**TO:** **Sen. Kate Lieber, Co-Chair**
**Rep. Jason Kropf, Co-Chair**
**Members of the Joint Committee on Addiction and Community Safety Response**

**FR:** **Oregon District Attorneys Association**
**Oregon Association of Chiefs of Police**
**Oregon State Sheriffs' Association**
**League of Oregon Cities**

**RE:** **HB 4002 – 1 Amendment**

**February 7, 2024**

On behalf of your public safety partners we appreciate the opportunity to provide the below comments on the proposed -1 Amendment to HB 4002. We applaud the Legislatures commitment to tackle the drug crisis facing Oregon and continue to believe there is an opportunity to pass meaningful policy that will arm your communities, behavioral health and law enforcement partners with the tools needed to address Oregon's severe addiction crisis and fentanyl overdose-related deaths.

We continue to believe that the recriminalization of an E-Violation to a C-Misdemeanor is an inadequate tool to tackle the crisis. We also have significant concerns that the current proposed deflection program unnecessarily complicates a C-Misdemeanor on the front end and back end and threatens to strip all benefits of any recriminalization. Law enforcement needs clear, meaningful and simple solutions to this crisis.

We continue to be a willing participant in the stakeholder conversations and appreciate all of the time the Co-Chairs and Republican leaders have afforded us over the past few months. Unfortunately, we continue to have serious concerns about the form and function of the recriminalization outlined in the -1 Amendment. We offer the following comments and look forward to continued discussion.

**HB 4002 -1 Amendment**

**Section 20 – Boyd Fix - SUPPORT**
We appreciate the clear language reflected on pg. 45, line 7. This simple language will return the law to before the *Hubbell* decisions and allow prosecution for drug dealing when the person possesses drugs with a generalized intent to transfer them to any person or persons in the future; i.e., that we shouldn't have to wait until a drug deal occurs, and that the person is accountable whether or not they have any specific transaction in mind.

**Section 21 – New Enhancements – Oppose w/o Amendment**
The new sentence enhancements for drug dealers that target vulnerable populations, like those seeking addiction treatment, the unhoused and children, are good additions to the base bill. We do not support the new mental state attached to the enhancements that will require prosecutors prove the person knew or reasonably knew they were selling by a protected space. This is inconsistent with current case law where, for example, ORS 475.904 does not require proof that defendant *intended* to transfer drugs within 1,000 feet of a school. Rather, it "requires proof that defendant possessed controlled substances in a quantity not consistent with personal use and that the possession occur within 1,000 feet of a school." *State v. Rodriguez-Barrera*, 213 Or App 56, *rev den'd*, 343 Or 224 (2007).

We also believe the park protection needs to include at a minimum across the street so that the new law doesn't push drug dealers across the street and into neighborhoods.

We suggest modifications to pg. 51, line 4 -10:

> **(a) It is unlawful for any person to deliver a schedule I, II or III controlled substance ~~The person knows, or reasonably should have known, that the delivery is occurring~~ within 500 feet of the real property comprising a treatment facility;**
>
> **(b) It is unlawful for any person to deliver a schedule I, II or III controlled substance ~~The person knows, or reasonably should have known, that the delivery is occurrin~~g within 500 feet of the real property comprising a temporary residence shelter; or**
>
> **(c) The delivery occurs within a public park or 30ft of the public park.**

We believe that the sentencing structure for these new enhancements should mirror the current practice of selling within 1,000 ft of a school – which is currently a Felony, Level 8 on the crime seriousness scale. The proposed sentencing scheme in the - 1 Amendment not only reduces this to a 7, but also separates the for consideration and without consideration, further reducing from an 8 to a 5. A reduction from 8 down to 7 moves these cases from optional probation to presumptive probation; and at a level 5, at least half of these cases will likely be presumptive probation or less than a 12-month

sentence, unless greater criminal history. As a refresher current crime seriousness for Dealing a Controlled Substance (selling) is:

- DCS – level 4
- DCS for consideration – level 6
- DCS CDO, Substantial Qty – 8
- DCS SSQ – 9 or 10 (depending on amount/weight)
- DCS w/in 1000 ft. of school – 8

Finally, as to this Section we support the definitions reflected on pg. 53, line 6-12 that allow for temporary residence shelters to include hotels/motels that are being utilized across Oregon to shelter our unhoused when communities are not able to construct new affordable or temporary housing.

**Section 22 – Modifying Pretrial Hold for Drug Dealers - SUPPORT**
We support this Section directing the Chief Justice and the CJAC to reevaluate the pretrial release guidelines as it relates to serious drug dealers and manufacturers. This discussion has started, but it is currently unclear if this modification will be completed prior to the conclusion of the Legislative Session and accordingly we ask it remain in the final bill. SB 48 (2021) required the Presiding Judge of each judicial district, following guidance from the Chief Justice and her Criminal Justice Advisory Council (CJAC), to enter a standing pretrial order specifying to the sheriff (or any other supervising entity) those persons and/or offenses that are subject to "Release on Own Recognizance" (ROR), subject to conditional release, or that are not eligible for release until arraignment. A modification in these guidelines will make it clear that a pre-trial hold for dealers is a community priority.

**Section 24 - 35 – Recriminalizing Possession of a Controlled Substance – OPPOSE w/o Amendment**
While we acknowledge the step towards recriminalizing possession of small quantities to serious drugs is reflected in the -1 Amendment, we continue to believe the reclassification at a C-Misdemeanor is grossly inadequate. The proposed C-Misdemeanor limits the amount of sanction units/jail days in the supervision period. ORS 137.540 (2)(a) limits the jail days/sanction units for supervision to 50% of the maximum period of confinement that could be imposed for the offense – which means the proposed C-Misdemeanor would only allow 15 possible jail days over the course of the supervision term (30-day max sentence). This limitation could make successful supervision and treatment, especially for high risk/high need individuals who will require a more intensive term of treatment to assist with their addiction, challenging and unlikely to succeed. ORS 135.753(2) further limits any intended benefit of the C-Misdemeanor, by serving as a bar from future prosecution if the misdemeanor is dismissed for lack of defense counsel. ORS 135.753(2) prohibits the State from re-filing a B or C misdemeanor after a dismissal provided that the dismissal was due to a civil compromise, a speedy trial violation, or the motion of the State or the court.

Complying with the requirements of a specialty court or supervision period is difficult, and we believe an A-Misdemeanor provides an additional incentive for a defendant to comply with their recovery program. Specialty courts, like drug courts, and behavioral health courts require a defendant to put in the work get better. That goal may be enough for some people before these courts but others need the possibility of sanction in order to complete their program. The consequences of a C-Misdemeanor don't sufficiently vector a person suffering from addiction toward the difficult goal of recovery.

We also note concerns with the Affirmative Defense outlined in Section 25, page. 54. This affirmative defense effectively bars the benefits of any recriminalization from any community that has failed, or delayed, in establishing a deflection program. The added steps that the community seek approval for a deflection program from the CJC, regardless if they are seeking CJC funding or not, further serves as a barrier and delay to any benefit recriminalization provides to the community. We have significant concerns this effectively delays any benefit of recriminalization 6-months to 1-year or even beyond.

We do want to flag the improvement reflected in the new definition of "completed" on line 28, pg. 54 which now requires more than a simple phone call, which the Class E-Violation has shown us as completely unsuccessful. The added step of a screening AND at least one additional contact including intervention planning, case management or connection to services is closer to what is needed for a pre-booking deflection program to be successful. We would support a step further – and even a longer day in the alignment period – to allow the successful COMPLETION, not just step, towards the recommended treatment plan.

There are also several technical concerns about the pre-booking deflection proposal not reflected in this draft – for example who is responsible for providing the deflection program notice of the citation? What if the individual refuses the citation and defense argues they were never offered it? How does the prosecutor know who has or hasn't completed a deflection program? How does the Court and defendant know what to do on that scheduled arraignment date? Because the current envisioned model is so dramatically different than the current criminal justice system model it is not only imperative we be clear in the roles and responsibilities of this program, but that we develop one that works – and our preference is simple for all to understand and implement. Without that the tool of recriminalization is meaningless.

**Section 36 - 39 – Making PCS a Drug Designated Misdemeanor - SUPPORT**
We support this provision and strongly believe that attaching community correction supervision, with addiction evaluation and treatment is a strong component of a successful tool to tackle the drug crisis. However, as noted above, without meaningful sanction units/jail days on the back end of these cases, probation officers will have their hands tied to encourage compliance or hold individuals accountable when there are violations of supervision conditions.

**Section 40 - 41 – Conditional Discharge – OPPOSE w/o Amendment**
While we support a meaningful pre-booking off ramp for these low level cases, we continue to have concerns that the proposed deflection + conditional discharge + affirmative defense + immediate set aside reflected in the -1 Amendment presents an unworkable, overly confusing and burdensome path that will make any benefit of recriminalization completely moot in our communities.

Considering the required deflection on the front end and the availability of an automated expungement upon successful completion of treatment/supervision, we believe further revision is need without the added cost, delay and complexity created by mandatory conditional discharge. DA discretion for conditional discharge would provide the flexibility if there are multiple offenses committed close in time. In addition, we have concerns about including a mandatory conditional discharge off ramp under the proposed deflection concept given that the defense bar has shared they will require OSP crime lab drug testing for all drugs prior to recommending their client enter a conditional discharge program. This will further delay these cases (estimated 1- 4 months) and put significant stress on the crime lab.

The current framework also provides endless off ramps with no escalator (meaning if two priors within 1-year it would increase to an A-Misdemeanor). This means an individual can enter pre-booking deflection countless times, re-enter the criminal justice system countless times, and prosecutors hands are tied as the conditional discharge offer is mandatory as outlined in the -1 Amendment. So even when we know these off ramps have failed for, example 5 times, we are continued to offer the same path, regardless of the likelihood of success.

**Section 42 - 45 – Expungement**
We support dismissal of a charge upon successful completion of the supervision or conditional discharge program, but continue to ask that the conditional discharge and supervision period provide a meaningful opportunity for engagement by the defendant.

**Section 61 – Data Tracking**
While we understand the desire for data tracking to determine if there are racial and other demographic disparities in the enforcement of the proposed C-Misdemeanor, we urge consideration of revised language that authorizes CJC to receive data for these purposes from state and local governments and courts. In addition, we recommend narrowing this data collection to PCS and not DCS - users versus dealers are very different data sets which raise very different issues.

**Section 67 – Expansion of Welfare Holds**
While we support the inclusion of this section and the expanded hold times from 48-hours to 72-hours, we do have concerns that without meaningful and targeted investment in new treatment and stabilization centers, this additional hold time provides a false solution. This may be an area that needs to be tabled until the 2025 Session when we can assess the availability of stabilization centers across Oregon.