Testimony of Kimberly McCullough, Legislative Director
In Support of HB 2704
House Committee on Judiciary
March 12, 2015

Chair Barker and Members of the Committee:

Thank you for the opportunity to submit comments in support of HB 2704, 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 and the Chair for giving the bill a hearing.

Imposition of in-car video and body worn cameras will ideally increase transparency and accountability of police actions, but recordings by the public serve that purpose best. Unfortunately, recordings of police fall into a grey area under Oregon law. In addition, although courts across the nation overwhelmingly agree that recording on-duty police is protected by the First Amendment, the unfortunate reality is that many law enforcement officers continue to use a variety of tactics—including orders to stop recording, arrests, and criminal prosecution under wiretapping and police interference statutes—to deter or punish members of the public who attempt to document arrests and the use of force.

A significant number of officers order members of the public to stop recording. This occurs even when the people recording are passively observing with a camera or cell phone and are not actually preventing officers from carrying out their duties. Many officers also arrest individuals for recording, claiming that those individuals failed to obey a lawful order to stop recording or that the recording somehow interfered with police activity or constituted wiretapping. These officers often have a genuine belief that they are authorized to halt recordings and to make these types of arrests. In some circumstances, they have been trained to take such actions.

Complicating things further, Oregon's wiretapping statute, ORS 165.540, is inconsistent with the vast and developing consensus among courts and legal scholars confirming that the right to record on-duty police is constitutionally protected.[1] This inconsistency stems from the fact that under ORS 165.540, a member of the public may be exposed to criminal liability for passively observing and recording on-duty police.

[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 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.

More specifically, ORS 165.540 currently requires that parties to a conversation be "specifically informed that their conversation is being obtained." What this means is that in order to avoid criminal liability under Oregon law, a person observing police misconduct—for example, a person witnessing an officer engaged in an act of excessive force—must draw the officer's attention before hitting the record button. Similarly, a person observing a police interaction that does not involve misconduct must interrupt the officer, who may be involved in a complicated or dangerous situation, by speaking or otherwise signaling to the officer that they are about to press record.

This notice requirement is bad public policy, as it endangers both the public and our peace officers. Further, the notice requirement is inconsistent with current constitutional law, which clarifies that the right to record is protected only so long as those recording do not actually prevent officers from carrying out their duties. Yet the notice requirement will force individuals to do just that, by drawing officers' attention away from their duties in order to signal the act of recording.

We would like to draw your attention to a few aspects of HB 2704 that are particularly important and reflect its careful drafting:

First, HB 2704 ensures that photography, video recording, and audio recording of on-duty police will be equally protected. The First Amendment does not distinguish between these different methods of documentation. In addition, treating these methods equally is good public policy. Recordings without audio present an incomplete portrayal of events. It is not difficult to think of scenarios where audio helps to clarify a video. In particular, more complete portrayals are particularly helpful to interpret the total situation.

Second, HB 2704 clarifies that the mere act of recording, without something more, does not constitute interference with police. Many officers claim that the simple act of recording constitutes interference. This is not to say a person recording could never interfere with police. Courts have generally recognized the necessity of a zone of safety around an officer in order to carry out his or her duties, but the size of that zone depends upon the circumstances, and the general consensus has been that 10 to 15 feet is sufficient. HB 2704 will still allow charges for those types of actions that actually prevent an officer from performing his or her duties. At the same time, HB 2704 clarifies that passive recording is not—in and of itself—interference.

Third, HB 2704 clarifies than an order to cease recording is not a lawful order. This provision is particularly important because officers time and time again claim that an order to cease recording is lawful. Further, officers frequently use the failure to obey an order to stop recording as the basis for arrest. This is clearly unconstitutional, as evidenced by a vast body of case law examining this issue. Yet officers continue to give orders and to make arrests on this basis. The legislature's instruction on this point would provide police departments and officers with clarity and go a long way towards solving this ongoing problem.

Finally, the statute clarifies that the mere act of recording audio of an on-duty police officer is not criminal under Oregon's wiretapping statute. The danger of criminal liability under Oregon law for the inclusion of audio in a recording is a very real threat. It is because of this very danger that the ACLU of Oregon's recently launched Mobile Justice phone application does not include audio. Mobile Justice is a smartphone application that allows its users to record police encounters and automatically upload the recordings to the ACLU. This tool was designed for affiliates across the country, but because of the current language of Oregon's wiretapping statute, we feared that people using the application would be placed directly between a rock an a hard place: on the one hand facing potential criminal liability for recording audio without warning an officer, and on the other hand facing personal danger and potential criminal charges (such as interference with police) by interrupting an officer who is engaged in an encounter with another member of the public in order to provide warning. It is worth noting that this particular use of wiretapping statutes to protect the government from public scrutiny flips wiretapping statutes on their heads, as wiretapping statutes were initially enacted across the country to protect the public from government intrusion and not the converse.[2]

HB 2704 is a carefully crafted vehicle for updating Oregon law so that it is consistent with the First Amendment. HB 2704 also sends a crucial and clear message to officers and to the people of Oregon that the mere act of recording on-duty officers is protected and will not lead to arrest, criminal charges, or conviction. These changes are necessary, because piecemeal litigation has not solved the problem. Court cases certainly help in some instances, but the problem continues to persist. For this reason, we urge you to support HB 2704 in its current form.

Thank you again for the opportunity to testify. I encourage you to contact me at any time with comments or questions, as we have a great deal of research on this issue at our disposal and would be delighted to share it with you if there is an issue that you would like more clarity on.

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[2] *See State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992) ("We decline the State's invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.").