Case No. S247278

IN THE SUPREME COURT
OF
THE STATE OF CALIFORNIA

In Re KENNETH HUMPHREY

on Habeas Corpus

After Decision by the Court of Appeal, First Appellate District,
Case No. A152056

On Appeal from the Superior Court for the State of California,
County of San Francisco, Case No. 17007715
The Honorable Joseph M. Quinn, Judge

APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND PROPOSED BRIEF OF *AMICI CURIAE* NATIONAL LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENT

Lara Bazelon, SBN 218501
University of San Francisco
School of Law
2130 Fulton Street
San Francisco, CA 94117
Telephone: (310) 663-7105
Facsimile: (425) 422-2750
Email: lbazelon@usfca.edu

Kellen R. Funk
Columbia Law School
435 West 116th Street
New York, NY 10027
Telephone: (212) 854-0675
Facsimile: (212) 854-7946
Email: krf2138@columbia.edu

Sandra G. Mayson
University of Georgia School of Law[1]
205 Hirsch Hall
Athens, GA 30602
Telephone: (706) 542-5138
Facsimile: (706) 542-5556
Email: smayson@uga.edu

Attorneys for Amici Curiae National Law Professors of Criminal, Procedural, and Constitutional Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutions

Books & Articles

Other Authorities

APPLICATION TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENT AND STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to California Rule of Court, Rule 8.520, amici curiae hereby respectfully apply for leave to file a brief amici curiae in support of the respondent, Kenneth Humphrey.

Amici are the following professors of criminal, procedural, and constitutional law at law schools across the United States:[1]

Laura Appleman, Associate Dean of Faculty Research and Van Winkle Melton Professor of Law, Willamette University College of Law

Shima Baradaran Baughman, Professor of Law, University of Utah College of Law

Lara Bazelon, Associate Professor of Law and Director of the Criminal Juvenile Justice Clinic and the Racial Justice Clinic, University of San Francisco School of Law

Monica C. Bell, Associate Professor of Law, Yale Law School

Josh Bowers, Professor of Law, University of Virginia School of Law

Locke E. Bowman, Clinical Professor of Law and Executive Director of the Roderick and Solange MacArthur Justice Center, Northwestern University Pritzker School of Law

Angela J. Davis, Professor of Law, American University Washington College of Law

Andrea L. Dennis, Professor of Law, University of Georgia School of Law

Barry Friedman, Jacob D. Fuchsberg Professor of Law, New York University School of Law

---

[1] The views expressed herein are the personal views of amici. Amici and counsel for amici have listed their titles and affiliations for purposes of identification only.

Kellen R. Funk, Associate Professor of Law, Columbia Law School

Craig B. Futterman, Clinical Professor of Law, University of Chicago Law School

Russell C. Gabriel, Clinical Professor and Director of the Criminal Defense Practicum, University of Georgia School of Law

Brandon Garrett, L. Neil Williams Professor of Law, Duke University School of Law

Russell Gold, Associate Professor of Legal Analysis, Writing and Research, Wake Forest University School of Law

Lauryn P. Gouldin, Associate Professor of Law, Syracuse University College of Law

Carissa Hessick, Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law, University of North Carolina School of Law

Mark J. Heyrman, Clinical Professor of Law, University of Chicago Law School

Eisha Jain, Assistant Professor of Law, University of North Carolina School of Law

Cliff Johnson, Assistant Professor and Director of the MacArthur Justice Center, University of Mississippi School of Law

Thea Johnson, Associate Professor of Law, University of Maine School of Law

Cynthia E. Jones, Professor of Law, American University Washington College of Law

Issa Kohler-Hausman, Associate Professor of Law and Sociology, Yale Law School

Adriaan Lanni, Touroff-Glueck Professor of Law, Harvard Law School

Gerry Leonard, Professor of Law and Law Alumni Scholar, Boston University School of Law

Kate Levine, Assistant Professor of Law, St. John's University School of Law

Sara Mayeux, Assistant Professor of Law, Vanderbilt Law School; Assistant Professor of History, Vanderbilt University

Sandra G. Mayson, Assistant Professor of Law, University of Georgia School of Law

Allegra McLeod, Professor, Georgetown University Law Center

Melanie Newport, Assistant Professor of History, University of Connecticut

Samuel P. Newton, Assistant Professor of Law, University of Idaho College of Law

Ira P. Robbins, Barnard T. Welsh Scholar and Professor of Law, American University Washington College of Law

Brendan D. Roediger, Professor of Law and Director of the Civil Litigation Clinic, St. Louis University School of Law

David Rudovsky, Senior Fellow, University of Pennsylvania Law School

Sarah Seo, Associate Professor of Law, University of Iowa College of Law

Alison Siegler, Clinical Professor of Law, University of Chicago Law School

Jocelyn Simonson, Associate Professor of Law, Brooklyn Law School

Christopher Slobogin, Milton R. Underwood Chair in Law and Director of the Criminal Justice Program, Vanderbilt Law School; Affiliate Professor of Psychiatry, Vanderbilt University

Fred Smith Jr., Associate Professor of Law, Emory University School of Law

Colin Starger, Associate Professor, University of Baltimore School of Law

Megan Stevenson, Assistant Professor of Law, George Mason University Antonin Scalia Law School

Alexa Van Brunt, Clinical Associate Professor, Roderick and Solange MacArthur Justice Center, Northwestern University Pritzker School of Law

Alec Walen, Professor of Law, Rutgers Law School

Samuel R. Wiseman, McConnaughhay and Rissman Professor, Florida State University College of Law

Ellen Yaroshefsky, Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics, Hofstra University Maurice A. Deane School of Law

Erica Zunkel, Associate Clinical Professor of Law and Associate Director of the Federal Criminal Justice Clinic, University of Chicago Law School

Amici are authors of many scholarly books, articles, and journalistic pieces on criminal, procedural, and constitutional law related to the issues before this Court. Several amici direct clinics or have otherwise participated in criminal litigation at bail hearings and other pretrial stages.

Amici have widely varying perspectives on many constitutional issues relating to pretrial criminal procedure, but agree that well-accepted federal constitutional principles and the overall history and tradition of the United States in regard to practices of pretrial bail support the proposition held by the lower court, that when the government proposes to incarcerate a person before trial, it must provide thorough justification, whether the mechanism of detention is a transparent detention order or its functional equivalent, the imposition of unaffordable money bail. Amici have a substantial interest in the issue before this Court, and believe that their expertise can help the Court assess more fully the merits of respondent's position.

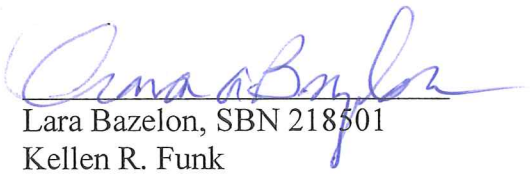
Amici recognize that the parties in this case rely on both California's Constitution and state laws as well as federal constitutional law. While not ignoring the former, as practitioners and professors of law from across the

United States, amici focus their remarks on federal constitutional law and on the history and tradition of bail common to the vast majority of the American states.

No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, and no one other than amici, and their counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

Dated: October 9, 2018

Respectfully submitted,



Lara Bazelon, SBN 218501
Kellen R. Funk
Sandra G. Mayson
Counsel for Amici
National Law Professors of Criminal, Procedural, and Constitutional Law

SUMMARY OF THE ARGUMENT

As scholars and professors of criminal law, criminal procedure, and federal constitutional law, we urge this Court to affirm the core federal constitutional holding of the decision below: *When the government proposes to incarcerate a person before trial, it must provide thorough justification, whether the mechanism of detention is a transparent detention order or its functional equivalent, the imposition of unaffordable money bail.*

This simple principle follows from the respect for physical liberty the Constitution enshrines. The protections of the criminal process—including the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the institution of bail itself—are meant to deny the state the power to imprison individuals solely on the basis of a criminal charge. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). This is an empty promise if a court can unilaterally detain a person by casually imposing a monetary bail amount that she cannot pay.

More specifically, as the Court of Appeal explained, the principle that any order of detention requires robust safeguards follows from two related lines of federal constitutional jurisprudence. The first is the line of Supreme Court cases, culminating in *Bearden v. Georgia*, 461 U.S. 660 (1983), holding that the Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit the state from conditioning a defendant's liberty on a monetary payment she cannot make unless no less restrictive alternative can meet its interests. The second is the line of cases, including *United States v. Salerno*, 481 U.S. 739, recognizing that physical liberty is a fundamental right, the deprivation of which triggers heightened scrutiny and requires procedural protections. The imposition of unaffordable bail constitutes a *de*

facto order of detention that deprives defendants of liberty—a proposition that no party to this case disputes.

Each of these doctrinal lines establishes that pretrial detention—either ordered outright or via unaffordable money bail—must be attended by a substantive legal determination and robust procedural safeguards. A court contemplating money bail must determine whether it is likely to result in detention. If so, and the court nonetheless wishes to impose it, the court must find, by clear and convincing evidence established through an adversary hearing, that the unaffordable bail amount serves a compelling interest of the state that no less restrictive condition of release can meet. This will rarely be the case. Few defendants pose an acute risk of willful flight or of committing serious harm in the pretrial phase. For the vast majority, attainable conditions of release can adequately protect the state's interests in ensuring appearance and protecting public safety, while also preserving the fundamental right to pretrial liberty.

The principle that the government must thoroughly justify any order of pretrial detention is not radical. Rather, it is continuous with the historical commitments of the bail system. Clarification of this core constitutional mandate is essential to recovering a rational system of pretrial detention and release, and the freedom it protects.

This brief does not address the question of whether unaffordable bail violates the Eighth Amendment Excessive Bail Clause.[2] Presuming for present purposes that the Eighth Amendment does not itself forbid

---

[2] That question is not before the Court. Case law on that question, moreover, is mixed. *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 605-610 (2018) (tracking and evaluating relevant case law).

unaffordable bail, we enumerate the constitutional criteria for a bail order that functions as an order of detention.

I. THE *BEARDEN* LINE: EQUAL PROTECTION AND DUE PROCESS FORBID DETENTION ON MONEY BAIL UNLESS NO ALTERNATIVE SATISFIES THE STATE'S INTERESTS

The Supreme Court has long been attuned to the danger that, without vigilance, core civil liberties might become a function of resources rather than of personhood. In a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and culminating in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court has established that the state cannot condition a person's liberty on a monetary payment she cannot afford unless no alternative method can meet the state's needs. As the Ninth Circuit recently put it: "[N]o person may be imprisoned merely on account of his poverty." *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017).

A. *Bearden* and Predecessor Cases Establish that the Government May Not Condition Liberty on Payment Unless No Alternative Meets Its Interests.

This line of jurisprudence began with challenges to wealth-based deprivations of another civil right: access to the courts. In *Griffin v. Illinois*, 351 U.S. 12 (1956), convicted prisoners lacked the funds to procure necessary transcripts for a direct appeal. The Supreme Court held that the Fourteenth Amendment prohibited Illinois from conditioning access to a direct appeal on wealth. As Justice Black wrote: "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)); *see also id.* at 24 (Frankfurter, J., concurring in the judgment) ("If [Illinois] has a general

policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.").

The Court reaffirmed *Griffin*'s holding in *Douglas v. California*, 372 U.S. 353 (1963), a challenge to California's system for appointing counsel in direct appeals. In cases where an indigent defendant requested appellate counsel, California law directed a state appellate court to conduct "an independent investigation of the record" and appoint counsel only if it judged that counsel would be "helpful" to the presentation of the case. *Id.* at 355 (internal quotation marks and citation omitted). The *Douglas* Court noted that the appellate court was thus "forced to prejudge the merits [of an indigent defendant's appeal] before it can even determine whether counsel should be provided," whereas people who could afford counsel were not "forced to run this gantlet of a preliminary showing of merit." *Id.* at 356–57. The Court held that a such a system violates the Fourteenth Amendment: "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357 (emphasis removed).

Soon thereafter, the Supreme Court applied the logic of *Griffin* and *Douglas* to wealth-based deprivations of physical liberty. The petitioner in *Williams v. Illinois* was held in prison after the expiration of his one-year term pursuant to an Illinois law that permitted continued confinement in lieu of paying off a fine. 399 U.S. 235, 236–37 (1970). Although the law offered "an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment," the Supreme Court held that this was "an illusory choice for Williams or any indigent who, by definition, is without funds." *Id.* at 242. The Court concluded that the Fourteenth Amendment prohibits the state from "making the maximum confinement contingent on one's ability to pay." *Id.*. The following year, in *Tate v. Short*, the Court held that "the Constitution prohibits the State from

imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 401 U.S. 395, 398 (1971) (quoting and adopting the reasoning of *Morris v. Schoonfield*, 399 U.S. 508 (1970)).

Bearden v. Georgia, 461 U.S. 660 (1983), synthesized this line of cases. The petitioner in *Bearden* challenged the revocation of his probation for failure to pay a fine. *Id.* at 662–63. To frame the Court's reasoning, Justice O'Connor explained that "[d]ue process and equal protection principles converge in the Court's analysis" of cases where the state treats criminal defendants differently on the basis of wealth: "[W]e generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Id.* at 665. The parties had argued over which tier of scrutiny should apply, but the Court rejected "resort to easy slogans or pigeonhole analysis," instead requiring "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Id.* at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

Considering the relevant factors, the *Bearden* Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment, when alternate measures may suffice to meet the state's interests. *Id.* at 672–73. "Only if alternate measures are not adequate to meet the State's interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* at 672. To hold otherwise, the Court reasoned, "would deprive the probationer of his conditional freedom

simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672–73.

B. The *Bearden* Doctrine Prohibits Unnecessary Detention on Money Bail.

The *Bearden* rule—that the Fourteenth Amendment prohibits unnecessary deprivations of liberty on the basis of indigence alone—applies "with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent." *Buffin v. City & Cty. of San Francisco*, Civil No. 15-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *accord, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) ("[Pretrial] imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible"); *ODonnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018); *Walker v. City of Calhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018).[3] In the pretrial domain, *Bearden* and its predecessors prohibit the state from conditioning a person's liberty on a payment she cannot make—unaffordable money bail or other secured financial condition of release—unless no "alternative measure" can adequately meet the state's interests. 461 U.S. at 672–73. The state's interest in the pretrial context is in ensuring defendants' appearance at future court dates and in protecting public safety. *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Salerno*, 481 U.S. at 750. *Bearden* thus prohibits a court from conditioning a defendant's pretrial liberty on payment of an unaffordable amount unless no alternative measure can adequately promote those goals. An increasing

[3] The Fifth Circuit recently stayed a revised preliminary injunction issued in *ODonnell* pending appeal, but did not question the applicability of *Bearden* to the pretrial context. *ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018).

number of federal courts have recognized this straightforward application of the *Bearden* doctrine. *See, e.g.*, *ODonnell*, 892 F.3d at 162 (concluding that "although the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy [of detaining misdemeanor defendants who could not afford prescheduled bond amounts] was not narrowly tailored to meet that interest").[4]

---

[4] *See also Rainwater*, 572 F.2d at 1057; *Caliste v. Cantrell*, Civil No. 17-6197, 2018 WL 3727768, --- F. Supp. 3d ---, *9 (E.D. La. Aug. 6, 2018); *Shultz v. State*, Civil No. 17-270, 2018 WL 4219541, --- F. Supp. 3d ---, *11–12 (N.D. Ala. Sept. 4, 2018); *Buffin v. City & Cty. of San Francisco*, Civil No. 15-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *Thompson v. Moss Point,* Civil No. 15-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015); *Jones v. City of Clanton*, Civil No. 215-34, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015) ; *Pierce v. Velda City*, Civil No. 15-570, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015); *Cooper v. City of Dothan*, Civil No. 15-425, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *accord* Statement of Interest of the United States Department of Justice at 1, *Varden v. City of Clanton,* Civil No. 15-34, ECF Doc. 26 (M.D. Ala., February 13, 2015) ("Incarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond, violates the Equal Protection Clause of the Fourteenth Amendment."); OFFICE FOR ACCESS TO JUSTICE, CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER 2 (Mar. 14, 2016), https://www.courts.wa.gov/subsite/mjc/docs/DOJDearColleague.pdf.

C. The *Bearden* Doctrine Subjects Wealth-Based Detention to Heightened Scrutiny

In recent litigation, a number of federal courts have struggled to determine which level of scrutiny applies to *Bearden* claims challenging aspects of money-bail systems. They have reached different conclusions. *Compare, e.g.*, *ODonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1138–39 (S.D. Tex. 2017) (concluding that "intermediate" scrutiny applies to differential detention based on wealth), *aff'd as modified*, 892 F.3d at 161, *with Walker*, 2018 WL 4000252, at *8–10 (concluding that rational-basis-review applies to the first 48 hours of pretrial detention prior to a bail hearing); *ODonnell v. Goodhart*, 900 F.3d at 226–28 (same).[5]

This dispute arguably misapprehends the *Bearden* line. *Bearden* itself rejected the tiered-scrutiny framework. The Supreme Court held, instead, that the proper framework for analyzing a claim of wealth-based discrimination in the criminal justice system was a multi-factored analysis similar to traditional due process analysis but also informed by equal protection principles, what some scholars call an "intersectional" analysis. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1315 (2017) (defining an "intersectional rights case" as "one involving rights that, when read together, magnify each other"); *see also* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016). *Bearden* recognized that wealth-based deprivations of liberty implicate both substantive and procedural rights.

---

[5] It is worth noting here that a number of courts have found systems that permit the casual or automatic imposition of unaffordable bail to fail even rational basis review. *See, e.g.*, *Shultz*, 2018 WL 4219541, at 15 n.23; *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994).

In practical effect, though, the *Bearden* doctrine essentially calls for heightened scrutiny when the individual interest at stake is physical liberty. This is clear from *Bearden*'s final rule: "Only if alternative measures are not adequate to meet the State's interests" may a court imprison a defendant for inability to satisfy a financial obligation. 461 U.S. at 672. The rule itself states a narrow tailoring requirement. Detention for nonpayment must be the only means of achieving the state's interests; if alternative means are available, detention is impermissible. *Accord Buffin*, 2018 WL 424362, at *9.

It is logical that wealth-based detention should trigger heightened scrutiny, given that all detention infringes the fundamental right to liberty. *See infra* Section II.A; *see also Shultz*, 2018 WL 4219541, *15 n.23. Indeed, the ostensible disagreement among the courts as to what degree of scrutiny applies is better understood as a disagreement over whether there has been a deprivation of liberty at all. In *Walker*, for instance, the Eleventh Circuit panel majority found that the challenged bail procedures did not deprive indigent defendants of pretrial liberty, but only subjected them to an incrementally slower release process than those who could afford to post bond. 901 F.3d, at 1261–62; *see also Edwards v. Cofield*, Civil No. 17-321, 2018 WL 4101511, at *2 (M.D. Ala. Aug. 28, 2018) ("[A]s the Eleventh Circuit explained in *Walker*, indigent arrestees (such as Plaintiff) do not suffer an 'absolute deprivation' of pretrial release.").[6] The dissenting judge

[6] A Fifth Circuit motions panel opinion in *ODonnell* seems to have reached a similar conclusion. *ODonnell v. Goodhart*, 900 F.3d at 226–28 (holding that, although "heightened scrutiny applied to the bail schedule" originally challenged, a 48-hour detention for indigent defendants awaiting a bail hearing triggered only rational-basis review).

in *Walker*, by contrast, concluded that "an incarcerated person suffers a complete deprivation of liberty . . . , whether their jail time lasts two days or two years." 901 F.3d at 1274 (Martin, J., dissenting in part).[7] The core dispute in these cases is whether a two- or three-day detention is a deprivation of liberty sufficient to trigger the *Bearden* rule at all. No court, however, has contested the application of the rule itself to the pretrial domain: The Fourteenth Amendment prohibits unnecessary detention on the basis of money bail.

II. THE *SALERNO* LINE: DUE PROCESS REQUIRES THAT ANY ORDER OF DETENTION MEET ROBUST SUBSTANTIVE AND PROCEDURAL CRITERIA

The second line of Supreme Court jurisprudence that constrains pretrial detention—*whether ordered outright or via unaffordable money bail*—is the series of cases in which the Court has considered the due process criteria for non-punitive detention. Because the right to physical liberty is

---

[7] The notion of an "absolute deprivation" of liberty comes from *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), where the Supreme Court recognized that *Williams-Tate* was an exception to the rule that wealth-based discrimination merits only rational basis review. The Court justified the rule and the exception on the reasoning that an "absolute deprivation" of liberty, such as custodial detention, was significantly more serious than a deprivation of degree, such as school systems that deprived poor students of the same quality of education as wealthy ones. *Id.* at 20–21. We agree with the Eleventh Circuit dissenter that even a detention lasting a few days is, for that period, an absolute deprivation of bodily liberty triggering the exception to *Rodriguez* and requiring heightened scrutiny.

fundamental, regulatory detention of an adult citizen triggers strict scrutiny, and must comply with robust substantive and procedural limits to survive.

A. Substantive Due Process Requires That Detention Be Carefully Tailored to a Compelling Government Interest.

The Supreme Court has recognized that the right to pretrial liberty is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990). Physical liberty is not only a fundamental right, it secures numerous other fundamental rights. In the pretrial context, the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (internal citation omitted).

As the Supreme Court has long acknowledged, the consequences of depriving a defendant of pretrial liberty are profound. "The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972). A defendant behind bars "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533. Recent empirical research has confirmed that pretrial detention itself increases the likelihood of conviction and the likely sentence imposed. *E.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741–59, 787 (2017); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224–26, 234 (2018). Some evidence suggests that it increases the

likelihood that the person detained will commit future crime. *E.g.* Heaton et al., *supra*, at 759–69; CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013). Detention also has adverse downstream effects on defendants' employment prospects. Dobbie et al., *supra*, at 227–32, 235. Importantly, the research indicates that all of these adverse effects are triggered by as little as two or three days of detention. *Id.* at 212; LOWENKAMP ET AL, *supra.* The cascading effects of detention extend beyond the individual; they affect entire communities. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612–16, 629–30 (2017); SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 77–91 (2018). Pretrial release is therefore a public, and not just an individual, interest. *Id.*

Because the right to pretrial liberty is fundamental, the substantive component of due process forbids pretrial detention unless the detention at issue is narrowly tailored to a compelling state interest. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993) (infringements of fundamental rights must be "narrowly tailored to serve a compelling state interest" (citing, *inter alia*, *Salerno*, 481 U.S. at 746)). The Supreme Court has not explicitly announced that pretrial detention is subject to strict scrutiny under substantive due process. But *Salerno* articulated the tailoring requirement of strict scrutiny in only slightly different terms. Having acknowledged the "fundamental nature" of the right to pretrial liberty, the *Salerno* Court upheld the challenged detention scheme on the basis that it was "a carefully limited exception" to the "norm" of pretrial liberty. 481 U.S. at 755, 746–52. It "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming" by limiting detention eligibility and requiring courts to comply with strict substantive and procedural

requirements before detention could be imposed. *Id.* at 749–52; *see also infra* Section III.A.

"If there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc). In *Foucha v. Louisiana*, for instance, the Court held that the detention of defendants acquitted on insanity grounds violated substantive due process on the basis that, "unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." 504 U.S. 71, 81 (1992); *see also Flores*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."). Substantive due process thus requires that pretrial detention be narrowly tailored to a compelling state interest, which may include the state's interests in promoting public safety and the effective administration of justice.

B. An Order of Detention Must Comply with Robust Procedural Safeguards.

The Due Process Clause also prohibits the deprivation of liberty or property without procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). In order to identify the specific procedural requirements for any given deprivation, courts consider "three distinct factors:" (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. Where the "private interest" at stake is

physical liberty, the risk of erroneous deprivations is particularly acute and procedural safeguards are especially critical. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 445 (2011); *In re Gault*, 387 U.S. 1, 73 (1967). Part III will consider at greater length what specific procedures are constitutionally required for pretrial detention.

C. An Order Imposing Unattainable Bail is an Order of Detention.

As a matter of both logic and law, an order imposing a secured condition of release that a defendant cannot satisfy constitutes an order of detention. It has precisely the same result: the defendant remains in jail. As the court below put it, "requiring money bail as a condition of pretrial release at an amount it is impossible for the defendant to pay is the functional equivalent of a pretrial detention order." *In re Humphrey*, 228 Cal. Rptr. 3d. 513, 517 (Ct. App. 2018). No party to this litigation disputes that fact. *Accord ODonnell*, 892 F.3d at 158 ("[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order."); *Shultz*, 2018 WL 4219541, at *9 (unattainable bail assessments "serve as *de facto* detention orders for the indigent"); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("The authors of the [federal Bail Reform] Act were fully aware that the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."). Because an order imposing unattainable bail is in fact a detention order, the due process requirements for a detention order apply. *Accord, e.g.*, *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) (explaining that unaffordable bail "is the functional equivalent of an order for pretrial detention," so "must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty").

In an analogous statutory context, the federal Bail Reform Act recognizes that the setting of unaffordable bail triggers all of the procedures

and protections that must attend a direct order of detention. The Senate Report on the law explains that, if a court concludes that an unaffordable money bond is necessary,

> then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and *therefore the judge may proceed with a detention hearing pursuant to section 3142(f)* and order the defendant detained, if appropriate.

S. REP. No. 98-225, at 16 (1984) (emphasis added).

The Fifth Circuit, in declining to hold that the Bail Reform Act prohibits unaffordable bail entirely, went out of its way to emphasize that unaffordable bail *does* trigger full detention proceedings. *United States v. McConnell*, 842 F.2d 105, 108–10 (5th Cir. 1988); *see also United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order."); *United States v. Clark*, Crim. No. 12-156, 2012 WL 5874483, at *3 (W.D. Mich. Nov. 20, 2012) ("In short, a finding that a defendant is unable to meet the financial conditions of a release order serves as a trigger to proceed to make the findings necessary to detain a defendant pursuant to a detention hearing.").

The notion that a court could circumvent the constitutional requirements for detention merely by announcing an unaffordable bail amount is logically and legally untenable. As Congress recognized in the Bail Reform Act and as the Fifth Circuit recognized in *McConnell*, an order imposing unaffordable bail is a detention order. The Court of Appeals was thus correct to conclude that "the [trial] court's order, by setting bail in an amount it was impossible for petitioner to pay" without a determination of necessity and robust procedural safeguards, "effectively constituted a *sub*

rosa detention order lacking the due process protections constitutionally required to attend such an order." *In re Humphrey*, 228 Cal. Rptr. 3d at 517.

III. EQUAL PROTECTION AND DUE PROCESS PROHIBIT UNAFFORDABLE BAIL ABSENT A DETERMINATION OF NECESSITY AND ROBUST PROCEDURAL SAFEGUARDS

As Parts I and II explained, two distinct lines of federal constitutional jurisprudence constrain the imposition of unaffordable bail.[8] *Bearden* and predecessor cases prohibit unnecessary detention on money bail; they require a substantive determination that no less restrictive measure can meet the state's interests. Due process doctrine, as elaborated in *Salerno* and cases that followed, requires that regulatory detention be narrowly tailored to a compelling state interest and imposed pursuant to a process that protects the liberty interest at stake. Both lines of doctrine thus require a substantive determination of necessity before the state may detain a person for inability to post bond. Due process additionally requires that this determination be attended by robust procedural protections.

A. Equal Protection and Due Process Prohibit the Setting of Unaffordable Bail Absent a Determination of Necessity.

Both the *Bearden* and the *Salerno* lines of jurisprudence require a determination of necessity before the government can detain an individual for inability to post bail. In order to fulfill this requirement, a court must first consider a defendant's ability to pay. *Cf. Bearden*, 461 U.S. at 672; *Hernandez v. Sessions*, 872 F.3d 976, 992–93 (9th Cir. 2017) (*Bearden* and its predecessors "stand for the general proposition that when a person's freedom from governmental detention is conditioned on payment of a

[8] The Eighth and Fourth Amendments are also relevant, but not at issue here. *See infra* Section IV.B.

monetary sum, courts must consider the person's financial situation . . .") (internal quotation marks omitted). If the bail amount contemplated is beyond the defendant's ability to procure, such that the bail order will constitute an order of detention, the unaffordable bail amount violates due process and equal protection unless the court determines that it is the least restrictive means to meet a compelling state interest. *Accord Rainwater*, 572 F.2d at 1057 (explaining that any "requirement in excess" of the amount "necessary to provide reasonable assurance of the accused's presence at trial . . . would be inherently punitive and run afoul of due process requirements"). The same is true of any bail *system* that permits the imposition of unaffordable bail. *Accord ODonnell*, 892 F.3d at 162; *Brangan*, 80 N.E.3d at 959; *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional.").

The state's interests during the pretrial phase are in ensuring the integrity of the judicial process—which includes ensuring a defendant's appearance at trial and the safety of witnesses—and in protecting public safety. *See, e.g.*, *Salerno*, 481 U.S. at 752–53. Yet these amorphous phrases can be misleading, because the state cannot claim an interest in *guaranteeing* defendants' appearance or in *eliminating* law-breaking. Every person poses some risk of nonappearance and of committing future crime. Short of jailing every accused person in escape- and crime-proof conditions, the state cannot eliminate all risk of nonappearance and future law-breaking. Any effort to do so would contravene the basic values of a legal order that prizes individual liberty and the presumption of innocence. *Id.*at 755 (emphasizing that pretrial liberty must be the "norm" and detention a "carefully limited exception"); *see also Coffin v. United States*, 156 U.S. 432, 453 (1895) (noting that the presumption of innocence is "the undoubted law, axiomatic and elementary,

and its enforcement lies at the foundation of the administration of our criminal law"). *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723 (2011). As the Supreme Court has written with respect to flight risk: "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

The more precise formulation, then, is that the state has a compelling interest in eliminating significant threats to witnesses, public safety, or the integrity of the judicial process. The drafters of the federal Bail Reform Act recognized this nuance. *See* S. REP. 98-225, at 7 (1984) (noting that "the societal interest implicated" by preventive detention was "the need to protect the integrity of the judicial process" from defendants who have "threatened jurors or witnesses, or who pose significant risks to flight," and "[t]he need to protect the community from demonstrably dangerous defendants" (footnote omitted)). The *Salerno* Court did too: It upheld the Act in part because, by limiting eligibility for detention to defendants who posed the greatest risk, it addressed a "particularly acute problem." 481 U.S. at 750.

It will rarely be the case that detention—including detention via unaffordable bail—is the least restrictive means of eliminating significant flight and public safety risks. Few defendants pose such risk in the first place. For those that do, alternative conditions of release may be sufficient to manage it. As a number of courts have now noted, the evidence on the relative efficacy of secured money bond at ensuring appearance or preventing crime is mixed at best. *ODonnell*, 892 F.3d, at 162 (noting that the district court's "thorough review of empirical data and studies found that the County had failed to establish any 'link between financial conditions of release and appearance at trial or law-abiding behavior before trial'" (referring to *ODonnell*, 251 F. Supp. 3d at 1117–21, quoting *id.* at 1152); *Shultz*, 2018 WL 4219541, at *13–14, 24 (reviewing empirical evidence and

concluding that there is no indication that secured bail is superior to other conditions of release at ensuring appearance or preventing new arrests).

Detention is especially unlikely to be necessary to ensure appearance. Most nonappearance is not willful flight from justice; many people fail to appear because they do not receive adequate notice of court dates, because they cannot afford to miss work, because they lack childcare or transportation, and for a range of other psychological and logistical reasons. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–35 (2018) (classifying this genre of nonappearance as "low-cost nonappearance," versus "true flight [from the jurisdiction of arrest]" and "local absconding"). As Professor Gouldin has explained, there are ample risk management measures short of detention that can effectively redress these obstacles to appearance. *Id.* Court-reminder systems and transportation support appear particularly promising. *Id.* at 731–32 (citing studies that show "that reminding defendants or their families of court dates can significantly reduce FTAs [failures to appear]"); BRICE COOKE ET AL., UNIV. OF CHI. CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018)[9] (rigorous controlled study finding that redesign of court-date notice form and text-message reminders decreased nonappearance by 36%); Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA JOURNAL (July 17, 2018). When there is a real risk of willful flight, electronic monitoring should usually be effective to mitigate it. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123

---

[9] *Available at* https://urbanlabs.uchicago.edu/attachments/store/9c86b123e3b00a5da58318f438a6e787dd01d66d0efad54d66aa232a6473/I42-954_NYCSummonsPaper_Final_Mar2018.pdf.

YALE L.J. 1344 (2014). It should be the rare case indeed where detention is necessary to get a person to court.

It will also be rare that detention is the least restrictive alternative capable of meeting the state's interest in protecting public safety. It is important to note that "the government's interest in preventing crime by *anyone* is legitimate and compelling," *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006), but that interest rarely justifies *ex ante* detention. The state must generally restrict its preventive efforts to threatening *ex post* punishment for bad acts, rather than preemptively lock up anyone who might commit some future harm. *E.g.* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 23, 44 (2d ed. 2008); *Salerno*, 481 U.S. at 749; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (arguing that the degree of risk that justifies detention is no different for defendants than non-defendants).

Salerno suggests some of the limits that careful tailoring may require of a detention order or detention regime. In upholding the preventive detention provisions of the federal Bail Reform Act, the *Salerno* Court noted that the regime applied only to those charged with "a specific category of extremely serious offenses," whom Congress had "specifically found" to be especially dangerous. 481 U.S. at 750. To impose detention, moreover, the Act required a court to find, by clear and convincing evidence, that the defendant presented "an identified and articulable threat to an individual or the community," and that "no conditions of release [could] reasonably assure the safety of the community or any person." *Id.* at 750–51 (citing 18 U.S.C. § 3142(f)). In short, the Act permitted detention only on the basis of "convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger." *Id. Salerno* did not hold that these precise limits were constitutionally mandated; it held, rather, that they

were sufficient to overcome the facial challenge. Nonetheless, the features of the federal regime that the *Salerno* Court emphasized offer a useful template.

Limiting detention eligibility to "a specific category of extremely serious offenses" is a logical component of narrow tailoring for detention on the basis of general dangerousness. *Accord* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.9 (3d ed. 2007) (limiting eligibility for detention on this ground to defendants charged with serious or violent offenses); TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, MODEL BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION174–77 (2017) (advocating "eligibility net" limited to defendants charged with violent offenses and explaining statistical support for that limit); CAL. CONST., art. I, § 12 (permitting outright denial of bail only in cases of serious felony charges with clearly evident facts and presumptions of guilt). For those charged with minor offenses who will be released shortly in any case, detention provides minimal public safety value and might actually increase the likelihood of future crime. *E.g.* Heaton et al., *supra*, at 759–69; LOWENKAMP ET AL., *supra*.

Careful tailoring also requires an individualized risk determination and proof of danger that cannot be mitigated through less restrictive means. For that reason, categorical barriers to pretrial release are unlikely to pass constitutional muster. The Ninth Circuit, for instance, has held that a categorical bar on pretrial release for undocumented immigrants violates substantive due process. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 791 (9th Cir. 2014). The Arizona Supreme Court has recently struck down two categorical release bars on the same basis. *Simpson v. Miller*, 387 P.3d 1270, 1273 (Ariz. 2017), *cert. denied sub nom. Arizona v. Martinez*, 138 S.Ct. 146 (2017) (categorical denial of pretrial bail for defendants accused of sexual conduct with a minor); *State v. Wein*, 417 P.3d 787, 789 (Ariz. 2018) (categorical denial of pretrial bail for persons charged with sexual assault).

Few offense categories, in isolation, are "convincing proof" of "demonstrable danger."

Nor do contemporary risk assessment tools suffice to make the requisite determination of necessity. The risks that such tools assess are typically broad: "failure to appear," defined as any nonappearance; "new criminal activity," defined as the risk of any new arrest; or even "pretrial failure," defined as *either* a nonappearance or new arrest. *E.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 867–71 (2016); Mayson, *supra*, at 509–10, 561–62; *cf.* Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 587 (2018); *ODonnell*, 251 F. Supp. 3d at 1117–18. These broad risk categories are not particularly informative in the necessity inquiry. To determine if detention is necessary to ensure appearance, it is essential to distinguish between defendants who merely need help getting to court and defendants who pose a genuine risk of willful flight. *Accord* Gouldin, *Defining Flight Risk*, *supra*. No existing risk assessment tool does that. To determine if detention is necessary to protect public safety, it is essential to identify those likely to commit serious crimes. The likelihood of "any arrest"—including for trivial violations—is far less relevant to public safety, especially because people at high risk for "any arrest" are not necessarily at high risk for serious-crime arrest, and vice versa. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 528–29 (2012). At the lower end of the offense spectrum, moreover, arrest is only a loose proxy for crime commission and arrest rates may be racially skewed vis-à-vis underlying rates of offending. *E.g.* Lauren Nichol Gase et al., *Understanding Racial and Ethnic Disparities in Arrest: The Role of Individual, Home, School, and Community Characteristics*, 8 RACE & SOC. PROBS. 296 (2016).

A few pretrial risk assessment tools do assess the risk of rearrest for violent crime specifically. *See* LAURA & JOHN ARNOLD FOUND., PUBLIC SAFETY ASSESSMENT: RISK FACTORS AND FORMULA (2016);[10] Mayson, *supra*, at 512. But, thus far, they cannot predict violent-crime arrest with much precision.[11] The first study of the PSA as implemented in Kentucky, for instance, found that among those defendants the tool flagged as high-risk for violence and released, the rate of rearrest for a violent crime in the pretrial period was 8.6%. *See* LAURA & JOHN ARNOLD FOUND., RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT – COURT IN KENTUCKY 3 (2014). A more recent re-validation study documented a rate of 3%. MATTHEW DEMICHELE ET AL., LAURA & JOHN ARNOLD FOUND., THE PUBLIC SAFETY ASSESSMENT: A RE-VALIDATION AND ASSESSMENT OF PREDICTIVE UTILITY AND DIFFERENTIAL PREDICTION BY RACE AND GENDER IN KENTUCKY (2018).[12] These rates do not account for defendants who are detained, so may understate the statistical import of a violence flag. Yet the experience of Washington D.C. suggests that they probably do not understate it by much. The District of Columbia releases approximately 94% of arrestees pending trial; of those individuals, at least 86% remained arrest-free

---

[10] Available at https://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf.

[11] The risk threshold at which defendants will be classified as "high" risk is a normative judgment that must be made in the development and implementation of each tool in each jurisdiction. It is generally made by tool developers, sometimes in consultation with local stakeholders. *See generally* Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017).

[12] *Available at* https://www.arnoldfoundation.org/wp-content/uploads/3-Predictive-Utility-Study.pdf.

and 98% remained free of arrest for violent crime each year between 2011 and 2017. *E.g.* PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST, FY 2019, 27 (2018); PRETRIAL SERVS. AGENCY FOR D.C., FY 2017 RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, D.C. (2018).[13] Lastly, even if a pretrial risk assessment tool did measure the right risks, and even if it could predict with greater precision, no instrument that measures risk alone can address the ultimate question, which is whether some method of release can adequately *reduce* the risk. *Accord* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 855–62 (2014).

In sum: The due-process mandate of careful tailoring precludes detention absent an individualized showing that the defendant presents a serious risk of flight, harm to witnesses or harm to the public that cannot be managed in any less restrictive way. As the example of Washington D.C. illustrates, few defendants present such unmanageable risk. Today's actuarial risk assessment tools may well have a useful role to play in pretrial decision-making, but no classification by any current pretrial risk assessment tool is *itself* sufficient to justify a deprivation of liberty.

---

[13] *Available at* https://www.psa.gov/sites/default/files/FY2019%20PSA%20Congressional%20Budget%20Justification.pdf; https://www.psa.gov/sites/default/files/2017%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf. Success rates for prior years are available at PRETRIAL SERVS. AGENCY FOR D.C., PERFORMANCE MEASURES, https://www.psa.gov/?q=data/performance_measures; and FY 2016 release rates are available at https://www.psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf.

B. Procedural Due Process Prohibits the Setting of Unaffordable Bail in the Absence of Robust Procedures.

Procedural due process requires that any deprivation of liberty be attended by robust procedural protections. *Mathews*, 424 U.S. at 332, 335; *supra* Section II.B. The Supreme Court has not specified the minimum procedures necessary for pretrial detention. Here again, though, *Salerno* offers a useful template.

The *Salerno* Court found that the Bail Reform Act's detention procedures survived a facial due process challenge. The Act permitted detention only after a court had found, by clear and convincing evidence in a full adversarial hearing, that the defendant posed "an identified and articulable threat" that no condition of release could manage. 481 U.S. at 751. The Act also provided for immediate appellate review of any detention order and imposed a speedy trial limit for cases in which defendants were detained. *Id.* at 752 (citing 18 U.S.C. § 3145(c)). *Salerno* held these procedures to satisfy due process, at least as a facial matter.

The Bail Reform Act itself is also instructive, because it represents Congress's understanding of the procedural protections the Due Process Clause requires for pretrial detention. *See* S. REP. No. 98–225, at 8 (1983). Congress recognized that the full set of detention procedures must apply when a court imposes unaffordable bail, as the Fifth Circuit noted in *United States v. McConnell*, 842 F.2d at 108–09; *see* Section II.C *supra*. Alarmingly, the Fifth Circuit panel in *ODonnell*, 892 F.3d at 147, dramatically misconstrued this aspect of *McConnell*, citing *McConnell* for the proposition that a court's unilateral necessity determination is sufficient process for

detention on unaffordable bail.[14] In fact, *McConnell* establishes just the opposite. The *McConnell* Court went out of its way to clarify that unaffordable bail triggers the Act's full detention process, and to "remind [the defendant] that the detention hearing is a critical component" of that process. 842 F.2d at 109–10 n.5.

The Supreme Court's analysis in *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011), is illuminating as well. In *Turner*, the Supreme Court considered whether the Due Process Clause guarantees a defendant's right to representation in a civil contempt proceeding for failure to pay court-ordered child support despite the inability to do so. *Id.* at 435. The Court recognized that the private interest at stake, the loss of physical liberty, "argue[d] strongly for the right to counsel that Turner advocates." *Id.* at 445. Nonetheless, the Court held that due process does not entail a right to counsel in this context. It reasoned that the only question at issue, the defendant's ability to pay, was "sufficiently straightforward" to determine without counsel. *Id.* at 446. Furthermore, a guarantee of defense counsel would "create an asymmetry of representation" in cases where the opposing party was an unrepresented parent seeking enforcement of the child-support order. *Id.* at 446–48. In such cases, the Court concluded, due process does not entail

---

[14] The *ODonnell* panel described *McConnell* as "concluding that, under the Bail Reform Act of 1984, the 'court must [merely] explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release' when setting a bond that a detainee cannot pay." *Id.* at 160 (quoting *McConnell*, 842 F.3d at 110). The insertion of "merely" into the quoted text is unjustified and profoundly misleading, however, given that the *McConnell* court went out of its way to emphasize that the setting of such bail triggers the full panoply of detention procedures. *See* Section II.C *supra*.

a right to counsel so long as the state provides "alternative procedural safeguards"—"notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding;" some process "to elicit relevant financial information" ahead of time; the opportunity for the defendant "to present, and to dispute, relevant information" at the hearing; and "an express finding by the court that the defendant has the ability to pay" before it can deprive the defendant of liberty. *Id.* at 447–48. In the absence of such safeguards, however, a defendant's incarceration for failure to pay child support does violate the Due Process Clause. *Id.* at 449.

Turner offers a helpful contrast to the pretrial criminal setting. The counter-party at a bail hearing that may result in detention is not an unrepresented parent, but the state itself. And although a defendant's ability to pay is an essential consideration in bail-setting, the key question when a court wishes to impose *unaffordable* bail is whether detention is necessary or whether some less restrictive measure might be adequate to manage whatever risk the defendant presents. This question is far from straightforward. Given those differences, the procedural safeguards the Court deemed sufficient in *Turner* are *not* sufficient to "assure a fundamentally fair determination of the critical incarceration-related question" in the pretrial setting. *Id.* at 435. Rather, *Turner* suggests that due process likely requires representation for indigent defendants whose liberty is at stake.

Several district courts have recently considered what procedures are required by the Due Process clause to minimize error in pretrial detention orders (including orders imposing unaffordable bail). In *Caliste v. Cantrell*, Civil No. 17-6197, 2018 WL 3727768 (E.D. La. Aug. 6, 2018), the court concluded, on the basis of a *Mathews* analysis, that due process requires "an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard on this issue;" "consideration of alternative conditions of release, including findings on the record applying

the clear and convincing standard and explaining why an arrestee does not qualify for alternative conditions of release;" and counsel to represent the defendant. *Id.* at *12.[15] In *Shultz v. State*, --- F. Supp. 3d ----, 2018 WL 4219541, *9 (N.D. Ala. Sept. 4, 2018), the court concluded that due process requires notice to defendants "of their constitutional right to pretrial liberty [and] the evidence they must provide to prove that there are non-monetary conditions of pretrial release that will satisfy the purposes of bail;" an opportunity to be heard on that question; and a finding on the record "by clear and convincing evidence that pretrial detention is necessary to secure the defendant's appearance at trial or to protect the public," along with a statement of reasons. *Id.* at *19–21.

The recent Fifth and Eleventh circuit opinions in *ODonnell* and *Walker* are not to the contrary, because neither opinion considered the procedures necessary if a fundamental right—the right to physical liberty—is at stake. The *ODonnell* panel analyzed the requirements of procedural due process in the context of the right, guaranteed by the Texas Constitution, to be "bailable by sufficient sureties." 892 F.3d at 157–59; *see also id.* at 163 (finding that in the present proceedings, no "fundamental substantive due process right . . . is in view"). The *Walker* panel deemed the forty-eight hour

---

[15] The court reasoned that,

> [W]ithout representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.

Id.

deprivation of liberty at issue in that case to be less than an "absolute" deprivation of physical liberty. 901 F.3d at 1264; *see also id.* at *12 (declining to apply a substantive due process analysis). Neither opinion contradicts the proposition that, when the state seeks to deprive an individual of her fundamental right to physical liberty indefinitely or for the duration of the pretrial period, due process requires robust procedures to minimize the risk of error.

Given the importance of the individual liberty interest at issue, and the emerging consensus of the federal courts, it is our view that, whenever a court seeks to impose pretrial detention (including by unaffordable bail), due process entitles the defendant to:

1. A prompt hearing on the necessity of detention;
2. Notice of the critical issue to be decided at the hearing (whether any less restrictive measure can meet the state's compelling interests in preventing flight or serious crime);
3. An opportunity to confront the state's evidence and present relevant evidence;
4. Representation by counsel;
5. A judicial finding of necessity on the record, by clear and convincing evidence, with explanation of the facts and reasoning that support it; and
6. A right to immediate appeal of the detention order.

IV. THE PROPOSITION THAT PRETRIAL DETENTION MUST BE THOROUGHLY JUSTIFIED IS CONSISTENT WITH HISTORY AND WITH OTHER CONSTITUTIONAL DOCTRINE.

A. Robust Substantive and Procedural Constraints on Pretrial Detention are Consistent with the History of Bail.

Bail is one of the oldest legal devices still in current use. Its origins predate both the division between civil and criminal law and the rise of commercial cash economies. For this reason, it is important to be careful about terminology and about sweeping statements regarding the history of bail. "Bail" is not synonymous with "secured money bail," the requirement of cash or secured collateral upfront to be released from pretrial confinement (often procured by paying a nonrefundable premium to a commercial surety). Secured money bail is relatively novel, unknown to the first hundred years of practice under the United States Constitution. As in property law, the historical meaning of "bail" in the criminal context is merely "delivery," or the transfer of custody on some pledge or "surety." *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769). Over time and across jurisdictions, a "sufficient surety" has consisted of nonfinancial pledges of good behavior, unsecured pledges of property or money conditioned on a defendant's appearance at trial, or collateral transferred upfront to "secure" that appearance.

Reviewing the history of the Anglo-American tradition of bail establishes three points. First, bail has virtually always been subject to constitutional and legal constraints *beyond* the mere prohibition that the surety required for bail not be "excessive." These constraints include both substantive rules cabining who can be deemed "ineligible" for bail and procedural rules regulating what has to happen before someone can be detained pretrial, with or without the offer of bail. Second, the "sufficiency" of a surety for bail originally had very little to do with a defendant's wealth and nothing to do with what a defendant or his personal sureties could pay *upfront*. Procedural protections against arbitrary detention are very old; the relationship of secured money bail to these protections is, by comparison, a relatively new problem to which courts and legislatures have only recently given their attention. Finally, English and American jurists have long

recognized that constitutionally, an unaffordable or "unobtainable" bail is functionally equivalent to an outright denial of bail and an order of detention pending trial.

Together, these historical points support the legal arguments made in this brief. In historical context, the *Bearden* line of cases rightly interprets equal protection and due process principles to constrain judicial discretion in ordering pretrial detention, including via a secured money bail requirement. The *Salerno* line of cases rightly recognizes that pretrial liberty must be protected, at minimum, by the substantive limits and rigorous procedures that Congress has imposed on pretrial detention in the federal courts. Lower federal courts following *Salerno* have, in keeping with historical jurisprudence, rightly recognized that an unaffordable bail is equivalent to a denial of bail, and therefore subject to the same constraints as an outright detention order.[16]

1. History and Tradition Support Rigorous Procedures Protecting the Accused from Pretrial Detention with or without Money Bail.

The modern institution of pretrial bail derives from the system of amercements in pre-Norman England. At a time when all crimes were privately prosecuted and all convictions paid in fines, a defendant could be

---

[16] The history related in this brief focuses on the regulation of bail beyond the prohibition of excessive bail, and on the clear and consistent practice of treating unaffordable bail as a denial of bail altogether. For other legal arguments drawn from the history of bail, see *State v. Brown*, 338 P.3d 1276, 1283–88 (N.M. 2014) (focusing on inequalities created by secured money bail systems); *ODonnell*, 251 F. Supp. 3d at 1068–84 (focusing on misdemeanor bail and alternatives to secured money bail systems).

released from pretrial confinement if a surety pledged to pay the total amount of the defendant's potential liability. The payment became due if the defendant absconded before trial. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–20 (1983). After the Normans imposed a system of public blood punishments, a bail system developed on the same logic of the amercements but with the difference that surety amounts had to be set by judicial discretion. Carbone, *supra*, at 519, 521.

As the English Parliament gained power over the centuries, its signal acts of constitution-making aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959, 966 (1965) ("It is significant that three of the most critical steps in this process—the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689—grew out of cases which alleged abusive denial of freedom on bail pending trial."). *See generally*, William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); ELSA DE HAAS, ANTIQUITIES OF BAIL (1940); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

Magna Carta provided one basis for this tradition by enshrining the principle that imprisonment was only to follow conviction by one's peers. Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."); *accord* Magna Carta ch. 39 (1215). From that principle jurists derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, to bodily liberty pending trial on adequate assurance that one would reappear to stand trial. See, e.g., *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963);

Sistrunk v. Lyons, 646 F.2d 64, 68 (3d Cir. 1981) ("Bail was a central theme in the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions.").

In 1554, Parliament required that the decision to admit a defendant to bail be made in open session, that two justices be present, and that the evidence weighed be recorded in writing. *See* TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010). Responding to perceived abuses by the Stuart kings and their justices and sheriffs, who detained defendants for months without charging them—such that they would not be admitted to bail—Parliament passed the Petition of Right in 1628, prohibiting imprisonment without a timely charge. *See* JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 126 (1997). In the Habeas Corpus Act of 1679, Parliament "established procedures to prevent long delays before a bail bond hearing was held," a response to a recent case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., *supra*, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges that kept defendants detained pretrial. Parliament responded again in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a phrase copied the next century in the Eighth Amendment to the U.S. Constitution. Carbone, *supra*, at 528–29.

In sum, by the time of the United States' founding, pretrial release on bail was a fundamental part of English constitutionalism, protected in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner so that accused defendants were not detained either with no charge, or on a charge alone without courts first carefully considering release on bail. All of

these constraints on pretrial detention were in addition to the famous prohibition that bail should not be excessive.

Not everyone was eligible for bail under English practice. Over the course of the eighteenth century, English jurists developed complex rules governing eligibility that differed depending on whether a local justice of the peace or a royal judge was making the decision. Justices of the peace, for instance, could not admit to bail "persons taken . . . in the fact of" stealing, but had discretion whether to bail "thieves openly defamed," and *had to* admit to bail "[p]ersons charged with petit larceny" who had not "been previously guilty of any similar offence." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 95–97 (1816). Royal justices could "bail any man according to their discretion" on a writ of habeas corpus. *Id.* at 129. They tended to deny bail in serious felonies, but admitted any defendant to bail after "unreasonable delay" in his case, with the upper bound of one year's delay on the most serious charge of treason. *Id.* at 129–31.

American practice simplified these rules and expanded the right to bail. Even before the English Bill of Rights, Massachusetts made all non-capital cases bailable in 1641 (and significantly reduced the number of capital offenses). *See* Foote, *supra*, at 968. Pennsylvania's 1682 constitution provided that "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." *See* Carbone, *supra*, at 531 (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). The vast majority of American states copied Pennsylvania's provision; many state constitutions still contain that language. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). The Judiciary Act of 1789 likewise made all non-capital charges bailable. 1 Stat. 91 ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death," in which cases judges had discretion to admit a defendant to bail.).

California was among the states that adopted the "consensus text" enshrining a broad right to bail. Hegreness, *supra*, at 921, 9393 & nn.37, 40. The 1849 California constitution prohibited excessive bail in its "Declaration of Rights" and also provided, "All persons shall be bailable, by sufficient sureties: unless for capital offences, when the proof is evident or the presumption great." CAL. CONST. OF 1849, art. I, §§ 6–7. A substantially similar provision remains in the state's constitution today, although it expands the list of serious felonies for which bail may be denied. CAL. CONST., art. I, § 32. Before his ascension to the U.S. Supreme Court, Stephen J. Field as Chief Justice of California interpreted the clause to mean that outside of capital cases, "the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse." *People v. Tinder*, 19 Cal. 539, 542 (1862).

Thus, adopting the English procedural protections regulating pretrial detention, early American constitutions also asserted a much broader substantive right to pretrial liberty. While the major determination to be made at an English bail hearing was whether to admit to bail, Americans answered that question in their state constitutions and in the statute founding the federal judiciary. The only determination left to judicial discretion was the sufficiency of the sureties, that is, *how* to bail, not *whether* to bail. *See* TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014).

It was largely after the mid-twentieth century that some states and the federal government expanded judicial discretion to order "preventive detention." See Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966). The discretion to deny bail in these jurisdictions has come with explicit protections long identified with due process in the English constitutional tradition. The federal Bail Reform Act of 1984, for instance, permitted detention only in serious felony cases upon a judicial finding by

clear and convincing evidence, after a full adversary hearing, that the accused presented an unmanageable flight risk or risk to public safety. Pub. L. No. 98–473, § 202, 98 Stat. 1837, 1976 (1984) (codified at 18 U.S.C. §§ 3141–50 (2012)). States that have expanded courts' authority to order pretrial detention have generally also included such constraints. *See, e.g.*, N.M. CONST., art. II, § 13; VT. CONST., art. II, § 40; WIS. CONST. art. I, § 8.

As this brief history illustrates, bail has for centuries been constrained by substantive and procedural requirements that go well beyond a prohibition on excessiveness. Indeed, the prohibition on excessive bail in the English Bill of Rights was a final resort to prevent officers from making an end run around *all the other* procedural protections for pretrial liberty imposed by the English Constitution, including timely evidentiary hearings with a right of appeal. *See, e.g.*, Foote, *supra*, at 965–68. The United States supplemented these procedures by limiting discretion to deny bail to capital offenses. As discretion to deny bail has expanded in recent years, so too have procedural protections. Given the long tradition of Anglo-American regard for pretrial liberty, these protections are best understood as articulations of deeply rooted constitutional notions of due process. *See generally* Caleb Foote, *The Coming Constitutional Crisis in Bail II*, 113 U. PA. L. REV. 1125 (1965) (arguing that history and tradition secure a right to release on affordable bail on Eighth Amendment, due process, and equal protection grounds).

2. The Anglo-American Bail System Has Long Recognized that Unaffordable Bail Constitutes an Order of Detention.

From medieval England to modern America, magistrates have wielded broad discretion to determine the sufficiency of pledged sureties in order to permit bail. But even as the nature of those pledges have changed

over time, jurists have consistently concluded that an unattainable surety requirement is tantamount to denying bail altogether.

Under the pre-Norman amercement system, the amount required for bail was coterminous with the amount of the fine for which the defendant would be liable upon conviction. But that amount differed based on the defendant's social rank. "[T]he baron [did] not have to pay more than a hundred pounds, nor the routier more than five shillings." 2 FREDERICK WILLIAM POLLUCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 514 (1895).

After the tie between the bail amount and the potential fine was severed, magistrates gained discretion to set the amounts that sureties would have to pledge based on a variety of factors, including the seriousness of the offense, the quality of evidence, the social status and reputation of the defendant, and the defendant's ability to procure sureties. *See, e.g.*, *Bates v. Pilling*, 149 ENG. REP. 805, 805 (K.B. 1834); *Rex v. Bowes*, 99 ENG. REP. 1327, 1329 (K.B. 1787) (per curiam); *Neal v. Spencer*, 88 ENG. REP. 1305, 1305–06 (K.B. 1698). Until the late nineteenth-century, virtually all bail was unsecured: a pledge to pay some value upon the defendant's failure to appear, but with no money changing hands up front, either between the sureties and the state, the defendant and the state, or the defendant and his sureties. SCHNACKE, FUNDAMENTALS, *supra*, at 24–25. By law, defendants could not pay their sureties, even to indemnify them after forfeiture—a rule that still obtains in all the common law world outside the United States and the Philippines. F. E. DEVINE, COMMERCIAL BAIL BONDING 5–15 (1991).

Even without upfront transfers of cash or collateral, jurists recognized that too high a standard for "sufficient" sureties could cause the pretrial detention of a defendant. In 1819, Joseph Chitty, the prolific commentator on English criminal practice, noted that "[t]he rule is, . . . bail only is to be required as the party is able to procure; for otherwise the allowance of bail

would be a mere colour for imprisoning the party on the charge." 1 CHITTY, *supra*, at 131. Chitty counseled justices of the peace that in cases where they had to admit defendants to bail, they could not "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a *denial of bail*." *Id.* at 102–03. If they did, the justices could both be prosecuted for a misdemeanor and also be sued civilly for false imprisonment.

Nonetheless, demands for "sufficient sureties" did sometimes operate as *de facto* orders of detention, especially for itinerant populations who lacked local connections. *Cf.* THE SIXTH ANNUAL REP. OF THE PRISON DISCIPLINE SOCIETY 22 (1831) (reporting that, in surveyed debtors prisons, the "poor seamen, poor laborers, and poor mechanics" remained in jail, "while there is scarcely an instance on record of a poor minister, a poor physician, or a poor lawyer in Prison for debt"). The commercial surety contract arose to address this imbalance between stable defendants who had local ties and mobile defendants who did not. Conventional accounts date the first commercial surety firm to 1898 in San Francisco, the hub of western mobility. SCHNACKE, HISTORY, *supra*, at 7. By the mid-twentieth century, the commercial surety system had almost totally replaced the personal surety system in practice, to the point that "bail" has come to mean "the premium paid in a secured money bail system" in common parlance. *See id.*

The shift in the nature of suretyship from unsecured pledges to upfront payments has made Chitty's point even more salient. Since the mid-twentieth century, numerous jurists and jurisdictions have recognized unaffordable bail as a *de facto* order of detention. Justice William O. Douglas, sitting as a Circuit Judge in 1960, reasoned that "[i]t would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Bandy v. United States*, 81

S.Ct. 197, 198 (1960) (Douglas, J., in chambers) (citing, *inter alia*, *Stack*, 342 U.S. at 1); *see also* Section II.C, *supra*. A number of state and local authorities have recognized the same principle, either by forbidding detention based on an inability to pay money upfront, or by protecting indigent detainees with the same procedures required of preventive detention. *See, e.g.*, Court of Appeals of Maryland, Rules Order 39 (Feb. 17, 2017); New Orleans Mun. Code § 54–23 (2017); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE § 10-1.4(e) (3d ed. 2007) ("The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.").

In sum, although the nature of surety relationships have changed dramatically over time, jurists in every era have recognized that requiring an unobtainable surety is tantamount to denying bail altogether, and thus demands the same substantive and procedural protections as an outright denial of bail. *See also ODonnell*, 251 F. Supp. 3d at 1156; *Shultz v. State*, --- F. Supp. 3d ----, 2018 WL 4219541, *9 (N.D. Ala. Sept. 4, 2018).

B. Other Constitutional Provisions Do Not Obviate Equal Protection and Due Process Constraints.

In response to equal protection and due process challenges to bail systems that permit unaffordable bail to be casually imposed, some have argued that the Fourth and Eighth Amendments provide the exclusive framework for claims alleging an unconstitutional deprivation of pretrial liberty. The basis for that argument is the interpretive canon that "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing such a claim." *Albright v. Oliver*, 510 U.S. 266, 266

(1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

The argument is mistaken. To start, there is no necessary reason for a state court to adopt the canon when interpreting its own constitution. But even if the canon were to apply with full force to the claims at issue in this lawsuit, the *Albright* standard would not limit constitutional analysis to the Fourth or Eighth Amendments (or state-law equivalents), as indeed both *Bearden* and *Salerno* show. The reason is that neither the Fourth nor the Eighth Amendment provide "an explicit textual source of constitutional protection" against the "particular sort of government behavior" to which the claims in this lawsuit, and similar lawsuits, are addressed.

The Fourth Amendment provides explicit textual protection against "unreasonable" searches and seizures, which the Supreme Court has interpreted to generally prohibit search or seizure without probable cause. U.S. CONST. amend. IV; *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975). When a claimant alleges a search or seizure without probable cause, or a defect in the process of a search or seizure, the Fourth Amendment therefore provides the relevant analytical framework. Both *Albright* and *Graham* involved such claims. The *Albright* petitioner sought to challenge his "prosecution without probable cause" pursuant to substantive due process; the majority held that he must bring a Fourth Amendment claim instead. 510 U.S. at 270-71. The petitioner in *Graham* alleged excessive force during an investigatory stop; this claim too, the Court held, was "most properly characterized as one invoking the protections of the Fourth Amendment." 490 U.S. at 388, 394. More recently, the Court has held that a petitioner could challenge both his arrest and later detention pursuant to the Fourth Amendment on the ground that the charge "was based solely on false evidence, rather than supported by probable cause." *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017).

Mr. Humphrey is not contesting probable cause for his seizure or the manner in which he was seized. He instead challenges the manner in which the state regulates detention and release of pretrial defendants after they have been seized.[17] It is true that *Manuel* broadly asserts that "[t]he Fourth Amendment . . . establishes 'the standards and procedures' governing pretrial detention," *Manuel*, 137 S.Ct. at 914, but the Court issued this statement to justify the application of Fourth Amendment to the situation at hand. It simply was not contemplating the question of whether a defendant might *ever* challenge his detention pursuant to a different constitutional guarantee. *Id.* at 919 (holding that, "[i]f the complaint is that a form of legal process resulted in pretrial detention *unsupported by probable cause*, then the right allegedly infringed lies in the Fourth Amendment" (emphasis added)). Clearly the Fourth Amendment does not preclude the application of other constitutional guarantees to the state's pretrial decision-making. If it did, the state could, with impunity, condition pretrial liberty on religion, race, or defendants' political views. Nor is it plausible to suggest that probable cause is all that is necessary to justify pretrial detention. The requirement of probable cause is a floor, not a ceiling. *E.g. Gerstein*, 420 U.S. at 126 (holding that a "timely judicial determination of probable cause" is a "*prerequisite* to detention," not that it is sufficient justification) (emphasis added); *id.* at 125 n.27 (recognizing that "the probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct").

Nor does the Eighth Amendment provide explicit textual protection against casual or systemic detention on unaffordable bail. The Excessive Bail

---

[17] Or, if one takes Justice Ginsburg's view that a defendant remains "seized" even if released so long as prosecution is pending, during the period of the seizure. *Albright*, 510 U.S. at 276–81 (Ginsburg, J., concurring).

Clause, as presently construed by the Court, does not itself prohibit detention. *Salerno*, 481 U.S. at 754–55. Nor has it been uniformly construed to prohibit bail beyond a defendant's ability to pay. *See supra* note 2. The Clause protects against bail set in an individual case that is greater than necessary to serve the state's interests. Excessive bail claims may therefore be brought by *released defendants* who wish to challenge the amount of collateral required to secure their release. *Cf. Murphy v. Hunt*, 455 U.S. 478, 481–82 (1982) (excessive bail claim becomes moot only on conviction). A detained defendant may have an excessive bail claim as well as equal protection and due process claims, but the latter are not logically enfolded in the former.

Instead, applying *Albright*'s principles, it is the Equal Protection Clause and the Due Process Clause that protect the "specific constitutional right[s] allegedly infringed" here. *Graham*, 490 U.S. at 393–94. The claim that the state has imposed detention without adequate justification or procedures sounds in due process, because "[f]reedom from imprisonment—from government custody, detention, and other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Moreover, the Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citation omitted). The right to pretrial release and the constraints on pretrial detention are deeply rooted in Anglo-American legal history and tradition, and those rights go well beyond the proscription of excessive bail. The claim that the state imposes detention in a manner that impermissibly discriminates against some group sounds in equal protection because, under the Equal Protection Clause, "[r]ules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent, befriended or friendless, employed or unemployed, resident or transient, of

good reputation or bad." *Rainwater*, 572 F.2d at 1057. As the *Bearden* Court reasoned, financial assessments that serve to detain the indigent are best evaluated at the point where "[d]ue process and equal protection principles converge." 461 U.S. at 665.

Indeed, *Bearden* and *Salerno* themselves are the best indications that pretrial detention and bail are not analyzed solely under the Fourth and Eighth Amendments.[18] *Bearden* subjected the conversion of monetary fines into incarceration to heightened scrutiny under the Equal Protection and Due Process Clauses apart from Eighth Amendment's prohibition on excessive fines. *Salerno* evaluated the federal bail system under both procedural and substantive due process apart from either the Eighth Amendment's prohibition of excessive bail or the Fourth Amendment's regulations of pretrial procedure. Lower federal courts have recently recognized the same principle. *Walker*, 901 F.3d 1245, 1260 (11th Cir. 2018) (rejecting defendants' argument that the Eighth Amendment provides the exclusive vehicle by which to challenge bail practices); *ODonnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018) (same); *see also United States v. Giangrosso*, 763 F.2d 849, 851 (7th Cir. 1985) ("[The defendant] is not complaining about excessive bail, but about the procedures used to deny bail; that is a complaint

---

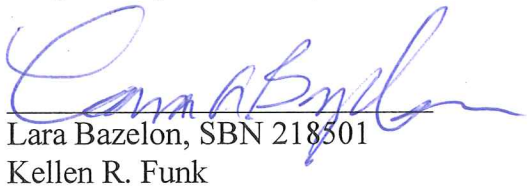
[18] The United States Congress also recognized substantive and procedural constraints beyond the Eighth Amendment's excessiveness prohibition in enacting the Bail Reform Act of 1984. The Senate Committee wrote: "[T]he Committee recognizes a pretrial detention statute may nonetheless be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind." S. REP. No. 98-225, at 8 (1983).

under the due process clause . . . ."). As these cases show, within the domain of pretrial detention substantive due process is not "uncharted," nor its guideposts "scarce and open-ended." *Albright*, 510 U.S. at 272 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)).

Rather, *Bearden* and *Salerno* require that pretrial detention meet heightened scrutiny. *Salerno* and the broad consensus of state constitutionalism counsel that detention, either ordered outright or de facto, must be limited to cases of serious, immitigable threats to the state's interests. *Salerno*, *Mathews*, and *Turner* suggest that, at a minimum, due process requires timely adversarial hearings, with findings by clear and convincing evidence on the record, and with a right of immediate appeal to protect the fundamental right of physical liberty pending trial.

Dated: October 9, 2018

Respectfully submitted,



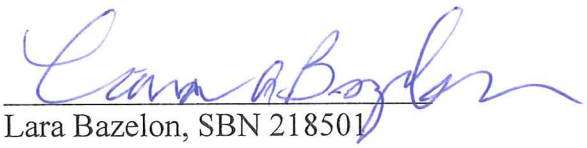
Lara Bazelon, SBN 218501
Kellen R. Funk
Sandra G. Mayson
Counsel for Amici
National Law Professors of Criminal, Procedural, and Constitutional Law

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief *Amici Curiae* has been prepared using proportionally spaced 13-point Times New Roman font. I further certify that the total word count of this brief, including footnotes, is 13,267 words, as determined by the word count of the Microsoft Word for Windows software used to prepare this brief.

Dated: October 9, 2018

Respectfully submitted,



Lara Bazelon, SBN 218501
Kellen R. Funk
Sandra G. Mayson
Counsel for Amici
National Law Professors of Criminal, Procedural, and Constitutional Law

DECLARATION OF SERVICE

Case No. S247278

In Re KENNETH HUMPHREY, on Habeas Corpus

I, Lara Bazelon, declare that I am over the age of eighteen years and I am not a party to this action. My business address is University of San Francisco School of Law, 2130 Fulton Street, San Francisco, CA 94117.

On October 9, 2018, I served the document listed below:

APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND PROPOSED BRIEF OF *AMICI CURIAE* NATIONAL LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF RESPONDENT

on the parties in this action, addressed as follows:

George Gascon
Sharon Woo
Wade K. Chow
Allison G. Macbeth
Office of San Francisco District Attorney
850 Bryant Street, Room 322
San Francisco, CA 94103
Attorneys for Petitioner

Alec Karakatsanis
Katherine Claire Hubbard
Civil Rights Corps
910 17th Street NW, Suite 200
Washington, DC 20006
Attorneys for Respondent

Thomas Gregory Sprankling
Wilmer Cutler Pickering Hale and Dorr LLP
950 Page Mill Road
Palo Alto, CA 94304
Attorneys for Respondent

Jeff Adachi
Matt Gonzalez
Christopher F. Gauger
Anita Nabha
Chesa Boudin
Office of the Public Defender
555 Seventh Street
San Francisco, CA 94103
Attorneys for Respondent

Seth Waxman
Daniel S. Volchok
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Attorneys for Respondent

Hon. Brendan Conroy
Hon. Joseph M. Quinn
Superior Court of California
County of San Francisco
850 Bryant Street, Room 101
San Francisco, CA 94103

Xavier Becerra
Katie L. Stowe
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

[X] **BY MAIL**: I am readily familiar with the business practice for collecting and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelopes were sealed, and with postage thereon fully prepaid, placed for collection and mailing on this date, following ordinary business practices, in the United States mail at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; that this declaration is executed on October 9, 2018, at San Francisco, California.

Lara Bazelon