

Testimony of Bert Krages in Support of HB 2129

I am an attorney who supports the passage of HB 2129 because it would make it lawful for persons such as law enforcement officers and researchers to use audio recordings made unlawfully by third parties (including the audio portions of videos) when such recordings relate to matters of public concern. Although there is legal precedent that the First Amendment protects persons who disclose unlawful recordings made by third parties when such disclosures involve matters of public concern, that protection does not necessarily extend to persons who use such recordings in other contexts. *E.g., Bartnicki v. Vopper*, 532 U.S. 514, 526–27 (2001)(distinguishing between the regulation of speech and the regulation of conduct).

ORS 165.540 was first enacted in 1955 when audio recordings were generally made using reel-to-reel tape recorders and associated with espionage and secret surveillance. Seven decades later, almost everyone routinely carries video cameras in the form of smartphones and attitudes towards recording have changed considerably. These changes have resulted in a plethora of citizen-made videos, often posted on platforms such as Youtube and TikTok, that violate ORS 165.540(1)(c) due to that subsection's broad prohibition of the recording of oral communications unless every participant has been explicitly informed they are being recorded.

Citizen videos, lawfully-made or otherwise, are frequently used by other persons for socially-beneficial purposes such as research, journalism, and the investigation of crimes. Here are a few examples of videos that contain audio content that was recorded in violation of ORS 165.540(1)(c), but were used by law enforcement officers and prosecutors in criminal cases:

[Hate speech directed at roofers brings arrest](#)

(unlawful recording by victim used by police officers to track down arrested person)

[Springfield family fall victim to racist tirade on Easter](#)

(unlawful recording by victim used by law enforcement officers and prosecutors)

[Stabbing suspect went on rant night before attack](#)

(unlawful recording by a rider on a TriMet bus showing Jeremy Christian threatening the driver on the day before he killed two people on a MAX train in 2017. Police and prosecutors used several unlawfully-made citizen recordings to bring Jeremy Christian to justice)

ORS 165.540(1)(d) & (e) unreasonably criminalize the use of recordings of non-private conversations when such use is clearly in the public interest. A good deal of the harshness comes from the fact that subsection (1)(c) of the statute prohibits the recording of conversations even when made in public places and where the persons being recorded have no reasonable expectation of privacy.

I would note that Senator Manning has introduced SB 700 that would add a subsection to ORS 165.540 to make it lawful to record conversations occurring in public places using an unconcealed recording device. Passage of SB 2129 will go a significant way towards amending ORS 165.540 to reflect modern sensitivities, but it would be even better if SB 2129 were further amended to permit the recording of non-private conversations made in public places.

Thank you for the opportunity to testify on this important bill.