**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**CASE NO. 76845**

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**AARON FRYE,**
**Petitioner**

**v.**

**THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JUDGE JERRY A. WIESE, DISTRICT JUDGE,**
**Respondent,**

**and**

**THE STATE OF NEVADA,**
**Real Party In Interest.**

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Petition for Writ of Mandamus from the Eighth Judicial District Court, Case No. C331986-1

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# MOTION FOR LEAVE OF COURT PURSUANT TO NRAP 29 TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN BAIL COALITION IN SUPPORT OF THE STATE OF NEVADA'S REPLY BRIEF TO THE BRIEFS OF AMICI CURIAE FILED BY THE LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTION LAW AND SOCIAL SCIENTISTS IN SUPPORT OF PETITIONER

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*Counsel for Amicus Curiae American Bail Coalition*

Pursuant to this Motion, proposed *amicus curiae* American Bail Coalition ("Coalition") seeks leave of this court to file the attached *amicus curiae* brief in support of Real Party In Interest, The State of Nevada's Reply Brief to the Briefs of *Amici Curiae* filed by Law Professors and Social Scientists, which Coalition expects will be filed on August 16, 2019, pursuant to this Court's August 1, 2019, Order Granting Motions. Rule 29(c) of the Nevada Rules of Appellate Procedure provide that the motion for leave to file an *amicus curiae* brief must state: "(1) the movant's interest; and (2) the reasons why an amicus brief is desirable."

Of note, Real Party In Interest, The State of Nevada consented to the filing of the instant Motion and its *amicus* brief, and Petitioner Aaron Frye, through counsel, advised that he does not oppose the Coalition filing the instant Motion and its *amicus* brief.

For the reasons set forth below, this Court should grant this Motion and allow the Coalition's *amicus curiae* brief to be filed.

## I. THE COALITION HAS A VESTED INTEREST AS PROSPECTIVE AMICUS CURIAE

The Coalition is a non-profit trade association that represents bail insurance companies across the United States of America. Its mission is to protect, promote, and advance the interests of its member companies by protecting the constitutional right to bail. The Coalition also works closely with local communities, policy makers, and the judiciary to educate them about the benefits of commercial bail bonds and collaborate to find effective criminal justice solutions. The Coalition has a direct interest in the outcome of this suit because its very existence is tied to the bail industry. The Coalition maintains that bail systems, like the one challenged in this case, are constitutionally permissible and beneficial to communities when used appropriately.

## II. DESIRABILITY OF THE COALITION'S PROSPECTIVE AMICUS BRIEF

An important part of the Coalition's educational purpose involves appearing as *amicus curiae* in significant bail cases. The Coalition has previously contributed as *amicus* to the Fifth and Eleventh Circuit Court of Appeals and the Supreme Court of Ohio. *See, e.g.*, Brief of *Amici Curiae* American Bail Coalition, Professional Bondmen of Texas, and Professional Bondsmen of Harris County in Support of Defendants-Appellants and Reversal, 892 F.3d 147 (5th Cir. 2018); Brief for *Amici Curiae* American Bail Coalition, Georgia Association of Professional Bondsmen, and Georgia Sheriffs' Association in Support of Defendant-Appellant and Reversal of the Preliminary Injunction, 901 F.3d 1245 (11th Cir. 2016); *Amicus Curiae* Brief of the American Bail Coalition *et al.* in Support of Relator Anthony Sylvester, Case No. 2012-1742 (Ohio, 2012).

Before this Court are constitutional arguments regarding the money bail system. The Coalition offers a unique legal perspective on this issue. The *amici* in this case have focused on social and political arguments regarding the impact of bail on criminal defendants—arguments better suited to a legislative body than this Court. By contrast, the Coalition's prospective *amicus* brief focuses on the history of bail in the American legal system, the constitutional authority supporting bail and bail schedules, as well as the benefits bail offers to criminal defendants and local governments. This legal perspective will enhance the Court's understanding of the origin and necessity of constitutional bail systems, without diverting attention to pure policy arguments.

## III. THE MOTION FOR LEAVE IS TIMELY

NRAP 29(f) mandates that *amici curiae* file their brief with an accompanying motion "no later than 7 days after the brief of the party being supported is filed." In this instance, the Coalition seeks leave to file an amicus

brief in support of Real Party In Interest, The State of Nevada's Response Brief to the Amici Briefs filed by Law Professors and Social Scientists, which is due on August 16, 2019. *See* Order Granting Motions, dated August 1, 2019. Because the Coalition's *amicus* brief and this Motion are filed within seven days of the filing of Real Party In Interest, The State of Nevada's Response Brief, the Coalition's *amicus* brief and this Motion are timely.

Alternatively, to the extent the Court finds this Motion and the *amicus* brief untimely as Real Party In Interest, The State of Nevada filed its Answer to the Petition for Writ of Mandamus on October 3, 2018, NRAP 29(f) also grants the Court discretion to "grant leave for later filing, specifying the time within which an opposing party may answer." Accordingly, the Coalition respectfully requests that this Court grant it leave to file the attached *amicus* brief on August 16, 2019, and provide specific the time in which any opposing party may answer. The Coalition's *amicus* brief addresses arguments and information presented by Law Professors and Social Scientists; therefore, it could not have been filed earlier. Oral argument in this matter is not scheduled until September 4, 2019, thus allowing the immediate filing of Coalition's *amicus* brief will not prejudice any parties as they should have sufficient time to review and respond to the issues presented prior to oral arguments. Real Party In Interest, The State of Nevada consented to the Coalition filing of the instant Motion and *amicus* brief, and Petitioner, though counsel, advised that he does not oppose the Coalition filing the instant Motion and *amicus* brief.

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## III. CONCLUSION

For the foregoing reasons, the Coalition respectfully requests that this Court grant its Motion for Leave to File *Amicus Curiae* Brief, and order that the *Amicus Curiae* Brief attached hereto be filed in this case.

Dated this 16th day of August, 2019. ARMSTRONG TEASDALE LLP

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## CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2019 I served all parties in the above titled case with the Motion for Leave of Court Pursuant to NRAP 29 to file Amicus Curiae Brief of the American Bail Coalition in Support of the State of Nevada's Reply Brief to the Briefs of Amici Curiae filed by the Law Professors Of Criminal, Procedural, and Constitution Law and Social Scientists in Support of Petitioner, via the Court's electronic filing and service system.

/s/ Jessica Myrold
An Employee of Armstrong Teasdale LLP

# EXHIBIT 1

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**AARON FRYE,**
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**THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JUDGE JERRY A. WIESE, DISTRICT JUDGE,**
**Respondent,**

**and**

**THE STATE OF NEVADA,**
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Petition for Writ of Mandamus from the Eighth Judicial District Court, Case No. C331986-1

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# BRIEF OF *AMICUS CURIAE* AMERICAN BAIL COALITION IN SUPPORT OF REAL PARTY IN INTEREST, THE STATE OF NEVADA'S RESPONSE BRIEF TO THE BRIEFS OF *AMICI CURIAE* FILED BY THE LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTION LAW AND SOCIAL SCIENTISTS IN SUPPORT OF PETITIONER

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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.

American Bail Coalition, as *amicus curiae*, declares that it does not have a parent corporation and no publicly held company owns ten percent or more of its stock.

Tracy A. DiFillippo, Esq. of the law firm of Armstrong Teasdale LLP, serves as counsel for the *amicus curiae* American Bail Coalition.

Dated this 16th day of August, 2019. ARMSTRONG TEASDALE LLP

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## INTEREST OF AMICUS CURIAE

The American Bail Coalition (the "Coalition") is a non-profit professional trade association of national bail insurance companies that underwrite criminal bail bonds throughout the United States of America. The Coalition's primary purpose is to protect the constitutional right to bail by bringing best practices to the system of release from custody pending trial. The Coalition works with local communities, law enforcement, legislators, and other criminal justice stakeholders to develop more effective and efficient criminal justice solutions. Coalition member companies currently have approximately 10,000 bail agents under appointment to write bail bonds nationwide.

The outcome of this case will determine the extent to which a money bail system employed in Clark County, Nevada, including use of a bail schedule to set bail for defendants when a judge is not present, remains constitutional. This Court's analysis will go a long way to determining whether bail continues to be perceived as it was by the Framers—a liberty-preserving option—or whether it becomes perceived as Petitioner Aaron Frye ("Petitioner") and his amici would have it as discrimination against those without the means to post. Amicus believes that the a money bail system and the bail schedule utilized in Clark County are constitutionally permissible and, when applied appropriately, allow for the timely and expedited release of defendants as well as provide full due process and equal protection under the law. Amicus also believes that Petitioner and his amici present a false dichotomy. Jurisdictions like Clark County can provide the liberty-

preserving option of bail while providing individualized hearings to ensure that no one is unnecessarily detained.

The parties to this proceeding have consented to the filing of this amicus brief, which Amicus files in support of Real Party In Interest, The State of Nevada's Response Brief to the Briefs of Amici Curiae filed by the Law Professors of Criminal, Procedural, and Constitution Law and Social Scientists in support of Petitioner. No counsel for any party authored this brief in whole or in part. In addition to those parties listed in the NRAP 26.1 Disclosure, Aladdin Bail NV, Inc. made a monetary contribution intending to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The Petition for Writ of Mandamus, which demands that this Court impose what Clark County is essentially already doing, is a guise for Petitioner's ultimate goal – to abolish monetary bail in Nevada. However, that goal is fundamentally inconsistent with American tradition, makes no practical sense, and is not compelled by the Constitution. Understood within its historical context and sound policy objectives, the modern bail system is not about poverty or wealth, but instead about providing a critical, constitutionally-guaranteed option for preserving liberty while ensuring community safety and appearance in court. The text and history of our founding charter conclusively confirm that the opportunity to post monetary bail, followed as necessary by more individualized proceedings, is not only constitutionally permissible, but an affirmatively liberty-preserving system. Since its earliest days, the Anglo- American legal system has used bail to strike a

careful balance between providing criminal defendants with an opportunity to avoid pre-trial deprivations of liberty, while also enabling communities to protect themselves and secure a defendant's appearance for trial. For almost as long, the commercial bail industry has facilitated those goals. By assuming responsibility for bail payments and enabling defendants to obtain release in exchange for a fraction of the required amount, the commercial bail industry allows all individuals to leverage social networks and community ties to obtain pre-trial release. But at no point from the Framing to today was every accused defendant guaranteed the resources to post bail or the right to immediate liberty if he averred that he lacked those resources. And nothing in the Eighth or Fourteenth Amendments has morphed to create a constitutional right for the indigent to obtain release just because others are offered bail in amounts they can post. Under these well-established principles, Clark County's monetary bail system is clearly constitutional.

Petitioner, with support from his *amici*, attack Clark County's bail system—and monetary bail in general—alleging that it discriminates against the indigent. But it does no such thing. Under Clark County's bail schedule, an arrestee's bail amount is initially set to match the *crime* he is accused of committing. The schedule does not consider, let alone discriminate on the basis of, the arrestee's wealth or poverty; and Petitioner's effort to turn that steadfast neutrality into unconstitutional discrimination depends upon the counterintuitive notion that a failure to discriminate in favor of the indigent constitutes discrimination against the indigent. Furthermore, in Clark County, each arrestee is afforded an individualized

hearing before a judge within 12 hours, where he has the opportunity to demonstrate that his bail should be eliminated based on individualized considerations. In other words, arrestees facing like charges are treated alike, and all arrestees unable to post their presumptive bail amounts are treated alike—the classic command of equal protection.

At the end of the day, Clark County's bail system need only be rationally related to a legitimate government purpose, and Clark County's bail system is eminently rational. Its bail schedule efficiently serves the twin goals of bail by enabling defendants to obtain rapid pre-trial release while protecting the community. And, Clark County's process of holding a hearing within 12 hours of arrest to determine release conditions is consistent with the Supreme Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (requiring probable cause hearings as soon as is reasonably feasible, but in no event later than 48 hours after arrest).

The Petition for Writ of Mandamus should be denied.

## ARGUMENT

### I. THE MODERN BAIL SYSTEM IS DEEPLY ROOTED IN AMERICAN LEGAL TRADITION

Petitioner's contention, which is supported by his amici, that a money bail system is a "tool of pretrial *confinement* rather than *release*" is incorrect. Petition for Writ of Mandamus ("Pet."), at 12. Since before the Founding, American communities have relied on bail systems to give criminal defendants an option to secure their liberty before trial, while guaranteeing their appearance for

prosecution through the "deposit of a sum of money subject to forfeiture." *Stack v. Boyle,* 342 U.S. 1, 5 (1951). The Eighth Amendment to the United States Constitution guarantees the option of bail for most crimes, but does not guarantee that particular defendants will be able to post bail. *See* U.S. Const. amend. VIII (stating "[e]xcessive bail shall not be required"). When Nevada passed its Constitution in 1864, it too guaranteed the option of bail "by sufficient sureties . . ." Nev. Const. § 7. Early case law discussing bail has underscored that bail strikes a balance between an accused's liberty and the community's safety. *See United States v. Feely,* 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (stating "[t]he object of a recognizance is[] not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty"); *see also Ex parte Milburn,* 34 U.S. 704, 710 (1835) (stating "[a] recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon").

Equally deep rooted in our legal tradition is that of a bondsman. Intrinsic to the common-law tradition of bail was the role of a surety, who would guarantee the accused's appearance in court and undertake to produce the accused in the event of non-appearance. *See* William F. Duker, *The Right to Bail: A Historical Inquiry,* 42 Alb. L. Rev. 33, 70 (1977). In 1869, the Supreme Court explained that "[b]y the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing." *Reese v. United States,* 76 U.S. 13, 21 (1869). While that does not mean the principal "can be subjected by [the surety]

to constant imprisonment," the surety was empowered to "surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty." *Id.*

### A. Modern Sureties are the Most Effective and Efficient Means to Balance the Interests of Defendants and Communities.

The commercial bail industry provides the most effective means of allowing defendants to obtain release before trial while ensuring the protection of communities. By enabling defendants to post bond at a fraction of the government-imposed amount, the industry allows the accused to obtain release before trial without liberty-infringing conditions. By assuming responsibility for the defendant's appearance at trial, the industry protects the community's interest in prosecuting criminals for their offenses.

The alternatives to monetary bail—uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions—are unworkable. A system of uniform pre-trial detention would promote community safety and secure defendants' appearances at trial, but would impose intolerable burdens on defendants' liberty interests. The Framers eliminated the possibility of uniform pre-trial detention by guaranteeing the option of non-excessive bail for most defendants.

Releasing all accused defendants on a mere promise to appear would threaten to wreak untold consequences on communities. Even the federal system is not this broad. Released defendants have significantly less incentive to appear in court and may commit additional crimes while released. *See, e.g.*, Byron L.

Warnken, *Warnken Report on Pretrial Release* 19, 21 (Feb. 2002), http://bit.ly/2s0N6XT ("*Warnken Report*"); Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 94 (2004) ("*The Fugitive*").

Defendants who fail to appear for scheduled court hearings also incur additional criminal charges and associated warrants, imposing costs on law enforcement who must track down missing defendants and diverting scarce resources from other law-enforcement efforts. *See The Fugitive*, *supra*, at 98; *see also* Pa. Joint State Gov't Comm'n, *Report of the Advisory Committee on the Criminal Justice System in Philadelphia* 19 (Jan. 2013), http://bit.ly/25Y8c8s (stating that in Philadelphia in 2007 and 2008, where a large share of its criminal suspects are released on personal recognizance and commercial bail is prohibited, "19,000 defendants each year—nearly one in three—failed to appear in court for at least one hearing"). Thus, without monetary bail and the commercial surety system, communities risk encouraging further criminal behavior and losing any incentive for securing appearance. Surety bonds are the best way of preventing these risks because the probability of being recaptured while released on a surety bond is 50% higher than for those released on other types of bonds or on recognizance. *The Fugitive, supra,* at 113.

The third alternative to monetary bail—uniform release subject to invasive pre-trial deprivations of liberty like mandatory drug testing, GPS monitoring, and onerous reporting requirements—is similarly unsatisfying and raises serious constitutional concerns. Just as the government generally cannot employ pre-trial

detention without offering bail, it cannot employ other deprivations, such as house arrest and GPS monitoring, without offering bail as an alternative. Although such significant deprivations on liberty may be tolerable in the context of probationers convicted of a crime, they cannot be substituted for the option of bail in the pre-trial context without substantially undermining the presumption of innocence. *See. e.g., United States v. Scott*, 450 F.3d 863, 873-74 (9th Cir. 2006).

Bail systems strike a proper balance between these competing interests. Through commercial sureties, criminal defendants are able to gain release while awaiting trial without being subject to liberty-infringing conditions and while maintaining a strong incentive to appear for trial and avoid additional arrest. Local communities can be confident in defendants' appearances at trial without the monetary costs of wide-scale detention or the concerns with an unsecured system of release.

The modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain release pending trial while ensuring court appearances, which results comport with common sense.[1]

[1] One study examining failure-to-appear rates in Maryland concluded that defendants released on recognizance were 25.7% more likely to fail to appear compared to defendants released on commercial-surety bonds. *Warnken Report, supra,* at 16-17. Another study concluded that misdemeanor defendants released on surety bonds were least likely to abscond. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* 17 (Jan. 2013), http://bit.ly/1tttqJD. Another report determined that felony "[d]efendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time." *The Fugitive, supra,* at 118. The U.S. Department of Justice similarly

Defendants who obtain release through commercial sureties owe bondsmen the full amount of bail if they fail to appear. Those defendants often lack the resources to pay the full amount, and thus commercial sureties are given incentives to produce defendants rather than pursue repayment. To do so, they often enlist the help of a defendant's community by obtaining contact information for friends and family, using cosigners on the surety, and requiring periodic check-ins and monitoring. *The Fugitive, supra,* at 97. Commercial sureties also permit bail for only a fraction of what the court requires. Thus, rather than *discriminating* against the poor, the system is designed to *support* those of lesser means.

## II. CONSTITUTIONALITY OF MONEY BAIL SYSTEM

Our modern system of bail is not about poverty and wealth, but instead about providing a critical, constitutionally-guaranteed option for preserving liberty for criminal defendants while ensuring their appearances in court and community safety. Defendants who cannot post bail are not detained because they are poor. Instead, they are detained, at least in Clark County, because the government had probable cause to arrest them with crimes and, after a timely hearing in which a judge considers numerous statutorily mandated factors including the defendant's financial ability (discussed below), desires to *secure* the defendant's appearance at

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confirmed the value of commercial sureties: "Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances." Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 1 (2007), http://bit.ly/2kG9rV3. A surety bond had a failure-to-appear rate of 18%, the second lowest. *Id.* at 8. The highest failure-to-appear rates belonged to emergency release (45%) and unsecured bonds (30%). *Id.*

trial and protect the community. The government must give defendants the *opportunity* to post non-excessive bail, but it need not guarantee defendants have the means to do so. It is in the very nature of bail that not every defendant will be able to find a willing surety. Indeed, the bail system relies on the premise that those who know the defendant the best—his family and friends—may decline to stake their resources on assuring appearance. But in the view of Petitioner and his amici, the government should simply release defendants nearly immediately if they are unable to pay.

### A. Clark County's Bail System Is Constitutional.

Petitioner and his amici are mounting a frontal constitutional attack on money bail. Under the guise of due process and equal protection challenges, they seek to impose upon Clark County greater demands than required under the Constitution. However, the Supreme Court has repeatedly recognized that money bail is a constitutional means of protecting society and securing the accused's appearance at trial. Indeed, the Eighth Amendment to the Constitution pre-supposes that bail is permissible by prohibiting only *excessive* bail.

The Petitioner goes to great lengths to affirm that he is challenging only the constitutionality of Clark County's *process*, yet glaringly absent from Petitioner's brief, or that of the *amici*, is Clark County's actual process of release after arrest. Petitioner instead calls out a single aspect of the process—use of the standardized bail schedule or issuance of an arrest warrant fixing bail—as a harbinger that the entire system is unconstitutional. However, as demonstrated below, Nevada's

statutory scheme and the actual practice in Clark County provide constitutional due process and equal protection in determining the conditions of release after arrest.

Nevada's Constitution mandates that "[a]ll persons *shall* be bailable by sufficient sureties." Nev. Const., art. I, § 7 (*emphasis added*). N.R.S. 178.484(1) codified the constitutional mandate: "Except as otherwise provided in this section, a person arrested for an offense other than murder in the first degree *must* be admitted to bail." (*emphasis added*). "Bail means a deposit made with a court or other governmental agency to secure or continue the release from custody to guarantee the appearance of the defendant in a criminal proceeding." N.R.S. 697.030. When a defendant is released on bail, the bail must be set "to ensure the appearance of the defendant and the safety of other persons and of the community." N.R.S. 178.484. In making this determination, the magistrate takes into consideration several factors, which include the offense, *the defendant's financial ability to give bail*, the defendant's character, and other enumerated factors in N.R.S. 178.4853. *Id*. A court may release a defendant without bail or impose other conditions of release upon consideration of certain enumerated factors set forth in N.R.S. 178.4853, which include length of residence in the community, status and history of employment, relationship with family and close friends, reputation, character, and mental condition, prior criminal record, prior failure to appears, responsible members of the community that will vouch for reliability of the person, nature of the offense and probability of conviction and sentence, nature and seriousness of danger to alleged victim or community if released, likelihood of more criminal activity if released, and any other factors

concerning ties to the community or bearing on the risk that the person may willfully fail to appear. *See* N.R.S. 178.4851; N.R.S. 178.4853.

Starting in January 2019, for arrestees who have not posted bail pursuant to Clark County's bail schedule and who have not otherwise been released without bail by the jail[2] or Pre-Trial Services[3], a probable cause and bail hearing is held within approximately 12 hours of arrest (9:00 a.m. the next day, or 1:00 p.m. the next day), including on weekends and holidays, in which a Las Vegas Justice of the Peace determines the conditions of an arrestee's release. Either before or at the time of the hearing, the Justice of the Peace receives and reviews the Nevada Pretrial Risk Assessment[4], the arrestee's criminal history, and any financial affidavit the arrestee completed for whether the arrestee needs appointed counsel. During the hearing, the arrestee is represented by counsel from the Public Defender's Officer or private counsel. Counsel from the District Attorney's Office is also present. Following argument, the Justice of the Peace will determine the arrestee's conditions of release: own recognizance, intensive supervision, alcohol

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[2] N.R.S. 178.4851(2) allows the jail to release a defendant, charged with a misdemeanor, without bail based on court standards.

[3] On February 19, 2019, the Las Vegas Justice Court issued Administrative Order #18-04, which directs that the Pre-Trial Services Division effectuates the release of certain defendants (*e.g.* charged with misdemeanors, certain non-violent gross misdemeanors or felonies, or felony possession of controlled substance) after assessing the defendant pursuant to Nevada Pretrial Risk Assessment and the final recommended risk level is low (or moderate for the drug charges).

[4] On March 21, 2019, this Court entered an Order Adopting Statewide Use of the Nevada Pretrial Risk Assessment. *See* ADKT 0539.

monitoring (for DUI), house arrest (low, moderate, high), or money bail and in what amount. The Justice of the Peace's findings and ruling with respect to the arrestee's conditions of release are made in open court on the record, which is reported by either the court's audio/visual equipment and/or a reporter. Furthermore, after this initial release determination, the arrestee has additional opportunities to file a motion to seek reassessment of the conditions of release.

Petitioner and Law Professors misconstrue application of *United States v. Salerno*, 481 U.S. 739 (1987) to this case and as it applies generally to Clark County's process. In *Salerno*, the Supreme Court upheld, against a facial attack, the Bail Reform Act of 1984, which allows a federal court *to detain* an arrestee pre-trial if the government shows by clear and convincing evidence, after an evidentiary hearing, that there are no release conditions that "will reasonably assure . . . the safety of any other person and the community." *Id*. at 741. The Supreme Court held that substantive due process did not prohibit *pre-trial detention* imposed as a regulatory measure. *Id*. at 750-51. Unlike the Bail Reform Act of 1984, Nevada law mandates release (*i.e.* must be admitted to bail). Thus, any argument that *Salerno* requires a "robust hearing" with a "clear and convincing" standard here is without merit. Granted, *Salerno*'s general due process standards apply; however, Clark County's current process—including use of its bail schedule and a hearing before a judge within 12 hours for pre-trial release assessment—meets the constitutional due process threshold.

Petitioner and Law Professors acknowledge that the Supreme Court has never mandated specific processes and procedures with respect to due process

requirements. And in fact, Law Professors only imply that *Salerno* offers a useful template. *See* Brief of *Amici Curiae* National Law Professors of Criminal, Procedural, and Constitutional Law in Support of the Petitioner ("LP Brief"), at 18. The Law Professors set forth a proposed procedure, which Clark County has already essentially implemented. *Id.* at 22. Indeed, Clark County holds a prompt hearing before a Justice of the Peace, within 12 hours of arrest, allows the arrestee an opportunity to respond to the government's arguments, appoints counsel to represent the arrestee at the hearing, and makes the findings of release on the record. Additionally, Clark County evaluates the arrestee's ability to pay bail when it reviews the affidavit the arrestee completes for appointed counsel and during the hearing. *See ODonnell v. Harris County,* 892 F.3d 147, 164 (5th Cir. 2018) (supports use of the form affidavit utilized to determine eligibility for appointed counsel in reviewing the arrestee's ability to pay for bail).

**B. Money Bail is Constitutional.**

At its root, Petitioner's Writ is an assault on the traditional American system of secured monetary bail. The theory endorsed by Petitioner is that an arrestee's ability to afford bail is the paramount concern in making any release decision. But that is not what the Constitution and Supreme Court precedent demands. Instead, monetary bail procedures are clearly aimed at securing appearance at trial and protecting society from danger. In *Stack v. Boyle*, the Supreme Court emphasized that "[t]he right to release before trial is conditioned upon the accused's giving adequate assurances that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. "[T]he modern practice of requiring a bail bond or the deposit of a

sum of money subject to forfeiture," the Court explained, "serves as additional assurances of the presence of an accused." *Id.* at 5. Far from prohibiting monetary bail, the Constitution generally guarantees its availability as an option and requires that it not be excessive. A guarantee that bail not be excessive, however, does not mean that bail must be affordable.

**1. Bail Schedules.**

Numerous bail cases take the constitutionality of monetary bail as a given, and include no suggestion that all indigent defendants must be released. Similarly, monetary bail schedules, which set default bail amounts for various crimes based on their severity, when appropriately administered meet due process and equal protection requirements. *See, e.g.*, *Walker v. City of Calhoun, GA*, 901 F.3d 1245, 1260-61 (11th Cir. 2018) (relying on *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978)) (en banc) providing that "[u]tilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting [] its requirements."); *Fields v. Henry Cty., Tenn*, 701 F.3d 180, 184 (6th Cir. 2012). Especially for large population centers—like Clark County—this standardized process is more efficient than requiring individualized bail hearings for every single offense by every single offender *immediately* upon arrest. By setting presumptive bail amounts, "bond schedules represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge" and is "therefore aimed at assuring the presence of a defendant." *Fields*, 701 F.3d at 184. Because bail schedules apply to all alike, "bond schedules are aimed at making sure that defendants who are accused of similar crimes receive

similar bonds," *id.*, consistent with the Eighth Amendment interest in avoiding excessive bail, *cf. Stack*, 342 U.S. at 5. This efficient process saves time for both the government and accused.

Importantly, bail is designed to provide an alternative to deprivations of liberty for the convenience of the accused, thus the fact that bail schedules allow quick release of many defendants is a constitutional virtue, not a lurking vice. The rights of those who have difficulty meeting the presumptive bail amount are more than adequately guaranteed by the availability in Clark County of a reasonably prompt hearing at which time the judge may adjust bail, set appropriate non-monetary conditions of release, or no conditions at all. That Clark County's process begins with a presumption that can be adjusted to meet the individualized needs of each unique accused renders it logical, not unconstitutional.

### C. Petitioner's Constitutional Challenge to the Clark County's Bail System is Meritless.

The Petitioner's federal constitutional claims, which are supported by his *amici*, are equally flawed. As a preliminary matter, Petitioner's affordable-bail claim under the Equal Protection Clause through the Fourteenth Amendment cannot be employed to invalidate bail procedures that the Eighth Amendment allows; instead, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment . . . must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality) (quoting *Graham v.*

*Conner*, 490 U.S. 386, 395 (1989)) (in the context of Fourth Amendment). That alone is reason to dismiss the equal protection challenge.

Petitioner and Law Professors principally rely on a line of cases culminating in *Bearden v. Georgia*, 461 U.S. 660 (1983), in mounting their flawed argument that heightened scrutiny applies to wealth based equal protection challenges. *See* LP Brief at 4-7. This, however, runs headlong into Supreme Court case law on how differential treatment by wealth is analyzed under the Equal Protection Clause. *See Walker*, 901 F.3d at 1260-61. As a point of significant divergence, in the *Bearden* line of cases, the government inflicted additional *punishment* (through an extended sentence or revocation of parole) on a convicted defendant because he could not afford a fine. *See Bearden*, 461 U.S. at 661-62; *Williams v. Illinois*, 399 U.S. 235 (1970); and *Tate v. Short*, 401 U.S. 395 (1971). However, Clark County's bail system, including the bail schedule, has no effect on a defendant's sentence post-conviction, and more importantly, as the Supreme Court held in *United States v. Salerno* (which post-dates *Williams*, *Tate*, and *Bearden*), "pretrial detention . . . does not constitute punishment." 481 U.S. at 748.

The Eleventh Circuit's recent decision in *Walker v. City of Calhoun* similarly does not lend support to Petitioner's position. Instead, it confirms that the Clark County's procedures are constitutional on equal protection grounds. On the issue of the level of scrutiny as applied to wealth based equal protection challenges, the Eleventh Circuit held rational basis review appropriate. *Walker*, 901 F.3d at 1260-61. The explanation comes from *San Antonio Independent School District v. Rodriguez*, wherein the Supreme Court turned away a claim by

students in districts with lower property tax revenue (and thus lower funding for their schools) concluding that wealth based distinctions were impermissible only where "because of their impecunity [, the indigent] were completely unable to pay for some desired benefit, and as a consequence, they sustained *an absolute deprivation* of a meaningful opportunity to enjoy that benefit." 411 U.S. 1, 20 (1973) (*emphasis added*). "Mere diminishment of a benefit was insufficient to make out an equal protection claim: '[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.'" *Walker*, 901 F.3d at 1261 (*citing Rodriguez*, 411 U.S. at 24). The Supreme Court has also explained that the *Williams-Tate-Bearden* line of cases apply only to "an absolute deprivation of the desired benefit," *Rodriguez*, 411 U.S. at 24, while the Equal Protection Clause requires only "an adequate opportunity to present [one's] claim fairly," *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

Under that rationale, the Eleventh Circuit deemed the new bail process instituted by the City of Calhoun, Georgia constitutional. Although it began with a standardized bail schedule, it provides a "constitutionally permissible secondary option" of a bail hearing within a reasonable time at which the judge could consider all relevant factors when deciding the conditions of release. *Walker*, 901 F.3d at 1261.

Without support in precedent, Petitioner's argument amounts to no more than a wealth-based disparate impact claim under the Equal Protection Clause. But the Supreme Court has repeatedly rejected such claims. In *Ross v. Moffitt*, the Supreme Court explained that in criminal proceedings involving indigents, "[t]he

duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . ., but only to assure the indigent defendant an adequate opportunity to present his claims fairly." 417 U.S. at 616. In *McGinnis v. Royser*, 410 U.S. 263 (1973), the Supreme Court upheld a state statute that gave good-behavior credit on an equal basis to those who had and had not been bailed before trial (even though those who could not afford pre-trial bail had already spent time incarcerated in jail) finding that there was a rational basis independent of wealth—that jails lacked rehabilitative programs of prisons—for the government to decline to give good-behavior credit for pre-trial time served in jail. 410 U.S. at 270-73. "Differential treatment by wealth is impermissible only where it results in a *total* deprivation of a benefit *because* of poverty." *Walker*, 901 F.3d at 1261.

Those standards are plainly met here. Monetary bail rationally serves the government's legitimate interest in securing the appearance of the accused at trial and community safety. Furthermore, as discussed *supra*, Clark County's process does not deny arrestees the opportunity to obtain pre-trial release. On the contrary, per N.R.S. 178.484(1), it presumes an individual is bailable (subject to certain statutory exception) and provides for a hearing within 12 hours of arrest wherein a judge assesses release conditions based on the individualized arrestees.

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## III. CONCLUSION

For those reasons, this Court should deny the Petition for Writ of Mandamus.

Dated this 16th day of August, 2019.

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4) , the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because:

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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 any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 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 this 16th day of August, 2019.

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