IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party, v. MICHAEL ADAM HANSEN, aka Michael Adam Hanson, Defendant-Relator.	No. S068166 Multnomah County Circuit Court No. 20CR55932 **MANDAMUS PROCEEDING**

RELATOR'S OPENING BRIEF

ALTERNATIVE WRIT OF MANDAMUS ISSUED TO JUDGE HEIDI H. MOAWAD

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STATEMENT OF THE CASE

NATURE OF PROCEEDINGS

This is a mandamus proceeding commenced under this Court's original jurisdiction. ORS 34.250.

Relator Michael Adam Hansen is the Defendant in *State v. Hanson*, Multnomah County Circuit Court No. 20CR55932. He is awaiting trial on one count of misdemeanor driving under the influence, ORS 813.010, two counts of manslaughter in the second degree, ORS 163.125, and two counts of criminally negligent homicide, ORS 163.145. It is from that proceeding that the instant mandamus petition arises.

He seeks an Order from this Court determining that Judge Moawad lacks adequate cause for failing to follow this Court's prior Order Allowing a Writ of Mandamus and releasing him pretrial on non-monetary conditions.

NATURE OF PROCEEDINGS BELOW

On October 10, 2020, Hansen was arrested and charged with various offenses arising out of a serious car crash. The conditions of his pretrial release were predetermined by the Multnomah County bail schedule, which required a secured financial condition of $42,500 for his pretrial release. After he was re-indicted on three additional charges arising from the same incident, the amount of money required for his pretrial release was automatically raised, pursuant to the predetermined schedule, to $542,500.

On November 11, 2020, Hansen filed a Motion to Reduce Bail. Hansen presented evidence of his inability to pay any amount of cash for his release, argued that his ongoing detention solely because of his inability to pay without adequate procedural and substantive protections violated the state and federal Constitutions, and requested that he be released on conditions including, *inter alia*, house arrest and GPS monitoring. The State opposed his motion but chose not to seek his pretrial detention under applicable Oregon law.

At a hearing on November 12, 2020, the trial court found the $542,500 security amount unconstitutional as applied to Hansen. The court ordered him released, but reset the amount required at $350,000—an amount the court explicitly found Hansen cannot pay. The court made none of the findings required under state or federal law to justify an order of pretrial detention, despite Hansen's explicit argument that it must in order to detain him. Hansen subsequently filed a Petition for a Writ of Mandamus or Habeas Corpus, seeking relief from this Court from his continued unconstitutional detention.

This Court granted an Alternative Writ of Mandamus on March 4, 2021. By its terms, the Writ directed Judge Moawad to "(a) (1) set the security release amount in an amount not greater than necessary to 'reasonably assure the defendant's appearance' (ORS 135.265(1)), or (2) conduct a hearing to determine whether relator can be detained consistently with the standards of ORS

135.240(4); or (b), in the alternative, show cause for not doing so within 14 days from the date of this order."

On March 15, the trial court held a hearing to address the Writ. At the hearing, with no circumstance having changed except for this Court's issuance of the Writ, the State took the opposite position from the one it had taken at Hansen's first bail hearing and—for the first time in the five months since his arrest—sought his pretrial detention. After the hearing, Judge Moawad issued an order holding that the State had not presented sufficient evidence to support Hansen's pretrial detention under applicable Oregon law. She ordered him released again, this time resetting the amount required for his release to $102,500—an amount that the record establishes Hansen cannot afford to pay.

No court has determined that Hansen's pretrial detention is necessary to serve any compelling government interest. Nor has any court determined that less restrictive alternatives to pretrial detention are insufficient. Yet, unable to pay the cash amount required to secure his release, Hansen remains jailed pretrial.

BASIS FOR THIS COURT'S JURISDICTION

On March 4, 2021, this Court issued an Order allowing Hansen's Petition for an Alternative Writ of Mandamus. Judge Moawad conducted the hearing required by the Writ and found that Hansen could *not* be detained consistent with the standards of ORS 135.240(4). She nonetheless set the security release amount at a level Hansen cannot pay—in effect imposing an order of pretrial detention,

despite explicitly holding that detention could not be justified under Oregon law and despite acknowledging that the State had not provided clear and convincing evidence that Hansen posed a danger or flight risk that could not be mitigated by alternative nonfinancial conditions of release. Hansen thus remains detained in violation of both Oregon and federal law.

QUESTIONS PRESENTED

1. May a trial court, consistent with the Oregon Constitution, set a security amount that is unattainable to a criminal defendant, without finding by clear and convincing evidence that the defendant is too dangerous to release pretrial?
2. What substantive standards and procedural safeguards, under Oregon and federal law, apply to orders resulting in pretrial detention?

SUMMARY OF ARGUMENT

The Oregon Constitution has, since the state's founding, enshrined a right to release on bail for all offenses except murder and treason. The Constitution contemplates only one exception to this right: Article I, section 43, which allows the State to detain a person charged with certain violent felonies prior to trial only if "a court has determined there is probable cause to believe the criminal defendant committed the crime, and the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release."

Section 43 remains the *only* textual exception to the longstanding right to release on bail. But trial courts across the state have, as the court did in this case, quietly established another way to detain individuals prior to trial: unattainable security amounts. Courts use impossible financial conditions of release to detain presumptively innocent people in cases in which the State does not even attempt to meet its section 43 burdens. By using unattainable amounts of money to prevent legally innocent people from being released, the trial courts are subverting the constitutional framework enacted by the people of Oregon.

That is what happened in this case: The offenses with which Hansen is charged are eligible for pretrial detention under section 43. But at no point (until after this Court issued a Writ) did the State seek his pretrial detention. And even after the State changed its position to seek detention, the trial court explicitly found that the State had not met its evidentiary burden of showing Hansen could be detained consistent with the standards of section 43, codified in ORS 135.240(4). The trial court nonetheless required an amount of money for Hansen's release that it had already found he cannot afford to pay. The court did this even though this Court has previously said that security amounts are "not to be set so as to make it impossible, *as a practical matter*, for a prisoner to secure release." *Gillmore v. Pearce*, 302 Or 572, 580, 731 P2d 1039 (1987) (en banc) (internal citations omitted) (emphasis added).

The routine use of unattainable security amounts to detain criminal defendants also violates longstanding federal constitutional law. Although the people of Oregon have gone further than what federal law requires in order to protect individual liberty from pretrial confinement, the U.S. Constitution similarly protects against wealth-based detention and enshrines a right to pretrial liberty. Those federal rights may not be infringed absent substantive findings that detention is necessary to guard the state's compelling interests in protecting against danger to the community or flight risk. If these risks can be sufficiently mitigated by alternative conditions of release, pretrial detention is not necessary and therefore impermissible. And to protect against erroneous deprivations of liberty, those substantive findings must be made in proceedings that meet robust procedural safeguards—including that deprivations of fundamental bodily liberty prior to trial be made by clear and convincing evidence. Every state and federal appellate court to consider the question has held that these principles hold true regardless of whether pretrial detention is achieved via a transparent order of detention or a *de facto* order of detention resulting from unattainable money bail.

Trial courts across this state routinely evade these legal protections, as Judge Moawad did in this case. Hansen presented the trial court with unrebutted evidence that he was unable to pay the amount required for his release. He argued in the trial court that his detention violated Oregon and federal law and requested that the court reduce the amount required for his release to an amount he can

afford to pay or release him pursuant to nonfinancial conditions and supervision. Instead, the court found the predetermined amount required by the schedule unconstitutional but still ordered Hansen jailed unless he paid an amount of money that the court acknowledged he cannot pay. After this Court issued an Alternative Writ, the trial court simply reduced security to yet another unattainable amount. At no point did the court make the findings that federal law requires before the government can detain a presumptively innocent person prior to trial.

This case, therefore, presents two questions that arise in trial courts across the state every day: First, under Oregon law, may a court lawfully order a person released, but then impose a security amount beyond their means? Second, if so, by what standard (and subject to what procedural protections) must it justify the resulting pretrial detention under federal law?

FACTS

Hansen is twenty-five years old. ER-141. He has lived in Portland since 2012 and has close family ties to the area: his wife, baby daughter, adoptive mother, and brother all live in the area, and his sister lives in Seattle, Washington. ER-36.

On October 10, 2020, Hansen was arrested and charged with two counts of criminally negligent homicide arising from a car crash during which he was alleged to have been intoxicated. ER-4. He was arraigned on October 12. That

day, the pretrial-services office conducted a release assessment, from which it determined that Hansen—who has no prior misdemeanor or felony convictions—was not high-risk enough to warrant immediate judicial review. ER-9. Thus, a $42,500 security amount, which would have required Hansen to pay $4,250 to be freed, was pre-printed on his paperwork as per the Multnomah County bail schedule.[1] ER-5. Unable to pay the cost of his release, Hansen remained in jail.

Nearly three weeks later, on October 28, Hansen was re-indicted on three additional charges arising from the same incident: misdemeanor driving under the influence and two counts of manslaughter in the second degree. ER-18–19. The security amount was increased pursuant to the predetermined schedule to $542,500, requiring Hansen to pay $54,250 in cash to secure his release. ER-19. A month into his pretrial detention, no judicial officer had made any individualized findings that he could pay this amount or that his detention was necessary because other conditions of release were insufficient to protect the community or against flight.

On November 11, Hansen filed a motion to reduce the amount of money required for his release. ER-21–35. He submitted an affidavit asserting that he has no significant savings, bank accounts, or assets; works only part-time;

[1] The Multnomah County bail schedule is set by order of the presiding judge. ER-140. It lists preset bail amounts for various charges, which a judge may deviate from "if the circumstances justify it." *Id.* Hansen's bail amount at arraignment, as well as the adjusted amount after he was re-indicted, were pre-printed as per the bail schedule. ER-5, 19.

receives food stamps each month; and was paying off a car loan when he was arrested. ER-36–38. Thus, he stated, the $542,500 security amount would be unattainable to him. ER-37. He argued that, once the State determines not to seek detention on the basis of dangerousness, Oregon law does not permit dangerousness concerns to factor into security amount determinations, nor does it permit security "to be set so as to make it impossible, as a practical matter, for a [person] to secure release." ER-24 (internal citation omitted).

If security is set at an amount greater than what the defendant can pay, Hansen argued, the security amount functions as an order of detention. And if a defendant is to be subject to pretrial detention, state and federal law impose stringent substantive and procedural requirements, none of which Hansen received. ER-22–24, 32–34, 55–57. Hansen stated that, by setting security at an amount that he could not pay, the court had impermissibly accomplished indirectly what Oregon law would not permit directly: pretrial detention without the requisite findings that it was necessary because clear and convincing evidence established that no other conditions existed to protect adequately against any danger he posed. *Id.* He requested conditional release on house arrest at his mother's house with GPS monitoring. ER-57–58.

The State's response did not address Hansen's constitutional arguments, though it did concede "[t]he prohibition against intentionally setting a security amount so high that it will be beyond reach of a defendant." ER-43. It also did

not dispute that Hansen could not pay $54,250 for his release. Instead, it argued that the security amount should not be reduced because Hansen is charged with "serious" crimes, ER-44, and "may be under enormous pressure to flee," ER-49. The State did not introduce any evidence supporting these arguments. Nor did it seek, or produce any evidence to support, Hansen's continued pretrial detention under section 43.

The trial court held a hearing on the motion on November 12. Counsel reiterated Hansen's strong family ties in Multnomah County. ER-61. Hansen's mother testified that, if Hansen were released, he would be able to live with her and volunteer alongside her at the Black Community of Portland, a local community-based organization. ER-66–67. So many of Hansen's friends and family members attended his release hearing that they had to wait in the hallway due to capacity limits. ER-58.

The State ignored Hansen's constitutional arguments and instead reiterated the alleged facts underlying the charges. It argued, primarily based on these facts, against any reduction in monetary bail. ER-70–74. The *only* evidence it offered in support of this position was a letter from one of the victims' brothers, who stated that it would be "devastating" to see Hansen released pretrial and that he considered Hansen a generalized "safety concern"—but did not explain or elaborate. ER-76–77. The State did not seek Hansen's pretrial detention, or offer any evidence to support such detention; it simply opposed his motion to reduce

the security required for his release. ER-69.

The trial court concluded that "the bail amount as currently set is unconstitutional as applied to Mr. Hans[e]n" and reset it to $350,000. ER-80. The court did not explain from where this number was derived; it acknowledged that "Hans[e]n has a limited ability to post bail," ER-78, and that $35,000 would be well outside his reach, ER-80. Importantly, the Court expressly found that Hansen "would not flee the jurisdiction." ER-80.

The Court also did not find Hansen too dangerous to release—though it did express a generalized "concern about public safety," ER-78—or purport to order Hansen detained based on dangerousness. Instead, it imposed a number of release conditions, including precisely the conditions the defense had requested (*i.e.*, house arrest and GPS monitoring), should Hansen somehow be able to secure the money required for his release. ER-81–82. Unable to pay $35,000, Hansen remained in jail.

Four months later, on March 15, 2021, after this Court issued an Order allowing Hansen's Petition for an Alternative Writ of Mandamus, ER-86, Judge Moawad held another hearing at the request of the State, ER-89. At the hearing, the State reversed course and sought Hansen's detention under ORS 135.240(4). ER-89. The State presented evidence nearly identical to what it had presented at

the November 12, 2020 hearing, at which the State had not sought detention.[2] Instead, the State relied upon *substantially the same record* to support Hansen's detention under ORS 135.240(4) that it had previously relied upon to argue for Hansen's "release" on an unaffordable security amount.[3] ER-123–28.

In contrast, the defense presented additional evidence at the March 15 hearing, including testimony from Hansen's mother, who stated that she would monitor his compliance with release conditions "on a full-time basis." ER-106–07. In particular, she testified that she had arranged with the Native American Rehabilitation Association for Hansen to receive "immediate" treatment upon release for four hours per day, to which she would drive him. ER-103–04. She stated that her house is setup with a landline via which Hansen could be GPS monitored, and that she does not keep any alcohol in the house. ER-102–04. She also testified to Hansen's lack of financial resources to pay any monetary condition of release. ER-105.

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[2] The only new evidence presented by the State at the March 15 hearing was another letter from one of the victims' families, stating—again in generalized terms, with no explanation—that "we believe it is not safe for [Hansen] to be released. . . ." ER-128.

[3] Longstanding precedent prohibits the prosecution from penalizing a criminal defendant for taking an appeal by treating the person more harshly on remand without changed circumstances. *Blackledge v. Perry*, 417 US 21, 25–29 (1974). *See also State v. Partain*, 349 Or 10, 26, 239 P3d 232 (2010) (en banc).

The following day, Judge Moawad issued an order concluding that the State had not met its burden to detain Hansen under ORS 135.240(4). ER-134–36. In particular, she wrote, "the state has not presented sufficient *evidence* to meet its burden . . . that the defendant is a danger for the purposes of ORS 135.240(4)." ER-136 (emphasis in original). Judge Moawad noted the State's failure to "call[] witnesses or submit[] as evidence the police reports . . . as opposed to asking the court to take judicial notice of an affidavit of probable cause." ER-135. Upon finding that detention could not be justified, Judge Moawad considered conditions of pretrial release under ORS 135.265(1). She again found that Hansen "has few, if any, assets that can be used to post bail." ER-136. Nevertheless, she reset the security amount required for his release at $102,500.[4] ER-137. She also ordered that, should Hansen somehow secure the money to buy his freedom, he remain under house arrest at his mother's house and submit to GPS monitoring. ER-138.

Unable to pay $10,250, Hansen remains jailed.

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[4] In her order, Judge Moawad expressed concern that Hansen would "feel some pressure to flee the jurisdiction," ER-137, though she had not been presented with *any* evidence of this fact. In fact, the State did not even purport to present any evidence about flight risk; because it sought Hansen's detention under ORS 135.240(4), it focused on dangerousness as required by the statute. Judge Moawad did not explain why she was contradicting her prior finding that Hansen is not a flight risk, find that non-monetary conditions of release would not mitigate the "some pressure," or find that pretrial detention was necessary.

ARGUMENT

In this case, the trial court has never purported to order Hansen detained. To the contrary, the trial court has explicitly held that there is insufficient evidence to detain him prior to trial under applicable Oregon law. The trial court also held that Hansen will not flee the jurisdiction. Nonetheless, Hansen remains detained, suffering from family separation and all the attendant harms of pretrial jailing,[5] solely because the trial court imposed a monetary condition of release that Hansen cannot meet. At no time has the trial court made any finding, by any evidentiary standard—let alone by clear and convincing evidence—that alternative conditions of release are not sufficient to serve the State's interests.

Oregon and federal law are clear that an unattainable condition of release that keeps a person in jail is the equivalent of an order of detention. Because the record unequivocally establishes that pretrial detention is not justified in this case, the security amount that Hansen cannot afford to pay, and that keeps him confined to a jail cell, is flagrantly illegal.

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[5] The harms of pretrial detention have been documented extensively. *See Barker v. Wingo*, 407 US 514, 532–33 (1972) ("The time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life . . . . Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."); *In re Humphrey*, __ P3d ___, 2021 WL 1134487, at *4 (Cal 2021) ("The disadvantages to remaining incarcerated pending resolution of criminal charges are immense and profound."). *See also* Paul Heaton et al, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 759–69 (2017).

I. Oregon's Constitution and Laws Have Long Protected a Fundamental Right to Bail, Which Trial Courts Across the State Routinely Violate

Oregon's pretrial-release framework, embodied in its Constitution and statutes, prioritizes release on recognizance and forbids unattainable security amounts. The state Constitution has long protected a robust right to bail: protecting individual liberty from government intrusion is so important that most presumptively innocent people (*i.e.*, those not charged with violent felonies) simply may not be detained prior to criminal conviction. To protect the public, state law provides a single, clear, limited mechanism by which people whose release poses a risk of harm may be detained. *See* Or Const Art I, § 43. Yet instead of invoking this mechanism to detain transparently, and making the findings and providing the protections that the mechanism requires, courts routinely impose unattainable security amounts to detain pretrial defendants indirectly—and in the process violate federal and state constitutional rights.

A. Oregon's Pretrial Release Framework

As a matter of history and law, the term "bail" means, and has always meant, *release* before trial. *See, e.g.*, *Armatta v. Kitzhaber*, 327 Or 250, 280, 959 P2d 49 (1998) (describing the right to bail in Article I, section 14 of the Oregon Constitution as entitling arrestees to "release"). Although the phrase "the Defendant is held on $1,000 bail" has become commonplace, it is a contradiction: As a historical matter, being "held on bail" was impossible.

The Oregon Constitution has, since its inception, protected a right to bail for all offenses other than murder or treason. *See Priest v. Pearce*, 314 Or 411, 418, 840 P2d 65 (1992) (en banc) ("The revolutionary nature of the concept of a right to bail, [was] first recognized in Massachusetts in 1641 and adopted by the people of this state when they adopted Article I, section 14, in 1857."). Over time, Oregon courts, like others across the country, came to conflate routinely "bail" with "money bail," which is the practice of requiring money for someone's pretrial release.[6] *Cf., e.g.*, *ODonnell v. Harris County*, 251 F Supp 3d 1052, 1068–71 (SD Tex 2017), *aff'd in relevant part*, 892 F3d 147 (5th Cir 2018). In 1973, Oregon "abandoned the concept of 'bail'" as it had come to be misunderstood in practice, *State ex rel Lowrey v. Merryman*, 296 Or 254, 256 n 2, 674 P2d 1173 (1984), and in its place adopted a comprehensive system of pretrial release, *see* ORS 135.230–295.

Under this system, most individuals are presumed eligible for release on their personal recognizance without any restrictions on their pretrial liberty. ORS

[6] For nearly a millennium, since the Magna Carta, pretrial bail has been "unsecured," meaning that it was not a payment required upfront but rather a promise to pay should the person not appear. It is only in relatively recent times that current practice of requiring secured money bail has come to dominate cultural understandings of the term "bail." *See generally Holland v. Rosen*, 895 F3d 272, 290 (3d Cir 2018) (discussing history of bail as "a means of achieving pretrial release from custody conditioned on adequate assurances"); U.S. Department of Justice—National Institute for Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 1 (Sept 2014), https://perma.cc/WQ6B-HK6Y.

135.245(3). If the magistrate responsible for pretrial-release decisions finds that "release of the person on personal recognizance is unwarranted, the magistrate shall impose either conditional release or security release." ORS 135.245(4). "If the magistrate . . . decides to release a defendant or to set security, the magistrate *shall* impose the *least onerous condition* reasonably likely to ensure the safety of the public and the victim and the person's later appearance." ORS 135.245(3) (emphases added).

Conditional release "means . . . release which imposes regulations on the activities and associations of the defendant." ORS 135.230(2). Typical regulations may require defendants to surrender their passports, restrict their movements to the state or even their home, check in regularly with the court, or use electronic monitoring to track their whereabouts. Security release "means a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property." ORS 135.230(12). To effect a security release, ten percent of the security-release amount, but in no event less than $25, must be deposited with the clerk of court. ORS 135.265(2). Security should be set in an "amount that will reasonably assure the defendant's appearance." ORS 135.265(1).

In 1987, this Court, in *Gillmore v. Pearce*, made three important decisions regarding security amounts. 302 Or at 574. First, this Court clarified that under the Oregon Constitution's excessive bail clause, Article I, § 16, although "the

likelihood that a particular accused person will commit further crimes if released is relevant to the decision to release the person on recognizance or conditional release, . . . this criterion . . . plays no role in setting the *amount* required for security release." *Id.* at 577 (emphasis in original) (citing *Sexson v. Merten*, 291 Or 441, 448, 631 P2d 1367 (1981) (en banc)). Second, this Court stated that "[s]ecurity amounts as a whole (not the ten per cent actually deposited) . . . are supposed to represent the least onerous amount whose possibility of loss reasonably assures the attendance at trial of the person charged." *Id.* (internal citation omitted). Third, because release statutes "shall be liberally construed to carry out the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the defendant," ORS 135.245(7), security amounts are "not to be set so as to make it impossible, *as a practical matter*, for a prisoner to secure release," *Gillmore*, 302 Or at 580 (emphasis added). The *Gillmore* decision, then, forbids security amounts that have the practical effect of detaining an individual.

Against this background, Oregon voters adopted several additional pretrial-detention measures. Measure 11, passed in 1994, would have "require[d] a trial court to deny release to a defendant accused of [certain offenses], unless the court determine[d] by clear and convincing evidence that the defendant will not commit any new crime while on release." *See State v. Sutherland*, 329 Or 359, 363, 987 P2d 501 (1999) (en banc). This Court found that Measure 11

violated Article I, section 14 of the Oregon Constitution, which provides that "'[o]ffences, except murder, and treason, shall be bailable by sufficient sureties' and thus grants most defendants accused of crimes a constitutional right to bail." *Id.* at 364–65 (citing *Priest*, 314 Or at 417). This Court's decision triggered a backup provision of Measure 11, which mandates a minimum $50,000 security amount for certain offenses. The Court allowed the backup provision to survive a facial challenge because, in some cases, a $50,000 security amount might be constitutional. But this Court simultaneously explained that this backup provision may be unconstitutional as applied in any individual case. *Id.* at 366–67. ("We hold that any defendant who wishes to make an 'as applied' challenge to the propriety of imposing the specified security release amount of $50,000 or higher . . . has a constitutional right to a hearing to address that question.").

In 2008, Oregon voters again amended the state Constitution to add, among other provisions, Article I, section 43. If a person is charged with a "violent felony"[7] other than murder or treason, section 43 allows the State to detain that person explicitly, but only if (1) "a court has determined there is probable cause to believe the criminal defendant committed the crime," and (2) "the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the

[7] A "violent felony" is defined as "a felony offense in which there was an actual or threatened serious physical injury to the victim, or a felony sexual offense." ORS 135.240(6).

criminal defendant while on release." Or Const Art I, § 43(1)(b). *See also* ORS 135.240(4)(a). By its plain terms, section 43 gives defendants robust substantive and procedural rights at a release hearing before they may be detained.[8] These rights mirror what the Due Process Clause of the federal Constitution requires and what the U.S. Supreme Court upheld in *United States v. Salerno*, 481 US 739, 751 (1987).

B. Trial Courts Across the State Depart from the Framework

Today, section 43, as implemented by ORS 135.240(4), remains the *only* constitutional exception to the longstanding right to bail for non-murder, non-treason offenses in Oregon. But in practice, trial courts have silently carved out another exception: unaffordable money bail. That is, trial courts across the state regularly avoid section 43's robust substantive and procedural protections by simply setting unattainable security amounts to detain defendants. *Gillmore*'s warning that security amounts are "not to be set so as to make it impossible . . .

[8] Section 43 has never been interpreted by this Court. In fact, this Court and the Court of Appeals have explicitly reserved interpretation of section 43, because the cases about bail presented previously—unlike this case—relied on statutes or on Article I, section 14, instead of section 43, in making their arguments. *See Rico-Villalobos v. Giusto*, 339 Or 197, 201 n 3, 118 P3d 246 (2005) ("[W]e express no opinion as to whether Article I, section 43(b) states a different standard for determining when bail may be denied."); *State v. Slight*, 301 Or App 237, 246 n 1, 456 P3d 366 (2019) ("It is an unresolved question precisely how Article I, section 14, and Article I, section 43, interact.") (citing *Rico-Villalobos*, 339 Or at 201 n 3).

for a prisoner to secure release," 302 Or at 580, is regularly and flagrantly ignored.

The result is that courts routinely violate longstanding federal law as well. "[I]n our society, liberty is the norm and detention prior to trial . . . is the carefully limited exception." *Salerno*, 481 US at 755. But pretrial detention fails to be a "carefully limited exception" if the government can evade the substantive and procedural requirements for constitutionally permissible pretrial detention simply by setting unattainable security amounts.

The legal error that Hansen presents in this case is widespread. Many trial courts in Oregon require unattainable amounts of money for security release without any finding that detention is necessary, let alone a finding by clear and convincing evidence. *See* Justice System Partners, *Multnomah County Pretrial System Assessment* at 33 (Feb 25, 2020) ("[T]he money bail system [in Multnomah County] results in poor people being detained in custody because they are poor, not because they are a danger to others or will not show up to court."). *See also id.* at 5. Indeed, more than two dozen petitions have recently been filed in this Court describing trial courts in Lane, Washington, and Multnomah counties making materially identical legal rulings to the one Hansen challenges here.

These problems are not unique to Oregon: Several state high courts have recently reviewed their state's wealth-based pretrial-detention practices to bring

them into compliance with state and federal requirements. For example, California has taken steps to address the "significant disconnect between the stringent legal protections state and federal appellate courts have required for proceedings that may result in a deprivation of liberty and what actually happens in bail proceedings in [California] criminal courts." *In re Humphrey*, 19 Cal App 5th 1006, 1014 (Cal Ct App 2018), *aff'd*, __ P3d ___, 2021 WL 1134487 (Cal 2021). So have Nevada, Massachusetts, and New Mexico. *See Valdez-Jimenez v. Eighth Judicial District Court in & for County of Clark*, 136 Nev 155, 165–66, 460 P3d 976, 987 (2020); *Brangan v. Commonwealth*, 477 Mass 691, 703, 80 NE3d 949, 961 (2017); *State v. Brown*, 338 P3d 1276, 1292 (NM Sup Ct 2014). The unconstitutional use of unattainable cash bail amounts was widespread in these states, as it is in Oregon. This Court now has an opportunity to follow suit, and to ensure that no Oregonian is jailed because she is too poor to buy her freedom.

II. Hansen's Ongoing Detention is Illegal Because Oregon Law Forbids the Setting of Unattainable Security Amounts

This Court has repeatedly and explicitly said that security amounts that preclude release as a practical matter are impermissible. *See Gillmore*, 302 Or at 580; *Owens v. Duryee*, 285 Or 75, 80, 589 P2d 1115 (1979) (en banc) ("Bail may not be set at an amount chosen in order to make it impossible, as a practical matter, for a prisoner to secure his release."). "To hold otherwise would allow

the court to do indirectly that which it cannot do directly." *Collins v. Foster*, 299 Or 90, 95, 698 P2d 953 (1985).

This makes sense in light of Oregon statutes, which provide that a "defendant *shall* be released" unless he or she is subject to explicit pretrial detention. ORS 135.240(1) (emphasis added). And it is the only way to coherently read the Oregon Constitution: If unattainable security amounts were permitted, section 43's requirement that the State prove, by clear and convincing evidence, that an individual's release would pose an immitigable risk of harm before detaining the person would be meaningless. *See, e.g.*, *State v. Hunt*, 307 Or App 71, 78, 476 P3d 530 (2020) ("In interpreting statutes, 'we assume that the legislature did not intend any portion of its enactments to be meaningless surplusage.'" (quoting *State v. Stamper*, 197 Or App 413, 418, 106 P3d 172 (2005))).

But pretrial detention without these findings and safeguards is exactly what happened in this case. Hansen presented evidence of his inability to pay the amount required for his release. ER-36–38. No one, including the State, contended that Hansen would be able to pay the money required for his release. In fact, after finding the scheduled amount "unconstitutional as applied to Mr.

Hans[e]n," the trial court nevertheless reset security at amount it explicitly found Hansen could not afford. ER-80.[9]

At the March 15 hearing, the trial court was presented with no changed evidence about Hansen's ability—or inability—to pay. It again found that Hansen "has few, if any, assets that can be used to post bail." ER-136. After refusing to order him detained or to make the findings required for his detention, it nonetheless reset security at $102,500, an amount that the record established he cannot pay. Security has therefore been set such that, as a practical matter, release is impossible. This Court's decisions, *see Gillmore*, 302 Or at 580, and the Oregon Constitution, do not allow that.

Unattainable security amounts also confuse the purpose of money bail. Under state law, an order setting an *attainable* security amount has a different purpose from an order of detention. If a defendant is not released on recognizance or on conditional release, release should be secured by an "amount that will reasonably assure the defendant's appearance." ORS 135.265(1). This, of course, assumes that the defendant will be released: If a person is not released then it is impossible for the theoretical financial incentive on which "release" is based to have any effect. "Secured release" is secured *release*, not secured detention. On

[9] It appeared to justify this decision by suggesting his friends and family "conceivably or potentially" post his bail, *id.*, though it lacked *any* evidence that those individuals had or could possibly come up with $35,000. (That Hansen remains jailed, months later, despite numerous loved ones and friends coming to court on his behalf, demonstrates that they could not.)

the other hand, state law says a defendant may be detained only if there exists clear and convincing evidence that releasing the defendant would pose a danger to the community. ORS 135.240(4)(a)(B). That is, the purpose of detention is to ensure community safety, while the purpose of attainable security amounts is reasonably securing appearance. Setting *unattainable* security amounts obliterates this distinction.

Judge Moawad's decision evinces precisely this confusion. Faced with overwhelming and uncontroverted evidence of Hansen's family and community ties, indigence, and sufficient alternative conditions like house arrest with GPS monitoring, she found that Hansen "would not flee the jurisdiction." ER-80. This fact alone establishes that security would not be necessary to "reasonably assure [Hansen's] appearance." ORS 135.265(1). But then, apparently motivated by a generalized "concern about public safety," ER-78—Judge Moawad did not specify why exactly she thought Hansen would be too dangerous to release, or explain why other conditions such as house arrest or GPS monitoring could not mitigate her concerns—she set a security amount that she explicitly found Hansen cannot pay, twice, ER-80, 136. Thus, Judge Moawad's decision runs afoul of two of *Gillmore*'s commands: that security not, as a practical matter, be set as to preclude release, and that "the likelihood that a particular accused person will commit further crimes if released . . . play[] no role in setting the *amount*

required for security release." *Gillmore*, 302 Or at 577 (emphasis in *Gillmore*) (internal citation omitted).

III. Hansen's Unattainable Money Bail is Unconstitutional Because Detention Has Not Been Justified Under the Oregon or U.S. Constitutions

An unattainable condition of pretrial release is an order of pretrial detention. And Oregon law forbids pretrial detention without clear and convincing evidence that release would pose an immitigable risk to public safety. Similarly, the federal Constitution requires that orders of detention satisfy exacting substantive and procedural standards. Those standards were not satisfied here.

A. Setting an Unattainable Security Amount is Tantamount to Ordering Pretrial Detention

Unattainable money bail "is simply a less honest method of unlawfully denying bail altogether." *Brown*, 338 P3d at 1292. If the state requires a money-bail amount that a person cannot afford to pay, it has entered "the functional equivalent of an order for pretrial detention." *Brangan*, 477 Mass at 705, 80 NE3d at 963. Although styled as a "release order," an order requiring an unattainable monetary obligation as a condition of release is "tantamount to setting no conditions at all" that would result in the defendant's release. *United States v. Leathers*, 412 F2d 169, 171 (DC Cir 1969) (per curiam). As this Court has explained, "[t]o hold otherwise would allow the court to do indirectly that which it cannot do directly." *Collins*, 299 Or at 95.

Courts across the country agree. *See United States v. Mantecon-Zayas*, 949 F2d 548, 550 (1st Cir 1991) (per curiam); *United States v. McConnell*, 842 F2d 105, 110 (5th Cir 1988); *Caliste v. Cantrell*, 329 F Supp 3d 296, 311 (ED La 2018), *aff'd* 937 F3d 525 (5th Cir 2019); *Humphrey*, 2021 WL 1134487, at *7; *Valdez-Jimenez*, 136 Nev at 165, 460 P3d at 987; *Brown*, 338 P3d at 1292. And it is easy to understand why. From the perspective of someone who cannot pay it, an unattainable money-bail order is equivalent to an order that he be released if he runs a mile in less than a minute: Both orders impose release conditions that are impossible to meet, and are therefore equivalent to imposing no release conditions at all.

Accordingly, these courts have held that, because an order requiring an unattainable monetary condition is an order of pretrial detention, an order requiring unaffordable money bail is constitutionally permissible only where a pretrial-detention order would be constitutionally permissible. *See, e.g.*, *Valdez-Jimenez*, 136 Nev at 165, 460 P3d at 987 ("[W]hen bail is set in an amount that results in continued detention, it functions as a detention order, and accordingly is subject to the same due process requirements applicable to a deprivation of liberty."). In these circumstances, the trial court's "insist[ence] on terms in a 'release' order that will cause the defendant to be detained pending trial . . . must satisfy the procedural requirements for a valid detention order." *Mantecon-Zayas*, 949 F2d at 550 (emphasis omitted). Specifically, a court's decision

requiring unaffordable money bail "must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty." *Brangan*, 477 Mass at 705, 80 NE3d at 963.

B. Oregon Law Forbids Detention Without a Finding by Clear and Convincing Evidence that Release Would Pose a Risk to Public Safety

The Oregon Constitution and laws forbid pretrial detention without clear and convincing evidence that release would pose an immitigable risk to public safety. Article I, section 43 of the Oregon Constitution, as implemented by ORS 135.240, entitles a defendant charged with a pretrial detention–eligible offense to a hearing at which the court is to consider whether there is probable cause that the defendant committed the crime charged, ORS 135.240(4)(a)(A), and whether there is "clear and convincing evidence[] that there is a danger of physical injury or sexual victimization to the victim or members of the public" if the defendant is released, ORS 135.240(4)(a)(B). The state bears the burden of producing evidence at the hearing. ORS 135.240(4)(c). Unless the court makes these findings, the "defendant shall be released." ORS 135.240(1). Section 43, as implemented by ORS 135.240, is the *only* written exception to this state's longstanding right to bail for non-murder, non-treason offenses.

The question presented here is whether trial courts may circumvent these explicit substantive and procedural requirements by setting unattainable security amounts. This case illustrates why they may not.

In Hansen's case, none of these substantive and procedural requirements were met. Indeed, at the hearing the trial court held following this Court's Alternative Writ, the trial court expressly found that the State had *not* met its evidentiary burden to detain Hansen under ORS 135.240(4). The trial court therefore found that Hansen should be released and set nonfinancial conditions of release that would mitigate any risk of public safety. The court then inexplicably contravened its own finding that detention was unjustified by imposing a financial condition of release that is strictly impossible for Hansen to meet. That is, Judge Moawad determined that the State had not satisfied the standard that section 43 mandates govern pretrial detention—but detained him nonetheless. Hansen is thus being detained in violation of this state's Constitution and laws.

C. Federal Constitutional Law Also Requires Robust Substantive and Procedural Protections Before a Court May Enter an Order of Detention

"[I]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *Salerno*, 481 US at 755. Thus, "[t]he Supreme Court has long recognized constitutional limits on pretrial detention." *Lopez-Valenzuela v. Arpaio*, 770 F3d 772, 779 (9th Cir 2014) (en banc). To satisfy the Due Process and Equal Protection Clauses of the U.S. Constitution, pretrial detention of a presumptively innocent person must be necessary to serve a compelling government interest. And to protect against the erroneous deprivation

of fundamental liberty interests, a court must find by clear and convincing evidence that the detention is necessary. These federal constitutional mandates mirror the Oregon law requirements, discussed above, that detention may be justified only upon clear and convincing findings that the defendant is a risk to public safety. Hansen is therefore being detained in violation of both the Oregon and U.S. Constitutions.

1. The U.S. Constitution Protects Substantive Rights Against Wealth-Based Detention and to Pretrial Liberty

Two lines of federal constitutional precedent strictly limit pretrial detention. First, equal protection and due process forbid jailing a person solely because of her inability to make a payment. *Bearden v. Georgia*, 461 US 660, 665 (1983); *Tate v. Short*, 401 US 395, 398 (1971); *Williams v. Illinois*, 399 US 235, 244 (1970); *Frazier v. Jordan*, 457 F2d 726, 728 (5th Cir 1972); *ODonnell*, 892 F3d at 161. As the Fifth Circuit has explained, bail-setting practices where "poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond" create a "basic injustice" that infringes the right against wealth-based detention. *ODonnell*, 892 F3d at 162. "[I]n the case of an indigent[] whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would [be unconstitutional]." *Pugh v. Rainwater*, 572 F2d 1053, 1058 (5th Cir 1978) (en banc).

Second, the Due Process Clause protects a "fundamental" interest in pretrial liberty. *See, e.g.*, *Salerno*, 481 US at 750 (recognizing the "importance and fundamental nature" of "the individual's strong interest in liberty").[10] "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 US 71, 80 (1992) (internal citation omitted). *See also Zadvydas v. Davis*, 533 US 678, 690 (2001); *Reno v. Flores*, 507 US 292, 302 (1993) (explaining that *Salerno* concerned "fundamental liberty interests" (internal citation and quotations omitted)). "[A]n indigent defendant's loss of personal liberty through imprisonment" falls squarely within the protection of the Due Process Clause. *Turner v. Rogers*, 564 US 431, 445 (2011) (citing *Foucha*, 504 US at 80). As the Ninth Circuit recently explained, the Due Process Clause "prohibits our government from discriminating against the poor in providing access to fundamental rights, including the freedom from physical restraints on individual liberty." *Hernandez v. Sessions*, 872 F3d 976, 981 (9th Cir 2017) (discussing "the age-old problem of providing equal justice for poor and rich, weak and powerful alike").

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[10] *See also Lopez-Valenzuela*, 770 F3d at 780 (recognizing the "fundamental" right to pretrial liberty); *Buffin v. City & County of San Francisco*, No. 15-cv-4959, 2018 WL 424362, at *6 (ND Cal Jan 16, 2018) (holding that pretrial detention "implicates plaintiffs' fundamental right to liberty"); *Humphrey*, 2021 WL 1134487, at *6 (same); *Brangan*, 477 Mass at 703, 80 NE3d at 961 (same).

2. These Rights Require Substantive Findings that Pretrial Detention is Necessary to Serve a Compelling Government Interest Before Unattainable Money Bail May Be Imposed

These two constitutional rights—the fundamental right to pretrial liberty and the right against wealth-based detention—may not be curtailed unless the government demonstrates that pretrial detention is necessary to serve a compelling interest. This principle holds true regardless of whether pretrial detention is achieved via a transparent order of detention or a *de facto* order of detention resulting from unattainable money bail. *See, e.g.*, *Valdez-Jimenez*, 136 Nev at 165, 460 P3d at 987. It follows that if the government's interest in court appearance could reasonably be assured by alternative conditions of release, then pretrial detention from unattainable money bail is unconstitutional. *Humphrey*, 19 Cal App 5th at 1058. Put differently, the amount of the monetary condition must "not be in an amount greater than necessary," *Valdez-Jimenez*, 136 Nev at 162, 460 P3d at 984, "to further the State's compelling interests in bail," *id.* at 163, 460 P3d at 985. *See also Brangan*, 477 Mass at 703, 80 NE3d at 961.

i. Pretrial Liberty

A person's due process "interest in liberty" is "fundamental." *Salerno*, 481 US at 750. Thus, the government may deprive a person of her pretrial liberty only if its interest is sufficiently compelling and the deprivation is narrowly tailored to serve that interest—*i.e.*, detention is necessary because alternatives are inadequate. *Id.* at 749. The government may not infringe "'fundamental' liberty

interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 US 702, 721 (1997).

State and federal courts across the country have repeatedly articulated this principle. *See, e.g.*, *Lopez-Valenzuela*, 770 F.3d at 779 (applying strict scrutiny to pretrial detention because it is a "fundamental liberty interest"); *ODonnell*, 251 F Supp 3d at 1156–57 (holding that government action infringing pretrial liberty must be the least restrictive means necessary to promote court appearance and community safety); *Reem v. Hennessy*, No. 17-cv-6628, 2017 WL 6765247, at *1 (ND Cal Nov 29, 2017) ("The due process clauses of the Fifth and Fourteenth Amendments bar pretrial detention unless detention is necessary to serve a compelling government interest."); *Humphrey*, 19 Cal App 5th at 1028, 1037 (holding that a person may be detained only if "no less restrictive alternative will satisfy" the government's interests because pretrial detention is permissible "only to the degree necessary to serve a compelling governmental interest"); *Brangan*, 477 Mass at 704, 80 NE3d at 962 (holding that pretrial detention is permissible if "such detention is demonstrably necessary" to meet a compelling interest).

ii. Wealth-Based Detention

Government action that infringes the right against wealth-based detention must likewise be necessary to serve a compelling government interest. In *Frazier*, the Fifth Circuit struck down as unconstitutional a policy which required indigent

persons to be jailed if they did not pay a fine because the alternative jail term was not "necessary to promote a compelling governmental interest." 457 F2d at 728 (internal quotations omitted). The *Frazier* Court explained that there were "far less onerous alternatives" that would satisfy the "state's interest in collecting its fine revenue." *Id.*; *see id.* at 729–30 (reviewing adequate available alternatives). Similarly, in *Bearden*, the Supreme Court required "careful inquiry" into the state's asserted interests and "the existence of alternative means for effectuating" those interests. 461 US at 666, 667; *id.* at 672 ("Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation . . . may the State imprison a probationer[.]").

What these cases recognize is that incarcerating a person because of their inability to pay a particular amount of money, when a similarly situated individual with money would go free, amounts to "little more than punishing a person for his poverty." *Bearden*, 461 US at 671. That violates both equal protection and substantive due process unless the government establishes that the incarceration is necessary to further a compelling government interest. *See id.* at 666; *Frazier*, 457 F2d at 728.

These constitutional principles compel the conclusion that pretrial detention solely because an accused person is unable to afford a monetary condition of release is unconstitutional unless the unattainable monetary

condition is necessary to satisfy the State's compelling interests in public safety[11] and court appearance. *See ODonnell*, 251 F Supp 3d at 1140; *Humphrey*, 2021 WL 1134487, at *9; *Valdez-Jimenez*, 136 Nev at 161–63, 460 P3d at 984 – 88; *Brangan*, 477 Mass at 703–04, 80 NE3d at 961–62.[12]

[11] Imposing money bail may rarely be justified relative to concerns about community safety because "[m]oney bail . . . has no logical connection to protection of the public, as bail is not forfeited upon commission of additional crimes. Money bail will protect the public only as an incidental effect of the defendant being detained due to his or her inability to pay, and this effect will not consistently serve a protective purpose, as a wealthy defendant will be released despite his or her dangerousness while an indigent defendant who poses minimal risk of harm to others will be jailed." *Humphrey*, 19 Cal App 5th at 1029; *ODonnell*, 251 F Supp 3d at 1109–10. Oregon law recognizes that money bail must be justified relative to concerns of court appearance. *See* ORS 135.265(1) ("[T]he magistrate shall set a security amount that will reasonably assure the defendant's appearance."); *Gillmore*, 302 Or at 579 ("The sole criterion to be considered in establishing the amount of security is the reasonable assurance of appearance by defendant for trial.").

[12] Only one federal court has addressed any of the federal issues presented in the context of a case arising out of Oregon. *See Rasmussen v. Garrett*, No. 20-cv-865, 2020 WL 5752334 (D Or Sept 27, 2020) (Immergut, J.). Judge Immergut's opinion in *Rasmussen* is not a model of clarity, but it appeared to allow a state trial court to avoid the substantive and procedural requirements for an order of pretrial detention simply by styling that order as one for "release" conditional on paying an amount of money that is unattainable to the defendant. To undersigned counsel's knowledge, if that was the court's holding, it is the first to issue such a ruling; every other federal and state appellate court and federal district court to consider the question has come to the opposite conclusion. Judge Immergut concluded that the petitioners had received "all the process to which they were entitled," *id.* at *25, but did not explain how the due process standard had been satisfied—or not—in the petitioners' cases. Notably, the *Rasmussen* Court did not address state law.

3. The Finding That Detention Is Necessary Must Be Made By Clear and Convincing Evidence

The federal Constitution, like Oregon law, requires that these findings—that detention via unattainable money bail is necessary to further the government's compelling interests, and that no alternative non-monetary conditions will suffice—be made by clear and convincing evidence. As the Supreme Court explained in *Addington v. Texas*, 441 US 418 (1979), the deprivation of the fundamental right to bodily liberty requires a heightened standard of proof beyond a mere preponderance to ensure the accuracy of the decision, *id.* at 432–33.

Addington held that the Due Process Clause requires that the standard of proof required before confining a person for mental illness based on the possibility of future dangerousness must be "equal to or greater than" the "clear and convincing" evidentiary standard. *Id.* at 433. Applying the *Mathews v. Eldridge* balancing test, the Court weighed the government's interest in protecting the community against the important private interest in bodily liberty, and concluded that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id*. at 427. "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Id.* The

"clear and convincing" standard enables the government to achieve its interest when it has a convincing basis, but simultaneously and rigorously protects the fundamental individual rights at stake. *See id.* at 424.

Since *Addington*, the Supreme Court has never permitted application of a standard lower than clear and convincing evidence in any context in which bodily liberty is at stake. *See Santosky v. Kramer*, 455 US 745, 756 (1982) ("This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" (quoting *Addington*, 441 US at 424)); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 US 261, 282–83 (1990) (explaining that the Court has required the clear and convincing evidence standard for deportation, denaturalization, civil commitment, termination of parental rights, allegations of civil fraud, and in a variety of other civil cases implicating important interests); *Foucha*, 504 US at 85–86. The Courts of Appeals have followed suit. *See, e.g.*, *Velasco Lopez v. Decker*, 978 F3d 842, 855–56 (2d Cir 2020); *Singh v. Holder*, 638 F3d 1196, 1203–04 (9th Cir 2011).

State courts, interpreting these cases alongside *Salerno*, have consistently required clear and convincing evidence to justify detaining a person prior to trial. Most recently, in *Humphrey*, the California Supreme Court held under the federal Constitution that an arrested person may be detained "only if [the trial court] first

finds, by clear and convincing evidence, that no nonfinancial condition of release can reasonably protect" the government's interests. *Humphrey*, 2021 WL 1134487, at *9. Similarly, the Nevada Supreme Court held that given the "important nature of the liberty interest at stake, the State has the burden of proving by clear and convincing evidence that no less restrictive alternative will satisfy its interests in ensuring the defendant's presence and the community's safety." *Valdez-Jimenez*, 136 Nev at 166, 460 P3d at 987 (citing *Foucha*, 504 US at 81, *Santosky*, 455 US at 756, and *Addington*, 441 US at 424). In *Caliste v. Cantrell*, the district court held that the Due Process Clause requires that the government prove by clear and convincing evidence that pretrial detention is necessary to mitigate a risk of flight, due to the "vital importance of the individual's interest in pretrial liberty recognized by the Supreme Court." 329 F Supp 3d at 313.[13]

[13] Many other state courts have held that the clear-and-convincing-evidence standard applies. *See, e.g.*, *State v. Ingram*, 230 NJ 190, 202, 204–05, 165 A3d 797, 803–05 (2017); *State v. Butler*, No. 2011-K-0879, 2011 WL 12678268, at *1 (La App 4th Cir July 28, 2011), *writ not considered*, 75 So 3d 442 (La. 2011); *Wheeler v. State*, 160 Md App 566, 579, 864 A2d 1058, 1065 (2005); *Brill v. Gurich*, 965 P2d 404, 409 (Okla Crim App 1998), *as corrected* (Sept 23, 1998); *Lynch v. United States*, 557 A2d 580, 581 (DC 1989) (en banc). *Compare Aime v. Commonwealth*, 414 Mass 667, 678–83, 611 NE2d 204, 211–14 (1993), *superseded on other grounds by Commonwealth v. Diggs*, 475 Mass 79, 85, 54 NE3d 1115 (2016) (striking down preventive detention statute because it did not require the "clear and convincing" burden of proof), *with Mendonza v. Commonwealth*, 423 Mass 771, 782–83, 673 NE2d 22, 30 (1996) (upholding successor statute and holding that "clear and convincing" evidence standard is required for pretrial detention decisions based on a prediction of future dangerousness).

A clear-and-convincing-evidence standard of proof is required for determinations of flight risk and dangerousness alike. "A defendant's liberty interest is no less—and thus requires no less protection—when the risk of his or her flight, rather than danger, is the basis for justifying detention without right to bail." *See Kleinbart v. United States*, 604 A2d 861, 870 (DC 1992). This holding in *Kleinbart* was based in part on "*Salerno*'s emphasis on the clear and convincing evidence standard to sustain the constitutionality of [the] statute [at issue]." *Id*. The American Bar Association's Criminal Justice Standards on Pretrial Release are consistent with this view.[14] And this principle makes particular sense when detention is in practice effected via unattainable money bail, given the divergent purposes of detention and money bail. *Compare, e.g.*, ORS 135.265(1) (explaining that money bail should be set to minimize flight risk), *with* ORS 135.240(4)(a)(B) (explaining that detention should only be ordered to protect the community).

4. Hansen's Ongoing Detention Violates the U.S. Constitution Because Findings Detention is Necessary Were Not Made

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[14] Standard 10-5.8(a) explains that the "clear and convincing" standard applies to decisions relating to dangerousness and risk of flight. Standards for Criminal Justice: Pretrial Release § 10-5.8(a) (Am Bar Ass'n 2007). Courts have long looked to the Standards for guidance when answering constitutional questions about the appropriate balance between individual rights and public safety in the field of criminal justice. *See, e.g.*, *Padilla v. Kentucky*, 559 US 356, 367 (2010); *Strickland v. Washington*, 466 US 668, 688–89 (1984).

In order to justify Hansen's pretrial detention under the U.S. Constitution, then, the trial court would have had to find, by clear and convincing evidence, that his detention is necessary to serve a compelling state interest, *i.e.*, to guard against dangerousness or flight. No part of this standard was met.

The trial court did not hear any evidence that Hansen was a flight risk. In fact, it found the opposite: that the "probability of Mr. Hansen appearing at trial" was "very good," and that "he would not flee the jurisdiction." ER-80.[15] Nor did the court find that Hansen was too dangerous to release. Neither the trial court nor the State even mentioned the burden of proof. The trial court also did not find that detention, via unattainable money bail or otherwise, was necessary. To the contrary, it assessed and ordered release conditions, *i.e.*, sufficient, less restrictive alternatives. ER-84, 138.

Had the State sought Hansen's detention, the trial court would have had to find, by clear and convincing evidence, that Hansen was too dangerous to release. But because the court instead relied on an unattainable security amount, it

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[15] In her March 16 Order, Judge Moawad expressed concern that Hansen would "feel some pressure to flee the jurisdiction," ER-137, though she had not been presented with *any* evidence of this fact and had previously concluded on substantially the same record that he would not flee. In fact, at the remand hearing, the State did not purport to present any evidence about flight risk; because it newly sought Hansen's detention under ORS 135.240(4), it focused on dangerousness as required by the statute. In any event, despite this vague expression of concern, Judge Moawad did not contradict her earlier finding that Hansen would not flee, which was based on the uncontroverted and overwhelming evidentiary record. Nor does Oregon law permit detention on the basis of flight risk.

believed that it was not required to make these findings. That is incorrect, and the consequence is that Hansen is detained in violation of the state and federal Constitutions. This Court should intervene to correct this grave, yet unfortunately widespread, error.

IV. This Court Will Have Jurisdiction to Rule on These Issues Even If Hansen Is Tried or Released Before This Court Reaches Final Judgment

Even if this case proceeds to judgment in the trial court, or Hansen is released pretrial, before this Court has rendered its judgment, this Court may retain jurisdiction to hear the matter because it is capable of repetition, yet evading review. Unlike federal mootness doctrine, which requires that the claimant show that the challenged action is capable of repetition to *her*, *see Murphy v. Hunt*, 455 US 478, 484 (1982), Oregon law—like the law of many other states—affords this Court far more discretion to hear important matters that may become moot. Oregon law requires only that a person show that the challenged action is capable of repetition to *someone* in a similar position. And so, because the constitutional issues in this case will affect tens of thousands future detained individuals, and because the issues would otherwise almost certainly evade this Court's review because of the temporary nature of pretrial detention, the case will remain justiciable. *Cf. Humphrey*, 2021 WL 1134487, at *4 n 2 (reviewing constitutionality of state bail practices though petitioner was

no longer detained pretrial); *Valdez-Jimenez*, 136 Nev at 158–61, 460 P3d at 981–83 (same).

In *Couey v. Atkins*, 357 Or 460, 355 P3d 866 (2015) (en banc), this Court considered whether a statute, ORS 14.175, that explicitly authorized Oregon courts to hear cases that are capable of repetition yet evading review violated the Oregon Constitution by impermissibly granting the courts non-judicial power, *id.* at 502. This Court held that the Oregon Constitution does not limit the Court's power to hear technically moot cases, overruling *Yancy v. Shatzer*, 337 Or 345, 97 P3d 1161 (2004) (en banc), which had made Oregon the only state whose courts refused to hear cases that were capable of repetition yet evading review. In doing so, the *Couey* court made clear that Oregon mootness law is more permissive than federal mootness law. Federal mootness cases, the Court noted, "[a]re expressly based on the text of Article III, which limits the exercise of judicial power to 'cases' or 'controversies.'" *Couey*, 357 Or at 502. "Oregon's constitution—like nearly all state constitutions—does not include that textual limitation on the exercise of judicial power. Rather, it is well settled that state judicial power, unencumbered by a case-or-controversy limitation, is 'plenary.'" *Id.* (internal citations omitted). For that reason, Oregon courts can hear cases that federal courts cannot.

In overruling *Yancy*, *Couey*—relying as it did on the history of mootness doctrine in the state and federal courts, *id.* at 487—effectively revived pre-*Yancy*

mootness cases. Those cases make clear that Oregon courts may hear issues that are capable of repetition yet evading review regardless of whether the repetition threatens the claimant herself. *See Linklater v. Nyberg,* 234 Or 117, 120, 380 P2d 631 (1963) (hearing case that may be moot because "there is a question here of sufficient general public interest to warrant its consideration and decision" without any evidence or discussion of whether issue would recur to claimant)*, overruled by Yancy,* 337 Or 345; *Stowe v. Sch. Dist. No. 8-C, Malheur County*, 240 Or 526, 528, 402 P2d 740 (1965) (same), *overruled by Yancy*, 337 Or 345. This is in line with how courts across the country treat this issue. *See, e.g.*, *Valdez-Jimenez*, 136 Nev at 158–59, 460 P3d at 981–82.[16] This case is, therefore, capable of repetition.

And it will evade this Court's review. First, pretrial detention can be terminated at any time by the adverse party to a mandamus action in this Court. So even if it were true—which it is not—that cases *could* remain live long enough for this Court to review them in the *ordinary* course, their unpredictability alone

[16] *See also State v. Wein*, 244 Ariz 22, 26, 417 P3d 787, 791 (2018), *cert. denied sub nom. Arizona v. Goodman*, 139 S Ct 917 (2019); *State v. Segura*, 321 P3d 140, 146 (NM Ct App 2014), *overruled on other grounds by State v. Ameer*, 458 P3d 390 (NM Sup Ct 2018); *State v. LeDoux*, 770 NW2d 504, 511 (Minn 2009); *Smith v. Leis*, 106 Ohio St 3d 309, 311–12, 835 NE2d 5, 8–9 (2005); *Ex parte D.W.C.*, 1 SW3d 896, 896 (Tex Ct App 1999); *State v. Orlik*, 226 Wis 2d 527, 529, 595 NW2d 468, 470 (Wis Ct App 1999); *State v. Washoe County Public Defender*, 105 Nev 299, 301, 775 P2d 217, 218 (1989); *Mallery v. Lewis*, 106 Idaho 227, 234, 678 P2d 19, 26 (1983); *United States v. Edwards*, 430 A2d 1321, 1324 n 2 (DC 1981); *Wickham v. Fisher*, 629 P2d 896, 899 (Utah 1981).

is sufficient to qualify them as evading review. *Cf. Gerstein v. Pugh*, 420 US 103, 110 n 11 (1975) (holding that claims challenging pretrial detention are inherently transitory because "[t]he length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance"). Second, cases challenging pretrial detention are unlikely to remain pending long enough for this Court to review them. For one thing, the pressure to plead guilty increases when a defendant is detained, making it unlikely that cases of pretrial detention remain technically non-moot for the extended period of time necessary to ensure this Court's review. This is true in part because illegal pretrial detention—which this case challenges—all but forces people to plead guilty just to get home. *See, e.g.*, *ODonnell*, 251 F Supp 3d at 1107. This case will be justiciable even if it becomes technically moot.

CONCLUSION

Michael Hansen is sleeping in a jail cell tonight because he does not have $10,250 to buy his freedom. Hansen asks this Court to recognize that an unattainable security amount is an order of detention, and, because the trial court has already determined that detention is not authorized in this case, release Hansen on non-monetary pretrial conditions.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 11,240 words.

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CERTIFICATE OF SERVICE

I hereby certify that I served the *Opening Brief* and *Excerpts of Record* on the following persons using the court's electronic filing system:

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I further certify that I served the trial court by first class mail, postage prepaid to:

The Honorable Heidi M. Moawad
1200 SW First Avenue
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I further certify that I filed it on the Administrator by eFiling.

April 1, 2020.

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