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Re: HB 2928

To Whom It May Concern,

I write to urge the members of this committee to advance HB 2928, as amended by Amendment 1. The use of "less-lethal" weapons by police against protesters, and particularly protesters who are demonstrating for the rights of Black people, has a long and shameful history. There is an unbroken line from Bull Connor's fire hoses and police dogs to the tear gas used Mayor Daley at the 1968 DNC to the pepper spray applied directly to the eyeballs of environmental protesters in Northern California in the 1990s to the Portland Police Bureau's use of dozens of canisters of tear gas on June 2, 2020. That common theme is a desire by police to suppress dissent and a willingness to use pain in order to accomplish the goal of silence. It is an unconscionable trend in American policing which the courts have proven inadequate to address. Legislative intervention is required, and I applaud this committee for taking up the task.

HB 2928 puts Oregon on the side of free speech and free expression, moving us in the direction of upholding the ideals of this country rather than its worst impulses. It does so by banning the indiscriminate use of substances which, by their very nature, cannot be targeted, and by limiting the use of other less-lethal weapons to their lawful purpose: limited targeted use against individuals for a valid police purpose. This places state law in line with the historical purpose of the Fourth Amendment to the federal Constitution. The "immediate evil" that motivated the adoption of the Fourth Amendment was the history of general warrants issued by the crown in the colonies. *Payton v. New York*, 445 U.S. 573, 583 (1980). In what was described as a catalyzing event leading to America's war for independence, James Otis described the evil at the heart of general warrants that "they placed 'the liberty of every man in the hands of every petty officer.'" *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The probable cause and specificity requirements thus are the essential features of the Fourth Amendment, because they provide the animating limitations on the intrusions of the government. *Id.* at 485. Indeed, as explained by the Court in *Stanford*, that requirement of specificity is essential to protect the First Amendment, because "unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id. quoting Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961). Particularly when people are engaged in activity that is specifically protected by the First Amendment—assembling in groups in public places in order to express their opposition to government policies and practices—the protections of the Fourth Amendment must be scrupulously honored in order to avoid the danger identified by the Court almost 60 years ago. *Marcus*, 367 U.S. at 729. When the Supreme Court grounded its police use of force limitations in the unreasonable seizure clause of the Fourth Amendment, it never stated or even suggested that it was dispensing with the particularity requirements that

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undergird the entire amendment. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). To do so would allow the government to undermine the basic protections of the Fourth Amendment: permitting the government to do by force what it cannot do through other types of searches and seizures. Each and every use of force by police is a seizure under the Fourth Amendment and must satisfy the particularity requirement for every individual against whom force is used. House Bill 2928 makes that clear and ensures that the civil rights of Oregonians are protected state law.

I would urge only one modification to the amended text: adding a sentence after section 2(2)(a) to make clear that the law expressly prohibits the indiscriminate use of chemical incapacitants against crowds of people. I suggest language such as “The use of gas canisters, grenades, and other similar devices which do not target a particular individual are prohibited.” That would leave no doubt that the state of Oregon sides with free expression over authoritarianism.

Sincerely,
/s/ Jesse Merrithew