TO: **Sen. Floyd Prozanski, Chair**
Sen. Kim Thatcher, Vice-Chair
Members of the Senate Committee on Judiciary

FR: **Oregon District Attorney's Association**

RE: **SB 188 – OPPOSE**

March 16, 2023

Thank you for the opportunity to offer our concerns on SB 188 and the -1 Amendment.

ODAA has three primary concerns: (1) would the caselaw governing suppression of evidence apply to violations of SB 188, (2) the inequitable application of SB 188 to investigations already underway, and (3) concerns about the impact of SB 188 on violations of ORS 181A.250, 131.615 and 810.410. Those concerns are further discussed below:

1. **Will prosecutors, defense attorneys, law enforcement, defendants and victims be able to continue to rely on prior case law on suppression if SB 188 passes?**

Presently, suppression hearings exist to allow criminal defendants the opportunity to challenge the admissibility of evidence they believe was collected in violation of their constitutional rights. These challenges are governed by centuries of ever-evolving case law interpreting both the Oregon and US constitutions. Existing case law helps trial and appellate courts determine whether such violations occurred, whether there is a remedy to the violation, and if there is an un-remedied violation, what evidence will be suppressed. It also provides precedent for prosecutors, defense attorneys and law enforcement to understand the boundaries of when and what evidence may be suppressed.

SB 188 introduces confusion into the present system because it does not clarify if the principles of constitutional suppression law are to be part of the legal analysis. The Oregon and Federal courts utilize several doctrines including whether evidenced sought to be suppressed is sufficiently attenuated from the violation such that it may still be admissible. It is unclear if SB 188 contemplates the inclusion of such constitutional precedents or if it intends to impose a strict liability that will result in suppression of all evidence no matter the circumstances. A lack of clarity in this regard will result in the suppression of evidence during criminal investigations

despite good faith efforts by law enforcement to follow the law, which will lead to either challenges in the criminal prosecution, or a total inability to prosecute the crime at issue. This lack of clarity will affect prosecutors, law enforcement, victims, defense attorneys and defendants.

2. **SB 188 will impact investigations presently underway, thereby resulting in suppression of evidence collected by law enforcement who acted in good faith and were following the law at the time of the investigation.**

If SB 188 becomes law in its present form or as amended by the -1 amendment, its suppressive effect will apply "to criminal and juvenile proceedings initiated on or after [its] effective date." The use of, "proceedings," means that the law will apply to criminal cases already in existence because each hearing and trial is a proceeding on its own. As a result, there will be some number of criminal cases already underway that would suddenly become subject to SB 188, potentially undermining the investigation and prosecution despite the investigation having conformed to the proper standards at the time.

3. **The particular statutes given suppressive effect in the -1 amendment will cause confusion in suppression hearings, and in some instances, are already covered under Oregon's interpretation of Article I, sec. 9 of the Oregon Constitution.**

The -1 amendments gives suppressive effect to the violation of three particular statutes: ORS 131.615, ORS 181A.250, and ORS 810.410.

ORS 181A.250 prohibits law enforcement from collecting or maintaining information about, among other items, the "social views, associations, or activities of any individual… unless such information directly relates to an investigation of criminal activities, and there are reasonable grounds to suspect the subject of the information is or may be involved in criminal conduct." Granting blanket suppression to a violation of that statute would likely have many unintended consequences. For example: A judge grants a warrant for social media conversations of a suspect within a two-hour window of when a crime occurred. In the conversations is a group chat between the suspect and 5 other people. It turns out those people are accomplices to the crime. Arguably, under this bill, we could not use that information at trial against those other suspects and we couldn't use that information to inform the investigation into those other suspects. Additionally, any further evidence collected as a result of that discovery might be suppressed.

ORS 131.615 and ORS 810.410 relate to the behavior of officers who have conducted a stop. Almost all of the rules imposed by those statutes are covered by case law stemming from Article I, sec. 9 of the Oregon Constitution. In particular, *Arreola-Botello*[1] and its progeny

[1] *State v. Arreola-Botello*, 365 Or 695 (2019).

already create the possibility of suppression for most behavior that would violate ORS 131.615(1)-(4) (and its counterpart in ORS 810.410), but suppression would be subject to all of the case law presently in existence that police officers, judges, and attorneys are familiar with and take into account in their cases. Even the additions to those statutes by HB 1510 (2022) are largely covered by the law surrounding voluntariness of statements, specifically the granting of consent. The addition of SB 188 to the existing case law calls into question the effect of suppression, the possibility of a remedy, and how the courts will interpret those issues.

ODAA is opposed to the passage of SB 188 because it potentially creates a strict liability standard requiring suppression for the violation of certain statutes with none of the protections and balancing tests that are an integral part of constitutional suppression legal analysis.