IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALLISON CHAPMAN,
aka Alison Chapman,
aka Allison Kate Chapman,
Defendant-Appellant.

Coos County Circuit Court
18VI72579; A168274

En Banc

Brett A. Pruess, Judge.

On appellant's petition for reconsideration filed August 4, 2018, of court's order dismissing the appeal filed July 31, 2018.

Allison Chapman *pro se* for petition.

Before Egan, Chief Judge, and Armstrong, Ortega, Hadlock, DeVore, Lagesen, Tookey, DeHoog, Shorr, James, Aoyagi, Powers, and Mooney, Judges.

DeVORE, J.

Reconsideration allowed; order of dismissal adhered to.

Aoyagi, J., concurring.

Egan, C. J., dissenting.

DeVORE, J.

Defendant petitions for reconsideration of an order of the Appellate Commissioner that dismissed her appeal for lack of jurisdiction because her notice of appeal appeared to have been filed late. She argues that a recent amendment to ORS 19.260(1) permits the court to treat the date on which she mailed the notice of appeal by first-class mail without certified or registered service (hereafter "ordinary first-class mail") as the date on which she filed the notice of appeal. If that were so, then her notice of appeal would not have been filed late. We allow reconsideration in order to address that question of statutory construction. We conclude that the legislature amended the statute to permit filing by expedited delivery services whose carriers calculate that they should achieve delivery within three calendar days, but that ordinary first-class mail does not satisfy that standard. As a consequence, we adhere to the commissioner's order dismissing the appeal.

Defendant seeks to appeal a general judgment convicting her of motor vehicle violations—driving while suspended or revoked, ORS 811.175, and failure to register a vehicle, ORS 803.300. The trial court entered the judgment in its register on June 8, 2018. The thirtieth day thereafter was Sunday, July 8. Defendant tendered her notice of appeal by mailing it from Coos Bay by means of first-class mail with the United States Postal Service. A "postage validation imprint" appears on the envelope showing that defendant submitted the envelope for mailing on July 9, 2018.

The timely filing of a notice of appeal is a jurisdictional prerequisite for an appeal. ORS 19.270(2)(b).[1] Because the last day of the appeal period fell on a Sunday, the period extended through Monday, July 9. *See* ORS 19.255(1) (as applied here, notice of appeal must be filed within 30 days of the date of entry of the judgment); ORS 174.120 (excluding

[1] In relevant part, ORS 19.270(2) provides:

"The following requirements of ORS 19.240, 19.250, and 19.255 are jurisdictional and may not be waived or extended:

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"Filing of the original of the notice of appeal with the Court of Appeals as provided in ORS 19.240(3), within the time limits prescribed by ORS 19.255."

the day when the court is closed from computation of time). The Appellate Court Administrator received the envelope containing defendant's notice of appeal on July 11, 2018, more than 30 days after the date of entry of the judgment. Given those dates, the notice of appeal was untimely and subject to dismissal unless defendant may rely on ORS 19.260(1) to relate the filing date back to July 9, 2018, the date on which she mailed the notice of appeal.

Under certain circumstances, the date of mailing may serve as the date of filing a notice of appeal. In relevant part, ORS 19.260(1) provides:

> "(a) Filing a notice of appeal in the Court of Appeals or the Supreme Court may be accomplished by mail or delivery. Regardless of the date of actual receipt by the court to which the appeal is taken, the date of filing the notice is the date of mailing or dispatch for delivery, if the notice is:
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> "(A) Mailed by registered or certified mail and the party filing the notice has proof from the United States Postal Service of the mailing date; or
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> "(B) Mailed or dispatched via the United States Postal Service or a commercial delivery service by a class of delivery calculated to achieve delivery within three calendar days, and the party filing the notice has proof from the United States Postal Service or the commercial delivery service of the mailing or dispatch date.
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> "(b) Proof of the date of mailing or dispatch under this subsection must be certified by the party filing the notice and filed thereafter with the court to which the appeal is taken. Any record of mailing or dispatch from the United States Postal Service or the commercial delivery service showing the date that the party initiated mailing or dispatch is sufficient proof of the date of mailing or dispatch. If the notice is received by the court on or before the date by which the notice is required to be filed, the party filing the notice is not required to file proof of mailing or dispatch."

This case focuses on ORS 19.260(1)(a)(B), due to defendant's choice of mailing. Defendant did not mail her notice of appeal by registered or certified mail as authorized by ORS 19.260(1)(a)(A). Rather, she mailed her notice of appeal by ordinary first-class mail. She contends that the date of

mailing by ordinary first-class mail should be the equivalent of filing under ORS 19.260(1)(a)(B).

Our task is to determine the meaning of the clause that recognizes mail or dispatch "via the United States Postal Service or a commercial delivery service by a class of delivery calculated to achieve delivery within three calendar days[.]" ORS 19.260(1)(a)(B). Accordingly, we employ the familiar methodology of statutory construction, examining the statute's text, context, and relevant legislative history, to determine the legislature's intent. *State v. Gaines,* 346 Or 160, 171-72, 206 P3d 1042 (2009).

In ORS 19.260(1)(a)(B), the important terms are "calculated," "class of delivery," and "calendar days." As a word of common usage, "calculated," may be given its "plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). "Calculated" may be understood to mean "planned or contrived so as to accomplish a purpose." *Webster's Third New Int'l Dictionary* 315 (unabridged ed 2002).[2] A "class" may be understood as "a group, division, distinction, or rating based on quality, degree of competence, or condition" as in "a [class] of travel accommodation." *Id*. 416. Similarly, the term "calendar days" refers to any of the seven days of a week. *See* ORS 657.010(15) ("'Week' means any period of seven consecutive calendar days ***.")

The term "calculated" is used in a passive voice without specific reference to *who* calculates that a class of delivery should achieve delivery within three days. But, context provides meaning. The phrase, "class of delivery calculated to achieve delivery within three calendar days," necessarily means that it is the "United States Postal Service or a commercial delivery service" that calculates the delivery times, because it is the delivery service that organizes itself to accomplish deliveries within one estimated time frame or another according to various means or priorities of service. The statute does not depend upon whether the individual appellant subjectively calculates mailing to achieve delivery

[2] "Calculated" is also defined as "worked out by calculation," "ascertained or estimated by calculation," "brought about or brought into existence as a consequence of deliberate intent and planning," or, simply, "likely." *Webster's* at 315.

within three calendar days. It is the carrier that calculates whether a class of mail should achieve delivery within three calendar days.[3] The determination is an objective determination, not a subjective determination about what the appellant expects for that particular mailing, nor even what might have actually occurred in a particular situation.[4]

In her petition for reconsideration, defendant argues that, although she did not choose to use registered or certified services with her mailing, her choice to use ordinary first-class mail was a permissible alternative mailing "via the United States Postal Service *** by a class of delivery calculated to achieve delivery within three calendar days" within the meaning of ORS 19.260(1)(a)(B). Defendant relies on the description that the Postal Service provides about its first-class mail at its public website. United States Postal Service, *First-Class Mail*, https://www.usps.com/ship/first-class-mail.htm (accessed Jan 8, 2019). Of that we take judicial notice. OEC 201(b)(2), (f). The Postal Service describes first-class mail, albeit with little detail, in terms of delivery within "1-3 *business* days." (Emphasis added.) Although defendant acknowledges no difference between the terms, three business days is *not* three calendar days. The term "business days" has long been understood to mean something deliberately different:

> "**business day**. (1826) A day that most institutions are open for business, usu. a day on which banks and major stock exchanges are open, excluding Saturdays, Sundays, and certain major holidays."

Black's Law Dictionary 480 (10th ed 2014).[5] As a consequence, ordinary first-class mail is *not* a *class* of delivery

[3] Although opinions differ in this case, the majority and concurring opinions agree that the statute requires an objective standard referring to the carrier's calculation of delivery.

[4] Indeed, that was the circumstance here where the court administrator received defendant's notice of appeal two calendar days after defendant deposited the notice of appeal with the Postal Service.

[5] The Code of Federal Regulations for the Postal Service does not directly define the term "business days," but the code does include this provision relating to proceedings involving certain civil penalties:

> "In computing any period of time provided for by this part, or any order issued pursuant to this part, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is

that is calculated to achieve delivery in three *calendar* days. An example reveals the significance of the difference. If an appellant mails a notice of appeal on a Thursday preceding a week in which a federal holiday falls on a Monday, the notice of appeal may not be delivered until Tuesday, five calendar days after the user left the notice with the Postal Service.

Defendant contends that statutory history and legislative history favor defendant's interpretation of the statute as allowing use of ordinary first-class mail. We disagree. Statutory history is to the contrary, and legislative history is conspicuously silent.

To review, we note first that, when a notice of appeal was mailed by ordinary first-class mail, the notice was not considered filed until later received by the court. *State v. Harding*, 347 Or 368, 371-72, 223 P3d 1029 (2009); *Southwest Forest Industries v. Anders*, 299 Or 205, 213, 701 P2d 432 (1985). When enacted in 1979, today's ORS 19.260, formerly ORS 19.028, provided a means of filing by particular forms of mail. As applicable here, the statute provided that the filing of a notice of appeal could be accomplished by mail and that "[t]he date of filing such notice *** shall be the date of mailing, provided it is mailed by registered or certified mail and the appellant has proof from the post office of such mailing date." Or Laws 1979, ch 297, § 1 (enactment) (emphasis added); *former* ORS 19.028 (1979), *renumbered as* ORS 19.260 (1997) (codification). By omission, the statute meant that ordinary first-class mail, with filing relating back to mailing, was not an option.[6]

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a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day. Except as otherwise provided in these rules or an applicable order, *prescribed periods of time are measured in calendar days rather than business days*."

39 CFR § 958.21 (2009) (emphasis added). Other regulations for things such as stand-alone special services are calculated in terms of "business days." *See, e.g.*, 39 CFR § 122.2 (address list service 15 business days; internet orders two business days). Consistent with common understanding, we should accept that, for the purpose of Postal Service calculations, "business day" means a day other than, arguably, a Saturday, and, certainly, a Sunday, or a legal holiday observed by the federal government.

[6] From time to time, the legislature amended the statute in other ways not material to resolution of the issue in this case.

In 1987, *former* ORS 19.028 was amended to add a new subsection (2) to authorize service of notice of appeal on a party, court reporter, or clerk of the court "by mail, subject to the *same* requirement as filing notice of appeal by mail ***." Or Laws 1987, ch 852, § 6 (emphasis added). Thereafter, the legislature demonstrated that it knew how to explicitly permit ordinary first-class mail for *some* things, but not others. In 1989, *former* ORS 19.028(2) (1987) was amended to provide that service of notice of appeal could be accomplished, in addition to registered or certified, by first-class mail, and such service would relate back to the date of mailing. Or Laws 1989, ch 768, § 12. Importantly, however, the 1989 amendment did not change how *filing* of notice of appeal could be accomplished.[7]

In 2015, the legislature amended ORS 19.260 to add what are now subparagraphs (1)(a)(A) and (1)(a)(B). Or Laws 2015, ch 80, § 1 (amending ORS 19.260 (2011)). Subparagraph (A) retained the provision allowing mailing of a notice of appeal via the Postal Service, provided the party mailed the notice of appeal by registered or certified mail. Subparagraph (B), for the first time, added mail or dispatch of a notice of appeal by the Postal Service or commercial delivery service, with relation back to the date of mail or dispatch, provided that the party used "a class of delivery calculated to achieve delivery within three calendar days." Significantly, and consistent with prior amendments, the legislature did not amend subsection (1) itself so as to authorize filing as mailing by first-class mail. The legislature refrained from providing for first-class mail as filing although the 1989 legislature had previously amended *former* ORS 19.028 to permit *service* of notice of appeal on others by first-class mail. Or Laws 2015, ch 80, § 1.

In 2015, the new "class of delivery" to be allowed was described in the commentary of legislative supporters. House Bill (HB) 2336 was introduced at the request of the Appellate Practice Section of the Oregon State Bar. Appellate Practice Section member Jordan R. Silk testified

[7] In 1997, Legislative Counsel reorganized ORS chapter 19, and *former* ORS 19.028 became ORS 19.260. *Former* ORS 19.028 (1989), *renumbered as* ORS 19.260 (1997).

in support of the bill. Referring to the now former version of ORS 19.260, he said,

> "[U]nder ORS 19.260, parties may not rely on the date of mailing if they file or serve notice of appeal via third-party commercial carriers, even though the Oregon Rules of Appellate Procedure expressly permit the use of third-party commercial carriers to file and serve other appellate documents.
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> "Currently, many appellate practitioners utilize third-party commercial carriers to mail and deliver documents in the ordinary course of business for pending appeals. For practitioners who do not handle appeals on a frequent basis, this is a trap for the unwary with very serious consequences.
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> "*****
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> "HB 2336A will amend ORS 19.260 to allow appellate practitioners to file and serve a notice of appeal *** by third-party commercial carriers, just as practitioners are allowed to do with other documents while an appeal is pending."

Testimony, House Committee on Judiciary, HB 2336, Apr 30, 2015 (statement of Jordan R. Silk). There is no indication in Mr. Silk's testimony of any intention to enlarge filing by mail so as to provide that ordinary first-class would achieve relation back to the date of mailing. Instead, the purpose that was expressed was an amendment to recognize commercial carriers that had become common alternatives offering expedited delivery.

When the legislature amended ORS 19.260(1), the legislature did not restrict the new means of filing to expedited delivery by commercial carriers. As noted above, ORS 19.260(1)(a)(B) recognizes mail or dispatch "via the United States Postal Service *or* a commercial delivery service by a class of delivery calculated to achieve delivery within three calendar days."[8] (Emphasis added.)

[8] The Postal Service identifies as one of its classes of delivery "Priority Mail Express." In describing that "class of delivery," the Postal Service says, "Delivering 7 days a week, Priority Mail Express is our fastest domestic

Given that statutory and legislative history, we conclude that ordinary first-class mail was *not* what the legislature intended by the phrase in ORS 19.260(1)(a)(B), "mailed or dispatched *** by a class of delivery calculated to achieve delivery within three calendar days." To be sure, the drafters intended to expand the categories of registered or certified mail so as to include expedited delivery services, but the drafters conspicuously refrained from substituting ordinary first-class mail. In this case, because defendant chose to mail her notice by a class of delivery that is not calculated to achieve delivery in three calendar days, she chose a class of delivery that does not provide a means of filing upon mailing under ORS 19.260(1)(a)(B).

A concurring opinion in this case proposes a construction of the statute that was not urged by defendant, but an interpretation that nonetheless must be considered. *See Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) ("[T]his court is responsible for identifying the correct interpretation [of a statute], whether or not asserted by the parties."). Although the concurring opinion finds no express support in legislative history and draws nothing from statutory history, that opinion concludes that the text of the statute, on its face, permits first-class mailing as filing under ORS 19.260 (1)(a)(B). The concurring opinion observes that it is possible that the actual delivery of a letter mailed by first-class mail could be achieved within one to three calendar days after mailing, depending on which day of the week an individual notice of appeal is mailed. Based on that possibility, that opinion suggests that whether a particular notice of appeal sent by first-class mail is calculated to be timely depends on which day of the week it happens to be mailed. That opinion concludes that, at the time it was mailed, the notice at issue here itself could be said to be calculated to achieve

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service for time-sensitive letters, documents, or merchandise. Guaranteed overnight scheduled delivery to most locations ***." United States Postal Service, *Mail and Shipping Services*, https://www.usps.com/ship/mail-shipping-services.htm (accessed Jul 16, 2019) (listing classes of delivery services); *see also* United States Postal Service, *Priority Mail Express*, https://www.usps.com/ship/priority-mail-express.htm (accessed Jul 16, 2019) (Priority Mail Express overnight delivery guarantee with limitations). Presumably, by providing delivery seven days a week, Priority Mail Express offers a class of delivery that is "calculated to achieve delivery within three *calendar* days."

delivery within three calendar days. For several reasons, we are unpersuaded.

First, the interpretation made by the concurring opinion disregards the text of ORS 19.260(1)(a)(B). That paragraph refers to a notice that is "[m]ailed *** by a *class* of delivery calculated to achieve delivery within three calendar days." (Emphasis added.) The phrase, "calculated to achieve delivery within three calendar days," modifies the words that are immediately adjacent, "class of delivery." Reasonably read, the clause about calculated delivery does not modify the term "notice" of appeal, which appears at least 20 words earlier in the provision. Properly read, the *class*, as a whole, must be calculated to be delivered in three calendar days. The statute does not ask whether the individual piece of mail is calculated to be delivered in three calendar days.[9] The earlier reference to a notice naturally refers to an individual notice of appeal, but that individual reference is necessary because the statute's requirements are directed at each notice of appeal. The nouns in the provision—notice of appeal and class of delivery—ought not be confused. Nor should "class" be omitted and "notice" alone remain. The restrictive clause—class of delivery calculated to achieve delivery within three calendar days—concerns the *class* chosen, not the *notice* that is mailed by one class or another of mail. That is, the statute requires the appellant to choose a *class* of mail that, as a class, is calculated to be delivered in three calendar days. In essence, the concurring

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[9] The concurring opinion imagines that, if someone asked a postal clerk, on a Monday of a non-holiday week, "what classes of delivery were calculated by USPS to achieve delivery by Thursday (three calendar days later), the postal clerk would include first-class mail in the answer." 298 Or App at __ (Aoyagi, J., concurring). In this record, however, defendant does not claim that she asked such a question or that the Postal Service calculated delivery for her individual notice. Instead, defendant points to the Postal Service announcement that, as a class, first-class mail is calculated to achieve delivery in one to three business days.

The concurring opinion, by framing an imagined question as what "class" will achieve delivery "by Thursday," rewrites the statutory inquiry, substituting "by Thursday" for "three calendar days." The question confuses the terms that involve a piece of mail, class of mail, Thursday, and three calendar days. A thoughtful clerk should carefully reply, "If mailed on Monday, *this* piece of mail should arrive by Thursday; but, as a class, ordinary first-class mail is calculated to achieve delivery in one to three *business* days." A careful clerk would not promise that first-class mail achieves delivery in "three calendar days."

opinion *removes* the word "class" from ORS 19.260(1)(a)(B) in violation of ORS 174.010, which exhorts that the role of a judge is not to insert or omit words from a statute.

Second, the concurring opinion's interpretation creates a system that is inconsistent with the uniformity of the original scheme. That scheme achieved uniformity by permitting mailing as filing, when an identified mail service was used and a proof of mailing was effected. When the requisites were satisfied, no one needed to worry about individually varying circumstances of delivery. The concurring opinion's interpretation, however, implies that a notice of appeal mailed by ordinary first-class mail on a Monday will achieve appellate jurisdiction, while a notice of appeal mailed on a Thursday will fail to achieve appellate jurisdiction. Even that sort of odd predictability assumes that no holidays will intervene. As it happens, there are twelve months in the year, and there are ten federal holidays.[10] In 2018, holidays occurred on Mondays, a Tuesday, a Wednesday, and a Thursday. Because holidays are scattered throughout the year and throughout the week, there is no uniformity even in thinking that a notice of appeal, sent by ordinary mail, can be calculated to arrive in three calendar days to achieve jurisdiction when mailed on any certain week day.

Our observation about uniformity is not a matter of preferred policy or administrative convenience. Rather, the point implicates reasoned legislative intention and canons of construction. We do not presume that the legislature intended irrational results. *See Landis v. Limbaugh*, 282 Or App 284, 294-95, 385 P3d 1139 (2016), *rev dismissed*, 361 Or 351 (2017) (resisting irrational construction). The proposed alternate interpretation is not what the statute reasonably should be construed to mean by its terms.

Finally, to treat ordinary first-class mail as effective on some days, but not others, would serve to create a fatal jurisdictional trap for the unwary. Legislative witness Silk testified in favor of the 2015 amendments, in part, to

[10] They are New Year's Day, Martin Luther King, Jr. Day, George Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas.

eliminate the "trap" wherein parties unwittingly trust expedited commercial deliveries. The amendments eliminated that trap. We ought not create another.

In sum, we conclude from the text, surrounding context, prior amendments, and legislative history that the legislature did not intend ORS 19.260 to provide that mailing a notice of appeal by ordinary first-class mail would accomplish filing on the date of mailing.[11] Because defendant chose to use the class of first-class mail to send her notice of appeal for filing, the date on which the notice was filed is the date that the notice was received. *Harding*, 347 Or at 371-72. Therefore, appellant's filing date does not relate back to the date defendant deposited the notice of appeal with the Postal Service. This court lacks the jurisdiction to entertain this appeal.

Reconsideration allowed; order of dismissal adhered to.

AOYAGI, J., concurring.

ORS 19.260(1)(a) provides that the mailing date of a notice of appeal will be treated as its filing date, if the notice is "[m]ailed or dispatched via the United States Postal Service [(USPS)] or a commercial delivery service *by a class of delivery calculated to achieve delivery within three calendar days*, and the party filing the notice has proof from [USPS] or the commercial delivery service of the mailing or dispatch date." (Emphasis added.) In dismissing petitioner's appeal as untimely filed, the majority concludes that, in order to satisfy ORS 19.260(1)(a), the would-be appellant must use a class of delivery calculated to achieve delivery *of all items mailed by that class of delivery* within three calendar days. I disagree with that construction of the statute, which I believe is not the most natural reading of the statutory text and therefore creates a jurisdictional trap. I would construe ORS 19.260(1)(a) as requiring a would-be appellant to use a class of delivery calculated to achieve delivery *of the individual notice of appeal* within three calendar days. To hold otherwise, as the majority does today,

[11] We do not reach the question, which is addressed by the concurring opinion, whether appellant satisfied the statutory requirement of proof of mailing.

in my view penalizes people for relying on the plain words of the statute. At the same time, I concur in the disposition, because petitioner did not satisfy the proof-of-mailing-date requirement, which is a separate and additional statutory requirement for the mailing date to be treated as the filing date.

As originally enacted, the statute that is now ORS 19.260 provided for the date of mailing to serve as the date of filing only if a notice of appeal was "mailed by registered or certified mail and the appellant ha[d] proof from the post office of such mailing date." *Former* ORS 19.028 (1979), *renumbered as* ORS 19.260 (1997). It should be noted that registered and certified mail are not classes of delivery—they are ancillary special services that USPS offers for items mailed by first-class or Priority mail. 39 CFR § 122.1(a). For 36 years, the only way that a party could file a notice of appeal by mail, if the party wanted the mailing date to be treated as the filing date, was to mail the notice by USPS mail (first class or Priority class) with registered or certified service.

That changed in 2015 when the legislature amended ORS 19.260(1) to read as quoted above. *See* Or Laws 2015, ch 80, § 1. The Appellate Practice Section of the Oregon State Bar proposed the 2015 amendments, because of a desire among appellate practitioners to use commercial delivery services, such as Federal Express and United Parcel Service, to file and serve notices of appeal. *See* Testimony, House Committee on Judiciary, HB 2336, Feb 4, 2015, Ex 10 (statement of Jordan R. Silk). Jordan Silk, testifying on behalf of the Appellate Practice Section, pointed out to the legislature that "the Oregon Rules of Appellate Procedure expressly permit the use of third-party commercial carriers to file and serve other appellate documents" and that "many appellate practitioners utilize third-party commercial carriers to mail and deliver documents in the ordinary course of business for pending appeals." *Id*. In addition to convenience, Silk asserted that not providing for the use of commercial carriers to file and serve notices of appeal was "a trap for the unwary with very serious consequences," particularly for "practitioners who do not handle appeals on a frequent basis." *Id*. He stated that the amendments would

"allow appellate practitioners to file and serve a notice of appeal *** by third-party commercial carriers, just as practitioners are allowed to do with other documents while an appeal is pending." *Id.*

Notwithstanding the bill proponents' focus on commercial delivery services, the 2015 amendments to ORS 19.260(1), as proposed and enacted, also expanded the options for using USPS delivery services. A notice of appeal that is "[m]ailed or dispatched via the United States Postal Service *** by a class of delivery calculated to achieve delivery within three calendar days" comes within the express language of ORS 19.260(1)(a). The question is whether USPS first-class mail is such a class of delivery. It is important to note that the legislative history is entirely silent on that issue. Indeed, all indications are that the legislature never considered which USPS delivery classes would or would not meet the standard—or, for that matter, which commercial delivery classes would or would not meet the standard. The legislature simply adopted a *general standard* for qualifying delivery classes, both commercial and USPS, without reference to any specific delivery classes.

Contrary to the majority's view, the legislature never suggested that it was limiting the qualifying classes of delivery to "expedited" classes. The majority injects that terminology, which appears nowhere in the statute or legislative history. *See State v. Chapman*, 298 Or App 603, ___, ___ P3d ___ (2019). The majority also reads too much into the legislature's silence, asserting that the legislature affirmatively "refrained" from including first-class mail in the expanded delivery options. *See id.* The legislative history does not support that conclusion. Again, all indications are that the legislature, like the bill's proponents, focused on commercial carriers and, as to both commercial carriers and USPS, did not consider the effect of the amendments on *any* particular delivery class. As such, the "silence in the legislative history *** does not inform our inquiry." *State v. Carlton*, 361 Or 29, 43, 388 P3d 1093 (2017). Rather, we must determine the meaning of "a class of delivery calculated to achieve delivery within three calendar days" from the statutory text and context.

So, what is "a class of delivery calculated to achieve delivery within three calendar days"? There "is no more persuasive evidence of the intent of the legislature" than the text of the statute. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). It is assumed that the legislature intended those words, which are not statutorily defined, to have their "plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). As such, like the majority, I understand "class of delivery" to refer to a service class provided by USPS or a commercial delivery service. I understand "calculated" to mean "planned or contrived so as to accomplish a purpose," *i.e.*, here, planned or contrived by USPS or the commercial delivery service to achieve delivery within a certain time period. *Webster's Third New Int'l Dictionary* 315 (unabridged ed 2002). And I understand "calendar days" to refer to all seven days of the week. *See id.* at 316 (defining calendar day as "the time from midnight to midnight").

As judicially noticed by the majority, USPS delivers first-class mail in "1-3 business days," according to its official website. US Postal Serv, *First Class Mail*, *available at* https://www.usps.com/ship/first-class-mail.htm (accessed July 23, 2019). That information is consistent with USPS performance standards within the continental United States, as published in the United States Code of Federal Regulations. *See* 39 CFR § 121.1. Therefore, first-class-mail, within the continental United States, is a class of delivery calculated to achieve delivery within three business days.

The next question is whether it necessarily follows that first-class mail is *not* a class of delivery "calculated to achieve delivery within three *calendar* days." ORS 19.260 (1)(a)(B) (emphasis added). In my view, it does not. Defendant was filing a single notice of appeal. The deadline for her to do so was Monday, July 9. On Monday, July 9, defendant deposited her notice of appeal, addressed to the Records Section, State Court Administrator, with USPS in Coos Bay, for delivery by first-class mail. Based on the judicially noticed information about that service class, defendant's notice of appeal was calculated by USPS to be delivered to the court by Thursday, which was three calendar days later.

In my view, an average person reading the plain language of ORS 19.260(1)(a) would understand a notice of appeal mailed under the foregoing circumstances to satisfy the mailing requirement in the statute. I do not believe that an average person would understand the statute to require use of a class of delivery that would result in the delivery of *all items mailed or dispatched by that class of delivery* within three calendar days. To illustrate, in the real world, if someone went to a post office on the Monday of a non-holiday week, with a notice of appeal in hand, and asked what classes of delivery were calculated by USPS to achieve delivery of the notice by Thursday (three calendar days later), the postal clerk would include first-class mail in the answer, because that is the latest delivery date that USPS calculates for that class of delivery. A person relying on published information from USPS would reach the same conclusion. And it is not only USPS delivery classes. The same is true of commercial carriers that do not deliver every day or that offer some delivery classes that, for example, exclude Sunday delivery. For delivery classes defined in terms other than "calendar days," whether any particular item is calculated by the carrier to be delivered within three calendar days will depend on the dispatch date.[1]

In construing the statute otherwise, the majority takes the view that ORS 19.260(1) requires a would-be appellant to send his or her notice of appeal by a class of delivery calculated to achieve delivery *of all items mailed by that class of delivery* within three calendar days. Thus, for example, to illustrate the practical application of the majority's construction, using a class of delivery that provides delivery in "one business day" would not satisfy the statute—because, in some circumstances, items mailed by that class of delivery would be calculated to be delivered in four calendar days, such as an item dispatched on the Friday before a Monday holiday.

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[1] To be clear, it is irrelevant to my analysis when an item is actually delivered to its recipient or when delivery theoretically "could be achieved." 298 Or App at ___. The "promises" of a carrier's employees also are irrelevant. *See id*. (slip op at 12 n 9). Only two data points are relevant to my analysis, and both are objective: (1) the date that the notice of appeal was delivered to the carrier, and (2) the carrier's defined delivery period for the class of delivery used.

The majority's construction is not entirely untenable and is certainly more administratively convenient than mine. However, I disagree that it is compelled by the statute. To the contrary, in my view, the most natural reading of the statute is that it requires only that the would-be appellant use a class of delivery calculated to achieve delivery *of the individual notice of appeal* within three calendar days—starting from the day that the notice is delivered to the carrier. The statute repeatedly refers to the individual notice of appeal. It states that "[f]iling *a* notice of appeal in the Court of Appeals or the Supreme Court may be accomplished by mail or delivery" and that "the date of filing *the* notice is the date of mailing or dispatch for delivery, if *the* notice is *** [m]ailed or dispatched via [USPS] *** by a class of delivery calculated to achieve delivery within three calendar days." ORS 19.260(1) (emphasis added). The most natural reading of the phrase at issue, in context, is that the class of delivery must be calculated to achieve delivery of *the* notice of appeal within three calendar days of mailing. Whether some other item mailed on a different day by the same class of delivery would be calculated to achieve delivery within three calendar days is irrelevant.

I recognize that my construction of the statute would result in some administrative inconvenience to the court, although that inconvenience should not be exaggerated.[2] And certainly the statute would be easier to construe if the legislature had required use of an "expedited" delivery class or expressly named the qualifying delivery classes—much like referring to "registered or certified" mail services in ORS 19.260(1)(a)(A) is helpfully specific—or expressly addressed first-class mail. But the fact is that the legislature chose to adopt a general standard, and it apparently never considered how that general standard would apply to

[2] The universe of affected notices would be limited to those mailed by first-class mail, without certified or registered service, and received after the filing deadline. Moreover, affected filers would have an opportunity to provide the relevant calculation information to the court, when filing and certifying the proof of mailing date under ORS 19.260(1)(b). In any event, the calculation is simple and objective. The majority may disagree with my reasoning, but there is nothing "irrational" about reading the statute as being directed to the filing of individual notices of appeal. 298 Or App at ___. Would-be appellants usually are filing only *one* notice of appeal, and my construction is entirely consistent with the statutory text.

first-class mail. In those circumstances, I think we should read ORS 19.260(1), as best we can, consistently with how average people in the real world will read it, especially given the high stakes. Timely filing of a notice of appeal is a jurisdictional requirement for the Court of Appeals to hear an appeal, *see* ORS 19.270(2)(b), and, under the majority's construction, people who comply with a reasonable reading of the plain text of the statute will nonetheless have their appeals dismissed. I cannot agree with that construction. If the statute is flawed, due to an issue that was not considered in 2015, it is for the legislature to fix it. If the legislature wants to limit the qualifying classes of delivery to expedited classes, or expressly exclude USPS first-class mail (unless registered or certified service is used), it may certainly do so. Until that time, we should construe the statute in a manner consistent with how an average person seeking to file a notice of appeal would read it.

I therefore disagree with the majority's reason for dismissing the notice of appeal in this case as untimely. I would construe "a class of delivery calculated to achieve delivery within three calendar days," as used in ORS 19.260 (1)(a)(B), to mean a class of delivery calculated by the service provider to achieve delivery of *the notice of appeal* within three calendar days, based on the mailing date and the class of delivery used.[3] Applying that construction, defendant timely mailed her notice of appeal when she mailed it by USPS first-class mail, a class of delivery calculated to achieve delivery in one to three business days, on the Monday of a non-holiday week.

As previously mentioned, notwithstanding my disagreement with the majority's reading of the "class of delivery" provision in ORS 19.260(1)(a), I concur in the disposition

[3] The majority faults my reasoning as reading "class of delivery" out of the statute. 298 Or App at ___. I do no such thing. ORS 19.260(1)(a) requires use of "a class of delivery calculated to achieve delivery within three calendar days." The only significant difference between the majority's construction and mine is in how we answer the question, *Class of delivery calculated to achieve delivery of what within three days?* The majority answers, delivery of "the class." *Id*. I answer, delivery of the notice of appeal. But that in no way reads out the term "class of delivery." Under my analysis, the would-be appellant must use a *class of delivery* calculated to achieve delivery of the notice of appeal within three calendar days, exactly as the statute says.

because the would-be appellant in this case did not certify and file with the court proof from USPS of the mailing date, as required by ORS 19.260(1)(a)(B), (b). Because the proof-of-mailing-date requirement was not briefed and raises some thorny issues, I am disinclined to engage in a lengthy written analysis of that issue for purposes of this concurring opinion, which is intended primarily to challenge the majority's analysis of the class-of-delivery provision. I will address the proof-of-mailing-date issue only briefly, because it is necessary to explain why I concur, rather than dissent, in the disposition.

In short, I do not view a USPS postmark or postage-validated imprint (PVI) label on the envelope in which a notice of appeal was mailed as sufficient to establish proof of mailing under ORS 19.260(1)(a)(B), (b). The statute requires the party filing the notice of appeal to "ha[ve] proof" *from* USPS or the commercial delivery service of the mailing or dispatch date. That is significant in two ways. First, a USPS postmark or PVI label is applied after the envelope is surrendered for mailing and, necessarily, goes with the envelope. A person filing a notice by first-class mail therefore will never "have" the postmark or PVI label. Second, the proof of mailing date must "be *certified by the party* filing the notice and *filed thereafter* with the court to which the appeal is taken." ORS 19.260(1)(b) (emphases added). A party cannot certify and file something not in their possession. And, even assuming for the sake of argument that a copy would suffice, it would be absurd for someone to obtain a copy of the postmark or PVI label *from* the court and then turn around and file it *with* the court and then certify *to* the court that it was obtained from the court. In any event, that did not happen here.

As I understand it, the proof-of-mailing-date requirement mandates that a party obtain proof of the mailing date directly from USPS or the commercial delivery service, and then certify and file that proof with the court, in order to rely on the mailing date as the filing date. With respect to first-class mail, the most obvious form of such proof would be a certificate of mailing, which can be obtained only from USPS at the time of mailing. I do not view the statement in ORS 19.260(1)(b)—that "[a]ny record of mailing or dispatch

from [USPS] or the commercial delivery service showing the date that the party initiated mailing or dispatch is sufficient proof of the date of mailing or dispatch"—as meaning that a USPS postmark or PVI label is sufficient. Rather, I understand that provision to address the reality that different delivery services provide different forms of proof. Thus, it does not matter if a person provides USPS's form of proof, or Federal Express' form of proof, or United Parcel Service's form of proof. However, in my view, that provision in no way supersedes ORS 19.260(1)'s requirement that the proof be obtained *from* the service provider and then certified and filed with the court. *See also* ORAP 1.35(1)(b)(iii)(A) (identifying a "receipt" from USPS as "[a]cceptable proof" of the mailing date when a person is relying on the date of mailing as the date of filing).

Because petitioner did not certify and file any proof of mailing from USPS, I concur in the disposition. For the reasons discussed, however, I disagree with the majority's construction of the "class of delivery" provision in ORS 19.260(1)(a)(B). Accordingly, I respectfully concur in the disposition only.

EGAN, C. J., dissenting.

In my view, defendant has met all of the necessary requirements to initiate a timely appeal. I agree with the concurrence's reasoning and conclusion regarding the construction of the term "class of delivery calculated to achieve delivery within three calendar days," particularly in light of the concurrence's focus on interpreting the rule from the perspective of an average person in the real world. *State v. Chapman*, 298 Or App 603, ___, ___ P3d ___ (2019) (Aoyagi, J., concurring). I disagree, however, with the concurrence's conclusion that, in directing the court's attention to the postage validated imprint on the envelope received by the Appellate Court Administrator, defendant failed to satisfy what the concurrence calls "the proof-of-mailing-date requirement." 298 Or App at ___ (Aoyagi, J., concurring). In my view, the concurrence constructs an additional, unnecessary roadblock for parties seeking only to have their appeal considered by this court. First, the concurrence adopts an overly strict read of what it means to "have proof,"

ignoring conflicting authority and contrary legislative history. Second, the concurrence declines to examine what the legislature intended by requiring that "proof of the date of mailing *** be certified by the party filing the notice and filed thereafter," and assumes that this "certification" is a jurisdictional requirement to initiate an appeal. In sum, the concurrence quickly and summarily assists the majority in transforming what should be the fairly straightforward process of initiating an appeal by mail into a complex exercise that is exactly what the legislature explicitly sought to avoid creating: a trap for the unwary.

The concurrence is correct to point out that mailing a notice of appeal by a statutorily authorized class of delivery is not the only requirement for the date of mailing to be treated as the date of filing. 298 Or App at ___ (Aoyagi, J., concurring). Indeed, ORS 19.260(1)(a)(B) also requires that (1) the party filing an appeal "ha[ve] proof" of the mailing date from the delivery service, and (2) the proof of the mailing date "be certified by the party filing the notice and filed thereafter" with the court. ORS 19.260(1). Though these requirements are related, the concurrence's analysis effectively conflates the two. Instead, I address each requirement in turn.

I begin with the requirement that a party filing an appeal "have proof" of the mailing date. The concurrence understands ORS 19.260(1) to require a party filing a notice of appeal to *obtain*—in other words, to personally possess—proof of the mailing date *from USPS*. 298 Or App at ___ (Aoyagi, J., concurring). Then, due apparently to this "personal possession" requirement, the concurrence concludes that an envelope that is marked with a postage validated imprint (PVI) showing the date of mailing and received by the Administrator is insufficient proof. 298 Or App at ___ (Aoyagi, J., concurring).

I acknowledge that the statute and corresponding rule that underly the concurrence's analysis are not spectacularly clear as to what constitutes "sufficient proof" of the date of mailing. ORS 19.260(1)(b) provides one answer:

> "*Any record of mailing or dispatch from the United States Postal Service* or the commercial delivery service showing

> the date that the party initiated mailing or dispatch is sufficient proof of the date of mailing or dispatch."

(Emphasis added.)

But ORAP 1.35(1)(b)(iii)(A) provides a different answer:

> "Acceptable proof from the U.S. Postal Service of the date of mailing must be *a receipt* for certified or registered mail or other class of service for delivery within three calendar days, with the mail number on the envelope or on the item being mailed, *and the date of mailing either stamped by the U.S. Postal Service on the receipt or shown by a U.S. Postal Service postage validated imprint on the envelope received by the Administrator or the U.S. Postal Service's online tracking system*."

(Emphases added.)

While the concurrence is able to reconcile the above authorities with regard to what constitutes sufficient proof of a date of mailing when a party files a notice of appeal using a class of service calculated to achieve delivery within three calendar days, I cannot. "Any record of mailing or dispatch" from the mail service is sufficient proof under ORS 19.260(1)(b), but only specific forms of proof—a receipt *and*, for example, a PVI—are "acceptable" under ORAP 1.35 (1)(b)(iii)(A). In fact, this case demonstrates the inconsistency of the two provisions. Under the statute, defendant's PVI received by the court is sufficient proof as it is a "record of mailing" from the USPS "showing the date that the party initiated mailing." But under the rule, defendant's PVI is not sufficient because she did not obtain a receipt from the USPS when she sent her notice by first class mail.

As the majority and concurrence explain, ORS 19.260 was amended in 2015 to add "class[es] of delivery calculated to achieve delivery within three calendar days" to the permissible mail services practitioners may use to file an appeal. In ORS 19.260(1)(b), the legislature also provided language to specifically address what proof would be allowed to show that a person using such a class had, indeed, mailed on a date calculated to achieve delivery within three calendar days. The added language was that "any record of mailing or dispatch" from the delivery service is sufficient proof.

When the appellate courts amended ORAP 1.35(1)(b)(iii)(A) after 2015, they appear to have merely inserted the additional class of delivery into the rule, without regard to the fact that the statute says that "any record" will do for that class.

Because the concurrence concludes that the above provisions are consistent, it determines that appellants using a class of mail calculated to achieve delivery within three days *cannot* rely on a PVI alone. Rather, insisting that ORAP 1.35(1)(b)(iii)(A) controls, the concurrence concludes that a PVI must be accompanied by some other form of proof. 298 Or App at ___ (Aoyagi, J., concurring). In my view, because ORAP 1.35(1)(b)(iii)(A) is irreconcilable with ORS 19.260(1)(b), the opposite is true: the statute governs, and defendant's PVI alone is sufficient proof.

I also disagree with the concurrence's understanding that, under ORS 19.260, an appellant must personally *obtain* proof *from* a mail delivery service. The concurrence is certainly correct that the party filing a notice of appeal must "ha[ve] proof from the [USPS]" of the date of mailing. However, it imposes an unnecessarily narrow and statutorily inappropriate definition of what it means to "ha[ve]" something. *Webster's Dictionary*, for example, defines "to have" as "to hold, keep, or retain esp. in one's use, service, regard, or affection or at one's disposal" in a general sense. *Webster's Third Int'l Dictionary* 1039 (unabridged ed 2002); *see also id.* (explaining in the synonym section that "have" is "a very general term indicating *any* condition of action or control, retaining, keeping, regarding, or experiencing as one's own" (emphasis added)). To "have," then, does not require one to personally or physically possess something. I can "have" a pizza that is on its way to me, for example, but it can currently be in the physical possession of the delivery driver. It follows then, that the statute does not require a party to actually, physically, possess the proof they intend to rely on from the mail delivery service.

As the concurrence notes, it would be "absurd" to require defendant to obtain her envelope from the court and then re-file it. 298 Or App at ___ (Aoygai, J., concurring). I agree with the concurrence on this point, but in my view, the

statute requires nothing of the sort. The statute requires that the proof the appellant "has"—or holds in his or her service—be filed with the court. As noted above, the legislature specifically provided that "any record of mailing" from the USPS that shows the date of mailing is sufficient proof. A PVI is a record of mailing from the USPS that shows the date of mailing, and thus, it is sufficient proof. I would hold that filing that proof could be accomplished by giving an unmarked envelope to a postal clerk for application of a PVI, and fairly assuming that the court will place that envelope as a digital file in the court records upon receipt. Precisely that process occurred in this case: When defendant's envelope with a PVI was delivered to this court, the Appellate Administrator's staff scanned the envelope, marked it received, and made it part of the appellate record.

I next address the related, but distinct, component of ORS 19.260(1)(b) which requires that, in order to use the date of mailing as the date of filing for purposes of initiating an appeal, the proof of the mailing date "must be *certified* by the party filing the notice and filed thereafter" with the court. (Emphasis added.) The concurrence apparently understands the ORS 19.260(1)(b) "certification" to mean that a party must somehow "certify" the actual proof—from the mail delivery service—of the mailing date. 298 Or App at ___ (Aoyagi, J., concurring). Furthermore, the concurrence assumes that the ORS 19.260(1)(b) certification is one of the required contents of a notice of appeal that is necessary for this court to have jurisdiction.

In any appeal, regardless of whether the appellant plans to use the date of mailing as the filing date or not, an appellant must "certify" the date he or she filed the notice of appeal with the administrator. ORAP 2.05; *see also Rivas-Valles v. Board of Parole*, 275 Or App 761, 767, 365 P3d 674 (2015), *rev den*, 359 Or 777 (2016) (stating that the Oregon Rules of Appellate Procedure in effect at the time of the enactment of a statute provide relevant context). That "certification" process is outlined in ORAP 2.05: A "notice of appeal shall be substantially in the form illustrated in Appendix 2.05 and shall contain," among other things, "[a] certificate of filing, specifying the date the notice of appeal was filed with the Administrator." ORAP 2.05(11).

Appendix 2.05 contains forms for use by parties who wish to file an appeal. One form, entitled "Certificate of Filing," provides the following language for parties to fill in the blanks:

> "I *certify* that on [date], I filed the original of this notice of appeal with the Appellate Court Administrator at this address:
>
> "Appellate Court Administrator
>
> "Appellate Court Records Section
>
> "1163 State Street
>
> "Salem, Oregon 97301-2563
>
> "by [specify method of filing]:
>
> "*United States Postal Service, ordinary first class mail*
>
> "United States Postal Service, certified or registered mail, return receipt requested
>
> "hand delivery
>
> "other (specify) _____
>
> "[Signature of appellant or attorney]
>
> "[Typed or printed name of appellant or attorney][.]"

(Emphasis added.)

Accordingly, a party may "certify" that he or she *filed* a notice of appeal on a particular date by simply indicating so on a form, signing it, and filing it with the court. Defendant submitted a form containing language similar to the above with her appeal. Defendant certified that she sent her notice of appeal by first class mail on Monday, July 9—the day that the majority correctly identifies as the last day defendant could have successfully filed an appeal.

Unfortunately, neither the Oregon Rules of Appellate Procedure nor its corresponding appendix address how a party may "certify," pursuant to ORS 19.260(1)(a)(B), the proof of a *mailing* date. What is clear from the rule, however, is that *if* ORS 19.260(1)(a)(B) requires a certificate *in*

addition to the one already required by ORAP 2.05, such additional certification is *not* one of the components that a notice of appeal "shall contain." *See* ORAP 2.05. In other words, if defendant was required to "certify" the actual proof of the date of mailing (the PVI on the envelope), she could submit such certification *after* her notice of appeal was received by the Administrator. This reading of what "certification" means under ORS 19.260(1)(a)(B) does not hinge solely on the absence of any requirement in ORAP 2.05. It is also supported by the language of ORS 19.260(1)(a)(B) itself, stating that the proof must be certified "and filed with the court *thereafter*." While the statute does not address what "thereafter" means, I would conclude that it means sometime after the date a party mails their initial notice of appeal. *See Webster's Third Int'l Dictionary* 2372 (unabridged ed 2002) (defining thereafter as, simply, "after that").

As the legislative history of the amendments to ORS 19.260(1) demonstrates, the intent behind the statute was to avoid "a trap for the unwary with very serious consequences." Testimony, House Committee on Judiciary, HB 2336, Feb 4, 2015, Ex 10 (statement of Jordan R. Silk). The testimony provided by the Appellate Practice Section focused on protecting "practitioners who do not handle appeals on a frequent basis," which, by definition, would include such *pro se* litigants. *See* Or State Bar Bylaws 1.2 ("We are champions for access to justice, fostering the public's understanding of and access to legal information, legal services, and the justice system."). In light of that history, I would exercise caution in penalizing parties who attempt to follow the complex maze of rules that determine whether or not a person will have a chance to get their case in front of an appellate court. In this case, defendant, a *pro se* litigant, filed a notice of appeal that contained all of the documents that are necessary in order for us to exercise jurisdiction. She used a permissible class of mail to deliver her notice of appeal and mailed it within the required timeframe. Finally, the Administrator received defendant's notice in an envelope marked with a PVI—proof from the USPS of the date defendant mailed the notice. If defendant was required to submit an additional certification that the PVI was proof of the date that she mailed her notice, I would hold that

she could submit that certification after the initial notice of appeal was filed. Therefore, I respectfully dissent from the majority, and I disagree with the concurrence on the "proof" requirement.