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

ANDREW GREEN; and SAMIRA GREEN, Plaintiffs, vs. CITY OF PORTLAND, Defendant	Case No. **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE**

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STRIKE

COMES NOW, Plaintiffs' reply to Defendant's response in opposition to striking its affirmative defense. Plaintiffs supported their Motion to Strike with legislative records that indicate support for its position. Defendant provides the same legislative records but comes to an opposite conclusion despite evidence to the contrary. The plain meaning of ORS 30.265(6)(e) is clear: the City cannot be held liable for the criminal acts of rioters or the City's inability to stop a riot. Even if the words are ambiguous, the legislative record supports Plaintiffs' reading, as was briefed in Plaintiffs' Motion.

Plaintiffs will make three points in the Reply:

1) The legislative record supports our interpretation of "Riot Immunity" clause

2) The changes made by the legislature from introduction to adoption are consistent with the intent of the statute as announced in the previous hearings

3) The overall text and context of the bill's introduction supports Plaintiffs' reading of the immunity clause.

Plaintiffs humbly requests that this Court **GRANT** their Motion to Strike the City's Affirmative Defense.

ANALYSIS

A. An Absence of Evidence is Evidence of Absence

Defendant has not shown that the text of the statute is so clear that it means what Defendant contends it does, nor that the legislative history of ORS 30.265(6)(e) supports their reading of the statute. To the contrary, the strongest evidence that does exist to describe what the words mean comes from the legislative drafter, Joseph Henke. In his testimony, he explained that the intent of this legislation was not to immunize from liability the conduct of the *state* employees but the conduct of criminal actors whom, under some tort theory, could make the state liable. Exhibit 1, p. 11.

The City does not dispute this legislative history. Instead, the City insists that the amended language following the draft document's introduction and initial hearings changes the meaning and intention from the initial draft language. But no evidence of this changed intention exists. A court may consult the legislative history proffered by a party after examining the text and context of a statute. *State v. Gaines*, 346 Or 160, 172 (Or 2009). Without evidence of a changed intention, the "context" of the bill should remain the same as before.

B. "There's A Riot Goin' On"

Even so, the changes made to ORS 30.265(6)(e) prior to passage do not demonstrate that they were intended to change the purpose and scope of the immunity from that put forth in the original draft and drafter's statement of purpose. Consistent with Mr. Henke's explanation that

the proposed bill would not limit suits against tortious police actions at protests or so-called "riots," the legislature further explained itself with its amendment.

The drafted language read as follows: "Section 8. Neither a public body nor its officers, employes and agents acting within the scope of their employment or duties are liable for injury or damage because of…

> (6) The ***occurrence*** or failure to prevent riot, unlawful assembly, public demonstration, mob violence, or other civil disturbance."

Ex. 2, p. 10. (Emphasis added.)

And the adopted language read as follows, "Neither a public body nor its officers, employes and agents acting within the scope of their employment or duties are liable for injury or damage:

> (a) ***Arising out of riot, civil commotion or mob action*** or out of any act or omission in connection with the prevention of any of the foregoing."

Former ORS 30.265(3)(a) (1969), renumbered as ORS 30.265(6)(e) (2011) (emphasis added).

The enacted version clarifies the intended scope of the immunized conduct. By adding the "Arising out of riot…" clause, it makes explicit that the statute immunizes municipalities from suits brought due to the actions of non-state actors. Both versions of this provision appear to bifurcate the intended scope of the immunized conduct into (a) actions of non-state actors—the "occurrence" and "[a]rising out of riot" clauses, and (b) the failure to act of the state actors—the "failure to prevent" and "prevention of any of the foregoing" clauses. However, the shift from "occurrence" to "[a]rising out of" serves to further explicate what is intended by "occurrence," a meaning that harmonizes with Henke's initial explanation of the bill's intentions.

Failing to explain what "occurrence" meant would have left ambiguous the scope of immunity intended by the legislature, which was originally created to fend off likely suits from property owners who suffered damages from rioters. The text was not changed in a way that shows an intention to provide immunity for police officers who cause injuries to people while taking police action during a riot. Rather, the statute was created to avoid litigating the question of whether the municipality's actions or omissions caused or failed to prevent a riot and the resulting damages from the riot.

Plaintiffs would be remiss to not confirm that the 1977 and 2011 amendments referenced in Defendant's response make no substantial changes to the text or context of the immunity clause at issue here. Indeed, as the legislative record and Defendant acknowledge, the changes made do not shift the meaning of the statute. In 1977 the legislature moved the provision in question to subsection (3)(e) and reworded the introductory clause referring to who is provided immunity for the listed acts, so that the relevant provision read: "(3) Every public body and its officers, employes and agents acting within the scope of their employment or duties are immune from liability for: …

> e) ***Any claim arising out of riot, civil commotion or mob action*** or out of any act or omission in connection with the prevention of any of the foregoing."

Former ORS 30.265(3)(e) (1977) (emphasis added).

In 2011, the subsection in question was renumbered from (3) to (6), an "e" was added to employees, and a piece about vehicle drivers who are provided immunity was added: "(6) Every public body and its officers, employees and agents acting within the scope of their employment

or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for: …

> (e) ***Any claim arising out of riot, civil commotion or mob action*** or out of any act or omission in connection with the prevention of any of the foregoing."

Neither of these changes, Plaintiffs and Defendant agree, change the meaning of the text at issue in this Motion.

Defendant does point to the crime of "riot" as defined in ORS 166.015 as one potential illumination of what the legislature's non-state actor clause means:

> "***A person*** commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm."

ORS 166.015(1) (emphasis added). That statute was enacted as part of the Oregon Criminal Code of 1971, which was the culmination of a comprehensive effort to revise substantive Oregon criminal law. The text of this provision has remained unchanged since 1971, although it has been significantly interpreted in subsequent case law. *See State v. Chakerian*, 325 Or 370 (1997) (A person does not commit the crime of riot by simply being part of a group where other members engage in tumultuous and violent conduct; riot statute proscribing such conduct was not addressed to speech.) When considering the statutory definition of riot with the current text of ORS 30.265(6)(e), as Defendant suggests, one would easily understand that a tort claim "[a]rising out of riot" would mean a claim arising out of a "[a] person commit[ting] the crime of

riot." While Plaintiffs would not foreclose on the concept of police officers rioting,[1] the plain language of the statute as it currently stands does not speak to police officer conduct. Defendant's assertion that criminal acts would not be within the scope of employment lends further credence to this understanding. Defendant's Motion, p. 14.

To return to the meaning of the word "occurrence" and the 1969 legislature's intent in changing the statutory language to "[a]rising out of riot," the word "occurrence" does not as clearly include the damages that were caused by persons participating in a riot. As discussed further in the next section, "occurrence" would potentially not cover the damages that ensue from a "riot," and would instead more broadly describe the mere existence of a "riot." The final 1969 language adopted thus harmonizes Mr. Henke's explanation of the contemplated conduct and the bill's necessity. Given this, Defendant's interpretation of the legislative change in language does exactly what ORS 174.010 instructs the Court not to do: inserts a broad immunity for police conduct contrary to the plain meaning of the words and context that demonstrate the legislative intent behind it.

C. The Historical Context of Limiting Liability for the Acts of Rioters

At the time of ORS 30.265(6)(e)'s initial introduction and passage in 1969, states across the country had been introducing statutes designed to curb liability for municipalities facing suits for the damages done by participants during "large-scale riots" over racial injustices and the war in Vietnam. *See* Ex. 4; Harvard Law Review Association, *Municipal Liability for Riot Damage*, 81 Harv. L. Rev. 3, 653-656 (Jan. 1968). These bills were made to target damages *caused by* rioters, not the police. The social policy behind limiting liability from damages caused by rioting

[1] Ed Kilgore, *The Origins of the 'Police Riot'*, New York Magazine (June 9, 2020), available at https://nymag.com/intelligencer/2020/06/remembering-the-walker-report-and-the-first-police-riot.html

citizens would likely be, as Mr. Henke explained to the Oregon legislature, to protect municipalities from unreasonable risk that made their jurisdiction uninsurable. The issue of potential municipal (un)insurability for damages caused by rioting non-state actors remained at the forefront of the legislature's mind even in 1977 when they made minor amendments to this subsection. The House Judiciary Committee included a *Forbes* article, "The Premiums on City Life," as a committee exhibit in 1977. As the article says, "The solution is to reform the tort system by putting limits on general types of damages allowed." *See* Ex. 3, 16-17. Indeed, as cited in the above Harvard Law Review article, in 1967, the City of Newark, NJ faced $6,000,000 in potential damages from 3,000 plaintiffs suing the municipality for property destroyed by rioters. Accordingly, in Plaintiffs' review of relevant analogous statutes, New Jersey passed a law that limited the scope and amount of damages that could be recovered from the municipality for damages made by rioters. However, in Plaintiffs' review of analogous state statutes, they could not find one that goes as far as to grant *carte blanche* immunity for tortious police conduct as the Defendant claims ORS 30.265(6)(e) does.

Idaho, Mississippi, Oklahoma, South Carolina, Tennessee, Utah, and West Virginia have some variation of or share the same statutory language as Oregon.[2] For instance, Tennessee's statute uses "arising out of or resulting from… [r]iots…" Tn. St. § 29-20-205(7)[3], while Idaho

[2] *See* Id. St. § 6-904(6); Ms St § 11-46-9(1)(u); OK ST T. 51 § 155(6); SC ST § 15-78-60(6); TN ST § 9-8-307(2)(c); Tn. St. § 29-20-205(7); UT ST § 63G-7-201(5)(g); WV ST § 29-12A-5(a)(5).

[3] Additionally, Tn. St. § 9-8-307(2)(c) says: "No item enumerated in this subsection (a) shall be interpreted to allow any claims against the state arising out of or resulting from… (c) Riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances…" besides harm to prisoners or their personal property "where the state's negligence is the proximate cause of the riot or disturbance." Using the same "arising out of" wording as ORS 30.265(6)(e), the statute makes clear that it provides immunity from the damages caused by the actions of rioters unless the state defendants were negligent in causing a prison riot.

uses "arises out of or results from riots" Id. St. § 6-904(6)[4]. The remainder do not use past continuous tense verbs. Two of these states (Mississippi and Oklahoma) have one case apiece examining these statutes. The Mississippi case found that the "riot" immunity is meant to curtail damages suits caused by *rioters*, not the police. *Chapman v. City of Quitman*, 954 So. 2d 468, 478 (Miss. App. 2007) (Court blocked suit by person injured by a rioter who stole a police car). The other case, from Oklahoma, cites one of the state's "riot" immunity statutes (51 Okl.St.Ann. § 155(6)) and briefly turns on the factual question of whether a "riot" existed. *Overall v. State ex rel. Dept. of Public Safety*, 910 P.2d 1087, 1092 (Okla. Civ. App. 1995) ("There is no evidence that the plaintiffs' arrests resulted from any civil disobedience, riot, insurrection, or rebellion. Moreover, the plaintiffs do not contend their arrests are the result of any failure to provide police protection, or the method of providing police protection to the public.")

Two statutes from other states arguably come closer to Defendant's position but remain unavailing. Florida's statute bans suits against municipalities for the actions of police if the suit is brought *by rioters themselves*. Fl. St. § 768.28(15) says:

> "No action may be brought against the state or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence, or civil disobedience. Nothing in this act shall abridge traditional immunities pertaining to statements made in court."

Critically, that statute would require a finding that the person had unlawfully participated in a riot, and it explicitly restricts the suit based not on the origin of the tortious conduct, but the conduct of the plaintiff. This is a limiting principle that does not exist in ORS 30.265(6)(e).

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4 Id. St. § 6-904(6) says: "A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any claim which: … (6) Arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence or civil disturbances."

An Oklahoma statute comes closer yet to Defendant's position but is specific and explicit in its carveout, which provides immunity to the state for the actions of the Oklahoma National Guard: "The state or a political subdivision shall not be liable if a loss or claim results from…[t]he activities of the National Guard, the militia or other military organization administered by the Military Department… in an effort to quell a riot…" 51 Okl. St. Ann. § 155(24a). The difference between that subsection and a separate subsection providing for immunity for damages that "result from" rebellion or riot or the "failure to provide, or the method of providing, police, law enforcement or fire protection," demonstrates that a legislature can, when it intends to, make explicit the immunity for state actions to "quell" a riot and not for injuries or damages occurring from the actions of a mob. *See* 51 Okl. St. Ann. § 155(6) (emphasis added).

To this end, and without conceding that this is a wise or just position on the part of the State of Oregon, the Oregon version of this immunity is meant to place liability for these damages on the perpetrators of the damages, not the taxpayers, as Plaintiffs argued in their Motion to Strike.

While Defendant cites one case that arrives to their desired conclusion, *Albers v. Whitley*, 546 F Supp 726 (D Or 1982), *reversed in part on other grounds by Whitley v. Albers*, 743 F2d 1372 (9th Cir 1984), and one that gestures in their direction in dicta, *Hicks v. City of Portland*, 2006 WL 3311552 (D Or Nov. 8, 2006), neither case contains a legislative history analysis of this statute. Moreover, both are federal court cases that do not provide any useful statutory analysis or understanding of the statute at issue here. Indeed, in Plaintiffs' review of the relevant caselaw ahead of filing this motion, only these two cases were found that refer to the (6)(e) immunity. Because neither provide any precedent or useful statutory analysis of ORS 30.265

(6)(e), these cases provide no guidance for this Court's response to a Motion about the Oregon legislature's intent. They also provide nothing to support Defendants' construction of this statute that was adopted in 1969, in a state known for its vibrant and, at times, tumultuous civic discourse.

CONCLUSION

Based on the foregoing, this Court should GRANT Plaintiffs' Motion to Strike.

RESPECTFULLY SUBMITTED: November 6, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a true copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO STRIKE and DECLARATION OF COUNSEL on:

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[X] by **MAILING** a full, true and correct copy thereof in a sealed, postage-paid envelope, addressed as shown above, and deposited with the U.S. Postal Service at Portland, Oregon, on the date set forth below;

[] by causing a full, true and correct copy thereof to be **HAND-DELIVERED** to the party the date set forth below;

[X] by **EMAILING** a full, true and correct copy thereof to the party, at the email address shown above, which is the last-known email address for the party's office, on the date set forth below;

[] by **FAXING** a full, true and correct copy thereof to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

Dated this 6th Day of November, 2020.

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