



TESTIMONY IN OPPOSITION TO HB 2974
HOUSE JUDICIARY COMMITTEE
FEBRUARY 26, 2025

My name is Mae Lee Browning, Legislative Director of the Oregon Criminal Defense Lawyers Association. I testify on behalf of OCDLA in strong opposition to HB 2974.

If the Oregon Legislature passes the redlined version of section 2 of this bill defining “sexually explicit conduct,” you will be harming victims. The proposed language will be found unconstitutional. If you pass this bill, the state will bring a case based on this unconstitutional definition. The state will drag a victim through the trauma of the criminal legal process only to have the case overturned on appeal. How is that justice for victims?

This bill will be costly and will use up precious and limited judicial resources that could be better spent helping Oregonians keep their housing in landlord tenant cases, expunge their record so they can get a job, obtain protective orders, settle dissolution and parenting time issues, to name a few. This bill will be costly in the appellate litigation that will necessarily follow and will be costly when the state wrongfully incarcerates someone based on this unconstitutional definition.

Put succinctly, a “lewd exhibition” must be objectively lewd. It cannot be subjectively lewd. ODAA’s proposed definition is a subjectively lewd standard.

It is ironic that the state through ODAA is proposing a subjective standard when the state on appeal in *State v. Parra Sanchez* acknowledged that a lewd exhibition must contain an objective component:

“The state, in its supplemental brief, now contends that “what qualifies as a lewd exhibition will depend in part on evidence of the objective qualities and circumstances of the image or live depiction.” Although the state does not explicitly reject its prior position that a lewd exhibition is determined exclusively by the subjective intent of the defendant, we understand the state’s shift as a tacit admission that “lewd exhibition” must contain an objective component, contrary to our prior case law holding otherwise.”ⁱ

The Court of Appeals was guided by sound analysis and **aligns Oregon’s caselaw with that of the majority of states and the federal courts so that it passes constitutional muster:**

“[T]he state must prove that the exhibition of a child’s sexual or intimate parts was objectively lewd, not simply that defendant found it to be sexually gratifying. Our conclusion is guided not only by our principles of statutory interpretation, but also the need to interpret our statutes in a manner that passes constitutional

muster. We further conclude that because our jurisprudence on this issue is not consistent with those principles, we disavow those cases today.”ⁱⁱ

“To assist factfinders and trial courts in making those objective determinations,” the Court adopted “a set of factors that have been widely analyzed and adopted by state and federal courts.”ⁱⁱⁱ **The DAs can achieve their objective for prosecuting certain cases if they use the factors provided in *Parra-Sanchez*.** The state said that they cannot prosecute certain cases where “offenders send images of nude children along with text of graphic descriptions of sex acts . . . that clearly evidence the sexual intent of the viewer.” If the state applied the *Dost*-factors,^{iv} we believe that at least 3 of the factors could be met given the aforementioned scenario in order to prove that the image was objectively lewd.

Since courts will engage in the roadmap laid out in *Parra-Sanchez*, there is no need for a “fix,” unless the Oregon Legislature wants to create a statute that will eventually be declared unconstitutional.

Section 3: Invasion of Privacy

Will there ever be a session where the Oregon Legislature does not create new crimes, expand existing crimes, and increase the punishment for crimes? I suggest that the Oregon Legislature try this session, so we can avoid ballooning the criminal legal system. Adding crimes and increasing punishments will not lead to public safety. It will lead to the Oregon Legislature spending more money on prosecutors, courts, defense attorneys, law enforcement, jails, probation and parole, and prisons. That is money that could be spent to actually help people, in the areas of housing, education, health care, behavioral health care, to name a few.

The Oregon Legislature does not need to increase the punishment for Invasion of Privacy from a crime category 6 to 8. Even with language stating that the provision apply to offenders more than 3 years older than the person whose privacy is being invaded, this can still apply to young people.

Prosecutors have all the necessary tools in their toolbox already. The Oregon Legislature does not need to add to that toolbox, especially when the community will not be safer because of the legislative change.

Vote NO on 2974.

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ⁱ *State v. Parra Sanchez*, 324 Or App 712, 717 (2023).

ⁱⁱ *Id.* at 718.

ⁱⁱⁱ *Id.* at 733.

^{iv} Those factors include: “1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; 4) whether the child is fully or partially clothed, or nude; 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.” *United States v. Dost*, 636 F Supp 828, 832 (SD Cal 1986), *aff'd sub nom United States v. Wiegand*, 812 F2d 1239 (9th Cir 1987), and *aff 'd*, 813 F2d 1231 (9th Cir 1987).

^v OCDLA's 1,200 members statewide include public defense providers, private bar attorneys, investigators, experts, and law students. Our attorneys represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon. Our mission is championing justice, promoting individual rights, and supporting the legal defense community through education and advocacy.