

HON. DAVID REES

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

STATE OF OREGON,

PLAINTIFF,

vs.

JOSEPH GIBSON,

DEFENDANT.

No. 19CR53042

JOSEPH GIBSON'S  
DEMURRER

DEMURRER

COMES NOW Joseph "Joey" Gibson, the defendant, by and through the Angus Lee Law Firm, PLLC, and submits this demurrer under ORS 135.610, ORS 135.630(4) & (6), and *State v. McKenzie*, 307 Or 554, 560, 771 P2d 264 (1989), as the accusatory instrument is "is not definite and certain", and is unconstitutional vague as applied in this case and therefore the facts alleged in an indictment under such a statute do not and cannot constitute an offense.

The lack of definitiveness, vagueness, and the uncertainty in the charging document, violates Mr. Gibson's Right to Due Process.

PROCEDURE

A demurrer is either "allowed" or "disallowed" by the court. ORS 135.660. If a demurrer is disallowed the defendant must enter a plea. ORS 135.700. A demurrer that is allowed is a final judgment on that particular accusatory instrument.

JOSEPH GIBSON'S DEMURRER  
No. 19CR53042  
Wednesday, August 28, 2019

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1 CHARGE

2 In this case Mr. Gibson is charged with Riot under ORS 166.015, for standing on a public  
3 sidewalk during a protest event on May 1, 2019.

4 ARGUMENT

5 “Generally, an accusatory instrument is sufficient if it describes the offense in the words  
6 of the statute.” *State v. Caffee*, 116 Or App 23, 25, 840 P2d 720 (1992), *rev den*, 315 Or 312  
7 (1993). However,

8 If the accusatory instrument charges a crime implicating the First Amendment to  
9 the United States Constitution or Article I, section 8, of the Oregon Constitution,  
10 ***greater specificity may be required.***  
11 1 *Criminal Law* 8.51 (OSB Legal Pubs 2013) (emphasis added); *citing State v. McNamara*, 547  
12 P.2d 598, 274 Or. 565 (Or., 1976) (Because a defendant would not know what actions were  
13 criminal and which were not, one could not take the risk of engaging protected expression for fear  
14 of prosecution, which could have a “chilling effect on freedom of expression render[ing] the  
15 verdict vulnerable to attack on constitutional grounds”); *see also Ankeny v. Lockheed Missiles &*  
16 *Space Co.*, 88 Cal.App.3d 531, 537 (1979) (A pleading must “allege facts and not conclusions,”  
17 and any “allegations of material facts which are left to surmise are subject to special demurrer for  
18 uncertainty.”)

19 Here, the charge clearly implicates the First Amendment to the United States Constitution  
20 and Art. I, sec. 8, of the Oregon Constitution, thus greater specificity is required in the accusatory  
21 instrument.

22 A. *Uncertainty and vagueness.*

23 The charging document is not definite or certain, and is unconstitutionally vague as applied,  
24 and is therefore unconstitutionally insufficient as applied to Mr. Gibson in this case, and serves to

1 deprive Mr. Gibson of Due Process and his rights under the First Amendment to the United States  
2 Constitution and Art. I, sec. 8 of the Oregon Constitution. ORS 135.610, ORS 135.630(4) & (6),  
3 and *State v. McKenzie*, 307 Or 554, 560, 771 P2d 264 (1989) (a vagueness challenge falls within  
4 ORS 135.630(4) because, if a statute is vague, “the facts alleged in an indictment under such a  
5 statute do not and cannot constitute an offense”).

6 Publicly available video of the May 1, 2019, event shows every minute of Mr. Gibson’s  
7 involvement in the protest.<sup>1</sup> The video is completely devoid of any act of “violence” of  
8 “tumultuous conduct” committed by Mr. Gibson personally.

9 The Oregon Supreme Court wrote plainly in *State v. Chakerian* that “[i]t is clear under the  
10 statute that a person does not commit the crime of riot if he or she merely is part of a group and  
11 five *other* members of that group engage in tumultuous and violent conduct that intentionally or  
12 recklessly creates a grave risk of causing public alarm.” 325 Ore. 370, 375 n 8 (1997) (emphasis  
13 original). “Under the statute, the state must prove that the person charged actually ‘engage[d] in  
14 violent and tumultuous conduct.’” *Id.*

15 The *Chakerian* court went on to “note that ‘conduct’ itself may be protected expression  
16 under Article I, section 8.” *Id.* n 9. “Artistic conduct, such as dance, *and political conduct*, such  
17 as the carrying of protest signs, are just two of the more obvious forms of conduct that also are  
18 protected expression under Article I, section 8.” *Id.* (emphasis added).

19 How is Mr. Gibson, or any other person, to know what is “tumultuous” under the statue  
20 where his speech and presence was protected under the First Amendment to the United States  
21 Constitution and Art. I, sec. 8 of the Oregon Constitution?

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<sup>1</sup> <https://youtu.be/HzId89utLys?t=1142>

1 As the video of the protest shows a clear lack of any act of “violence” or “tumultuous  
2 conduct” committed by Mr. Gibson personally, both of which are required for a riot charge to  
3 stand, the charging document is insufficiently definitive or certain enough to give Mr. Gibson  
4 meaningful notice of what he is actually accused of having done. Accordingly, the demurrer  
5 should be allowed by this court.

6 *B. Free Speech and The Unconstitutional Application of The Riot code.*

7 Statutory provisions may be challenged on the grounds that they violate constitutional  
8 rights on their face *or as applied in a particular case*. See, e.g., *City of Eugene v. Lincoln*, 183 Or  
9 App 36, 39–41, 50 P3d 1253 (2002) (city trespass ordinance, although constitutional on its face,  
10 was applied in an unconstitutional fashion when police ordered the protester to leave county fair  
11 grounds and prosecuted her for noncompliance); See also *City of Eugene v. Miller*, 318 Ore. 480,  
12 871 P.2d 454 (1994) (holding that city ordinance restricting sidewalk activity violated Art. I, sec. 8  
13 as applied to defendant in that case).

14 In *Lincoln*, 183 Or App at 41, the court explained that

15 [t]he distinction between “facial” and “as-applied” challenges is based not on the  
16 validity of the government action involved but on whether the agent of the invalid  
17 action happens to be legislative as opposed to executive. A facial challenge asserts  
18 that lawmakers violated the constitution when they enacted the ordinance; an as-  
19 applied challenge asserts that executive officials, including police and prosecutors,  
20 violated the constitution when they enforced the ordinance.

21 Here, Mr. Gibson is charged with Riot for standing on a public sidewalk in protest. The  
22 right to assemble and engage in advocacy in a traditional public forum such as a public sidewalk  
23 is conduct in the furtherance of constitutionally protected free speech. See *Hill v. Colorado*, 580  
24 U.S. 703, 714-15, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2002) (noting that “the First Amendment  
25 interests of petitioners are clear and undisputed” because “their leafleting, sign displays and oral

1 communications are protected by the First Amendment,” and that the “public sidewalks, streets  
2 and ways” where they chose to exercise their rights “are ‘quintessential’ public forums for free  
3 speech.”); *NAACP v. State of Alabama*, 357 U.S. 449, 460 (1958) (“Effective advocacy of  
4 both public and private points of view, particularly controversial ones, is undeniably enhanced by  
5 group association, as this Court has more than once recognized by remarking upon the close nexus  
6 between the freedoms of speech and assembly.”); *See also Organization for a Better Austin v.*  
7 *Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d. 1 (1971) (“The claim that the expressions  
8 were intended to exercise a coercive impact on respondent does not remove them from the reach  
9 of the First Amendment”); *Hill*, 580 U.S. at 715 (“The fact that the messages conveyed by those  
10 communication may be offensive to their recipients does not deprive them of constitutional  
11 protection.”).<sup>2</sup>

12 In *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207 (2011), the United States Supreme  
13 Court held:

14 [S]peech on matters of public concern . . . is at the heart of the First Amendment’s  
15 protection. The First Amendment reflects a profound national commitment to the  
16 principle that debate on public issues should be uninhibited, robust, and wide-open.  
17 That is because speech concerning public affairs is more than self-expression; it is  
18 the essence of self-government. Accordingly, speech on public issues occupies the  
19 highest rung of the hierarchy of First Amendment values, and is entitled to special  
20 protection.

21 *Id.*, 562 U.S. at 451-452 (internal quotation marks and citations omitted). The Court also  
22 emphasized that

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<sup>2</sup> See also *Askins v. United States Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (“The government’s ability to regulate speech in a traditional public forum, such as a street, sidewalk, or park, is ‘sharply circumscribed.’”); *United States v. Grace*, 461 U.S. 171, 177, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) (noting that public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered to be public forums); *see also Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618, 2626, 168 L. Ed. 2d 290 (2007) (Political speech, of course, is at the core of what the First Amendment is designed to protect.).

1 Such speech cannot be restricted simply because it is upsetting or arouses contempt.  
2 If there is a bedrock principle underlying the First Amendment, it is that the  
3 government may not prohibit the expression of an idea simply because society finds  
4 the idea itself offensive or disagreeable. Indeed, the point of all speech protection  
5 . . . is to shield just those choices of content that in someone's eyes are misguided,  
6 or even hurtful.

7 *Id.*, 562 U.S. at 458 (internal quotation marks and citations omitted).

8 Nor is it of any consequence to First Amendment protection that Mr. Gibson's decision to  
9 livestream his visit to the sidewalk in front of Cider Riot met with hostility from the Antifa crowd.  
10 As the Supreme Court has emphasized, speech

11 may indeed best serve its high purpose when it induces a condition of unrest, creates  
12 dissatisfaction with conditions as they are, or even stirs people to anger. Speech is  
13 often provocative and challenging. It may strike at prejudices and preconceptions  
14 and have profound unsettling effects as it presses for acceptance of an idea.

15 *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896 (1949).

16 The District Attorney's Office may regard Mr. Gibson's attempts to induce the Antifa  
17 participants to see the evil of their ways as highly unlikely to succeed, but the conduct is protected.

18 Mr. Gibson confined himself to making true comments during his livestream, and far from  
19 authorizing, directing or ratifying any violent or tumultuous conduct, sought to limit any violence  
20 by others that he observed.

21 As the United States Court of Appeals for the Seventh Circuit explained in reviewing the  
22 convictions of the "Chicago Seven" for organizing the 1968 protests against the Vietnam War in  
23 Chicago,

24 When the group activity out of which the alleged offense develops can be described  
25 as a bifarious undertaking, involving both legal and illegal purposes and conduct,  
26 and is within the shadow of the first amendment, the factual issue as to the alleged  
27 criminal intent must be judged strictissimi juris. ***This is necessary to avoid***  
28 ***punishing one who participates in such an undertaking and is in sympathy with***  
29 ***its legitimate aims, but does not intend to accomplish them by unlawful means.***  
30 Specially meticulous inquiry into the sufficiency of proof is justified and required

1 because of the real possibility in considering group activity, characteristic of  
2 political or social movements, of an unfair imputation of the intent or acts of some  
3 participants to all others.

4 *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972) (emphasis added).

5 Without greater specificity in the charging document it is impossible to know what action  
6 Mr. Gibson is alleged to have personally committed in violation of the law as it is clear that Mr.  
7 Gibson was in a public forum engaging in protected expression at the time of the alleged offense.

#### 8 CONCLUSION

9 As the accusatory instrument charges a crime clearly implicating the First Amendment to  
10 the United States Constitution or Art. I, sec. 8, of the Oregon Constitution, greater specificity is  
11 required so that Mr. Gibson can be actually informed of what he is being accused of having done.  
12 The current charge is vague and uncertain as applied to Mr. Gibson.

13 For all the reasons stated, Mr. Gibson's demurrer should be allowed under ORS 135.630(4)  
14 & (6).

15 Respectfully submitted this Wednesday, August 28, 2019.

/s/ D. Angus Lee

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**CERTIFICATE OF SERVICE**

I, Carole A. Caldwell, hereby declare under penalty of perjury under the laws of the State of Oregon that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. I am an employee of Murphy & Buchal LLP and my business address is 3425 SE Yamhill Street, Suite 100, Portland, Oregon 97214.

On August 28, 2019, I caused the following document to be served:

JOSEPH GIBSON'S DEMURRER

in the following manner on the parties listed below:

Brad Kalbaugh	(X)	(BY FIRST CLASS US MAIL)
Multnomah County District Attorney's Office	(X)	(BY E-MAIL)
600 Multnomah County Courthouse	( )	(BY FAX)
1021 SW 4th Ave	( )	(BY HAND)
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/s/ Carole Caldwell