IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE VALDEZ-JIMINEZ, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK B. BAILUS, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party In Interest.	Case Nos. 76417
AARON WILLARD FRYE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JERRY A. WIESE, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party In Interest.	Case Nos. 76845
NATHAN GRACE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MICHAEL VILLANI, DISTRICT JUDGE, Respondents, and THE STATE OF NEVADA, Real Party in Interest.	Case Nos. 76947

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MOTION FOR LEAVE OF COURT PURSUANT TO NRAP 29(f) FOR LATER FILING OF AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS' CONSOLIDATED PETITIONS FOR WRIT OF MANDAMUS

Law Professors are prepared to file an amici curiae brief with this motion for leave to file an amici curiae brief in accordance with Nevada Rule of Appellate Procedure (NRAP) 29 in support of the consolidated Petitions for Writ of Mandamus filed by Petitioners Jose Valdez-Jimenez, Nathan Grace, and Aaron Frye. These petitions were filed on July 18, August 31, and September 14, 2018, respectively. NRAP 29(f) states that an amicus brief must be filed within seven days after the date the brief of the party being supported is filed. However, this Court "may grant leave for later filing[.]" For the reasons discussed below, Amici respectfully move this Court for leave to file the Amicus Brief by July 26, 2019.

Amici are law professors who teach and write about criminal, procedural, and constitutional law. Several amici direct clinics, participate in criminal litigation at bail hearings and other pretrial proceedings, or study those proceedings.

This Honorable Court should grant this motion for the following reasons. First, before the court are constitutional arguments about pretrial detention and release. Amici seek to assist the Court's consideration of these issues by providing an overview and explanation of United States

Supreme Court jurisprudence and scholarship addressing federal constitutional constraints on depriving the indigent of pretrial liberty. To this end, Amici also provide a short history of legal protections applied to bail and pretrial detention from pre-Norman England to today. This history, context and explanation will assist this Honorable Court in understanding the law that governs this case; indeed it has helped other state and federal courts contemplating similar constitutional challenges to pretrial detention. See e.g. Brief of Amici Curiae Law Professors in Support of Respondent, In re Humphrey, 19 Cal App 5th 1006 (Ct. App. 2008); Brief of Amici Curiae Law Professors in Support of Appellants-Cross Appellees, Daves v. Dallas County, Texas, No. 18-11386 (5th Cir. filed Jan. 30, 2019).

Second, Amici are not involved in the proceedings below and only recently became aware of Petitioners' challenges to the Clark County money-bail system. Once aware, Amici have moved as expeditiously as possible to prepare a brief to aid this Court in resolution of this case. Third, although Petitioners' challenges were filed as long as more than a year ago, oral argument was only recently scheduled in this case and does not take place for almost six weeks. Accordingly, no party will be prejudiced if this motion is granted.

For the forgoing reasons, Amici Law Professors respectfully request their Motion for Leave to File a Later Amicus Brief be granted.

Dated this 25th day of July, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 25th day of July, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 76417

JOSE VALDEZ-JIMINEZ,
Petitioner

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK BAILUS, DISTRICT JUDGE, Respondents,
and
THE STATE OF NEVADA,
Real Party in Interest.

Petition for Writ of Mandamus

BRIEF OF *AMICI CURIAE* NATIONAL LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF THE PETITIONER

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Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) 14, 22

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2 FREDERICK WILLIAM POLLUCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1895).....34

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Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4 (2018)..... 28, 29

Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).....14

Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018) 8

Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014) 20

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NEVADA RULE OF APPELLATE PROCEDURE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Under Nevada Rule of Appellate Procedure 26.1, the Law Professors identified in Appendix 1 hereto declare that they do not have a parent corporation or issue publicly held stock.

Attorney Franny Forsman from the law firm of LAW OFFICE OF FRANNY FORSMAN serves as Counsel for Amici.

/s/ Franny Forsman
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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write about criminal, procedural, and constitutional law. Several *amici* direct clinics, participate in criminal litigation at bail hearings and other pretrial proceedings, or study those proceedings. *Amici* seek to assist the Court's consideration of the issues before it by providing (1) an overview of Supreme Court jurisprudence and scholarship addressing federal constitutional constraints on depriving the indigent of pretrial liberty, and (2) a short history of legal protections applied to bail and pretrial detention from pre-Norman England to today. A full list of *amici* appears in the Appendix.

SUMMARY OF THE ARGUMENT

As scholars and professors of criminal law, criminal procedure, and constitutional law, we urge this Court to recognize that when the government proposes to incarcerate a person before trial, it must provide thorough justification and process, whether the mechanism of detention is a transparent detention order or its functional equivalent, the imposition of unaffordable money bail.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made such a monetary contribution. The parties to this appeal have consented to the filing of this brief.

This 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. These protections are illusory if a court can unilaterally detain a person by casually imposing a monetary bail amount that he cannot pay.

The principle that any order of detention requires robust safeguards follows from two related lines of federal constitutional jurisprudence, exemplified by *Bearden v. Georgia*, 461 U.S. 660 (1983) and *United States v. Salerno*, 481 U.S. 739 (1987).[2] This jurisprudence establishes that pretrial detention must be attended by a determination of necessity and robust process. A court that wishes to impose or maintain an unaffordable bail amount must find that it serves a compelling interest of the state that no less restrictive condition of release can meet. That determination must be made through a process that adequately guards against erroneous deprivations of liberty.

[2] This brief does not address whether unaffordable bail is "excessive" under the Eighth Amendment. Case law on that question is mixed. *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 605–10 (2018).

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 addresses only *federal* constitutional criteria for pretrial detention. State constitutions can and often do impose independent limits, but any such limits the Nevada Constitution might impose are beyond the scope of this brief.

ARGUMENT

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 measure can meet the state's needs.

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. *Id*. at 17; *see also Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that California violated the Fourteenth Amendment by limiting indigent defendants' access to appellate counsel).

The Court later applied the logic of *Griffin* to wealth-based deprivations of liberty. The petitioner in *Williams v. Illinois* was held in prison after the expiration of his term pursuant to an Illinois law that permitted continued confinement in lieu of paying off a fine. 399 U.S. 235, 236–37 (1970). The Court held that the Fourteenth Amendment prohibits the state from "making the maximum confinement contingent on one's ability to pay." *Id*. The next 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 *Morris v. Schoonfield*, 399 U.S. 508 (1970)).

Bearden, 461 U.S. at 660, 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. Explaining that "[d]ue process and equal protection principles converge in the Court's analysis" of claims of wealth-based discrimination raised by criminal defendants, the Court held that the proper analysis for such claims requires "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 665–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)). Considering those factors, the Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment, unless nothing short of revocation can satisfy 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.

The *Bearden* rule—that the Fourteenth Amendment prohibits unnecessary deprivations of liberty for inability to pay—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 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."); *Walker v. City of Calhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018); *ODonnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018).

In the pretrial domain, *Bearden* prohibits the state from conditioning a person's liberty on unaffordable bail unless no other measure can meet the state's interests: ensuring defendants' appearance at future court dates and protecting public

safety. *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Salerno*, 481 U.S. at 750. "Only if alternative measures are not adequate to meet the State's interests" in public safety and court appearance may a court imprison a defendant for inability to satisfy a financial obligation. 461 U.S. at 672.[3] An increasing number of federal and state courts have recognized this straightforward application of the *Bearden* doctrine. *See, e.g.*, *ODonnell*, 892 F.3d at 162.[4]

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[3] Some courts have interpreted recent challenges to money-bail systems in more classic equal protection terms and wrestled with the question of what standard of scrutiny to apply. *See* Kellen Funk, *The Present Crisis in American Bail*, YALE L.J. FORUM 1098, 1113-20 (2019). Although *Bearden* itself rejected the tiered-scrutiny framework, in practical effect *Bearden* calls for heightened scrutiny of criminal court orders or policies that condition liberty on payment, because its final rule states a narrow tailoring requirement: If alternative means can meet the state's interests, detention is impermissible. *Accord Buffin*, 2018 WL 424362, at *9. Even before *Bearden*, the Supreme Court recognized that wealth discrimination merits heightened review when indigence causes an "absolute deprivation" of liberty. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20–21 (1973).

[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); 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; *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Ct. App. 2018); *State v. Pratt*, 166 A.3d 600 (Vt. 2017); *State v. Brown*, 338 P.3d 1276 (N.M. 2014).

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 applies whether detention is ordered outright or via unaffordable money bail. Because the right to physical liberty is fundamental, regulatory detention of an adult citizen triggers strict scrutiny, and must comply with robust substantive and procedural limits to survive.

A. Pretrial Detention Must 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 also 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) (citation omitted).

As the Supreme Court has long acknowledged, the consequences of depriving an accused person of liberty are profound. "[T]ime spent in jail . . . 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 person 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. *E.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741–59, 787 (2017); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224–26 (2018). Some evidence suggests that it increases the likelihood of 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 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 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).

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). The Supreme Court has not explicitly announced that pretrial detention is subject to strict scrutiny. 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.

"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 challenged detention regime violated substantive due process because, "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.

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. *Salerno*, 481 U.S. at 451-52; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To identify the procedural requirements for any given deprivation, courts consider (1) "the private interest" at stake; (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" in the proceeding, including any burdens that additional safeguards would entail. 424 U.S. at 335. Where the private interest at stake is liberty, 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 address the safeguards 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 unaffordable bail constitutes an order of detention. It has precisely the same result: the defendant remains in jail. *See ODonnell*, 892 F.3d at 158; *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). 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).

In an analogous statutory context, the federal Bail Reform Act recognizes that unaffordable bail triggers the procedures that must attend a direct order of detention. The accompanying Senate Report explained 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); *see also United States v. McConnell*, 842 F.2d 105, 108–10 & n.5 (5th Cir. 1988) (noting that unaffordable bail triggers the full detention process, and that "the detention hearing is a critical component" of that process); *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.").

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.

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

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 later cases, requires that regulatory detention be narrowly tailored to a compelling state interest and imposed pursuant to a process that protects individual liberty. 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. To fulfill this requirement, a court must determine what a defendant *can* pay. *Cf. Bearden*, 461 U.S. at 672; *Hernandez v. Sessions*, 872 F.3d 976, 992–93 (9th Cir. 2017). If the bail amount contemplated is beyond the defendant's ability to procure, 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 Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).[5]

The state's interests during the pretrial phase are ensuring the integrity of the judicial process—which includes ensuring a defendant's appearance at trial and the safety of witnesses—and 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. As the Supreme Court has recognized, "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, identifiable 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). The *Salerno* Court did too. 481 U.S. at 750.

[5] 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).

B. Detention is Rarely Necessary, Given Modern Alternatives.

It will rarely be the case that detention is the least restrictive means of eliminating flight and public safety risks. Few defendants pose significant risk in the first place. For those that do, alternative conditions of release should usually be sufficient to manage it.

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, or for other psychological and logistical reasons. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–35 (2018). There are ample risk-management measures short of detention that can effectively address these obstacles to appearance. Court-reminder systems and transportation support appear particularly promising. *Id.* at 731–32; BRICE COOKE ET AL., UNIV. OF CHI. CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018). When there is a real risk of willful flight, electronic monitoring can usually mitigate it. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 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 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. *Salerno*, 481 U.S. at 749; *see also* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018). Only when the danger is acute and no alternative form of prevention is feasible may the state resort to detention.

Salerno suggests some of the limits that careful tailoring may require of such detention. In upholding the federal Bail Reform Act, the *Salerno* Court noted that it limited detention eligibility to those charged with "extremely serious offenses" that Congress had "specifically found" to indicate danger. 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)). The Act permitted detention only on "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, they offer a useful template.

As *Salerno* suggests, narrow tailoring may require a limited detention-eligibility "net." *Accord* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.9 (3d ed. 2007); TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, MODEL BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 174–77 (2017). Detention of those charged with minor offenses who will be released shortly in any case 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 individualized proof of danger that cannot be otherwise managed.[6] A statistical risk assessment cannot provide sufficient evidence of danger.[7] Few defendants, moreover, pose this kind of threat. The District of

[6] Categorical bars on pretrial release are unlikely to pass muster. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 791 (9th Cir. 2014) (en banc) (mandatory pretrial detention for undocumented immigrants violates due process); *Simpson v. Miller*, 387 P.3d 1270, 1273 (Ariz. 2017) (mandatory pretrial detention for defendants accused of sexual conduct with a minor violates due process); *State v. Wein*, 417 P.3d 787, 789 (Ariz. 2018) (mandatory pretrial detention for persons charged with sexual assault violates due process). Few offense categories, in isolation, are "convincing proof" of "demonstrable danger." *Salerno*, 481 U.S. at 750.

[7] *See, e.g.*, *State v. Mercedes*, 183 A.3d 914, 922 (N.J. 2018) (revising court rule to clarify, inter alia, that risk assessment score alone is not a sufficient ground for detention). Actuarial risk assessment tools are increasingly prevalent in pretrial systems, and can be a useful method of identifying low-risk defendants for

Columbia, for instance, releases approximately 94% of arrestees pending trial; in every year between 2011 and 2017, at least 98% avoided arrest for violent crime. *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).[8]

C. 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. Although the Supreme Court has not specified the minimum procedures necessary for pretrial detention, *Salerno* again offers a useful template.

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immediate release while directing higher-risk defendants into more careful release or detention procedures. But contemporary pretrial risk assessment tools cannot identify the kind of significant risks that might justify detention with anything close to sufficient precision. *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. Rev. 837, 867–71 (2016); David P. Robinson et al., *Pretrial Risk Assessments: A Practical Guide for Judges*, 57 JUDGES' J. 3 (2018). Even if they could, no instrument that measures risk alone can determine whether detention is necessary or whether some method of release can adequately *reduce* the risk.

[8] *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.

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 an 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)).

The Bail Reform Act itself is also instructive, because it represents Congress's understanding of the safeguards constitutionally required for pretrial detention. *See* S. REP. No. 98–225, at 8 (1983) (recognizing that "a pretrial detention statute may . . . 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 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 where the defendant faces incarceration for failure to pay child support. *Id.* at 435. The Court recognized that the private interest at stake, physical liberty, "argue[d] strongly" for the right to counsel. *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" when the opposing party is an unrepresented parent. *Id.* at 446–48. In such cases, the Court concluded, "alternative procedural safeguards" can suffice—"notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding"; a process "to elicit relevant financial information" ahead of time; the opportunity for the defendant "to present, and to dispute, relevant information"; and "an express finding by the court that the defendant has the ability to pay" before it can deprive him of liberty. *Id.* at 447–48. In the absence of such safeguards, however, incarceration for failure to pay child support does violate due process. *Id.* at 449.

Turner offers a helpful contrast to the pretrial criminal setting. The counter-party at a bail hearing is not an unrepresented parent, but the state itself. And although a defendant's ability to pay is central to bail-setting, the key question when a court wishes to impose *unaffordable* bail is whether detention is necessary or whether some less restrictive measure can manage the risk. 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 federal district courts have recently considered what procedures the Due Process Clause requires 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 that it requires "an inquiry into the arrestee's ability to pay, including notice of the importance of this issue and the ability to be heard"; "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. In *Shultz v. State*, --- F. Supp. 3d ---, 2018 WL 4219541, at *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.[9]

[9] The recent opinions from the federal courts of appeal in the Fifth and Eleventh circuits are not to the contrary, because neither court has considered the procedures necessary if a fundamental right—the right to physical liberty—is at

Given the importance of the liberty interest at stake 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.

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stake. *See ODonnell*, 892 F.3d at 157–59 (analyzing procedural due process with respect to Texas' state-constitutional right to be "bailable by sufficient sureties"); *Walker*, 901 F.3d at 1264 (finding that 48-hour detention is not an "absolute deprivation" of liberty for purposes of constitutional analysis). Neither opinion contradicts the proposition that, when the state seeks to deprive an individual of liberty indefinitely or for the duration of the pretrial period, due process requires robust procedures to minimize the risk of error.

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

Although the Founders would have been unfamiliar with bail policies making liberty contingent on wealth, English and American law have long provided strict protections for defendants facing pretrial detention.

A. Bail Policies Historically Did Not Condition Liberty on a Defendant's Ability to Pay.

As a preliminary matter, the Founders would have been unfamiliar with policies that made a defendant's pretrial liberty dependent on the ability to proffer cash or secured collateral. At the founding, the meaning of "bail" in the criminal context was merely "delivery" of a person to his "sureties" in exchange for some pledge—not a deposit. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769).

For hundreds of years in common-law jurisdictions, a "sufficient" surety might include nonfinancial pledges of good behavior, or a surety's unsecured pledges of property or money, conditioned on a defendant's appearance at trial. Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6 (2018). The personal surety was not to be purchased; in fact, the United States today is almost completely alone (save for the Philippines) in permitting indemnification of sureties. F. E. DEVINE, COMMERCIAL BAIL BONDING 6–8 (1991).

Only in the last century has the term "bail" commonly incorporated upfront monetary transfers intended to secure an appearance. Schnacke, *Brief History*, *supra*, at 6–7. Modern bail policies that require upfront payment are therefore substantially more likely to result in pretrial detention for the indigent than the bail systems reflected in early English and American case law. *See Holland v. Rosen*, 895 F.3d 272, 293–95 (3d Cir. 2018). The Founders would not have recognized the bail system as it exists today.

B. The Anglo-American Legal Tradition Provides Special Protections to Prevent Arbitrary Pretrial Detention.

While the form of bail has changed recently and dramatically, Anglo-American law has long imposed strict protections against arbitrary pretrial detention. Indeed, the tradition was well-established long before the drafting of the U.S. Constitution.

The tradition finds its clearest post-Norman expression in Magna Carta, which enshrined the principle that imprisonment was only to follow conviction by one's peers. Magna Carta ch. 32 (1216); *accord* Magna Carta ch. 39 (1215). From that principle, legislators and jurists over time derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, a defendant's right to bodily liberty on adequate assurance that he or she will reappear to stand trial. *See, e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (speedy trial "has its roots at

the very foundation of our English law heritage" dating to Magna Carta and earlier); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (Magna Carta and trial right); *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.").

As the English Parliament gained power through the 1500s and 1600s, its signal acts of constitution-making aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. For example, "the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689" all "grew out of cases which alleged abusive denial of freedom on bail pending trial." Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959, 966 (1965). *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).

Each such act sought to increase fairness in pretrial custody determinations. In 1554, for instance, 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). In 1628, responding to perceived abuses by the Stuart kings and their justices and sheriffs,

who detained defendants for months without bail or charge, Parliament passed the Petition of Right 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," responding to a case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., BAIL AND PRETRIAL RELEASE, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges, leading to defendants' pretrial detention. Parliament responded in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a protection later incorporated into the Eighth Amendment to the U.S. Constitution. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 528–29 (1983).

In sum, by the time of the United States' founding, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections enshrined 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. All of these constraints were designed to ensure a fair, prompt consideration of each defendant's case for release.

American practice expanded the right to bail. Even before the English Bill of Rights, in 1641 Massachusetts made all non-capital cases bailable (and significantly reduced the number of capital offenses). 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, *New Clothes*, *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—including Nevada's. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013); NEV. CONST. art. I, § 7. The Judiciary Act of 1789 likewise made all non-capital charges bailable, 1 Stat. 91, as did the Northwest Ordinance, 1 Stat. 52.

Thus, while adopting the English procedural protections regulating pretrial detention, early American constitutions also provided additional guarantees of pretrial liberty. English practice often required a full hearing to determine whether the defendant was to be released on bail; by contrast, Americans *categorically* established—in state constitutions and in the statute founding the federal judiciary—that defendants facing non-capital charges would be entitled to release on bail. 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).

Though the federal government and some states later granted courts authority to allow "preventive" pretrial detention in some cases, *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966), that authority was accompanied by protections long identified with due process in the English constitutional tradition, and ordinarily has been quite limited. States that have authorized pretrial detention have generally also required a judicial finding by clear and convincing evidence, after an adversary hearing, that the accused presents an unmanageable flight risk or risk to public safety. *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 policies have for centuries been constrained by procedural and substantive protections that go well beyond a prohibition on excessiveness. Laws protecting a defendant's right to pretrial release "have consistently remained part of our legal tradition." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting).

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

Although the nature of surety pledges has changed over time, jurists have consistently concluded that an unattainable surety requirement is tantamount to denying bail altogether.

From its inception, Anglo-American law has tethered bail to a defendant's means. Under the pre-Norman amercement system, the bail amount matched the potential fine upon conviction—which depended 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). Once magistrates set bail by discretion, they were required to consider 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).

Even without upfront transfers of cash or collateral, jurists recognized that too high a pledge demand could result in detention. 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 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 131 (1816). Chitty counseled justices of the peace that if a defendant was entitled 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 sued for false imprisonment. *Id*.

The shift 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); *see also* section II.B, *supra*.

In sum, 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; *Daves v. Dallas Cty.*, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018), *appeal pending*.

CONCLUSION

For the reasons set forth above, we urge this Court to grant the petition.

Dated: July 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 25, 2019

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CERTIFICATE OF SERVICE

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