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April 2, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in opposition to Senate Bill 999, The *Banks* "Fix"

Dear Chair Prozanski and Members of the Committee:

My name is Richard Oberdorfer and I am a member of OCDLA and the Oregon State Bar. I am licensed to practice law before all Oregon courts, the U.S. District Court for the District of Oregon and the U.S. Ninth Circuit Court of Appeals. I am a frequent lecturer on DUII, alcohol and drug pharmacology, and driving-related topics. I am a lifelong Oregonian, graduating cum laude from the Lewis & Clark Law School in 2001 after an undergraduate History degree from the University of Oregon in 1996. I have been involved in the criminal defense function of our justice system since 1997. I am a trial lawyer, and have litigated hundreds of DUII and other driving prosecutions in Oregon state courts.

I oppose the proposed *Banks* "fix" from the Attorney General for three primary reasons:

(1) There is no need to "fix" a Constitutional decision from the Oregon Supreme Court.

The Oregon Supreme Court is a co-equal branch of our government, and is entitled to respect. It is the final word on what the Oregon Constitution means. It has followed a long line of precedent in deciding that Oregonians cannot have their refusal of a search (of their home, pocket, car, or breath) used against them in a criminal trial. The Court explained: "if a person's verbal refusal to consent to a warrantless search could be admitted as evidence of guilt, it would 'impose a prohibitive cost upon an individual's assertion of his [or her] constitutional rights.'" *State v. Banks*, 364 Or 332, 348 (2019) (quoting *Elson v. State*, 659 P2d 1195, 1198 (Alaska S Ct, 1983).

(2) In 2019, across this state, police officers routinely get e-warrants for blood when a driver refuses a breath test.

In the past few years, it has been an extreme rarity in my office to see a breath test refusal case where a police officer did not simply apply for an electronic warrant. Police officers are trained on warrant applications at Basic Academy, including telephonic warrants. A few years ago, all Multnomah County Circuit Court judges were issued

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taxpayer-funded iPads so they could electronically sign warrants at any time of day or night. ORS 133.545(8) specifically permits warrants by fax, telephone, or electronic submission. Once the warrant is e-signed, the police officer simply calls the phlebotomist who drives to the jail to draw blood – in Multnomah County, the police contract for such services is with AMR, American Medical Response. In the alternative, in some jurisdictions police have contracted with local hospitals, and police drive the DUII arrestee there for the blood draw.

Obviously, **a direct test of blood for *blood* alcohol content is a better, more reliable test than an indirect estimate of blood alcohol content via breath.** When people refuse a breath test, the prosecution ends up with better evidence against that driver. Moreover, the driver who has refused a breath test ends up with an **enhanced 1-year license suspension for the refusal –** rather than a 90-day license suspension for failing the test. In addition, the driver refusing a test receives an **infraction ticket for "Refusal to Take a Test for Intoxicants,"** punishable by up to $2,000 in fines ($650 as the presumptive fine).

Shortly after *Banks* was announced, I tried a DUII case involving a breath test refusal. The prosecutor conceded that the driver's refusal of a breath test was excluded from the jury's consideration in light of *Banks*. Instead, what came in was the .127% BAC blood draw that was promptly performed with a warrant from a Columbia County Circuit Court Judge. The jury convicted that driver, because the police did their job of gathering and producing evidence. That is all that is required by the *Banks* decision: police must gather and produce evidence if they are to accuse an Oregonian of criminal wrongdoing. That is the standard across the board for all crimes, and it is as it should be. It protects us all.

(3) Amending the Implied Consent statute to make consent irrevocable will not work, and is bad public policy.

Consent can be revoked. That is true in our interpersonal lives, and it is true in the law. *State v. Ford*, 220 Or App 247, 251 (2008) (cataloging cases explaining that consent can be revoked as a matter of Constitutional law). Revoking your consent to a breath test means you will likely suffer an enhanced 1-year suspension (instead of 90-days for failing a breath test); will be charged with an expensive violation "Refusal to Take a Test for Intoxicants" under ORS 813.095 ($650-$2,000); and a phlebotomist will likely draw your blood when a judge signs an electronic search warrant authorizing that extraction.

The law has occasionally attempted to make a person's consent non-revocable, but not in ways Oregon should emulate. Specifically, until 1993 some states still had rape laws on their books that forbade a married woman from revoking consent for intercourse with her husband. Married men could not be charged with raping their wives as a result. This "legal fiction" robbed women of autonomy over their bodies.

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The proposed *Banks* "fix" likewise would rob people of autonomy over their own bodies by using a "legal fiction" that Oregonians have and always will submit to breath testing. In my experience, drivers revoke their "Implied Consent" to breath testing for many, many reasons, including most prominently: they do not trust the police officer who has arrested them.

The destruction of that trust happens for all sorts of reasons, including an overly-aggressive arrest, entry into a person's home, loud heavy metal music played in the police cruiser on the ride to the jail, etc. Just like consent in our interpersonal relationships, sometimes police officers do or say the wrong thing that makes one no longer trust them. People should not be told they must "submit" to a search at the hands of the police officer alone. Warrant applications are there specifically to interpose a judge's intelligence and judgment and neutrality into the equation. When a person has their blood drawn pursuant to a search warrant, it is not the police officer doing the draw, and it is not the police officer who authorized the draw. It's a judge who made that call. That is exactly what the Constitution, and our Framers, contemplated:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 US 10, 14 (1948).

OCDLA as an organization seeks to protect peoples' Constitutional rights, including their right to bodily security and integrity enshrined in Article I, section 9 of the Oregon Constitution's Bill of Rights. OCDLA and I urge you to vote no on SB 999 for the reasons articulated above. We oppose this bill.

Sincerely,

s/ Richard E. Oberdorfer

Richard E. Oberdorfer