IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SEAN MICHAEL MCNALLY, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court Case No. 111152528 CA A150977 SC S063644

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable Alicia A Fuchs, Judge

Opinion Filed: July 8, 2015
Author of Opinion: Armstrong, Presiding Judge
Concurring Judge(s): Nakamoto, Judge, and De Muniz, Senior Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
ANDREW D. ROBINSON #064861
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Andrew.Robinson@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870 Deputy
Solicitor General
JAMIE K. CONTRERAS #022780
Assistant Attorney-in-Charge
Criminal & Collateral Remedies
Appeals
400 Justice Building
1162 Court Street NE
Salem, OR 97301
jamie.k.contreras@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision and Statutes

Other Authorities

BRIEF ON THE MERITS OF PETITIONER ON REVIEW,

SEAN MICHAEL MCNALLY

STATEMENT OF THE CASE

The state charged defendant with interfering with a peace officer or parole and probation officer (interfering with a peace officer or IPO) for refusing to obey a police officer's order to leave a bus station. The IPO statute "does not apply in situations in which the person is engaging in * * * passive resistance." ORS 162.247(3)(b). At defendant's trial, the court refused to instruct the jury that passive resistance does not constitute interfering with a peace officer.

The jury found defendant guilty, defendant appealed, and the state conceded that the trial court's refusal to give the "passive resistance" instruction was reversible error. But the Court of Appeals declined to accept the concession. Under its caselaw, the term "passive resistance" applies only to "specific acts or techniques that are commonly associated with governmental protest or civil disobedience." *State v. Patnesky*, 265 Or App 356, 366, 335 P3d 331 (2014). Under that standard, passive resistance requires "purposeful, deliberate, planned, or coordinated action that represents something more than the mere refusal to obey a particular order during a particular police encounter." *Id.* at 362 n 3. The Court of Appeals concluded that the trial court was not required to give the instruction, because "nothing suggests that defendant was

engaging in a non-cooperative technique or act known to be used to protest government action." *State v. McNally*, 272 Or App 201, 207, 353 P3d 1255 (2015). This court allowed defendant's petition to review that decision.

Question Presented and Proposed Rule of Law

Question Presented

The crime of interfering with a peace officer does not apply to situations in which the person is engaging in passive resistance. Must passive resistance be politically motivated?

Proposed Rule of Law

No. "Passive resistance" refers to interference or disobedience that does not consist of physical action, but instead takes an inactive form, such as a failure or refusal to move one's body. It does not have to be part of a political protest.

Summary of Argument

The crime of interfering with a peace officer does not apply to situations in which the person is engaging in "passive resistance." Undoubtedly, the purpose of the "passive resistance" exception was to ensure that things like nonviolent political protest and civil disobedience would not be prosecuted. But, for reasons of practicality, "[t]he legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention." *South Beach Marina, Inc. v. Dept.*

of Rev., 301 Or 524, 531, 724 P2d 788 (1986). Here, an exception that would apply only to *bona fide* nonviolent political protest would have been difficult for the legislature to draft, and even more difficult to apply in the courtroom. Instead of asking juries to decide whether a defendant's refusal to obey an order constituted nonviolent political protest, the legislature chose a broader, but more easily-applied exception. The provision's text, context, and legislative history show that the legislature intended the "passive resistance" exception to apply to any interference or disobedience that does not consist of physical action, but instead takes an inactive form, like a failure or refusal to move one's body. The conduct does not have to be part of a political protest.

Under the ordinary meanings of "passive" and "resistance," "passive resistance" has no political element. In the IPO context, the term refers to interference or disobedience that does not resort to physical action, but instead takes an inactive form, such as a failure or refusal to move. To be sure, "passive resistance" can also be used as a compound noun, which the dictionary defines as resistance that depends mainly on techniques and acts of noncooperation, without violence or other active measures of opposition. But despite being commonly used in a political context, "passive resistance" as a compound noun is broad enough to include conduct that is not part of a political protest. Accordingly, whether the legislature used "passive" to modify "resistance," or used "passive resistance" as a compound noun, the term would

include any interference or disobedience that does not resort to physical action, but instead takes an inactive form, like a failure or refusal to move.

The provision's statutory context confirms the absence of a political requirement. When it defined the related crime of obstructing governmental administration, the legislature recognized the need to exclude conduct that would be protected by the freedoms of speech and assembly. But it did not try to draft an exception that would cover only nonviolent political protest. Instead, the legislature avoided the constitutional implications and practical difficulties of a narrow exception by defining the crime to require "intimidation, force, physical or economic interference or obstacle." Thus, for that related statute, the legislature excluded nonviolent political protest by enacting a broader limitation that is defined by physical qualities that could create a heightened risk of harm, rather than by the conduct's political status.

The legislature initially took a similar approach to the problem when it enacted the crime of resisting arrest. Rather than an express exception for "passive resistance," the legislature excluded it by defining the crime to require conduct that "creates a substantial risk of physical injury." The legislature subsequently redefined the crime to expressly exclude "passive resistance," but the legislative record shows that it was not using that term as a compound noun with a political implication. Instead, it naturally used "passive" to modify the person's "resistance" to an arrest. In the context of resisting arrest, the term's

ordinary meaning would include any resistance to an arrest that is not comprised of physical action, but instead takes an inactive form.

Like resisting arrest, interfering with a peace officer did not initially include an express exception for "passive resistance." And like that crime, even before the express exception was added, interfering with a peace officer was intended to apply only to interference or disobedience that used some physical means that could create a heightened risk of harm. The legislature's subsequent enactment of the express "passive resistance" exception was intended to clarify that limitation. Just as with resisting arrest, the exception applies to interference or disobedience that does not consist of physical action, but instead takes an inactive form, such as a failure or refusal to move one's body.

In sum, a pattern can be discerned from the legislative histories of the three related crimes of obstructing governmental administration, resisting arrest, and interfering with a peace officer. For each crime, the legislature wanted to prohibit conduct that obstructs or interferes with the work of the government and its officers. But out of concern for the freedoms of speech and assembly, the legislature did not want the crimes to apply when the obstruction or interference was caused by nonviolent political protest. It took a consistent approach to that problem. Rather than defining the crimes to exclude *only* nonviolent political protest, it defined them to exclude broader categories of conduct defined by readily-identifiable physical qualities that could create a

heightened risk of harm. The legislature took that approach because, for both practical and constitutional reasons, it would not have wanted trial courts and juries to weigh in on whether a given instance of nonviolent conduct constituted a *bona fide* political protest. Rather, as pertinent here, the legislature used "passive resistance" to refer to interference or disobedience that does not consist of physical action, but instead takes an inactive form. The evidence below supported defendant's instruction, because his disobedience did not include any physical action, but instead took the form of a refusal to move his body as directed by the police. The trial court erred by refusing to give the instruction.

Alternatively, even if "passive resistance" must be part of a political protest, the evidence supported defendant's instruction. Defendant told the jury that being ordered to leave the bus station was a "huge injustice." Viewing the evidence in his favor, a juror could have concluded that he refused to leave at least in part as a political protest against that injustice.

Argument

The state charged defendant with interfering with a peace officer for refusing to obey an officer's order to leave a bus station. ORS 162.247 defines that crime:

> "(1) A person commits the crime of interfering with a peace officer or parole and probation officer if the person, knowing that

> another person is a peace officer or a parole and probation officer as defined in ORS 181.610:
>
> "(a) Intentionally acts in a manner that prevents, or attempts to prevent, a peace officer or parole and probation officer from performing the lawful duties of the officer with regards to another person; or
>
> "(b) *Refuses to obey a lawful order by the peace officer* or parole and probation officer.
>
> "(2) Interfering with a peace officer or parole and probation officer is a Class A misdemeanor.
>
> "(3) *This section does not apply in situations in which the person is engaging in:*
>
> "(a) Activity that would constitute resisting arrest under ORS 162.315; or
>
> "(b) *Passive resistance*."

(Emphasis added).

The crime thus comes in two forms. First, under ORS 162.247(1)(a), it involves action that intentionally prevents, or attempts to prevent, an officer from performing certain duties. In other words, it involves *interference*. Second, under ORS 162.247(1)(b), the crime involves refusing to obey a lawful order. In other words, it involves *disobedience*. Defendant uses "interference" and "disobedience" as shorthand for the two alternative forms of interfering with a peace officer.

The form of interfering with a peace officer that involves disobedience is the pertinent one here. A person commits that form of the crime if, knowing that another person is a peace officer, the person refuses to obey a lawful order

by the peace officer. However, the crime does not apply "in situations in which the person is engaging in * * * passive resistance." Accordingly, a person commits the crime by refusing to obey a lawful order only if the person is not engaging in "passive resistance" by refusing the order.

Defendant asked the trial court to instruct the jury that passive resistance does not constitute interfering with a peace officer. *Defendant's Special Jury Instruction #2*, TCF; Tr 170-73. Defendant's request correctly stated the law. Accordingly, the trial court was required to give the instruction if it was supported by the evidence, considered in the light most favorable to defendant. *State v. McBride*, 287 Or 315, 319, 599 P2d 449 (1980). Whether the evidence supported the instruction depends on what constitutes "passive resistance," which is a question of statutory interpretation.

I. "Passive resistance" refers to interference or disobedience that does not consist of physical action, but instead takes an inactive form.

The goal of statutory construction is to discern and implement the intent of the legislature. ORS 174.020(1)(a); *State v. Gaines*, 346 Or 160, 165, 206 P3d 1042 (2009). When this court interprets a statutory term or provision, it first considers a statute's text and context. *Id*. at 171-72. This court may consider the legislative history of the text, but the text itself and its context are primary. *Id.* If the legislature's intent remains unclear after reviewing the text and context, the court may resort to general maxims of statutory construction.

Id. at 172. A court must not add to, or subtract from, the words that appear in the statute. ORS 174.010.

Here, the full sentence at issue is:

> "This section does not apply in situations in which the person is engaging in * * * [p]assive resistance."

ORS 162.247(3)(b).

The statute's text, context, and legislative history show that the legislature used "passive" to modify the "resistance" presented by a person's interference or disobedience. In that sense, "passive resistance" includes any interference or disobedience that that does not resort to physical action, but instead comes in an inactive form, like a failure or refusal to move. There is no requirement that the conduct be part of a political protest.

A. Text: "passive resistance" refers to interference or disobedience that is does not consist of physical action; it does not have to be part of a political protest.

In construing statutory text, this court gives words of common usage their plain, natural, and ordinary meanings. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). Unless the disputed term is a term of art, its ordinary meaning is presumed to be what is reflected in a dictionary. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006). This court ordinarily uses *Webster's Third New Int'l Dictionary* (unabridged ed 2002). *See, e.g.*, *Pacificorp Power Marketing, Inc. v. Dept. Revenue*, 340 Or 204, 215, 131 P3d 725 (2006).

Here, in addition to being two separate words, "passive" and "resistance" can be used together as the compound noun "passive resistance," which has its own special meaning. *Webster's* at 1651; *see Patnesky*, 265 Or App at 360 n 2 (explaining that "passive resistance" is a compound noun and, in particular, a permanent compound term). But because the legislature did not necessarily intend to use the term as a compound noun, it makes sense to examine the definitions of "passive" and "resistance" first.

1. Assuming that the legislature used "passive" to modify "resistance," the term refers to interference or disobedience that does not consist of physical action.

Webster's provides numerous different definitions for both "passive" and "resistance." Assuming for the moment that the legislature was *not* using "passive resistance" as a compound noun, it is not difficult to identify the sense the legislature would have intended for each word.

As for "resistance," the pertinent definition is the primary one, which defines the kind of "resistance" that one person or group offers to another, as opposed to the kind of "resistance" presented by physical forces or objects:

> "the act or an instance of resisting **:** *passive or active opposition*; *also* **:** a means or method of resisting <unfold some warlike [resistance] –Shak.>"

Webster's at 1932 (emphasis added).

Because that definition of "resistance" uses the word "resisting," it is also necessary to refer to the definition of "resist." The pertinent definition of that word is "to exert oneself to counteract or defeat **:** strive against **:** OPPOSE[.]" *Id.*[1]

Under those definitions, "resistance" can refer to an instance of opposition, and, more specifically, a means or method of opposition. In the context of interfering with a peace officer, "resistance" would therefore refer to the person's opposition to the officer either through interference, under ORS 162.247(1)(a), or through disobedience, under ORS 162.247(1)(b).

Turning to "passive," the pertinent definition of that word is "not active or operating **:** not moving **:** INERT **:** QUIESCENT[.]" *Id.* at 1651. In addition to those meanings, *Webster's* provides an especially pertinent discussion of the meaning of "passive" as a synonym of "inactive":

> "[passive] implies immobility or a lack of positive reaction when acted upon by an external force or agent, often implying a submissiveness consisting of a failure to be provoked to resistance or of a planned avoidance of any action that will give aid to the dominating force or agent[.]"

Id. at 1139.

Applying those definitions, and assuming that the legislature used "passive" to modify "resistance," rather than using "passive resistance" as a

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[1] Notably, the dictionary gives the phrase "resisting arrest" as an example of the use of "resist" in that sense. *Id.*

compound noun, "passive resistance" would refer to interference or disobedience that does not involve physical action, but instead comes in an inactive form, such as a failure or refusal to move one's body. Under that definition, "passive resistance" does not have to be part of a political protest.

2. Even if the legislature used "passive resistance" as a compound noun, it does not have to be part of a political protest.

As noted, in addition to being two separate words, "passive resistance" is also a compound noun. The Court of Appeals' interpretation in *Patnesky* depended on its assumption that the legislature used "passive resistance" as a compound noun, rather than meaning "resistance" that is "passive." That is an unlikely assumption, for reasons discussed below in connection with the term's statutory context. But even assuming that the legislature used "passive resistance" as a compound noun, the dictionary definition relied on by the Court of Appeals does not include a political requirement. The definition gives nonviolent political protest as an example of "passive resistance," and includes passive resistance that takes the form of civil disobedience, but the definition is general enough to include any nonviolent interference or disobedience in the form of a failure or refusal to cooperate.

Webster's defines "passive resistance" as follows:

> "resistance (as to a government or an occupying power) that does not resort to violence or active measures of opposition but depends mainly on techniques and acts of noncooperation."

Webster's at 1651.

The definition establishes two requirements. First, "passive resistance" is resistance that does not use violence or other active measures of opposition. And second, "passive resistance" is resistance that depends mainly on noncooperation. That is all the definition requires. Though often present, a political element is unnecessary.

Several features of the definition merit this court's close attention. First and foremost, it establishes one uncontroversial requirement: "passive resistance" is resistance that "does not resort to violence or active measures of opposition." *Id.* The term refers only to conduct that takes an inactive form and, in particular, is nonviolent.

Second, the definition uses the parenthetical phrase, "(as to a government or an occupying power)[.]" *Id.* Although at first glance that phrase might appear to suggest that "passive resistance" has a political element, a closer look shows otherwise. The function of the parenthetical phrase within the definition is to resolve an ambiguity in the definition's use of the word "resistance." *See Webster's* at 1932 (giving diverse definitions of "resistance" and "resist"). In particular, the parenthetical phrase gives resistance "to a government or occupying force" as an example in order to illustrate that "passive resistance" refers to resistance in its social sense, *i.e.*, "resistance" offered by one person or

group to the power of another, rather than the kind of "resistance" that is presented by physical objects, physical forces, and the like. *See Id.*

But the example is not a criterion. By giving resistance to a government or occupying power as an example, the parenthetical phrase does *not* imply that "passive resistance" can refer *only* to politically motivated resistance. If the dictionary meant for the phrase to establish a criterion, it would not have needed to use the parentheses and the word "as." The fact that the dictionary mentions resistance to a government or occupying power as an example, rather than as a requirement, means that "passive resistance" can also refer to resistance that is *not* directed against a government or occupying power. That, in turn, suggests that it can refer to resistance that is not political at all.

The third feature of the definition that requires close scrutiny is its use of the word "noncooperation." The Court of Appeals reached its erroneous interpretation in *Patnesky* largely by assuming that "noncooperation" introduced a political requirement into the definition of "passive resistance." But a close examination does not bear out that assumption.

> "Noncooperation" has two meanings:
>
> "failure or refusal to cooperate; *specif* **:** refusal through civil disobedience of a people to cooperate with the government of a country."

Webster's at 1536.

Thus, the entry for "noncooperation" first gives a more general meaning, under which "noncooperation" simply means "failure or refusal to cooperate." Next, the definition gives a more specific, highly restricted meaning, under which "noncooperation" means "refusal through civil disobedience of a people to cooperate with the government of a country." *See Merriam Webster's Collegiate Dictionary* (tenth ed 1994), 19a (explaining that the sense divider "*specif*" "is used to introduce a common but highly restricted meaning subsumed in the more general preceding definition").[2]

Webster's' definition of "passive resistance" does not signal that it refers to "noncooperation" in its highly restricted sense. In that sense, "noncooperation" can refer *only* to the refusal to cooperate through civil disobedience, and *only* to the refusal "of a people" to cooperate. It cannot apply to the conduct of an individual who is not contributing to a collective effort, and it cannot apply to resistance that does not take the form of civil disobedience. Using the highly restricted sense of "noncooperation" to import a political requirement into "passive resistance" ignores its more general sense – "failure or refusal to cooperate."

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[2] Oddly, *Webster's Third New Int'l Dictionary* does not appear to include an explanation of the sense divider "*specif.*" Defendant assumes that *Webster's Third* uses "*specif*" in the same way as the *Collegiate Dictionary*.

By incorporating "noncooperation" into its definition of "passive resistance," *Webster's* defines the latter term to include *both* any general failure or refusal to cooperate *and* the specific refusal "of a people through civil disobedience to cooperate with the government of a country." Although "passive resistance" is commonly used to refer to resistance that has a political element, that is not essential. Even assuming the legislature used "passive resistance" as a compound noun in ORS 162.247(3)(b), a person's interference or disobedience does not have to be part of a political protest to qualify for the exception.

3. This court has already described "passive resistance" as meaning "passive or otherwise nonphysical resistance or disobedience."

This court's interpretation of a statute is informed by its own prior constructions of the statute. *State v. Cloutier*, 351 Or 68, 100, 261 P3d 1234 (2011). In that regard, this court discussed "passive resistance" in *Gaines*, 346 Or 160. There, the defendant was convicted of obstructing governmental or judicial administration (obstructing governmental administration) based on her oral refusal to cooperate in being photographed after she was arrested and lodged in a county jail. *See* ORS 162.235 (defining the crime). The issue presented was whether her refusal to cooperate was a "means of * * * physical * * * interference or obstacle" within the meaning of ORS 162.235(1). *Id.* at 162. The court's initial examination of the statute's text concluded that it did

not support the state's claim that mere inaction and lack of cooperation were within the statute's scope. *Id.* at 176. But the state argued that the legislature's inclusion of express "passive resistance" exceptions for interfering with a peace officer and resisting arrest showed that it intended no similar exception to apply to obstructing governmental administration. *Id.* If it had, the state argued, it would have made the exception explicit, as it did for resisting arrest and interfering with a peace officer.

This court rejected that argument. It explained that, because interfering with a peace officer and resisting arrest are broad enough that they naturally might be understood to prohibit "passive or otherwise nonphysical resistance or disobedience," it made sense for the legislature to enact express "passive resistance" exceptions to exclude such conduct. *Id.* at 177. The court thus understood the text at issue here as excluding what it described as "passive or otherwise nonphysical resistance or disobedience" from the scope of interfering with a peace officer. *Id.* In other words, the court assumed that the legislature used "passive" to modify "resistance," rather than using the term as a compound noun with a political implication. And as previously explained, in that sense, "passive resistance" refers to interference or disobedience that does not employ physical action, but instead takes an inactive form, such as a failure or refusal to move. It does not have to be part of a political protest.

B. Context: the legislature's use of physical limitations to exclude nonviolent political protest from other, related crimes is strong evidence that it meant to enact a physical limitation in the IPO statute.

A statute's context includes other statutes on the same general subject, *State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012), and the legislative history of those statutes. *State v. Ofodrinwa*, 353 Or 507, 517, 300 P3d 154 (2013).

Here, the pertinent statutory context includes the related crimes of obstructing governmental administration and resisting arrest.

1. The legislature used a physical limitation to exclude nonviolent political protest from obstructing governmental administration.

ORS 162.235 provides that obstructing governmental administration applies only to conduct manifested by threats, violence or physical interference. The commentary to the Proposed Oregon Criminal Code of 1971 explains that that limitation

> "recognizes certain constitutional safeguards, *e.g.*, freedom of speech and assembly.
>
> " * * * * *
>
> "It would be inconsistent to prohibit in this section all activities intended to obstruct governmental administration, since broadly generalized prohibitory language might be construed as a restriction upon the lawful exercise of political agitation in opposition to governmental policy."

Commentary to Proposed Oregon Criminal Code § 199 (1970).

That comment shows that in enacting ORS 162.235, the legislature recognized that a broad prohibition would prohibit activities that might be constitutionally protected. Its approach to that problem was to provide an express limitation on the provision's scope: it would apply only to "threats, violence or physical interference." Notably, the legislature did *not* approach the problem by attempting to draft text that would exclude only constitutionally protected activity, or only nonviolent political protest. Instead, it relieved trial courts and juries of the task of determining what conduct might be constitutionally protected in a given case by enacting a broader exclusion that would be much easier to apply. The statute's limitation to conduct that was threatening, violent, or physical would exclude activities that might be constitutionally protected, while still addressing the most culpable conduct, without requiring the jury to evaluate on a case-by-case basis whether the conduct was *bona fide* "political agitation in opposition to governmental policy." *Id.*

As discussed below, the legislature's purpose in enacting the "passive resistance" exception from interfering with a peace officer was to address the same constitutional concerns mentioned by the commentary regarding obstructing governmental administration. Having found a broad limitation effective for obstructing governmental administration, the legislature is unlikely to have chosen a narrowly-tailored limitation to address the same concerns here.

That supports defendant's interpretation, on which "passive resistance" applies to conduct that does not consist of physical action, but instead takes an inactive form.

2. The legislative history of resisting arrest shows that the legislature used "passive" to modify "resistance" in that context, rather than using "passive resistance" as a compound noun with a political implication.

This court ordinarily assumes that the legislature uses terms in related statutes consistently. *Cloutier*, 351 Or at 99. Here, the legislative history shows that when the legislature enacted the "passive existence" exception that applies to resisting arrest, it used "passive" to modify "resistance," rather than using "passive resistance" as a compound noun with a political implication.

When the legislature codified the crime of resisting arrest in 1971, it defined "resists," for purposes of resisting arrest, to require "the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury[.]" ORS 162.315(2) (defining "resists"). The legislature limited resisting arrest in that way because "[n]either flight from arrest nor *passive resistance* should be made crimes in themselves." Commentary to Proposed Oregon Criminal Code § 206 (1970) (emphasis added) (internal quotation omitted).

Two things are notable about the commentary's explanation regarding flight from arrest and "passive resistance." First, the explanation shows that, as

with obstructing governmental administration, the legislature gave effect to its intent to exclude certain conduct from resisting arrest by excluding a broader category of conduct defined by its physical attributes as opposed to its political status, *viz.*, "the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury." As just discussed, it is reasonable to assume that the legislature continued to rely on that technique when, to address similar concerns, it enacted the "passive resistance" exception that applies to interfering with a peace officer.

Second, because the subject of the commentary was the definition of "resists" for purposes of resisting arrest, the commentary would naturally have used "passive" to modify the person's "resistance" to the arrest, rather than using "passive resistance" as a compound noun with a political implication. After all, the commentary's point was that resisting arrest should exclude flight from arrest and "passive resistance" not only because those things might be constitutionally privileged, but because they present a lesser risk of harm than "the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury[.]" ORS 162.315(2). For that reason, it was the actual passivity of the resistance that mattered to the commentators, as much as the possibility that "passive resistance" would be protected by the freedoms of speech and expression. For those reasons, the most reasonable understanding of the commentary's use of "passive resistance"

is that it used "passive" to modify the person's "resistance" to the arrest, rather than using the term as a compound noun with a political implication.

The commentary's use of "passive" to modify the person's "resistance" to arrest is especially significant, because it represents the term's first appearance in the legislative record in this context. All things being equal, it would be natural for the legislature to continue to use "passive resistance" as it was first used in this context, rather than as a compound noun with a political implication, even when its concern clearly *was* to exclude nonviolent political protest.

As it happens, the legislative history confirms that legislature continued to use the term in that way when it added the express "passive resistance" exception that applies to resisting arrest. In 1989, an amendment to ORS 162.315(2) was proposed that would, among other things, expressly include conduct intended to effect an escape within the definition of "resists." 1989 Or Laws ch 877 §1 (House Bill 2654). Representative Bauman expressed concern that the amendment might make nonviolent political demonstrators liable for resisting arrest. Work Session, House Judiciary Committee, April 28, 1989 (Tapes 32A and 33B). Consistently with the commentary discussed above, Representative Mannix responded to that concern by explaining that the amendments would not make nonviolent political demonstrators liable, because that conduct does not create the risk of injury required by the definition of

"resists." *Id.* Mannix assured Bauman that people who want to "lie there and be taken away" would not be liable. *Id.*

Nevertheless, at Mannix's suggestion, the amendment was redrafted to address the concern about political demonstrators by making it explicit that "[p]assive resistance does not constitute behavior intended to prevent being taken into custody" for purposes of the statute's definition of "resists." In explaining that change, Representative Minnis stated that the "passive resistance" language was added to the bill to ensure that people who are "passively resisting" would not be liable. Work Session, House Judiciary Committee, June 9, 1989 (Tape 48A). Consistently with that understanding, the staff measure summaries of both the House and Senate Judiciary Committees described the measure as providing that a person who is "passively resisting arrest" is not considered to be "resisting arrest." Staff Measure Summary, House Judiciary Committee, HB 2654, June 9, 1989; Staff Measure Summary, Senate Judiciary Committee, HB 2654, July 1, 1989.

The legislative history of the "passive resistance" exception from resisting arrest is informative, because it provides concrete examples of legislators and legislative staff using "passive" or "passively" to modify the person's "resistance" to arrest, rather than using "passive resistance" as a compound noun with a political implication. In particular, Representative Mannix referred to people who just "lie there" at the June 8 hearing, and

Representative Minnis referred to "people who are passively resisting" at the June 9 hearing. And the staff measure summaries each describe the bill as providing that the crime does not apply to people who are "passively resisting arrest." Those examples show that, even though the legislature's intent in using the term was to exclude nonviolent political protest from the scope of the crime, it accomplished that by using "passive" in its physical sense to modify the person's resistance to arrest, rather than by using "passive resistance" as a compound noun with a political implication. In that sense, the term would include any resistance to arrest that does not resort to physical action, but instead takes an inactive form, such as a failure or refusal to move one's body.

In the absence of a reason to do otherwise, this court should assume that the legislature used the term consistently when it enacted the "passive resistance" exception that applies to interfering with a peace officer. In particular, it used "passively" to modify "resistance," rather than using the term as a compound noun with a political implication. In that sense, the term refers to interference or disobedience that does not consist of physical action, but instead comes in an inactive form, such as a failure or refusal to move. There is no political requirement.

C. The legislative history of interfering with a peace officer shows that the legislature continued to use "passive resistance" to refer to conduct that that does not consist of physical action, but instead takes an inactive form.

1. Even before the enactment of the "passive resistance" exception, the IPO statute did not apply to inactive interference or disobedience.

The legislature created the crime of interfering with a peace officer in 1997. 1997 Or Laws ch 719 §1 (SB 423). Representative Prozanski drafted the text that would eventually be enacted. That text did not include an express "passive resistance" exception. Even so, it *was* intended to exclude "passive resistance" from liability for the new crime.

When the proposal encountered concern that it could prohibit nonviolent political protest, Prozanski responded by mentioning that resisting arrest does not apply to people who are "passively resisting arrest." In particular, he stated that "so long as that resistance is passive, it's permissible." Prozanski argued that interfering with a peace officer would include the same limitation, because of the "voluntary act or omission" required for criminal liability under ORS 161.095.[3] He apparently understood that requirement as precluding criminal liability for conduct that does not involve physical action, and assumed that

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[3] ORS 161.095 provides, in part:

> "(1) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing."

nonviolent political protest would be exempt for that reason. Public Hearing, Senate Crime and Corrections Committee, February 19, 1997 (Tapes 13A, 14A, and 13B).

Prozanski's comments are significant to this case for two reasons. First, they provide yet another example of a legislator using "passive" or "passively" to modify "resistance," rather than using the term as a compound noun with a political implication. Second, they show that Prozanski, at least, saw the problem of excluding nonviolent political protest from resisting arrest and interfering with a peace officer as being resolved by each statute's limitation to physical conduct, rather than by imposing a narrower limitation that would depend on the conduct's political status.

There is one additional aspect of the original enactment of interfering with a peace officer that bears mentioning. Prozanski explained that the text of his measure originated with a Eugene ordinance that was drafted in response to the Court of Appeals' decision in *City of Eugene v. Kruk*, 128 Or App 415, 875 P2d 1190 (1994). In that case, the court had struck down the ordinance's predecessor, because it prohibited "a refusal to leave a particular area in response to a lawful order from a police officer[.]" *Id.* at 418. Because the ordinance's "refusal to leave" provision would prohibit conduct that was permitted by the "passive resistance" exception to resisting arrest, the court

concluded that the ordinance was displaced under Article XI, section 2, of the Oregon Constitution, and struck it down. *Id.*

The IPO statute's connection to *Kruk* is significant, because it shows that even before the express "passive resistance" exception was enacted, interfering with a peace officer was not intended to prohibit conduct that would be permitted by the "passive resistance" exception to resisting arrest. And because, as previously explained, the legislature likely used "passive" to modify the person's "resistance" to arrest in that context, rather than using the term as a compound noun, the "passive resistance" exception to resisting arrest applies to any resistance that does not consist of physical action, such as a failure or refusal to move one's body. It does not include a political requirement. If, as Prozanski's comments seem to show, the IPO statute was intended to exclude the same conduct as the "passive resistance" exception to resisting statute, it also was intended to exclude conduct that does not consist of physical action, even before the enactment of the express "passive resistance" exception at issue here.

2. The text at issue here was intended to clarify that the IPO statute applies only to interference or disobedience in the form of physical action.

Prozanski's intent in that regard was far from apparent from the original measure's text, so it is not surprising that the legislature returned to the issue two years later. In 1999, the House Judiciary Committee's Criminal Law

Subcommittee was considering a HB 3374, which, among other things, would adjust the wording of the IPO statute's exception for conduct that constitutes resisting arrest. Work Session, House Judiciary Committee – Criminal Law Subcommittee, May 4, 1999 (Tape 178B). Representative Bowman asked for clarification regarding the lawfulness of passive resistance and civil disobedience under interfering with a peace officer. Representative Mannix explained that to be liable for interfering with a peace officer, a person would have to be "doing something physically" and that "just being passive" would not violate the statute. *Id.*

Nevertheless, in response to Bowman's concern, Representative Prozanski proposed the language that would become the text at issue here. At the subcommittee's hearing two days later, Prozanski explained that it had always been intended that someone who is "passively resisting" would not be liable for either resisting arrest or interfering with a peace officer. Prozanski stated that the proposal to make the exception explicit "clarifies that if someone is passively resisting *such as* a protest situation," the person would not be liable for interfering with a peace officer. Work Session, House Judiciary Committee – Criminal Law Subcommittee, May 6, 1999 (Tape 185B) (emphasis added).

Prozanski's comments on the text at issue confirm that while its purpose was to clarify the exclusion of nonviolent political protest from the definition of interfering with a peace officer, its intended scope was not so narrow. First, he

again used "passively" to modify "resistance," instead of using the term as a compound noun with a political implication. And second, he used "a protest situation" as an *example* of "passively resisting," rather than saying that a protest situation is essential to the exception. *Id.* His use of a political protest as an example implies that he did not intend it as a requirement.

Consistently with that apparent intent, the committee's staff described the measure as "clarif[ying] that that the crime of Interfering with a Peace Officer does not apply if a person is engaging in activity that would constitute the crime of Resisting Arrest, or is *passively resisting.*" Staff Measure Summary, House Judiciary Committee – Criminal Law Subcommittee, HB 3374A, May 11, 1999 (emphasis added). The staff measure summary thus described what the committee meant by "passive resistance" by using "passively" to modify "resisting," rather than using "passive resistance" as a compound noun with a political implication. At least until the measure reached the Senate, the exception's legislative history reflected the legislature's intent to exclude nonviolent political protest by enacting an exception that would apply to a category of conduct defined by the absence of physical action, rather than its political status.

3. The Senate Judiciary Committee's staff measure summary is not conclusive.

The legislative record does contain one piece of evidence that is directly contrary to defendant's interpretation. When HB 3374 was passed out of the Senate Judiciary Committee, that committee's staff prepared a measure summary stating that the committee had discussed its intent that "the 'passive resistance' exemption to the Interfering with a Peace Officer statute * * * be narrowly construed as referring to situations where there is organized civil disobedience or civil protest, and/or passive resistance to an arrest[.]" Staff Measure Summary, Senate Judiciary Committee, HB 3374C, July 6, 1999.

That comment is not conclusive. At most, it expresses only the Senate Judiciary Committee's intent. It does not express the legislature's intent as a whole. And it is only one comment in the midst of a much larger historical context. As such, it is substantially outweighed by the legislative history discussed above, in which legislators discussing both this statute and resisting arrest consistently used "passive" or "passively" to modify "resistance," and described the operation of the exception in physical terms, rather than political ones. Although the Senate Judiciary Committee may have intended to enact a narrow exception applicable only to "organized" political protest, the statute's text, context, and the remainder of its legislative history show that the

legislature as a whole had the actual physical passivity of the person's conduct in mind, and did not intend to impose a political requirement.

D. An interpretation in which "passive resistance" applies only to "organized" political protest would be constitutionally infirm.

It is worth remembering that there is no dispute about the legislature's purpose in enacting the "passive resistance" exception: the point of the exception is to exclude nonviolent political protest from liability for interfering with a peace officer, out of respect for the freedoms of speech and assembly.

Because the legislature's specific purpose in enacting the text at issue was to avoid constitutional difficulties, the canon of statutory interpretation under which this court interprets statutes to avoid constitutional invalidity is especially pertinent. *See, e.g.*, *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). Here, the interpretation urged by the Senate Judiciary Committee's staff measure summary would require not only a *bona fide* political protest, but a protest that is "organized." *Id.* In addition to being outweighed by the contrary textual, contextual, and historical evidence, this court should reject that interpretation, because it would subject a broad subset of nonviolent political protest to criminal liability, which is precisely what the legislature was seeking to avoid.

As far as the historical evidence shows, the legislature was concerned about nonviolent political protest *in general*. It had no special concern for

"organized" protest. While nonviolent political protest might ordinarily be conducted in an "organized" way by an "organized" group, the freedoms of speech and assembly protect other kinds of protest, as well. Obviously, a person can make a political protest as an individual, rather than as part of an "organized" group. And a group of people might make a political protest that is spontaneous and unplanned, rather than being "organized." The legislature would have been equally concerned about the rights of those kinds of protesters. Indeed, in addition to courting constitutional difficulty by subjecting protected conduct to liability, an exception only for "organized" protest would present a second kind of constitutional difficulty, by unreasonably preferring one form of political protest over another. This court should reject an interpretation requiring "organized" protest, because the legislature would not have intended to create those constitutional difficulties.

Aside from its misreading of the definition of "passive resistance" in *Webster's*, the Court of Appeals' primary argument for its interpretation of "passive resistance" is based on the exception's legislative history. *Patnesky*, 265 Or App at 365. Undoubtedly, that history shows that the legislature's purpose in enacting the text at issue here was to ensure that a person would not be prosecuted for nonviolent political protest. As the court noted, "what they had in mind to protect are refusals to move or to stand when an individual is engaging in governmental protest or civil disobedience." *Id.* But the fact that a

legislative enactment was intended to address a specific concern does not imply that the legislature intended the enactment to apply only to the extent necessary to address that concern. For practical reasons, the legislature often approaches a narrow problem by enacting a broad solution. *See, e.g.*, *Hamilton v. Paynter*, 342 Or 48, 55, 149 P3d 131 (2006) ("[T]he statutory text shows that, even if the legislature had a particular problem in mind, it chose to use a broader solution.") *South Beach Marina*, 301 Or at 531 ("Statutes ordinarily are drafted in order to address some known or identifiable problem, but the chosen solution may not always be narrowly confined to the precise problem. The legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention."); *Doe v. Medford School Dist. 549C*, 232 Or App 38, 59, 221 P3d 787 (2009) ("The fact that a particular problem precipitated a bill does not necessarily mean that the legislature intended the enactment to be given only such meaning as will address that particular problem; often, legislatures respond to particular issues by enacting very broadly worded statutes.").

This case presents a good example of that principle. In enacting the crimes of obstructing governmental administration, resisting arrest, and interfering with a peace officer, the legislature wanted to avoid prohibiting certain kinds of conduct, out of respect for the freedoms of speech and assembly. But narrowly-tailored exceptions applicable *only* to the privileged

conduct would be impractical. First, such narrow exceptions would require the legislature to find statutory text precise enough to mirror the protected conduct – a daunting task, given the difficulty appellate courts have always experienced in interpreting the constitutional protections involved. And still more troublingly, narrow exceptions would require trial courts and juries to determine whether particular instances of conduct were legitimate cases of political protest in order to adjudicate otherwise-routine cases. In effect, narrow exceptions would turn a routine misdemeanor into a constitutional case.

Understandably, then, the legislature chose a different solution. For each crime, it excluded a broader category of conduct, defined by the heightened risk of harm presented by the conduct's physical characteristics, rather than by its political status. That approach allows trial court and juries to decide questions of physical fact, instead of having to decide what constitutes a *bona fide* political protest. And it ameliorates that difficulty without sacrificing the crimes' application to the more serious, culpable instances of the crimes at issue, *i.e.,* instances whose physical characteristics present a heightened risk of harm.

In sum, the text, context, and legislative history of the "passive resistance" exception to interfering with a peace officer show that the legislature used "passive" to modify the "resistance" presented by the person's interference or disobedience. In that sense, "passive resistance" refers to

interference or disobedience that does not consist of physical action, but instead takes an inactive form, such as a failure or refusal to move one's body. There is no requirement that the conduct be part of a political protest, organized or otherwise.

II. The trial court was required to give the instruction, because the evidence would have allowed a juror to conclude that defendant's disobedience did not involve any physical action, but instead took an inactive form: the refusal to move his body as directed by the police.

As noted, a party is entitled to have the jury instructed on the law supporting the party's theory of the case where there is evidence to support that theory and the party submits an instruction that correctly states the law. *McBride*, 287 Or at 319. In determining whether the evidence supports an instruction, a court assesses the evidence in the light most favorable to the party requesting it. *State v. Branch*, 208 Or App 286, 288, 144 P3d 1010 (2006); *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 101 n 1, 957 P2d 147 (1998).

Here, defendant refused to obey a police officer's order to leave a bus station. There was nothing violent or otherwise active about defendant's

disobedience.[4] Instead, he simply refused to move his body according to the officer's order. Accordingly, viewed in the light most favorable to defendant, the evidence would have allowed a juror to conclude that by disobeying the officer's order to leave, defendant was engaging in disobedience that was not comprised of any physical action, but instead took an inactive form: the refusal to move his body as directed. Because the evidence supported the instruction, the trial court was required to give it and erred by refusing to do so.

III. The evidence supported the instruction, even if "passive resistance" must be part of a political protest.

Even if the legislature intended the "passive resistance" exception to apply only to a *bona fide* political protest, the evidence here supported defendant's instruction. When the officer ordered him to leave the premises, defendant told the officer that he "couldn't make him leave." Tr 64. In addition, defendant described being ordered to leave the bus station as a "huge injustice." Tr 143. Viewing that evidence in the light most favorable to

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[4] After he refused to leave, the police tried to arrest defendant, and there was a scuffle. The state's theory of the interfering charge was that the crime was complete when defendant refused to leave, before the scuffle started. The state chose that theory because it had charged defendant with resisting arrest for his conduct in the scuffle, and interfering with a peace officer does not apply to conduct that would constitute resisting arrest. ORS 162.247(3)(a). Accordingly, even if defendant engaged in interference or disobedience that was not limited to a failure or refusal to move *after* he refused to leave, that conduct was not the subject of the interfering charge, and did not prevent the conduct that *was* the subject of the interfering charge from being "passive resistance."

defendant, a juror could have concluded that defendant objected to the officer's order because it was unlawful and unjust, and that he refused to leave at least in part as a political protest against that injustice. Accordingly, even if "passive resistance" must be part of a political protest, the evidence supported the instruction. The trial court was required to give it and erred by refusing to do so.

CONCLUSION

This court should reverse the decision of the Court of Appeals as to the charge of interfering with a peace officer, reverse the conviction for that crime, and remand the case to the trial court for a new trial.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Sean Michael McNally

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,395 words.

Type size

I certify that 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 24, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits, will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, and Gregory A. Rios #064830, Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Petitioner on Review
Sean Michael McNally