



May 27, 2021

Senate Committee on Rules
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

RE: Testimony in Support of SB 48A and the -A5 Amendment

Chair Wagner and Vice Chair Girod, and Members of the Committee,

My name is Gail Meyer, and I am representing the American Civil Liberties Union of Oregon (ACLU of Oregon). We are a nonpartisan, nonprofit organization dedicated to the preservation and enhancement of civil liberties and civil rights, with more than 28,000 members statewide. We are here today in support of SB 48A, -A5.

It should stand to reason that the decision to detain or release a person prior to trial should not be based on wealth: neither the amount of money a person as an individual possesses, nor the amount of money a person might have access to through family and others. To base a person's imprisonment on wealth is not only morally and constitutionally unjustifiable, it is also inherently prejudicial and counter-productive — especially in continuing the disproportionate harms of Oregon's criminal justice system on Black, Indigenous, and people of color (BIPOC) and low-income communities. The ACLU of Oregon stands in support of reforming Oregon's pretrial justice system to eliminate reliance on wealth-based detention, and we consider SB 48A a necessary first step for enacting urgently needed reforms to wealth-based detention.

- **A wealth-based pretrial detention system is irrational and wrong.**

It is irrational and wrong to base a person's liberty or imprisonment on the assumption or illusion that a specific dollar amount will assure a person's return to court. There is no scientific study, premise, or data to determine the amount of money that will assure that a person returns to court and complies with safety requirements while on release. Level of risk and motivation to flee do not translate to dollars and cents. There is no basis to discern whether a lower amount of money might not arguably serve the same goals as a higher amount. In summary, the setting of financial bail has simply resulted in a massive system of preventive detention in the US — where those with wealth are able to avoid detention and those without wealth are imprisoned — with no scientific backing to justify this practice.¹

¹ Pretrial Justice Institute, Key Features of Holistic Pretrial Justice Statutes and Court Rules (2016) page 6, available at <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=743bab92-f9b4-a1f5-dcd8-eab810535231&forceDialog=0>

- **A wealth-based pretrial detention system unfairly discriminates against BIPOC and low-income communities.**

A pretrial system reliant on cash bail by necessity will unfairly discriminate against low-income communities. The government has not collected national data on race or ethnicity of pretrial detainees since 2002, but figures from 2002 data show that nearly 7 in 10 (69%) of detainees were people of color, with Black (43%) and Hispanic (19.6%) defendants disproportionately imprisoned. Since 2002, pretrial jail populations have doubled in size, with unconvicted defendants now making up two-thirds (65%) of jail population nationally.²

More localized studies show that Black felony defendants are over 25% more likely than White defendants to be held pretrial, with young Black men about 50% more likely to be detained pretrial than White defendants. Further, Black and Brown defendants receive bail amounts that are twice as high as bail set for White defendants, while being less likely to be able to afford it. Racial disparities continue to persist even in states that have implemented pretrial reforms.³

- **A wealth-based pretrial detention system unduly and unfairly impacts sentence outcomes.**

Being jailed pretrial severely and unfairly impacts the course of a person's case and sentence outcome. Pretrial detention has a strong coercive effect on individuals to waive their right to trial and plea bargain, regardless of the merits of their defense to the underlying charge. Detained individuals are more likely to plea and more likely to receive a sentence of incarceration, and a longer sentence than persons of the same risk level who were released.⁴ As such, pretrial detention should only be employed when absolutely necessary and no other option is available.

- **A wealth-based pretrial detention system is counter-productive to public safety.**

Recent research has shown that pretrial detention can be counterproductive to public safety in the long run. A recent study determined that across all risk levels, there was no statistically significant difference in rates of failure to appear or new criminal activity depending on whether money was posted as a condition of release. But pretrial detention did impact recidivism upon release. Detention for even one day increased the likelihood of arrest for new criminal activity once released. Low and moderate risk defendants who remain detained recidivated at much higher rates than low and moderate risk defendants who were released during the pretrial period. Eliminating reliance on wealth as a metric to determine release will help to overcome this unintended negative consequence of pretrial detention.⁵

- **The Oregon Constitution guarantees rights to the accused and to crime victims.**

² Prison Policy Initiative, How Race Impacts Who is Detained Pretrial, *available at* https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/

³ *Ibid.*

⁴ Criminal Justice Policy Research Institute, Portland State University, The Effect of Pretrial Detention in Oregon (2019), available at <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/PublicTestimonyDocument/18871>

⁵ Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, The Hidden Costs of Pretrial Detention, Laura and John Arnold Foundation (2013), *available at* <https://www.nicic.gov/hidden-costs-pretrial-detention>

In reforming Oregon's pretrial system of justice, it is important to note that Oregon is among a minority of states whose constitution enshrines the right to release on bail. Article I Section 14 provides that offenses other than murder and treason "shall be bailable by sufficient sureties." Section 16 guarantees that "excessive bail shall not be required." In 1999, Oregonians added Section 43 which affords crime victims the right "to have decisions . . . regarding the pretrial release of a criminal defendant based upon the principle of reasonable protection of the victim and the public." To date there is no Oregon court decision which explains how these three constitutional provisions interrelate nor how their provisions are to be accommodated or harmonized. ACLU of Oregon is willing and eager to participate in those conversations as further attention is given to SB 48A and efforts in Oregon to create greater fairness in our criminal justice system by eliminating wealth-based detention.

Oregonians are calling on Oregon's leaders to reimagine public safety so that it is data driven, equitable, and fair. Ending wealth-based detention is an important part of Oregon's work in reimagining public safety.

For these reasons, the ACLU of Oregon respectfully urges you to support SB 48A and the -A5 Amendment.

Thank you,

Gail Meyer
On behalf of the ACLU of Oregon