IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party, v. MICHAEL HANSEN, Defendant-Relator.	SC No. S068166 Multnomah County Circuit Court No. 20CR55932 **Mandamus Proceeding**

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES FOUNDATION, ACLU FOUNDATION OF OREGON, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, OREGON CRIMINAL JUSTICE RESOURCE CENTER, DISABILITY RIGHTS OREGON, PORTLAND FREEDOM FUND, THE FAMILY PRESERVATION PROJECT, THE PORTLAND INTERFAITH CLERGY RESISTANCE, AND THE APPELLATE DIVISION OF THE OFFICE OF PUBLIC DEFENSE SERVICES IN SUPPORT OF RELATOR'S OPENING BRIEF

Alternative Writ of Mandamus Issued to the
Honorable Heidi H. Moawad, Multnomah County Circuit Court Judge

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INTRODUCTION

Amici support relator's request that this court hold that the circuit court violated the state and federal constitutions and Oregon's pretrial statutory scheme when it ordered security release but set a security amount that relator cannot pay. That amounted to a detention order based solely on relator's inability to pay security. *Amici* ask this court to end the widespread practice of wealth-based pretrial detention in Oregon state courts and to help bring circuit courts practices into line with the intent of the Constitution and the Legislature. Doing so will help alleviate wealth-based disparaties in the criminal-justice system—disparties that result in People of Color being more likely to be convicted and upon conviction to receive longer sentences—and increase public confidence in the system's fairness.

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ARGUMENT

I. This case illustrates a statewide problem with pretrial release where circuit courts impose bail amounts as a proxy for a detention order

A. An arrestee has a right to pretrial release in the absence of a valid detention order.

An arrestee has a fundamental interest in pretrial liberty. The Oregon and United States Constitutions prohibit circuit courts from detaining a person solely because of an inability to pay bail. Moreover, a circuit court may issue a detention order for a person charged with a violent felony only if the court the makes the findings set out in the Oregon Constitution and in the Oregon Revised Statutes.

Article I, section 14, of the Oregon Constitution, provides that "Offences [*sic*], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." That provision, which was in the original state constitution, creates a right to pretrial release in Oregon. *Priest v. Pearce*, 314 Or 411, 416-17, 840 P2d 65 (1992).

Article I, section 43, provides that designated crime victims have, in pertinent part:

> "[t]he right to have decisions by the court regarding the pretrial release of a criminal defendant based upon the principle of reasonable

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> protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for trial. Murder, aggravated murder and treason shall not be bailable when the proof is evident or the presumption strong that the person is guilty. *Other violent felonies shall not be bailable when a court has determined there is probable cause to believe the criminal defendant committed the crime, and the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release*."

Or Const, Art I, § 43(1)(b) (emphasis added). The voters added that provision to the Constitution in 1999. *State v. Slight*, 301 Or App 237, 245, 456 P3d 366 (2019).

The legislature created a statutory scheme that implements the right to pretrial liberty and strict requirements for pretrial detention orders under Article I, sections 14 and 43. ORS 135.230-290. Consistent with the constitutional right to bail, the legislative scheme provides that a court shall release an arrested person unless a provision of law expressly authorizes pretrial detention. ORS 135.240(1). The statutory scheme permits a court to deny release to an arrestee charged with a violent felony only under the following circumstances:

> "(4)(a) Except as otherwise provided in subsection (5) of this section[regarding conditions of release for a defendant charged with a Measure-11 offense], when the defendant is charged with a violent felony, release shall be denied if the court finds:

> "(A) Except when the defendant is charged by indictment, that there is probable cause to believe that the defendant committed the crime; and
>
> "(B) By clear and convincing evidence, that there is a danger of physical injury or sexual victimization to the victim or members of the public by the defendant while on release."

ORS 135.240. Thus, a circuit court must release an arrestee charged with a violent felony upon certain conditions, which may include a security amount, unless the court makes the findings required by ORS 135.240(4)(a). ORS 135.230(10) (defining "release decision"); *see also Slight*, 301 Or App at 249 (so stating). Those findings mirror the findings required by the "other violent felonies" provision of Article I, section 43.

The statutory scheme requires a court to "set a security amount that will reasonably assure the defendant's appearance" when a defendant is not released on personal recognizance or conditional release:

> "If the defendant is not released on personal recognizance under ORS 135.255, or granted conditional release under ORS 135.260, or fails to agree to the provisions of the conditional release, the magistrate shall set a security amount that will reasonably assure the defendant's appearance. The defendant shall execute the security release in the amount set by the magistrate."

ORS 135.265(1). The security amount cannot exceed a defendant's ability to pay because security cannot cannot function as a detention order. *Gillmore v. Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987).

The federal constitution similarly recognizes the right to pretrial liberty and right against detention based on wealth, and it places comparable restrictions on detention orders. As set out in relator's brief, the Due Process Clause protects an arrestee's fundamental interest in pretrial liberty. *United States v. Salerno*, 418 US 739, 750-51 (1987). The Equal Protection and Due Process Clauses forbid jailing a person solely because of their inabilty to afford a sum of money. *Bearden v. Georgia*, 461 US 660, 667-68 (1983). That includes a person's inability to afformed a security amount. *See In re Humphrey*, __ P3d __, 2021 WL 1134487, *7 (Cal March 25, 2021) (holding that detaining an arrestee pretrial solely because they cannot pay bail violates the person's "state and federal equal protection rights against wealth-based detention as well as the [arrestee's] state and federal substantive due process rights to pretrial liberty").

Here, the court's order setting security functions as a pretrial detention order. The court declined to make the findings necessary to detain relator on the manslaughter charge, which is a violent felony. Relator's Opening Brief (Rel Op

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Br) at ER-134-36. The court reduced the security amount from $350,000 to $102,500. Rel Op Br at ER-137. But relator cannot pay even the reduced amount. *Id*. at ER-136. Because relator would be released on security if he had more money, the security amount is the sole basis for his pretrial detention. That violates the state and federal constitutions, as set out in the relator's opening brief.

B. Oregon circuit courts regularly impose bails amounts that an arrestee cannot afford without entering a detention order under Article I, section 43 or ORS 135.240 (4).

Circuit courts throughout the state impose bail amounts without making the findings required under Article I, section 43, or ORS 135.240(4). In OCDLA members' experience, only some circuit courts occasionally make the findings necessary to justify pretrial detention. Circuit courts often set a bail amount that exceeds what an arrestee can afford without making the requisite findings.[1] Orders setting bail at unaffordable amounts are the functional equivalent of detention orders. As a result, low-income persons remain in pretrial detention only because they cannot afford to post bail. *See Larsen v. Nooth*, 292 Or App 524, 535-36, 425 P3d 484 (2018) (James, J., concurring) ("Because of the stark demarcation that

[1] OCDLA bases that experience on anecdotal evidence and a recent informal survey of its members. The survey was not scientific, but its results were consistent with the anecdotal evidence.

exists between in-custody and out-of-custody defendants, the base characteristic shared amongst those who are restrained in court is not necessarily violence, or security concern, or risk of disruption—it is poverty.").

Amici also submit for the court a letter from public-defense providers around the state that describes the "widespread problem of Oregon circuit courts using a bail amount that a defendant cannot pay as a substitute for a detention order." APP-1 (letter from public defense providers in Coos, Deschutes, Lane, Marion, Multnomah, and Washington Counties). As the public defenders explain, "In our cases, judges routinely set security amounts for our court-appointed clients that exceed what they can pay. In every case of a person charged with a violent felony that we are aware of, the court has not made the findings required by ORS 135.240(4)." APP-1. Statewide practice thus results in wealthier individuals obtaining release by paying security while less wealthy people remain in custody pretrial solely because they cannot afford security. *Id*. That undermines public defenders' attempts to help their clients succeed in the community and results in wealth-based disparities in the outcomes of criminal cases:

> "The disparity in pretrial release results in a disparity in outcomes. Our clients accept worse plea offers because of the stresses of pretrial custody. Our clients who are in pretrial custody receive longer sentences because they have not had the opportunities afforded people

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> on pretrial release, like participating in treatment programs. And, in many cases, our clients spend more time incarcerated awaiting trial than they would if they were to accept the state's offer."

APP-1.

II. Using an unaffordable security amount as a proxy for a preventive detention order both decreases public safety and exacerbates existing disparities in the criminal legal system.

A. Social science has found a strong correlation between the length of pretrial incarceration and both new arrests and failures to appear.

The circuit courts' routine imposition of unaffordable bail had led to an excessive amount of pretrial incarceration. Social science research shows that over-incarceration pretrial is counterproductive to the goals of Oregon's bail and pretrial-release systems, which are to secure the individual's appearance and prevent the individual from committing new offenses. *See* Oregon Criminal Justice Commission (CJC), *Oregon Public Safety Task Force Report Per House Bill 2238* 3 (2017) *available at* https://www.oregon.gov/cjc/CJC%20Document%20Library/PSTFReport%20-%20Final%20Report%20-%2012-4-2020.pdf (hereinafter, "CJC Report") (explaining those goals).

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First, social science suggests that longer pretrial detention is associated with increased rates of failures to appear (FTA). Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention* 10 (2013) *available at* https://nicic.gov/hidden-costs-pretrial-detention. In a Kentucky-based study investigating the relationship between the length of pretrial detention and failure to appear, researchers found that, "when other relevant statistical controls are considered, defendants who are detained 2 to 3 days pretrial are slightly more likely to FTA than defendants who are detained 1 day (1.09 times more likely)." *Id.* at 10. Longer pretrial incarceration had an even greater negative impact on individuals who otherwise presented a low risk of FTA on an actuarial tool.[2] The study found that individuals with lower risk scores are *more likely* to FTA the longer that a court holds them in pretrial custody: as compared to low-risk arrestees detained pretrial for one day or less, low-risk arrestees detained for two to seven days were 1.22 times *more likely* to FTA; and1.41 times more likely if detained 15 to 30 days. *Id.* Thus, longer

[2] While a discussion of algorithmic risk scores helps elucidate the results of the Lowenkamp study, *amici* do not endorse the use of actuarial and/or algorithmic tools to inform a pretrial detention decision because the outputs from such tools measure overly inclusive proxy variables (*i.e*. FTA rather than flight), are racially biased, and do not in practice result in marked improvements in pretrial decision-making.

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pretrial incarceration is likely to increase FTAs overall, with worsening outcomes the longer a person is incarcerated.

The same study also investigated the relationship between pretrial detention, length of pretrial detention, and new arrests during the pretrial period. *Id.* at 19. Again, researchers found that pretrial incarceration *increases* arrest rates: persons who were detained pretrial were 1.3 times more likely to be arrested than those who were released at some point pending trial. *Id.* Again, the longer a person's pretrial incarceration, the higher the risk of rearrest. *Id.* And again, the relationship between pretrial detention and arrest was strongest for low-risk individuals. *Id.*

These results are not surprising: when individuals, particularly low-risk individuals, are incarcerated, the community bonds that would have helped promote their future court appearance and general pretrial success—*e.g.*, employment, residential stability, prosocial networks, positive community involvement—are disrupted, which in turn makes them more likely to miss court dates or face rearrest. Anne Milgram, et al., *Pretrial Risk Assessment: Improving Public Safety and Fairness in Pretrial Decision Making*, 27 Fed Sent Rep 216, 217 (2015) (summarizing the takeaways from the Lowenkamp study in Kentucky). Thus, when a court incarcerates individuals simply because they cannot afford

their "right to bail" in a manner tied to wealth rather than individual risk factors, that policy has public-safety costs. Eliminating pretrial detention solely because a person cannot afford a security amount advances the twin goals of Oregon's pretrial release scheme because it is consistent with ensuring a person's future court appearance and helps to reduce the risk of future arrest.

B. Pretrial incarceration negatively impacts the lives and criminal cases of those who are detained and their communities.

In addition to those public-safety concerns, pretrial incarceration comes with extremely high costs for the individuals detained, their criminal cases, and their communities. All incarcerated individuals suffer the tremendous harms from pretrial detention—whether they are detained because of poverty, flight risk, or a finding of dangerousness. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1353 (2014). *See also* Heaton *et al*, 69 Stan L Rev at 715 (noting that, "[f]or misdemeanor defendants who are detained pretrial, the worst punishment may come before conviction").[3] Those harms begin with a

[3] Relator's case presents an excellent example: the state failed to prove by clear and convincing evidence that defendant presents a danger of physical injury to the victim or members of the public as required under ORS 135.240(5)(a)(B). Yet, relator is detained just the same because he cannot afford bail.

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substantial loss of liberty and the deeply personal impact of that loss. Wiseman, 123 Yale L.J. at 13453. Incarcerated individuals are physically separated from their communities; restricted to limited contact with their families and attorneys; their conversations are monitored and costly; and they are subjected to regular, invasive searches. *Id.* at 1353-54. They are also exposed to violence while in jail and potentially exposed to infection disease, as with the COVID-19 pandemic.

Being jailed pretrial also produces negative effects on the course of an arrestee's criminal case and later cases. First, pretrial incarceration substantially impacts the quality of an individual's defense. *Id.* at 1354. For example, an appointed lawyer may not even be aware of an in-custody client until over a week has passed since the court appoints them as counsel. Sixth Amendment Center, *The Right to Counsel in Oregon* 147 (Jan 2019), *available at* https://sixthamendment.org/6AC/6AC_Oregon_report_2019.pdf (accessed March 25, 2021) (so explaining the arraignment and case assignment procedure for cases at Metropolitan Public Defender Services, Inc.). In the early days of representation, that attorney's time may quite reasonably be focused on seeking release for the client rather than on investigating and litigating the actual charges. Thus, valuable time to investigate and preserve evidence is lost while individuals are incarcerated.

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This is especially true for indigent defendants, as many of them do not have stable living circumstances that would safeguard their relevant personal effects while they are in custody, and many of their witnesses may be transient and increasingly difficult to locate over time.

Second, pretrial incarceration strongly encourages individuals to waive their right to trial and plea bargain, consistent with the anecdotal evidence of the criminal defense bar in Oregon. Will Dobbie, Jacob Goldin, & Crystal S. Yang, C. S., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) Am Econ Rev, 201 (2018) (finding that pretrial detention increases the probability of conviction on charges that would otherwise be dismissed, primarily through an increase in guilty pleas, based on data from Miami and Philadelphia); Paul Heaton , Sandra Mayson, and Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan Law Rev 711 (2017) (finding that detained defendants were 25 percent more likely to plead guilty); *Letter from Defense Providers*, APP-1.[4] In particular for misdemeanor-level offenses, a plea and conviction generally

[4] The Oregon-specific data available is presented in the CJC report, which notes that data collection is limited and challenging given various recordkeeping flaws. However, the CJC report offers no reason to believe that the

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means getting out of jail with a time-served offer. *E.g.*, Heaton *et al*, 69 Stan Law Rev at 716. And the incentives for accepting such an offer can be overwhelming. For defendants with a job or housing that depends on their release, such an offer may be impossible to pass up.[5] *Id. See also* Sixth Amendment Center at 215-16 ("Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation."). Thus, even innocent people may plead guilty to lesser charges rather than continue to bear the effects of pretrial incarceration.

A Philadelphia-based study that examined case outcomes across a randomly assigned group of bail magistrates found that pretrial detention led to a 13% increase in defendants being convicted of at least one charge (as well as a 42%

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same trends do not occur under Oregon's system. For that reason, *amici* offer support from the CJC report where available but supplement that report with information collected in other states and our members' experience. Notably, the CJC report explains that data collection regarding race and ethnicity in Oregon jails is flawed, particularly as regards identifying and reporting data on detention of Hispanic and Latinx persons. CJC Report at 16.

[5] Even upon release from incarceration, individuals face additional barriers to accessing healthcare, housing, and employment as a result of incarceration. *See* OREGON HEALTH AUTHORITY, *State Health Assessment Social Determinants of Health* 50 (2018), *available at* https://www.oregon.gov/oha/PH/ABOUT/Documents/sha/state-health-assessment-full-report.pdf (accessed March 24, 2021).

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increase in total incarceration). Megan T Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J L Econ & Org 4, 511, 512 Nov 2018. The study attributes that to "an increase in the likelihood of pleading guilty among those who would otherwise have been acquitted, diverted, or had their charges dropped." *Id.* As one public defender explained, "Your client is desperate, stripped of freedom and isolated from family. Such circumstances make those accused of crimes more likely to claim responsibility, even for crimes they did not commit." Jeffrey D. Stein, *How to Make an Innocent Client Plead Guilty*, The Washington Post, Jan 12, 2018 (https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html) (accessed Apr 14, 2021). As of 2015, 15% of actual-innocence exonerations arose in cases in which the defendant pleaded guilty. National Registry of Exonerations, *Innocents who Plead Guilty*, Nov 24, 2015 (available at http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf) (accessed Apr 14 2021). That effect is even more pronounced in misdemeanor cases:

> "For misdemeanor defendants who are detained pretrial, the worst punishment may come before conviction. Conviction generally

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> means getting out of jail; people detained on misdemeanor charges are routinely offered sentences for 'time served' or probation in exchange for tendering a guilty plea. And their incentives to take the deal are overwhelming. For defendants with a job or apartment on the line, the chance to get out of jail may be impossible to pass up. Misdemeanor pretrial detention therefore seems especially likely to induce guilty pleas, including wrongful ones. This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated. These defendants' incentives to abscond should be relatively weak, and the public safety benefit of detention is dubious."
> Paul Heaton, Sandra Mayson, Megan Stevenson, *The Downstream*

Consequences of Misdemeanor Pretrial Detention, 69 Stan L Rev 711, 715–16 (2017). (footnotes omitted). Pretrial detention is particularly likely to affect the reliability of criminal trials for indigent defendants. Indigent defendants frequently lack stable living accommodations, and pretrial incarceration may result in the loss of their possessions and social connections in a far more profound way than more economically stable defendants. The result is that pretrial incarceration results in the loss of evidence in the form of the personal effects of the defendants, and loss of witnesses, because the transient contacts with whom indigent defendants often interact may be impossible for an incarcerated defendant to find. The upshot is that even if an innocent defendant decides not to plead guilty to get out of jail, the defendant will be at a major trial disadvantage as compared to a defendant released on bail.

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Third, individuals who were not released pretrial statistically receive longer sentences, even when controlled for other variables like criminal history and dangerousness. In Oregon, detained individuals are *twice as likely* to receive an incarceration sentence as those released prior to their case disposition. CJC Report at 11. This phenomenon holds even when controlled for gender, county, most serious charge, number of charges, prior sentences and criminal history, risk level, appointed representation, mental health, plea type, and prior convictions for FTA. *Id*. Collectively, those negative impacts dictate that pretrial incarceration increases the likelihood that a detained individual will be convicted, imprisoned, and subjected to prolonged deprivation of liberty, privacy, and other fundamental elements of human existence. *See* Wiseman, 123 Yale L.J. at 1354.

C. The negative impacts of pretrial detention fall disproportionately on the poor and People of Color.

> "When you start to see how who stays in and who gets out relates to prison (populations), it really sets up a pretty bad picture of wealth being an important aspect of whether or not you're going to end up going to prison."[6]

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[6] McKenna Ross, *Study Finds Jail Before Trial Doubles Incarceration Chances in Oregon*, OREGONLIVE.COM, June 22, 2019, https://www.oregonlive.com/crime/2019/07/study-finds-jail-before-trial-doubles-incarceration-chances-in-oregon.html (accessed March 25, 2021).

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Multnomah County District Attorney Mike Schmidt (statement made when DA Schmidt was the Executive Director of the Oregon Criminal Justice Commission).

Between 70 and 80 percent of Oregonians charged with crimes qualify for court-appointed counsel. Written Testimony, Senate Committee on Judiciary, SB 48-1, March 18, 2021 (statement of Bridget Budbill public testimony submitted on behalf of OPDS). "[M]ost persons accused of crimes in Oregon's criminal legal system are poor." *Id.* That may help explain why, although most arrestees have the right to security release on their cases, security-release accounts for only nine percent of all release events according to the CJC's 2020 report CJC Report at 7.

Of those who remain incarcerated pretrial because they cannot afford to pay, People of Color are overrepresented. For example, studies have found that men are more likely to be detained before trial than women, and that Black and Latinx individuals are more likely to be detained that white individuals. *See* Christopher Campbell and Ryan M. Labrecque, *Effect of Pretrial Detention in Oregon* 10 (2019) *available at* https://www.oregon.gov/cjc/CJC%20Document%20Library/EffectofPretrialDetention.pdf (collecting studies). In Oregon, data regarding the distribution of income indicates that Oregonians of Color are more likely to be low-income than white

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Oregonians. CJC Report at 24. Although there is insufficient data available in Oregon to show a conclusive link between pretrial detention and the ability to pay security by race, "it does show that the resources available to different racial groups varies substantially and that certain groups would be at a collective disadvantage if faced with the requirement to pay security in a criminal case." *Id.* at 24.

In summary, pretrial incarceration adversely affects both public safety and the people who are incarcerated. Those effects make it more likely that individuals will be convicted and sentenced more harshly due to poverty rather than the seriousness of the offense. The practice is flawed and counterproductive; it deviates from the constitutional and legislative framework and is likely to have a disproportionate impact on Oregonians who are poor. In turn, that disparity is likely to have an outsized impact on people of color.

III. Other jurisdictions are moving away from wealth-based pretrial detention

Jurisdictions around the country have recently limited or abolished wealth-based pretrial detention through their courts or legislatures. The Supreme Courts of California, Nevada, Massachusetts, and New Mexico have struck down their trial courts' use of security amount that a defendant cannot pay as proxies for pretrial

detention orders. *Humphrey*,__ P3d at __, WL 1134487 at *7-8; *Valdez-Jimenez v. Eighth Judicial District Court in & for County of Clark*, 136 Nev 155, 165, 460 P3d 976, 987 (2020); *Brangan v. Commonwealth*, 80 NE3d 949, 961 (Mass 2017); *State v. Brown,* 338 P3d 1276, 1292 (NM 2014). Illinois recently became the first state in the country to eliminate cash bail entirely via the Illinois Pretrial Fairness Act. HB 3653 (Ill 2021) *available at* https://ilga.gov/legislation/101/HB/10100HB3653sam002.htm. *See also* Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NPR, Feb 22, 2021 https://www.npr.org/2021/02/22/970378490/illinois-becomes-first-state-to-eliminate-cash-bail (accessed April 12, 2021). The District of Columbia eliminated unaffordable cash bail decades ago (D.C. Code § 23-1321(c)(3)). The District of Columbia's experience shows that eliminating unaffordable cash bail is consistent with ensuring public safety and court appearances. *See* Pretrial Justice Institute, *The Pretrial Services Agency for the District of Columbia*, Case Studies, Aug 22, 2018, at 8-9 (available at https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b72173e8-0c59-ac66-0122-d9bad6a564c9&forceDialog=0); *What Changed After D.C. Ended Cash Bail*, NPR (Sept 2, 2018),

https://www.npr.org/2018/09/02/644085158/what-changed-after-d-c-ended-cash-bail. New Jersey overhauled its pretrial system in 2014, following a report by the Drug Policy Alliance that found that approximately 40% of the New Jersey jail population was detained pretrial solely because individuals could not afford their money bail. Marie VanNostrand, PhD, *New Jersey Jail Population Analysis* (Mar 2013) *available at* https://www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf. New Jersey's law all but eliminates cash bail by significantly restricting its use, increasing consideration of affordability, and promoting pretrial release. NJ Rev Stat. § 2A:162-16. Finally, New York recently eliminated cash bail for most misdemeanors and non-violent felonies. New York requires a court to hold an ability-to-pay hearing before it may impose cash bail. N.Y. Crim. Proc. Laws § 510.10(4), 510.30. *See* Michael Rempel and Krystal Rodriguez, *Bail Reform Revisited: The Impact of New York's Amended Law* 2, 16 (May 2020) *available at* https://www.courtinnovation.org/sites/default/files/media/document/2020/bail_reform_revisited_05272020.pdf (describing the effects of the New York law).

In summary, other states are recognizing the need to reform their bail systems. Those state reforms demonstrate the need for Oregon to follow the Constitution and statutory procedures in order to likewise eliminate the use of wealth as a proxy for a detention order.

CONCLUSION

Amici support relator's request that this court hold that the circuit court violated the state and federal constitutions and Oregon's pretrial statutory scheme when it ordered security release but set an security amount that relator cannot pay. That amounted to a detention order based solely on relator's inability to pay security. *Amici* ask this court to end the widespread practice of wealth-based detention in Oregon state courts and to help bring the practice in the circuit courts in line with the intent of the Constitution and the Legislature. Doing so will help alleviate wealth-based disparaties in the criminal-justice system—disparties that often also resulted in people of color receiving longer sentences—and increase public confidence in the fairness of Oregon system of criminal justice.

DATED April 15, 2021

Respectfully Submitted,

O'Connor Weber LLC
1500 SW First Avenue, Suite 1090
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/s/ *Ryan T. O'Connor*

_____

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(D) in that the word count of this brief is 4,487 words, as required by ORAP 5.05(1)(d)(i).

Type Size

I certify that the size of the type in this brief is not smaller than 14-point font for both the text of the brief and footnotes as required by ORAP 5.05(1)(d)(ii).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief Of Amici Curiae American Civil Liberties Foundation, ACLU Foundation Of Oregon, Oregon Criminal Defense Lawyers Association, Oregon Criminal Justice Resource Center, Disability Rights Oregon, Portland Freedom Fund, The Family Preservation Project, The Portland Interfaith Clergy Resistance, And The Appellate Division Of The Office Of Public Defense Services In Support Of Relator's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief Of Amici Curiae American Civil Liberties Foundation, ACLU Foundation Of Oregon, Oregon Criminal Defense Lawyers Association, Oregon Criminal Justice Resource Center, Disability Rights Oregon, Portland Freedom Fund, The Family Preservation Project, The Portland Interfaith Clergy Resistance, And The Appellate Division Of The Office Of Public Defense Services In Support Of Relator's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered

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eFilers) on Paul Smith, OSB No. 001870, and Carson Whitehead, OSB No. 105404, attorneys for Plaintiff-Adverse Party; Jesse Merrithew, OSB No. 074564, and Viktoria Safarian, OSB No. 175487, attorneys for Defendant-Relator; and service by first-class mail, postage prepaid to: The Honorable Heidi M. Moawad, 1200 SW First Ave., Portland, OR 97204

DATED April 15, 2021

Respectfully Submitted,

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April 15, 2021

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Re: *State v. Michael Adam Hansen*, S068166

Dear Justices of the Oregon Supreme Court:

We are attorneys who represent court-appointed clients charged with crimes in circuit courts in Oregon. We write in support of Michael Hansen's case because his experience illustrates a wide-spread problem of Oregon circuit courts using a bail amount that a defendant cannot pay as a substitute for a detention order.

We and the attorneys who we supervise regularly appear in the circuit courts in Coos County, Deschutes County, Lane County, Marion County, Multnomah County, and Washington County. In our cases, judges routinely set security amounts for our court-appointed clients that exceed the amount that they can pay. With the exception of Deschutes County, in every case that we are aware of, the court has not made the findings required by ORS 135.240(4). That is, the circuit court judge has not found that there is probable cause to believe that the defendant

committed the crime and has not found by clear and convincing evidence that there is a danger of sexual victimization to the victim or members of the public by the defendant while on release.

In Deschutes County, judges often do not follow pretrial release statutes. Very seldom is personal recognizance release granted. Judges commonly use release schedules for security amounts without regard to the individual defendant's ability to pay. Occasionally, a judge will deny security under 135.240(4). As in other Oregon counties, many defendants in Deschutes County are held pretrial because they cannot afford bail.

Many of our court-appointed clients remain in custody pretrial solely because they cannot pay the bail amount, not because of any particularized risk to the community or flight concerns. Our mission is to provide our clients with a holistic defense. We train our lawyers and employ staff to identify our clients' needs—housing, medical, mental health, employment, or substance abuse—and come up with plans to address those needs. Often this happens in the context of a release hearing because addressing those needs also addresses public safety risks and flight concerns. However, those efforts are wasted when a judge also imposes, ostensibly as a condition of the person's release, a condition that they pay money which they do not have. A wealthier person in the exact same circumstances gets released. The disparity in pretrial release results in a disparity in outcomes. Our clients accept worse plea offers because of the stresses of pretrial custody. Our clients who are in pretrial custody receive longer sentences because they have not had the opportunities afforded people on pretrial release, like participating in treatment programs. And, in many cases, our clients spend more time incarcerated awaiting trial than they would if they were to accept the state's offer.

Thank you for considering the information in this letter. We hope that it helps provide context for the issues before you Mr. Hansen's case.

Sincerely,

/s/ *Stacey Lowe*
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/s/ *Brook Reinhard*
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/s/ *Jessica Kampfe*
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