IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE VALDEZ-JIMENEZ, 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 No. 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 No. 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 No. 76947

PETITIONERS' RESPONSE TO THE FOR-PROFIT BAIL INDUSTRY'S AMICUS BRIEF

COMES NOW Petitioners AARON FRYE, NATHAN GRACE and JOSE VALDEZ-JIMENEZ by and through their attorneys, NANCY LEMCKE, Deputy Clark County Public Defender, and CHARLES GERSTEIN, Esq., and hereby respond to Amicus American Bail Coalition's brief in support of Respondent.

This Response is based upon the following Memorandum and all papers and pleadings on file herein.

DATED this 28th day of August, 2019.

DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By */s/ Nancy M. Lemcke*
NANCY M. LEMCKE, #5416
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

/s/ Charles Gertstein
CHARLES GERSTEIN, Esq.
(admitted *pro hac vice*)
CIVIL RIGHTS CORPS
910 17th Street NW, Suite 200
Washington, D.C. 20006
(202) 670-4809

ARGUMENT

Petitioners Jose Valdez-Jimenez and Aaron Frye each spent more than a year detained in jail pretrial, and Petitioner Nathan Grace spent more than two months detained in jail pretrial. All would have been released if they had more money. They seek writs of habeas corpus or mandamus from this Court.

Conditioning release on a money-bail amount that a person cannot pay is equivalent to an order of detention. American courts may detain presumptively innocent people only if they have very good reasons for doing so, and courts must do so intentionally using rigorous procedures. An order of pretrial detention requires a finding, by clear and convincing evidence, after a hearing with robust procedural safeguards, that the accused person poses an immitigable risk of flight or danger to the community. Where, as here, no court made those findings, an order of pretrial detention is illegal.

Amicus American Bail Coalition ("Industry"), representing the for-profit bail industry, writes in support of Respondent. Although both Respondent and the Industry misunderstand and confuse both Petitioners' claims and the law that surrounds them, they nonetheless agree with Petitioners on a number of basic principles. First, the Bail Industry says that "money bail is constitutional." (Industry Br. at 14 (capitalization altered)).

Second, the Industry says that "bail" is—or at least should be—a mechanism of pretrial release, not pretrial detention. Id. at 4. And, finally, the Industry says that the "general due process standards," id. at 13, of United States v. Salerno, 481 U.S. 739 (1987), apply to unattainable money-bail orders. So far, so good. Petitioners agree that financial conditions of release can be constitutional, and nowhere do their papers contend otherwise. Moreover, Petitioners themselves argue that "bail means release before trial" (Petition at 18 (emphasis in original)), and that Salerno requires courts to make robust findings before imposing money-bail amounts that operate as orders of detention because arrestees cannot pay them.

Still, the Industry purports to disagree with the legal arguments in the Petitions, perhaps because the Industry fears that a jurisdiction using a constitutional bail system might choose to base release decisions less on paying money and more on whether there are alternative non-financial conditions of pretrial release to address an arrestee's risk of flight or danger to the community. But whatever is motivating the Industry, it cannot be a fear that this Court's ruling will end money bail. Petitioners argue that reasonable money-bail amounts that result in release are constitutional and that money-bail amounts that result in detention because the detainee cannot

pay them are equivalent to orders of detention and must be justified accordingly.

Petitioners argue that the state may not magically alter the rules governing orders of detention merely by saying "you will be released pretrial if you pay a sum of money that you cannot pay" rather than saying "you will be detained pretrial." Those statements mean the same thing. And the state may do what those statements describe—order pretrial detention—only if it complies with due process and equal protection.

To the extent that it disagrees at all, the Industry relies on false statements of fact, wrong contentions of law, and—above all else—mischaracterizations of Petitioners' arguments. The Industry's brief offers these mischaracterizations in a scattershot fashion, and so, to avoid confusion of the issues, this Response will address each misstatement one by one.

A. Petitioners' legal claims

Because both the Industry and Respondent misrepresent Petitioners' simple claims, Petitioners set them forth clearly one more time: Petitioners' detention is illegal under two distinct legal theories. One: The Fourteenth Amendment forbids the state to jail someone before trial—either through a de facto wealth-based detention order or through a transparent order of

detention—unless a court finds, by clear and convincing evidence, that pretrial detention is necessary to secure an important state interest such as the safety of the community or the prevention of flight from prosecution.[1] The courts below made neither finding in these cases, and routinely fail to make such findings in thousands of cases every year. Two: An order of pretrial detention must have been the result of a rigorous process, meaning that there must be notice of the critical issues, an opportunity to be heard and to present and confront evidence at a counseled adversarial hearing, and that the decisionmaker make the required findings on the record by clear and

[1] As described in Petitioner's opening brief, two constitutional doctrines require that findings of necessity be made in the bail context. First, equal protection and due process forbid jailing a person solely because of her inability to make a payment. See, e.g., Bearden v. Georgia, 461 U.S. 660, 665–68 (1983); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978); Frazier v. Jordan, 457 F.2d 726, 728–29 (5th Cir. 1972) (holding that a requirement to pay a fine or serve time in jail violates equal protection and due process unless it is "necessary to promote a compelling governmental interest" (quotation and citation omitted)). Second, substantive due process protects a right to pretrial liberty that is "fundamental." United States v. Salerno, 481 U.S. 739, 750 (1987); see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). Third, the Constitution requires the government to provide procedural safeguards to protect against the erroneous deprivation of substantive rights. See Washington v. Harper, 494 U.S. 210, 228–29 (1990). To determine whether those procedural safeguards are adequate, a court must first determine whether a liberty interest has been deprived and then ask whether the procedures accompanying the deprivation were sufficient. See ODonnell v. Harris County, 892 F.3d 147, 157–58 (5th Cir. 2018); Caliste v. Cantrell, 329 F. Supp. 3d 296, 310 (E.D. La. 2018).

The two substantive constitutional rights at issue—the right against wealth-based detention and the fundamental right to pretrial liberty—cannot be infringed unless the government satisfies strict scrutiny: the government must demonstrate that wealth-based pretrial detention is the least restrictive way for it to serve a compelling interest. Thus, before requiring a person to make a monetary payment in exchange for release from detention, the government must inquire into and make findings concerning the person's ability to pay. If the person cannot pay the amount required, such that the condition of release will function as a de facto detention order, then the government must justify the order in the same way that it justifies a transparent order of detention.

convincing evidence. The courts below did not provide many of these basic safeguards, and routinely fail to provide them in thousands of cases every year.

Petitioners ask that this Court hold that these failures violate the Constitution.

B. Money bail amounts required without consideration of ability to pay jail individuals solely because they are indigent

The Industry opens its brief by arguing that Clark County's bail system—which frees those who can pay money and jails those who cannot—does not discriminate against the indigent because it bases money-bail amounts on the crime charged, not ability to pay, and, therefore, accused people "who cannot post bail are not detained because they are poor." (Industry Brief at 9.) "Instead," says the Industry, "they are detained . . . because the government . . . desires to secure the defendant's appearance at trial and protect the community." (Id. 9–10). This makes no sense. If the government believed the only reasonable way to secure Petitioners' appearance at trial and to protect the community was through their detention, it should have sought an order of detention. It did not. It agreed to their release upon payment of a sum of money. The only difference between Petitioners and similar arrestees who are in fact released is that wealthier arrestees are able to pay the predetermined sum of money.

In addition to making no sense, the Industry's argument is contrary to Supreme Court and lower-court precedent. Courts across the country have explicitly described practices that decide whether arrestees are detained or released based not on consideration of ability to pay or alternatives to jailing but on whether they have access to sums of money—as is routine in Clark County—as "discriminatory." Tate v. Short, 401 U.S. 395, 397–98 ("[P]etitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency."); Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) (explaining "the invidiousness of [] discrimination that exists when criminal procedures are made available only to those who can pay" (emphasis added)); Williams v. Illinois, 399 U.S. 235, 240–42 (1970) (describing "discrimination that rests on ability to pay" as "impermissible" and "invidious" (emphasis added)); Douglas v. California, 372 U.S. 353, 355 (1963) (condemning the "evil" of "discrimination against the indigent" (emphasis added)); ODonnell v. Harris Cty., Texas, 892 F.3d 147, 161 (5th Cir. 2018) (""[P]retrial imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." (internal quotation marks and citations omitted) (emphasis added))

C. An unattainable money-bail order is an order of detention

The Industry disagrees with Petitioners' argument that ordering someone to be released on the condition that he pay an amount beyond his means is the legal equivalent of ordering the person detained. The Industry does not explain why it disagrees, and there is no sensible argument in its favor. An order of release predicated on an impossible condition is akin to an order of detention. For this reason, every state and federal court to have considered this question has ruled that money-bail orders that require amounts beyond arrestees' means are equivalent to orders of detention. State v. Brown, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."); see also United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a "release" order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid detention order"); United States v. Leathers, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."); ODonnell, 251 F. Supp. 3d at 1145; In re Humphrey, 19 Cal. App. 5th at 1029. This point alone is

sufficient reason to grant the petitions, and neither Respondent nor its Industry amicus cites a single piece of authority that holds to the contrary.

D. Salerno imposed due-process requirements on pretrial detention

The Industry maintains that, although Salerno's "general" due process holding applies to unaffordable secured money-bail amounts, a money-bail amount that an arrestee cannot pay is not an order of detention. (Industry Brief at 13.) Salerno, says the Industry, does not apply here because Nevada mandates pretrial release of Petitioners, while Salerno concerned orders of detention. Id. But, as discussed above, state and federal courts have already considered and rejected this contention every time it has been raised. Whether an order is called an order of detention or an order of "release" with an impossible condition (say, to run a three-minute mile, or to pay $1 trillion, or to return to court with a unicorn), if the result of the order is that a person is detained, then it is subject to the same constitutional standards as a transparent order of detention. If the Industry were right that Petitioners were "released," then Petitioners would not have spent more than a year in jail pretrial.

Perhaps the Industry's position on Salerno, then, is that it does not apply merely because the challenge in that case was to a federal statute. Respondent and the lower court judges who refused to release Petitioners

agree. (See, e.g., Pet. App'x at 22:6 (showing that the district court announced, in response to Petitioner Valdez-Jimenez's request for a hearing of the type described in Salerno, that those are "federal beasts, not state beasts.")). This argument is wrong.

In Salerno, the U.S. Supreme Court addressed the liberty interests of pretrial arrestees detained without the imposition of money bail under the federal Bail Reform Act. 481 U.S. at 749–50. Holding that the pretrial liberty interest of an accused is "fundamental," the Court explained that, as a "'general rule' of substantive due process, the government may not detain a person prior to a judgment of guilt." Id. at 749.

Like other constitutional rights, however, the right to pretrial liberty is not absolute: the government may deprive a person of her right to pretrial liberty if the government's interest is sufficiently compelling and the deprivation is narrowly tailored to serve that interest—meaning that pretrial detention is necessary because alternatives are inadequate. Id. at 749, 751 (describing the government interest in preventing serious pretrial crime as "compelling" and the statute as "careful[ly] delineat[ing] . . . the circumstances under which detention will be permitted"); Reno v. Flores, 507 U.S. 292, 301–02 (describing Salerno as a case that "forbids the government to infringe certain 'fundamental' liberty interests at all, no

matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); see also Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (same).

Although the Bail Reform Act does not apply in state courts, the Constitution does. And courts across the country have made clear that Salerno explains the kinds of rigorous findings and procedures required before the "fundamental" interest in pretrial liberty may be infringed: the government must demonstrate that its "infringement [of pretrial liberty] is narrowly tailored to serve a compelling state interest." Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780 (9th Cir. 2014 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)); see also Simpson v. Miller, 387 P.3d 1270, 1276 (Ariz. 2017), ("[I]t is clear from Salerno and other decisions that the constitutionality of a pretrial detention scheme turns on whether particular procedures satisfy substantive due process standards."); Humphrey, 19 Cal. App. 5th at 1029; Brangan, 80 N.E.3d at 961; Kleinbart v. United States, 604 A.2d 861, 868 (D.C. 1992); Caliste, 329 F. Supp. at 313. The Industry, like Respondent and the lower court, is wrong to contend that Salerno's articulation of a "fundamental" interest in pretrial liberty does not apply to the detention of individuals in Nevada courts.

E. The courts below violated the Equal Protection and Due Process Clauses of the Constitution

The Industry relies on Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018), in which the Eleventh Circuit upheld a policy under which indigent arrestees who could not pay a money-bail amount determined by a bail schedule for minor misdemeanors were automatically released if they could not pay after 48 hours. The Eleventh Circuit found that this brief period of detention for inability to pay prior to a bail hearing did not result in a total deprivation of pretrial liberty because it was a brief detention that did not last for the entire pretrial period. Id. at 1265–66.

Ignoring that Walker was about only 48 hours of pre-hearing detention, the Industry argues that Clark County's policy is constitutional because the Equal Protection and Due Process Clauses forbid only "a total deprivation of a benefit because of poverty." (Industry Brief at 11.) Even assuming the majority in Walker is correct in its various holdings and dicta, Walker cannot help the Industry or Respondent here. In Walker, the Eleventh Circuit re-affirmed that "wealth-based distinctions" are subject to heightened scrutiny if arrestees suffer "an absolute deprivation" of their pretrial liberty "because of their impecunity." *Id.* at 1261 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973)). The Walker court found that heightened scrutiny did not apply to the city's "Standing Bail Order" because under the order, "Walker and other indigents

suffer no 'absolute deprivation' of the benefit they seek, namely pretrial release. Rather, they must merely wait [48 hours] to receive the same benefit as the more affluent." Id. at 1261–62.

By contrast, here, Petitioners' money bail was set at amounts that they could not pay, and as a result they were jailed pretrial—two for more than a year—with no alternative mechanism for achieving relief. Unlike the indigent arrestees in Walker, Petitioners were detained for far longer than 48 hours, and so Walker's logic—for whatever it is worth—does not apply here.

Finally, Petitioners are not arguing, as the Industry purports, "that an arrestee's ability to afford bail is the paramount concern in making any release decision." (Industry Br. at 14). Of course not. The paramount concern in making the release decision is under what conditions the person may be released so as to mitigate any articulated evidence of a risk of flight or danger to the community. Then, unless the court finds by clear and convincing evidence that there exist no conditions it could impose to mitigate those risks, the person must be released. At that time, a financial condition of release can be perfectly reasonable if it is set at an amount that the court believes will serve the government's interests, by, for example,

incentivizing court appearance.[2] That is not what happened here. In each of Petitioners' cases, the court set a financial condition of release at an amount that ensured Petitioners would not be released at all. That is an order of detention by another name. And that violates the Constitution if it is not accompanied by the appropriate findings and safeguards.

F. Petitioners are not required to proceed under the Eighth Amendment Alone

The Bail Industry argues that the Equal Protection and Due Process clauses do not govern Petitioners' challenges to a discriminatory and procedurally flawed bail system because the Eighth Amendment also governs certain challenges to bail systems. Relying on the plurality opinion in Albright v. Oliver, 501 U.S. 266 (1994), the Industry contends that Petitioners must proceed under only the Eighth Amendment. Binding precedent rejects this argument.

The Court has repeatedly "rejected" the notion "that the applicability of one constitutional amendment pre-empts the guarantees of another." United States v. James Daniel Good Real Property, 510 U.S. 43, 49 (1993). "Certain wrongs," the Court has explained, "affect more than a single right

[2] This Court rejected as untimely a brief on behalf of national experts at state and federal pretrial and probation agencies that noted that financial conditions of release are in fact less effective than alternatives. (See Brief of Amicus Curiae Nat'l Ass'n of Pretrial Servs. Agencies.) The court need not make any findings about the respective efficacy of financial conditions because Petitioners are not seeking to eliminate them. Courts remain free to require financial conditions of release that result in release.

and, accordingly, can implicate more than one of the Constitution's commands." Soldal v. Cook County, 506 U.S. 56, 70 (1992); see also, e.g., Colorado Christian University v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) (recognizing that "statutes involving discrimination on the basis of religion . . . are subject to heightened scrutiny whether [a claim] arise[s] under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)). Where a plaintiff invokes more than one constitutional provision, the Supreme Court has instructed, a court must "examine each constitutional provision in turn." Soldal, 506 U.S. at 70.

Salerno itself exhibits this approach. Salerno analyzed a challenge to a pretrial-detention scheme under the Due Process Clause and the Eighth Amendment. Salerno, 481 U.S. at 746. Plus, Albright endorsed Salerno's approach. See Albright, 510 U.S. at 272 ("[C]ases such as United States v. Salerno, 481 U.S. 739, 746 (1987) . . . [say] that the Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights. This is undoubtedly true.") (plurality opinion).

And many other courts have followed suits, analyzing challenges to unconstitutional money-bail schemes under substantive-due-process and equal-protection principles. ODonnell, 892 F.3d 147; Walker, 901 F.3d 1245; Rainwater, 572 F.2d 1053.

Albright instead stands for the unremarkable proposition that where a specific amendment governs the challenge made to a government policy, the challenger may not rely on substantive due process for further protection. It does not stand for the radical and false proposition that a government policy may not implicate more than one Constitutional right. If the Industry were correct that any challenge to a bail system must proceed only under the Eighth Amendment, there would be no constitutional problem with a system that jailed only Christian arrestees and released all Muslim ones, or jailed all women and released all men. That is not right. And neither is the Industry's argument.

G. For-profit sureties are a novel departure from a long constitutional tradition of pretrial release

The forgoing is sufficient alone to reject the Industry's arguments. This case presents a narrow question of what basic findings and safeguards are required for an order of pretrial detention, whether de facto or transparent. This is not a controversial legal issue, and the existing practices in Clark County fall woefully short of these requirements. Nothing in this case requires this Court to rule on the constitutionality of money bail generally or to make any empirical judgments about the efficacy of money bail. Nonetheless, the Industry makes a number of bold claims about the virtues of for-profit sureties and their role in our Constitutional tradition that

are completely belied by the state of academic and empirical research and the experience of the law-enforcement community.

The key flaw in the Industry's argument is that it conflates "bail" with the payment of money upfront. "Bail" is not equivalent to "money bail." "Bail" means *release* before trial. See Timothy R. Schnacke, U.S. Department of Justice—National Institute for Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 1 (August 2014). "Money bail" is the practice of requiring defendants to forfeit money if they do not appear for trial. Money bail can be either secured or unsecured. A secured money-bail system requires defendants to deposit money before they are released; an unsecured money-bail system allows defendants to be released without depositing any money so long as they promise to pay if they fail to appear.

The Industry argues that sureties have a deep and longstanding role in our Constitutional bail tradition. And that is true. *ODonnell* 251 F. Supp. 3d at 1070. What is notably missing from the Industry's argument is any support for the proposition that for-profit sureties have any role in our Constitutional tradition, or any reason to disagree with Petitioner's contention (supported by amici and affirmed by the courts) that traditionally "a bail bond was typically based on an individualized assessment of what the

arrestee or his surety could pay to assure appearance and secure release." ODonnell, 251 F. Supp. 3d at 1070 (emphasis added), aff'd in relevant part ODonnell, 892 F.3d at 166. Traditionally, bail bonds were meant to secure release not impose detention, and sureties were friends or family of the defendant, not strangers operating for profit. Id. The Industry does not even attempt to argue otherwise.

H. Secured money bail is not effective

Although, as mentioned above, this Court need not address the devastating practical consequences—to arrestees and to the safety of the community—of the money bail system, Petitioners respond here to the Industry's mischaracterizations of these issues. In 2018, Chief Judge Lee Rosenthal of the United States District Court for the Southern District of Texas issued a comprehensive, 96-page opinion, based on eight days of live expert testimony from all sides of this issue and consideration of every available study, concluding that the secured money bail system contributes nothing to public safety and instead makes people more likely to commit crimes and fail to appear for court; disrupts their lives by causing them to lose their jobs, their homes, and their children; and interrupts necessary medical and psychiatric care. ODonnell, 251 F. Supp. 3d at 1129–32. The

Fifth Circuit Court of appeals unanimously affirmed those findings of fact. ODonnell, 892 F.3d at 166.

Indeed, the Industry should know all this: it filed an amicus brief in the Fifth Circuit, making the same points it makes here. See Brief for Amicus Curiae American Bail Coalition, ODonnell v. Harris County, No. 17-20333, 2017 WL 2861849 (5th Cir., June 26, 2017). And yet the Industry relies here on the same flawed, misleading "studies" to oppose efforts to return to a more historically grounded, rational, safe, constitutional bail system, as it did in ODonnell. *See, e.g.*, DOJ, Bureau of Justice Statistics, Data Advisory (March 2010) (cautioning against misuse of certain statistics collected by the Bureau), available at www.bjs.gov/content/pub/pdf/scpdsdl_da.pdf (last accessed Jan. 29, 2019); Kristin Bechtel, et al., PJI, Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research 1, 3-10 (2012) (analyzing secured-bail industry studies that misuse Bureau statistics). Throughout its brief, the Industry contends that "[t]he 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." (Industry Br. 8). The Industry's contentions have no merit.

Consider, for example, the logically flawed 2004 article on which the Industry relies here. *See* Eric Helland & Alexander Tabarrok, The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping, 47 J.L. & Econ. 93 (2004). Helland and Taborrok's article has been discredited for misusing data from the Bureau of Justice Statistics by alleging causation in ways the Bureau itself has rejected. See Bechtel, supra, at 7–8. Still, the Industry and its paid advocates continue to cite this discredited article for its conclusions without acknowledging that those conclusions cannot be inferred from the underlying data. The same is true for the Industry's citation to what they claim is agreement by the U.S. Department of Justice. See Thomas H. Cohen & Brian A Reaves, Bureau of Justice Statistics, Pretrial Release of Felony Defendants in State Courts 8 (2007). In that study, the researchers compared failure-to-appear (FTA) rates across different types of release. They found roughly the same FTA rate for felony arrestees released on secured bonds (18 percent) as for those released on nonfinancial conditions based on individualized risk assessments (22 percent). The Bail Industry, however, neglects to report the latter findings in their brief. (Industry Br. at 8 n.1 (comparing FTA rates for commercial sureties only to those for defendants given emergency release to relieve jail overcrowding (45 percent) and those released on unsecured bonds (30 percent))).

In fact, secured money bonds are no more effective at ensuring appearance or law-abiding conduct than release on unsecured bond and non-financial conditions of supervision. Notably, even Helland and Tabarrok credit the success of surety bonds to bondsmen using many of the same tools that pretrial services agencies use: collecting information about the accused's residences, employers, and families; monitoring people and requiring them to check in periodically; and reminding people of court dates. *See* Eric Helland & Alexander Tabarrok, supra at 96–97. Because it is not effective in promoting the state's interests, preservation of the secured-money-bond system cannot be the basis for a practice that discriminates against the poor solely because they cannot post money bail, particularly where other effective alternatives exist.

I. Ample, reasonable alternatives to the current system exist

The Industry contends that there are three, and only three, "alternatives to monetary bail[:] uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions." (Industry Brief at 6.) False. Jurisdictions across the country (including all federal courts) have employed systems that detain *some* defendants based on their risk of flight or dangerousness and release all others, some with liberty-infringing conditions (like GPS monitoring or house arrest) and some without. (Pet. Br.

at 23 (explaining alternatives to Clark County's money-bail system).) No jurisdiction in the country releases everyone, and no jurisdiction detains everyone either. Why the Industry thinks that these are the only alternatives to the system under which it currently profits is left unsaid. But these are not the only alternatives, and many alternatives are more effective at achieving any permissible goal than the current system.

J. Money bail cannot protect the community from crime because money amounts are not forfeited if the defendant commits a crime while released

Finally, the Industry contends that the money-bail system "protect[s] the community." (Industry Brief at 4.) The Industry does not further elucidate what it means by this, but all possible readings are untrue. To the extent that the industry argues that secured money bail is an effective means of ensuring reappearance at trial, the overwhelming weight of empirical evidence is against it, as discussed above. See supra Section H. But to the extent that the industry argues that money bail is at all effective at preventing crime while an arrestee is released, its argument is nonsensical: in Nevada, a person who commits a crime while released on a secured money bail amount does not forfeit the money deposited. See N.R.S. 178.508, 509 (discussing forfeiture of bonds where "defendant fails to appear when the defendant's presence in court is lawfully required for the

commission of a misdemeanor and the failure to appear is not excused or is lawfully required for the commission of a gross misdemeanor or felony"); see also N.R.S. 178.502 (providing that bond may be reassigned to new criminal offense). Therefore, for-profit sureties have no incentive whatsoever to prevent future crimes by their customers. Indeed, when a customer commits a new crime while on release, the for-profit surety keeps the premium but no longer needs to do anything at all to earn it.

More importantly, this false claim is irrelevant to resolve the issue at hand. Petitioners are not challenging the Industry or whether secured money bonds can help protect the community. As discussed above, there are a number of means by which the government can accomplish its goal of protecting the community. Petitioners assert that the government is required to choose that which is the least restrictive for the accused. At each of their bail hearings, Petitioner's presented conditions they believed would accomplish the government's goals and also allow for their release. No court found those conditions insufficient to protect the community or assure their appearance at trial, and therein lies the illegality of the detention order.

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CONCLUSION

The for-profit Bail Industry's amicus brief deserves no further attention from this Court, and for the foregoing reasons this Court should grant the petitions.

Dated this 28thth day of August, 2019.

Respectfully submitted,
DARIN IMLAY
CLARK COUNTY PUBLIC DEFENDER

By _*/s/ Nancy M. Lemcke*_____
NANCY M. LEMCKE, #5416
Deputy Public Defender
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

/s/ Charles Gerstein
CHARLES GERSTEIN, Esq.
(*pro hac vice*)
CIVIL RIGHTS CORPS
910 17th Street NW, Suite 200
Washington, D.C. 20006
(202) 670-4809

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 28th day of August, 2019. Electronic Service

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ADAM LAXALT
STEVEN S. OWENS

NANCY M. LEMCKE
CHRISTY L. CRAIG
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

HON. MARY KAY HOLTHUS
District Court, Dept. XVIII
200 Lewis Avenue
Las Vegas, NV 89101

HON. JERRY WIESE
District Court, Dept. XXX
200 Lewis Avenue
Las Vegas, NV 89101

HON. MICHAEL VILLANI
District Court, Dept. XVII
200 Lewis Avenue
Las Vegas, NV 89101

BY___*/s/ Carrie M. Connolly*_____
Employee, Clark County Public
Defender's Office