No. 18-814

IN THE
Supreme Court of the United States

MAURICE WALKER
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF CALHOUN, GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PRETRIAL JUSTICE INSTITUTE, AND NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

For the past forty years, not-for-profit organizations, the National Association of Pretrial Services Agencies (NAPSA) and the Pretrial Justice Institute (PJI), have been dedicated to advancing proven and pragmatic solutions for improving pretrial justice in the United States.

Founded in 1973, NAPSA is a membership association that maintains the Standards of Practice for the pre-trial services profession. NAPSA's membership consists of national and international pretrial practitioners, judges, attorneys, prosecutors, and criminal-justice researchers. Its board contains elected representatives from federal, state, and local pretrial services agencies.

NAPSA's mission is to promote pretrial justice and public safety through rational pretrial decision-making and practices informed by evidence. NAPSA aims to promote the establishment of pretrial agencies nationwide, further research and development on pretrial issues, establish mechanisms for the exchange of information, and increase the pretrial field's professional competence through professional standards and education. NAPSA has exclusively hosted the premier annual pretrial-services training conference for the last 46 years.

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[1] Pursuant to Rule 37 of the Supreme Court of the United States, *amici* certify that no counsel for any party authored this brief in whole or in part and that no counsel or party made any monetary contribution toward the brief's preparation and submission. Parties were provided notice of the filing of this amicus brief and have waived the 10 day notice requirement. The parties' letters of blanket consent are on file with the Clerk.

NAPSA published its first set of Standards on Pretrial Release in 1978. NAPSA revised these standards in 1995, 2004, and 2008 in light of emerging issues facing pretrial decision makers and changes in practices, technology, case law, and program capabilities. The proposed revised standards call for the elimination of secured financial conditions of release.

PJI's mission is to advance safe, fair, and effective pretrial justice. Its staff are among the nation's foremost pretrial-justice experts. PJI's Board includes representatives from the judiciary, law enforcement, prosecutors, victim advocates, pretrial services, county commissioners, and academia. Founded in 1977, PJI is supported by grants from the U.S. Department of Justice (DOJ) and private foundations. PJI is at the forefront of building stakeholder support for legal and evidence-based pretrial-justice practices. For example, PJI staff served on the task force that drafted the most recent American Bar Association (ABA) Criminal Justice Standards on Pretrial Release. In 2011, PJI partnered with the DOJ to hold a National Symposium on Pretrial Justice. That symposium issued dozens of recommendations for concrete reforms addressing serious deficiencies in the money-based bail system. *See* PJI, *Summary Report of Proceedings of the National Symposium on Pretrial Justice* (May 31, 2011), *available at* http://ww.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf. The DOJ's Bureau of Justice Assistance then assigned PJI to lead a Pretrial Justice Working Group comprised of over 90 justice-system-related organizations and associations, which was responsible for overseeing the implementation of the Symposium's recommendations.

Over the past four decades, NAPSA and PJI have released dozens of publications, conducted hundreds of training sessions, and provided technical assistance to thousands of jurisdictions on enhancing pretrial justice.

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all states and territories in the United States. NAPD's members include attorneys, investigators, social workers, administrators, and other support staff responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are the defense advocates in jails, courtrooms, and communities. They are experts in both theoretical best practices and practical, day-to-day delivery of indigent-defense services. With respect to the constitutional right to bail, NAPD's members constitute the front-line defenders of the right to be released from custody pending trial, and they observe the collateral damage that occurs in the lives of defendants who remain incarcerated while presumed to be innocent. NAPD has an interest in preserving its clients' constitutional right to release pending trial and reforming the bail system in the United States.

SUMMARY OF THE ARGUMENT

This case requires Supreme Court review to resolve confusion regarding the proper level of scrutiny with which lower courts should evaluate wealth-based classifications used to deprive defendants of pretrial liberty. The amici offer this brief to highlight the national importance of petitioner's questions and to outline the empirical evidence demonstrating how money bail and non-money alternatives impact legitimate state interests like appearance rates and public safety.

Independent, appropriately controlled scholarship demonstrates that effective alternatives to money-based bail successfully achieve the three goals of constitutional bail: maximizing appearance at trial, minimizing harm to the community from the small percentage of high-risk defendants who cannot be safely released, and maximizing pretrial release of those not proven guilty. Pretrial release systems based on secured bonds perform no better than other systems with regard to appearance at trial and community safety. Secured bonds delay or prevent the release of individuals who are bailable under the law, increasing pretrial costs and consequences for the innocent, the guilty, and states. States have been able to effectively manage pretrial release and meet the three goals of constitutional bail by utilizing pretrial-supervision programs and evidence-based risk-screening tools.

The secured-bond system, monopolized by the profit-driven commercial-surety industry, runs counter to evidence from credible studies and core constitutional values. The money-bail industry props up a flawed

system that financially benefits the secured-bond industry but fails to advance the legitimate goals related to bail. The benefits flow entirely to the bail-bond industry, making the costs of this system—whether measured in dollars or days in pretrial custody—excessive and unconstitutional. National challenges have been raised to the discriminatory impact of money-bonds, and this case presents this Court with a clear opportunity to provide lower courts with appropriate standards for evaluating legal challenges to the secured-bond system.

ARGUMENT

I. The bail process is intended to achieve three legitimate state interests.

Our system has long recognized legitimate state interests that impose pretrial burdens on people who have been accused—but not convicted—of a crime. These legitimate state interests resulted in the traditional concept of bail. However, because our constitution forbids excessive bail, "liberty is the norm and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Under the constitutional view, "[t]he practice of admission to bail…is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Stack v. Boyle*, 342 U.S. 1, 7–8 (1951) (Jackson, J., concurring).

A. Legitimate bail systems must promote return for trial, public safety, and pretrial release.

Our judicial system recognizes that the bail process is meant to effectuate pretrial release while ensuring later appearance and preserving public safety; a constitutional bail system does not necessarily collect fines or generate profits for governments or commercial entities. *See Stack*, 342 U.S. at 8. These three legitimate objectives also establish the relevant factors courts weigh when considering bail: the risk that (1) a defendant will fail to return or (2) will endanger the public before returning for trial,

balanced against (3) the right to pretrial release. While these three state interests—return, safety, and release—were historically the focus of the bail process, the shift to a commercial bail system resulted in higher detention rates for pretrial defendants.

Money bail has its root in the Anglo-Saxon criminal justice system, which was mainly comprised of monetary penalties for criminal acts. Timothy R. Schnacke, DOJ, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 23 (2014). England and America eventually adopted a personal-surety system in which a reputable person would take responsibility for the accused and promise to pay the required financial condition if the defendant failed to return. *Id.* at 25.

A key component of the personal surety system was that the surety took on this responsibility without any initial remuneration or promise of future payment. *Id.* But as American communities grew larger, the personal-surety system gave way to one that allowed "impersonal" sureties to demand re-payment upon a defendant's default. *Id.*at 26. An "impersonal and wholly pecuniary," for-profit industry emerged, *Leary v. United States*, 224 U.S. 567, 575 (1912), which requires bailable defendants to pay before being released. This shift resulted in an increase in detention of defendants who were traditionally eligible for bail. Schnacke, *supra*, at 26.

B. Other conflicting interests distract from the legitimate purposes of bail.

The secured bail industry has stymied the return to a more rational, constitutional system. This industry actively opposes evidence-based reforms, such as the use of unsecured or personal-recognizance bonds that permit bailable defendants to post bond without a pre-release payment and only require forfeiture if the defendant fails to appear.

The industry's opposition to reform is fierce and well-funded, and its use of flawed, misleading studies to advance its interests is well-documented. *See, e.g.*, DOJ, Bureau of Justice Statistics, *Data Advisory* (March 2010) (cautioning against misuse of the Bureau's statistics), *available at* www.bjs.gov/content/pub/pdf/scpsdl_da.pdf; 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). Consider, for example, a logically flawed 2004 article popular with the industry. *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 Tabarrok's article has been discredited for misusing data from the Bureau of Justice Statistics by alleging causation in ways that the Bureau itself has rejected. *See id.*, at 7–8. Industry advocates and others continue to cite this discredited article for its conclusions without acknowledging that those conclusions cannot be inferred from the underlying data. *See, e.g.*, Helland & Tabarrok, *The Fugitive*, 47 J.L. & ECON. 93 (2004).

The money-based bail system at issue in this case does not reasonably advance any discernable state interest. Instead, it solely advances the interests of the rent-seeking bail-bond industry.

II. Secured-money bonds do not serve the three legitimate state interests.

Secured-money bonds prejudicially prevent or delay release without reliably advancing the legitimate state interests that bail is intended to address:

- Secured-money bonds do not correlate with higher rates of appearance;
- They do not improve public safety; and
- They *hinder* pretrial release.

Secured bonds thus fail to achieve any legitimate goals related to bail and succeed only in supporting the bail industry.

A. Secured-money bonds do not correlate with higher rates of appearance for trial.

Rigorous studies from Colorado, Kentucky, Washington, and elsewhere support this conclusion and stand in stark contrast to the flawed studies promoted by the bail-bond industry.

1. A first-of-its-kind study in Colorado found unsecured bonds offer the same likelihood of court appearance as secured bonds.

In an unprecedented study, researchers collected hundreds of case-processing and outcome variables on 1,970 defendants booked into ten Colorado county jails over a 16-month period and analyzed whether secured bonds were associated with better pretrial outcomes than unsecured bonds. Michael R. Jones, PJI, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 6 (2013), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c57cebe-9456-f26b-49173d0f8b1f03ce&forceDialog=0.

Over 80 percent of Colorado's population resides in the ten participating counties. *Id.* Each local jurisdiction collected data on a pre-determined, systematic, random sampling to minimize bias in selecting defendants. *Id.* Defendants' pretrial risks were assessed and assigned to one of four risk categories. Nearly 70 percent scored in the lower two risk categories. *Id.* This study—unlike the industry's—analyzes pretrial outcomes by risk level to ensure valid comparisons.

The study tracked defendants who received unsecured and secured bonds. *Id.* at 7. Unsecured bonds in Colorado are authorized by statute as "personal recognizance bonds" and do not require defendants to post any money with the court prior to pretrial release. If defendants fail to appear, the court can hold those defendants liable for the full amount of

the bond. The Court can also require co-signors on unsecured bonds. In contrast, secured bonds require money to be posted with the court prior to a defendant's release. *Id.*

The study showed that unsecured bonds offer the same likelihood of court appearance as secured bonds. Fully 97 percent of defendants who were assigned to the lowest risk level and given a personal-recognizance bond attended all future court appearances. *Id.* at 11. Only 93 percent of defendants in the same risk level with a secured bond attended all future court appearances. *Id.* Similarly, in the second risk category, 87 percent of defendants with unsecured bonds attended all future court appearances. *Id.* Only 85 percent of defendants in the same risk category with a secured bond attended all future court appearances. *Id.* Thus, defendants released on unsecured bonds returned for trial *more* consistently than similar defendants with secured bonds.

2. Recent data from Kentucky and Washington also demonstrates that unsecured bonds are as effective as secured bonds in ensuring court appearance.

Court appearance rates in Kentucky recently increased when Kentucky reformed its bail process. In 2011, Kentucky passed HB 463, requiring the state pretrial-services division to use an empirically valid risk-assessment instrument to assess defendants' likelihood of returning for trial without threatening public safety. Low-risk defendants were released on their own recognizance unless the court found that

release was not appropriate. In the first two years after the law passed, the number of defendants released on unsecured bonds increased from 50 percent to 66 percent while the court appearance rate rose from 89 percent to 91 percent. Administrative Office of the Courts, Kentucky Court of Justice, *Pretrial Reform in Kentucky* 16–17 (2013), *available at* https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0.

Both the Kentucky and Colorado data sets demonstrate that secured bonds are statistically no better than unsecured bonds (and may actually be worse) at ensuring that defendants return to court as promised. The foundation of the money-bail system is statistically invalid.

In Yakima County, Washington, policymakers recently implemented an actuarial pretrial assessment tool—called the Public Safety Assessment ("Yakima PSA")—to provide recommendations regarding supervised pretrial release. Claire M. B. Brooker, *Yakima County*, *Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis* (2017). At the first appearance, an arrestee was assigned a combined scaled score, determined by the defendant's charges, the local jurisdiction, and local resources available to defendants. *Id.* at 2. For defendants assigned a high likelihood of pretrial success, the algorithm recommends low-level supervised release. *Id.*

Following the implementation of the Yakima PSA, Yakima County observed a statistically significant

increase in the number of arrestees released pretrial with no statistically significant difference in public safety and court appearance outcomes. *Id.* at 6.

The Yakima PSA has also decreased the rate of pretrial detention for minority arrestees. *Id.* at 8. Before the Yakima PSA was implemented, there was a disparity in the pretrial-release rates by race, with Caucasian arrestees being released at higher rates. *Id.* Following the implementation of the Yakima PSA, there was no significant difference in release rates among racial and ethnic groups. *Id.* An empirical analysis of this pretrial assessment also confirmed "that a jurisdiction can reduce pretrial detention and improve racial/ethnic equity by replacing high use of secured money bail with non-financial release conditions guided by actuarial-risk-based decision making, and do so with no harm to public safety or court appearance." *Id.* at 16.

3. Studies that claim secured bonds are more effective do not adequately control for risk.

Supporters of secured bail often tout studies—usually funded by the for-profit bail industry—that claim secured bonds are more effective than other types of bonds. *See* Bechtel, *supra*, at 6–15 (critiquing flawed studies commonly cited by the for-profit bonding industry). None of the most often cited bail-industry-sponsored studies take the basic analytical step of controlling for risk levels in order to make comparisons between similar defendant populations. *See id.* at 6–15.

In contrast, the Colorado study sorted each defendant using a pretrial risk assessment. This made it possible to accurately compare the failure-to-appear rate of low-risk defendants released on secured and unsecured bonds, allowing a valid comparison to be drawn between two similarly-situated populations. Ignoring the differences between high-, moderate-, and low-risk defendants makes it impossible to evaluate the effectiveness of secured bonds.

Because the industry studies fail to account for risk, the Bureau of Justice Statistics, the federal agency responsible for collecting the data used by the bail industry in these studies, has specifically warned that this data cannot be used to advocate for one type of pretrial release over another. The Bureau warned in March 2010 that "the data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another." DOJ, Bureau of Justice Statistics, *Data Advisory*, *supra*. The agency explained that in order to determine the most effective type of pretrial release, "it would be necessary to collect information relevant to the pretrial decision and factors associated with individual misconduct." *Id.* Unlike the typical study supporting the money-bail system, both the Colorado and Kentucky studies collected and analyzed such information, validating their conclusions.

B. Secured-money bonds do not correlate with lower rates of pretrial criminal conduct

Secured-money bonds do not meaningfully affect the rate of new criminal activity committed by

misdemeanor defendants. Secured-money bonds are not intended to and cannot deter criminal activity during the defendant's pretrial release, because bond forfeiture is predicated only on failing to appear in court. Defendants do not forfeit their bond if they are arrested again. Indeed, the ABA recognizes that financial conditions on release are not appropriate tools for preventing pretrial criminal conduct. ABA Standards for Criminal Justice, *Pretrial Release* § 10-5.3 (3rd ed. 2007). Logic thus suggests that secured bonds are no more effective than other types of release conditions at preventing new pretrial criminal activity, except perhaps as a blunt tool for detaining defendants without regard to actual risk.

The Colorado study confirms this point. It shows no statistical difference between unsecured and secured bonds in preventing criminal activity during the pretrial period. Jones, *supra*, at 10. Only seven percent of defendants in that study's lowest risk group who received an unsecured bond were rearrested for new pretrial crimes compared with ten percent of defendants with a secured bond—a consistent finding across all risk groups. *Id.*

The Kentucky case study likewise shows no positive correlation between secured bonds and public safety. After HB 463 passed, the public safety rate—a rate measuring how often defendants complete pretrial release without being charged with a new crime—actually improved slightly. *Pretrial Reform in Kentucky*, *supra*, at 17; *see* Kentucky Justice & Public Safety Cabinet, *Sourcebook of Criminal Justice Statistics,* tbl.5.9 (2012), *available at* https://justice.ky.gov/Documents/Sourcebook/

Sourcebook2012ChapterFive.pdf. In 2013, as part of the reform started by HB 463, the pretrial services program began using an improved pretrial risk assessment tool. Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 3–5 (2014). A study conducted six months after the improved tool was introduced showed the pretrial release rate rose to 70 percent of all defendants and the rate of new criminal activity for defendants on pretrial release declined by 15 percent. *Id.* Thus, secured bonds are neither necessary nor effective in promoting public safety.

C. Secured-money bonds excessively and arbitrarily delay or prevent release for indigent defendants, increasing costs for both states and bailable defendants.

Further, secured-money bonds and fixed bail schedules directly undermine the primary purpose of bail by delaying or preventing the release of defendants—particularly the poor. Resource-blind bail schedules, like the one endorsed by the City of Calhoun's Standing Bail Order, inevitably lead to the detention of people who would be low risk for release but are too poor to post the amount required by the schedule. *See* Doc. 29-5. Failing to release bailable defendants harms individuals and increases the financial cost to states through higher pretrial detention rates. Unsecured bonds produce significantly higher release rates, do less harm to bailable defendants, and impose fewer costs on states.

1. Pretrial detention destabilizes defendants economically and socially.

The money-based bail system exacerbates and perpetuates poverty and other sociological stigmas. Predictably, the Colorado study found defendants with secured bonds were detained significantly longer than those with unsecured bonds. Five days of pretrial incarceration passed before defendants with secured bonds achieved the same threshold of 80-percent release that defendants with unsecured bonds achieved on the first day. Jones, *supra*, at 15. This imposes a pre-trial punishment on defendants who—though presumed innocent—are too poor to secure their freedom.

Multi-day pretrial detention poses threats to employment and family stability. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356–57 (2014) ("Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release. Without income, the defendant and his family may fall behind on payments and lose housing, transportation, and other basic necessities."). "Jail stays of several weeks are long enough to cause evictions for nonpayment of rent, suspensions of government entitlements such as food stamps and SSI, and the loss of possessions (cars towed, clothing thrown away in homeless shelters, belongings stolen from the street)." *See* Megan Comfort, "*A Twenty-Hour-a-Day Job": The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, Ann. Am. Acad. Pol. Soc. Sci. 665:1, p. 5 (2016). Further, parents risk losing contact with and custody of their

children when they are incarcerated awaiting trial. *See id.* This destabilization (*caused* by the money-based bail system) is thought to contribute to an increased risk of failure to appear and new criminal activity—the exact interests the bail system is intended to address. *See* Lowenkamp, *supra*, at 3. The personal costs to defendants may persist past the conclusion of the case, even if the charges are dismissed.

Even a pretrial detention as short as 48 hours may destabilize an arrestee, making him or her "40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours." Christopher T. Lowenkamp, et al. Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 3 (2013), *available at* https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (last accessed Jan. 28, 2019); *see also Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

2. Pretrial detention correlates with higher failure to appear rates.

Even brief periods of pretrial incarceration associated with secured bonds negatively impact rates of appearance and re-offense. Another study using Kentucky's historical data determined that even a short delay in release of bailable individuals correlated with a significant increase in failure to appear. *See* Lowenkamp, *supra*, at 17–18. After controlling for relevant factors including risk level, the researchers found statistically significant decreases in appearance rates for low- and moderate-risk defendants related to delayed pretrial release. *Id.*

at 4, 13. When compared with those released within a day, bailable low-risk defendants detained for as few as two to three days were 22 percent more likely to miss future proceedings. *Id.* at 15.

3. Pretrial detention correlates with higher rates of pretrial criminal activity.

The same study found that "the longer low-risk defendants were detained, the more likely they were to have new criminal activity pretrial." *Id.* at 17. When compared with those released within a day, bailable low-risk defendants detained for two to three days were 39 percent more likely to engage in criminal activity while awaiting trial. *Id.* Moderate-risk bailable defendants also showed an increase in reported pretrial criminal activity. *Id.* These results may follow from the loss of jobs, transportation, and housing that can occur when pretrial detention prevents a defendant from working or meeting other commitments. *See* Wiseman, *supra*, at 1356–57. In sum, evidence correlates secured bail with measurably poorer outcomes in the metrics that should drive bail decisions.

4. Pretrial detention results in higher costs to states.

The extended pretrial detention associated with secured bonds also increases financial costs to states. *See generally* Criminal Justice Section, *State Policy Implementation Project*, ABA 2, *available at* https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_civilcitations.authcheckdam.pdf (last accessed Jan. 28, 2019) (comparing

costs of pretrial detention with noncustodial supervision). While bail is designed to move bailable defendants out of expensive pretrial detention, defendants who cannot afford secured bail remain in custody, increasing costs to states.

A recent study by the DOJ's Office of the Federal Detention Trustee quantified State costs associated with pretrial detention. Like the Colorado study, this study sorted defendants into risk levels. It then analyzed the costs associated with pretrial detention and the Alternatives to Detention Program (ATD). ATD includes options such as computer monitoring, third-party custody, and mental health treatment.[2] The study found the average cost of pretrial *detention* for all risk levels was between $18,768 and $19,912 per defendant. In contrast, the average cost of the ATD program was $3,860 per defendant including the costs of supervising the pretrial defendant, the alternatives to detention, and fugitive recovery. Marie VanNostrand, DOJ, Office of the Fed. Detention Trustee, *Pretrial Risk Assessment in Federal Court* 34–36 (2009). On average, detention is between *four and six times more expensive* than the alternatives, even after factoring in costs related to recovering defendants who do not return on their own. *See id.* Reducing pretrial detention rates significantly

[2] NAPD does not take a position as to whether these or other pretrial detention alternatives are constitutional or valid in any particular case. Its members reserve the right to challenge the appropriateness of specific detention alternatives in individual cases. Nonetheless, NAPD does agree that, on a systemic level, there are less invasive, less burdensome, and more efficacious alternatives to imposing money bail on pretrial defendants.

decreases the cost to states by decreasing the number of expensive pretrial detainees.

III. The experience of professionals who do not have a vested financial interest in secured-money bonds confirms the conclusions of these empirical studies.

Judges, other neutrals, and advocates on both sides of the criminal justice system who engage the empirical data presented in this brief consistently find that it conforms to their experience with the pretrial system. The American Judges Association agrees that pretrial detention decisions "have a significant, and sometimes determinative, impact on thousands of defendants and communities every day" and that defendants who are detained "solely because they cannot afford to pay for their release" bear an increased risk of adverse outcomes. American Judges Association, Resolution 2 (2017), *available at* http://www.amjudges.org/pdfs/AJA-Pretrial-Resolution.pdf. Accordingly, the American Judges Association calls for "the adoption of evidence-based risk assessment and management," the elimination of "practices that cause defendants to remain incarcerated solely because they cannot afford to pay for their release," and "the elimination of commercially secured bonds at any time during the pretrial phase." *Id.*

The National Association of Counties also recognizes the utility of evidence-based risk assessment and the need to "eliminate practices that cause defendants to remain incarcerated even for a few days solely because they cannot afford to pay for their release." National Association of Counties, *Resolution on Improving Pretrial Justice Process* (2017), *available at*

http://www.naco.org/sites/default/files/attachments/Final%20Adopted%20Interim%20Resolutions%20-%202017%20Legislative%20Conference.pdf.

Law enforcement organizations also recognize that this empirical data quantifies and offers solutions to problems that are borne out in their members' experiences. Sheriffs are troubled by a system in which most pretrial inmates are detained "not because of their risk to public safety or of not appearing in court, but because of their inability to afford the amount of their bail bond." National Sheriffs' Association, Resolution 2012-6 (June 18, 2012), *available at* https://www.sheriffs.org/sites/default/files/uploads/documents/2012resolutions/2012-6%20Pretrial%20Services.pdf.

IV. Legitimate state interests are better served by approaches proven successful elsewhere.

Other successful approaches to pretrial release without financial conditions put the secured-money-bond system into context, revealing it as a failed deviation from traditional bail systems. Those approaches eliminate the damage done by secured-money-bond systems and restore constitutional values in which "liberty is the norm[] and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Evidence shows that personal-recognizance bonds are an effective tool for most bailable defendants.

A. Pretrial supervision has been shown to be effective with bailable individuals in all risk levels.

Community-based support is effective for managing low- and moderate-risk defendants without imposing financial conditions of release. While secured bonds delay or prevent release, they do not fundamentally alter the consequences of violating the conditions of release. New charges under either type of bond will result in revocation and detention. Whether bonds are secured or unsecured, defendants who fail to appear may be required to forfeit money. Jones, *supra*, at 10–11. The relevant question for the judge, therefore, is: What conditions on bail might improve the outcomes for defendants at what risk profiles?

A 2013 study drawing from historical data in two states identified statistically significant correlations between pretrial supervision—a common condition of release in which defendants meet and communicate regularly with a supervising officer—and improvements in court appearance rates of defendants released on bail. Christopher T. Lowenkamp & Marie VanNostrand, Laura & John Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 10, 14–17 (2013). The study indicates that "the effect of pretrial supervision [on appearance rates] appears to matter even more as risk level increases," especially for moderate- and higher-risk defendants who were 38 percent and 33 percent less likely to fail to appear when supervised during their release. *Id.* at 15.

B. Risk assessment tools are available and effective.

Risk-assessment tools are valuable for distinguishing low-risk defendants from higher-risk defendants so a judge may determine appropriate, individually tailored release conditions for each defendant.[3] Evidence-based risk assessment has recently advanced dramatically such that courts may now reliably assess risk and minimize conflict with the constitutional rights related to pretrial release. PJI, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 4–5 (2015), available at https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=23a6016b-d4b3-cb63-f425-94f1ab78a912&forceDialog=0. Screening tools developed in multiple jurisdictions—including Virginia, Ohio, Kentucky, and Colorado—and validated through rigorous study have discredited prior assumptions about the factors that predict a defendant's risk to the community and risk of non-appearance in court. *Id.*; see, e.g., PJI, *The Colorado Pretrial Assessment Tool (CPAT) Revised Report* 19–20 (2012).

[3] While NAPD agrees that risk-assessment tools can be effective, depending on how they are designed and applied to an individual defendant, it does not endorse any particular risk-assessment tool and has not taken a position on whether such tools are a constitutionally adequate remedy for flawed state-court bail systems. Accordingly, NAPD does not join this section of the brief.

1. Individual states have been able to tailor risk assessment to statutory requirements.

Several states, including Virginia and Ohio, employ objective tools tailored to statutory criteria governing pretrial release. Virginia developed and validated a pretrial risk assessment instrument tailored to its statutory requirements. Marie VanNostrand & Kenneth J. Rose, *Pretrial Risk Assessment in Virginia* 1 (May 1, 2009). The Virginia validation study analyzed a year's worth of records from five representative counties and identified a set of statistically significant predictors of negative outcomes including failure to appear, new arrests, and criminal allegations prior to trial. *Id.* at 2.

Ohio followed a similar process in developing several tools for pretrial assessment and other risk inquiries related to recidivism. *See* Edward Latessa, et al., *Creation and Validation of the Ohio Risk Assessment System Final Report* ii, 13 (2009). The Ohio initiative demonstrated the value of these assessment tools not only for managing pretrial release, but also for addressing community supervision, institutional intake for convicted defendants, and community re-entry following incarceration.

State and local governments thus have abundant options for effectively and efficiently managing pretrial release without imposing a burden that adds cost to the accused and states themselves.

2. Pretrial risk assessments are more effective than bail schedules.

The rise of objective, evidence-based assessment tools is precisely why bail schedules should be rejected. Recognizing the importance of individual risk assessment, the ABA "flatly rejects the practice of setting amounts according to a fixed bail schedule based on charge." ABA Standards for Criminal Justice, *Pretrial Release* 10-5.3(e), p. 113. Such schedules exclude consideration of factors that may be far more relevant than the charge. *Id.*

In addition, the use of such schedules inevitably leads to the detention of persons who pose little threat to public safety but are too poor to afford release while releasing others that pose a higher safety risk but can afford to post bond. For this reason and others, the International Association of Chiefs of Police adopted a resolution criticizing the use of bail schedules and calling for the use of pretrial risk assessments to increase public safety and reduce release of individuals that may pose a threat. International Association of Chiefs of Police, *supra*. In sum, evidence-based, objective pretrial risk assessments are more effective than bail schedules at serving legitimate state interests.

CONCLUSION

Any unbiased review of the relevant data shows that secured-money bail is ineffective and counter-productive at achieving the legitimate goals of maximizing release, maximizing court appearance, and minimizing public risk. The practice hinders release of bailable defendants and shows no

statistically significant positive impact on any other valid metric. Its only reliable function is to provide the bail bond industry with a literally captive market. The Court should grant review of the Petition because courts across the country face challenges to the wealth-based classifications, and the corresponding deprivations of pretrial liberty, inherent in the money-bail system. This important issue deserves this Court's attention because clear and consistent standards are needed to guide lower courts in their analysis of the constitutionality of bail requirements that keep bailable defendants in custody under purely wealth-based standards.

Respectfully submitted,

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