No. 129248

IN THE SUPREME COURT OF ILLINOIS

IN RE: JAMES R. ROWE, KANKAKEE COUNTY STATE'S ATTORNEY, and MICHAEL DOWNEY, KANKAKEE COUNTY SHERIFF,

Plaintiffs-Appellees

v.

KWAME RAOUL, ILLINOIS ATTORNEY GENERAL, JAY ROBERT PRITZKER, GOVERNOR OF ILLINOIS, EMANUEL CHRISTOPHER WELCH, SPEAKER OF THE HOUSE, DONALD F. HARMON, SENATE PRESENT

Defendants-Appellants.

On Appeal from the Kankakee County Circuit Court
22CH16
The Honorable Thomas W. Cunnington

BRIEF OF *AMICUS CURIAE* SEAN KENNEDY OF THE MARYLAND PUBLIC POLICY INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES

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TABLE OF POINTS & AUTHORITIES

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STATEMENT OF INTERESTS OF THE *AMICUS CURIAE*

1. Mr. Sean Kennedy is a visiting fellow with the Maryland Public Policy Institute (MPPI), a nonprofit public policy research organization based in Rockville, Maryland. The Institute, dedicated to conducting independent research on matters of public policy importance, is non-partisan and does not accept government funding to maintain its intellectual independence and rigor.

2. Mr. Kennedy is an expert on criminal justice policies at the local, state, and federal level with a special emphasis on criminal processing, sanctions, recidivism, and re-entry. He has written extensively on bail systems and that research has been featured in The Washington Post, The New York Daily News, and Baltimore Sun. Kennedy testified before the Maryland General Assembly in 2017 on pending bail system changes. He has advised state legislators, governors, prosecutors, Members of Congress, researchers, and the media on criminal justice policy including bail policy proposals.

3. Based on his research, Kennedy has found that bail system changes must be considered carefully and implemented cautiously. To be safe, effective, and fair, pretrial release systems must balance the interests of the defendant, public safety, and the justice system. It should provide judicial actors with broad discretion in the manner of bail-setting to include financial release conditions (e.g., monetary bonds) while promoting accountability through transparency and remedy. Needlessly limiting available bail-setting mechanisms often produces unintended harm to the safe, effective, efficient, and fair functioning of the justice system.

INTERESTS OF *AMICUS CURIAE*

The *amicus curiae* is an individual who has extensive knowledge of the history and

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functioning of the criminal and pretrial justice systems, the existing academic and public policy literature, and policy proposals and their potential impact on public safety and the efficient and effective administration of justice. The expertise and views of the *amicus curiae* are grounded in data-driven research and analysis and a commitment to prudent and effective policy development and implementation. The *amicus curiae* presents to the Court verifiable data, measured analysis and valuable context critical to the Court's assessment of the Act's constitutionality.

SUMMARY OF ARGUMENT

The Circuit Court rightly decided that the Act's abolition of monetary bond is unconstitutional in that it violates the separation of powers by usurping judicial authority in bail-setting and impinges on victims' rights to safety enshrined in the Illinois Constitution. Research and experience demonstrates that the Act's elimination of monetary bond as a mechanism to release a defendant does: (a) upends the historical purposes and practical functions of bail; (b) severely inhibits the ability of the court to function by guaranteeing the accused's appearance and compliance with court orders, (c) imperil the public safety and put victims at greater risk; and (d) impinge on the rights of defendants and potentially worsen their outcomes.

First, bail exists for a compelling reason – to provide yet-to-be adjudicated defendants the opportunity to be released pending trial and participate in their own defense, while providing society with "surety" that the accused will appear, comply with court conditions, and desist from misconduct including re-offense. Monetary bond – rooted in millennium-old practice – endures because it balances well the defendant's interests in liberty with those of society in safety and assures the accused will appear to face justice

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under law. Second, abolishing that available and often appropriate mechanism for bail-setting disrupts court functions as defendants are less likely to appear in court and more likely to engage in pretrial misconduct.

Third, pretrial misconduct – as measured by rearrest or re-offense – threatens the safety of crime victims and the general public, as defendants commit new crimes against property, persons, and society on release.

Fourth, severe limitations on, or the total elimination of monetary bond, compels the courts to use more intrusive mechanisms to effect compliance and appearance. Those mechanisms including the use of pretrial risk algorithms, GPS monitoring, drug testing, and often greater reliance on indefinite pretrial detention cause harms far worse than the burden of monetary bond.

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ARGUMENT

I. BAIL IS A PROVEN, EFFECTIVE, & NECESSARY JUDICIAL MECHANISM

Bail should be understood, at root, as an instrument of assurance that the accused will face justice, under due process of law. Bail is not a specific mechanism of that assurance *per se*, rather it is a means to attain the defendant's appearance in court. And its purpose is to balance competing interests, since "[b]ail acts as a reconciling mechanism to accommodate both the defendant's interest in pretrial liberty and society's interest in assuring the defendant's presence at trial." Donald B. Verrilli, *The Eighth Amendment and the Right to Bail: Historical Perspectives,* Colum.L.Rev. 82 (1982).

Courts including the Supreme Court of the United States and the Illinois Constitution expressly attach further considerations including a defendant's public safety risk as part of the calculus in determining whether an offense is bailable, and, if bail is granted, what is an appropriate bail.

This mechanism is often misconstrued, deliberately or inadvertently, as a singular practice within the pretrial adjudication system (conflating property bond, commercial surety, pretrial detention, release on recognizance, monetary bail, pretrial supervision/monitoring, etc.) when in fact each practice represents a different component in the bail system and each bail system – in all fifty states and at the federal level – differs and each has evolved over time.

While bail systems' components have been altered, the larger mechanism's purpose remains unchanged: to balance the fugitive and safety risk of the accused against their interest in liberty.

Illinois' pretrial system [prior to the adoption of the SAFE-T Act and Cook

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County's Bail 2017 Order] established a process for adjudicating bail: following arrest, they are charged and booked, and soon after appear before a judge for a bond hearing. At that hearing, a judge orders bond or no bond (pretrial detention). Bond consists of three primary types: 1) "I-Bond" or "release on recognizance" whereby the defendant pledges to appear in court and abide by any pretrial conditions (i.e., drug testing, supervision check-ins, GPS monitoring, etc.), 2) "D-Bond" or a monetary payment directly to the court of 10% of the amount set by the judge at the bond hearing, or 3) "C-Bond" or a money payment to the court of the full bond amount. Jessica Reichert & Alysson Gates, *An Examination of Illinois and National Pretrial Practices, Detention, and Reform Efforts*, Illinois Criminal Justice Information Authority (2018).[1] Should the defendant commit a new crime, fail to appear, or not abide by the conditions imposed by the court, those funds are to be forfeited to the court. If the accused complies, the amount will be returned.

For decades, Illinois has prohibited the practice of bondsmen, or commercial bail, which allows for third parties to collect as a fee a portion of the total bond from the defendant in exchange for providing the court the full amount necessary to secure the defendant's release. Illinois does allow a different type of third-party bond, whereby another party posts the bond amount on behalf of the defendant and assumes the financial risk of forfeiture if the bailed-out individual violates their bail terms.

Black's Law Dictionary defines the bail bond process as "to transfer custody of the defendants from the officers of the law to the custody of the surety on the bail bond, whose undertaking is to redeliver the defendant to legal custody at the time and place appointed

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[1] *An Examination of Illinois and National Pretrial Practices, Detention, and Reform Efforts*, available at https://icjia.illinois.gov/researchhub/articles/an-examination-of-illinois-and-national-pretrial-practices-detention-and-reform-efforts.

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in the bond." Black's Law Dictionary (11th ed. 2019).

This assumed responsibility is critical as the defendant themselves or a third party gains an interest in the requisite court appearances and adherence to bail conditions, beyond potentially losing their liberty.

Importantly, the Eighth Amendment to the United States Constitution, the English Bill of Rights (1688), from which it was drawn, and Illinois statute and case law prohibit "excessive bail" precisely because bail is not a punishment.

Further, bail amounts are not fines or fees – or punishments – but collateral on obligations or promises, held to guarantee compliance.[2] These deposits serve as proxy assurances, under penalty of forfeiture, that the defendant's obligations will be upheld. In contrast, a fine is a pecuniary punishment, and a fee is a charge for the cost of a provided service. A bail bond is neither a fine nor a fee, despite often being erroneously conflated for the purposes of political rhetoric.

This distinction is made clear in a close reading of the Eighth Amendment to the United States Constitution ("Excessive bail shall not be required, nor excessive fines imposed.") And if fines are an imposition, bail is a right under Illinois' Constitution:

> *All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person.*

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[2] Black's Law Dictionary (11th ed. 2019): "A written promise to pay money or do some act if certain circumstances occur or a certain time elapses; a promise that is defeasible upon a condition subsequent; esp., an instrument under seal by which (1) a public officer undertakes to pay a sum of money if he or she does not faithfully discharge the responsibilities of office, or (2) a surety undertakes the responsibility to pay if the public officer so fails."

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Ill. Const. 1970, art. I, §9.

Expressly allowing for release of all accused persons [with specified exceptions for certain cases] "by sufficient sureties." Here the phrase, "sufficient sureties" means a security or collateral that is adequate, proper, or appropriate as an instrument to ensure compliance with the obligation, through the provision of an assurance to the court.

These assurances have been made in financial terms in the English Common Law tradition for over a millennium. The reason a monetary or asset instrument has been adopted is precisely because the risk of loss provides incentive for the accused, and/or their third-party guarantor, to face the charges before the court instead of absconding. Because such collateral has inherent and transferrable value to the accused, any and all guarantors, and the court, non-compliance has a direct and tangible cost to the forfeiter and the same to the court.

Critically, that potential loss provides a crucial interest for the defendant and/or their guarantor ensuring their appearance in court and compliance with release conditions. This staking mechanism offers a substantial incentive to the defendant.

This is unlike other pretrial conditions (e.g., GPS monitoring, drug testing, pretrial check-ins etc.,) which only enforce violations after the fact, require the state resources to enforce them, and are enforced unevenly. Violating these non-monetary conditions can result in only three outcomes: detention until trial, imposition of further more strenuous conditions, or no action. Under a money bail system, the first two actions are already available to the court as well as the ability to effect the tangible and permanent loss of the posted surety funds by the defendant.

This financial stake is greater than the value of the court set bail amount, it is a test

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of the defendant's social capital and the potential loss of more than any forfeited monies. First, most defendants who post monetary bail are not solely posting their own resources but shared and/or borrowed sums that require a third-party to attest (by accepting a financial risk) to the defendant's good faith intent to comply and appear. A spouse, a parent, a child, or close friend who values the liberty of the accused must be willing to guarantee it on penalty of forfeiture, providing that third party their own incentive to ensure compliance with court terms. Additionally, the ability to lean on such a person demonstrates the accused's productive social ties, which further reduces the risk of absconding.

While critics of money bail point to a perceived two-tier system that "punishes the poor," judges in Illinois already take case-specific circumstances into account related to risk of flight and dangerousness including financial means, social ties, offense severity, and future safety risk. This judicial calculus is built-in to any and all bail decisions whether to detain, release on recognizance, or set money bail.

Although, like all human endeavors, judicial bail setting in Illinois can be prone to errors, its imperfections pale in comparison to the systemic, arbitrary, and obscure decisions made by "risk assessment tools" and algorithms that often evince racist and classist biases on a mass scale.

Research demonstrates that this added incentive (fearing the risk of loss) and money bail's test of a defendant's social ties and stake in others and their own well-being is an effective and largely productive mechanism for achieving the dual aims of the bail system: ensuring a defendant's appearance and compliance and protecting public safety.

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II. MONEY BAIL PROVIDES ASSURANCES THE ACCUSED WILL APPEAR & ENSURES THE EFFICIENT FUNCTIONING OF COURTS

As one of the aims of a bail system is to guarantee the accused's appearance in court, the rate at which defendants 'fail-to-appear' is of primary importance to assessing the effectiveness of the money bail system against its alternatives. Those alternatives, namely indefinite pretrial detention and release on recognizance or with non-financial conditions, deprive the court of another option that meets the test put forth by Illinois statute that conditions be:

> *the least restrictive conditions or combination of conditions necessary to reasonably ensure the appearance of the defendant as required or the safety of any other person or persons or the community.*

725 ILCS 5/110-5. That option – money bail – is an effective measure in achieving a defendant's appearance in court in the least restrictive manner and potentially in combination with other measures. Money bail is not exclusive of other conditions unlike pretrial detention which inherently precludes any other bail conditions and is the most restrictive manner to ensure trial appearance.

The General Assembly, under the 2017 Bail Reform Act, 725 ILCS 5/110-5, narrowed the applicability of money bail, stopping short of imposing terms on the courts, by recommending the court consider the financial ability of the accused, avoid "oppressive bail," and presume the use of non-monetary conditions. That law renders moot the substantive claims of SAFE-T Act proponents since the status quo already asks courts to consider "affordability" and prefer the use of pretrial supervision and monitoring conditions. Those means of assuring court appearances are in use and will continue to be so for the foreseeable future, no matter if the Act's provisions are struck down on constitutional grounds.

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The remaining question is what appearance outcomes, absent a money bail option, can be expected to be and what impact will that have on the functioning of the justice system. Much of the literature that shows money bail has no impact on failure-to-appear rates treats judicial bail decision-making as a standardized, assembly-line process without inherent defendant and offense specific variables. Kristen Bechtel, *et al.*, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions* (March 6, 2016).[3] Judges do not make decisions in a vacuum or from a template but based on facts and experience, thus reducing specific defendants across whole offense categories into generalized categories can obscure more than it illuminates.

The most recent complete national data from the Department of Justice shows that defendants with financial release terms were more likely than those released on recognizance to make their court appearances. Overall misconduct rates (failure to appear, rearrest, and fugitive status) for the two monetary bail types (C-Bond and D-Bond) still in use in Illinois were significantly lower, when controlling for other predictive variables. Office of Justice Programs, *Effect of Release Type on Failure to Appear* (2011).[4] Other studies drawing on this national depository of state court statistics similarly found that all types of secured monetary bond including cash and deposit bonds had lower failure-to-appear rates than release on recognizance. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public versus Private Law Enforcement from Bail Jumping*, Journal of Law and Economics (2004).

Still, the existing academic literature has yet to fully test the impact of the Act's

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[3] *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741635.
[4] *Effect of Release Type on Failure to Appear*, available at https://www.ojp.gov/ncjrs/virtual-library/abstracts/effect-release-type-failure-appear.

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far-reaching provisions abolishing any and all forms of monetary bail, presumes a right to release on personal recognizance, and imposes a high hurdle for either pretrial release conditions or detention.

These strictures on judicial authority extend further by deeming entire offense categories as "non-detainable," regardless of the defendant's history or other aggravating factors contributing to an increased public safety or flight risk, for which the burden of proof lies with the prosecution. If a judge still orders detention for an eligible offense, the judge's decision must be justified and relitigated and sustained at every court appearance.

These provisions individually are not entirely unique but taken as a whole, they are unprecedented in their sweep. While other jurisdictions have severely limited monetary bail, none has gone as far – at once. Maria Cramer, *Illinois Becomes the First to Eliminate Cash Bail*, The New York Times (February 27, 2019).[5] Similarly, Cook County Chief Judge Timothy Evan's General Order 18.8A limited monetary bail to a release condition of last resort and required bail to be set at an affordable level.

While differing in some respects, New York's 2019 bail changes (twice since revised after public criticism) provide the most apt comparison to the Act's provisions. Manhattan Institute, *More Criminals, More Crime: Measuring the Public Safety Impact of New York's 2091 Bail Law* (July 28, 2022).[6] New York's 2019 changes (which took effect January 1, 2020) included the elimination of cash bail and pretrial detention for almost all misdemeanors and "nonviolent" felonies, including weapons offenses and child

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[5] *Illinois Becomes the First to Eliminate Cash Bail*, available at https://www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html.

[6] *More Criminals, More Crime: Measuring the Public Safety Impact of New York's 2091 Bail Law*, available at https://www.manhattan-institute.org/measuring-the-public-safety-impact-of-new-yorks-2019-bail-law?utm_source=press_release&utm_medium=email.

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endangerment. Over 400 offenses were subject to "mandatory release" under the law, irrespective of the defendant's criminal history, past violence, lack of community ties, or flight risk.

Although two later revisions made some offenses bail-eligible, other offenses were added to the mandatory release register, offering judges little to no discretion in bail setting. Despite the number of reported offenses in New York rising dramatically since the bail law took effect, the number of arrests and arraignments has declined precipitously. Meanwhile, the share of those arrests released on bail fell (from 11% to 5%) as did release on recognizance while nonmonetary release rose in proportion as a share of releases between 2019 and 2021. By 2021, bail paid releasees, who already had lower failure to appear rates than releases on recognizance and nonmonetary conditions releases, were half as likely as the other two categories to fail to appear. New York State Unified Court System, *Pretrial Release Data* (last visited February 16, 2023).[7]

The experience following the Cook County Circuit Court's General Order (2017) offers further insight into the expected results of a statewide implementation of the Act. An initial analysis conducted by the Chief Judge's office itself apparently proved the effectiveness of the changes. OFFICE OF THE CHIEF JUDGE, CIRCUIT COURT OF COOK COUNTY ILLINOIS, *Bail Reform in Cook County, An Examination of General Order 18.8A and Bail in Felony Cases* (May 2019).[8] The detained population fell, appearance rates remained flat, and rearrest rates for new crimes, especially violent crime remained low.

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[7] *Pretrial Release Data*, available at https://ww2.nycourts.gov/pretrial-release-data-33136.

[8] *Bail Reform in Cook County, An Examination of General Order 18.8A and Bail in Felony Cases*, available at https://www.cookcountycourt.org/Portals/0/Statistics/Bail%20Reform/Bail%20Reform%20Report%20FINAL%20-%20%20Published%2005.9.19.pdf).

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Interestingly, that May 2019 study, which later came under harsh criticism following media and academic scrutiny that found it to be error-riddled at best and misleading at worse, showed that court appearance rates fell across almost all felony crime categories (i.e., person, weapon, property, drug, and other). Only released violent crime offenders' appearance rates ticked up but only slightly.

In 2020, a *Chicago Tribune* investigation exposed a series of critical methodological errors in the Cook County Judge's study including: narrowing the definition of violent crime to a handful of offenses; misclassifying the release status of defendants; and not analyzing comparable timeframes pre-reform and post-reform. David Jackson, *et al.*, *Bail Reform Analysis by Cook County Chief Judge Based on Flawed Data, Undercounts New Murder Charges,* The Chicago Tribune (February 13, 2020).[9] The *Tribune* also found that due to questionable data-entry and tracking, the report severely undercounted new crimes including twenty-one releasees who later committed a homicide, compared to Evans' claim of only three.

The Loyola University study, conducted on behalf of monetary bail opponents, found that, in fact, the probability of a defendant who would have previously received monetary bail increased by 3.1% in just the six months following the order's issuance. Manhattan Institute, *Bail Reform in Chicago: Un-Solving Problems in Public Safety and Court Financing* (November 22, 2022); Don Stemen & David Olson, *Dollars and Sense in Cook County, Examining the Impact of General Order 18.8A on Felony Bond Court*

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[9] *Bail Reform Analysis by Cook County Chief Judge Based on Flawed Data, Undercounts New Murder Charges,* available at https://www.chicagotribune.com/investigations/ct-cook-county-bail-bond-reform-tim-evans-20200213-tkodxevlyvcp7k66q2v2ahboi4-story.html.

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Decisions, Pretrial Release and Crime, Safety & Justice (November 19, 2020).[10] Even using the Circuit Court's own data reports, the failure-to-appear rate for felony releases rose steadily over time from 8.5% at the start of reforms to a cumulative 21% rate five years later – with nearly 18,000 defendants failing to appear in court over that period. STATE OF ILLINOIS CIRCUIT CT. OF COOK CTY, *Model Bond Initiative & Data Dashboards* (last visited February 14, 2023).[11] Following a sharp dip during the height of the COVID-19 pandemic, the average daily Cook County jail population is down 13% from 2017 levels. This can be attributed to a number of factors, inclusive of the county's bail order – with important caveats. Since publicly available Sheriff's data does not breakdown inmate categories it is difficult to ascertain detention population type changes across time.

One analysis estimates that if 2021 Cook County's bond decisions, which are already adverse to monetary bonds, were made under the Act's detainable standards, pretrial detention would rise by 3,726 individuals or 18%. Stemen & Olsen, *Dollars and Sense in Cook County*.[12] Those 2021 figures mask the notable decline in overall arrests, falling from 287,000 arrests in 2015 to 155,000 arrests in 2021. Arrests plummeted in Cook County, and particularly in the city of Chicago, by more than half from more than 130,000 across the county (by 69,000 in Chicago) in 2015 to less than 50,000 (by 28,000 in

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[10] *Bail Reform in Chicago: Un-Solving Problems in Public Safety and Court Financing*, available at https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/11/Report-Dollars-and-Sense-in-Cook-County.pdf; Don Stemen & David Olson, *Dollars and Sense in Cook County, Examining the Impact of General Order 18.8A on Felony Bond Court Decisions, Pretrial Release and Crime*, Safety & Justice (November 19, 2020), available at https://safetyandjusticechallenge.org/resources/dollars-and-sense-in-cook-county/.

[11] *Model Bond Initiative & Data Dashboards*, available at https://www.cookcountycourt.org/HOME/Model-Bond-Court-Initiative.

[12] Stemen & Olson, *Dollars and Sense in Cook County*, available at https://safetyandjusticechallenge.org/resources/dollars-and-sense-in-cook-county/.

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Chicago) in 2021 with the steepest decline occurring in 2020 and 2021. Illinois Criminal Justice Information Authority, *Arrests by Year* (last visited February 16, 2023).[13]

That decline in arrests concurrent with the Circuit Court's bail order and the term of the county State's Attorney, Kim Foxx, who is less aggressive in pursuing felony cases. The Cook County SAO approved far fewer felony cases filed by police (an average rate of 74% through 2021) compared to her predecessors (85% of cases in the six years prior to 2017). CBW Chicago, *Kim Foxx Says She Approves 86% of Cases Bring In and Over 90% of Carjackings. That's Not Even Close* (March 30, 2022).[14] At the same time, the SAO dismissed one-third more felony cases including murder and sex crimes cases through 2019 while securing fewer felony convictions. Dave Jackson, Gary Marx, and Alex Richards, *Kim Foxx Drops More Cases As Cook County State's Attorney Than Her Predecessor*, The Chicago Tribune (February 13, 2020).[15] A released defendant whose charges are dismissed can neither fail to appear to a moot court hearing nor commit a new crime on release and those held in custody, either until disposition or seeking to post bond, cannot be detained or have a new offense classed pretrial release recidivism.

With fewer arrests, more restrictive bail rules, and a less zealous State's Attorney, it follows that Cook County's pretrial population – detained, bailable, or released on recognizance – would fall and it has, but not exclusively owing to bail policy changes. Another critical impact on the efficient and effective functioning of the justice system

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[13] *Arrests by Year*, available at https://icjia.illinois.gov/arrestexplorer/.
[14] *Kim Foxx Says She Approves 86% of Cases Bring In and Over 90% of Carjackings. That's Not Even Close*, available at https://cwbchicago.com/2022/03/kim-foxx-felony-approval-rate-carjackings-murders.html.
[15] *Kim Foxx Drops More Cases As Cook County State's Attorney Than Her Predecessor*, available at https://www.chicagotribune.com/investigations/ct-kim-foxx-felony-charges-cook-county-20200810-ldvrmqvv6bd3hpsuqha4duehmu-story.html.

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linked to bail is financing of court functions. Outside of Cook County, the 10% deposit value of a bond is held by the court clerk through disposition and returned to the defendant upon resolution, minus an allowed 10% fee or 1% of the total bond. In Cook County, the maximum collectable fee is limited to $100 as of 2016. Defendants who are adversely adjudicated often have their bond payments applied to court and other agency costs as well as restitution. In 2016, 96 Illinois counties collected $154 million in these payments but that fell to $83 million in 2021. The Civic Federation, *Updated Report: Elimination of Cash Bail in Illinois: Financial Impact Analysis* (October 21, 2022).[16] Those resources enable the courts to perform their functions, pay necessary costs, and make victims restitution without being directly beholden to state or local government budgetary decisions or burdening the taxpayer further.

But that revenue stream is shrinking due largely to the reduced use of monetary bail in Cook County, where total bond collected dropped from $141 million in 2016 to $63 million by 2020. *Id.* at 7. There, bond processing fees fell from $7.5 million in circuit court revenue (2016) to $150,000 in 2020. Since for most counties, these fees equaled 15% of total circuit court budgets, the statewide elimination of monetary bail and the related revenues severely impact the functioning of the courts.

This revenue shortfall would require additional taxpayer funds to maintain the local courts and agencies' full function or exacerbate any court backlog, leading to one of two outcomes (or both): 1) prosecutors dropping cases or pleading down cases to resolve them as quickly as possible to relieve stress on the system and/or 2) extend the period of pretrial detention or supervision on a defendant before disposition. The unintended consequence

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[16] *Updated Report: Elimination of Cash Bail in Illinois: Financial Impact Analysis*, available at https://www.civicfed.org/eliminationofcashbailinillinois.

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of this resulting budget crunch would be less justice for victims and the accused at the same time.

III. THE ABILITY TO MAKE MONETARY BAIL DECISIONS SAFEGUARDS PUBLIC SAFETY, A LEGITIMATE INTEREST OF THE STATE & COURTS

The state's duty to protect public safety is well-established both as a general obligation and a specific one in the matter and manner of bail setting. *See* Ill. Const. 1970, art. I, §9. Effectively upholding that responsibility is integral to maintaining a healthy relationship between citizens and their government, and the efficient functioning of the justice system.

Hitherto, the judiciary's exclusive power to set bail has been enshrined in the Illinois Constitution, codified in statute, and upheld by the courts. The Act's transference of that judicial authority to the legislature – by abolishing monetary release conditions and prescribing the method and means of release decisions – has practical implications as much as legal ones.

The proscription of monetary bail, presumptions of release and detention, and prescription to apply "risk assessments" will have real-world, negative impacts on public safety.

Experience is often the greatest teacher so it would be wise to take lessons from those who learned first-hand of the consequences of far-reaching 'bail reforms.' Elected

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officials in New Mexico,[17] New Jersey,[18] Alaska,[19] Utah,[20] and New Hampshire[21] including sitting governors, prosecutors, and legislators who were once ardent supporters of bail changes have had a change of heart faced with its real impact on public safety. In November 2020 California voters, who witnessed firsthand the results of the governor's order for "zero bail" edict during the pandemic, voted 56% to 44% to restore a money bail system in the state. *Prop. 25 California 202 Election Results: Bail Reform Measure is Rejected By Voters*, ABC 7 Eyewitness News (November 4, 2020).[22]

A new study of California's emergency "zero bail" policy from Yolo County compared the rearrest rates of two randomized samples of defendants released during the five-week zero bail period in April-May 2020 to a cohort released on monetary bond in 2018 and 2019. Zero bail releasees were rearrested at 70% higher rates, 148% more often, and 90% more for felonies and 200% more for violent crimes. YOLO COUNTY DISTRICT

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[17] Mike Gallagher, *Gov. Backs Bail Reform Law Changes*, Albuquerque Journal (August 28, 2021), available at https://www.abqjournal.com/2424184/pretrial-detention-to-be-reviewed-violent-offenders-should-be-in-jail-before-trial-governor-says.html.

[18] Matt Friedman & Joseph Spector, *New Jersey Overhauled Its Bail System Under Christie. Now Some Democrats Want to Roll It Back*, Politico (December 11, 2022), available at https://www.politico.com/news/2022/12/11/new-jersey-bail-system-roll-back-00072781.

[19] Julie Swisher, *The Alaska House of Representatives Voted to Repeal and Replace Senate Bill-91*, KTVF/KXDF (May 10, 2019), available at https://www.webcenterfairbanks.com/content/news/The-Alaska-House-of-Representatives-voted-to-repeal-and-replace-Senate-Bill-91-509737041.html.

[20] Sonja Hutson, *Utah's Bail Reform Law Will Be Repealed In May. What Happens Next?*, KUER 90.1 (March 30, 2021), available at https://www.kuer.org/politics-government/2021-03-30/utahs-bail-reform-law-will-be-repealed-in-may-what-happens-next.

[21] Damien Fisher, *In Rebuke to Progressives, GOP Bail Restrictions Bill Passes House With 64 Dem Votes*, NH Journal (March 15, 2022), available at https://nhjournal.com/gop-bail-restriction-bill-passes-house-with-64-dem-votes-in-rebuke-to-progressives/.

[22] *Prop. 25 California 202 Election Results: Bail Reform Measure is Rejected By Voters*, available at https://abc7.com/prop-25-california-2020-results-did-pass-election-ca/7587637/.

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ATTORNEY'S OFFICE, *Yolo County: Posted Bail vs. Zero Bail Analysis* (February 6, 2023).[23]

New York's experience in the wake of its bail changes is also instructive. The law's presumption standard and restrictions on monetary bond eligibility shifted defendants from bail (from 11% of releases in 2019 to 5% in 2021) to nonmonetary conditions (from 7% of releases in 2019 to 17% in 2021). New York State Unified Court System, *Pretrial Release Data* (last visited on February 16, 2023).[24] Rearrest rates for nonmonetary release (NMR) and release on recognizance (ROR) increased significantly over pre-reform levels and compared to a decline in marked felony rearrest rates for bail-set defendants. Charles F. Lehman, *Yes, New York's Bail Reform Has Increased Crime, New Data Prove It*, City Journal (September 22, 2022).[25] Of those defendants arraigned in 2020 after the law took effect, 36% of NMR defendants were rearrested for a new crime with 22% charged with a new felony offense, and 7.5% of NMR arrested for a new violent crime. Accounting for the overall decline in arrests, the felony arrest rates for both NMR and ROR felony rearrest rates rose by 50% in 2020 over 2019 releases. Bail paid releasees' rate of felony rearrest rose by 25% but off a diminished baseline, so that overall felony arrests for bail paid defendants fell in real terms from 2,035 rearrest in 2019 to 811 in 2020 while NMR counts rose from 1,858 to 3,506 and ROR ticket up by 32 more rearrests than the year before.

Those figures put into context the attention-grabbing headlines about a shoplifter released more than one hundred times only to be released yet again to commit more crime. Crime in New York City and across the state has risen in tandem with the revolving pretrial

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[23] *Yolo County: Posted Bail vs. Zero Bail Analysis*, available at https://drive.google.com/file/d/1FwrH5hT1m2KYKp5v3JknbTvTVZfWMoJ7/view).
[24] *Pretrial Release Data*, available at https://ww2.nycourts.gov/pretrial-release-data-33136.
[25] *Yes, New York's Bail Reform Has Increased Crime, New Data Prove It*, available at https://www.city-journal.org/new-yorks-bail-reform-has-increased-crime.

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doors under the new bail law. According to the New York City Police Department, the 60-day rearrest rates for burglary (23.7%), auto theft (21%), and grand larceny (19.7%) in 2021 had more than doubled from 2017 rates. Bernadette Hogan, *et al.*, *Recidivism Rates for NYC's Burglars and Thieves Soar Amid Bail Reform: NYPD Data*, The New York Post (July 29, 2022).[26]

This commensurate rise in crime can be attributed to recidivists who benefit from the new presumption standard and, knowing that they will likely not be detained upon rearrest, lack sufficient incentive to desist. That disincentive for pretrial misconduct, whether non-appearance or re-offense, is more readily apparent in the bailed population, whose misconduct rates are lower.

Cook County's defendant recidivism experience following its bail changes parallels that of New York. Research shows significant increases in re-offense can be attributed to the implementation of General Order 18.8A. According to the University of Utah study "both the number of crimes and the number of violent crimes committed by pretrial releasees appears to have substantially increased after G.O. 18.8A, contrary to the Study's assertions." Paul Cassell, *et al.*, *Does Bail Reform Increase Crime? An Empirical Assessment of the Public Safety Implications of Bail Reform in Cook County, Illinois*, University of Utah College of Law Research Paper No. 349 (2020). This is because the study by the Chief Judge of Cook County Circuit Court systematically undercounted the crimes committed by pretrial releasees, biased the control sample, and compared two unlike time frames. More critically, the Chief Judge's study gauged success by the re-

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[26] *Recidivism Rates for NYC's Burglars and Thieves Soar Amid Bail Reform: NYPD Data*, available at https://nypost.com/2022/07/28/recidivism-rates-for-burglars-and-thieves-soar-nypd-data/.

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offense rate by dividing recidivists (numerator) by releasees (denominator), a ratio skewed toward a favorable result since the bail policy inherently sought to increase the size of the denominator. The Utah analysis suggests that public safety should instead be assessed by how much more offending occurred in the post-reform period by the releasee cohort. Adjusted, the data shows that pretrial crime by releasees under Cook County's new bail policies increased – overall crimes rose 45% and violent crimes grew by 33%. Owing to the fact that most crime including violent crime is not reported to police, the authors acknowledge that their figures likely represent a severe underestimation of the adverse crime differential attributable to Cook County's pretrial releases.

The impact of the bail reform is more readily seen by looking at one particular and heinous offense – homicide. While the Chief Judge's study identified only three homicide suspects that were on pretrial release following the reforms, the Chicago Tribune identified 21 defendants subsequently charged with a homicide during their release period. Sixteen of them were awaiting prior felony charges and four of the remaining five misdemeanor defendants had previous felony convictions. One of the accused killers remained free at the time of the homicide despite having violated his pretrial release conditions.

While it is impossible to say if their bond decisions had been left to the prudent discretion of judges, these offenders would not have been free to commit all of their alleged offenses, including the homicides, it is reasonable to assume that many, if not most, of the offenders would have either remained in custody or been sufficiently deterred by the risk of tangible loss to desist from pretrial misconduct. At least a portion of these offenses, and the lost lives and livelihoods that resulted, were preventable.

A community's lost sense of security and psychic pain of crime are difficult to

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quantify but an existing economic literature seeks to calculate the economic cost of crime to society – in dollars. Economists at Vanderbilt University and the Pacific Research Institute tabulated incurred costs to victims (i.e., property, income, medical, and productivity loss etc.) and related government service expenditures and then distributed by offense. Ted Miller, *et al.*, *Incidence and Costs of Personal and Property Crimes in the United States*, Journal of Benefit-Cost Analysis (February 10, 2021).[27] The total economic cost of personal property crime tallied $2.6 trillion in 2017. If adjusted for inflation and subsequently elevated crime levels, the cost of crime exceeds $3 trillion per year. Each homicide alone incurs a loss of $7.8 million. Another study using prior cost-of-crime figures imputes the total cost of violent and property crime in Chicago to be $10.9 billion in 2021 or $4,060 per resident per year. Deb Gordon, *Safest Cities In America 2023: Violent Crime Rate Increases Drive Per Capita Cost of Crime*, Moneygeek (January 19, 2023).[28]

Those real costs of crime whether measured in citizens' dollars, lives, or personal well-being and security must be weighed against any perceived harm to defendants under the bail system.

IV. ELIMINATING MONETARY BAIL WILL NOT SOLVE PRE-EXISTING AND ENDEMIC SOCIAL ILLS, BUT WILL EXACERBATE THEM

Critics of monetary bail argue that the inability to post bond is the cause of social ills afflicting criminal defendants by increasing economic and housing insecurity, health and family problems, and the probability of future justice-involvement. This analysis

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[27] *Incidence and Costs of Personal and Property Crimes in the United States*, available at https://www.cambridge.org/core/journals/journal-of-benefit-cost-analysis/article/abs/incidence-and-costs-of-personal-and-property-crimes-in-the-usa-2017/37CD0589C84DAEF0FEC415645A6D7977.

[28] *Safest Cities In America 2023: Violent Crime Rate Increases Drive Per Capita Cost of Crime*, available at https://www.moneygeek.com/living/safest-cities/#safety-and-the-cost-of-crime.

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fallaciously reduces to a single cause the personal plight of defendants and is also disproven by recent experience.

First, a defendant's personal history and circumstances influence their behavior, and if that behavior is anti-social and criminogenic in nature, it can result in arrest and arraignment for the alleged offense. The personal and social inputs that contributed to the output (i.e., allegedly committing a crime and being charged) were pre-existing before their bond hearing.

Second, "the defendants who are detained before trial are likely unobservably different from defendants who are not detained, biasing cross-sectional comparisons." Will Dobbie, *et al.*, *The Effects of Pretrial Detention of Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, American Economic Rev., 108 (2018).[29] The detained population falls into two broad categories: those remanded until trial and those who have yet to post bond. Only those who are eligible for release but unable to secure it can reasonably be said to accrue a benefit if their bond conditions were eliminated.

Third, those potential benefits – reduced job loss, family stability etc. – are only observed in these studies as counterfactuals (i.e., if not for detention, the accused would not have been evicted) that presuppose the factors contributing to the defendant's alleged offense would have not otherwise manifested negatively. Robust research shows the link between these negative traits and adverse outcomes, making it extraordinarily difficult to isolate a singular experience like temporary pretrial detention from other factors. Valeria

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[29] *The Effects of Pretrial Detention of Conviction, Future Crime, and Employment: Evidence From Randomly Assigned Judges*, available at https://www.aeaweb.org/articles?id=10.1257/aer.20161503.

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Saladino, *et al.*, *The Vicious Cycle: Problematic Family Relations Substance Abuse, and Crime in Adolescence: A Narrative Review*, Frontiers in Psychology, 12 (2021).[30]

Critically, these studies often assume the pretrial detainee would have been granted favorable nonmonetary bond conditions in lieu of a monetary condition they could not meet. And New Jersey's pretrial experience directly contradicts this reasoning, as prosecutors are effectively prohibited from seeking monetary bond, they seek pretrial detention in 43% of all indictable felony offenses instead and 57% of those are granted. NEW JERSEY CTS., *Criminal Justice Reform Statistics: Jan. 1, 2022-Dec. 31, 2022* (last visited February 16, 2023).[31] As a result, New Jersey's pretrial detention population is now higher than it was before it implemented its bail reforms in 2017.

Other mechanisms used to replace judicial discretion in detention decisions like pretrial risk assessment algorithms exacerbate racial and class biases, increase justice and life outcome disparities more than monetary bail does, and are less effective at ensuring appearance and good conduct by defendants. Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, Science Advances 4 (2018).[32]

CONCLUSION

The abolition of monetary bond as prescribed by the Act fails two critical tests before the court: (a) does the Act guard the judiciary's constitutionally guaranteed powers to set bail?; and (b) does the Act uphold the judiciary's constitutional obligation to protect

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[30] *The Vicious Cycle: Problematic Family Relations Substance Abuse, and Crime in Adolescence: A Narrative Review*, available at https://www.frontiersin.org/articles/10.3389/fpsyg.2021.673954/full.

[31] *Criminal Justice Reform Statistics: Jan. 1, 2022-Dec. 31, 2022*, available at https://www.njcourts.gov/sites/default/files/courts/criminal/criminal-justice-reform/cjrreport2022.pdf.

[32] *The Accuracy, Fairness, and Limits of Predicting Recidivism*, available at https://www.science.org/doi/10.1126/sciadv.aao5580.

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the rights of crime victims?

The answer to both questions is a definitive no. The elimination of monetary bond has not improved court functioning and the administration of justice as defendants are less likely to appear in court. It has not protected the victims of crime or the public from threats to their lives and property, as no money bail systems observe released defendants committing new crimes at higher rates than before. And lastly, mechanisms used to replace money bond can and do often exacerbate the same adverse effects critics accuse financial release conditions of fostering. The undersigned *amicus curiae* urges this Court to uphold the Circuit Court's well-considered opinion and rule for the Plaintiffs-Appellees in this matter.

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Respectfully submitted,
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RULE 341(c) CERTIFICATE OF COMPLIANCE

I, David W. McArdle, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, and the Rule 341(c) certificate of compliance is 25 pages.

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