v. Foster*, 12 Or 247, 249, 7 P 24, 24 (1885) ("When the right to the use of the street is admitted, * * * an injunction will be granted to restrain its obstruction by building a house thereon"). Other cases involved future fences and buildings. *See, e.g, London & Scottish Assur. Corp. v. California Oregon Power. Co.*, 221 P 833, 834 (Or 1924) ("[B]y placing his lumber upon and entirely across defendant's right of way * * * Kesterson unlawfully encroached upon and obstructed defendant's right of way); *Bernard v. Willamette Box & Lumber Co.*, 64 Or 223, 229, 129 P 1039 (1913) ("[T]he defendant * * * also piled lumber in that street thereby obstructing travel thereon and preventing ingress to and egress from [plaintiff's] premises"). One entrepreneurial defendant blocked entry to the town of Orodell, Oregon by building a "toll-gate" that "obstructed the said main highway passing through said town * * *." *Milarkey v. Foster*, 6 Or 378, 379 (1877).

The seriousness of "obstructing" a road explains why, between 1864 and 1971, "obstruct[ing]" and "injur[ing]" public ways always fell under a single criminal statute. *See* General Laws of Oregon, Crim Code, ch LI, § 682, p 571 (Deady 1845-1864). That statute's final incarnation, ORS 164.510, made it a crime to "willfully break down, injure, undermine, *obstruct*, remove or destroy any free or toll bridge, railroad, railway, plank road, macadamized road, highway, canal, telegraph or telephone posts or wires, or any gate upon such road * * *."

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Former ORS 164.510 (emphasis added). All of these proscribed acts, including obstruction, posed serious threats to the public way itself, thereby imperiling public passage. Obstruction under ORS 164.510 required the actual prevention of public passage. *See* 20 Op Atty Gen 307 (1941), 1941 WL 41955 (logging contractor's cable prohibiting access to a public road was no basis for prosecution under former ORS 164.510 when company allowed the public to use private road as an alternative).

Furthermore, the Court of Appeals has held that a crowd of "30 to 35 people" in a "busy public walkway" did not "obstruct[] vehicular or pedestrian traffic" under a city ordinance derived from ORS 166.025(1)(d). *City of Eugene v. Lee*, 177 Or App 492, 503, 34 P3d 690 (2001). In *Lee*, a street preacher attracted a large crowd of onlookers, but this crowd "did not 'obstruct' pedestrian traffic" because "those who did not wish to stop and listen or argue were able to simply walk past the location where defendant was preaching." *Lee*, 177 Or App at 503. *Lee* confirms that traffic is not obstructed when it can flow around the alleged obstruction with relative ease.

B. The legislative history confirms that "obstructs" refers to rendering a public way "impassable without unreasonable inconvenience or hazard."

The legislative history distills the lengthy history of "obstructs" into a succinct definition: "to render impassable without unreasonable inconvenience or hazard." This definition derives from the MPC provision prohibiting the obstruction of highways. *See* Model Penal Code § 250.7(1) (Proposed Official Draft) ("Obstructs means renders impassable without unreasonable inconvenience or hazard."). The proposed Michigan Revised Criminal Code, from which ORS 166.025 was borrowed verbatim, built on the MPC's approach: "To 'obstruct' means to render impassable without unreasonable inconvenience or hazard. A gathering of persons to hear a person speak or otherwise communicate does not constitute an obstruction." Proposed Michigan Revised Criminal Code § 5501(a).

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The MPC's drafters feared granting "police too wide a discretion: they will tolerate or aid (by diverting traffic) a presidential candidate's speech that blocks a central city intersection, or an approved religious or patriotic procession, while harassing minority sectarians * * *." Model Penal Code § 250.2 cmt (Tentative Draft No 13 1961). "The key" to protecting disfavored expression was to include a clear definition of "obstructs." Model Penal Code § 250.2 cmt (Tentative Draft No 13 1961). Under the MPC's definition, "as long as passersby may with reasonable safety and convenience get through or past the crowd, picketing, speech-making, or idling in groups will not be criminal." Model Penal Code § 250.2 cmt (Tentative Draft No 13 1961).

Defining "obstructs" as "renders impassable without unreasonable inconvenience or hazard" is consistent with more than a century of Oregon precedent and incorporates the meaning provided by the proposed Michigan Revised Criminal Code and the MPC, from which the word "obstructs" in ORS 166.025 derives.

C. The doctrine of constitutional avoidance requires a narrow reading of "obstructs."

If the meaning of "obstructs" remains in any doubt after reviewing the context and legislative history of ORS 166.025, then the Court should "choose the interpretation which will avoid any serious constitutional difficulty." *Lanig*, 154 Or App at 674. The court in *Lee* held that because traffic was able to pass by the defendant unimpeded, the city ordinance could not "constitutionally be applied to defendant under these circumstances." *Lee*, 177 Or App 492. The MPC's definition of "obstructs" is consistent with the constitutional limits recognized in *Lee*, whereas applying a more expansive interpretation raises difficult constitutional questions. There is "no reason to assume that the legislature would wish to raise such questions." *Westwood Homeowners Ass'n, Inc.*, 318 Or at 160.

This is especially true because the Commission expressly carved out protection for free speech. *Compare* Commentary at 214 ("Paragraph (e) covers the intentional obstruction of

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vehicular or pedestrian traffic. It is not intended to prohibit persons gathering to hear a speech or otherwise communicate.") *with* Proposed Michigan Revised Criminal Code § 5501(a) ("A gathering of persons to hear a person speak or otherwise communicate does not constitute an obstruction."); Model Penal Code § 250.7 (Proposed Official Draft 1962) ("No person shall be deemed guilty of recklessly obstructing * * * solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering."). Therefore, it appears the statute was not intended to reach the type of non-violent free speech at issue in this case.

III. ORS 166.025 prohibits intentionally causing, or recklessly creating a risk of causing, a breach of the peace by intentionally obstructing traffic.

By combining the definitions of "public inconvenience, annoyance or alarm" and "obstructs" with the Oregon Criminal Code's mental state framework, it is now possible to construe ORS 166.025(1)(d) in its entirety.

A. ORS 166.025 requires the intentional obstruction of vehicular or pedestrian traffic.

Under the Oregon Criminal Code, courts must require a culpable mental state with respect to each "material element" of an offense, even if the legislature fails to specify one. ORS 161.095(2). In other words, "a culpable mental state is required for *all* facts that the state must prove beyond a reasonable doubt to convict a defendant except those that relate solely to the statute of limitations, jurisdiction, venue, or other procedural prerequisites to conviction," unless the legislature "expressly dispense[s]" with this requirement. *State v. Olive*, 259 Or App 104, 113 n 2, 312 P3d 588 (2013) (citing ORS 161.095(2)) (emphasis added). Several statutes establish "rules of construction for inserting culpable mental states," which "relieves the legislature of the obligation to specify the applicable mental state (or states) for each element of an offense." *Olive*, 259 Or App at 113 n 2. Under these rules of construction, material elements

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fall into three categories: "a conduct, a circumstance, or a result," and "each mental state relates to two of those three different categories." *State v. Crosby*, 342 Or 419, 428, 154 P3d 97 (2007).

ORS 166.025(1)(d) contains two material elements: (1) the *conduct* of obstructing traffic and (2) the *result* of causing public inconvenience, annoyance, or alarm. Although the statute provides the mental state for causing public inconvenience, annoyance, or alarm, it does not provide a mental state for obstructing traffic. Yet, obstructing traffic is "conduct" and "[o]nly the culpable mental states 'intentionally' and 'knowingly' can apply to a conduct element of a crime." *State v. Wier*, 260 Or App 341, 350, 317 P3d 330 (2013) (citing ORS 161.085). "Knowingly" is a lesser included mental state of "intentionally." ORS 161.115(3). Therefore, ORS 161.085 requires the defendant to at least "knowingly" obstruct traffic in order to commit disorderly conduct.

The legislative history, however, reveals that the Commission intended to require the intentional obstruction or traffic. Commentary at 214 ("[The statute] covers the *intentional* obstruction of vehicular or pedestrian traffic.") (emphasis added). In *Horn*, the Court of Appeals interpreted this statement to require "a specific intent to obstruct traffic, or a reckless disregard of the danger that traffic will be obstructed * * *." *State v. Horn*, 57 Or App 124, 127, 643 P2d 1338 (1982). Yet, the Commentary expressly specifies "intentionally," not "recklessly." Moreover, applying a mental state of recklessness to conduct would violate ORS 161.085. *See* ORS 161.085(9) (defining "[r]ecklessly * * * with respect to a *result* or to a *circumstance* * * *.") (emphasis added); *accord Crosby*, 342 Or at 428; *Wier* 260 Or App at 350. Accordingly, ORS 166.025(1)(d) requires "the intentional obstruction of vehicular or pedestrian traffic."

B. ORS 166.025 requires the conscious objective to cause a breach of the peace or the awareness and conscious disregard of a substantial and unjustifiable risk of causing a breach of the peace.

In *Ausmus*, the Oregon Supreme Court determined that a person violates ORS 166.025 if that person engages in proscribed conduct "with the conscious objective to cause, or with the

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awareness and conscious disregard of the substantial and unjustified risk of causing, public inconvenience, annoyance, or alarm * * *." *Ausmus*, 336 Or at 504 (citing ORS 161.085).[7]

Separating the statute's mental states for clarity, the intentional variant of disorderly conduct applies when:

> A person intentionally renders a public way impassable to vehicular or pedestrian traffic without unreasonable inconvenience or hazard and does so with the conscious objective to cause injury, nuisance, or terror to the public at large.

So, in order to convict a defendant for *intentional* disorderly conduct under ORS 166.025(1)(d), the state must prove beyond a reasonable doubt that the defendant (1) intentionally rendered a public way effectively impassable and (2) that the defendant was motivated to do so by the conscious objective to cause injury, nuisance, or terror to the public at large.

When determining the defendant's conscious objective, "[r]easonable inferences are permissible; speculation and guesswork are not." *State v. Cook*, 265 Or App 506, 508-510, 335 P3d 846 (2014) (holding that although defendant possessed a tool that *could only* be used to

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[7] ORS 161.085 provides, in relevant part:

> "(7): "'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.
>
> "* * * * *
>
> "(9): "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

ORS 161.085.

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commit burglaries, this alone did not support a reasonable inference that he actually intended to commit theft). Accordingly, under ORS 166.025(1)(d), simply showing that the defendant obstructed traffic is an insufficient basis for inferring intent to cause public inconvenience, annoyance or alarm.[8] Every type of conduct included in ORS 166.025 *could* cause public inconvenience, annoyance, or alarm—that is exactly why they are included. *See* Model Penal Code and Commentaries at § 250.2 cmt 2. But, like the tool in *Cook*, the fact that obstruction of traffic *could* cause public inconvenience, annoyance, or alarm is an insufficient basis for a jury to infer, beyond a reasonable doubt, that the defendant actually intended to cause such a breach of the peace. Allowing such an inference impermissibly "collaps[es] the intent element of the crime into the [conduct] element," ignoring the fact that "the legislature has *not* chosen to make" obstruction of traffic "a *per se* violation of the statute." *Cook*, 265 Or App at 514 (emphasis in original).

By contrast, *reckless* disorderly conduct occurs when:

> A person intentionally renders a public way impassable to vehicular or pedestrian traffic without unreasonable inconvenience or hazard while aware of and consciously disregarding the substantial and unjustifiable risk that doing so will cause injury, nuisance, or terror to the public at large.

Although the conduct component remains the same, the mental state of recklessness requires proof of both an objective and a subjective element. *See* ORS 161.085(9) (defining "recklessly"); *Morehouse v. Haynes*, 350 Or 318, 328-30, 253 P3d 1068 (2011) (construing recklessness standard). Thus, the state must prove beyond a reasonable doubt that the defendant (1) intentionally rendered a public way impassable without unreasonable inconvenience or hazard, (2) that doing so created a substantial and unjustifiable risk of causing injury, nuisance, or terror to the public at large and grossly deviated from the standard of care that a reasonable

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[8] Although the Court of Appeals has previously stated otherwise, *see State v. Hund*, 76 Or App 89, 93, 708 P2d 621 (1985), that decision cannot survive the directly inconsistent holding in *Cook*.

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person would observe in the situation, and (3) that the defendant was aware that doing so would create a substantial and unjustifiable risk of causing injury, nuisance, or terror to the public at large, but consciously disregarded that risk. *See, e.g., Crosby*, 342 Or at 431 ("For a defendant to have committed manslaughter * * * the defendant must have been 'aware of and consciously disregard[ed] a substantial and unjustifiable risk' of causing a result: death.") (quoting ORS 161.085).

Recklessness is a "heightened standard that the legislature has established," requiring "gross deviation" from "the standard of care that a 'reasonable person' would exercise." *Morehouse*, 350 Or at 331 (De Muniz, C.J., concurring). The objective element focuses on whether the defendant created a substantial and unjustifiable risk. For example, the defendants in *State v. Willy*, 155 Or App 279, 963 P2d 739 (1998), created a substantial and unjustifiable risk of public inconvenience, annoyance, or alarm by firing over 100 rounds of ammunition at night, "across a public roadway and in the direction of a residence," and within hearing range of "members of the public." 155 Or App at 287. In *Horn*, the court held "that the evidence was sufficient to present a jury question as to whether defendants recklessly created a risk of inconvenience, annoyance or alarm to the public," where "defendants were 'stepping in front of autos'" causing "close calls where people would have to stop suddenly." 57 Or App at 130. Shooting across a road way or causing sudden "close calls" are examples of dangerous conduct that may create a substantial and unjustifiable risk of public inconvenience, annoyance, or alarm.

The subjective element requires the state to "adduce evidence that defendant consciously disregarded an unjustifiable risk" of causing inconvenience, annoyance, or alarm to "not just specific individuals, but the public in general." *Love*, 271 Or App at 554. As with determining the defendant's "conscious objective," "[r]easonable inferences are permissible; speculation and guesswork are not." *State v. Cook*, 265 Or App at 509. Applying *Cook* to recklessness, the fact that obstructing traffic *could* cause a breach of the peace does not support an inference that the defendant was aware of and consciously disregarded that risk. Permitting such an inference

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without sufficient additional evidence of conscious disregard would collapse the subjective element of recklessness into the objective element—thereby converting recklessness into the lesser mental state of criminal negligence. *See* Model Penal Code and Commentaries at § 250.2 cmt 2 ("Nothing less than conscious disregard of a substantial and unjustifiable risk of public nuisance will suffice for liability. Conviction cannot be had merely on proof that the actor should have foreseen the risk of public annoyance or alarm."). The state must prove beyond a reasonable doubt that the defendant consciously disregarded a substantial and unjustifiable risk that obstructing traffic would so greatly harm the general public as to "erode the community's sense of safety and security."

CONCLUSION

Together, the text, context, and legislative history of ORS 166.025(1)(d) reveal that the legislature intended to limit the scope of the statute to conduct threatening to cause substantial disturbances amounting to a breach of the peace. The drafters adopted this narrow scope in order to preserve civil liberties, especially the right to engage in constitutionally-protected speech. Reinforcing the statute's concern with substantial disturbances, longstanding precedent establishes that obstructing traffic requires rendering a public way effectively impassable. A broader interpretation is inconsistent with the statute's context and legislative history and threatens to chill the exercise of constitutional rights. Additionally, the obstruction must be intentional and it must involve either the conscious objective to cause, or the conscious disregard of a substantial and unjustifiable risk of causing, a breach of the peace. For the foregoing reasons, ORS 166.025 should be interpreted to effectuate the legislature's intent to protect civil liberties by limiting the statute's reach to conduct that truly "threatens to erode the community's sense of safety and security."

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DATED this 6th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON** on:

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