



March 17, 2023

Senate Committee on Judiciary
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony In Support of -1 Amendment of SB 188

Dear Chair Prozanski, Vice-Chair Thatcher, and members of the Senate Committee on Judiciary:

Thank you for the opportunity to provide testimony on behalf of the ACLU of Oregon in support of Senate Bill 188-1. My name is Alexandra Bass, and I am a legal and policy intern at the ACLU of Oregon. The ACLU of Oregon is a nonpartisan, nonprofit organization dedicated to preserving and enhancing civil liberties and civil rights, with more than 28,000 supporters statewide.

In addition to protecting Oregonians' rights during traffic and pedestrian stops, this bill is critical for protecting democracy by ensuring First Amendment activities have sufficient "breathing space" from chilling government conduct. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (advocating for the need to give "adequate breathing space to the freedoms protected by the First Amendment" so as to avoid chilling effects). ORS 181A.250 defines that breathing space and SB 188-1 gives it dimension beyond mere words on paper. It does so by filling the current accountability and remedy gap that exists when police engage in unlawful information gathering. We hope that filling that gap will encourage better training and deter police misconduct.

Under the current version of ORS 136.432, evidence can only be excluded if it is obtained in violation of a person's federal or state constitutional rights.¹ Constitution-based evidence suppression typically happens when the government violates a person's privacy as protected by the Fourth Amendment of the federal constitution and the Oregon Constitution's Article I, Section 9. But there may not be a Fourth Amendment violation in every instance of intrusive and unlawful surveillance, especially in situations where an individual may not expect privacy—such as a protest or on their social media account. Indeed, racial justice movements in the United States have long been the subject of invasive police surveillance that can be chilling to speech and association. For example, in 1988 the ACLU of Oregon reached a contractual agreement with the

¹ There are two additional grounds for suppression in ORS 136.432 that are inapposite to this discussion.



Portland Police Bureau to stop the 181A.250 surveillance of activists who had been protesting U.S. military and police aid to violent government regimes in Central America. *See attached, Exhibit A.* This happened despite Oregon having already made police monitoring of speech and association unlawful.

In 1981, after uncovering that police were spying on community groups, including the ACLU of Oregon, this legislature enacted 181A.250 (previously ORS 181.575). This law continues to prohibit law enforcement officers from collecting or maintaining information regarding Oregonians' political, religious, or social views or activities unless there is a criminal investigation and the subject of the information is or may be involved in criminal conduct. The ACLU of Oregon continues to work to ensure that this law's requirements have practical meaning. That is exactly what SB 188-1 will do.

Unfortunately, 181A.250 violations seem to remain commonplace. In April 2022, *The Oregonian* reported that Portland police collected information on racial justice protesters without documenting a single potential crime.² We have seen photographs of an immigrants rights rally taken and held by the Washington County Sheriff Office. There is evidence of Springfield police documenting license plate numbers of journalists covering protests.³ We have had activists in Bend report being photographed and filmed repeatedly by police. *The Guardian* has reported on coordinated, right-wing-backed police monitoring of environmental activists in Southern Oregon.⁴ And the Attorney General's Office has also been caught surveilling one of their Black employees who tweeted with the hashtag "BlackLivesMatter."⁵ Allowing this behavior to continue unchecked and without remedy severely chills Oregonians' First Amendment rights by threatening their ability to freely speak, believe, and associate with the people, ideas, and organizations of their choice.

² Maxine Bernstein | The Oregonian/OregonLive, *Portland police collected info on protesters in 2020 without documenting why, city audit finds*, oregonlive (2022), <https://www.oregonlive.com/crime/2022/04/audit-portland-police-collected-info-on-protesters-in-2020-without-documenting-why.html>.

³ See Civil Liberties Defense Center, "Springfield Police Engaged in Politically-Motivated Surveillance and Spying; CLDC Amends Lawsuit," (Aug. 19, 2021), <https://cldc.org/springfield-police-engaged-in-politically-motivated-surveillance-and-spying-claims-amended-lawsuit>.

⁴ Jason Wilson and Will Parrish, "Revealed: FBI and police monitoring Oregon anti-pipeline activists," *The Guardian* (Aug. 8, 2019), <https://www.theguardian.com/us-news/2019/aug/08/fbi-oregon-anti-pipeline-jordan-cove-activists>.

⁵ David Rogers, "Black Lives Matter Supporters in Oregon Targeted by State Surveillance" ACLU (Nov. 11, 2015), <https://www.aclu.org/news/racial-justice/black-lives-matter-supporters-oregon-targeted-state>.



In response to reports of repeated 181A.250 violations across the state, the ACLU of Oregon has requested public records of more than 15 law enforcement agencies across the state, including the Department of Public Safety Standards and Training (DPSST), to determine whether Oregon police officers are receiving training about their obligations under 181A.250. The results have been alarming. **Not a single agency has provided records that indicate they require or offer training regarding the surveillance and collection of citizens' political, social, and religious information prohibited by 181A.250.** Specifically, DPSST was not aware of any required training specific to 181A.250. We believe these preliminary findings explain the aforementioned recurring intrusions.

This means law enforcement currently remains free to track the activities of racial justice activists and compile information about them well before any alleged criminal activity, and later use that information in a criminal case with no consideration of fairness to the defendant.⁶ The evidence may be used even if the act in question was unrelated to the information gathered about them. This loophole completely undermines the intent of ORS 181A.250. Evidence suppression for violations of 181A.250 is a commonsense remedy to close this gap.

Currently, there is little recourse for people harmed by unlawful police monitoring. **Senate Bill 188 is a small and necessary step toward realizing the promises and protections of 181A.250, giving critical breathing room to Oregonians' expression and association.** For the reasons discussed within, we urge your support of SB 188-1.

Respectfully,

Alexandra Bass
Legal & Policy Intern
ACLU of Oregon

⁶ We urge you to review the written testimony of the Civil Liberties Defense Center whose clients have had motions to suppress denied because law enforcement's violations of 181A.250 did not amount to constitutional violations.

EXHIBIT A



CITY OF

PORTLAND, OREGON

OFFICE OF CITY ATTORNEY

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AUG 4 1988

E. ROSENTHAL

August 3, 1988

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1001 SW FIFTH AVENUE
PORTLAND OR 97204-1165

Re: Portland Police Bureau Policy on
Maintaining Information

Dear Elden:

I have met with the appropriate Police Bureau officials to discuss your partial counter-proposal in your March 2, 1988 letter. We accept the new paragraph you proposed.

Accordingly, it is our understanding that the American Civil Liberties Union and the Portland Police Bureau have agreed to the following resolution of this matter.

1. The American Civil Liberties Union will not litigate over the collection of information by the Portland Police Bureau at demonstrations which have occurred prior to July 27, 1988.
2. The Portland Police Bureau will formally adopt the following policy by amending its standard operating procedures for the criminal investigation division. The amended policy shall state:

Portland Police Officers shall not collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association, organization, corporation, business or partnership unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct.

Any photographs or other tangible information taken or obtained at peaceful demonstrations in accordance with the above paragraph may be retained by the Portland Police Bureau for 30

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days, during which time the Bureau will be able to process police officer reports and review evidence, including any citizen complaints or charges of criminal misconduct, property damage, or other matters for which the photographs or information could constitute evidence. At the end of this 30-day period the photographs and information shall be destroyed by the Portland Police Bureau unless, at that time, there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct and the photographs or information relate directly to a criminal investigation, in which case, the photographs may be maintained by the Portland Police Bureau as long as those conditions exist.

The Bureau shall not collect or maintain information about the political, religious or social views, associations or activities of any individual, group, association or organization, corporation, business or partnership, solely for the reason that the individual, or individual members of a group, association, organization, corporation, business or partnership have been convicted of a crime, but the Bureau may consider the relationship of the facts which supported the conviction to any current information in determining whether there are reasonable grounds to suspect the subject is or may be involved in criminal conduct.

3. The Portland Police Bureau has reviewed its files, and will review them again in light of the amended policy, to ensure that their contents comply with the law and the amended policy adopted pursuant to this agreement.
4. The Portland Police Bureau assures that they are not currently collecting or maintaining information upon the political, religious, or social views, associations or activities of Mr. John Blank, the American Field Services (AFS), or the Portland Central American Solidarity Committee (PCASC). Furthermore, the Bureau assures that it does not presently have any documents whatsoever concerning Blank, AFS or PCASC in criminal intelligence files.

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I have one additional concern, although I do not propose that it be an official part of the resolution of this matter. My concern is how the ACLU portrays this agreement. Understandably, any organization wants to portray itself as a frequent "winner." Although it wouldn't be the end of the world if the ACLU portrays this agreement as a victory over the Police Bureau, I believe it would be inaccurate and might create unnecessary tension which would interfere with future cooperative approaches to problem solving. In other words, I believe that the Portland Police Bureau has responded in a constructive and responsible manner to the legitimate parts of the ACLU's concerns, and I hope that the ACLU will acknowledge that action in any public portrayal of this agreement.

The City has been making increased efforts to talk with the ACLU prior to taking actions which might raise civil liberties questions. Conversely, we appreciated your approaching us informally on this matter before commencing litigation. Although there is inevitably healthy tension between your organization and the Portland Police Bureau, I believe strongly that it is in everyone's interest to promote a non-adversarial approach to these difficult and important issues.

I will be out of town from August 4th through August 15th. I hope that before my return you will be able to confirm this agreement. When I receive your confirmation upon my return, I will advise the Police Bureau and they will amend their policy in accordance with this agreement.

Thank you.

Very truly yours,



Jeffrey L. Rogers
City Attorney

JLR/dzl
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c: Deputy Chief Rob Aichele
Lt. Al Dean
Mary Overgaard
Steve Moskowitz