



**Testimony of Kimberly McCullough, Policy Director
City Council Item No. 1160 – Protest Ordinance
November 8, 2018**

Mayor Wheeler and Council Members,

The American Civil Liberties Union of Oregon¹ appreciates the opportunity to testify today regarding the proposed ordinance that would authorize new time, place and manner regulations for demonstrations held in the City of Portland.

Before addressing the ordinance, we want to acknowledge that we share the concerns of many Oregonians that Portland is becoming a regular gathering place for white nationalists. **We share concerns about the safety of our communities and the desire to make Portland an inclusive and equitable city.** We don't want to downplay the challenges we are currently facing, as a city, state and nation. And we don't want to suggest that we sit idly by when violence occurs in our streets.

At the same time, **we have deep concerns about the ordinance that is being presented as a solution to the challenges we face.** Because those concerns run so deep, and because they cannot be addressed through amendments to this ordinance, **we urge you to change course and not lead the city down a path of rights violations and costly litigation.**

Specific Concerns About the Ordinance

Overall, this ordinance problematic both as a matter of public policy and because it raises constitutional concerns. If the ordinance passes, it will most certainly lead to constitutional challenges in court. But we shouldn't just be asking ourselves if the ordinance and its application would be struck down by a court. We should also be asking ourselves if it will actually solve the problems it seeks to address or if it will miss the mark and create new problems.

As a matter of policy, we are hard pressed to see how this ordinance will actually prevent violence from occurring or reduce the use of law enforcement resources and police enforcement. We've heard the suggestions that that government can't wait until violence has occurred to act, and that we have to take preventative measures; that this ordinance will somehow reduce law enforcement use of force in response to violence by

¹ The ACLU of Oregon is a nonpartisan, nonprofit organization dedicated to preservation and enhancement of civil liberties and civil rights, with more than 28,000 members and supporters in the City of Portland and over 45,000 members and supporters statewide.

giving law enforcement preemptive tools to prevent violence; and that this ordinance will somehow reduce the diversion of law enforcement resources when protests occur.

Despite the suggestion that imposition of these rules will reduce violence, we fail to see how that will actually be accomplished. Instead, we are left with numerous questions:

- If this is really aimed at people who intend to cause harm, will such a person follow these “free speech zone” rules?
- If a person is already willing to violate criminal laws against assault, are they going to follow rules about when, where for how long, and with how many people to protest?
- Even if a person set on causing harm does follow the rules about when and where to protest, is that going to stop them from engaging in problematic behavior in or near the “free speech zone”?
- Is it going to stop them from leaving the zone and engaging in violent behavior elsewhere?

It’s also hard to understand how an ordinance that gives government additional authority to enforce new rules will somehow lead to reduced enforcement. These rules just create another avenue for enforcement, but now aimed at enforcing exactly where people can be—and how big their group can be, and how long they can remain—when they protest.

The fact that violence has occurred at permitted events with associated time, place and manner regulations begs the question of whether these new rules will actually stop violence from occurring. At least some of the incidents that involved violence cited in the findings of the ordinance are related to permitted protests. Our understanding is that this ordinance is aimed at groups that don’t seek permits, with the idea that the city can impose time, place and manner regulations outside the permit process. But if for those permitted events, regulations didn’t stop violence, why should we believe that regulations on unpermitted protests are going to do something different?

We understand that the city attorney’s office believes the ordinance is constitutional, but we respectfully disagree. **No lawyer would disagree that reasonable, content-neutral time, place, and manner regulations are constitutional, but that doesn’t mean this ordinance and its potential application are not problematic.** The problem is we can’t just say that reasonable, content-neutral time, place, and manner regulations are constitutional and end our analysis there. And no matter how many times the ordinance states that rules set under its authority will be content-neutral and reasonable, that does not necessarily mean that a court will agree.

With time, place and manner regulations, the devil is in the details—and here, those details are incredibly problematic. In addition, the cases cited in the ordinance (and additional case law we've been provided with that purports to justify the ordinance) are legally distinguishable, involving very different facts. And none of the cases cited related to an ordinance with the same framework as what is being presented to city council now.

The ACLU of Oregon isn't alone in pointing out the constitutional issues with this ordinance. In an article published several weeks ago, Jim Oleske, a constitutional law professor at Lewis & Clark Law School raised serious doubts about the city's ability to prove decisions made under the ordinance are content-neutral.² In another article published today³, Greg Magarian, law professor and free expression scholar at Washington University School of Law stated that the ordinance gives the mayor "unilateral authority to criminalize constitutionally protected speech before the speech happens, based on wildly subjective criteria." Tim Zick, professor of law at William & Mary Law School similarly stated that the ordinance is "constitutionally vulnerable."

It's also important to note that none of us have had sufficient time to analyze the ways this may violate Article 1, sections 8 and 26 of our state constitution, which actually provides more protection for free speech and assembly than our federal constitution.

The ordinance suffers from overbreadth and vagueness. The wide variety of actions authorized by the statute is so broad that many actions taken under the four corners of the statute could easily be deemed as unconstitutional.

The ordinance simply gives too much discretion and power to city officials. This ordinance centralizes the power to dictate conditions on the exercise of our free speech rights into a single official. Not only does this raise serious constitutional issues, but we also need to be concerned as a matter of policy.

When we allow for an official to singlehandedly wield power in that official's sole discretion, we should be thinking not only about our present circumstances but also into the future. We should ask ourselves how we think this power could be used by a variety of individuals holding public office and whether we can trust that everyone will use their power and discretion appropriately. What if we had people in charge that we didn't trust with this sort of power, and who could that power be used against in the wrong hands?

² *Are Mayor Wheeler's Proposed Protest Rules Legal?*, Alex Zielinski, Portland Mercury <https://www.portlandmercury.com/blogtown/2018/10/16/23739031/are-mayor-wheelers-proposed-protest-rules-legal>

³ *Are Portland Mayor Ted Wheeler's proposed limits on protests legal?*, Gordon R. Friedman, The Oregonian/OregonLive, https://www.oregonlive.com/politics/index.ssf/2018/11/are_portland_mayor_ted_wheeler.html

Imposing legal consequences based on a city official's judgment that a person or group has a "history of violence" and is likely to commit violence is extremely problematic. As an initial matter, it is unconstitutional to retaliate against protesters for past protest activity,⁴ or to silence speakers who advocate for illegality in the abstract.⁵

In addition, although we understand that the ordinance is aimed at predicting and getting out ahead of violence, restricting speech preemptively raises constitutional concerns because **there is a "'heavy presumption' against the validity of a prior restraint" on speech.**⁶

In our society, we are entitled to due process and a presumption of innocence, both of which are absent here. Yet this ordinance gives government officials the ability to impose legal restrictions on groups of people based on findings about past behavior and predictions of future behavior that are made outside a judicial setting and without any legal process.

As explained below (alternatives to the ordinance), if people engage in violent acts, there are already legal mechanisms to hold those individuals accountable in a court of law. Those mechanisms involve due process and the ability to present evidence and be represented by counsel, and cannot be based on the sole judgement of a city official.

Checks on official discretion are extremely important to prevent overreach and dubious findings of violence based on bias against particular groups. That is exactly why enforcement of this ordinance risks legal challenge on the basis that these judgements and decisions by city officials are not "content-neutral."

All of this raises numerous questions about how judgements about groups of protestors will be made:

- If a city official is going to be designating particular groups as groups that have a history of violence with another group, and using that designation to restrict that group and its perceived members' first amendment rights – will this list of violent groups be made public?
- What is the criteria for making this determination?
- What is the mechanism for an organization to challenge that finding?
- What is the mechanism for individuals to challenge their inclusion in that group if they do not belong to a group and are erroneously included?

⁴ *Ford v. City of Yakima*, 706 F3d 1188, 1196 (9th Cir 2013); *Skoog v. County of Clackamas*, 469 F3d 1221, 1232 (9th Cir 2006).

⁵ *United States v. Williams*, 553 U.S. 285, 298–99 (2008); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974).

⁶ *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (internal citation omitted).

On a related note, this ordinance creates the dangerous and constitutionally problematic possibility that it will lead to a “heckler’s veto.” A key problem with restrictions based on predictions of violence is that one group’s right to protest could be endangered by another group showing up at their protests and provoking violent encounters, with the aim of giving the group a “history of violence.”

It is because of this potential for a heckler’s veto that **the U.S. Supreme Court has ruled that it is not “content-neutral” to limit a protest based on the possibility that listeners will react angrily** to the protesters’ speech⁷ **nor can they punish peaceful speakers if those reactions turns violent.**⁸ If a group’s right to protest is limited because of a prediction that others may react to that protest with violence—which is exactly what the ordinance allows for—then a costly constitutional challenge is sure to follow.

The way this ordinance is aimed at specific “groups” of people is problematic as both a constitutional and practical matter. Essentially, the ordinance authorizes prior restraint on entire groups of people (and anyone who is somehow found to be associated with those groups) based on anticipated actions and/or prior actions of a few individuals that government has associated with the group.

Unless an entire group of people is working in concert, with clearly articulated common goals, **government shouldn’t be in the business of punishing the group for the past or present actions of a few.**

We have deep concerns about how police will know who is and isn’t part of these “groups.” Unless people clearly identify with a particular group, government shouldn’t be making judgements about who is or isn’t part of that group and then imposing restrictions on those individuals based on assumptions about group membership. We certainly hope Portland Police aren’t going to get in the business of tracking who is and isn’t associated with various political movements. If so, we would like to remind everyone that we have state laws that prohibit that type of information gathering.

All of this raises even more questions about how this ordinance will regulate “groups” as a practical matter:

- If the regulations are aimed at two particular groups, does everyone in the city have to follow those rules?
- If not, how is government going to figure out who is part of a group and is therefore subject to the rules?

⁷ *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134, (1992); *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 252 (6th Cir. 2015).

⁸ *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966); *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015).

- What if a person or group totally separate from the groups targeted by the rules are protesting outside the “free speech zones” on their own or as part of a totally different group—will they face police enforcement?
- Does it matter if they are protesting something related to the two groups, and what if they happen to be protesting something totally different at the same time the rules are in effect?
- What if someone is wanting to counter-protest one of the groups, but they aren’t associated with either of the groups targeted by the rules? Can they do that outside the “free speech zones”?
- How is the city going to resolve issues of group membership if a person engages in violence, the city believes they are part of a group, but the group says they are not a member, or if they disavow and disassociate with them?

The ordinance allows for limits on the number of people who may attend a protest, which is both impractical and raises serious constitutional concerns. How this would even function is anyone’s guess. People don’t all sign up ahead of time to participate in a protest, and government can’t require that they do so. Beyond that, people should be able to make a decision to protest whenever they want, whether it be far in advance or in the spur of the moment. Certainly, when a specific public space has capacity limits and those limits have been reached, police can direct people to a space nearby for safety concerns, but that’s something they can already do under our current laws.

We have deep concerns about the potential for criminal sanctions related to the enforcement of this ordinance. **Our concerns were heightened when the ordinance expressly included the potential for a sentence of six months in jail for violation of the ordinance.** That provision raised serious questions about whether the ordinance was consistent with our city charter’s restrictions on separation of powers and the fact that an executive officer cannot, in her power as executive, unilaterally create criminal laws. It also provided for severe and disproportionate penalties for non-violent conduct that amounts to no more than the failure to stay inside a “free speech zone.”

We see that provision has now been altered, yet the new language just raises more questions and concerns. For example, what is now the statutory basis for imposing criminal penalties for violating the written order? Is the ordinance intended to refer to some specific criminal statute, and if so which one(s)?

Regardless of the answer to those questions, **the potential for criminal charges for violating this ordinance will have a chilling effect on the exercise of First Amendment rights** in our city. More specifically, we worry that that civilians wanting to express their political opinions will be deterred from engaging in peaceful protest by this ordinance and associated orders by the mayor.

If this ordinance is passed, we worry that other jurisdictions will follow our lead. We need to think about how this could play out in other locations. It could create a mechanism for suppressing protest by groups like Black Lives Matter based on false accusations that groups have a propensity for violence. This is not an unfounded fear, as even the FBI has falsely associated Black Lives Matter with past acts of violence and the threat of future violence. We would also be remiss if we didn't note that at this very moment, Donald Trump is trying to restrict protest rights in Washington D.C. based on similar justifications.

This long list of concerns should be a strong indication that this ordinance will lead to costly litigation. There are so many things that our community needs our time and resources for. Instead of diverting those resources into legal battles over problematic laws, we should be working together to create tangible changes that will truly help and protect our communities.

What the City Can Do Instead of Passing this Ordinance

At the outset, it is important to point out that in the context of protests, **law enforcement's job is to facilitate First Amendment activity by enabling peaceful protest, preventing violence, and managing large crowds.** In a balance between free speech and the state's power to maintain the peace, "the scale is heavily weighted in favor of the First Amendment,"⁹ and speech cannot be banned or interrupted because of the potential for disturbance or disorder.¹⁰ Punishing, removing, or otherwise silencing a speaker will seldom, if ever, constitute the least restrictive means available to manage a crowd.¹¹

Police can intervene if there is credible evidence that a person or persons intend to commit acts of violence. Law enforcement's hands are not tied if there are credible threats of violence. If there are credible threats, they should be swiftly addressed.

Police can keep groups of people physically separated when there is conflict at a protest. We've seen Portland Police do this successfully in the past, and we encourage them to use this tactic in the future. One caveat here is that there have been times when our police have given the impression that they are protecting only one group of protestors, so we suggest they explore how to be more balanced when engaging in group separation.

⁹ *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 252 (6th Cir. 2015) (citing *Terminiello*, 337 U.S. at 4);

¹⁰ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939) ("uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right").

¹¹ *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Terminiello v. City of Chi.*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. City of Chi.*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969).

Law enforcement can address violence if and when it occurs. We have only cautioned law enforcement that they must respond to isolated incidents of property damage, violence, or other lawlessness by arresting the individuals responsible, not by breaking up a protest.¹² That caution should not, however, prevent officers from taking appropriate actions in response to incidents of violence.

People who have committed acts of violence can be subjected to consequences and restrictions that limit the potential for future harm. Individuals who commit violent acts can be prosecuted or subjected to a variety of civil actions. Associated legal mechanisms can be used to limit their actions. For example, restraining orders can limit a person's ability to be physically near another person or persons. If a person is convicted of committing a violent act, the court and probation officers can limit their conduct during the period of their probation.

If we are concerned about public safety at protests, we should also be concerned about the ways that police actions can endanger people's rights and safety. For example, police **use of crowd control weapons is a danger to public safety.** We have provided the City and Portland Police Bureau with feedback on this issue in the past, much of which has not been satisfactorily addressed.

Police response needs to be proportional to what has occurred or is occurring. Officers should also be mindful of the risk that crowd control measures can be counter-productive and escalate, rather than lower, risks to public health, safety, and welfare.

Police should actively use techniques designed to de-escalate the potential for violence. Indeed, scientific studies have shown that the most successful policing of protest focuses on de-escalation and crowd management, rather than crowd control.¹³ We would also like to see the city research and implement **better training and violence-prevention tactics** for police during protests.

Finally, we believe that a huge part of the solution here is engaging in **conversations with our community** about how we can creatively and **collaboratively address what is occurring** in our city. We look forward to engaging in those conversations with you. Thank you for the opportunity to testify today.

¹² *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Kunz*, 340 U.S. at 294–95; *Gregory*, 394 U.S. at 120 (Black, J., concurring); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

¹³ See, e.g., Jaffe, *If Cops Understood Crowd Psychology, They'd Tone Down the Riot Gear* (Aug. 27, 2014), available at <https://www.fastcodesign.com/3034902/evidence/if-cops-understood-crowdpsychology-theyd-tone-down-the-riot-gear>; The International

Network of Civil Liberties Organizations (INCLIO) and Physicians for Human Rights,

Lethal in Disguise: The Health Consequences of Crowd-Control Weapons, available at <https://www.aclu.org/report/lethal-disguise-health-consequences-crowd-controlweapons>.