OREGON TRIAL LAWYERS ASSOCIATION
In the Service of Justice

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Chair Prozanski and Members of the Committee:

The Oregon Trial Lawyers Association writes to you today to express our opposition to SB 178, which would begin laying the groundwork to permit district attorneys to withhold discovery materials that prosecutors are constitutionally obligated to provide to criminal defendants unless the defendants pay a fee. This would be a significant, radical, and deeply disturbing departure from the principles of a fair, open, and equitable justice system.

Discovery—the compulsory disclosure of certain information and evidence—is a foundational brick upon which the entire American justice system is built. It is an obligation rooted in both statute and the federal and state constitutions, and it has a very practical purpose: "[t]o assure to both the state and the defendant the opportunity, in advance of trial, to be provided with the information required … so as to enable each party to prepare adequately for trial and to prevent 'surprise' at the time of trial … ' … to avoid unnecessary trials, to expedite trials and to prevent the expense and delay of continuances when either party claims to be unprepared to go to trial[.]'"[1]

To be blunt, *any* statutory arrangement that permits district attorneys to charge defendants for the cost of disclosing or providing discovery materials to a defendant or their lawyer—and to withhold that discovery if payment is not received—is extortionate. In a system that is best served when both sides are on an equal footing, it gives all the power and leverage in the district attorneys' offices, allowing them to withhold potentially critical—or even exculpatory—evidence unless they are paid. It places an enormous, unfunded burden on criminal defendants, with a disproportionate impact on the already under resourced and understaffed Oregon Public Defense Commission. And it fundamentally defeats the entire purpose of the discovery process: to allow *both* the state and the defendant the opportunity to fairly and adequately prepare for trial.

Obviously, providing legally mandated discovery costs money. But in an age where virtually all discovery is now digital (for example, in the form of PDFs or digital videos or photographs) the cost to review, compile, and provide discovery is almost entirely time. The cost of that time is already reflected in the salaries of prosecutors and their legal assistants. This proposal would fully shift that cost from counties to the state—funds appropriated to public defenders would now be funneled directly to district attorneys—and to individuals who do not qualify for a public defender. Oregon's justice system is already under severe stress because of a lack of public defenders. This additional burden will only worsen that problem.

The members of the Oregon Trial Lawyers Association primarily practice civil law, not criminal. Should this bill move forward, we have deep concern that it will only be a matter of time before

[1] *State v. Mai*, 294 Or 269, 273-74 (1982) (citing *State v. Dyson*, 292 Or 26, 35-36 (1981)).

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the Oregon Department of Justice, county counsels, and city attorney's offices will also ask this legislature for the power to withhold evidence pending payment.

But OTLA's primary concern with this bill is not that "slippery slope." It is that it is fundamentally unfair and incompatible with our mission to promote "a fair and equitable justice system." The law affirmatively requires district attorneys to provide discovery to criminal defendants. Allowing them to condition that constitutional and statutory obligation on a price violates the spirit of fairness, due process, and justice upon which our court system is supposed to be founded.

The Oregon Trial Lawyers Association urges you to reject SB 178.

Sincerely,

Timothy P. Walsh

Rian Peck

Oregon Trial Lawyers Association