IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

	)	
	)	OPINION & ORDER
STATE OF OREGON,	)	REGARDING DEMURRER
	)	(PCC 14A.050.303)
Plaintiff,	)	
	)	
vs.	)	Case Nos. 03-07-50223
	)	03-08-51352
TODD KURYLOWICZ	)	03-09-52390
JASON DUNLAP	)	
VICTORIA TAYLOR	)	03-08-51288
	)	
Defendants.	)	03-09-52332

These matters came before the Court on Defendants' demurrer to the charging instruments filed by the State of Oregon alleging that defendants' conduct violated Portland City Code Section 14A.050.030 (Obstructions as Nuisances). Defendants appeared by and through their attorney Adam Arms. The State of Oregon appeared by and through Deputy District Attorney Shanon Gray. The Court, having considered the written submissions of the parties, the points and authorities raised therein and the argument by counsel, now being fully advised regarding the legal issues that are now before this Court,

IT IS HEREBY ORDERED that defendants' demurrer is SUSTAINED. Judgment shall be entered dismissing the accusatory instruments in these consolidated cases.

OPINION

I. Introduction

Defendants' demurrer asserts that Portland City Code Section 14A.050.030 ("the ordinance") is unconstitutionally vague and overbroad, infringes upon the constitutional guarantees of Equal Protection and Due Process, and violates Oregon's constitutional prohibition against disproportionate sentences. Defendants also contend that the city code section is preempted by state laws criminalizing disorderly conduct and conduct impeding traffic. Because the Court concludes the ordinance is vague and overbroad, it does not reach Defendants' other challenges.

A demurrer is the appropriate method of challenging the unconstitutionality of a law. ORS 135.630(4); *State v. Robertson*, 293 Or 402, 405 n2 (1982). A law that is unconstitutional on its face is invalid and an accusatory instrument charging a violation of that law fails to state an offense. *Id.*

The constitutionality of a law enacted by an Oregon legislative body must be examined under the Oregon Constitution before the Court undertakes an analysis of the law under the U.S. Constitution. *State v. Kennedy*, 295 OR 260, 262 (1983).

II. The Ordinance

Portland City Code 14A.050.030 states in relevant part:

> I. Unless specifically authorized by ordinance, it is unlawful for any person to obstruct any street or sidewalk, or any part thereof, or to place or cause to be placed, or permit to remain thereon, anything that obstructs or interferes with the normal flow of pedestrian or vehicular traffic, or that is in violation of parking lane, zone or meter regulations for motor vehicles. Such an obstruction hereby is declared to be a public nuisance. * * *
>
> II. The provisions of this Section do not apply to merchandise in course of receipt or delivery, unless that merchandise is permitted to remain upon a street or sidewalk for longer than 2 hours. * * *

III. Statutory Analysis

Before beginning its constitutional analysis, the Court must "first discern the conduct that [the ordinance] proscribes" by construing the meaning of the law, beginning with its text and context. *State v. Ausmus*, 336 Or 493, 499 (March 11, 2004). In doing so, the Court is required to give words of common usage their plain, natural and ordinary meaning. *Id.*

Defendants argue that PCC 14A.050.030 contains vague terms and phrases that are not defined or explained in the law itself or by reference to the definition section of the City Code. They refer, by example, to the words "obstructing" and "interfering" and to the phrases "any part" of a sidewalk and the "normal flow" of traffic.

Stripped to its essentials, and giving the words of the Portland City Ordinance their plain and ordinary meaning, **PCC 14A.050.030 prohibits a person from doing two things: (1) blocking any part of a sidewalk or street; or (2) placing, asking someone else to place, or permitting an object to be placed and remain on the sidewalk in a way that makes it**

difficult for others to walk around it.[1] This interpretation is consistent with the definition of "obstruct" and "obstruction" that the Oregon Court of Appeals considered in *City of Eugene v. Lee*, 177 Or App 492, 493 (2001)[2] and the commonly used definition for "interfere." [3]

Having construed the legislative body's intent, the next inquiry is whether the ordinance is unconstitutionally overbroad. *State v Ausmus,* 336 Or at 504. In other words, the Court must determine whether enforcement of the law at issue reaches a substantial amount of

---

[1] Likewise, the ordinance prohibits a person from: (1) blocking a street; or (2) putting something in the street so that cars, trucks, etc cannot get by it or must go out of their way to drive around it.

[2] The Oregon Court of Appeals considered the definition of "obstruct" and "obstruction" in *City of Eugene v. Lee*, 177 Or. App. 492, 503 (2001), looking to the common definitions found in *Webster's Third New Int'l Dictionary,* 1559 (unabridged ed 1993):

> To obstruct is:
>
> **"1:** to block up : stop up or close up : place an obstacle in or fill with obstacles or impediments to passing ïtraffic ~ing the street› ïveins ~ed by clots› **2:** to be or come in the way of : hinder from passing, action, or operation : impede, retard ïunwise rules ~ legislation› ïconstant interruptions ~ our progress› **3:** to cut off from sight : shut out ïthe high wall ~ed the view[.]"
>
> Similarly, "obstruction" is the "act or condition of being obstructed" or " a condition of being clogged or blocked." *Id.*

[3] The common definition of "interfere" is quoted below from Merriam-Webster Online Dictionary at http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=interfere (June 22, 2004)

> **1 :** to interpose in a way that hinders or impedes **:** come into collision or be in opposition **2 :** to strike one foot against the opposite foot or ankle in walking or running -- used especially of horses **3 :** to enter into or take a part in the concerns of others **4 :** to act reciprocally so as to augment, diminish, or otherwise affect one another -- used of waves

constitutionally protected conduct. *State v. Plowman,* 314 Or at 162, *citing Robertson*, 293 Or at 409. The analysis is the same under the Oregon Constitution or the US Constitution. *See e.g., City of Chicago v Morales,* 527 US 41, 119 S Ct 1849, 1857 (1999); *Village of Hoffman Estates v. The Flip-side, Hoffman Estates, Inc*., 455 US 489, 102 S Ct 1186, 1191 (1982).

IV. Constitutional Analysis

A. Is Portland City Code 14A.050.030 unconstitutionally overbroad?

A law is unconstitutionally overbroad if it purports to prohibit conduct that is constitutionally protected. *State v Ausmus,* 336 Or at 504. A statute should be struck down as overbroad when it is susceptible to regular application with respect to constitutionally protected conduct. *State v Blocker*, 291 Or 255 (1981). An overbreadth analysis seeks to resolve whether there are "instances in which one is constitutionally privileged to engage in the conduct proscribed by the statute . . . [and] to the extent that an overbroad law forbids what may not constitutionally be forbidden, it is invalid as such without regard to the facts in the individual case." *State v. Garcias*, 296 Or 688, 699 (1984).

A claim of overbreadth can often be resolved by interpreting the law at issue and discerning legislative intent. The question is whether the enacting body intended the terms of the law to encompass the type of constitutionally protected activity that the defendants contend is at issue. *State v. Ausmus*, 336 Or at 505, *citing State v. Robertson*, 293 Or 402, 410 (1982). Although an informed legislative body like the City of Portland would not intentionally enact a law knowing it was constitutionally overbroad., its legislative action does occasionally generate law that reach protected conduct. *See e.g., City v. Tidyman,* 306 Or 174 (1988) (adult bookstores as public nuisances); *City of Portland v. James*, 251 Or 8 (1968) (curfew ordinance); *City of Portland v Arndorfer*, 44 Or App 37 (1979) (off-road recreational vehicles).

In this case, Defendants contend the Ordinance is overbroad because it infringes on their constitutional right to association, which is closely tied to the constitutional right of free expression. Defendants argue these fundamental rights are necessarily intertwined because people who assemble together to consult for their common good are necessarily engaged in expressive behavior. Therefore, they say, the Court's strong protection of the right to assemble is critical to giving substance to the right to express opinions and to speak freely.

The State argues that the ordinance is narrowly tailored to serve the City's significant interest to ensure the safety of the general public to allow for safe passage on public ways and to maintain the flow of pedestrian traffic. The State offers a document titled "Guidelines for the Enforcement of PCC 14A.050.030 (Obstructions as Nuisances)," which is marked "Draft" and dated August 11, 2003, to support its argument that the ordinance is narrowly tailored.[4]

---

[4] These guidelines are discussed further in this opinion at p11.

1. Does PCC 14A.050.030 infringe on the right to assemble peacefully?

Defendants argue that PCC 14A.050.030 infringes on the constitutionally protected rights of speech and assembly because the ordinance encompasses all assemblies on or near public sidewalks or streets, regardless of whether those assemblies are peaceful or riotous. They note the law makes it criminal to meet with others on a sidewalk to discuss local politics, for a transient veteran standing on a sidewalk to explain his opinion that veterans benefits are inadequate, and even for persons to stand in front of City Hall for the sole purpose of demanding accountability from public representatives.

Defendants also note that PCC 14A.050.030 is particularly broad due to its prohibition against blocking "any part" of the sidewalk. They suggest the government's burden to draft legislation precisely and narrowly is particularly high in this case because the ordinance prohibits gathering on public streets and sidewalks -- "the archetype of the traditional public forum" that has historically been a privileged site for free speech activity." *See, e.g., Frisby v Schulz*, 487 US 474 (1988); *Boos v Barry*, 485 US 312 (1988).

The constitutional rights of assembly and free speech share a preeminent status in the hierarchy of constitutionally protected activities. Those rights are found in the 1st Amendment to the US Constitution and in Article 1, sections 8 and 26 of the Oregon Constitution.

Article 1, section 8 provides in relevant part:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print on any subject whatsoever . . .

Article 1, section 26 provides in relevant part:

> No law shall be passed restraining in any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good . . .

The 1st Amendment to the US Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech ... or the right of the people peaceably to assemble. . . .

Defendants rely on the recent opinion of the Oregon Supreme Court in *State v Ausmus*, 336 Or 493 (2004), *reh'ing denied* __Or__ June 1, 2004. In that case, the Court

examined an overbreadth challenge to the state's disorderly conduct statute, ORS 166.025. Section (1)(e) prohibits persons from "congregating with others in a public place" and refusing to comply with a lawful order of the police to disburse when the person had the intent to cause public inconvenience, annoyance or alarm "or if one recklessly creates a risk thereof." The Court held section (e) invalid because it impermissibly reached the constitutionally protected rights of assembly and expression.

In *State v Ausmus*, 336 Or at 506, the Oregon Supreme Court emphasized that "it is the range of the conduct that the statute criminalizes that must be tested against the constitutional right of assembly and speech." The Court found that the disorderly conduct statute encompassed peaceful assembly as well as disorderly assembly, making both types of conduct criminal. The constitutional infirmity noted by the Court was based on the Court's finding that under the statute, "a person ordered to disperse violates [the law] ***regardless of whether or not any harm results*** from the group's refusal to disperse, the continued congregation with others, or the proscribed mental state." *Id.* at 507. (*emphasis added*) The Court noted:

> [T]he statute applies to an individual who, in response to an order to disperse, abandons whatever activity in which they were engaged that made the order lawful in the first place, but ***continues peaceably to congregate*** with others, with the intent to cause public inconvenience, annoyance, or alarm or recklessly creates the risk of causing public inconvenience, annoyance or alarm.
>
> * * *
>
> Simply put, congregating with others in a manner that does not cause harm, even when coupled with one of the mental states proscribed in the statute, is conduct that Article 1, sections 8 and 26, protects.

Id. (*emphasis added*) And in concluding, the Court summed up by once again referring to constitutionally protected "conduct and thought ***that does not produce a harmful effect***." *Id* at 507-08 (*emphasis added*). The message in the Court's reasoning is "loud and clear." If a criminal statute encompasses conduct that is not harmful, in other words peaceful conduct, that law is unconstitutionally overbroad.

In addition to *State v Ausmus*, *supra,* defendants point the Court to *Terminello v Chicago*, 337 US 1, 4,69 S Ct 894 (1949). In that case, the US Supreme Court stated that there "must be a clear and present danger of a ***serious substantive evil*** that rises far above public inconvenience, annoyance or unrest" in order to lose the constitutional protections of free speech and right of assembly. *Id,* 69 S Ct at *896* (*emphasis added*) *See also, Coates v City of Cincinnati,* 91 S Ct at 1689 (mere public intolerance or animosity cannot be the basis for abridgment of constitutional freedoms). The Oregon Supreme Court's recent analysis in *State v Ausmus* is certainly consistent with these US Supreme Court cases.

In *City of Eugene v Lee, supra*, the Court considered an "as applied" constitutional challenge to a Eugene ordinance making it a crime (among other things) to obstruct vehicular or pedestrian traffic on a public way, if a person intends to cause (or recklessly creates a risk of causing) a public inconvenience, annoyance or alarm. ECC § 4.725(d).[5] After considering the dictionary definition of obstruct and obstruction, the Court observed and concluded:

> "Street preaching that **induces some people in a busy public walkway to stop and listen while others may pass unimpeded is expressive activity that is protected by Article I, section 8.** ECC section 4.725(d) cannot constitutionally be applied to defendant under these circumstances."

Oregon cases, like *State v Ausmus* and *City of Eugene v. Lee* instruct that a key determinant of whether conduct is constitutionally protected or not is whether that conduct causes or has the potential to cause someone else harm. If so, the conduct is not protected; if not, it is protected (although the protected conduct may be subject to regulation). Thus, in *City of Eugene,* a person could stand on the sidewalk preaching so long as other could pass by unimpeded. In *State v. Ausmus*, persons could congregate and remain as a group so long as their conduct was peaceable and did not produce a harmful effect.

The Portland city ordinance here reaches the same type of constitutionally protected conduct: persons assembled on a sidewalk, for whatever reason, who are blocking or impeding others' travel along the sidewalk. It does not distinguish between persons who are creating a disturbance or some other harmful effect and those who are not. As such, I find that PCC 14A.050.030 encompasses conduct that is protected by Article I, section 26 of the Oregon Constitution and by the First Amendment to the US Constitution.

An overbroad law may sometimes be saved by judicial interpretation. *State v. Robertson*, 293 Or at 412 (1982). That is unless the constitutional guarantee at issue prohibits the ordinance's very enactment. *Id.* The Oregon Constitution forbids the enactment of any law that prevents persons from gathering together in a peaceable manner.[6] The same constitutional prohibition is found in the First Amendment to the US Constitution. In other words, the legislature

---

[5] The defendant did not argue that the ordinance was facially vague; only that as applied to his particular circumstances (preaching and Bible pounding on the sidewalk, and from time to time calling others "whores" or "drunkards"), the law was unconstitutional.

[6] Oregon Constitution, Article 1, section 26.

may not make laws that criminalize the mere gathering of two or more persons when they are not harming anyone else. *Id.* There is one exception, however, when "the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of [peaceful assembly] were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Id.* Only if a law passes this test may it be saved by a narrowing judicial interpretation or through an "as applied" analysis regarding the particular facts that were found to violate the law before the court. *Id.*

Neither party here has presented arguments that reach this issue nor has either party identified any legal authorities for the Court to consider with respect to the question of whether the gathering of persons on streets or public sidewalks in a manner that interferes with others' use of the sidewalk amounts to conduct that was prohibited at the time the Oregon Constitution or the First Amendment to the U.S. Constitution were adopted. This Court simply does not have the time or resources to conduct that inquiry on its own, in a manner that would give the Court confidence that it has fully considered this issue.[7]

There is nothing in the text or context of the Portland city ordinance that permits this Court to interpret the ordinance to touch only those persons whose assembly blocks a substantial (versus any) part of the street or sidewalk in a manner that creates an unreasonable (vs. reasonable) interference with pedestrian or vehicular traffic. Although Section B of the ordinance refers to objects and arguably establishes parameters for what constitutes an unreasonable obstruction of the sidewalk by merchandise, nothing in that subsection or any other part of the ordinance limits its scope with respect to persons who obstruct the sidewalk. Similarly, the other city ordinances found in Portland City Code, Title 14 (Public Order) suggest the city intended to narrow the scope of unlawful conduct described as interfering with the free passage of persons along public sidewalks. *See* PCC 14A.050.035 (Pedestrians). For these reasons, this Court concludes it cannot "faithfully [narrow] the application of the [ordinance] to only conduct that the constitution does not protect." *State v. Ausmus* at 891.

Because PCC 14A.050.030 restrains conduct protected by Article 1, section 26, it is unconstitutionally overbroad. Defendants' demurrer is, therefore, sustained on this ground.

B. Is Portland City Code 14A.050.030 unconstitutionally vague?

1. Oregon Constitution

---

[7] This Court has already spent countless hours considering the parties' arguments, the authorities cited in their briefs and at oral argument and reviewing many of the authorities that are relied upon by the courts' whose decisions have been referenced by the parties.

A vague law violates Article 1, sections 20 and 21 of the Oregon Constitution. *State v Plowman*, 314 Or 157 (1992). A criminal statute must be sufficiently explicit to inform those who are subject to the law's enforcement of the type of conduct that will render a person liable to its penalties. *Id.*; *State v Graves*, 299 Or 198, 195 (1985); *City of Portland v. White*, 9 Or App 239 (1972). That being said, however, constitutional protections require only that a criminal statute provide persons with a "reasonable degree of certainty" about whether a particular type of conduct falls within the law's prohibition; absolute certainty of what the law prescribes is not required. *State v. Cornell/Pinnell*, 304 Or 27, 29-30 (1987).

Likewise, the statute must be definite enough in its terms to constrain the exercise of discretion by judges and juries in order to prevent unanticipated results or uneven enforcement of the law. *State v. Graves*, 299 Or 189 (1985); *State v. Hodges*, 254 Or 21, 27 (1969). A law must not be so vague that it permits a jury to decide what the law will be and it must be sufficiently definite to prevent against the imposition of *ex post facto* laws embodied in Article 1, section 21 of the Oregon Constitution and the principle against unequal application of criminal laws embodied in Article 1, section 20. *State v Plowman,* 314 Or at 161.

2. Federal Constitution

The failure to notify potential defendants of a law's scope and reach constitutes the denial of due process under the 14th Amendment to the US Constitution. *State v. Robertson,* 293 Or at 409, *quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 US 489, 498 (1982), *quoting Grayned v City of Rockford*, 408 US 104, 108 (1972). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential element of due process." *Connally v General Construction Co,* 269 US 385, 391 (1926). Without specificity, it is impossible to determine if the state's powers are being used to support the legislature's legitimate objectives or whether there will be arbitrary and capricious use of the law by law enforcement officers. *See e.g., Grayned v City of Rockford*, 408 US 104, 108 (1972).

According to defendants, because the important constitutional right of assembly is infringed by the ordinance in question, the Court's inquiry is not confined to a determination of whether the law is "vague in all possible applications." *Hotel & Motel Assn's of Oakland v City of Oakland,* 344 F3d 959 (2003). *Cf State v. Sutherland,* 329 Or 359 (1999)(criminal statute did not address an infringement on the right of speech or assembly). Instead the test is whether "vagueness permeates the text" of the statute. *City of Chicago v Morales,* 119 S Ct at 1858; *Kolender v. Lawson*, 461 US 352, 103 Sct 1855, 1859 n8 (1983)(discussing facial challenges based on vagueness in the context of a criminal statute attacked because it allows for arbitrary

enforcement).[8]

a. Indefinite Terms

Defendants argue that the ordinance contains vague terms and phrases that are not defined or explained in the law itself or by reference to the definition section of the City Code. They say it fails to give notice to persons standing, ambling or participating in a public assembly on public sidewalks that their presence may amount to a criminal offense. Furthermore, it allows police officers to make ad hoc decisions regarding whether a person is "obstructing" a sidewalk or "any part" of a sidewalk or "interfering" with the "normal flow" of pedestrian or vehicular traffic. By way of example, defendants ask "who is to determine what the normal flow of pedestrian traffic may be or when a person's presence on the sidewalk is obstructing or interfering with the flow?"

The State argues that PCC 14A.050.030 is not unconstitutionally vague under the Oregon Constitution because "the activity described in the ordinance is circumscribed by reference to specific or non-vague conduct in a manner manifesting the purpose of preventing persons from

---

[8] In *Kolender v. Lawson*, 103 S Ct at n8, the majority responded to the dissent's concerns that a statute should not be held unconstitutionally vague on its face unless it is "vague in all of its possible applications." The Court said,

> "First, * * * we permit a facial challenge if a law reaches 'a substantial amount of constitutionally protected conduct.' Second, where a statute imposes criminal penalties, the standard of certainty is higher. This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application.
>
> * * *
>
> [I]n the dissent's view, one may not 'confuse vagueness and overbreadth by attacking enactment as being vague as applied to conduct other than his own.' But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. *[internal citations omitted]* * * * ."

obstructing a public way (sidewalk).[9]" The State relies on *City of Portland v Levi*, 98 Or App 341 (1989), *rev denied* 309 Or 645 (1990), *citing State ex rel Juv Dept v D.*, 27 Or App 861 (1976). In the *Levi* case, the Court upheld an ordinance targeted at prostitution, finding that the word "loitering" was unconstitutionally vague because it was further described by the phrase "in a manner manifesting the purpose of soliciting prostitution."

The State offers an August 11, 2003 draft entitled "Guidelines for Enforcement of PCC 14A.050.030 (Obstructions As Nuisances)" as further explanation of the type of conduct made criminal under this specific section of the city code. However, there is no evidence in the record that this draft was ever finalized or that these guidelines were ever distributed to the City's law enforcement officers. Moreover, even if the State could show that the draft was eventually finalized and distributed to law enforcement personnel, it is unlikely that an everyday person would have ready access to the guidelines so that they had an opportunity to circumscribe their actions in a manner that would not violate the law. And, it is only speculative as to whether the guidelines would be presented to a judge or jury to assist their determination of whether the defendant's conduct was prescribed by the ordinance. Finally, neither *State v. Levi, supra*, nor *State ex rel Juv Dept v. D.* stand for the proposition that the Court may look outside the ordinance or statute at issue *to any source* that may circumscribe a potentially vague term. In *State ex rel Juv Dept v. D* at 866, the Court of Appeals said,

> "The requirement that the vaguely described activity be circumscribed by reference to specific conduct is fulfilled when *the reference is to an already existing non-vague criminal enactment* or when *the enactment itself* delineates in its modifying language a specific non-vague offense." (e*mphasis added).*

The draft enforcement guidelines proffered by the State do not fit within the description of external resources this Court may consider in its vagueness analysis. For all of these reasons, the Court does not find that the draft guidelines can cure the challenged vagueness of PCC 14A.050.030.

b. Lack of a mental state or *mens rea* requirement

Defendants argue that the strict liability aspect of PCC 14A.050.030 (lack of mental state requirement) fails to provide adequate standards for citizens to distinguish between protected conduct and criminal acts. *See, e.g. State v Blair*, 287 Or 519 (1979). *See also, Colautti v Franklin*, 429 US 379 (1979) and *City of Chicago v Morales,* 119 S Ct at 1860 (courts have uniformly invalidated criminal laws that do not join the *actus rea* with a *mens rea*). They point out that the City of Portland has drafted an ordinance similar to the one at issue here which does provide a *mens rea* requirement and it would have been easy for the City to make the ordinance at

---

[9] *State's Response to Defendants' Demurrer, pgs 1-2.*

issue here less vague by including a *mens rea* requirement.[10]

The State argues that PCC 14A.050.030 is not a strict liability law because the violator has the opportunity to abate his or her behavior and his/her decision not to do so is evidence of intent to violate the law. Once again, the State relies on the draft guidelines for enforcement of Ordinance 14A.050.030, which this Court has determined are not proper for its consideration. However, even if the guidelines were considered, the opportunity to abate has been rejected as a basis for interpreting an ordinance to cure it from a vagueness challenge premised on the law's failure to include a mental state. *City of Chicago v Morales,* 527 US 41, 119 SCt 1849, 1860. *See also*, *Coates v City of Cincinnati*, 402 US 611 (1971).[11] For sure, nothing in the text of the Portland city ordinance mentions giving the violator a chance to abate his or her activity. The Court will not read into the law a material term, such as *mens rea*, that was not included in the ordinance by the legislative body that enacted it.

The Portland City Ordinance here is not unlike the Cincinnati ordinance found to be unconstitutional in *Coates v City of Cincinnati, supra.* Both ordinances were drafted without a mental state requirement and, as discussed above, both unconstitutionally infringe on constitutionally protected conduct.

c. Potential for arbitrary enforcement

A law will be vague if it fails to give fair notice of what it prohibits. *Delagado v. Souders*, 334 Or 122, 148 (2002)(under the Due Process Clause). A criminal law will be vague in violation of Article 2, section 21 of the Oregon Constitution if "it gives judges and juries

'unbridled discretion' to decide after the fact what is prohibited in a given case." *Id.* at n3. Similarly, a law that gives unbridled discretion will result in the unequal application of criminal law thereby violating Article 1, section 20. *State v. Graves*, 299 Or 189, 195 (1985).

---

[10] PCC 14A.050.035A provides: "No person *with the intent to interfere with free passage* shall block or attempt to block or interfere with any person(s) along the public sidewalks by any means, including but not limited to standing on that part of the sidewalk used for pedestrian travel or by placing any object or vehicle in such area." *(emphasis added)*

[11] The Supreme Court struck down an ordinance without a *mens rea* requirement that made it a criminal offense for a group of people to gather on a sidewalk and conduct themselves in a manner "annoying" to persons passing by. The Cincinnati ordinance was held invalid on its face because it infringed on the right of people to gather in public places for social or political purposes. *Id* at 615.

Defendants argue PCC 14A.050.030 allows police officers to make ad hoc decisions regarding whether a person is "obstructing" a sidewalk or "any part" of a sidewalk or "interfering" with the "normal flow" of pedestrian or vehicular traffic. By way of example, defendants ask "who is to determine what the normal flow of pedestrian traffic may be or when a person's presence on the sidewalk is obstructing or interfering with the flow?"

The State counters that defendants' arguments are "simply preposterous and ridiculous" and are evidence that "defendant has obviously not read PCC 14A.050.030 and the enforcement guidelines." The State contends that the ordinance specifically addresses particular situations regarding individuals and their right to free speech and assemblage.[12] The enforcement guidelines are quoted to illustrate that a pedestrian can stand on a sidewalk for up to 8 hours or more while people who are engaged in the delivery of merchandise can only block a sidewalk for 2 hours. This, the State says, "clearly discredits defendant's [sic] entire argument as unfounded" since there is no arbitrary or unreasonable treatment provided for in the ordinance and its guidelines.

The Oregon appellate courts have not adopted the facial vagueness analysis used by the federal courts. *See State v. Illig-Renn*, 189 Or App 47, 51-54 (2003) (debate between majority and concurring opinions concerning the correct test to apply when a vagueness challenge is brought based on lack of fair notice versus a challenge based on the 'nondelegation' requirements of the Oregon Constitution).[13] Oregon cases like *State v. Robertson*, 293 Or at 411, recognize that a

---

[12] "Members shall not enforce PCC 14A.050.030 against:

a. A person standing in a through pedestrian zone as part of a crowd that has formed to participate in or observe an expressive event unless the event lasted more than eight hours;
b. A person participating in or observing an event permitted by the City;
c. A person obstructing or interfering due to facts beyond the person's control.

[13] Judge (now Justice) Kistler, writing for the majority, notes that the Court of Appeals is bound to apply the test articulated by the Oregon Supreme Court for claims based on lack of fair notice under the Due Process Clause even though that precedent's doctrinal underpinnings may have been eroded, citing *Powell v. Bunn*, 185 Or App 334, 347 (2002). Judge Schuman's concurrence observes that the Oregon Supreme Court's decision in *Delgado v. Souders*, 334 Or 122 (2002) undermines any precedential value of the Oregon Court of Appeal's decisions in *State v. Ausmus*, 178 Or 321, *rev'd by* 336 Or 493 (2004)(disorderly conduct statute) and *State v. Andre*, 178 Or App 566 (2002)(interfering with a police officer statute) may have had with respect to that court's ruling on defendants' challenges to ORS 162.247(1)(b) "Interfering with a Police Officer" based on Article1, sections 20 and 21 of the Oregon Constitution. Those sections

facial challenge to a criminal statute based on the vagueness concept of lack of fair notice implicates the protections of the Due Process Clause of the U.S. Constitution; whereas, a facial challenge based on vagueness grounds targeted to the "ad hoc administration and after-the-fact lawmaking" implicates the *ex post facto* and equal protection provisions of Article 1, sections 20 and 21 of the Oregon Constitution. *State v. Illig-Renn* at 55 (Schuman concurring on the basis that the protections set forth in these provisions of the Oregon Constitution cannot be defeated merely by "imagining a case in which those evils do not occur.")

Judge Schuman's analysis appears to be consistent with recent U.S. Supreme Court precedent discussing vagueness challenges based on the claims that the statute suggests arbitrary and discriminatory application. *See Kolender v Larson*, 461 US 352, 103 S Ct 1855, 1858 n8 (1983); *City of Chicago v Morales, supra*. In these cases, the Supreme Court struck down city ordinances on the ground that they were unconstitutionally vague on their face without considering whether the ordinances were vague in all applications. Judge Schuman suggests the Oregon Supreme Court is moving in this direction, but the majority opinion in *Illig-Renn* reminds us that it has not done so yet.

For purposes of the Portland city ordinance at issue here, the distinction discussed between the majority and concurring opinions in *Illig-Renn* makes little difference. Because, even though this Court is bound to conduct an analysis of the statute under the Oregon Constitution before it reaches the federal constitutional analysis, the end result would be the same. Assuming this Court found that defendants had not met their burden of showing that the ordinance is vague in all applications, the next step would be to analyze defendants' vagueness challenges under federal law.

Under the federal constitutional analysis, Portland City Ordinance 14A.050.030 fails the facial vagueness test articulated by the majority in *City of Chicago v Morales, supra.* As defendants have noted, the ordinance provides essentially no guidelines for law enforcement officers to use to avoid unconstitutional application. In this respect, the Portland city ordinance is even more vague than the Chicago ordinance struck down by the U.S. Supreme Court. Portland's ordinance does not require an officer to give an order to disperse before issuing a criminal citation, it permits persons to be arrested before an order to abate is given and there is no reasonableness requirement to protect against unfettered enforcement of the ordinance. But even if it did, as the Supreme Court explained in *City of Chicago v Morales*, 119 S Ct at 1861-62, those protections would not be enough to save the ordinance here. For the reasons stated above, this Court finds PCC 14A.050.030 to be unconstitutionally vague on its face.

---

of the Oregon Constitution prohibit the delegation to prosecutors, judges or juries to decide what conduct is unlawful after that conduct has occurred and to engage in standardless, arbitrary law enforcement. *State v. Illig-Renn*, 189 Or App at 52-53.

V. Conclusion

Defendants' separate challenges to Portland City Ordinance 14A.050.030 based on overbreadth and vagueness are well taken. First, the ordinance is overbroad in that it reaches conduct that the Oregon and United States constitutions declare cannot be prohibited, the right to assemble peacefully. The ordinance makes no exceptions for peaceful association or for conduct that merely causes others to step around a person who happens to be standing on any part of a sidewalk in a manner that is not causing any harmful effect. Second, the ordinance is also void for vagueness, in violation of the federal constitution protections which require that a criminal law have sufficient definiteness that an ordinary person can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement of the law. Finally, nothing in the text or context of the ordinance would allow this Court to cure the constitutional infirmities noted above through judicial interpretation. For all of these reasons, defendants' demurrer to PCC 14A.050.030 is sustained and judgment shall be entered without delay dismissing the accusatory instruments in these consolidated cases.

DATED: June 23, 2004

Marilyn F. Litzenberger

Circuit Court Judge

cc: Adam Arms (for Defendants)
Shanon Gray (for State of Oregon)