



June 19th, 2020

Dear Governor Brown, President Courtney and Speaker Kotek,

With the pending Special Session on Police Accountability and COVID-related legislation called for Wednesday, June 24th, we wanted to call attention to the suspension of criminal trial timelines outlined in LC 29, dated April 8, 2020, section 45, and how passing these proposed laws puts our clients at risk of being held pre-trial indefinitely. We know that a work group was convened and has provided improved language that has been included in LC 37 as a stand alone bill that is now in LC 45 Section 14. However, our concerns about indefinite detention remain, and our current statutes provide for the much needed flexibility the proponents say is needed during the COVID pandemic. For simplicity, we will refer to LC 37.

We acknowledge that conducting a trial during the pandemic is difficult. We are all experiencing new challenges to provide the services and supports that are essential to a thriving democracy. We shouldn't risk our values because it becomes harder to do the work. While the language in LC 37 continues to allow trials to move forward, and puts a higher bar on whether or not an individual should be held in custody longer than 180 days, it also still allows for indefinite pretrial detention.

LC 37 hasn't been proposed in a vacuum. It's part of a larger context. In particular, it represents a choice about who bears the cost of COVID-19, and its effect on the criminal justice system. When trials can't be timely held because of COVID-19, does society bear the cost collectively, in the form of releases the state might have preferred to avoid? Or will you choose to shift some of that cost to poor people and people of color, in the form of indefinite pretrial detention? That's the decision you face.

Current law limits pretrial detention to 180 days for people facing charges other than murder, treason, and certain violent felonies. LC 37 changes that. Section 1, subsection (3), would authorize presiding judges to *indefinitely* jail people charged with *any crime* pending trial during the COVID-19 emergency, under certain conditions. We ask you to reject that proposal, for four basic reasons.

- **LC 37 unnecessarily expands the use of *preventive* pretrial detention to people accused of petty crimes;**
- **LC 37 unnecessarily expands the use of *indefinite* pretrial detention to people accused of petty crimes;**
- **The changes will disproportionately impact people of color; and**
- **The changes don't apply to rich people at all.**

LC 37 expands the use of *preventive* pretrial detention to people accused of petty crimes.

In our legal tradition, pretrial detention is supposed to be strictly limited. The main reason courts order people held pending trial is supposed to be to ensure their appearance at trial, not to prevent them from committing anticipated future crimes. “Preventive detention” (detention to prevent future crimes) is morally and legally suspect, because it flouts the presumption of innocence based on dubious predictions of future dangerousness. For reasons like those, in our tradition, preventive detention is the exception, not the rule.

LC 37 departs from that principle. It authorizes pretrial detention, even for people accused of non-violent felonies and misdemeanors, for the express purpose of preventing them from committing future crimes. We ask you to reject LC 37’s expansion of the use of preventive detention to people charged with petty crimes.

LC 37 expands the use of *indefinite* pretrial detention to people accused of petty crimes.

Of course, there are exceptions to our legal tradition’s strict limits on preventive detention. ORS 135.240(1) already allows indefinite pretrial detention of people charged with the most serious crimes. And ORS 135.240(4) allows indefinite pretrial detention of people charged with violent felonies who present a clear danger to the alleged victim or the public. You don’t have to change the law to make sure those defendants can be held indefinitely without trial during the COVID-19 emergency.

What current law does *not* allow is indefinite pretrial detention of people charged with non-violent felonies and misdemeanors. LC 37 would change that, allowing indefinite pretrial detention of people accused of petty crimes.

As the public is calling for restructuring laws and policy that have perpetuated violence in all of its forms against Black and Brown people, we cannot counter that call and the work you all are doing to answer that call with this law, even if only temporary. While this proposed legislation is not directly tied to the police accountability legislation, choosing to keep our current statutes in place will go much further to support the work that you do to untangle and destroy the long roots of systemic racism in that legislation. Even the slightest chance of indefinite detention will more likely than not be applied to a person of color than a white person.

Of course, LC 37’s expanded authority for indefinite pretrial detention would expire after the COVID-19 emergency ends. But given the uncertainty about the course the pandemic will take, that is a decidedly *indefinite* limitation.

LC 37’s vague standards will disproportionately impact people of color.

The current proposal authorizes presiding judges to impose indefinite pretrial detention during the COVID-emergency for people charged with non-violent crimes and misdemeanors whenever the court finds that

“there is a substantial and specific danger of physical injury or sexual victimization to the victim or members of the public by the defendant if the defendant is released, and that no release

condition, or combination of release conditions, is available that would sufficiently mitigate the danger.”

As with any vague standard, that text leaves the real decision criteria unspecified. Just *how* “substantial and specific” the danger must be to warrant indefinite pretrial detention?

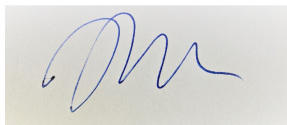
LC 37’s expansion of indefinite pretrial detention doesn’t apply to rich people.

Most disturbingly, LC 37’s elimination of the time limits on pretrial detention would apply *only* to people who can’t post bail. A wealthy person charged with a non-violent felony or a misdemeanor can still bail out, no matter how dangerous they are to the public or the victim. LC 37 is an expansion of wealth-based detention at a time when other state legislatures rethink, abolish, or neuter the cash bail system.

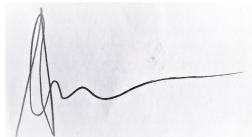
Needless to say, you are working hard right now to *reduce* the racially disparate impacts of our broken criminal justice system. LC 37 would *gravely exacerbate* those disparities, because it applies only to people who can’t post bail, who are disproportionately people of color. It would be especially counterproductive to enact such a change at a time like this.

In sum, LC 37 doesn’t just “extend criminal timelines.” It expands pretrial detention for expressly *preventive* purposes, undermining the presumption of innocence. It authorizes indefinite pretrial detention for people charged with non-violent crimes – but only if they can’t post bail. And because of its vague “dangerousness” standards, it will disproportionately impact people of color.

LC 37 lets judges jail poor people and people of color indefinitely pending trial on minor charges, while rich white people charged with the same crimes walk free, no matter how dangerous they are. Especially now, that is unacceptable. We urge you to reject LC37’s expansion of indefinite pretrial detention.



Andrew Robinson, President, AFSCME Local 2435 (OPDS Appellate Attorneys)



Autumn Shreve, AFSCME Local 2805, Multnomah Defenders, Inc.

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a horizontal line and a small loop.

Steven Eberlein, AFSCME Local 3668, Metropolitan Public Defender