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STATEMENT OF SAKIRA COOK, DIRECTOR, JUSTICE REFORM PROGRAM
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

U.S. HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRRORISM & HOMELAND SECURITY

HEARING ON "THE ADMINISTRATION OF BAIL BY STATE AND FEDERAL COURTS: A CALL FOR REFORM"

NOVEMBER 14, 2019

Chairman Karen Bass, Ranking Member John Ratcliffe, and members of the Committee: my name is Sakira Cook and I am the director of the Justice Reform Program at The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States.

While we were founded as the legislative arm of the civil rights movement, The Leadership Conference's mission has since expanded so that today we are meeting the new challenges of the 21st century, which include guaranteeing quality education for children, ensuring economic opportunity and justice for all workers, preserving the right to vote and other democratic institutions for marginalized communities, and transforming the criminal legal system in America. Thank you for the opportunity to submit written testimony regarding the need for bail reform at both the federal and state levels.

The American criminal legal system is a stain on our democracy. This system replicates and reinforces patterns of racial and economic oppression that can be traced from slavery — and the result is a criminal-legal bureaucracy that denies millions of people the opportunities, legal equality, and human rights they deserve. while at the same time fueling the world's highest incarceration rate. Our overreliance on incarceration and criminalization as the primary mechanism to advance public safety has had a devasting impact on our communities.

Today, the United States leads the world in imprisoning or supervising more than 6.6 million people while ripping parents and loved ones from their families every day. Research shows that nearly one in two adults in America — approximately 113 million people — has an immediate family member who is currently or formerly incarcerated. This crisis of over-criminalization and incarceration is fueled by the policy choices the nation has made since the start of the "War on Drugs" more than 40 years ago.

Since then, there has been a growing movement to reverse course. But while there has been some progress at the state and federal level to address drivers of mass incarceration and criminalization, and to decrease prison populations and address racial inequity, these reforms have largely overlooked the crisis we face within our jail systems —- a crisis that is largely fueled by our massive over-use of pretrial detention. Ultimately, we cannot end mass incarceration and criminalization without significant changes to our pretrial systems.

According to the Vera Institute, between 1970 and 2015, "the number of people being detained before trial increased by a whopping 433 percent."[i] One of the primary drivers of rising jail populations and overcrowding has been an increase in pretrial detention, despite a decrease in crime rates.[ii] This significant increase in pretrial detention can be tied directly to the fact that many jurisdictions require people arrested and accused of crimes to pay upfront money bail in order to be released until their trial, regardless of their offense. This phenomenon flies in the face of one of the bedrock principles of the American criminal legal system and the fundamental purpose of bail: that Americans are presumed innocent until proven guilty in a court of law.

Fundamentally, bail is the mechanism through which pretrial release is secured. Many people today misconceive this point, thinking of bail as a monetary sum. This misconception is tied to how the bail system has evolved, not the essential nature of pretrial release, because as originally defined, bail meant release from custody. The original conception of bail undergirds the legal principle of innocence until proven guilty. This presumption of innocence ensures that individuals who are faced with criminal charges will be treated fairly by the court and places the burden of proof on the government to prove one's guilt beyond a reasonable doubt. Yet, the current structure of the bail system belies these core tenets of our judicial system.

That is why in recent years advocates and activist throughout this country have issued a clarion call to end wealth-based detention and transform our state and federal bail systems. We can no longer afford to use the criminal legal system as the sole mechanism for advancing public safety. Instead, we must take bold action to end the structural inequalities and racism that plague the system, especially at the earliest stages — arrest and pretrial. Our nation must be willing to imagine a new paradigm for public safety, one that does not rely exclusively on criminalization and incarceration. The time has come to overhaul the bail system. We need a new pretrial framework that dramatically reduces pretrial detention, ends racial and other inequities prevalent in the current system, and abolishes wealth-based discrimination throughout the pretrial process. Congress must pass legislation that incentivizes states to end wealth-based detention (i.e. money bail), use alternatives to arrest and prosecution for minor offenses, and preserve the presumption of innocence by establishing robust due process protections.

Overview of Bail in in the Criminal Legal System

The modern concept of bail originated in England, where a person accused of a crime was required to find an individual to serve as their "surety" who would agree to pay the settled amount to the victim if the defendant fled. The English framework was brought over to the colonies, and when the framers drafted the first ten amendments to the U.S. Constitution, they enshrined a protection against the use of "excessive bail."[iii] The understanding of whether bail was excessive was originally tied to the purpose of

bail, which was interpreted to be to assure the presence of the accused person at subsequent hearings.[iv] Therefore, bail that was excessive was bail "set at a figure higher than an amount reasonably calculated [to] assure the presence of the accused."[v] The Judiciary Act of 1789 required that in the federal system, bail must be set for all crimes not punishable by death.

This system established at the founding was revolutionary, since it created an almost universal presumption of release; pretrial detention was only considered permissible for a small, confined subset of the most serious capital crimes.[vi] Over time, though, the United States turned this system on its head. While England went in a different direction, allowing judges to release people even without a surety, the United States entrenched a commercial system of cash bail. In this system, judges would release people if someone - usually a bail bonds agent who was making a profit off of the transaction (and charging individuals a 10 percent premium that they would never get back) - promised to pay a large sum if the person did not appear in court. In setting money bail amounts, judges seldom ask what the accused individual can actually pay. The result was that our jails became filled with people who could have been free if they had enough money in the bank but were left behind bars simply because they were poor. As courts used money bail more and more frequently, and set money bail at higher and higher amounts, this country saw an explosion in the private bail industry—as well as in the rate of pretrial detention—much of it simply because people were too poor to pay a sum of money.

In 1964, Congress set out to reform the federal bail system, introducing a suite of bills and holding hearings. The testimony of the then-Attorney General Robert F. Kennedy is instructive on the problems with bail our society faced at that time and are still very present today. He said in part:

> "That problem, simply stated is: the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail. Bail has only one purpose -- to insure that a person who is accused of a crime will appear in court for his trial. We presume a person to be innocent until he is proven guilty, and thus the purpose of bail is not punishment. It is not harassment. It is not to keep people in jail. It is simply to guarantee appearance in court. This is a legitimate purpose for a system of justice. In practice, however, bail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom. I am talking about a very large number of Americans. In fiscal 1963, the number of federal prisoners alone held in jail pending trial exceeded 22,000. The average length of their detention was nearly 29 days. Like figures can be compiled from state and local jurisdictions. On a single day last year, for example, there were 1,300 persons being held prior to trial in the Los Angeles County jail. In St. Louis, 79 percent of all defendants are detained because they cannot raise bail. In Baltimore the figure is 75 percent. A 1962 American Bar Association survey of felony cases showed high percentages of pre-trial detention in New Orleans, Detroit, Boston, San Francisco and Miami. And similar conditions exist in smaller communities. In Montgomery County, Maryland, nearly 30 percent of jail inmates are persons awaiting grand jury action or trial. The heart of the problem is that their guilt has not been established. Yet they must wait in jail for three to six months. The main reason for these statistics is that our bail setting process is unrealistic and often arbitrary. Various studies

> demonstrate that bail is set without regard to defendants' character, family ties, community roots, or financial condition. Rather, what is often the sole consideration in fixing bail is the nature of the crime."[vii]

As a result of this outcry for reform, the first significant effort to change the federal bail system was the Bail Reform Act of 1966. The 1966 Act sought to ensure that "all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges."[viii] The Act established a presumption in favor of releasing non-capital defendants pending trial, and required that the lowest possible burden be placed as a condition of release that would ensure a charged individual's appearance. This included restrictions on money bail, which could only be imposed if a non-financial condition was not enough to ensure appearance.[ix] While the Act of 1966 went far in accomplishing its main goal to reduce the needless detention of bailable defendants, it failed to provide a solution to a growing concern surrounding pretrial release: assessing an individual's threat to public safety while on release.[x] The Act generally forbade judges from treating a defendant's dangerousness or risk to public safety as a reason for detention, except in capital cases, cases where the convicted were awaiting sentencing, and cases where those convicted filed an appeal. Put together, these exceptions represented the first time in American history that a law authorized a judge to consider dangerousness as a legitimate reason to deny bail.[xi] This narrow class of exceptions was considered by some to be too restrictive, however, and a movement to consider an individual's risk to public safety while on pretrial release began to gain traction.[xii]

During the height of the War on Drugs and the crack cocaine epidemic in the 1970s and 1980s, the appearance of rising crime rates drew public concern.[xiii] Much of this concern was directed to crimes attributed to individuals on pretrial release, despite significant evidence to the contrary.[xiv] Congress passed the Bail Reform Act of 1984 to address these concerns, removing many of the protections against detention established by the 1966 Act, and establishing the modern federal bail framework.[xv] The 1984 Act created presumptions of pretrial detention for "previous violators" and "drug and firearm offenders."[xvi] Under the "previous-violator presumption," no condition of release is presumed to be able to ensure the safety of the community where the defendant has been convicted of committing one of a series of specified crimes while out on bail, and is now accused of committing another of the specified crimes.[xvii] The "drug-and-firearm-offender presumption" assumes that no condition of release will reasonably be able to ensure the individual's appearance and the safety of the community where there is probable cause to believe the defendant has committed the same enumerated offenses considered for the "previous violator presumption."[xviii]

The act also expanded the allowable scope of the bail inquiry from a question of ensuring re-appearance, to include a consideration of the defendant's "dangerousness" to the community if released prior to trial.[xix] A 'danger to the community' included not only a physical danger of violence, but the broader, more subjective question of a person who is in danger of recidivism while on pretrial release. This is the first time that the question of the potential dangerousness of an individual's was explicitly allowed to inform the bail inquiry, and these changes led to a significant increase pretrial detention: between 1982 and 2004, federal pretrial detention rates rose from 38 percent to 60 percent.[xx] More than three decades after the Bail Reform Act of 1984 became law, "federal and state statutes were rewritten . . . [to] permi[t]

judges to order dangerous defendants to be detained, money bail is still used as a back-door means to manage dangerousness."[xxi]

The Supreme Court asserted the constitutionality of the Bail Reform Act of 1984 in its decision in *United States v. Salerno* in 1987.[xxii] The Court stated that an arrestee may additionally be detained prior to trial if the government can provide "clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community."[xxiii] The Court went further, explaining that under this new standard, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designated to ensure that goal, and no more… [however] when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here [with dangerousness], the eighth amendment does not require release on bail."[xxiv] In its determination, the Court noted that the Bail Reform Act served a regulatory purpose, not a penal one, because it requires a 'prompt' detention hearing, the maximum length of pretrial detention is limited by the requirements of the Speedy Trial Act,[xxv] and pretrial detainees must be housed in a "facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal."[xxvi] Perhaps most importantly, *Salerno* created a clear mandate for how our bail system should operate that "in our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Today, we have turned *Salerno* on its head. With more than 60 percent of our jail population legally innocent and awaiting trial,[xxvii] we have made pretrial detention our norm in all too many places and for all too many communities. It is time to address this crisis and restore the promises of our constitutional framework.

Pretrial Detention Significantly Impacts Individuals and Communities

Each year, there are 12 million admissions to jails[xxviii] and each night, nearly half a million people sit in jail not because they have been convicted of a crime, but because they are detained prior to trial,[xxix] often because they cannot afford money bail. Nationally, 62 percent of people in jail are there because they are awaiting trial, usually for misdemeanors or lesser offenses.[xxx] These are mostly cash-poor people arrested for very minor offenses who cannot afford to post bail and are more often than not dealing with mental health or substance use problems.[xxxi]

Research shows that this pervasive system of pretrial detention has devastating effects on individuals, their families, and the community. Stories like those of Sandra Bland[xxxii] and Kalief Browder[xxxiii] show the shocking effects of detention, whether for a couple of days or three years, on an individual not convicted of a crime, who is detained for very minor offenses.

The impact of prolonged pretrial detention, however, reaches further than the detention itself. While in jail, people are at risk of losing employment, falling behind in school, not getting needed medication, losing their housing and losing custody of their children.[xxxiv] Not only does pretrial detention significantly impact access to counsel and opportunities for dismissal, diversion, and plea bargaining,[xxxv] detention has a coercive effect that has been shown to induce individuals to plead guilty out of a desire to go home.[xxxvi] People detained prior to trial are three to four times more likely to receive a sentence to jail or prison, and their sentences are two to three times longer.[xxxvii] Just three days in jail increases the risk that some people will be arrested on new charges. Pretrial detention further bleeds resources from communities that can

least afford it, sucking away billions of dollars[xxxviii] from families and communities that will never get it back.

The Problems with Money Bail & The Need for Reform

Between 1992 and 2006, the average bail amount increased by 118 percent, and 8 in 10 people would have to pay over a full year's wages to meet the average bail amount.[xxxix] According to a report by the Federal Reserve Board, 43 percent of individuals stated that they would be unable to pay for an emergency expense of $400 out of pocket,[xl] while 12 percent of Americans have no means at all to pay for such an expense.[xli] In the federal system in 2018, 51,000 people were detained prior to trial, representing 75 percent of those charged with crimes.[xlii] The median bail nationwide for felonies is currently $10,000, roughly 8 months' income for a typical individual facing pretrial detention.

Despite constitutional requirements that bail may not be set higher than necessary to assure that the defendant will appear to stand trial,[xliii] many states determine bail costs through bail schedules, which tie the cost of release to the seriousness of criminal charges and sometimes additional factors such as criminal history or age.[xliv] Absent from those additionally considered factors is the individual's ability to pay, and an individualized assessment of the person's risk of flight or danger to the community.[xlv] This often results in higher rates of pretrial detention, because the amount required to post bail is vastly greater than an average defendant's financial capacity. Local communities often bear the burden of these higher rates of detention, as jails have become increasingly more overcrowded, and as a result, more expensive. The population in local and regional jails has tripled over the last 40 years, and a significant reason for that increase is rooted in the high rates of pretrial detention.[xlvi]

This money-based system is shown to be counterproductive to policy goals and ineffective at performing the very functions that bail is meant to perform. The primary concern driving the imposition of bail is that defendants will not appear for their court appearances, but the statistics show that failure to appear is incredibly rare: in a study done by the Bureau of Justice Statistics between 1990 and 2004 in 40 of the 75 largest U.S. counties, over 75 percent of those accused of a crime showed up for their court dates within a one-year timespan.[xlvii] Many of the people who miss court appearances do so not out of a desire or attempt to flee, but because of structural barriers to appearance.[xlviii] The inability to miss work, find child care, or find adequate transportation often contribute significantly to individuals failing to appear in court, as do simple mistakes like forgetting and getting the date wrong. Statutes criminalizing failure to appear fail to take these structural barriers into account, criminalizing missed court dates as if they were equivalent to willful fleeing of the jurisdiction.[xlix]

There are several methods that have been found to be more effective at ensuring court appearances, including a robust system of pretrial support and the imposition of non-financial conditions of release. Pretrial support systems seek to target many of the structural barriers to appearance through the provision of childcare and transportation services. Additionally, studies have shown that pretrial support systems that provide reminder calls or text messages dramatically reduce rates of failed appearances, sometimes reducing failure to appear rates by as much as 75 percent.[l] Courts can also choose to impose non-financial conditions for pretrial release, including periodic reporting to a pretrial services office, maintaining

current routines related to employment, training or education, and release to the custody of a designated person who can ensure the individual's appearance.[li]

Risk Assessment Tools Are Not the Answer

As calls for reform of money bail systems have grown and in recognition of the major emotional and financial costs of pretrial detention on individuals, families, and communities, many jurisdictions in recent years have switched to using pretrial risk assessment tools as an alternative to cash bail. Pretrial risk assessment tools are often promoted as an essential part of bail reform, one that can help judges make more informed, objective pretrial decisions. The Leadership Conference, however, believes that risk assessments should never be used to replace the judgement of a court of law, as they threaten to further intensify unwarranted discrepancies in the justice system, and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change.

Risk assessments are actuarial tools that use historical data, both from criminal legal databases and demographic factors, to attempt to "forecast" which people can be safely[lii] released from custody, without failing to appear at court, and without getting arrested again on a new charge. Designers of these tools purport that they are evidence-based and can provide magistrates and judges high-quality "objective" data that will help them make their jail populations smaller without putting public safety at risk by providing insights about who can be safely released following an arrest. But independent studies of whether or not risk assessment actually causes decarceration of our jails, while reducing racial disparities,[liii] have shown that many jurisdictions have not made their jails smaller, some have increased pretrial incarceration, and none have reduced racial disparities in pretrial decision-making when using these tools.[liv] Prominent independent research has shown that these algorithms, trained on a practice of criminal justice that is racist at its root, have a punitive disparate impact on Black and brown people, even when well calibrated for "accuracy."[lv]

After these tools are deployed, they are often tied to a "decision-making framework"[lvi] that interprets the scores risk assessments produce and ties those scores to pretrial outcomes based on the level of risk of flight or rearrests that an individual poses--often termed low, moderate, or high.[lvii] Recommendations of release, pretrial supervision, or pretrial detention follow those risk levels. Because the tracking of a numerical score of "low", "moderate", and "high" risk is a policy decision, the ultimate determination of whether a defendant poses a "low, "moderate,' or "high" risk is one of policy, not science, and is the result of "risk factors" that are highly malleable, subjective, and informed by the local tolerance for "risk" in the legal system.[lviii] At bottom, actuarial risk assessments have not proven effective in reducing the number of people detained pretrial or the racial disparities attendant to pretrial justice. That is not the fault of the tools, but a function of the deep and pervasive structural inequities that define America's criminal legal system. At best, the forecasts that come from technological tools will reflect those inequities, rendering them an inadequate solution to meet the challenge of infusing fairness and racial equity into the criminal legal system in general, and the pretrial justice system in particular.[lix]

Because of these concerns, The Leadership Conference released "The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns," signed by over 100 civil rights, data science, and community-based organizations. The statement argued that risk assessment tools were deeply flawed,

skewed based on race and socioeconomic status, and therefore should not be used to replace the constitutional judgement of courts of law when making detention decisions.[lx] If at all utilized, the only meaningful purpose they can serve is to identify which people can be released immediately and which people are in need of non-punitive or restrictive services. We acknowledged, however, the increasing adoption of risk assessment tools by many jurisdictions as alternatives to cash bail and therefore, developed six principles guiding their use in order to reduce the harm that these assessments can impose.[lxi]

- First, if in use, a pretrial risk assessment instrument must be designed and implemented in ways that reduce and ultimately eliminate unwarranted racial disparities across the criminal justice system.
- Second, pretrial risk assessment instruments must be developed with community input, revalidated regularly by independent data scientists with that input in mind, and subjected to regular, meaningful oversight by the community.
- Third, risk assessment instruments must never recommend detention. Instead, if they do not recommend immediate release, they should recommend a hearing where a person is protected by rigorous procedural safeguards.
- Fourth, neither pretrial detention nor conditions of supervision should ever be imposed, except through an individualized, adversarial hearing.
- Fifth, in accordance with the presumption of innocence, pretrial risk assessment instruments must communicate the individuals' likelihood of success upon release, not failure, in clear and concrete terms.
- Finally, these instruments must be transparent, independently validated, and open to challenge by an accused person's counsel.

Recommendations

A new framework for pretrial justice must maximize pretrial liberty while ending racial and wealth-based discrimination. To realize this vision, changes must be made to the release processes and presumptions of the pretrial process itself, the mechanisms of release, and the frameworks into which individuals are released prior to trial at both the federal and state levels.

Federal Reform Recommendations

Since the Bail Reform Act of 1984, the federal pretrial detention rate has risen from 24 percent to 75 percent of individuals facing trial.[lxii] Policymakers should set clear metrics for reversing this increase, in order to return at least to a rate consistent with the levels prior to 1984. An essential first step in reducing this rate is to eliminate existing "presumptions" of pretrial detention: the "previous violator presumption," and the "drug and firearm offender presumption."[lxiii] Instead, courts should work to further protect the presumption of innocence by presuming pretrial release in all but the most extreme cases, where absolutely no combination of conditions will ensure the person's appearance at court or the safety of identified members of a community.[lxiv] Where the court feels that release is not appropriate, a decision to

detain must be made only after a robust, adversarial hearing in front of a judge, where the charged person is represented by an attorney.[lxv] The government should invest the savings from bail reform in community-based, community-led services, including pretrial support services, drug and alcohol treatment centers, job training, youth programs, financial literacy, and childcare for communities adversely impacted by discriminatory bail practices. Further, Congress should examine the extent to which the Federal Pretrial Risk Assessment (PTRA) has failed to influence pretrial release in the federal system. It was hoped that the instrument, developed in 2009, "might lead to an increase in release rates." However, "the PTRA's implementation has not been associated with rising pretrial release rates. Rather, release rates have declined during the period coinciding with PTRA implementation."[lxvi]

State Reform Recommendations

Many states have already undertaken significant efforts at bail reform, and others should be incentivized by the federal government to go further. Washington, D.C. moved away from its use of cash bail in 1992, and currently releases 94 percent of those arrested.[lxvii] Between 2011 and 2016, roughly 90 percent of individuals on pretrial release were not re-arrested prior to the resolution of their case, and between 98-99 percent of released defendants were not arrested for violent crimes.[lxviii] During that same time frame, between 88 and 90 percent of released defendants made their scheduled court dates.[lxix] Of those that were, the vast majority were not re-arrested for violent crimes.[lxx]

Since New Jersey deprioritized the use of money bail in 2014, it has seen time spent behind bars while awaiting trial reduced 40 percent,[lxxi] and the state's overall population detained prior to trial has decreased 44 percent.[lxxii] A comparison of the old, money bail system used until 2014 and the new system implemented in 2017 show that both recidivism and court appearance rates have largely remained consistent.[lxxiii] New York's bail reform law, passed this year, deprioritized money bail, mandated release for 90 percent of all arrests statewide, and prohibited significant electronic monitoring in the vast majority of cases.[lxxiv] The law is expected to reduce the state's pretrial jail population by 40 percent if implemented effectively. While these jurisdictions use risk assessment tools, their successes in decreasing pretrial detention cannot be wholly attributed to their adoption. In fact, these successes are the result of a combination of changes that completely overhauled the pretrial systems in these jurisdictions and increased due process protections for accused persons.

Declines in pretrial detention rates and the jail populations in Philadelphia are additionally instructive on this point. Philadelphia has been successful in reducing its jail population by 40 percent, beginning to move away from cash bail and driving other reforms by implementing systemic changes to its pretrial system, including diversion programs and recommending release automatically for minor offenses. Partially due to advocacy from local and national communities, Philadelphia has accomplished all of this without implementing a new risk assessment for pretrial decision-making. When Philadelphia's new system is compared with the old, money bail approach, there has been no change in failure-to-appear or recidivism rates, and in fact, the court-appearance rate for Philadelphia individuals charged with a crime was the highest it had been in a decade.[lxxv]

Meaningful efforts to reform state pretrial detention policies should begin by reducing jail populations. Unless prohibited by a local statute, courts should assume release for the vast majority of accused

persons—95 percent—before trial. In order to achieve this target, The Leadership Conference recommends supporting states engaging in bail reform measures that include the following;

- Eliminating the use of money bail, pretrial fees, and any other "secured" financial conditions that require upfront payments and/or proof of collateral.
- Automatically releasing on recognizance everyone charged with a misdemeanor and/or certain felonies using a "cite and release" program that avoids the need for police processing or jail booking. The only condition should be that the person returns to court.
- Before imposing conditions or detention, requiring robust hearings that start by presuming innocence and, accordingly, release. Such a process must require, at minimum:
    - The right to appointed counsel immediately following arrest;
    - A written record justifying detention or any release conditions imposed;
    - The right to discovery;
    - The right to testify, present witnesses, cross-examine witnesses, and present evidence;
    - The right to a good cause continuance; and
    - The right to appeal and to have decisions speedily reviewed.
- Ensuring that eligibility for pretrial detention (the "detention eligibility net") is extremely limited. In addition to the "net" requirement, ensuring that, before imposing onerous conditions or detention, there is a robust adversarial hearing, where judges must find by clear and convincing evidence that individuals pose a high risk of intentional flight or of seriously physically harming another reasonably identifiable person during the adjudication period. Judges must also find that there are no combinations of conditions that will ensure the accused person will return to court and public safety. Evidence supporting these findings must be specific to individuals and not based on generalized characteristics, such as the neighborhood in which they reside.
- Requiring release conditions to be no more restrictive than necessary to mitigate — and directly tied to mitigating — the specific risk or risks identified. Ensuring that neither probation offices nor other enforcement agencies bear responsibility for providing pretrial services, including, but not limited to, engaging in monitoring, surveillance, and searches.
- Requiring robust, timely collection and reporting of pretrial detention and release data so communities can monitor whether racial and/or other disparities persist. Specifically, data must be automatically collected before trial for each individual detained and must include information about race and ethnicity, age, and gender.

- Requiring reporting of all prosecutorial decision-making (i.e. charging decisions and other discretionary decisions).

- Resisting the use of algorithm-based "risk assessment" tools, that exacerbate racial biases, in determinations of the conditions of release and detention.

Conclusion

Bringing fairness, equity, and dignity to our legal system is one of the most profound civil and human rights issues of our time. The unequal treatment of people of color and people who are low-income undermines the progress the nation has made over the past five decades toward equality under the law. The Leadership Conference appreciates the recognition by many in Congress that this country has a broken bail system; and we have been pleased to support some of the federal reform efforts on this front. The Leadership Conference endorses The No Money Bail Act and the Pretrial Integrity and Safety Act legislation that has been offered in this body by Representative Ted Lieu (D-CA-33). These bills use federal resources to assist states in reforming the injustices of money bail systems that incarcerate people who have not been convicted of a crime because of their inability to pay. These bills are significant steps forward as we work to eliminate all forms of preventative detention and unnecessary bail conditions.

In addition to federal legislation that encourages meaningful state level reforms, The Leadership Conference urges Congress to address the inadequacies of the federal bail system. The Bail Reform Act of 1984 presumes pretrial detention for certain offenders, including drug offenders, which has led to a federal pretrial detention rate of approximately 75 percent. Congress should eliminate existing presumptions of pretrial detention, reserving pretrial incarceration for rare, serious charges. With that change, we expect that, at both the state and federal levels, at least 95 percent of people in the criminal legal system will be released no later than 48 hours after arrest.

We urge the subcommittee to pursue the measures outlined above to reform the federal pretrial release system, and to assist and incentivize states to engage in their own reform initiatives.

Thank you for your leadership on this critical issue.

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[i] Lockhart, P.R. "Thousands of Americans are jailed before trial. A new report shows the lasting impact." *Vox*. May 7, 2019. https://www.vox.com/2019/5/7/18527237/pretrial-detention-jail-bail-reform-vera-institute-report.

[ii] Ibid.

[iii] *Eighth Amendment*

[iv] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

[v] Ibid. Pg. 1.

[vi] Schnacke, Timothy R. "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention." *Center for Legal and Evidence-Based Practices.* April 18, 2017. Pgs. 49-50. https://university.pretrial.org/viewdocument/model-bail-laws-re-drawing-the-l.

[vii] Kennedy, Robert F. "Testimony on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvements in Judicial Machinery." *Department of Justice Library.* August 4, 1964. 11:15 a.m. https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[viii] *Bail Reform Act of 1966 (Public Law 89-465).*

[ix] Ibid. § 3146(a).

[x] Schnacke, Timothy R. "'Model' Bail Laws: Re-Drawing the Line Between Pretrial Release and Detention." *Center for Legal and Evidence-Based Practices.* April 18, 2017. Pgs. 66-67. https://university.pretrial.org/viewdocument/model-bail-laws-re-drawing-the-l.

[xi] Hegreness, Matthew J. "America's Fundamental and Vanishing Right to Bail." *Arizona Law Review, Volume 55.* 2013. Pg. 958. For a detailed history on the reform efforts from the 1960s through the 1980s, *see* Koepke, John L. & Robinson, David G. "Danger Ahead: Risk Assessment and the Future of Bail Reform." *Washington Law Review, Volume 93.* 2018. Pgs. 1731-1743.

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[xiii] *See* Travis, Jeremy & Western, Bruce, & Redburn, Steven, "COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES." 2014. ("The unprecedented rise in incarceration rates can be attributed to an increasingly punitive political climate surrounding criminal justice policy formed in a period of rising crime and rapid social change.").

[xiv] *See* Prepared Statement of Guy Willetts, Chief of the Pretrial Services Branch, Division of Probation, Administrative Offices of the United States Courts. "Bail Reform Act of 1981–82: Hearing on H.R. 3006, H.R. 4264, and H.R. 4362 Before the H. Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary." 97th Congress. 1981. (testifying that in a sample of ten jurisdictions, "new crimes committed by federal offenders released on bail occurred at a rate of 8.4 percent"); *see also,* J.W. LOCKE ET AL., U.S. DEP'T OF COMMERCE, NAT'L BUREAU OF STANDARDS, COMPILATION AND USE OF CRIMINAL COURT DATA IN RELATION TO PRE-TRIAL RELEASE OF DEFENDANTS: PILOT STUDY 2 (1970), [https://perma.cc/8DEP-Z76R] (providing statistics from a four-week period in 1968 in Washington D.C. showing that of 712 defendants who entered the District of Columbia Criminal Justice System, 11% of those released charged with misdemeanors or felonies were subsequently re-arrested on a second charge during the release period).

[xv] *Bail Reform Act of 1984 (H.R. 5865) 98th Congress.*

[xvi] 18 U.S.C.A. § 3142(e) (2008).

[xvii] Adair Jr., David N. "The Bail Reform Act of 1984." *Federal Judicial Center.* 2006. https://www.fjc.gov/sites/default/files/2012/BailAct3.pdf. This presumption applies to crimes including: crimes of violence, federal drug offenses that carry a maximum prison term of ten years or more, certain offenses related to children, and certain terrorism-related charges.18 U.S.C. § 3142(f)(1).

[xviii] *See* 18 U.S.C.§ 3142(e)(2),

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[xix] Ibid. § 3142(e)(1) ("If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required *and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.").*

[xx] Austin, Amaryllis, & Cohen, Thomas H. " Examining Federal Pretrial Release Trends over the Last Decade." *Federal Probation Journal, Volume 82, Number 2,* September 2018. Pg. 4.

[xxi] Gouldin, Lauryn P. "Disentangling Flight Risk from Dangerousness" *Brigham Young University Law Review.* 2016. Pg. 863.

[xxii] *United States v. Salerno,* 481 U.S. 739 (1987).

[xxiii] Ibid. pg. 751.

[xxiv] Ibid. pg. 754.

[xxv] 18 U.S.C. § 3161 (1982).

[xxvi] 18 U.S.C. § 3142(i)(2) (2008),

[xxvii] Minton, Todd D. & Zeng, Zhen. "Jail Inmates at Midyear 2014." *Bureau of Justice Statistics,* June 2015 Table 2, Pg. 3. https://www.bjs.gov/content/pub/pdf/jim14.pdf.

[xxviii] Digard, Léon & Swavola, Elizabeth. "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention." *Vera Institute of Justice*, April 2019. Pg. 1. https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention.

[xxix] Sawyer, Wendy. "How does unaffordable money bail affect families?" *Prison Policy Initiative.* August 15, 2018. https://www.prisonpolicy.org/blog/2018/08/15/pretrial/.

[xxx] Mathew, Teresa. "Bail Reform Takes Flight in Philly." *Citylab.* February 2, 2018. https://www.citylab.com/equity/2018/02/bail-reform-takes-flight-in-philly/552212/.

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[xxxiii] Gonnerman, Jennifer. "Before the Law." *The New Yorker.* September 29, 2014. https://www.newyorker.com/magazine/2014/10/06/before-the-law.

[xxxiv] Pretrial Justice Institute. "Why We Need Pretrial Reform." https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/.

[xxxv] Digard, Léon & Swavola, Elizabeth. "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention." *Vera Institute of Justice*, April 2019. Pg. 1. https://www.vera.org/publications/for-the-record-justice-denied-pretrial-detention.

[xxxvi] In Harris County, Texas, for instance, a study found that pretrial detainees were 25% more likely to plead guilty than similarly situated defendants who were released prior to trial. Heaton, Paul. "The Downstream Consequences of Misdemeanor Pretrial Detention." Stanford Law Review. 2017. Pg. 711.

[xxxvii] Lowenkamp, Christopher T, VanNostrand, Marie, & Holsinger, Alexander. "Investigating the Impact of Pretrial Detention on Sentencing Outcomes." *Laura and John Arnold Foundation*, November 2013. https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf.

[xxxviii] Justice Policy Institute, "For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice." September 2012. Pgs. 12-15. http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf.

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[xxxix] "The High Price of Bail." *Justice Policy Institute.* http://www.justicepolicy.org/uploads/justicepolicy/documents/high_price_of_bail_-_final.pdf.

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[xlii] Rowland, Matthew G. "The Rising Federal Pretrial Detention Rate, In Context." *Federal Probation Journal.* September, 2018. https://www.uscourts.gov/sites/default/files/82_2_2_0.pdf.

[xliii] *Stack v. Boyle*, 342 U.S. 1 (1951).

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[l] *See* Uptrust."What We Do." http://www.uptrust.co/what-we-do.

[li] *See* 18 U.S.C. § 3142(c) (2006).

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