



**DEPARTMENT OF JUSTICE  
Criminal Justice Division**

**TESTIMONY ON SENATE BILL 999 (As Amended)  
For the Senate Judiciary Committee  
April 3, 2019**

**Presented by:**

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**SUMMARY**

Senate Bill 999 as amended contains a fix to the implied consent portions of Oregon's DUII statutes – a need that arises out of the recent Oregon Supreme Court opinion in *State v. Banks*, 364 OR 332 (2019). In this case, Mr. Banks was arrested for DUII. He was informed of the statutory rights and consequences associated with breath testing, including the license suspensions for failing or refusing a breath test as well as that a refusal to give a test can be used against him in court. He was then asked, "Will you take a breath test?" The conveyance of this information is statutorily required by ORS 813.130. The court in *Banks* ruled that a defendant can revoke their implied consent to provide a test. Because of this, the information about rights and consequences provided in accordance with statute has been made unclear. It is no longer certain whether a person is being asked to voluntarily consent to a breath test or instead being asked to physically cooperate with a breath test, a significant legal distinction. The court ruling suggests that a person's refusal to submit to a breath test could not be used against them in court *unless* an officer clarifies whether the person is being asked for voluntary consent - a refusal of which cannot be commented upon, or they are simply being asked to provide physically cooperation - a refusal of which can be commented upon. Difficulty in applying these parameters has caused immediate and widespread uncertainty throughout state law enforcement, greatly complicating even routing prosecution for DUII.

## **BACKGROUND**

All 50 states have implied consent laws that require a motorist, as a condition of driving, to consent to a breath test. This consent is “implied” through the conveyance of the right to drive. The purpose of implied consent is to incentivize individuals to provide a breath test without the more invasive manner of non-consensual blood draws. Those incentives take the form of administrative penalties for failing or refusing to provide a breath test as well as the state’s ability to comment on a person’s refusal to give a breath test in trial. This intent is illustrated in Oregon law under ORS 813.130, which outlines the information that must be given to a person before they are asked to give a breath test under implied consent. ORS 813.310 specifically allows the state to comment on a person’s refusal to give a breath test in trial.

The *Banks* court interpreted the implied consent statute to say that when a person refuses a breath test, they are revoking their implied consent to give a test under current ORS 813.100(2). The court found that since the statute allows a person to revoke the person’s implied consent, the state must clarify whether it is asking for voluntary consent to provide a breath test - the refusal of which cannot be commented upon pursuant to the constitution; or if the state is merely asking for physical cooperation with a breath test based on another lawful basis - the refusal of which can be commented upon.

## **PROPOSAL**

Based on the *Banks* opinion, it is presently impossible for the state to comply with Oregon law as currently written. ORS 813.130 specifies the statement of rights and consequences that must be provided by law. Because these provisions are statutory, they cannot be varied without legislative action. Senate Bill 999 -1 will bring implied consent into realignment with the holding in *Banks*. Oregon’s statutes would be amended to first inform a person of the consequences of passing or failing a test which allows the person an opportunity to voluntarily consent. Only if the person refuses then to consent to take a test would the person

then be informed of the consequences of refusing to submit to the test based upon implied consent. Upon the second refusal, the state would be able to then comment on the person's refusal in court, consistent with the long-standing intent of implied consent laws. In addition, the statute must be amended to comply with legislative intent to be able to comment on a person's refusal to submit to a breath test under the statutory implied consent scheme, but not comment upon a person's refusal to provide voluntary consent.

The Supreme Court also recognized that the state may ask for voluntary consent to give a breath test outside the implied consent structure based on ORS 813.140. However, if the state chooses that method there are a additional statutes that must be modified. For example, a person who blows over a .08, "*under implied consent,*" is required to have an ignition interlock while on diversion. The reference to implied consent needs to be removed so that anyone who provides a sample over a .08 is subject to the same consequences. Finally, the statutes that allow for a urine sample must be modified so as not to be intertwined with the implied consent process.

### **CONCLUSION**

Senate Bill 999 as amended is a necessary fix to comply with the requirements of the Supreme Court's opinion in *Banks*. Without this fix, all DUII cases are subject to additional litigation and the state expects further widespread disruption to our system of implied consent and the fundamental prosecution of the crime of DUII.

### **DOJ Contact**

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