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Introduction

There is widespread agreement that the cash bail system is broken, and there is a robust reform movement afoot at the state level to eliminate money bail. The federal pretrial detention system is in crisis, too, but its problems have been largely overlooked, even by federal legislators. The Bail Reform Act of 1984 (BRA or “the Act”) results in the pretrial detention of far too many people because it is overbroad, confusing, and targets low-risk defendants for detention. Legislative reform is needed to address this crisis.

In fall 2018, the Federal Criminal Justice Clinic (FCJC) created a Federal Bail Reform Project that is having far-reaching local and national impact. FCJC Director Alison Siegler and Associate Director Erica Zunkel conceived of this project out of a concern that pretrial release and detention practices in federal court deviated from the legal requirements of the Bail Reform Act.

To delve deeper into the source of the problems, the FCJC designed what appears to be the first courtwatching project ever undertaken in federal court anywhere in the country. Volunteers observed 170 federal bail-related hearings in Chicago over the course of 10 weeks. The clinic watched both types of federal bail hearings: Initial Appearance hearings and Detention Hearings. The clinic gathered and logged detailed information about each hearing, including whether defendants were being illegally detained and whether the government was requesting detention for reasons not authorized anywhere in the statute. The clinic’s courtwatching revealed significant problems in the implementation of the Bail Reform Act in practice. In the wake of our courtwatching, we met with Federal Public Defenders around the country and learned that many of the problems we had observed in Chicago were happening elsewhere in the country. Although judges, prosecutors, and the defense bar are changing their approach to bail-related issues in response to our Federal Bail Reform Project, it is clear that changing the culture of federal bail is not enough; legislative reform is urgently needed.

I. Certain Provisions of § 3142(f) Should be Eliminated or Made Discretionary.

Under the BRA, if the prosecutor charges any offense that is listed in § 3142(f)(1) and seeks detention at the Initial Appearance, detention is mandatory. In determining what types of offenses authorize detention at the Initial Appearance, § 3142(f) sweeps too broadly and unnecessarily cabins judicial discretion.

The simplest fix would be to entirely eliminate certain categories of offenses listed in § 3142(f), including drug offenses under § 3142(f)(1)(C) and cases involving flight risk concerns under § 3142(f)(2)(A). This fix alone would bring skyrocketing detention rates under control. According to United States Sentencing Commission data, approximately 68% of federal cases in 2018 appear to qualify for detention under § 3142(f)(1) (excluding immigration cases).¹ This fix

¹ U.S. SENT. COMM., *2018 Annual Report and Sourcebook* 45 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf>. This number was calculated using the total number of federal cases in 2018 (69,245) and subtracting the number of immigration cases (23,883). That results in 45,542 federal cases. Using the Sentencing Commission’s “type of crime” breakdown, 30,900

would not have detrimental effects on public safety given the data showing lower federal detention rates are not accompanied by any increase in reoffending or failure to appear.² Moreover, the mandatory detention provisions in § 3142(f) were created when the crime rate was much higher and are no longer necessary in the current climate.³

Alternatively, for certain categories of offenses—including drug offenses and cases involving flight risk concerns—detention at the Initial Appearance should be discretionary rather than mandatory. This change would shift the locus of discretion from prosecutors to judges, giving judges the authority to decide whether detention at the Initial Appearance is warranted.

Regardless, mandatory detention that rests solely in the hands of the government must be reevaluated and limited. There are reasons to be concerned with a regime that makes the prosecutor’s charging decision the sole determinant of detention at the Initial Appearance and removes all discretion from judges at this stage. Recent empirical research shows that prosecutors’ charging decisions are the major driver of mass incarceration in the state system.⁴ Further support for shifting the locus of discretion from prosecutors to judges at the Initial Appearance can be found in a growing body of research in the federal system showing that prosecutorial charging decisions create sentencing disparities—including racial disparities—and arguing for increased judicial discretion in the sentencing arena.⁵

federal cases appear to qualify for detention under one of the § 3142(f)(1) case categories, which equals 67.8% of all non-immigration cases.

² Court data shows that the five federal districts with the lowest release rates (average 20.5%) have a failure to appear rate of 1.44%, while the five districts with the highest release rates (average 69.94%) have a failure to appear rate of 1.37%. *See* ADMIN. OFF. U.S. COURTS, *Judicial Business: Federal Pretrial Services Tables*, Table H-15 (Sept. 30, 2018). The five districts with the lowest release rates have an average re-arrest rate of 0.59%, while the five districts with the highest release rates have an average re-arrest rate of 1.04%. *Id.* (The districts with the lowest release rates are the S.D. California, W.D. Arkansas, E.D. Tennessee, D. Puerto Rico, and S.D. Texas; the districts with the highest release rates are D. Guam, W.D. Washington, M.D. Alabama, E.D. Wisconsin, and D. Hawaii. *Id.*)

³ *See* John Pfaff, *Locked In* 72 (2017) (“The crime decline since 1991 has been dramatic. Between 1991 and 2008, violent crime fell by 36% and property crime by 31%. By the end of 2014, both violent and property crime declined another 14%.”).

⁴ *See* Pfaff, *supra* note 3, at 72. (“I had expected to find that changes at every level—arrests, prosecutions, admissions, even time served had pushed up prison populations. Yet across a wide number and variety of states, . . . the only thing that really grew over time was the rate at which prosecutors filed felony charges against arrestees.”); *id.* at 72–73 (“Between 1994 and 2008, the number of felony cases in my sample rose by almost 40%, from 1.4 million to 1.9 million. . . . In short, between 1994 and 2008, the number of people admitted to prison rose by about 40%, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees.”).

⁵ *See* Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 48 (2013) (prosecutorial “charging decisions appear to be the major driver of sentencing disparity,” including racial disparities); *see also id.* at 31 (“Our research thus suggests that the post-arrest justice process—especially mandatory minimum charging—introduces sizeable racial disparities.”); *id.* at 78 (“[W]e are particularly concerned about proposals to respond to sentencing disparities by restoring tighter constraints on sentencing, especially those that entail expanding mandatory minimums” and thus moving the locus of discretion from judges to prosecutors); Crystal S. Yang, *Have Inter-judge Sentencing Disparities Increased in an Advisory*

Alternative limitations could be placed on the current § 3142(f)(1) categories to shift discretion from prosecutors to judges. For example, some of the § 3142(f)(1) categories could be limited to people with more serious criminal histories, or to people who have reoffended while on pretrial release in the past. This latter limitation echoes § 3142(e)(2), which creates a presumption of detention for people who have previously reoffended while on pretrial release. Such a recidivist limitation would also support Congress’s intent to target those who commit new offenses while on release. Alternatively, the § 3142(f) categories could be limited to those facing mandatory minimum penalties.

II. The Standard for Detention at the Initial Appearance Should Be Clarified and Amended.

A key reason the Supreme Court upheld the Bail Reform Act as constitutional in *United States v. Salerno* was because the statute only authorizes detention at the Initial Appearance under certain limited circumstances.⁶ Specifically, § 3142(f) limits the circumstances under which a person can be detained at the Initial Appearance to “extremely serious offenses.”⁷

Congress intended § 3142(f) to serve as a gatekeeper to detention, and the Supreme Court upheld the statute in reliance on the limitations in that section. The BRA only authorizes pretrial detention at the Initial Appearance hearing when one of 7 enumerated factors in § 3142(f) is met. It was these limitations, among others, that led the Court to conclude that the Act was “regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause.”⁸ The *Salerno* Court further relied on the narrow limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that “the government’s interest in preventing crime by arrestees is both legitimate and compelling.”⁹

Caselaw further supports § 3142(f)’s role as a gatekeeper. Since the Supreme Court decided *Salerno*, every court of appeals to address the issue agrees that it is illegal to detain someone—or even hold a Detention Hearing—unless the government affirmatively invokes one of the § 3142(f) factors.¹⁰

Guidelines Regime? Evidence from Booker, 89 N.Y.U. L. Rev. 1268, 1278–79, 1323–26 (2014) (finding “that the application of a mandatory minimum is a large contributor to interjudge and interdistrict [sentencing] disparities,” explaining that eliminating mandatory minimums would “reduc[e] unwarranted disparities in sentencing,” and arguing that “any proposal that contemplates shifting power to prosecutors will likely exacerbate unwarranted disparities”).

⁶ 481 U.S. 739, 747 (1987).

⁷ *Id.* at 750; *see also id.* at 747 (“The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (*detention hearings available if case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders.*”) (emphasis added).

⁸ *Id.* at 748.

⁹ *Id.* at 749.

¹⁰ *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988) (“Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a Detention Hearing exists.”); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir.

In practice, however, judges and the government misunderstand and disregard the limitations § 3142(f) places on detention. At times, this issue results in people being illegally detained at the Initial Appearance when, in fact, there is no statutory basis for detention. When this happens, the Act as applied becomes unconstitutional. The disregard for § 3142(f)'s gatekeeping role also illustrates a broader problem, which is that the practice at detention proceedings has become untethered from the statute.

Our courtwatching confirmed that the fundamental disregard for the Bail Reform Act's limitations on detention at the Initial Appearance is a serious and nationwide problem. Lack of adherence to the statute results in prosecutors requesting detention without a legal basis, and at times even leads to illegal detentions. For example, the government sought detention in 80% of the cases we observed during the first 7 weeks of our courtwatching. In approximately 95% of those cases, the government did not cite a § 3142(f) factor and instead based their detention request on reasons not authorized by the statute.¹¹

Conversations with Chief Federal Public Defenders and other defense attorneys around the country reveal that disregard of the statute's gatekeeping provisions is a significant problem. In one federal district, prosecutors ignore the adversarial requirements of the criminal justice system and do not even appear in court at the Initial Appearance, let alone state the statutory basis for their detention requests. Instead, only the judge, defense attorney, and defendant are present at the Initial Appearance, and judges regularly detain defendants without any discussion of the statutory basis for detention. This violates the statute and the common law rule established by every court of appeals to address the issue.

Discussions with judges and practitioners further reveal that part of the problem is one of organization: The legal standard for the *first* court appearance is buried in the middle of the statute—in subsection (f)—and is lumped together with the procedures that apply at the *second* court appearance, the Detention Hearing. Clarifying § 3142(f)'s application and requirements would reduce or eliminate these problems, put the Act on stronger constitutional footing, and bring it back in line with the drafters' intent.

A. The BRA Should Be Modified to Clarify That Detention at the Initial Appearance Hearing is Limited to Cases That Raise One of the 7 Factors in § 3142(f).

The plain language of the statute demonstrates that the BRA only authorizes pretrial detention at the Initial Appearance hearing when one of the 7 factors in § 3142(f) is met. Section 3142(f) says: “The judicial officer shall hold a [detention] hearing” only “in a case that involves” one of the seven factors in § 3142(f)(1) and (f)(2). Section (f)(1) lists case-specific factors and authorizes pretrial detention in cases charging crimes of violence, drugs, guns, minor victim

1992); *United States v. Twine*, 344 F.3d 987, 987 (9th Cir. 2003); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999).

¹¹ The clinic's courtwatching spanned 10 weeks in late 2018 and early 2019. In January 2019, our clinic conducted a training for criminal defense attorneys about the BRA and best practices at bail-related hearings. After that training, bail practices improved. To provide the most accurate information about the problems we observed, we will reference data from the first 7 weeks of our courtwatching, before any intervention occurred.

offenses, and terrorism offenses, among others. Section (f)(2) authorizes detention on the grounds of “serious risk that such person will flee” or “serious risk” of obstruction of justice in the form of a threat to a witness or juror.

Despite § 3142(f)’s gatekeeping role, the government and judges often rely on impermissible factors not found in § 3142(f). There are two primary ways in which the statutory restrictions are evaded or disregarded.

First, across the country, the government often moves for detention on the ground that the person is a *danger to the community*, even though that is not a permissible statutory basis. The courts of appeals agree that generalized danger to the community is not a basis for detention at the Initial Appearance because it is not one of the enumerated § 3142(f) factors.¹² Judges nevertheless grant detention on dangerousness grounds.

Second, the government often moves for detention on the ground that the person is an ordinary “risk of flight,” which is also not a permissible statutory basis for detention. Rather, the statute only authorizes detention if there is a “*serious risk* that [the defendant] will flee.”¹³ There is some risk of flight in every criminal case; according to a basic canon of statutory interpretation, the term “serious risk” means that the risk must be more significant.¹⁴ Moreover, the government rarely, if ever, presents any evidence to support its allegation that the risk that a particular person will flee rises to the level of a “serious risk.” In fact, the Senate’s 1983 report makes clear that detention based on serious risk of flight should only occur only in *extreme and unusual cases*.¹⁵ Congress surely intended judges to make findings on this issue. After all, § 3142(f)(2)(A) only authorizes detention at the Initial Appearance “in a case that involves” a “serious risk” that the person will flee. Yet judges regularly detain people under this provision in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a “serious risk” the person will flee.¹⁶

¹² See, e.g., *United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) (“[W]e find ourselves in agreement with the First and Third Circuits: a defendant’s threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention.”).

¹³ § 3142(f)(2)(A) (emphasis added).

¹⁴ See *Corley v. United States*, 556 U.S. 303, 314 (2009) (“One of the most basic interpretative canons” is “that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”).

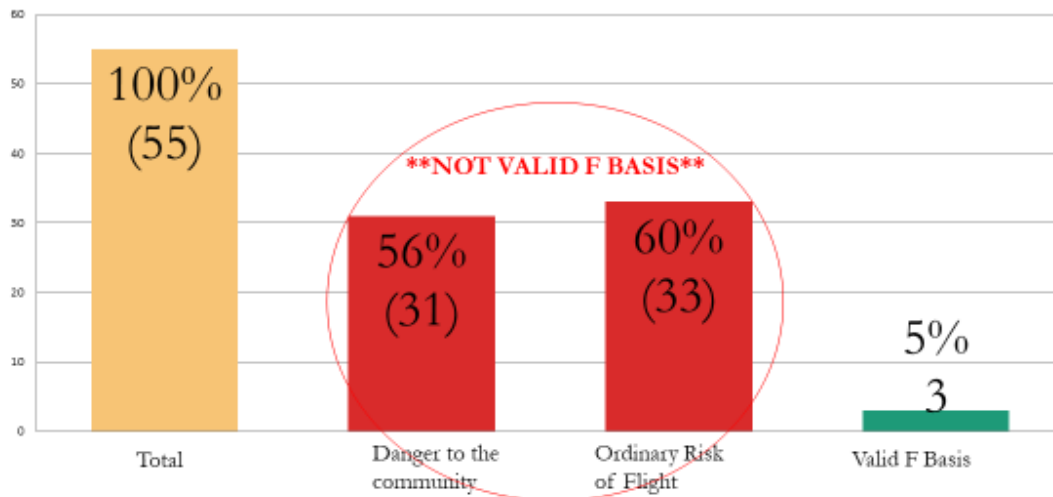
¹⁵ See *Bail Reform Act of 1983: Report of the Committee on the Judiciary*, 98th Cong. 48 (1983) (“Under subsection f(2), a pretrial Detention Hearing may be held upon motion of the attorney for the government or upon the judicial officer’s own motion in three types of cases. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.”) (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a “rare case of extreme and unusual circumstances . . . justifies pretrial detention”—as representing the “current case law”).

¹⁶ For example, a federal magistrate judge in the District of Puerto Rico detained a defendant based on ordinary “risk of flight,” even though no § 3142(f)(1) factor was met and there was no determination that the defendant posed a “serious risk of flight” as required by the statute, and despite clear First Circuit authority to the contrary. *United States v. Martinez-Machuca*, 18-cr-568 (D.P.R. April 30, 2019) at 5–6 (acknowledging that First Circuit law only authorizes detention when “one of the

We saw both of these problems repeatedly in our courtwatching and have heard similar anecdotes from defense attorneys in many federal districts. On the dangerousness issue, during the first 7 weeks of our courtwatching, the government cited danger to the community as the basis for detention in approximately 56% of the cases. Regarding flight, during that same period of courtwatching, the government cited ordinary risk of flight as the basis for detention in approximately 60% of the cases, and only provided evidence to support the request in one case. All told, the government cited improper bases for detention in 95% of cases. In many cases, a legitimate statutory basis for detention existed under § 3142(f)(1), but simply was not cited. However, in some cases there was no statutory basis for detention whatsoever.

The chart below illustrates the problem:

Initial Appearance: Factors Cited by Gov't to Support Detention Request



B. The BRA Should Specify a Standard and Burden of Proof for Detention Based on Risk of Flight at the Initial Appearance.

As discussed above, in practice, people are regularly detained at the Initial Appearance and held for a Detention Hearing on a mere allegation of “risk of flight,” without regard to the fact that § 3142(f)(2)(A) authorizes detention only if the person poses a “serious risk that such person will flee.” There is rarely any discussion by judges, the government, or the defense about the seriousness of a particular person’s risk of flight.

This failure can be traced to the fact that the statute does not specify a standard or burden of proof for proving “serious risk” of flight at the Initial Appearance hearing. Courts have

§ 3142(f) conditions for holding a detention hearing exists”) (citing *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988)).

expressed frustration at the statute’s lack of an evidentiary requirement for proof of serious risk of flight, explaining that at the Initial Appearance, “[n]either side [prosecution or defense] provides any guidance about the quantum of evidence needed to show a serious risk of flight sufficient to warrant the holding of a Detention Hearing.”¹⁷ This guidance must be provided by Congress.

Without a clear standard and burden of proof, § 3142(f)(2)(A) is not performing the gatekeeping function that Congress intended. Instead, prosecutors can detain someone on mere assertion and speculation. Relatedly, there is a risk that the government will treat the flight risk provision in § 3142(f)(2)(A) as a catch-all and will “move for detention as . . . [an] end run around subsection (f),” ignoring the narrow tailoring that led the Supreme Court to uphold the Act as constitutional.¹⁸

Practitioners report that this risk is a reality in certain jurisdictions, and the caselaw bears this out. In *United States v. Robinson*, for example, the judge criticized the government for not presenting evidence of “serious risk” of flight at the Initial Appearance. Though the government purported to be proceeding by proffer, the judge noted, “[n]othing about those statements amounts to a ‘proffer’ of anything . . . because no information was offered to support either allegation.”¹⁹

Legislative reform is particularly important in this area, as some judges have construed the Bail Reform Act as not requiring the government to provide any evidence whatsoever of risk of flight at the Initial Appearance.²⁰ During our courtwatching, when the government asked for detention based on ordinary “risk of flight,” they virtually never cited evidence to support their request, and the judges did not require them to do so. This cannot be right, because § 3142(f)(2)(A) authorizes detention only “in a case that involves” a “serious risk” of flight, which contemplates at least some kind of judicial finding. Clear guidance from Congress is needed to require the government to provide a sufficient evidentiary basis to support detention.

III. The BRA Should Be Reorganized and Reformatted to Provide Much-Needed Clarity to Judges and Practitioners.

Judges and practitioners alike lament that the Bail Reform Act is badly organized, difficult to follow, and does not proceed in a logical order. For example, judges and practitioners do not understand the limitations on detention at the Initial Appearance, perhaps in part because the relevant provision comes in the middle of the statute—in subsection (f)—rather than towards the beginning. The confusion may also arise because one part of § 3142(f) discusses the legal standard for the Initial Appearance hearing, while another part lists the standards and procedures for the Detention Hearing. The Act needs to be reorganized so that the text proceeds in the order in which the legal issues arise during the two bond-related court proceedings, the Initial

¹⁷ *United States v. Lizardi-Maldonado*, 275 F. Supp. 3d 1284, 1288–89 (D. Utah 2017).

¹⁸ *United States v. Gibson*, 384 F. Supp. 3d 955, 964 (N.D. Ind. 2019).

¹⁹ 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010).

²⁰ *See, e.g., United States v. Baltazar-Martinez*, No. 19-20439, 2019 WL 3068176, at *2 (E.D. Mich. July 12, 2019) (noting “the Government is not required to make an evidentiary proffer before a Detention Hearing can even be set, and such a requirement is not supported by the statute”).

Appearance hearing and the Detention Hearing. Subsections and headings should also be added to further clarify the meaning of the Act.

IV. Financial Conditions of Release Should Be Eliminated.

The BRA should be modified to prohibit all financial conditions of release. Such a modification would bring the Act back in line with Congress’s original intent of preventing judges from imposing financial conditions that lead poor people to be detained while wealthy people can buy their freedom.

The purpose of the Bail Reform Act of 1966 was to “revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest.”²¹ At the bill signing, President Lyndon Johnson reiterated harsh criticism against the system of money bond, arguing that “[b]ecause of the bail system, the scales of justice [were] weighted not with fact nor law nor mercy. They [were] weighted with money.”²² The Bail Reform Act of 1984 continued to work towards the elimination of detention based solely on inability to pay. To effectuate this intent, § 3142(c)(2) states, “The judicial officer may not impose a financial condition that results in the pretrial detention of the person.” The purpose of § 3142(c)(2) was to ensure that “the judicial officer may not impose excessive bail as a means of detaining the individual” was an “unauthorized” practice.²³

However, the Act also contains and endorses a panoply of financial restrictions and conditions that privilege the wealthy over the poor.²⁴ These provisions enable judges to impose conditions that are dependent on, or proxies for, a person’s financial means. The data make clear that, for some people, the scales of justice are still weighted with money. For example, nearly 10% of federal defendants detained pretrial are held because they cannot post a secured bond.²⁵

In practice, some of the Act’s financial provisions result in de facto detention. For example, in some federal districts, judges will not authorize a defendant’s family member to serve as a third-party custodian and/or co-signer of a bond unless that person can demonstrate that they are a solvent surety. Federal judges elsewhere refuse to release defendants unless they pay cash bonds or post real property as security for their release, in spite of § 3142(c)’s mandate.

²¹ Pub. L. No. 89-465, 80 Stat. 214, 214 (1996).

²² See Lyndon B. Johnson, President of the United States, *Remarks at the Signing of the Bail Reform Act of 1966*, (June 22, 1966), <https://www.presidency.ucsb.edu/ws/?pid=27666>.

²³ *Bail Reform Act Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House of Representatives*, 98th Cong. 243 (1984) [hereinafter 1984 Hearings] (testimony of Ira Glasser).

²⁴ See 18 U.S.C. § 3142(c)(1)(B)(xi)–(xii) (listing “execut[ing] a bail bond with solvent sureties” and agreeing to forfeit “property of a sufficient unencumbered value, including money” as permissible conditions of release); § 3142(g)(4) (authorizing a judge to inquire into the source of property in considering the conditions of release in § 3142(c)(1)(B)(xi)–(xii)).

²⁵ Thomas H. Cohen, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010* at 6–7, Special Report, U.S. Dep’t of Justice Bureau of Justice Statistics (2012), <https://perma.cc/4LT8-YPX8>.

In addition, indigent defendants released on bond are sometimes ordered to pay costs associated with mandatory conditions of release, such as the cost of electronic monitoring.

The Act should be amended to make clear that the imposition of financial conditions is flatly impermissible. Such a bright line rule will do a far better job of effectuating the drafters' intent. It will also avoid the injustice—not to mention the constitutional minefields—of a regime that conditions liberty on a person's financial means.²⁶

V. The Standard for Flight Risk/Appearance Should be Modified.

Currently, the BRA authorizes detention at the Initial Appearance under § 3142(f) if there is a “serious risk that such person will flee.” The BRA authorizes continued detention at the Detention Hearing under § 3142(e) if a judge finds that “no condition or combination of conditions will reasonably assure the appearance of the person as required.”

A. Detention Based on Flight Risk Should Only Be Authorized Where There Is a Real Likelihood That a Defendant May *Voluntarily Abscond*.

The BRA should be modified to authorize detention for flight risk only where there is a serious likelihood that someone will voluntarily abscond. Legal scholars and criminologists have recently advocated for a clearer delineation between the small number of “defendants who are expected to flee a jurisdiction” and the “much larger group” of people who are simply attendance risks due to poverty, transportation barriers, and lack of resources.²⁷ Increasingly, scholarship recognizes that “some nonappearances are more problematic than others”²⁸ and

²⁶ The legality of cash bail is being aggressively litigated around the country. On June 1, 2018, the Fifth Circuit struck down as unconstitutional the cash bail system in Harris County, Texas, because the “state of affairs [where a wealthy arrestee is able to post bond while an identical indigent arrestee cannot] violates the equal protection clause.” See *ODonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018). Similarly, on June 11, 2019, a federal judge granted a preliminary injunction, enjoining the City of St. Louis, Missouri from “enforcing any monetary condition of release that results in detention solely by virtue of an arrestee’s inability to pay” unless “detention is necessary because there are no less restrictive alternatives to ensure the arrestee’s appearance or the public’s safety.” See *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2019 WL 2437026, at *16 (E.D. Mo. June 11, 2019). And on August 29, 2019, the Fifth Circuit ruled unanimously that the Louisiana bail system, where judges receive a cut of every monetary bond they set to fund their courts, was unconstitutional. See *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019). There are other lawsuits pending that challenge the cash bail systems in Cook County, Illinois (encompassing Chicago), Davidson County, Tennessee (encompassing Nashville), and Calhoun County, Georgia, among others.

²⁷ Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 683 (2018); see also Jason Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*, ABA JOURNAL (July 17, 2018) (“[T]he vast majority of criminal defendants are not flight risks—they’re attendance risks.”).

²⁸ *Id.* at 726.

“detention should be reserved for those who cannot be prevented or dissuaded from leaving the jurisdiction using less intrusive interventions.”²⁹

State level data further shows that most concerns about non-appearance (i.e. cases where the person is *not* fleeing to avoid prosecution) can be prevented in ways that are less costly and less restrictive than detention. One study was able to reduce rates of non-appearance from 25% to 6% by reminding people directly of their upcoming court date.³⁰ Another recent study found that text message reminders “reduced failures to appear by 26% relative to receiving no messages.”³¹ Partnering with community organizations, improving access to high-quality substance abuse treatment, and improving pretrial services support can also reduce rates of non-appearance.³²

Where other factors may be responsible for appearance risks, such as inadequate transportation or drug addiction, a drug treatment program or vouchers for transportation may well meet the requirement that the judge impose the “least restrictive . . . conditions” that “will reasonably assure the appearance of the person as required” under § 3142(c)(1)(B).

B. Detention Based on Flight Risk Should Only Be Authorized When There is a High Risk of Imminent and Intentional Non-Appearance.

The BRA’s provisions regarding flight risk and failures-to-appear must be revised, because they have become catchalls and contribute to the rising federal pretrial detention rate. The legislative history of the Bail Reform Act of 1966 indicates that Congress was primarily concerned about identifying and detaining people who might *flee to avoid prosecution*. One preliminary version of the bill, for example, specified that penalties for non-appearance applied only to a defendant who “fail[ed] to comply with the terms of his release with intent to avoid prosecution; the service of his sentence, or the giving of testimony.”³³ As Deputy Attorney General of the United States Ramsey Clark testified, “the test [as to whether a penalty would apply to a defendant] is whether he failed to appear *with intent* to avoid prosecution.”³⁴

²⁹ *Id.* at 686; *see also* John S. Goldkamp, *Fugitive Safe Surrender: An Important Beginning*, 11 *Criminology & Pub. Pol.* 229, 429–30 (drawing a distinction between “active flaunters” and “inadvertent absconders”).

³⁰ Gouldin, *supra* note 27, at 731 (citing data from Coconino County, Arizona); *see also* Rachel A. Harmon, 115 *Mich. L. Rev.* 337–38 (noting that “[j]urisdictions can increase appearance pursuant to citations by screening out the suspects least likely to appear if cited; by reducing obstacles to appearing as required; and by optimizing consequences for failures to appear”); Marie VanNostrand et al., *State of the Science of Pretrial Release Recommendations and Supervision*, Pretrial Justice Institute (June 2011) (“All . . . studies concluded that court date notifications in some form are effective at reducing failures to appear in court.”).

³¹ Brice Cook et al., *Using Behavioral Science to Improve Criminal Justice Outcomes*, UChicago Crime Lab & Ideas 42 (January 2018), <https://www.ideas42.org/wp-content/uploads/2018/03/Using-Behavioral-Science-to-Improve-Criminal-Justice-Outcomes.pdf>.

³² Gouldin, *supra* note 27, at 732.

³³ *Federal Bail Procedures Hearings Before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate*, 89th Cong. 5 (1965) [hereinafter 1965 Hearings] (text of S. 1357).

³⁴ *Id.* at 33 (statement of Ramsey Clark) (emphasis added).

Legislative history accompanying the Bail Reform Act of 1984 reveals a continued focus on the need to prevent high-level, wealthy drug defendants from fleeing to avoid prosecution. In his 1984 testimony, Deputy Attorney General James Knapp emphasized that “detention to assure appearance at trial” was appropriate for “habitual and violent criminals and major drug traffickers.”³⁵ He then cited a case where “a bond of \$1 million was forfeited in the Southern District of Florida after a reputed head of a major marijuana smuggling operation failed to appear for trial” as an example of a case in which pretrial detention was appropriate.³⁶ In fact, however, the typical federal drug defendant does not have the funds to hire his own lawyer, let alone the means or wherewithal to flee the city, state, or country.

Legislative history supports modifying the Bail Reform Act to specify that risk of flight must be “imminent” and “intentional” for a Detention Hearing to be held. Regarding the imminence of flight, the government wanted to prioritize detention for people who would flee immediately upon release. Indeed, the 1964 Report of the Attorney General’s Committee on Poverty and the Administration of Criminal Justice expressed a concern about “imminent flight.”³⁷ Notably, this point of view was adopted by Senator Fong, then a member of the Committee on the Judiciary, who urged courts to place “reasonable restrictions on association or movement” in order to “prevent[] *imminent* flight.”³⁸ The legislative history also supports an emphasis on the intentionality of the flight. When Deputy Attorney General Ramsey Clark testified to the Senate, he made it clear that the executive branch placed great importance on a person’s intent and was in favor of a statute where “the Government would have the obligation or the burden of coming forward with some evidence of willfulness on the part of the defendant in connection with his failure to appear,” before imposing penalties.³⁹

VI. The Presumptions of Detention Should be Clarified and Modified.

The BRA includes a statutory presumption in favor of detention in many federal cases.⁴⁰ The language of the BRA has improperly led federal judges to feel that most presumption cases should result in detention, and many judges have a near-blanket policy of detaining defendants in presumption cases. Relatedly, there is a great deal of confusion among the bench and bar alike over how the presumptions operate.

A. Eliminate or Limit Certain Presumptions Of Detention.

The presumptions of detention in the Bail Reform Act restrict judicial discretion, undermine the constitutional presumption of innocence, and are responsible for a massive increase in the pretrial detention rate. The presumptions of detention also run counter to the BRA’s presumption of release. Other provisions of the BRA already account for the seriousness of the offense, rendering the presumption superfluous. The BRA specifically requires judges to consider “the nature and circumstances of the offense charged” and “the weight of the evidence”

³⁵ *1984 Hearings, supra* note 23, at 233 (Statement of James I.K. Knapp).

³⁶ *Id.*

³⁷ *See 1965 Hearings, supra* note 33, at 211 (text of S. 1357) (emphasis added).

³⁸ *Id.* at 16 (emphasis added).

³⁹ *Id.* at 33.

⁴⁰ 18 U.S.C. § 3142(e)(3).

at the Detention Hearing.⁴¹ And, even without the presumptions, judges will retain the authority to detain defendants in serious cases.

The Administrative Office of the U.S. Courts released an important empirical study about the § 3142(e)(3) presumption and release rates, entitled *The Presumption for Detention Statute's Relationship to Release Rates*. The study made several key findings that support eliminating certain presumptions.⁴²

First, pretrial services officers recommend release less frequently in § 3142(e)(3) presumption cases than non-presumption cases, especially for low-risk people. For low-risk people in category 1 (meaning little to no criminal history and a stable personal background⁴³), pretrial services recommended release in 93% of non-presumption cases, compared to only 68% of presumption cases.⁴⁴ The numbers between presumption and non-presumption cases begin to converge as risk levels increase.⁴⁵

Second, release rates are higher for low-risk non-presumption defendants than low-risk § 3142(e)(3) presumption defendants, meaning there may be some “unnecessary detention.” At the lowest risk level, people with non-presumption cases were released 94% of the time, while people with presumption cases were released only 68% of the time.⁴⁶ This suggests that the purported purpose of the presumption—to detain high-risk people who were likely to pose a danger to the community if released—was not being fulfilled.⁴⁷ “[W]ere it not for the existence of the presumption, these defendants might be released at higher rates.”⁴⁸

Third, the § 3142(e)(3) presumption failed to correctly identify those who are most likely to recidivate, fail to appear, or be revoked for technical violations. For example, other than category 1 presumption cases, presumption rearrest rates were *lower* than non-presumption rearrest rates (for category 1, presumption rearrest rates were only slightly higher than non-presumption cases).⁴⁹ Similarly, for category 1 and 2 defendants, non-presumption cases were revoked for technical violations at a lower rate than presumption cases. However as risk levels increased there was no difference in revocation rates for technical violations for category 3 defendants. Notably, for risk categories 4 and 5, non-presumption cases were actually more likely to be revoked than presumption cases—again showing that the presumptions have little predictive value in the cases where they should matter most.⁵⁰ Finally, across all risk categories,

⁴¹ 18 U.S.C. § 3142(g).

⁴² See Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Federal Probation Journal 52 (Sept. 2017), https://www.uscourts.gov/sites/default/files/81_2_7_0.pdf.

⁴³ In the study, the Pretrial Risk Assessment Tool was used to identify defendants' risk level. *Id.* at 54. The tool puts defendants into a one of five categories based on their response to 11 questions. *Id.* at 55. These categories are different than a defendant's Criminal History Category under the U.S. Sentencing Guidelines.

⁴⁴ *Id.* at 56.

⁴⁵ *Id.*

⁴⁶ *Id.* at 57.

⁴⁷ *Id.* at 56–57.

⁴⁸ *Id.* at 57.

⁴⁹ *Id.* at 58.

⁵⁰ *Id.* at 59–60.

there was no significant difference in rates of failure to appear between presumption and non-presumption cases.⁵¹

The study concluded that “the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant’s charge was a good proxy for that defendant’s risk.”⁵² The study goes on to state that the presumption has become “an almost de facto detention order in almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration.”⁵³

B. Clarify the Presumptions to Grant Judges More Discretion and Bring the Statute In Line With Case Law.

Even if certain presumptions are not eliminated, the statutory language should be clarified to ensure that judges have the authority to make individualized, discretionary decisions in presumption cases. This will also promote judicial efficiency, ensuring that courts of appeals are not required to clarify the meaning of the statute for lower courts.

Moreover, the rules in § 3142(e)(2) and (3) should not be called “presumptions” at all, because that is not how they operate. A presumption typically shifts the burden of proof to one party; the presumption in § 3142(e) does not. Instead, the burden of proof/persuasion continues to rest with the government at all times. This presumption merely imposes on the defendant a burden of *production*, requiring the defendant to present some evidence that he/she will not flee and some evidence that he/she will not pose a danger to the community.⁵⁴

Given the confusing language of the statute, courts have struggled with how to interpret and apply the presumption. Tellingly, a seminal case on the issue begins its extensive discussion of the presumption by saying, “We must first decide what the rebuttable presumption means,” and continues, “Congress did not precisely describe how a magistrate will weigh the presumption, along with (or against) other § 3142(g) factors.”⁵⁵

⁵¹ *Id.* at 60.

⁵² *Id.*

⁵³ *Id.* at 61.

⁵⁴ See, e.g., *United States v. Jessup*, 757 F.2d 378, 380–84 (1st Cir. 1985) (holding that the government bears the burden of *persuasion* at all times while a defendant just bears a burden of *production*, which entails producing “some evidence” under § 3142(g)); *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (engaging in lengthy analysis of the different burdens the presumption places on each party, explaining that the defendant rebuts the presumption by producing “some evidence” under § 3142(g), and concluding that after it is rebutted, “the presumption remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)”; *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (holding that the defendant has a burden of production and only needs “to offer some credible evidence contrary to the statutory presumption”); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (holding that the burden of *persuasion* rests with the government, not the defendant).

⁵⁵ *Jessup*, 757 F.2d at 380, 384.

Anecdotal information gathered during our courtwatching reveals that courts rarely understand how the presumption is supposed to operate, resulting in its misapplication in practice. For example, it is rare for judges to follow the two-step process of first analyzing whether the presumption has been rebutted and then weighing the presumption against the other evidence under § 3142(g). In practice, many judges feel that the presumption is a de facto directive by Congress that ties their hands and requires detention. For these reasons, the wording of the presumption should be changed to make it easier for judges to understand how it is supposed to work in practice.

C. Eliminate or Substantially Limit The Presumption Of Detention That Specifically Applies to People Charged in Federal Drug and Gun Cases.

Section 3142(e)(3) contains a presumption of pretrial detention in drug and gun cases that applies in approximately 45% of all federal cases. The AO study found that the presumption applied in 93% of all federal drug cases.⁵⁶ The presumption has resulted in high detention rates. From 1995 to 2013, the percentage of people charged with drug crimes who were jailed while awaiting trial increased from 76% to 84%.⁵⁷

It is important to address the drug presumption because drug crimes make up nearly 30% of the federal docket nationwide.⁵⁸ In contrast, when the BRA was enacted in 1984, drug crimes made up just 18% of the federal docket.⁵⁹ Moreover, in the ensuing years men of color have borne the brunt of our federal drug laws; data shows that they ultimately face longer prison terms than whites arrested for the same offenses with the same prior records.⁶⁰

The drug and gun presumptions should be eliminated or substantially limited because they sweep too broadly. The BRA's drug presumption applies to any drug offense for which the maximum term of imprisonment is ten years or more—not just those that carry a mandatory minimum penalty.⁶¹ This encompasses virtually all federal drug offenses, including all offenses involving any amount of a drug stronger than marijuana and 50 kilograms or more of marijuana.⁶²

⁵⁶ Austin, *supra* note 42, at 55.

⁵⁷ *Id.* at 53.

⁵⁸ U.S. SENT'G COMM'N, *Overview of Federal Cases—Fiscal Year 2018*, at 4, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf.

⁵⁹ John Scalia, *Federal Drug Offenders, 1999 with Trends 1984-99*, U.S. Dep't of Justice Bureau of Justice Statistics Special Report at 1 (Aug. 2001), <https://www.csdp.org/research/fdo99.pdf>.

⁶⁰ See Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. Pol. Econ. 1349 (2014); see also Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 *Judicature* 6 (July–Aug. 2010) (“Mandatory minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.”); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 350 (Oct. 2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf (finding that the cumulative sentencing impacts of criminal history and weapon involvement are “particularly acute for Black drug offenders”).

⁶¹ See 18 U.S.C. § 3142(e)(3)(A).

⁶² See 21 U.S.C. §§ 841(b), 960(b).

Because it covers so many drug offenses, the drug presumption applies to kingpins and couriers alike, regardless of culpability. This is not what the Congress that passed the BRA intended. In fact, the drug presumption was not part of the original bill, and was only added later in the drafting stages.⁶³ Senator Strom Thurmond, the Chair of the Senate Judiciary Committee, remarked that a presumption of detention for “grave drug offense[s]” was needed because “[i]t is well known that drug trafficking is carried on to an unusual degree by persons engaged in continuing patterns of criminal activity” and “these persons have both the resources and foreign contacts to escape to other countries with relative ease[.]”⁶⁴ But, today, the drug presumption applies equally to a poor person with no criminal history who is alleged to possess only 1 gram of cocaine as it does to a true “kingpin” like Joaquin “El Chapo” Guzman. Likewise, we have heard from judges that the gun presumption is overbroad because it applies to cases in which a person may have possessed a weapon in a way that is only tangentially related to the underlying crime.

VII. The Definition of Dangerousness Should Be Modified.

The statutory language that allows judges to detain anyone who “will endanger the safety of any other person or the community” is vague, overbroad, and results in more detention than is necessary to protect the community. The statute should be modified to comport with the original intent of Congress—that judges use this prong to detain only the “small but identifiable group of particularly dangerous defendants [for] whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”⁶⁵

A. Congress Intended Only a Small Minority of Defendants to Be Detained Based on Dangerousness, and Put Procedural Protections in Place to Ensure That Happened.

From the Founding until the passage of the Bail Reform Act in 1984, judges were only permitted to detain people in order to mitigate their risk of flight, not on dangerousness grounds. Congress justified its departure from this historic norm in two ways. First, it pointed to the “growing problem of crimes committed by persons on release.”⁶⁶ Second, it found that judges were already detaining people they considered dangerous, even without statutory authorization, by setting high money bond that defendants could not pay. The hope was that formally authorizing the detention of dangerous defendants would allow Congress to deal with the problem of crimes committed by defendants released pretrial, and would ensure that detention decisions were happening in a transparent manner.

⁶³ See *Senate Report of the Committee on the Judiciary on S. 1554, Subcommittee on the Constitution*, November 3, 1981 (“Senator DeConcini also offered an amendment which was approved 5-0, creating a rebuttable presumption that an individual charged with a grave drug-related offense, for which a maximum penalty of 10 years or more may be imposed, is not likely to appear for trial and is likely to pose a risk to community safety if not detained. The Subcommittee then approved S. 1554, as amended by a recorded vote of 4-0.”).

⁶⁴ S. Rep. No. 98-147, at 45–47

⁶⁵ S. Rep. No. 98-225, at 6.

⁶⁶ *Id.* at 6, 7, 10.

The legislative history of the BRA reveals that Congress expected only a small minority of defendants to be detained as dangerous. The Senate Judiciary Committee Report described the defendants eligible for detention under this prong as the “small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons.”⁶⁷

The design of the statute reflected this intention on the part of Congress to carefully limit the pool of people who could be detained as dangerous. For example, as noted above, to detain a person at the Initial Appearance, the government must prove that the defendant satisfies one of the factors laid out in § 3142(f). Generalized dangerousness is not one of the factors. Instead, the government must prove that the person is charged with a particular type of crime or that there is a serious risk that the person will obstruct justice.

Testimony from the Department of Justice in the lead-up to the passage of the BRA reveals a clear understanding that the government would have to carry a heavy burden to successfully detain someone based on dangerousness. Deputy Attorney General James Knapp testified that under this new regime the Department felt detention would “require clear and convincing evidence and . . . require something tangible in a particular case. It is going to have to be something very tangible demonstrated to the judge before he is going to make this finding [that a defendant is so dangerous that detention is required].”⁶⁸

B. Congress Should Modify the BRA’s Definition of Dangerousness.

To better reflect Congressional intent and ensure that defendants who pose a true danger are being detained, the definition of dangerousness could be modified to require the government to identify an individual’s specific risk of physical harm to another reasonably identified person or persons in order to detain an individual as dangerous.⁶⁹

⁶⁷ *Id.* at 6. The House Judiciary Committee Report described them as “*the dangerous few* who will commit offenses while on bail.” H.R. Rep. No. 98–1121, at 60 (emphasis added).

⁶⁸ 1984 Hearings, *supra* note 23, at 223.

⁶⁹ See, e.g., *Blackson v. United States*, 897 A.2d 187, 194 (D.C. 2006) (interpreting similar “dangerousness” language in the D.C. bail statute to mean that “[t]he trial court . . . need[s] clear and convincing evidence that appellant pose[s] an identified and articulable threat to an individual or the community and that nothing short of detention [will] reasonably suffice to disable [him] from executing that threat.”).