



February 14, 2024

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

RE: Testimony in Opposition to House Bill 4135

Dear Chair Kropf, Vice-Chair Wallan, Vice-Chair Andersen and members of the Committee,

Thank you for the opportunity to provide testimony on behalf of the American Civil Liberties Union of Oregon (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. **We oppose House Bill 4135, which would create a new crime of threatening a mass injury event and urge you to vote NO.**

While the ACLU of Oregon can appreciate the aims of this bill, the ACLU of Oregon opposes the means selected to achieve them and cannot ignore the risks to youth, people with disabilities and to fundamental freedoms attendant in this bill.

The ACLU of Oregon, along with partner organizations also expressed concerns about a similar bill last session, HB 3035 (2023). Several of those concerns remain:

- There is already a criminal law - ORS 163.190 (menacing) - that punishes threats, so this bill is unnecessary. Creating new and redundant crimes does not equate to increased public safety.
- “Fear, alarm, or terror,” especially the inclusion of the word “fear,” makes the statute very broad and potentially vague as to the distinct meanings of these terms; there is a risk of sweeping in protected speech.
- It is vague which clause(s) the first “intentionally” modifies. This opens the bill, should it become law, to challenges.
- The number of persons (2 in HB 3035/4 in HB 4135) is arbitrary and does not seem to fit the notion of a “mass” injury event.
- The use of the phrase “may be” in Section 1(3) broadens the potential expression that is impacted.
- Youth, people with intellectual or developmental disabilities, or people experiencing mental illness that impacts their judgment or behavior should enjoy protections from the harmful consequences of being criminalized and the serious collateral consequences that the punishment scheme in this bill contemplates.

Additionally, after the last legislative session, on June 27, 2023, the United States Supreme Court issued its decision in *Counterman v. Colorado*, 600 U.S. 66 (2023). In *Counterman*, the Supreme Court concluded that Colorado violated the First Amendment when it convicted a person of stalking without requiring any proof of whether the defendant understood his



communicative acts to be threatening. Specifically, the Supreme Court held that the First Amendment requires “proof that the defendant had some subjective understanding of the threatening nature of his statements.” *Id.* at 69.

It is not enough to prove that a communicative act is objectively threatening, and HB 4135 does not have a clear subjective element as *Counterman* requires.

It is important to note that the Supreme Court drew its conclusion recognizing that requiring such proof “comes at a cost” because “[i]t will shield some otherwise proscribable (here, threatening) speech because the State cannot prove what the defendant thought.” *Id.* at 75. The trade-off to that cost is that requiring such proof “reduces the prospect of chilling fully protected expression.” *Id.* **In short, in order to ensure robust and First-Amendment-mandated protections for speech, it is supposed to be hard to prosecute and punish speech.**

By refusing this invitation to make prosecution of speech easier, you have the opportunity to reaffirm Oregon’s commitment to protecting the basic freedoms underpinning our democracy. **The ACLU of Oregon urges you to vote NO on HB 4135.**

Respectfully,

Kelly Simon,
Legal Director

For questions, please email Jessica Maravilla, Policy Director at jmaravilla@aclu-or.org