IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	Supreme Court No. S060858
	)	
Plaintiff-Relator,	)	Multnomah County
	)	Circuit Court No. 1110-51946
v.	)	
	)	**MANDAMUS PROCEEDING**
LAURIE ANN BENOIT,	)	
	)	
Defendant-Adverse Party.	)	

BRIEF ON THE MERITS OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF OREGON, INC.

On Appeal from a Judgment of the
Multnomah County Circuit Court
The Honorable Cheryl A. Albrecht, Judge

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The question here is whether this case is a "criminal prosecution" within the meaning of Article I, section 11, of the Oregon Constitution. If it is, the parties agree, then defendant is entitled to a jury trial. Otherwise, she is not. The decision below held that this is a criminal prosecution and that the jury trial right does apply. That result is correct and follows from *Brown v. Multnomah County Dist. Ct.*, 280 Or 95 (1977), which all parties agree sets the applicable standard. The American Civil Liberties Union of Oregon, Inc. (ACLU), urges this court to dismiss the writ of mandamus. *State v. Fuller*, 252 Or App 391 (2012).

I. ORS 161.566 and the facts of this case

In October 2011, defendant was arrested and incarcerated along with dozens of other Occupy Portland protesters. She was then charged with second-degree criminal trespass, a misdemeanor. At arraignment, the state elected to treat that charge as a violation pursuant to ORS 161.566(1). The court granted defendant's motion for trial by jury, and the state sought and obtained a writ of mandamus on that issue.

Under ORS 161.566(1), "a prosecuting attorney may elect to treat any misdemeanor as a Class A violation." The state merely needs to do so by the defendant's first appearance. *Id.* The violation is then prosecuted without a jury or appointed counsel, the standard of proof is by a preponderance of the evidence, and various other rights of criminal defendants disappear. All of

those changes save the state money. *See State v. Thomas*, 311 Or 182, 186 (1991) (recognizing that ORS 161.565, the predecessor of ORS 161.566, "was a cost-saving measure adopted to avoid the need to appoint counsel for indigent defendants"). The switch from misdemeanor to violation also benefits defendants because, unlike with misdemeanors, violation convictions cannot lead to incarceration.

But those benefits come at a cost to the defendant, who must give up significant procedural safeguards against erroneous conviction. *See State v. Harrell*, 353 Or 247, 261-62 (2013) ("As a general matter, the right to trial by jury in criminal matters is fundamental to the American system of justice."); *Miller v. Lampert*, 340 Or 1, 12 (2006) (the "right to counsel" is "a bedrock procedural element essential to fundamental fairness"); *Thomas*, 311 Or at 184 ("After a trial to the court, the trial judge, as factfinder, stated on the record that he would have found defendant not guilty had he required proof beyond a reasonable doubt but, because he used the standard of proof by a preponderance of the evidence, he found defendant guilty.").

A defendant might decide that the costs of violation treatment outweigh the benefits. This defendant so decided. But ORS 161.566 did not give her a say in the matter. The choice lies solely with the state. That is where Article I, section 11, comes in. The state has discretion in fashioning the law, but only insofar as it does not "depart[] from a constitutional standard, in this case

primarily the standards prescribed by article I, § 11." *Brown*, 280 Or at 101.

II. This case is a "criminal prosecution" under Article I, section 11.

Article I, section 11, provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed."

In *Brown*, this court considered five factors to determine whether or not a proceeding is a "criminal prosecution" under Article I, section 11. Those factors are (1) the type of offense; (2) the severity of the penalty for the offense; (3) the collateral consequences of a conviction; (4) the punitive significance associated with the offense: and (5) the applicability of pretrial practices ordinarily used in the enforcement of criminal laws. 280 Or at 102-08. "All [of those factors] are relevant, but none is conclusive." *Id.* at 102.[1]

Each of those factors supports the conclusion that this is a criminal prosecution. Below, the ACLU discusses each of the factors as defendant experienced them.

A. The pretrial practices are criminal.

1. Defendant experienced criminal pretrial practices.

In *Brown*, this court held that trial for driving under the influence of

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[1] "[T]his court's case law demonstrates that, even if an ostensibly civil proceeding can be characterized as a criminal prosecution under *Brown*, an applicable historical exception to Article I, section 11, can exempt such a proceeding from the safeguards set out in that provision." *Delgado v. Souders*, 334 Or 122, 139 (2002) (criminal contempt is such an exception). The state does not assert the existence of any such exception here.

intoxicants (DUII) was a "criminal prosecution," in part because "the Oregon Vehicle Code retains many of the pre-trial practices used in the enforcement of criminal laws." 280 Or at 108. By "practices," the court was referring not only to those parts of the process which post-date arraignment, but also to pre-arraignment events such as arrest and "the possible use of physical restraints, such as handcuffs, a search of the person, booking (including the taking of fingerprints or photographs), and detention in jail if not released by police officers, or at a later time by a magistrate" or "unless bail is made." *Id.* That process "comports with criminal rather than with civil procedure and is surely so perceived by the public." *Id.*

This factor weighs in defendant's favor, just as in *Brown*. As noted, defendant was arrested and incarcerated and charged with a misdemeanor. It was not until arraignment that the state elected to treat the misdemeanor as a violation. It may be true that, after arraignment, this case was governed by civil, not criminal, procedure. But Article I, section 11, rights attach at arrest, *see State v. Davis*, 350 Or 440, 477 (2012) (so recognizing), and the arrest and attendant events here are sufficient to put this factor on defendant's side of the scale. *See Brown*, 280 Or at 108 (focusing on pre-arraignment procedures, not post-arraignment procedures); *State v. Selness*, 334 Or 515, 537 (2002) (same); *Easton v. Hurita*, 290 Or 689, 694-98 (1981) (indicating that it would be unconstitutional to arrest and jail a person subject to bail for a traffic violation).

This court's focus on pre-arraignment procedure makes sense because criminal defendants' trial rights are mostly constitutional in origin, and criminal defendants enjoy limited rights between arraignment and trial. *See, e.g.*, *State v. West*, 250 Or App 196, 203 (2012) ("A criminal defendant's constitutional entitlement to discovery is limited * * *."). The state identifies only one post-arraignment procedural advantage for those facing violations rather than misdemeanors: failure to appear is not a crime, and a defendant cannot be arrested for it, if the defendant is charged with a mere violation. But that is cold comfort for a person who has already been arrested and suffered the emotional, social, and sometimes physical harm incident to arrest. *See Pierson v. Multnomah County*, 301 Or 48, 52 (1986) ("We realize that the trauma of an arrest and jail booking and the stigma that flows from an arrest are well known * * *.").

Notably, a person may be arrested for a misdemeanor, ORS 133.310(1)(b), and held in jail for 36 hours or more before arraignment, ORS 135.010, and for up to 180 days between arraignment and trial, ORS 136.290; ORS 136.295(4)(a). Not so with a violation. ORS 153.039(1). If the state had charged defendant with a violation from the beginning here, this factor would weigh in favor of the state.

2. Other Occupy Portland protesters also experienced criminal pretrial practices.

The disparity between arrest and incarceration for a misdemeanor, and

citation for a violation, is further clarified by the experiences of other Occupy Portland protesters. A photograph of Elizabeth Nichols receiving a blast of pepper spray in the face went viral worldwide. Nichols dropped to the ground, and police dragged her away by her hair. Lynne Terry, *A face full of pepper spray vaults Occupy Portland protester to Internet fame, albeit painfully*, Oregonian (Nov 18, 2011). Then they arrested her, placed her in zip ties in a police wagon, took her to jail, and denied her requested medical care. Tr. 29. She was charged with misdemeanors, which were then reduced to violations.

Keller Henry was another Occupy Portland protester.[2] At 6:00 a.m. on October 13, 2001, Ms. Henry was standing in the street near the curb at the intersection of Southwest Third Avenue and Main Street, surrounded by two male police officers and two protesters. She was unable to move and became concerned that she might be arrested. She began to call a friend on her mobile phone, but the officers told her they were going to arrest her. When Ms. Henry told the officers she wanted to put her phone in her pocket before she was arrested, they began pulling on her arms. Ms. Henry immediately felt a burning sensation inside her right shoulder joint and told the officers that she had a preexisting injury to that shoulder from a car accident a decade earlier. The officers made no response. Ms. Henry further asked the officers to cuff her

[2] The following facts are taken from Defendant's Motion for the Application of Constitutional Rights to Her Prosecution and Memorandum of Law in Support, filed on November 8, 2011, by Ms. Henry's counsel, Bear Wilner-Nugent.

hands in the front. The officers said "no."

The officers dragged Ms. Henry away from the protest and put her against the north wall of the Multnomah County Detention Center (MCDC) on Main Street. Without attempting to involve a female officer, the two male officers began going through Ms. Henry's pockets and frisking her. This traumatized Ms. Henry, as she suffers from post-traumatic stress disorder. A third officer then came over and told the first two officers to take Ms. Henry around the corner onto Southwest Second Avenue. Ms. Henry asked why she was being separated from the other protesters, but the officers did not answer.

The officers took Ms. Henry to a booking area downstairs in MCDC. Ms. Henry's right arm began to go numb. She asked the law enforcement officers present to recuff her in front or to insert a spacer into the flex cuffs on her wrists. Only after two and a half to three hours of detention, once Ms. Henry's hands were completely cold and numb, did the officers do this. By then she had spent an extended period of time in a painful and uncomfortable position. One officer cut a body piercing out of Ms. Henry's lip with a sharp metal tool.

After a lengthy booking process and over nine hours of detention, Ms. Henry was released at around 3:30 p.m. and cited to appear in court on misdemeanor charges of second-degree disorderly conduct and interfering with a peace officer. The prosecutor then elected to treat those misdemeanors as

violations under ORS 161.566.

Ms. Henry suffered severe anxiety and agoraphobia from these events was unable to sleep normally because of pain in her shoulder. Her right hand remained numb for weeks afterward.

The circumstances of arrest and incarceration are unique to each of the Occupy Protesters, but each person was booked and held for a period of several hours and ordered to appear at an arraignment. None of that could have happened if these protesters had been cited with violations. This factor favors defendant.

B. Criminal trespass is a criminal type of offense.

The analysis of whether an offense is of a criminal or civil type focuses on whether it was a crime at common law (or for a long time thereafter) and whether it involves a *mens rea* element or is a strict liability offense. *Brown*, 280 Or at 102. *See also In re Harris*, 334 Or 353, 360-61 (2002) (violation of lawyer disciplinary rule was not criminal type of offense because bar disciplinary proceedings exist alongside criminal prosecutions).

Defendant was charged with second-degree criminal trespass, a Class C misdemeanor, ORS 164.245(2). That crime includes a *mens rea* element. *See* ORS 164.245(1) ("A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises."); ORS 161.115(2) ("Except as provided in ORS 161.105,

if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required as is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence."). The *mens rea* element favors defendant. *See City of Portland v. Tuttle*, 295 Or 524, 530-31 (1983) (ostensible "violation" was a crime, in part because it required proof of "[t]he culpable mental state of 'knowledge'").

The crime of trespass has ancient roots. "Originally all types of trespass, including trespass to land, were punishable under the criminal law because the trespasser's conduct was regarded as a breach of the peace." *Martin v. Reynolds Metals Co.*, 221 Or 86, 99 (1959). "[T]respass was so likely in earlier times to lead to a breach of the peace that even unwitting and trivial deviations on to another person's land were reckoned unlawful." *Id.* (quoting Winfield on Torts, at 305(4th ed 1948)). A person accused of even a petty trespass had a right to counsel at common law. *See Davis*, 350 Or at 465 n10 (so noting). Even today, "trespass [is] colored by its past, and the idea that the peace of the community [is] put in danger by the trespasser's conduct" abides. *Martin*, 221 Or at 99. The name "criminal trespass" alone brands one who commits it as a criminal regardless whether it is prosecuted as a violation. Indeed, it is comical to consider the phrase "violation criminal trespass." No one who heard that phrase would think the crime had been "decriminalized."

It also is significant in this regard that ORS 161.566(1) does not

transform the proscribed conduct into violation-only conduct. The exact same conduct continues to give rise to criminal liability unless and until the prosecutor, unilaterally, elects "to treat" a particular defendant's crime as a violation. ORS 161.566(1). That is not a "fully carried out" decriminalization of "criminal trespass"; the unilateral election "did not free this offense from the punitive traits that characterize a criminal prosecution." *Brown*, 280 Or at 110.

C. The punitive significance of criminal trespass is criminal.

In analyzing the "punitive significance" factor, this court in *Brown* looked to both legislative intent and the stigma of condemnation that attends the offense. *Id.* at 105-08. As this court explained: "The stigma of that condemnation can accompany the imposition of a sanction whether it is imprisonment, a fine, or something else; and its presence in a judgment of conviction, as much as the potential sanction itself, makes the right to a jury peculiarly appropriate to a criminal prosecution." *Id.* at 106. This court held that a DUII prosecution was a criminal prosecution, in part because the legislative history indicated "a legislative desire to 'decriminalize' the procedure rather than the offense." *Id.* at 108.

1. The legislature did not intend to decriminalize "criminal trespass."

The legislative intent is the same here. The intent behind the criminal trespass statutes is to punish it. These offenses are crimes unless and until the prosecutor unilaterally elects to treat them as violations. ORS 161.566. Even if

one were to look at the legislative intent behind ORS 161.566, it is to save money by skimping on process, not to decriminalize misdemeanors generally. *See Thomas*, 311 Or at 186 (ORS 161.565 "was a cost-saving measure adopted to avoid the need to appoint counsel for indigent defendants"). ORS 161.566 is another example of "a legislative desire to 'decriminalize' the procedure rather than the offense." *Brown*, 280 Or at 108.

Judge Edmonds correctly recognized as much twenty years ago:

> [T]he legislature is free to define what is criminal and what is not. But that is not what has happened when the legislature enacted ORS 161.565(2). No conduct that was once a crime is declared to be lawful. Rather, under the statute, a criminal charge commences as a criminal proceeding with all its punitive traits intact and purportedly changes in the midst of the process. If the prosecutor elects, the prosecution ends up being classified as a non-criminal proceeding, potentially resulting in a conviction for a "violation." The change in many ways is semantical, not substantive. A defendant can be arrested, must be arraigned, and can be required to post security for future court appearances before the prosecution elects to charge him with a violation. Even after the election, the charge is still prosecuted by the state who can call agents of the government who will accuse the defendant of conduct that would otherwise be considered criminal. The defendant who desires to be vindicated must appear and defend himself in an environment identical to what would have occurred had the prosecutor not made his election. * * *
>
> The subject matter of the trial is about conduct that most citizens would consider criminal when prosecuted by the government. For instance, Patty Thomas was charged with theft. Defendant is charged with attempted assault. The public's understanding of the implication of those charges comes from the fact that theft and assault were crimes at common law. There can be no doubt that the framers of section 11 contemplated that when the state prosecuted defendants for theft and assault, those prosecutions fell within the meaning of the phrase "in all criminal prosecutions" in

> section 11. That understanding will not be altered by changing the nomenclature describing the conviction. In sum, the only material difference between this proceeding and a criminal proceeding, when their punitive traits are evaluated, is in the nature of the sanction that can be imposed if conviction results.

State v. Rode, 118 Or App 665, 672-73 (dissent), *rev dismissed*, 318 Or 338 (1993) (footnote omitted). Constitutionally, the legislature could decide that some or all forms of trespass are no longer criminal, but that is not what the legislature has done. The legislature has instead added to the roster of trespass crimes by targeting obnoxious sports fans. ORS 164.278 (criminal trespass at a sports event, enacted in 2003).

2. Criminal trespass carries a significant social stigma.

There also is a significant social stigma that accompanies a charge and conviction for criminal trespass.

> Probably the most important factor which describes the nature of the interest protected under the law of trespass is nothing more than a feeling which a possessor has with respect to land which he holds. It is a sense of ownership; a feeling that what one owns or possesses should not be interfered with, and that it is entitled to protection through law.

Martin, 221 Or at 100. When a person commits criminal trespass, they impair the property owner's "right to exclude others from entering and using her property – perhaps the most fundamental of all property interests," *W. Linn Corp. Park, L.L.C. v. City of West Linn*, 349 Or 58, 78 (2010), which themselves are "fundamental, sacred rights." *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 108 (2001).

Judge Edmonds' characterization of theft in *Rode* applies equally to criminal trespass:

> Conceivably, [defendant's] employment, her standing and reputation in the community and her record as a law abiding citizen all were jeopardized because the [criminal trespass II] charge was brought against her. If she had been convicted, the onus of that conviction would trail after her for the rest of her life whether the conviction was termed a conviction for "[criminal trespass II]," a "violation," or "[criminal trespass II]," a "misdemeanor." Every employment application, credit request, insurance form, or other ordinary life activity would be potentially impacted by what had occurred as the result of the complaint of one person in her past.

118 Or App at 671-72 (dissent).

A prosecution for criminal trespass is not a purely regulatory matter, such that the attendant stigma is outweighed by a non-punitive purpose. *Cf. Harris*, 334 Or at 363 ("We agree that disbarment carries a stigma, particularly within the legal profession, but we note that that stigma is an unavoidable consequence of the means by which this court is able to protect the public from harm and preserve the integrity of the judicial system."). Nor is the stigma a "vague public condemnation" equally associated with "indisputably civil" proceedings. *Selness*, 334 Or at 539. It is instead a profound "stigma of the individual that marks a [criminal trespass] proceeding as criminal in nature in the constitutional sense." *Id.*

Conviction is not all that matters here. Significant stigma flows from arrest alone. *See Pierson*, 301 Or at 52 ("We realize that the trauma of an arrest

and jail booking and the stigma that flows from an arrest are well known * * *."). Arrest records are available for employers, landlords, licensing agencies, and others to review. *See* ORS 181.560 (providing for release of arrest records to those who ask). When the Department of State Police releases a person's arrest record, that record includes not only the date of the arrest but also the "offense for which arrest was made," ORS 181.560(1)(b)(B), which in this case was criminal trespass.

92% of employers subject their job candidates to criminal background checks. Equal Employment Opportunity Commission, EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, at pt. III.B (April 25, 2012) ("EEOC Guidelines"), *available at* www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Landlords often do so with potential tenants. *See Landers v. Chicago Housing Auth.*, 936 NE2d 735 (Ill Ct App 2010) (landlord denied applicant housing because of his arrest record). An applicant for admission to the state bar must answer this question: "Including any matters that may have been expunged, except expunged juvenile matters, have you ever been cited, *arrested*, charged or convicted of a criminal offense?" Oregon State Bar, Application for Admission to Practice Law in the State of Oregon, p. 10 (July 2013), *available at* www.osbar.org/_docs/admissions/ExamApplication.pdf (emphasis added). If the answer is "yes," the applicant

must then identify "each citation, charge, *arrest* or conviction, whether stemming from the same facts or not." *Id.* at p. 11 (emphasis added).

One Occupy Portland protester, Cathy Alexander, saw her application for a professional license for a mental health clinic put on hold because of her arrest for criminal trespass. Tr. 13-14.

This information is sought because of the stigma of arrests, despite the rule that arrests are not proof of criminal conduct and the presumption that one is innocent until proven guilty. Recognizing this stigma, ORS 137.225(1)(b) provides for expungement of arrest records. Nonetheless, arrest records often "include inaccuracies" and "continue to be reported even if expunged or sealed." EEOC Guidelines at pt. V.B.2. That is one reason why at least 13 states prohibit employers from reviewing job applicants' arrest records. *Id.* at pt. V.B.2. Oregon is not one of those states, however. Oregon law merely provides that, when the state gives out arrest records, it must inform the arrestee that "discrimination by an employer on the basis of arrest records alone may violate federal civil rights law." ORS 181.557(1)(b)(B); ORS 181.560(1)(a)(C).

The government is not the only depository of arrest records. Numerous counties put their arrest records online, complete with mug shot and identifying information, where anyone can download them.[3] The City of Portland's

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[3] *See, e.g.*, www.e-airs.org/eAirsInternet/InmateInformationList.aspx (Lane County); www.co.marion.or.us/SO/Institutions/inmateoffender/ (Marion County); www.mcso.us/PAID (Multnomah County).

Facebook page also contains mug shots and other information about people who have been arrested. www.facebook.com/portlandpolice.[4] This, in turn, breeds websites such as www.pdxmugshots.com and www.bustedmugshots.com. A Google images search readily reveals this defendant's mug shot at www.mugshots.com/US-Counties/Oregon/Multnomah-County-OR/Laurie-Benoit.4417379.html. Beneath defendant's picture is a description of the crime she was charged with "TRESPASS II (C Misdemeanor)." Notably, the webpage also states that she was charged with interference with a peace officer and disorderly conduct.

The webpage also permits the user to click the pictures of other arrestees whose mug shots are apparently next to defendant's in the site's database; those pictures are of people who have been arrested for rape, sex abuse, assault, menacing, theft, and possession of a stolen vehicle. Some websites charge a fee to remove mug shots. HB 3467 (2013), recently passed by the House, would force those websites to do so for free if a misdemeanor was reduced to a violation. But defendant would not have to worry about any of this if she had been charged with a violation from the start. If that had occurred, she would simply have been issued a citation and could not have been arrested. ORS

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[4] The City's Facebook postings also automatically appeared on the Facebook pages of the Occupy protesters and their friends, publicly shaming them and sparking a torrent of criticism on the City's Facebook page and other social media. *See* Defendants' Memorandum of Law Regarding the Application of State v. Fuller, filed on October 5, 2012, by this defendant's trial counsel.

153.005(4); ORS 153.039(1).

For all of the foregoing reasons, the stigma associated with criminal trespass weighs in favor of the conclusion that even "violation criminal trespass" is a criminal prosecution.

D. The penalties associated with criminal trespass are criminal.

"The prescribed penalty is generally regarded as the single most important criterion, at least when it involves imprisonment." *Brown*, 280 Or at 103. Potential "'imprisonment' cannot be used as a 'punishment' for a civil offense," yet "the absence of potential imprisonment does not conclusively prove a punishment non-criminal." *Id.* "[A] large fine may be as severe, in practical terms, as a short imprisonment, and so strikingly severe as to carry the same punitive significance." *Id.* at 104. In *Brown*, the maximum fine for DUII was $1,000, and this court held that that amount, "if not in itself a criminal rather than civil penalty, must be at the margin of legislative discretion. At the least it is strong evidence of the punitive significance that the legislature meant to give this fine." *Id.* at 105.

Brown was decided in 1977. $1,000 then amounts to approximately $3,800 today.[5] There is no reason to think that amount is not still "at the margin of legislative discretion." It still amounts to about one-third of the

[5] www.bls.gov/data/inflation_calculator.htm.

annual income of a person living at the poverty line.[6] And about the same percentage of people live at or below the poverty line today as in 1977,[7] giving stability to the margin adopted in *Brown*. For 1.3 million Oregonians today, a $3,800 fine is two months' worth of wages – not discretionary income.

ORS 161.566(2) (2009) provided: "The maximum fine that a court may impose upon conviction of a violation under this section may not exceed the amount provided in ORS 161.635 for the class of misdemeanor receiving violation treatment." ORS 161.635(1)(c) sets $1,250 as the maximum fine for a Class C misdemeanor (such as the second-degree criminal trespass charge).[8]

The $1,250 fine is admittedly below the margin that this court recognized in *Brown*. Nonetheless, it represents over a month's worth of wages for a person living at the poverty line. For such a person, the fine "may be as severe, in practical terms, as a short imprisonment, and so strikingly severe as to carry the same punitive significance." *Brown*, 280 Or at 104.

The punitive significance of the fine is not only tangible, it also is part of

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[6] The poverty threshold in 1977 was $3,267 for a household of one man under age 65; that threshold is $11,945 today for a similar household. www.census.gov/hhes/www/poverty/data/threshld/index.html.

[7] In 1977, that description fit 11.6% of the population; it now fits 15% of the population. www.census.gov/hhes/www/poverty/data/historical/hstpov5.xls. Then as now, about one-third of the population earned an income twice the poverty line; for those people, the *Brown* margin would cost them one-sixth of their annual income. Approximately 3.9 million people live in Oregon. www.quickfacts.census.gov/qfd/states/41000.html.

[8] Effective March 27, 2012, the maximum fine for a Class A violation is $2,000. 2012 Or Laws, ch 82, § 2; ORS 153.018(2)(a).

the legislative scheme. ORS 161.566(2) (2009) equates the maximum fine for a violation with the maximum fine for a misdemeanor. That "express correlation" is "significant," *Fuller*, 252 Or App at 398, because it shows that, in the legislature' view, the violation is just as serious as the crime. (We are talking about the exact same conduct, after all.) This is not a case where the fine serves a regulatory purpose beyond punishment. *Cf. Selness*, 334 Or at 358-59 (forfeiture process serves "several remedial purposes" and "ensure[s] that forfeitures are not excessive in relation to those purposes"); *Harris*, 334 Or at 361-62 (costs award in bar disciplinary proceeding "is not a penalty assessed to punish the lawyer for past violations or deter future violations"; it "connotes only that a party did not prevail").

E. The collateral consequences factor favors the state.

The collateral consequences factor "refer[s] to additional burdens and losses that flow automatically from a judgment in a proceeding and that amount to 'another form of punishment.'" *Selness*, 334 Or at 535. If the burden or loss instead serves a "regulatory" purpose, then it is not criminal. *Brown*, 280 Or at 105 (license suspension regulatory, not punitive). *See also Selness*, 334 Or at 539 (same for forfeiture); *Harris*, 334 Or at 362 (same for loss of professional license).

Under ORS 153.008(2), "[c]onviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime." This

factor favors the state.

F. Analysis of the *Brown* factors

As indicated above, four of the five *Brown* factors indicate that defendant's prosecution for second-degree criminal trespass is a "criminal prosecution" within the meaning of Article I, section 11. While the fifth factor looks in the opposite direction, it does not outweigh the other factors. Accordingly, the trial court was correct to order a jury trial here.

The state argues that the absence of imprisonment as a potential punishment for a violation should create a presumption that this is no criminal prosecution. That is similar to what the state argued in *Brown*. 280 Or at 103 ("[T]he state's main argument is that the line between traffic infractions and traffic crimes can be defended by [the penalty] criterion alone."). This court rejected that argument, explaining that, while "'imprisonment' cannot be used as a 'punishment' for a civil offense," "the absence of potential imprisonment does not conclusively prove a punishment non-criminal." *Id.* *See also id.* ("The prescribed penalty is generally regarded as the single most important criterion, *at least when it involves imprisonment.*") (emphasis added). This court went on to highlight that *all* of the five criteria "are relevant, but none is conclusive on what we believe is the ultimate determination." *Id.* at 102.

This court has consistently adhered to that view in the years since. *See, e.g.*, *Pendleton v. Standerfer*, 297 Or 725, 729 (1984) (noting that, while the

federal right to counsel in misdemeanor cases "extends only to those cases in which actual imprisonment is imposed," "Article I, section 11 is not so limited" and the *Brown* factors "will determine whether the procedure is criminal"); *Selness*, 334 Or at 358-59 (engaging in *Brown* analysis where imprisonment was not a potential penalty); *Harris*, 334 Or at 361-62 (same).

III. ORS 161.566 does not eliminate the risk of government oppression.

There is a theme running through the state's brief urging the view that ORS 161.566 presents no risk of government overreach or oppression, so no conviction of a violation under that statute can offend Article I, section 11. That theme is incorrect, as this case demonstrates.

The right to jury trial enshrined in Article I, section 11, "entered the state and federal constitutions as a result of 'Abuses and Usurpations' charged against George III in the Declaration of Independence." *Brown*, 280 Or at 100 (noting abuses such as trial without jury and taking people in custody "to be tried for pretend offences"). Therefore, "the question whether the distinction between 'criminal prosecutions' and 'infractions' is itself wholly in the discretion of the legislature has notable importance." *Id.*

This case arises out of the Occupy Portland protests, in which defendant participated in order to exercise her core constitutional rights to free expression, assembly, and to petition the government for redress of grievances. *See* Or Const, Art I, § 8 (free expression); Or Const, Art I, § 26 (assembly and

petition); US Const, 1st Amend (all those rights). The Occupy movement's specific concerns relate to socioeconomic injustice in Oregon and the nation. *See, e.g.*, *Watters v. Otter*, 854 F Supp 2d 823, 826 (D Idaho 2012) (describing Occupy Boise movement).

In October 2011, Occupy Portland protesters began a continuous demonstration in Chapman and Lownsdale Squares in downtown Portland. Those squares are in the heart of the city's commercial district and are surrounded by the county and federal courthouses, county jail, and city hall. They are ideal locations to confront the government authority and class oppression that are the focus of the Occupy movement's grievances. Indeed, the location of those squares is central to the content of the message intended by the occupation.

Southwest Main Street runs between Chapman and Lownsdale Squares. Numerous Occupy protesters closed the street by physically occupying it with their bodies in order to draw attention to their political message. The protesters had a constitutionally protected right to be there. *See Galvin v. Hay*, 374 F3d 739, 752 (9th Cir 2004) ("[T]here is a strong First Amendment interest in protecting the right of citizens to gather in traditional public forum locations that are critical to the content of their message."); *id.* at 755 (protecting "the protesters' message of confronting the authority represented by the building").[9]

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[9] Pages 22 to 23 of the Motion to Dismiss of Angela Hammitt, filed on April 1,

On the morning of October 13, 2011, Portland police officers arrested eight protesters and cleared the street. "Beginning at 5:52 a.m., dozens of uniformed officers poured into the street from the Justice Center on bicycles, motorcycles and on foot. With speed and efficiency, they removed barricades and protesters' signs blocking Main Street." Noelle Crombie & Kimberly A.C. Wilson, *Portland police remove Occupy Portland protesters from downtown street*, Oregonian (Oct 13, 2011). All of the protesters were charged with misdemeanors, as Ms. Henry was. The prosecutor later elected to treat those misdemeanors as violations.

In a similar vein, Occupy Portland protesters also demonstrated in Jamison Square in the heart of the affluent Pearl District. On the morning of October 30, 2011, Portland police officers arrested 25 protesters and cleared the

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2012, by her attorney Peter Castleberry, eloquently expands on these points:

> While the subject matter encompassed by the Occupy movement is broad, the core of the symbolic message is to physically occupy a public space. The bare act of being in the park is an essential part of the expressive conduct in this case. The symbolic component of the Occupy movement – prolonged physical presence in public fora – is an expressive act of reclamation. It embodies the idea that the citizenry should lay claim to public rights, rights which in the opinion of the Occupiers have been eviscerated at the confluence of corrupt government and corporate greed. Naturally, the movement began by claiming a right to exist and demonstrate in areas that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 US 496, 515 (1939). The fact that [these squares] constitute[] a traditional public forum is central to the content of Occupiers' message.

park. Some officers were in riot gear; others were on horses. Officers used night sticks and horses to shove the protestors. *Portland police arrest 25 Occupy Portland demonstrators overnight*, Oregonian (Oct 30, 2011). All of the protesters, including defendant, were charged with misdemeanors. The prosecutor later elected to treat those misdemeanors as violations.

It bears repeating that no one can be arrested for a violation. *See* ORS 153.039(1) ("An enforcement officer may not arrest * * * a person for the commission of a violation * * *."). All a police officer can do is issue the defendant a citation. ORS 153.005(4). If the state had cited the protestors with the violations that it later decided it wanted to charge, then the state could not have cleared Main Street or Jamison Square. The state needed the criminal charges to clear those locations. But the state did not want to prosecute these cases as crimes (a costly and laborious undertaking). The state knew that, once those locations were cleared, it could "decriminalize" the charges to violations under ORS 161.566.

In short, the state used ORS 161.566 as a tool to break up constitutionally protected protests that were, among other things, challenging the state itself. The tool not only stopped the protests, it also circumvented the protestors' right to a jury trial. That is the very heart of government oppression.[10]

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[10] The ACLU is not arguing that there never would be a legitimate government interest in clearing the street and square (such as safety concerns and required maintenance of public property). But if a person protesting the

IV. The effect of ORS 161.566 must be analyzed as to each offense.

Another theme running through the state's brief urges this court to hold broadly that no misdemeanor treated as a violation under ORS 161.566 can ever be a "criminal prosecution" under Article I, section 11. That theme also is incorrect. This court has already held that ORS 161.566 is not a "decriminalization" of all misdemeanors. *See Thomas*, 311 Or at 186 n5 ("Neither did the legislature in this instance attempt permanently to 'decriminalize' all charges of theft or all misdemeanor charges.").

Legislative changes since *Thomas* have further undermined the state's theme. In *Thomas*, this court held that the statutory scheme *retained* for violations the "beyond a reasonable doubt" standard of proof. *Id.* at 185-86. Based on the retention of that criminal procedure, this court distinguished *Brown*, saying: "This is not a case where the legislature sought to 'decriminalize the procedure rather than the offense.'" *Id.* at 186 n5 (quoting *Brown*, 280 Or at 108) (some quotation marks omitted). After *Thomas*, the legislature amended the statutory scheme such that now the state bears only "the burden of proving the charged violation by a preponderance of the evidence." ORS 153.076(3). In other words, the state has "decriminalized" the procedure; *Brown* is no longer distinguishable.

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government refuses to leave when instructed, and the state arrests that person for a crime in order to remove that person, then there is a risk of government oppression if the state later strips the person of their constitutional rights by "downgrading" the crime to a violation for which no arrest is permitted.

To be sure, this court stated in *State v. Swanson*, 351 Or 286, 291-92 (2011), that "[v]iolations under our current criminal code are charges that have been 'decriminalized'" and "are not subject to the constitutional procedural protections that are required for crimes." But this court made those statements in the context of discussing a pure violation, careless driving. ORS 811.135. *Swanson*, unlike *Thomas*, did not involve misdemeanors that have been treated as violations under ORS 161.655. *Swanson*'s statements are therefore *dictum* as applied to this case. At any rate, *Swanson* cited *Brown* approvingly as a case "discussing constitutional implications of decriminalizing traffic infractions." 351 Or at 291. *Brown* set forth the test for determining "whether an ostensibly civil penalty proceeding remains a 'criminal prosecution' for constitutional purposes." 280 Or at 102.

V. *Brown* sets the applicable standard.

A. All parties agree that *Brown* sets the applicable standard.

In its petition for review, the state urged this court to reconsider and modify *Brown*. The state abandoned that position in its merits brief, however. *See* p. 12 n4 (admitting that, because this court has "analyzed Article I, section 11 according to the *Priest* framework in recent years," and *Brown* has become embedded in this court's Article I, section 12, analysis as well, "a renewed *Priest* analysis is not required in this case") (citing *Priest v. Pearce*, 314 Or 411 (1992)). The state now believes that *Brown* is consistent with the understanding

of Article I, section 11, that it favors. *Id.* at p. 12. The state merely asserts that the Court of Appeals misread *Brown*. *Id.* at p. 15.

The state's change in position is a sufficient reason for this court to dismiss the writ of mandamus. *See State v. Blok*, 352 Or 394 (2012). In *Blok*, a criminal defendant sought mandamus, arguing that the trial court could not forbid him from having contact with his father as a condition of pretrial release. *Id.* at 395. This court issued an alternative writ of mandamus to consider that argument, which the defendant subsequently briefed. *Id.* at 398-99. At oral argument, however, the defendant "essentially abandoned that position" and adopted a different one: that the trial court could impose the no-contact provision only in certain circumstances which were not present in that case. *Id.* at 399. Based on the defendant's change in position, this court dismissed the writ. *Id.* at 400. As this court explained:

> This court's exercise of its mandamus power is discretionary. We issued the alternative writ to consider the legal question that relator asserted in his petition and, later, in his brief * * *. Relator now has conceded that [issue] and has shifted his focus to [a different issue]. Because that is not the legal question that was presented in the petition or briefed in this court, we exercise our discretion to dismiss the alternative writ.

Id. (citations omitted).

Given the state's change in position in this case, this court should, as in *Blok*, dismiss the writ or, alternatively, adhere to *Brown*.

B. *Brown* is the correct standard.

Brown has become a bedrock of Oregon constitutional law. This court has cited it approvingly dozens of times and has followed its test in applying Article I, Section 11. *See, e.g., Harris*, 334 at 360-63; *State ex rel. Redden v. Discount Fabrics, Inc.*, 289 Or 375 (1980).

This court has even done so in the context of a historical analysis of Article I, section 11. *State ex rel. Juvenile Dep't v.* 317 Or 560 (1993). was a juvenile proceeding in which the court's jurisdiction was dependent on its finding that the youth had violated the law. *Id.* at 563. The youth argued that Article I, section 11, conferred a right to a jury trial as to that determination. To answer that question, this court conducted a historical analysis of Article I, section 11, asking "whether, in 1859, when the Oregon constitutional guarantee of a jury trial 'in all criminal prosecutions' was adopted, a person in the child's position would have been entitled to a jury trial." *Id.* at 566.

The answer to that question would be yes, this court explained, if the juvenile proceeding had "the characteristics of a criminal prosecution." *Id.* at 572. *Cf. Brown*, 280 Or at 98 ("[T]he right to a jury trial extends to all offenses if they have the character of criminal prosecutions."). This court discussed characteristics such as the severity of the penalty at issue; the punitive significance associated with the proceeding; and pretrial enforcement

procedures such as confinement, mug shot, and fingerprinting. 317 Or at 572-73. This court also considered the collateral consequences of the proceeding, although it did not discuss that factor. *State v. Stewart*, 321 Or 1, 10 n7 (1995) (so recognizing). The "type of offense" factor was irrelevant because a juvenile adjudication was not a conviction of an offense. 317 Or at 569 n9. Those are all of the *Brown* factors.

The fact that considered each of the *Brown* factors in its historical Article I, section 11, analysis is significant: It negates the state's argument in its petition for review here that the *Brown* analysis differs from the historical analysis.[11]

This court also has held that the *Brown* factors are applicable to other constitutional provisions under a historical analysis. *See Selness*, 334 Or at 536 (adopting *Brown* factors as relevant under Article I, section 12 (double jeopardy)); *State v. MacNab*, 334 Or 469 (2002) (applying *Brown*'s "punitive significance" factor to Article I, Section 21 (*ex post facto* clause)). *Brown* itself mentioned some of the cases the state relies on for its proffered version of historical analysis. 280 Or at 98 n2. And, while the state asserted in its petition

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[11] Interestingly, although this court considered all of the *Brown* factors in it did not mention that it was doing so. Instead, this court cited to *Brown* only to explain that "the criteria relevant to the *Brown* analysis are *offense-specific*, and do not apply to the present challenge." 317 Or at 565 n3 (emphasis added). By that, this court meant that the *Brown* analysis applies only to the review of offenses (crimes and violations). Juvenile proceedings do not provide for conviction of offenses, as noted above.

for review that the *Brown* test is too vague and subjective, that test is no more vague or subjective than other tests this court has adopted following a historical analysis. *See, e.g., State v. Wheeler*, 343 Or 652 (2007) (adopting a "shock the moral sense" standard for Article I, section 16 (disproportionate punishment)).

For all of the foregoing reasons, this court should adhere to the *Brown* test under Article I, section 11.

VI. Conclusion

Adherence to constitutional standards may provide a disincentive for reduction of charges under ORS 161.566, leading to busier dockets and a costlier criminal justice system. But those pragmatic concerns are not properly part of the analysis. "It is axiomatic that, among the various interests that the government of this state seeks to protect and promote, the interests represented by the state constitution are paramount to legislative ones. Consequently, *a state legislative interest, no matter how important, cannot trump a state constitutional command.*" *State v. Stoneman*, 323 Or 536, 539 (1996) (emphasis added). "Constitutional guarantees have more substance than that," *Brown*, 280 Or at 102, and the relevant guarantees protect defendants, not the state.

The state also posits a false dichotomy. The state has other options: it could fully decriminalize the offense of which defendant was charged by making it a pure violation. Or the state could, perhaps, return to the regime that

prevailed before 1999 (when the election went from violation to misdemeanor). The state could also reduce the potential fine. But the state cannot continue arresting people for stigmatizing misdemeanors, threatening them with substantial fines, and unilaterally slapping the label "violation" on the proceedings and pretending they are not criminal prosecutions under Article I, section 11. The ACLU urges this Court to affirm the decision below.

DATED: May 7, 2013.

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I certify that (1) the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f); (2) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (3) the word-count of this brief as described in ORAP 5.05(2)(a) is 7,766 words.

I further certify that on May 7, 2013, I filed the foregoing document with the State Court Administrator through the court's electronic filing system and that, on the same date, I served the same document on the party or parties listed below in the following manner(s):

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