No. 20220636-SC

IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellant,

v.

KOLBY RYAN BARNETT,

Defendant/Appellee.

Brief of *Amicus Curiae*
Utah Association of Criminal Defense Lawyers
In Support of Appellee Kolby Ryan Barnettt

Troy Rawlings (6969)
Davis County Attorney
Jeffrey G. Thomson (14023)
Deputy County Attorney
800 West State Street
P.O. Box 618
Farmington, UT 84025
(801)451-4300
jthomson@co.davis.ut.us
troy@co.davis.ut.us
Counsel for Appellant

Emily Adams (14937)
Freyja Johnson (13762)
Sara Pfrommer (9366)
Cherise Bacalski (15084)
The Appellate Group
P.O. Box 1564
Bountiful, UT 84054
(801) 924-0854
eadams@theappellategroup.com
fjohnson@theappellategroup.com
spfrommer@theappellategroup.com
cbacalski@theappellategroup.com

Todd Utzinger (6047)
Davis County Legal Defenders
P.O. Box 618
28 E. State Street, Suite 121
Farmington, Utah 84025

(801) 451-3010
tutzinger@daviscountyutah.gov
Counsel for Appellee

Jeremy Delicino (9959)
David Ferguson (16043)
Utah Association of Criminal
Defense Lawyers
P.O. Box 3254
Salt Lake City, UT 84110
(801) 215-9469
director@uacdl.org
Counsel for Amicus Curiae

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CONSENT FOR AMICUS FILING

All parties received timely notice of Amicus's intent to file via email. A motion to grant the acceptance of this brief has been filed concurrently.

STATEMENT OF AUTHORSHIP

In compliance with Utah Rule of Appellate Procedure 25(e)(6), this brief has been authored by members of the Utah Association of Criminal Defense Lawyers (UACDL), specifically Jeremy Delicino. No party or party's counsel authored this brief in whole or part nor has UACDL received any financial contribution for the filing of this brief.

INTEREST OF AMICUS CURIAE

The Utah Association of Criminal Defense Lawyers (UACDL) is a non-profit voluntary professional legal organization dedicated to protecting the rights of Utah's criminal defendants by supporting attorneys, encouraging reforms, and advocating against policies that decrease justice.[1]

The issue in this case is one of significance to the criminal legal system because of its broad effect on bail determinations for felony-on-felony defendants. UACDL has over 400 members comprised of both private counsel and public defenders who are interested in avoiding needless pretrial incarceration in the State.

[1] *See* Mission Statement *available at* http://www.uacdl.org/mission-statement (last visited 11/13/2022).

INTRODUCTION

State constitutions have long afforded greater protections than their federal counterpart. Indeed, "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution."[2] And it is equally true that "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory[.]"[3] But the power of a state to serve as a "laboratory" is not boundless, and is instead limited to providing its citizens with more, not fewer, rights and freedoms that the federal constitution demands. Much ink is spilled in the parties' briefs detailing the history of Utah's bail provision, and rightfully so. But for all the collective handwringing over that history, comparatively few words are devoted to the grave federal constitutional concerns posed by the State's interpretation. For that reason, the Utah Association of Criminal Defense Lawyers (UACDL) submits this amicus brief on behalf of its members and the thousands of

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[2] *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

[3] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

accused they represent to ensure that interpretations of the Utah Constitution do not run afoul of the federal constitution.[4]

I. Interpreting the Utah Constitution to Prohibit Pretrial Release Violates Defendants' Substantive Due Process Rights.

Throughout most of American history, bail was used solely to prevent pretrial flight.[5] Bail was a bulwark protecting against punishment before conviction. The United States Supreme Court recognized the gravity of interests affected by pretrial detention, explaining that:

> [F]ederal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail because [t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citation omitted.] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[6]

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[4] *See Minnesota v. National Tea Co.*, 309 U.S. 551 (1940) (stressing the importance that "state courts will not be the final arbiters of important issues under the federal constitution"); *Evans*, 514 U.S. at 8 ("State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution.").

[5] *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio St. L.J. 723, 754 (2011) (noting that "the original purpose of bail" was "to assure that a defendant appears at trial"); William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 68-69 (1977) ("The function of bail is … limited to insuring the presence of a defendant before the court.").

[6] *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

Other perils of pretrial incarceration are well known, as it "often means loss of a job; it disrupts family life; and it enforces idleness."[7] Indeed, "[d]eprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."[8] Despite these perils, the basis for pretrial detention eventually expanded beyond the risk of flight to encompass concerns over the danger to the community posed by an accused. It was not until 1987 that the United States Supreme Court considered the substantive due process implications of preventive detention.

A. The Supreme Court Upholds the Constitutionality of Preventive Detention in Carefully Limited Circumstances.

The State's interpretation of the felony-on-felony provision requiring mandatory, and not merely discretionary, pretrial detention clashes with

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[7] *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

[8] ABA Standards for Criminal Justice: Pretrial Release 10-1.1; *see also Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (recognizing that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, … impair his family's relationships" and undermine his "ability to assist in preparation of his defense").

the careful federal protections laid out by the Supreme Court in *Salerno v. United States*.[9]

In *Salerno*, the defendants challenged the federal Bail Reform Act, which authorized pretrial detention of arrestees charged with certain serious felonies. Notably, the Bail Reform Act authorized detention only if the government demonstrated by clear and convincing evidence that no release conditions would "reasonably assure … the safety of any other person and the community." 18 U.S.C. § 3142(e). The Supreme Court applied a two-part substantive due process inquiry, considering whether (1) the Act violated substantive due process by authorizing "punishment before trial,"[10] and (2) the restrictions were excessive in relation to a legitimate regulatory purpose.[11] The Court in *Salerno* held that there was no due process violation because: (1) the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes"; (2) the "arrestee is entitled to a prompt detention hearing" at which the arrestee could seek pretrial release; and (3) the maximum length of pretrial detention is limited by the stringent time limitations of the

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

[10] *Id*. at 746.

[11] *Id*. at 748.

Speedy Trial Act. Because those protections ensured that the scope of preventive detention was limited, the Court held "that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."[12]

The Court in *Salerno* also applied general due process principles to consider whether the Bail Reform Act impermissibly infringed on arrestees' liberty interests, applying heightened scrutiny to its analysis. The Court recognized that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,"[13] and was careful "not [to] minimize the importance and fundamental nature of" an arrestee's "strong interest in liberty."[14] Mindful of those interests, the Court nonetheless concluded that the Bail Reform Act satisfied heightened scrutiny.[15] But it did so only because the Act "careful[ly] delineat[ed] … the circumstances under which detention will be permitted."[16] Critical to

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[12] *Id*.

[13] *Id.* at 755.

[14] *Id*.

[15] *Id*. at 749-50.

[16] *Id*. at 751.

upholding the constitutionality of the Act was the Court's determination that the Act:

(1) "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming";

(2) "operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses" for which "Congress specifically found" were "far more likely to be responsible for dangerous acts in the community after arrest"; and

(3) afforded arrestees a "full-blown adversary hearing" at which the government was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person."[17]

Ultimately, the Act satisfied heightened scrutiny because it was a "carefully limited exception" and not a "scattershot attempt" at preventing crime by arrestees.[18]

B. The Ninth Circuit Rejects Arizona's Attempt to Bar the Right to Bail.

Several years later, the Ninth Circuit examined an amendment to Arizona's constitution that prohibited bail "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption

[17] *Id*. at 750.

[18] *Id*.

great as to the present charge."[19] The court in *Lopez-Valenzuela* was guided by the substantive due process framework set forth in the Supreme Court's pretrial detention cases, particularly *Salerno*.[20]

Sheriff Arpaio, a proponent of the amendment, argued that "categorical denial of bail to undocumented immigrants, without any individualized determination of flight risk" was justified "because undocumented immigrants *in general* pose an unmanageable flight risk."[21] The Ninth Circuit, while not questioning "that Arizona has a compelling interest in ensuring that persons accused of crimes, including undocumented immigrants, are available for trial,"[22] nonetheless rejected Arizona's argument for three reasons.

First, the court in *Lopez-Valenzuela* found that the amendment did not address "a particularly acute problem."[23] Critical to the Court's holding in *Salerno* was that the Bail Reform Act sought to address an

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[19] *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (en banc).

[20] *Id*. at 780.

[21] *Id*. at 782.

[22] *Id*.

[23] *Id*. (citing *Salerno*, 481 U.S. at 750).

"alarming problem of crimes committed by persons on release."[24] Further, the record in *Salerno* contained empirical evidence that the legislation addressed a "pressing societal problem" and operated only on those "Congress specifically found … are far more likely to be responsible for dangerous acts in the community after arrest." In contrast, there was "no evidence that the [Arizona amendment was] adopted to address a particularly acute problem."[25]

Second, the Ninth Circuit found that the amendment was not limited to "a specific category of extremely serious offenses."[26] The amendment failed to satisfy the requirements of *Salerno* because:

> they encompass[ed] an exceedingly broad range of offenses, including not only serious offenses but also relatively minor ones, such as unlawful copying of a sound recording, altering a lottery ticket with intent to defraud, tampering with a computer with intent to defraud and theft of property worth between $3,000 and $4,000.[27]

Lastly, the *Lopez-Valenzuela* court found that the amendment employed "an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an

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[24] *Salerno*, 481 U.S. at 742.

[25] *Lopez-Valenzuela*, 770 F.3d at 783.

[26] *Id*. at 784.

[27] *Id*.

unmanageable flight risk."[28] The court contrasted Arizona's approach with the Bail Reform Act's emphasis on "case-by-case determinations of the need for pretrial detention" and the federal provision ensuring a "full-blown adversary hearing."[29] Because of the failings above, the Ninth Circuit held the amendment to Arizona's constitution facially unconstitutional.[30]

C. The State's Reading of the Utah Constitution Fails to Comport with the Requirements of Salerno.

Many of the protections essential to the Supreme Court's decision to uphold the Bail Reform Act are missing under the State's interpretation of the Utah Constitution. Similarly, many of the failings found in Arizona's laws present themselves in the State's reading of Utah's bail provision.

First, assuming that the Utah Constitution provides an outright prohibition on bail, it is unclear that prohibition addresses a "particularly acute problem." To be sure, the State has a vested interest in protecting against crime. No one can quibble with the general principle that states have an interest in "ensuring a defendant's presence at future court

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[28] *Id*.

[29] *Id*.

[30] *Id.* at 789.

proceedings and protecting the safety of victims and the community." It may be that individuals charged with felonies while on release pose more risk, but the Supreme Court upheld the Bail Reform Act because the law operated only on individuals "Congress specifically found … are *far more likely* to be responsible for dangerous acts in the community after arrest."[31] No such findings are present here.

Second, the State's expansive reading of the bail prohibition is not limited to a specific category of extremely serious offenses. Not all felonies are alike. The State's reading sweeps in violent and non-violent felonies alike. A defendant convicted of a felony retail theft who swipes a few loaves of bread while on probation could be detained without bail.[32] So could countless other non-violent offenders who are charged with additional non-violent offenses while on release.

To that end, *Salerno's* mandate to make "case-by-case determinations of the need for pretrial detention"[33] for each defendant is an important role that Utah's district courts fulfill. For example, a defendant who, while on

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[31] *Lopez-Valenzuela v. Arpaio*, 770 F.3d at 783.

[32] *See* Utah Code § 76-6-412(1)(b)(v) (making *any* theft a felony theft if the person has been convicted of a prior felony theft within the last 10 years).

[33] *Salerno*, 481 U.S. at 784.

felony probation, gets a new felony charge will often be arrested on the probation case for violating probation by committing the new felony and will further be held until the new felony is adjudicated. Courts frequently, however, find good reasons to release the felony probationer without adjudicating the new case. When a defendant appears before the same judge on both the probation violation and the new matter the court is well positioned to make release decisions based on its familiarity with the defendant through its probation supervision. When drugs are an issue—as is often the case—the court may elect to release the defendant on both cases (the probation violation and the new case) to a treatment facility.

The availability of release is particularly important for defendants on probation through one of Utah's specialty courts. Utah's three primary specialty courts—drug court, mental health court, and veterans court—exist primarily to handle high risk/high needs defendants; that is, defendants who are at a high risk to reoffend and who have a high need for support.[34] While some specialty courts allow the participation of

[34] *See*, *e.g.* the Third District Policy Manual for Veteran's Court, p.10, available here: https://perma.cc/5SZ7-Z35L (accessed 3/20/2023). *Cf.* the Third District's ASAP Drug Court (different from its regular drug court) which is unique because it is designed to handle low-risk drug offenders. https://perma.cc/D8H4-866F (accessed 3/20/2023).

misdemeanor defendants, the demands placed on participants typically do not make sense unless the person is facing more than one felony with a real risk that more will occur without serious intervention.[35] Even with the intervention of a specialty court, getting new criminal charges is an anticipated part of the process. As UACDL attorneys can attest, drug court participants frequently relapse during participation; mental health court participants sometimes get new charges while medications are adjusted; veterans court participants occasionally commit new crimes when triggered by a PTSD episode or traumatic brain injury. Being jailed after a new criminal episode may not only disrupt the efforts of a therapeutic court, but prolonged pretrial incarceration may even reverse progress.[36] That is why, in UACDL's experience, judges often release a defendant arrested on a new charge when the defendant is otherwise actively engaged in a specialty court elsewhere. The State's interpretation of the

[35] *Id*. Notably, the ASAP drug court is frequently poorly utilized because the demands of participation outweigh the benefits.

[36] Best practices for using incarceration as a tool in drug court limit incarceration to three to five days unless there is an immediate risk to public safety. National Drug Court Institute, *Adult Drug Court Best Practice Standards*, vol. I, 28 https://perma.cc/7M3C-6PYQ (accessed March 20, 2023).

bail provision would leave judges powerless to address release quickly. That cannot be the right interpretation.

Lastly, the State's reading affords no adversarial hearing to the accused on the issue of detention. Unlike the Bail Reform Act, which provides for an adversarial detention hearing in virtually all instances—including murder, sexual assault, and terrorism-related charges—the State's reading would eliminate release determinations altogether for a broad swath of defendants. And that reading would run afoul of *Salerno*, as "[n]either *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial [ ] based merely on the fact of arrest for a particular crime. To the contrary, *Salerno* upheld the constitutionality of a bail system where pretrial defendants could be detained *only* if the need to detain them was demonstrated on an *individualized* basis."[37] Depriving trial courts of even the opportunity to release an individual until conviction or plea runs afoul of the minimum requirements laid out in *Salerno*.

II. Because the State's Interpretation Raises Significant Constitutional Concerns, the Canons of Constitutional Doubt and Constitutional Avoidance Support Barnett's Interpretation.

> "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the

[37] *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

> other which such questions are avoided, our duty is to adopt the latter."[38]

Set aside for a moment the question of which party has correctly divined the meaning of a disputed term of art. After all, it may be that "bailable" means what the State says it does; or it may mean what Mr. Barnett contends. Or perhaps the dispute may be a result of what Mark Twain called "the infernal phraseology of the law."[39] But where competing interpretations are plausible and one raises grave constitutional questions, the interpretation that avoids vexing questions of constitutionality should prevail. The constitutional-doubt canon "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality."[40]

This Court recently observed that the canon of constitutional avoidance "provides that when a court is presented with two plausible readings of a statute, and one raises constitutional concerns, the court

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[38] *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

[39] Mark Twain, "Ye Sentimental Law Student" (Feb. 10, 1963), in *Mark Twain, Collected Tales, Sketches, Speeches, & Essays 1852-1890*, at 25 (Louis Budd ed., 1992).

[40] Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* at 247-48 (2012). Scalia and Garner draw a distinction between the constitutional-doubt canon and the rule of constitutional avoidance.

should choose the interpretation that steers clear of constitutional issues."[41] To be sure, the "mere presence of potential constitutional issues does not trigger the canon of constitutional avoidance."[42] Instead, a party seeking to invoke the canon must show that "the statute is genuinely susceptible to two constructions."[43]

UACDL takes the position that Mr. Barnett's reading of the Utah Constitution's bail provision is correct. At the very least, however, a genuine dispute exists. Because the State's interpretation raises the very constitutional concerns outlined above, Barnett's interpretation—one that harmonizes the constitutional provision with the centuries-old presumption of bail—should prevail.

CONCLUSION

The State's interpretation of the felony-on-felony provision of Utah's bail provision create friction with the federal constitution and the protections given by it through *Salerno*. Mindful of these considerations

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[41] *Miller v. State*, 2023 UT 3, ¶75.

[42] *Id*. at ¶ 77.

[43] *Id*. (citation omitted).

this Court should reject the State's interpretation, keeping release decisions in the hands of Utah's district courts.

DATED this 21st day of March 2023.

On behalf of UACDL

/s/ Jeremy Delicino
Jeremy Delicino
David Ferguson

CERTIFICATE OF DELIVERY

I hereby certify that on the 21st day of March 2023, a true and correct copy of the foregoing *Amicus Brief* was filed electronically with the Utah Supreme Court at supremecourt@utcourts.gov and served by email on the following:

Troy Rawlings (6969)
Davis County Attorney
Jeffrey G. Thomson (14023)
Deputy County Attorney
800 West State Street
P.O. Box 618
Farmington, UT 84025
(801)451-4300
jthomson@co.davis.ut.us
troy@co.davis.ut.us
Counsel for Appellant

Emily Adams (14937)
Freyja Johnson (13762)
Sara Pfrommer (9366)
Cherise Bacalski (15084)
The Appellate Group
P.O. Box 1564
Bountiful, UT 84054
(801) 924-0854
eadams@theappellategroup.com
fjohnson@theappellategroup.com
spfrommer@theappellategroup.com
cbacalski@theappellategroup.com

Todd Utzinger (6047)

Davis County Legal Defenders
P.O. Box 618
28 E. State Street, Suite 121
Farmington, Utah 84025
(801) 451-3010
tutzinger@daviscountyutah.gov
Counsel for Appellee

CERTIFICATES OF COMPLIANCE

I, DAVID FERGUSON, certify that:

This brief complied with the type-volume limitation of Utah R. App. P. 25(e)(f) and 24(a)(11), I certify this contains 3,143 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using Microsoft Word in Book Antiqua, a Serif font at 13 point.

I also certify that any Public Version of this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(h).

/s/ David Ferguson
DAVID FERGUSON
Executive Director, UACDL