Testimony of Kimberly McCullough, Legislative Director
In Support of SB 391
House Judiciary Committee
May 5, 2015

Chair Barker and Members of the Committee:

For the record, I am Kimberly McCullough, Legislative Director of the ACLU of Oregon. I am appearing today to give our strong support to the passage of SB 391.

The introduction of this bill should not have been necessary. Unfortunately, experience indicates that a number of local authorities have improperly seized – without a court order – funds being deposited as security by family members and other third parties to gain the pre-trial release of individuals who are being held in jail.

The ACLU of Oregon believes that these seizures are already unlawful for several reasons. First, individuals who are accused of a criminal offense and are being held in jail have a constitutional right to be released pending trial once the security amount determined by the court is posted on their behalf.

When personnel at a local jail have been designated by the Circuit Court to accept payment of security, those personnel are acting as agents of the court. We believe that both as a statutory matter and as a constitutional matter, jail personnel who accept a security payment and then convert that payment into a seizure for the purpose of civil forfeiture are violating their fiduciary duties to the court and the defendant on whose behalf the security payment was made.

That, however, is not the end of the constitutional and statutory violations committed in the examples which have come to our attention. Both Oregon civil forfeiture law and the Oregon Constitution contain restrictions that should have prevented most of these seizures – unless specific court authorization was obtained in advance.

First, a specific provision of Oregon civil forfeiture law, found at ORS 131A.035, which was first adopted in 1993, prohibits the seizure of currency in an amount less than $15,000 on the basis that it is in the form of cash rather than some other form. This law was adopted by the Legislature because in the early 1990s the Oregon State Police had a practice of seizing cash (for civil forfeiture) from individuals even when there were no unlawful drugs present and no arrest was made or criminal charges filed against any individual.

Second, while other sections of Oregon's civil forfeiture law could possibly be read to permit seizure of currency or other financial instruments without a court order, even those provisions require that there be probable cause to believe the funds are subject to forfeiture and can be seized without a warrant without violating the constitution.

The ACLU believes it does violate the Oregon Constitution – and possibly the U.S. Constitution – for jail personnel to seize funds being posted for bail unless there is prior review by a judge and a court order authorizing the seizure. To the extent that local authorities disagree with our view of the law and the constitution, this Committee should join the Senate in approving SB 391 and eliminate any doubt as to what is required.

Third, to the extent that any local jail personnel seized funds being deposited as security and then transferred those funds to federal authorities for purposes of forfeiture, the Oregon Constitution prohibits such transfers without the approval of an Oregon court.

Article XV, section 10, subsection 13 provides:

> "Neither the State of Oregon, its political subdivisions, nor any forfeiting agency shall transfer forfeiture proceedings to the federal government unless a state court has affirmatively found that:
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> (a) The activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer;
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> (b) The seized property may only be forfeited under federal law; or
>
> (c) Pursuing forfeiture under state law would unduly burden the state forfeiting agencies."

Between 1989 and 2001, Oregon law enforcement agencies happily seized the assets of individuals who allegedly had a tenuous connection to unlawful drug activity – even when there was no probable cause to arrest or charge that individual with a crime.

As many of the members of this Committee are well aware, Oregon voters changed that landscape in November 2000 when they approved Ballot Measure 3, which the ACLU helped to draft. That constitutional amendment, even as modified in 2008, in most cases requires that an individual be convicted of an offense connected to the property.

Passage of SB 391 would keep faith with the voters and provide clarity for local officials. Again, the ACLU believes this bill should be unnecessary, but we urge you to pass it to eliminate this practice in the future.

Thank you.