AMERICAN BAIL COALITION

January 30, 2018

Dear Members of the Joint Legislative Budget Committee:

I travel the nation working on bail reform issues, and I think there are serious considerations and issues with the administration's budget and legislative proposal on bail reform. While certainly I represent a trade association of insurance underwriters of bail who will be affected by this legislation, this legislation directly follows the lead of New Jersey in implementing sweeping bail reform. In so doing, it undoes a generation-long tradition in New York that has continuously rejected the no-money bail system and intentional labeling of persons as dangerous as a general crime control policy for purposes of setting bail or detaining them in jail with no bail. Similarly, this law will trigger massive spending on a large new state bureaucracy that will be put in place to replace self-guarantee, third-party guarantee, or for-profit guarantee posted bail bonds, and also in order to put on the litany of mini-trials on preventative detention that will requires new judges, prosecutors, and public defenders.

Prior to 1987 and the Supreme Court's landmark decision in *U.S. v. Salerno*, very few people, including this author, would have believed that the federal constitution allowed persons to be detained by finding that they are dangerous to the community. The purpose of bail had always been to secure appearance in court, and any considerations related thereto were the only relevant considerations. The reason was fundamental—that to go further would be to take a legal sledge-hammer to the presumption of innocence. At the time of the passage of the Bail Reform Act of 1984, the ACLU was similarly skeptical, arguing that even with these new computers, we will never be able to accurately predict who is dangerous, which certainly remains the case in our country today.

Of course, Justice Thurgood Marshall dissented in *Salerno*:

> This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future. Such statutes, consistent with the usages of tyranny and the excesses of what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by our Constitution. Today a majority of this Court holds otherwise. Its decision disregards basic

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principles of justice established centuries ago and enshrined beyond the reach of governmental interference in the Bill of Rights.

Yet, the Supreme Court allowed the power to preventatively detain, i.e., detain with no bail, in a split decision in *Salerno*, and many states and the federal government have embraced it. New York has not embraced preventative detention and is in fact one of four states that disallows considerations of risk of danger in setting bail in first place. Justice Marshall predicted that preventative detention would be abused and expanded, which occurred. In fact, as a result the federal government in eliminating financial conditions of bail, pretrial detention has increased by 267% since 1984 due to using preventative detention so that roughly two thirds of all defendants are detained without bail. New Jersey, which system started January 1, 2017, upon which this legislation appears to be based, is now moving for detention in 43.6% of cases, obtaining it in about 20% of the total cases. In one jurisdiction in New Jersey, one of three defendants are being detained using preventative detention. I'm not quite sure this is what Chief Justice Rehnquist had in mind in his oft-quoted line in the majority opinion: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

This legislation would follow the lead of the federal government and New Jersey and reverse New York legal tradition to allow for expanded preventative detention. If protecting the presumption of innocence is the goal, then it would be an open question of whether going in this direction of allowing for detention without bail (and the hammer of threatening preventative detention) and a new dragnet of pre-conviction supervision and widespread use of electronic and other correctional technology is a better fit to protect the presumption of innocence. The power to preventatively detain is quite expansive in the proposed legislation, including cases involving "serious violence," all domestic violence arrests, witness intimidation, any and all new crimes while on bail, and willful failures to appear. *Salerno* does not require, but this legislation includes a serious of cases where there is a "rebuttable presumption" of detention that the person accused then has to overcome by a preponderance of the evidence. This will further tip the balance in favor of the state.

In terms of the costs, it will be millions and millions of dollars to implement a system of preventative detention. In each case, the prosecutor must reach a high bar of proving by clear and convincing evidence that the person is a "high risk of flight" or a "current threat." Of course, the legislation makes clear that there is some discovery, specifically noting Section 240.44 of the N.Y. Criminal Procedure Law, which is a rule regarding witness testimony discovery. In both New Jersey and New Mexico, this triggers the equivalent of a mini-trial, and of course all of these trials will have to be held within five working days of a motion having been filed. This will put immense burdens on the police, prosecutors, public defenders, and judges. In New Mexico, because no funding was received by prosecutors, motions are filed in 15% of all cases, whereas in New Jersey it is of course 43.6%. That should be the planned range for budgeting purposes.

This legislation requires the Office of Court Administration to certify a pretrial services agency in each county. **This would require the creation of a pretrial services program in each county, I assume ultimately at the expense of the state.** The bill enumerates with specificity the types of conditions a court has authority to require of these county programs in monitoring defendants who are out on bail. In fact, judges will have unfettered authority to impose supervision by pretrial programs and electronic monitoring in all cases whatsoever. The state will be required to pay for some tremendous portion of the monitoring fees because most defendants will assert indigence. Of course, this allows for consideration of public safety through the back door by allowing for all of these conditions, many of which may have nothing to do with coming back to court. In the end, this will cost a fortune to put all of these programs in place, which coupled with the expansion of putting on the preventative detention mini-trials, will prove quite expensive.

In some states, we have used the Washington, D.C. per-capita costs as an estimate, which in practice are proving to be a little high. In New Jersey, the annual cost would have been $1.2 billion annually when comparing to D.C., when the actual costs are now estimated at roughly $542 million annually according to the latest economic analysis. Of course, the New Jersey Attorney General was unable to estimate the costs and indicated the total would not be known until the program is completely implemented. Judge Grant in New Jersey has said the program will run a deficit and face a long term funding issue on July 1, 2018. Thus, if we applied the experience in New Jersey to New York, which is approximately double the size of New Jersey, a $1.1 billion price tag to implement this does not seem that far off. We assume included in this would be to offset the current costs of programs already in place that are already providing such pretrial services. In other states, such as California, which tried to implement this, independent legislative analysts determined it would cost California hundreds and hundreds of millions of dollars in several different categories in order to implement S.B. 10 and A.B. 42, legislation similar to this proposal.

Calls of justice reinvestment due to the savings from this legislation will be widespread and prove hollow. In New Jersey, the jail population dropped 16% last year (prior to bail reform), and dropped 20% this year. There is no evidence tying the drop to bail reform, and in fact most studies of the drop are blaming it on other factors (dropping crime rates in some categories, changing of the handling of drug cases, etc.). Of course, detaining 20% of persons without bail statewide is significant, and in one jurisdiction, judges are detaining 33% of defendants, which is likely more defendants than prior to bail reform. So, it is hard to say that this will have any overall impact in reducing mass incarceration, and thus there will be funds to spend. Of course the fixed costs of creating supervisory programs and the electronic dragnet will have to be taken into account.

For defendants, this trammels their rights. Basically, now you are going to be on pre-conviction probation by the state and electronic monitoring at your expense or state expense. This is problematic from a perspective of least restrictive, because as the U.S. Supreme Court has said, bail is the right to choose the jailer of one's choice. This means that the state is then out of your

business while you are at liberty. Here, everyone who could have posted a bond or have one provided to them free of charge by a third party, will instead face liberty restricting non-monetary conditions that may not be necessary to guarantee their appearance. On the other hand, the state can threaten preventative detention, and must threaten it early, which will put extreme pressure on a defendant since the state has 180 days of automatic detention available *with no possibility of bail* if the motions are won.

New York's bail system does not suffer from the problems of other states, and the idea that use of financial bail is rote, routine and widespread is false. The bails in New York City are generally lower than many other major cities in the United States. In San Francisco, misdemeanor domestic violence is $35,000. In fact, according to the Comptroller's report in New York City, 70% of defendants are already released on their own recognizance in New York City. In fact, California is twice the size of New York in terms of population, and in my professional judgment based on numbers I have seen, I would estimate that on a per-capita basis the amount of bail liability written in New York is probably 10-20% of what is written in California.

Further, this legislation restricts judicial discretion only as against financial conditions of bail, allowing unfettered discretion when it comes to any non-financial liberty-restricting conditions, most of which will be not chargeable to the defendant but to the state. In setting up procedural hurdles such as making findings on the record and showing "support" of alternatives, this unnecessarily restricts judicial discretion. Judges should have discretion to impose all conditions of bail or any combination of conditions of bail as necessary to meet the purposes of bail, which in New York right now is only to guarantee appearance. No restrictions should hamper that discretion to impose the least restrictive form of release in general, which has always generally been any combination of conditions as allowable by law.

Of course, the further expansion of releases without the incentives of financial conditions are not proving people will simply show up and not commit new crimes while out on bail if they are not required to post a cash or surety bond. This will spike failures to appear in court. In Houston, Texas, those released pursuant to a federal court order on a simple promise to appear were failing to appear in 34.46% of all cases in July, 2017. Of course, this was six times higher than the rate of failing to appear on a surety bond (5.7%) and three times higher than the rate of failing to appear on a cash bond (11.3%). In one study of the Dallas County system, it was noted that the use of surety bonds saved the county $8 million annually. That is not to say that everyone in New York should be on a surety bond, but where it meets the purposes of bail and is otherwise not excessive bail, judges should have discretion to impose financial conditions of bail as necessary to guarantee appearance in court and as another tool to impose that may have greater incentive to return someone to court than an ankle monitor would. Other national studies prove the worth of financial conditions of bail in reducing failures to appear in court, reducing long-term fugitive rates, and in the return of defendants over state lines in misdemeanor cases where state and local governments will not retrieve them. In fact, in one landmark study published

in the *University of Chicago Journal of Law and Economics*, the authors called surety bail agents "the true long-arms of the law."

While I cannot say for certain that this legislation will entirely eliminate surety bail and underwriting by insurance companies in New York, I can say that the passage of this legislation would absolutely call into question whether it would be viable to continue to operate in New York at both the retail bail and underwriting levels. All retail operations have certain minimums necessary to operate in the first place, as do underwriters. Certainly, the intent of this legislation is to eliminate financial conditions of bail, and while there appears to some discretion to impose financial bail, I could easily see this legislation reducing amount of surety bail used in New York by 50-90%. Of course, the loss of public revenue and loss of small business and jobs caused thereby should be another factor that should be taken into consideration. I would also caution the legislature from believing the arguments that bail will still be an option—in the two other states where this legislation passed, New Jersey and New Mexico, bail was still going to be an option—until court rules and administrative directives then virtually eliminated all financial conditions of bail.

This legislative debate is a rehash of territory that has been considered by New Yorkers many times over the years. New York has one of the purest of bail systems in my view, which does honor the presumption of innocence in a fashion not required of New York but chosen by New York. In New York we ask one question—what is necessary to secure the appearance of the defendant in court? Questions of using bail for other purposes, like trying to stop crimes we have a hard time in predicting, have been rejected for some time. We know that a criminal intervention is going to take place at sentencing anyway. Then, the idea that we are going to give the power to the state to detain large swaths of the population without bail and threaten the same is abhorrent to New York's tradition of the right to bail. Judges have discretion to set bail in New York, and while adjustments can and should be made to the system (such as the bail review due process section contained in the legislation, for example), moving New York in the direction of New Jersey, New Mexico, Washington, D.C. and the federal system risks not reducing mass incarceration but instead risks increasing mass incarceration and also widening the net of intrusive pre-conviction supervision and a web of electronic and other conditions that will be provided at defendant expense or state expense.

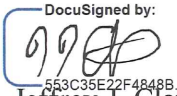
I would instead encourage further study and data gathering regarding New York's bail system. In other states that have considered such significant reforms, most occurred in relation to a lengthy study that highlighted jurisdiction-specific issues that could be corrected. In some states, they discovered they had no data, like in Ohio, where only four out of fifty-six jurisdictions collected any data regarding failures to appear or new crimes while out on bail. For these reasons, I would call on the legislature to spearhead a study of bail reform prior to the passage of any significant legislation. I would be of course glad to participate in any such efforts in New York.

Finally, I would point out that in an article from the *Journal of Law and Criminology* in 1986 entitled "Preventive Detention: A Constitutional But Ineffective Means of Fighting Pretrial Crime," the ideal solution to the reduction of pretrial detention, and all other related considerations in the bail process, as noted in the article, is speedier trials. The reason is that when we try to predict who is dangerous, we get it wrong much of the time and risk detaining those who we would have predicted wrongly. In fact, one of the largest bail algorithms in the country, the Arnold Foundation Public Safety Assessment, will recommend preventative detention in category six risk cases. The problem is that the training data one researcher was able to discover indicated that the risk of failing to appear or committing a new crime was 40% in risk six cases. This means that if we recommended and obtained detention in 10 of such cases, 6 of those persons would not have committed a new crime or failed to appear. The article also notes another study showing that 8 defendants in Washington, D.C. would have been detained to stop 1 person who would have committed a new crime while out on bail. **For these reasons, the only true way to fairly, accurately, efficiently, and across all groups reduce pretrial incarceration is to encourage speedy trial reforms.** In the article, the ACLU made this recommendation a generation ago suggesting that speedy trial reforms could reduce pretrial incarceration in total by as much as 50%, and it is a recommendation today that we continue to support. We therefore do support all efforts by the administration to reduce the delays in criminal trials because it is truly the only mechanism that can fairly and neutrally reduce the number of new crimes while on release, reduce pretrial incarceration and the length of pretrial incarceration, reduce failures to appear or violations of bond conditions, reduce the need for expensive intrusive correction technology and/or supervision by a state agency, reduce waste in the process, and get to the end result—justice—more quickly.

I would glad to provide any supporting documents referenced. Thank you for your time and consideration.

Sincerely,

DocuSigned by:



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