IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TENNESSEE

JUST CITY, INC., and class representatives **DEANGELO TOWNES** and **MARSHAWN BARNES**, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FLOYD BONNER, JR., Shelby County Sheriff;

LEE WILSON, Presiding Shelby County General Sessions Criminal Court Judge; and

JOHN MARSHALL, ROBERT BARBER, RHONDA HARRIS, KEVIN REED, CHRISTOPHER INGRAM, SHAYLA PURIFOY, ROSS SAMPSON, SERENA GRAY, TERITA HEWLETT, MISCHELLE BEST, KENYA SMITH, ZAYID SALEEM, KATHY KIRK JOHNSON, LESLIE MOZINGO, Shelby County Judicial Commissioners, in their official capacities,

Defendants,

STATE OF TENNESSEE,

Intervenor.

No. 2:24-cv-02540

Judge Parker
Magistrate Judge Pham

STATE OF TENNESSEE'S MEMORANDUM OF LAW IN SUPPORT OF THE CONSTITUTIONALITY OF TENN. CODE ANN. § 40-11-118(b)(2)

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INTRODUCTION

The State of Tennessee has intervened in this case for the limited purpose of defending the constitutionality of Tenn. Code Ann. § 40-11-118(b)(2), as amended in 2024, which Just City and the other plaintiffs have challenged on due-process and equal-protection grounds. Plaintiffs' claims amount to a contention that the Fourteenth Amendment to the United States Constitution demands that Tennessee courts release criminal defendants for whom bail has been set whenever they are unable to pay the bail. It does not.

Tennessee's legislature has instructed magistrates to engage in two individualized assessments when making release decisions. First, the magistrate must determine "the least restrictive conditions of release that will reasonably ensure" the defendant's appearance and the public's safety. Tenn. Code Ann. § 40-11-115(b). Then, if a necessary condition includes monetary bail, the magistrate must set bail "as low as . . . necessary" to serve those two interests. *Id.* § 40-11-118(a)(2). In making that determination, the magistrate must consider individualized factors like the defendant's criminal history, family and residential ties to the community, prior appearance history, and financial condition. *Id.* § 40-11-11(b). Under the amendment Plaintiffs challenge, the defendant's "ability to pay" may not be considered. *Id.* § 40-11-118(b)(2). The defendant may participate in—and immediately appeal—a magistrate's evaluation of those factors. Tenn. R. App. P. 8.

Plaintiffs' claims are unavailing. The Constitution does not require consideration of a defendant's ability to pay the amount of bail set; the 2024 amendment therefore does not violate Plaintiffs' procedural-due-process or equal-protection rights; nor is it unconstitutionally vague. This Court should therefore uphold the constitutionality of the Tenn. Code Ann. § 40-11-118(b)(2).

BACKGROUND

Tennessee's bail framework rests on three bedrock principles: (1) bail ensures the safety of the community and the appearance of the defendant; (2) any bail conditions must be the least restrictive necessary to meet those core purposes; and (3) judges must make individualized bail decisions by weighing statutory factors. *See* Tenn. Code Ann. §§ 40-11-102, -115, -118. In 2022, Shelby County, through an agreement with Plaintiff Just City that resulted in a Standing Bail Order (SBO), began requiring both the use of an Affordable Bail Calculator and the setting of bail at an "affordable" amount. In 2024, the Tennessee legislature enacted amendments to the bail statutes requiring prioritization and consideration of the safety of the community; it also enacted an amendment—the amendment Plaintiffs now challenge—prohibiting consideration of a defendant's ability to pay when setting the amount of bail.

A. Tennessee's Bail Statutes

All defendants charged with non-capital offenses in Tennessee are bailable by "sufficient sureties." Tenn. Const. art. I, § 15. Tennessee law establishes a sequential process for magistrates[1] to follow when determining the least restrictive release terms that will ensure the safety of the community and the appearance of the defendant. *See* Tenn. Code Ann. §§ 40-11-101 to -118.

Magistrates must consider release options in ascending order of restrictiveness, starting with release on personal recognizance, then release on unsecured bond, and culminating in release on conditions, including the deposit of bail. Tenn. Code Ann. § 40-11-115(a). In making the recognizance-versus-bail decision, Tennessee law requires judicial officers to "give first consideration to ensuring the safety of the community." *Id.* § 40-11-115(a)(2). After that, the

[1] For simplicity, this brief refers to individuals that have authority to determine release conditions and set bail as "magistrates." *Cf.* Tenn. Code Ann. §§ 40-11-104, -105 (addressing the power of magistrates, judges, and clerks in this context).

magistrate must consider the defendant's "financial resources" and risk assessment. *Id.* § 40-11-115(b). He can also consider seven factors ranging from the defendant's ties to the community to his prior criminal record. *Id.* If the magistrate determines that release is warranted, he must only impose "the least restrictive conditions of release that will reasonably ensure" community safety and the defendant's appearance at trial. *Id.*

If the magistrate determines that "release on recognizance or with [non-monetary] conditions will not reasonably ensure the safety of the community and the appearance of the defendant," he must set a secured monetary bail amount. *Id.* § 40-11-117. The bail amount must be set "as low as the court determines is necessary" to achieve those two goals. *Id.* § 40-11-118(a)(2). That determination requires the magistrate to individually assess each defendant on factors including:

(1) "length of residence in the community";

(2) "employment status and history and financial condition";

(3) "family ties and relationships";

(4) "reputation, character and mental condition";

(5) "prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings";

(6) "nature of the offense and the apparent probability of conviction and the likely sentence"; and

(7) "the identity of responsible members of the community who will vouch for the defendant's reliability"; among others.

Id. § 40-11-118(b).

B. The Standing Bail Order

Catalyzed by an agreement with Plaintiff Just City, as well as Black Lives Matter Memphis Chapter, the ACLU, and others, Shelby County implemented a standing bail order ("SBO") that altered the statutory bail procedures. *See* June 9, 2022 MOU, ECF 119-6 at 1320.[2] As pertinent here, the agreement included five key provisions. First, Shelby County magistrates had to set an affordable bail amount, defined as an estimate of the amount a defendant could pay within 24 hours without borrowing money, absent an intent to detain. SBO, ECF 119-5, Page ID# 1313, 1316. Second, it delegated the determination of an affordable bail amount to an Affordable Bail Calculator developed by a third party and reliant on information provided by the defendant. *Id.* at Page ID# 1313–14; ECF 119-7 at 1350–51; Llana Greer Deposition, ECF 119-8 at 1418–21. Third, it prohibited magistrates from justifying a decision to impose conditions, including the setting of a bail amount, solely on any one statutory factor. *Id.* at Page ID# 1316. Fourth, it raised the standard for evidence warranting detention to "clear and convincing." ECF 119-5, Page ID# 1316.[3] Fifth, when a defendant was not released within 72 hours from the setting of an "affordable" bail, the SBO required magistrates to lower the bail amount or change the conditions. ECF119-5 at 1317.

C. 2024 Amendments to Tennessee Bail Laws

In 2024, the Tennessee General Assembly amended the bail laws in two ways important to this case. First, it amended the bail law to require magistrates to prioritize the "safety of the community" when determining whether to release a defendant with a recognizance bond, an unsecured bond, or with conditions such as the deposit of bail. *See* 2024 Tenn. Pub. Acts, ch. 612,

[2] Pincites refer to the PageID# in the Electronic Case Filing (ECF) system.

[3] Tennessee law requires a preponderance of the evidence. *See State v. Burgins*, 464 S.W.3d 298, 310 (Tenn. 2015).

§ 1 (amending Tenn. Code Ann. § 40-11-115(a)) (attached as exhibit 1). That legislation also added the "safety of the community" language to other bail statutes. *See id.* §§ 3-6 (amending Tenn. Code Ann. §§ 40-11-116(a), (b)(3), -117, and -118(a)(2)); *see also id.* § 6 ("Bail must be set as low as the court determines is necessary to reasonably ensure the safety of the community and the appearance of the defendant as required.").[4]

The legislature also amended the bail law to prohibit consideration of a defendant's "ability to pay"—without eliminating the requirement that magistrates consider the defendant's "financial condition" (or "employment status and history") when setting a bail amount. 2024 Tenn. Pub. Acts, ch. 869, § 1 (amending Tenn. Code Ann. § 40-11-118(b)(2)) ("Amended Bail Law").

D. Parties and Posture

Just City is a "mission-driven nonprofit organization" that "operates a charitable bail fund" to further its goal of reducing income discrimination. First Am. Class Action Compl., ECF 75-2, ¶ 10. It "pays the full cash bail amount . . . for indigent arrestees who cannot afford to do so." *Id.* ¶ 37. Once a criminal case is over, "Just City receives a full refund of the bail amount," which it then "recycles . . . to pay bail for other qualifying arrestees." *Id.*

At the time Plaintiffs filed their amended complaint, Deangelo Townes and Marshawn Barnes were detained in the Shelby County Jail. *Id.* ¶ 11. They bring individual claims and also serve as representatives suing on behalf of a certified class defined as "[a]ll people in the custody of the Shelby County Sheriff who are detained under bail orders issued by Shelby County judges . . . without consideration of their ability to pay." *Id.*; Order Granting Class Certification, ECF 113 at 1187.

[4] These amendments reaffirmed the longstanding public-safety focus and purpose of Tennessee's bail laws. *See*, *e.g.* 1996 Tenn. Pub. Acts, ch. 851, § 1 (setting requirement that bail be set at an amount that ensures the defendant's appearance and "the safety of the public").

In Count 1, Plaintiffs claim that "the statutory prohibition on consideration of an arrestee's ability to pay when setting bail violates the Due Process Clause of the Fourteenth Amendment." ECF 75-2, ¶ 54. In Count 2, Plaintiffs claim that "[d]etention under an unaffordable bail order, without any inquiry into or determination of ability to pay or meaningful consideration of alternatives, is discriminatory wealth-based detention in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Id.* ¶ 57. In Count 3, Plaintiffs claim that "Tenn. Code Ann. § 40-11-118(b) violates the Due Process Clause of the Fourteenth Amendment because it is void for vagueness." *Id.* ¶ 62.

LEGAL STANDARD

A. Constitutional Avoidance

Federal courts approach constitutional challenges to state laws with the utmost restraint. So courts will consider a constitutional question "only after considering and rejecting every nonconstitutional ground for the decision." *Firestone v*. Galbreath, 976 F.2d 279, 285–86 (6th Cir. 1992). When the constitutionality of a statute must be addressed, federal courts presume the statute is valid, and state laws are given "the widest possible latitude within the limits of the Constitution." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 510 (1937)); *Hartford Fire Ins. Co. v. Lawrence*, 740 F.2d 1362, 1366 (6th Cir. 1984) ("state legislatures are presumed by federal courts to have acted constitutionally in making laws"). This presumption of constitutionality is especially strong in areas of state police power, such as in establishing criminal procedure. *Salsburg v. Maryland*, 346 U.S. 545, 550 (1954) ("A state has especially wide discretion in prescribing practice relating to its police power").

And federal courts endeavor, when possible, to interpret state statutes so as to "avoid . . . constitutional questions," particularly when the state statute has not been "authoritatively construed by the state court." *Dale Baker Oldsmobile, Inc. v. Fiat Motors of N. Am., Inc.*, 794 F.2d 213, 221 (6th Cir. 1986). So where a statute is capable of two readings, one of which avoids constitutional problems, courts must adopt the constitutional one. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (describing failure to do so as "plain error"). This avoidance doctrine applies even if the court finds the constitutional construction "plainly not the best" one, because it "is at least a possible one." *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 377 (6th Cir. 2019) (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18 (2013)).

B. Facial Constitutional Challenges

Facial challenges to legislative acts are "the most difficult challenge to mount successfully." *United States v. Salerno*, 481 U.S. 739, 745 (1987). To prevail, a plaintiff bears a heavy burden to show that "no set of circumstances exists under which the [law] would be valid." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). So it is not enough that a law "might operate unconstitutionally under some conceivable set of circumstances"; it must be constitutional under *all* circumstances. *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997) (quoting *Salerno*, 481 U.S. at 745). Facial invalidation must be employed "sparingly and only as a last resort" because it is "strong medicine" that "threatens to short-circuit the democratic process." *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 960 (6th Cir. 2009) (internal quotations omitted).

ARGUMENT

Tennessee may constitutionally prioritize public safety and the orderly and efficient administration of justice over indigency concerns when setting bail, so long as the process includes an individualized consideration of whether alternatives to detention are sufficient to meet those priorities. *See Salerno*, 481 U.S. at 755. Tennessee law satisfies this requirement. Accordingly, the Amended Bail Law does not violate procedural due process, does not violate equal protection based on wealth, and is not unconstitutionally vague.

I. The Amended Bail Law Does Not Violate Due Process.

Procedural due process requires the State to provide fair procedures before depriving a protected liberty interest like freedom from detention. Plaintiffs allege that the Amended Bail Law creates "fundamentally unfair" procedure. ECF 75-2 at 755. Because Plaintiffs challenge a criminal procedure, the test established in *Medina v. California* controls. 505 U.S. 437, 443 (1992); *see Bergman v. Howard*, 54 F.4th 950, 958 (6th Cir. 2022). That test is deferential to state legislatures, requiring that a federal court "upset" a State's criminal procedures only if it finds "they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). And because Plaintiffs bring a facial challenge, they must prove that Tennessee's Amended Bail Law is fundamentally inadequate in all circumstances. *Salerno*, 481 U.S. at 745.

Tennessee's bail process clears that bar. The amendment simply adjusts one factor in the bail-setting analysis by prohibiting consideration of the defendant's "ability to pay." Tenn. Code Ann. § 40-11-118(b)(2). But the law maintains the fundamentally fair balancing of the defendant's pretrial-liberty interests against the government's interests in minimizing flight and community-safety risks. *Id.* § 40-11-118(b) (requiring bail to be set as low as "necessary" to meet those twin goals). Plaintiffs' quarrel here is not with the lack of process, and they concede the law balances competing interests. ECF 119-1 at 1227 (noting the "state's interests in public safety and court appearance"). Instead, they object to the legislature's judgment about what factors matter most. That balancing decision falls to the legislature, empowered through the democratic process—not to aggrieved parties through judicial proceedings.

But even if the more intensive *Mathews v. Eldridge* test applies here, that test tips against Plaintiff's claim and in favor of finding that the Amended Bail Law satisfies due process. Contrary to Plaintiffs' position, criminal defendants are not deprived of a "meaningful opportunity to be heard." ECF 119-1 at 1236. Tennessee law provides adequate procedures to balance the defendant's pretrial liberty interests against the State's compelling interests while minimizing the risk of erroneous deprivations.

A. Due process mandates fair procedures, not consideration of affordability.

1. The bail process is a component of Tennessee's criminal procedure.

Under Tennessee law, bail determinations are a core aspect of criminal procedure. The Tennessee Constitution expressly addresses bail in the criminal context, asserting that "all *prisoners* shall be bailable by sufficient sureties," except for capital offenses. Tenn. Const., art. 1, § 15. The General Assembly has implemented that constitutional command through Title 40 of the Tennessee Code, which governs criminal procedure. Tenn. Code Ann. §§ 40-1-101 to 40-39-402. Those laws speak of "bailable offenses," and a court's "[a]uthority to release defendants." Tenn. Code Ann. §§ 40-11-102, -104. They also direct courts to assess and set bail by considering circumstances that arise only in the context of pending criminal offenses, such as the nature of the offense, the defendant's likelihood of appearing, and the risks the defendant poses to public safety. *Id.* §§ 40-11-115, -118.

The way Tennessee courts review bail determinations confirms that it is a component of criminal procedure. In Tennessee, bail determinations are appealable to the Court of Criminal Appeals. *Columbia Bonding Co. v. State*, 225 Tenn. 719, 722 (1972). Before the creation of that criminal appellate court, bail determinations were appealable to the Tennessee Supreme Court—not to the Court of Appeals, which handles civil appeals. *Id.*

Federal precedent supports this conclusion. According to U.S. Supreme Court guidance, bail decisions are adjudicated under the "traditional standards expressed in the Federal Rules of Criminal Procedure." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). And the district court in *Torres*—a case on which Plaintiffs rely—found that "a bail hearing is a 'critical stage' of the criminal prosecution against an arrestee." *Torres v. Collins*, No. 2:20-CV-00026-DCLC-CRW, 2023 WL 6166523, at *11 (E.D. Tenn. Sept. 21, 2023).

2. *Medina* governs.

The Supreme Court has employed two tests for procedural-due-process challenges. In challenges to civil laws and processes, federal courts apply the common, more rigorous test of *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). That test balances (1) the "nature of the private interest" affected by the deprivation of a procedural right; (2) the "risk of erroneous deprivation in the current procedures used, and the probable value, if any, of additional or alternative procedures"; and (3) "the governmental interest involved, including the burden that additional procedures would entail." *Doe v. Michigan State Univ*., 989 F.3d 418, 428 (6th Cir. 2021) (citation omitted).

But "in th[e] criminal context," the Supreme Court "jettisoned" that balancing test. *Bergman*, 54 F.4th at 958. "[T]he *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are a part of the criminal process." 505 U.S. at 443. Instead, it engages a "narrower" inquiry. 505 U.S. at 445. *Medina* asks whether a procedure violates a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* Challengers of a state procedure under this test face a "heavy burden." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).

Medina establishes the correct test to apply in a challenge to state bail procedures, despite a trend among district courts of applying the more intensive *Mathews* test. *Patterson v. New York*, 432 U.S. 197, 201–02 (1977). As the Supreme Court has instructed, *Medina* "'provide[s] the appropriate framework for assessing the validity of state procedural rules' that 'are part of the criminal process.'" *Nelson v. Colorado*, 581 U.S. 128, 134 (2017). The two principles animating *Medina* bear that out. First, because States retain the power to "regulate procedures by which [their] laws are carried out," they possess substantial latitude in structuring their criminal process. *Patterson*, 432 U.S. at 201; *see also Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (noting "diversities of laws and judicial proceedings may exist in the several states without violating the . . . Fourteenth Amendment"). Bail falls squarely within the "procedures by which" Tennessee's criminal laws are carried out. *Patterson*, 432 U.S. at 201. Second, the Supreme Court has long accepted that the Due Process Clause "has 'limited operation' in criminal contexts because of the many other guarantees that the Bill of Rights gives to criminal defendants." *Fields v. Jordan*, 86 F.4th 218, 235 (6th Cir. 2023) (quoting *Medina*, 505 U.S. at 443). Those guarantees include the Eighth Amendment's specific protection against excessive bail. Where the "express protections" of the Eighth Amendment "do not apply, due process bars only those practices that 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (quoting *Medina*, 505 U.S. at 445).

Medina precludes *Mathews* balancing to assess due-process challenges to criminal procedures. *Medina*, 505 U.S. at 437. Because this case brings a due-process challenge to the criminal process in Tennessee, *Medina*, not *Mathews*, governs.

3. Tennessee's Amended Bail Law is fundamentally fair.

Tennessee's bail laws pass *Medina*'s test. The inquiry begins by asking whether the asserted principle is "fundamental." *Medina*, 505 U.S. at 446 (quoting *Patterson*, 432 U.S. at 201–202). "[H]istorical practice" serves as the "primary guide" for determining whether a particular criminal procedure is fundamental. *Kahler v. Kansas*, 589 U.S. 271, 279 (2020); *Fields*, 86 F.4th at 235. At base, the question becomes whether the practice "is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another." *Id.* "An affirmative answer to this question," the Supreme Court has advised, "is rare." *Id.* (citations omitted).

While the principle that excessive bail may not be imposed is fundamental, U.S. Const. amend. VIII, the principle Plaintiffs push here—that criminal defendants have a right to 'affordable bail' and that their ability to pay must therefore be considered when setting bail (ECF 75-2 at 755)—is not fundamental. *Cf. Medina*, 505 U.S. at 446 (observing that while the rule that a defendant who is incompetent should not stand trial "has deep roots in our common-law heritage," "there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence"). Considering "ability to pay" is a modern, developing phenomenon in bail laws. *See* Appendix, Part III. Those changes constitute reformation, not reversion to a historical norm, so they are inherently not "so old and venerable" as to prevent Tennessee from maintaining its historical practice rather than joining the trend in some states. *Fields*, 86 F.4th at 235.

Today, only twenty-one states in the U.S. *require* consideration of ability to pay or affordability when setting bail.[5] Two additional states *allow*, but do not require courts to consider

[5] *See* Appendix, Part III.

the defendant's ability to pay bail.[6] And many of those states—eleven out of those twenty-three—*amended* their laws in the last ten years to require or allow that consideration.[7]

Twenty-seven states (including Tennessee) require or allow consideration of an arrestee's financial condition or resources when setting bail, consistent with Tennessee's requirements.[8] And even in the eleven states that have recently introduced affordability language into their bail laws, their preexisting rules required nothing more than consideration of financial condition or resources—and in some jurisdictions, not even that.[9] As of ten years ago, then, the overwhelming majority of state laws—evident in the procedure of thirty-eight states—did not require consideration of an arrestee's ability to pay, or any greater consideration than Tennessee law currently requires. The laws of a handful of states and a series of recent amendments do not define the fundamental "traditions and conscience of our people." *Medina*, 505 U.S. at 443 (quoting *Patterson*, 432 U.S. at 201–202).

Centuries-old practice likewise counsels that "fundamental fairness" does not demand bail the arrestee can pay. The founding-era bail system, drawn from English common law, was unconcerned with an arrestee's ability to pay for a simple reason: a surety, and not the arrestee, was required to provide or promise monetary assurances on behalf of the arrestee. *See Holland v. Rosen*, 895 F.3d 272, 288 (3d Cir. 2018) (describing bail practices in the founding era); *see also* Lord Edward Coke, *A Treatise of Bail and Mainprize* (1635), *reprinted in* Lord Edward Coke & William Hawkins, *Three Law Tracts* 279 (1764) (noting the word "bail" derived from the French word *bailer*, meaning "to deliver," "because he that is bailed, is as it were delivered into the hands

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[6] *Id.* (specifically, New Hampshire and Wisconsin)
[7] *See id.* at Part III (specifically, California, Hawaii, Maine, Maryland, Massachusetts, Missouri, Nebraska, New Hampshire, New York, Utah, and Vermont).
[8] *Id.* at Part II–III.
[9] *Id.* at Part III.

and custody of those that are his pledges and sureties.") (available at https://perma.cc/74EG-98EE). That is why Tennessee's constitution, like others, speaks of prisoners being bailable by "sufficient sureties." Tenn. Const. art. 1, § 15; *see also Holland*, 895 F.3d at 288 (noting "New Jersey's colonial predecessor . . . provided '[t]hat all persons arrested shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great.'") (citations omitted).

It was the sureties, and not the arrestee, who was responsible for paying the set bail sum if the prisoner absconded. 1 Wayne R. LaFave et al., *Criminal Procedure* § 1.5(j)(i) (4th ed. Nov. 2025) (describing the history of bail practices in the United States). The forfeitable financial assurances provided by sureties were designed to incentivize their active role in ensuring the defendant complied with the conditions set by the court, including appearance as required. *Reese v. United States*, 76 U.S. (5 Wall.) 13, 19 L.Ed. 541 (1869) (noting the defendant is, "in theory of the law, committed to the custody of the sureties as to jailers of his own choosing" and they possess authority to arrest him "at any time . . . and surrender him to the court").[10] A central tenet of this system was that the arrestee could not indemnify the surety for the bail sum—a practice that was "declared unlawful in both England and America as being against the fundamental public policy for having sureties take responsibility in the first place." Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and Framework for American Pretrial Reform*, 25 (National Institute of Corrections, 2014), *available at*: https://perma.cc/AF88-3E3G. As a result, the defendant's ability to pay the bond amount was irrelevant because the defendant was

[10] Tennessee courts continue to recognize the value of this incentive system in modern times. *In re Sanford & Sons Bail Bonds, Inc.*, 96 S.W.3d 199, 202 (Tenn. Crim. App. 2002) (noting "[t]he profit motive [for bail bondsmen sureties] is presumed to insure diligent attention to his custodial obligation.") (citations omitted).

not allowed to pay it. LaFave et al., *Criminal Procedure* § 1.5(j)(i). And in practice, the bail amount was "typically set by the court before the defendant" identified their proposed sureties and therefore "was not individualized to account for the wealth of the particular surety." *Id.*

This historical record shows that consideration of a defendant's "ability to pay" has such shallow roots that it cannot "be ranked as fundamental." *Fields*, 86 F.4th at 235 (quoting *Medina*, 505 U.S. at 445). Because the Amended Bail Law, by prohibiting consideration of a defendant's ability to pay the amount of bail set, does not offend a fundamental principle, Tennessee's practice is "fundamentally" fair. *Medina*, 505 U.S. at 445. Though true that some states have recently amended their bail laws to require consideration of a defendant's ability to pay, developments of such recent vintage do not amount to historical practice. At most, these policy choices reflect contemporary preferences, not principles considered "fundamental" to our system of justice. *Montana v. Egelhoff*, 518 U.S. 37, 51 (1996) ("Not every widespread experiment with a procedural rule favorable to criminal defendants establishes a fundamental principle of justice.").

B. Tennessee's Amended Bail Law is constitutionally sound even under *Mathews*.

The Amended Bail Law is constitutional even under the rigorous *Mathews* balancing test.

Private Interest. Plaintiffs lack a protected liberty interest in the outcome of a discretionary judicial determination, including the setting of bail. *Richardson v. Twp. of Brady*, 218 F.3d 508, 517 (6th Cir. 2000). True, plaintiffs have a liberty interest in an individualized process to set bail at the lowest amount necessary to meet *the state's compelling interests* in ensuring community safety and the defendant appearance as required. Also true, that protection is enshrined in the Tennessee Constitution. Tenn. Const. art. 1, § 15. But what is *necessary* to meet the state's interests is not inherently equivalent to what is *affordable* to the arrestee. *United States v. Tirado*, No. 95-4226, 1995 WL 684553, at *1 (6th Cir. Nov. 16, 1995) (holding arrestees have no right to affordable bail); *Rasmussen v. Garrett*, 489 F. Supp. 3d 1131, 1163 (D. Or. 2020) (collecting cases); *In re Sanford & Sons Bail Bonds, Inc*., 96 S.W.3d 199, 202 (Tenn. Crim. App. 2002) (noting Tennessee Constitution does not ensure affordable bail).

Plaintiffs also assert an interest not to be held on "excessive bail." U.S. Const. amend. VIII; ECF 119-1 at 1232. But Plaintiffs cannot repackage specific constitutional protections as generalized due-process claims. *Albright v. Oliver*, 510 U.S. 266, 273 (1994). Courts see through such attempts and instead analyze this type of claim under the specific constitutional provision. In any event, Plaintiffs' invocation of the Eighth Amendment rests on the premises that bail is unconstitutional because it is unaffordable, or because less restrictive means might also satisfy the government's compelling interest in appearance and public safety. And courts have repeatedly rejected both premises. *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980) ("The test for excessiveness is not whether defendant is financially capable of posting bond"); Holland, 895 F.3d at 291 ("[T]he existence of a purportedly less restrictive means does not bear on whether the conditions are excessive" under the Eighth Amendment). The Eighth Amendment requires only that bail not exceed the amount reasonably calculated to ensure the defendant's presence, (*Stack*, 342 U.S. at 5), and Tennessee law meets that requirement. Tenn. Code Ann. § 40-11-118 (requiring bail to be set "as low as necessary" to ensure the state's dual interests).

Finally, Plaintiffs contend the Amended Bail Law affects their First Amendment liberty interests to petition a court. ECF 119-1 at 1232. Functionally, this contention is indistinguishable from the rest; Plaintiffs are bootstrapping a restriction on judicial discretion into a violation of their right to petition the government. If that was a cognizable claim, then every exercise of judicial discretion would constitute some form of Due Process Clause injury. That cannot be the case. And Plaintiffs are not concerned with their access to the courts or with what they can tell the magistrate.

"Nothing in this record indicates that [Plaintiffs are] in any way precluded from making any argument [they] wish[] to make." *Sinclair v. City of Ecorse*, 366 F. App'x 579, 583 (6th Cir. 2010).

In short, and in response to the Tennessee's legislative action, Plaintiffs are trying to "etch their preferred . . . policy into constitutional bedrock." *Fowler v. Benson*, 924 F.3d 247, 252 (6th Cir. 2019). But the concept of setting bail based on a defendant's ability to pay has only recent, shallow roots cabined to less than half (forty percent) of the states. *See supra* Part II.A.iii. So there is no fundamental right to affordable bail as determined by consideration of an arrestee's ability to pay. *Id.* Plaintiffs cannot show a "legal entitlement that falls within the Fourteenth Amendment's protection." *Fowler*, 924 F.3d at 259. This deficiency is dispositive, and the Court need not advance to the other *Mathews* factors. *Id.*

Risk of Erroneous Deprivation. The second *Mathews* prong, though, also favors finding the statute constitutional. Plaintiffs mischaracterize the alleged erroneous deprivation by looking at outcomes. ECF 119-1 at 1237 (asserting that, without considering ability to pay, judges will not be able to "determine if the bail amount will function as an incentive to appear in court [i.e. result in the defendant's release] or as a de facto detention order"). But the *Mathews* test is concerned with procedures, not outcomes. *Mathews*, 424 U.S. at 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions.").

Plaintiffs also rest their argument on faulty logic: bail that results in detention of indigent arrestees that would not result in detention of a wealthy arrestee in similar circumstances is an unconstitutional deprivation of the indigent's rights. ECF 119-1 at 1244. Not so. "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Stack*, 342 U.S. at 4. And in Tennessee, it is also conditioned on adequate assurance that the community will remain safe. What is adequate does not depend on one's ability to pay a bail amount. And "[t]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 741. As a result, "the indigent and non-indigent arrestees are not on equal footing—only the latter has made a showing that he will appear for his trial" and not harm the public. *Schultz v. State*, 42 F.4th 1298, 1324 (11th Cir. 2022). Deprivation of liberty in that context is therefore not a constitutional error that *Mathews* is concerned about.

And critically, Tennessee law already employs robust procedures that guard against erroneous deprivation. When determining whether any conditions of release, including monetary bail, are necessary, Tennessee magistrates must consider a defendant's "financial resources." Tenn. Code Ann. § 40-11-115(b). If the magistrate finds monetary bail necessary based on flight and safety risks, it must set the amount "as low as . . . necessary" to counter those risks after considering a long list of individualized considerations—including defendant's employment status and financial condition—relevant to balancing the well-established state interests against the arrestee's liberty interests. *Id.* §§ 40-11-115(b), -118(a)(2), -118(b). And Tennessee's procedure allows arrestees to challenge their bail amounts in general sessions court and trial court. Tenn. Code Ann. §§ 40-11-105, -143. If unsatisfied with those results, they also have a right to appeal any bail decision. Tenn. Code Ann. § 40-11-144; Tenn. R. App. P. 8(a). Tennessee's procedure—hearing with notice and evidence, neutral magistrate, and the right to appeal—has all "the touchstones of procedural due process." *Kratt v. Garvey*, 342 F.3d 475, 483 (6th Cir. 2003); *Sinclair*, 366 F. App'x at 583. These "extensive safeguards" inherent in Tennessee's system certainly "suffice to repel a facial challenge." *Salerno*, 481 U.S. at 752.

Indeed, prohibiting consideration of a defendant's "ability to pay" decreases the risk of erroneous deprivation—i.e., a bail amount that is not as low as necessary to ensure the defendant's appearance and community safety. Magistrates consider finances twice—once to determine the necessity of bail conditions, including monetary bail, and again to set the amount of bail. *See* Tenn. Code Ann. §§ 40-11-115(b), 40-11-119(b)(2). It cannot be said that a magistrate who sets bail while focusing on those inquiries, among others—though without knowledge of a defendant's "ability to pay"—has "erroneously" imposed financial conditions of release. *Cf. Torres*, 2023 WL 6166523, at *7. The risk of erroneous deprivation is therefore low.

Value of Alternatives. Plaintiffs say they must have "an opportunity to show that they cannot afford the bail amount." ECF 119-1 at 1237. The value of this additional process, they contend, lies in reducing "a risk that judges will set higher bail amounts than necessary to meet the purposes of bail." *Id*. at 25.

But Plaintiffs' saying this does not make it so—indeed, there is a mismatch between "the nature of the relevant inquiry" under *Matthews* and Plaintiffs' proposed additional safeguard. 424 U.S. at 343. The purposes of the bail procedure are to protect the public and secure the defendant's appearance. *Fields v. Henry Cnty.*, 701 F.3d 180, 184 (6th Cir. 2012). Present liquidity has little to no bearing on those purposes. The "potential value" of an unaffordability hearing is low because "the information critical to the . . . decision is derived" from the existing statutory factors. *Mathews*, 424 U.S. at 345. And adversarial proceedings and the right to immediate appeal already protect against erroneous decisions. *Columbia Bonding Co.*, 225 Tenn. at 722.

The limited record developed as to Shelby County's implementation does not alter the assessment of the process set out by Tennessee statutes. For one, "[b]are statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process." *Mathews*, 424 U.S. at 346.

And as Plaintiffs' own evidence shows, bail costs have decreased over the most recent eight months of reported data to levels below those observed before the Amended Bail Law's enactment. ECF 119-19 at 1652. Moreover, Plaintiff's statistics fail to account for the passage of Chapter 612, enacted shortly before the Amended Bail Law, which prioritized community safety as the primary consideration in setting bail and likely contributed to higher bail amounts. See Tenn. Code Ann. § 40-11-115(a) (2024). And regardless of evidence to the contrary, the General Assembly's decision on this matter reflects the State's public policy of choosing to prioritize public safety. *See* Tennessee General Assembly, Criminal Justice Subcommittee, capitol.tn.gov, at 57:27-37 (Feb. 13, 2024), https://bit.ly/3AE2WO1 ("February 13 Hearing").

Government interest. The fourth and final *Matthews* factor weighs the government's interest against the burden imposed by Plaintiffs' proffered additional procedure. Tennessee's interests in public safety and arrestee appearance are "compelling." *Salerno*, 481 U.S. at 749 ("The government's interest in preventing crime by arrestees is both legitimate and compelling"); *Bell*, 441 U.S. at 536; *Reform Am. v. City of Detroit*, 37 F.4th 1138, 1150 (6th Cir. 2022); *Schultz*, 42 F.4th at 1324. As evidenced by conditions under the SBO, lowering bail based on a defendant's "ability to pay" burdens that interest by using liquidity to trump the balance of risks struck by the Tennessee Legislature. *See* February 13 Hearing at 57:27-37.

Plaintiffs' proposal also burdens the public fisc. Plaintiffs claim their proposal has only "minimal added burden." ECF 119-1 at 1221. That is belied by the evidence. When Shelby County adopted the SBO, it spent over $3.5 million in just the first year to implement it. *See* Shelby County Board of Commissioners Resolution, ECF 119-18 at 1620. The Just City-Shelby County MOU assumed that it would require significant "fiscal resources," including hiring additional staff for the Shelby County courts, the Public Defender, the District Attorney, and the

Pretrial Services Agency; training new and existing staff; and logistical changes to courtroom procedure. June 9, 2022 MOU, ECF 119-6 at 1321, 1325–26, 1328. And it expressly required these costs to be paid from the Shelby County budget, even including a provision for "stakeholders" to seek "additional appropriation of funds" to implement the policy change. *Id.* at 1325, -28. It is no help to say these costs are "sunk." Continuing to use the Vera Affordable Bail Calculator requires additional Pretrial Services Agency employee time, which inherently impacts the fisc. ECF 119-8 at 1427. Nor does it account for the additional time and resources for training and implementation by judges, public defenders, and district attorneys general. Constitutionalizing Plaintiffs' preferred bail process locks in all those costs.

At bottom, Plaintiffs seek to constitutionalize a policy preference by forcing Tennessee courts to elevate affordability over the State's express interests. Such a system would make bail outcomes, not public safety and the defendant's appearance, the controlling consideration. Tennessee's legislature—not a federal court—is "in a better position to gauge how best to preserve public safety and balance competing correctional and law enforcement concerns." *Brown v. Plata*, 563 U.S. 493, 538 (2011). Due process demands fair process and individualized determinations—not the prioritization of any particular factor. Tennessee's procedure provides ample process.

II. The Amended Bail Law Does Not Violate the Equal Protection Clause.

In support of their equal-protection claim (ECF 75-2 at 755-56), Plaintiffs argue that the Amended Bail Law runs afoul of *Bearden v. Georgia*, 461 U.S. 660 (1983), because indigent defendants may be detained without consideration of their ability to afford bail. ECF 119-1 at 1241. But the Equal Protection Clause does not mandate equal release outcomes. So plaintiffs bringing a *Bearden*-style claim must "show that the indigent are being treated systematically worse 'solely because of [their] lack of financial resources,'—and not for some legitimate State interest." *Walker v. City of Calhoun*, 901 F.3d 1245, 1260 (11th Cir. 2018) (quoting *Bearden*, 461 U.S. at

661). The "sine qua non" of such a claim is not met here, because any differences in release outcomes are the result of the State's legitimate and compelling interests in ensuring community safety and ensuring the defendant appearance—and not "solely" because the defendant lacks financial resources. *Id.*; *see Bearden*, 461 U.S. at 661, 664–68.

The issue comes down to whether a bail scheme that sometimes results in different outcomes based on the wealth of the arrestee—without expressly classifying defendants by wealth or requiring detention of indigents—triggers heightened scrutiny under the Equal Protection Clause. It does not, so rational-basis review is proper. *Walker,* 901 F.3d at 1265 (signaling rational basis is the proper level of scrutiny to apply to an equal-protection claim brought by an arrestee challenging state bail procedures). Because there is a rational basis for Tennessee's Amended Bail Law, it comports with equal protection.

A. Rational-basis review applies.

The Supreme Court has never held that laws that result in different outcomes based on wealth constitute a suspect classification. Accordingly, "at least where wealth is involved," the Constitution "does not require absolute equality or precisely equal advantages[,]" but only forbids "an absolute deprivation of a meaningful opportunity to enjoy [a desired] benefit" based solely on the person's indigency. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20, 24 (1973).

In line with this precedent, the Supreme Court has identified wealth-based equal-protection violations only in the narrow circumstances where indigent individuals were *absolutely deprived* of a right or benefit based *solely* on the inability to pay. *See*, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (striking law that deprived convicted indigent defendants of adequate appellate review based solely on their inability to afford a trial transcript); *Williams v. Illinois*, 399 U.S. 235, 242 (1970) (striking law that deprived convicted indigent defendants from the benefit of statutory maximum sentencing ranges "solely" because they were too poor to pay a fine). Indeed, in

Bearden the Supreme Court held that a probationer could not be deprived of continued post-conviction release *solely* because he could not pay a fine. *Bearden*, 461 U.S. at 672. But the Court held that a detention resulting from Bearden's inability to pay would withstand constitutional scrutiny if "the sentencing court determine[d] that alternatives to imprisonment [were] not adequate . . . to meet the State's interest in punishment and deterrence." *Id.*

Outside of these narrow situations, the Court has consistently held that differential outcomes for the indigent are permissible. *See*, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996) (noting wealth-based sanctions are impermissible *only* when "wholly contingent on one's ability to pay"); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (finding states need not appoint counsel for indigents in discretionary appeals, despite ability of wealthy to afford one). Indeed, the Court has recognized that poverty "in no way immunizes" an offender from sanctions otherwise justified by legitimate state interests. *Bearden*, 461 U.S. at 669.

Consistent with the *Bearden* framework, lower courts addressing bail laws have drawn a sharp line between diminishment of pretrial liberty, which triggers rational-basis review, and absolute deprivation caused *solely* by indigency, which triggers heightened scrutiny. In *Walker*, for example, the Eleventh Circuit confirmed that "differential treatment by wealth is impermissible only where it results in a *total* deprivation of a benefit *because* of poverty." *Walker*, 901 F.3d at 1261. So where detention is not *solely* caused by indigency, but from the operation of a bail system meant to ensure the safety of the community and the appearance of arrestees—and prioritizing the former—rational-basis review applies. *See Torres*, 2023 WL 6166523, at *6–7 (applying rational-basis review to a wealth-based-detention challenge to bail practices).

Distinct from the situation in *Griffin*, *Williams*, and *Bearden*, poverty is not the sole decider of whether an arrestee is released pretrial under the Tennessee bail statutes. What Plaintiffs cast as wealth-based discrimination is in fact the inevitable disparity in outcomes whenever bail is conditioned on providing neutral assurances of appearance and public safety. But that type of disparity is present in all sorts of government benefits provided at some cost to the beneficiary. *See Walker*, 901 F.3d at 1262, 1264 (noting lack of equal-protection problem in the potential inability to afford cost of express mail or state college tuition). The Constitution has never been interpreted to require that States equalize outcomes across economic classes. *Rodriquez*, 411 U.S. at 24. And Tennessee's bail laws do not jail defendants *solely* because of poverty. *Bearden*, 461 U.S. at 672. Bail set according to the these statutes, including the Amended Bail Law, may result in detention, but only because the monetary amount set is the lowest amount necessary to *adequately meet other legitimate state interests*—public safety and defendant appearance. *Id.* That is a constitutionally valid distinction: detention reflects risk, not wealth. *See Schultz*, 42 F.4th at 1324 (noting the "financial sacrifice" of bail puts the non-indigent on a different footing than the indigent).

Moreover, contrary to Plaintiffs' claim, the Amended Bail Law does not "discriminate"—it treats indigent and wealthy defendants the same. A billionaire defendant with illiquid assets and an indigent defendant with no assets are subject to the same restrictions: the magistrate can consider the financial condition of each but cannot adjust the bail amount deemed necessary to counter the safety and appearance risks simply because either defendant lacks ready access to cash at the time bail is set. This comprehensive scheme ensures individualized judicial bail determinations based on nearly everything *but* poverty.

The challenged amendment does not require deprivation of a benefit *solely* because of poverty; it does the opposite and prohibits consideration of ability to pay. Tenn. Code Ann. § 40-

11-118(b)(2). Because Plaintiffs cannot show they or other Shelby County arrestees are *absolutely deprived* of pretrial liberty *solely because of poverty*, their claim gets rational-basis review.

B. Tennessee's Amended Bail Law has a rational basis.

Tennessee's Amended Bail Law remains rationally related to the legitimate and compelling interests behind the statutory bail process itself—ensuring (1) community safety and (2) arrestee appearance at trial. Tenn. Code Ann. §§ 40-11-115(a)(2), -118(a)(2). The bail laws achieve those goals through two mechanisms. First, they require that bail be set "as low as the court determines is necessary" to achieve those dual goals. Tenn. Code Ann. § 40-11-118(a)(2). Second, they require a magistrate to measure each arrestee against a long list of individualized statutory considerations directly relevant to the forerunning priorities of safety and accountability—including the defendant's financial resources and their financial condition.[11] *Id.* §§ 40-11-115, -118(b).

The Amended Bail Law simply precludes consideration of a defendant's "ability to pay" the bail set in accordance with this process. The amendment does not discriminate based on wealth; it forces judges to set bail based on factors *other* than someone's ability to pay. The amendment is therefore rationally connected to the government's legitimate interest in ensuring public safety and the defendant's appearance by ensuring that *all* these relevant factors are considered when bail is set. Tenn. Code Ann. §§ 40-11-115(a)-(b), -118(a)-(b). The amendment ensures that bail determinations are consistently tethered to the defined considerations, rather than fluctuating based on a defendant's present liquidity, willingness or ability to borrow funds, or preferences regarding the sale of assets to provide the necessary assurances. It also prevents courts

[11] Financial condition, distinct from ability to pay, bears on community ties and flight risk. *See United States v. Jefferson*, 40 F.3d 385 (5th Cir. Nov. 4, 1994) (per curiam) (unpublished); *United States v. Abdulkadir*, No. 1:21-cr-377, 2024 WL 342698, at *2 (N.D. Ohio, Jan. 29, 2024).

from diluting the State's interests by setting bail at an artificially low level simply to match an arrestee's self-described resources. If the amendment results in certain arrestees being unable to pay bail, that remains an acceptable outcome, because bail need not be "set at a rate which a defendant can afford to pay." *Tirado*, 1995 WL 684553, at *1.

Courts addressing pretrial wealth-based-detention claims have upheld the challenged laws on similar grounds. That is true of *Walker*—which this Court has already found "most useful." *Just City, Inc. v. Bonner*, 758 F. Supp. 3d 785, 813 (W.D. Tenn. 2024). There, the Eleventh Circuit applied rational basis to an equal-protection challenge to pretrial detention. *Walker*, 901 F.3d at 1251. And that court found the scheme survived such scrutiny even though it sometimes resulted in longer detention of indigent defendants. *Id.* It is also true of *Torres*, in which the court expressly rejected an equal-protection claim like Plaintiffs' here, and held that pretrial detention resulting from inability to pay constitutionally adequate bail was rationally related to ensuring appearance and safety. *Torres*, 2023 WL 6166523, at *7.

Because Plaintiffs cannot show an *absolute deprivation* of pretrial liberty based *solely* on their indigent status, and the Amended Bail Law has a rational basis, it does not violate the Equal Protection Clause.

III. The Amended Bail Law Is Not Unconstitutionally Vague.

Plaintiffs lastly claim that the Amended Bail Law fails to provide "fair notice" to arrestees and judges, and "lacks standards for judicial officers to apply when setting bail . . . inviting arbitrary enforcement." ECF 75-2 at 756. They allege this vagueness "interferes with arrestees' ability to protect their right to liberty pending trial." *Id.*

That claim fails because a vagueness challenge to the Amended Bail Law—which only guides judicial decision-making—is not cognizable. At any rate, even analyzing the amendment under void-for-vagueness case law, the plain text is unambiguous and the exercise of subjective judgment does not automatically make a law vague.

A. The vagueness doctrine does not apply to statutes that guide judicial discretion.

Supreme Court precedent forecloses vagueness challenges to statutes like the Amended Bail Law that neither define crimes, impose penalties, nor regulate protected speech—the typical areas in which vagueness challenges arise. *Beckles v. United States*, 580 U.S. 256, 263 (2017); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982).[12]

In *Beckles*, the Supreme Court recounted that it had historically applied the Due Process Clause to "invalidate two kinds of criminal laws as 'void for vagueness': laws that *define* criminal offenses and laws that *fix the permissible sentences* for criminal offenses." *Beckles*, 580 U.S. 562. Refusing to extend the vagueness doctrine any further, the Court held that federal sentencing guidelines—statutes that "merely guide the exercise of a court's discretion," rather than establishing criminal offenses or permissible punishments—are not subject to vagueness challenges. *Beckles*, 580 U.S. at 263.

Furthermore, the Court held that "[t]he advisory Guidelines also do not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." *Id.* at 265. The Court concluded that notice concerns are diminished in the sentencing context because the "applicable statutory [sentencing] range . . . provide[s] all the notice that is required"; the Court observed that even the best possible notice would remain insufficient given that a court retains discretion to impose an enhanced sentence even if the defendant sought to conform his

[12] As noted above, the Amended Bail Law is a "criminal law," in that it relates to criminal procedure. *See supra* Part I.A.1. But even if the Amended Bail Law was not a criminal law, a void for vagueness challenge would still be inappropriate because it does not implicate the First Amendment and merely guides judicial discretion. As a result, the law, does not trigger arbitrary enforcement concerns. *See infra* Section III.B; *Beckles*, 580 U.S. at 263.

behavior to avoid it. *Id.* at 267. And because the sentencing guidelines "do not regulate the public by prohibiting any conduct or by establishing minimum and maximum penalties for any crime," they did not implicate an arbitrary-enforcement concern. *Id.* at 266 (citation modified).

Federal courts have applied this logic to challenges to federal bail laws. In *United States v. Watkins*, 940 F.3d 152 (2d Cir. 2019), the Second Circuit denied a vagueness challenge to federal bail laws, finding they were not "amenable to a due process challenge" because they do "not define criminal offenses or impose mandatory penalties." 940 F.3d at 161. The court pointed out that the "'distinct character' of non-punitive pretrial detention does not trigger the same constitutional concerns as the indisputably punitive post-conviction sentences." *Id.* (quoting *Mont v. United States*, 587 U.S. 514, 539 (2019) (Sotomayor, J., dissenting). It also held that federal bail guidelines do not invite arbitrary enforcement because they do not allow magistrates to decide what actions are prohibited or what sentences are available for punishment. *Id.*

And in *United States v. Haley*, No. 2:23-cr-20191-MSN-CGC, 2024 WL 4906517 (W.D. Tenn. Nov. 27, 2024), *aff'd United States v. Haley*, No. 24-6078, 2025 WL 674224 (6th Cir. Feb. 27, 2025), the court generally observed that "[u]nlike statutes that define crimes or fix sentences, the Bail Reform Act serves a distinct function—it guides judicial determinations about pretrial detention and detention pending sentencing or appeal"; the Act thus does not implicate due-process concerns regarding notice and arbitrary enforcement. 2024 WL 4906517, at *4. The court ultimately declined an invitation to find a clause in the Bail Reform Act unconstitutionally vague "as that clause is applied in the context of detention pending sentencing," stating that whether vagueness concerns are triggered in that context "is a question better left to the wisdom of higher courts." *Id.*, 2024 WL 4906517, at *5.

The reasoning in *Beckles* applies here. The Amended Bail Law also does "not implicate the twin concerns underlying vagueness doctrine—providing notice and preventing arbitrary enforcement." 580 U.S. at 265. Notice concerns simply do not translate to bail, and both the bail laws in general and the Amended Bail Law in particular provide "all the notice that is required" anyway. *Id.* at 267. Criminal defendants in Tennessee have never been able to predict bail outcomes because those decisions inherently depend on judicial discretion. Nor does the Amended Bail Law invite arbitrary enforcement. Like sentencing guidelines, Tennessee's bail laws do not regulate the public and are not "enforced" against any defendant; they instead provide guidance to magistrates in the exercise of their discretion. *Id.* at 266–67; *see Watkins*, 940 F.3d at 161. They channel judicial discretion toward the twin purposes of bail—ensuring appearance and safety—and away from the amount of money a defendant has.

B. Facial vagueness challenges are not cognizable.

As a general matter, vagueness challenges to statutes which do not involve First Amendment freedoms and which do not impose criminal sanctions "must be examined in the light of the facts of the case at hand." *Hoffman Ests.*, 455 U.S. at 495 n.7; *see also Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) (citing *Springfield Armory, Inc. v. Columbus*, 29 F.3d 250, 252–54 (6th Cir. 1994)); *Johnson v. Morales*, 946 F.3d 911, 928–29 (6th Cir. 2020). The Amended Bail Law does not regulate protected expression, nor does it carry criminal consequences. Accordingly, it falls outside the narrow category of enactments subject to facial vagueness scrutiny.

Plaintiffs argue that the bail law implicates criminal defendants' First Amendment rights. ECF 119-1 at 1232.[13] It does not. The Amended Bail Law regulates judicial discretion, not

[13] Notably, Plaintiffs do not explicitly allege a violation of their First Amendment rights in their amended complaint. *See* ECF 75-2 at ¶¶ 60-61.

criminal defendants' speech. And in any event, courtrooms are not public forums, and the First Amendment does not confer an unrestricted right to speak during judicial proceedings. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (noting it is "unquestionable" that free speech rights in a courtroom are "extremely circumscribed"); *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005) (noting that "[t]he courtroom is a nonpublic forum" where First Amendment rights "are at their constitutional nadir.").

The Amended Bail Law also does not impose criminal sanctions. Any pretrial detention is inherently non-punitive where it relates to legitimate State regulatory goals. *Salerno*, 481 U.S. at 748 (holding pretrial detention that is "regulatory in nature . . . does not constitute punishment before trial"); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) (same). Again, and even as amended, Tennessee's bail laws require bail to be set "as low as . . . necessary" to ensure defendant appearance and community safety, which are legitimate State regulatory goals. *Id.* § 40-11-118(a)(2).

C. The Amended Bail Law is sufficiently definite.

Even if this Court determines that the vagueness doctrine does apply, it should still reject Plaintiffs' vagueness claim. The Amended Bail Law does not "fail[] to provide people of ordinary intelligence a reasonable opportunity to understand" what it means, and thus does not encourage arbitrary enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Plaintiffs' vagueness claim rests on the suggestion that "financial condition" and "ability to pay" cannot be given distinct meanings. ECF 75-2 at 756; *see* ECF 119-1 at 1235 (asserting that "an analysis of an individual's 'financial condition' and 'ability to pay' involves the same inquiry"). That defies a basic rule of statutory interpretation under which Tennessee courts would give effect to both terms and not read the terms as redundant. *See Tidwell v. Collins*, 522 S.W.2d 674, 676–77 (Tenn. 1975) (holding Tennessee courts must "construe a statute so that no part will be inoperative, superfluous, void or insignificant"); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167, 174 (2012) (describing the "surplusage" canons of interpretation). The Amended Bail Law's language prohibiting consideration of "ability to pay" while retaining consideration of "financial condition" clearly indicates that the Legislature intended for the two terms to mean something different.

And they do. More importantly, even if some overlap or ambiguity may be perceived to exist, "interpretive principles favor Defendants and the State"—as this Court previously concluded. *Just. City, Inc.,* 758 F. Supp. 3d at 814. In that event, then, the Court should interpret the Amended Bail Law so as to avoid any constitutional infirmity. *See Bevan & Assocs., LPA*, 929 F.3d at 374.

Tennessee courts use contemporary "authoritative dictionaries" "[i]n the absence of statutory definitions" to understand a statute's "natural and ordinary meaning." *State v. DeBerry*, 651 S.W.3d 918, 925 (Tenn. 2022). The word "condition" means a "social status," or "attendant circumstances." *Condition*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/condition (last visited Feb. 5, 2026). When modified by the adjective "financial," it means financial circumstances—i.e., "a statement of a [person's] net worth, overall financial health, or ability to generate income." *See, e.g.*, *In re Joelson*, 307 B.R. 689, 696 (B.A.P. 10th Cir.). In this context, then, "financial condition" refers to a wholistic view of a defendant's finances, including the defendant's status as indigent.

The meaning of "ability to pay" is also capable of being understood—and it doesn't mean "financial condition." The word "ability" refers to the "physical, mental, or legal power to do something" or a "quality or state of being able." *Ability*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/ability (last visited Feb. 19, 2026). The word "pay" obviously refers to the sum tendered. *See Pay*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/pay (last visited Feb. 19, 2026). Ability to pay, then, refers not only to the specific amount of money available to the defendant at a moment in time to pay bail, but also to the defendant's "physical, mental, or legal power to access" that money. In other words, what is "affordable" to the defendant; an amount that the defendant can "bear the cost of" or "make available . . . naturally or inevitably." *Afford*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/afford (last visited Feb. 19, 2026).

Recognizing this distinction between the two terms aligns with Tennessee court interpretations. Long before the Amended Bail Law, Tennessee courts understood the distinction, particularly in the context of bail, and rejected the notion that a defendant's ability to pay was a necessary consideration. *See In re Sanford & Sons Bail Bonds*, 96 S.W.3d at 202 ("The right to bail . . . does not ensure a criminal defendant's *ability to pay* the amount of bail set") (emphasis added). The record evidence demonstrates that Shelby County magistrates also understand the "clear [legislative] intent" of the Amended Bail Law: that Shelby County "stop using the affordable bail calculator," which defined "ability to pay" as a defendant's liquidity within the 24 hours of bail setting, without borrowing money. ECF 119-7 at 1372. The only magistrate deposed in this case described the Law as "very clear," "straightforward," with "[n]othing complicated about it." Commissioner John Marshall Deposition, ECF 119-7at 1388, 1394. To follow the new law, that magistrate and the other Shelby County Judicial Commissioners just stopped using the calculator. *Id.* "Real simple." *Id.* And this understanding of "ability to pay" v. "financial condition" also aligns with statements of the Law's sponsor regarding the legislature's intent: that affordability not become a "trump card" over the balancing of safety and flight risks. *See* February 13 Hearing at 57:27-37.

Nor is the Amended Bail Law directed at persons of "ordinary" intelligence, *Hill*, 530 U.S. at 73—it's directed at court magistrates (i.e., magistrates, judges, and sometimes clerks), and courts are presumed capable of applying context-dependent terms. Tenn. Code Ann. § 40-11-104; *see United States v. Williams*, 553 U.S. 285, 306 (2008) (noting vagueness doctrine is not triggered by hypothetical closes cases, which "can be imagined under virtually any statute"). In the bail context, Tennessee courts routinely interpret standards like "risk of danger to the community[,]" and "risk of . . . willful failure to appear[.]" Tenn. Code Ann. § 40-11-118. Tennessee magistrates are no less able to interpret "financial condition" without confusing it with "ability to pay." *Id.* Indeed, they have been doing so for many years. *See In re Sanford & Sons Bail Bonds*, 96 S.W.3d at 202.

The Supreme Court has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range[,]" which requires interpretation and application of words that are often difficult to precisely define. *Beckles*, 580 U.S. at 263 (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005)). There is likewise no reason to doubt the ability of Tennessee magistrates to understand and constitutionally apply the Amended Bail Law in a way that recognizes the distinction between an arrestee's financial condition and his ability to pay. *See Trainor v. Hernandez*, 431 U.S. 434, 443 (1977) ("'[S]tate courts have the solemn responsibility equally with the federal courts' to safeguard constitutional rights[.]") (quoting *Steffel v. Thompson*, 415 U.S. 452, 460–61 (1974)), *see also Formosa v. Lee*, No. 23-5296, 2024 WL 113788, at *3 (6th Cir. Jan. 10, 2024). Principles of federalism and comity demand that they be allowed to do so. *Mich. Wolfdog Ass'n v. St. Clair Cty.*, 122 F. Supp. 2d 794, 801 (E.D. Mich. 2000) (noting that if a federal court finds a state law unclear, it "should abstain from deciding the constitutionality of [that statute] until a state court has considered and clarified the law[.]" (citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941)).

CONCLUSION

For the reasons stated, the Court should reject Plaintiffs' claims and uphold the constitutionality of Tenn. Code Ann. § 40-11-118(b)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing was filed and served by the Court's ECF/PACER system on this the 19th day of February 2026, upon:

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APPENDIX

This Appendix organizes state laws related to pretrial bail into categories defined by what the law requires or allows magistrates to consider when setting bail specifically related to a defendant's financial resources, financial condition, ability to pay, or affordability of bail.

STATE SURVEY

I. States that Require or Allow Bail-Setting Magistrates to Consider an Arrestee's Financial Resources.

1) **Arizona**

Authority: Ariz. Rev. Stat. § 13-3967(B)(7)

Summary of requirements: "In determining the method of release or the amount of bail, the judicial officer, on the basis of available information, shall take into account . . . [t]he accused's . . . financial resources."

2) **Connecticut**

Authority: Conn. Gen. Stat. § 54-63b(b)(6)

Summary of requirements: "The Court Support Services Division shall establish written uniform weighted release criteria . . . based on, but not be limited to, the following considerations . . . (6) the defendant's financial resources, character and mental condition."

3) **Delaware**

Authority: 11 Del. C. § 2105(b)

Summary of requirements: "In determining whether the defendant is likely to appear as required and that there will be no substantial risk to the safety of the community the court shall, on the basis of available information, take into consideration . . . the defendant's . . . financial resources."

4) **Florida**

Authority: Fla. Stat. § 903.046(2)(c)

Summary of requirements: "When determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court shall consider . . . [t]he defendant's . . . financial resources."

5) **Georgia**

Authority: Ga. Code Ann. § 17-6-1(e)(2)(A)-(C)

Summary of requirements: "When determining bail, as soon as possible, the court shall consider . . . [t]he accused's financial resources and other assets, including whether any such assets are jointly controlled"; "earnings and other income"; and "financial obligations, including obligations to dependents."

6) **Illinois**

Authority: 725 Ill. Comp. Stat. Ann. 5/110-5(a)(3)(A)

Summary of requirements: "In determining which conditions of pretrial release, if any, will reasonably ensure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of pretrial release, the court shall, on the basis of available information, take into account . . . the history and characteristics of the defendant, including . . . the defendant's . . . financial resources."

Note: As of 2023, Illinois has abolished monetary bail. *See* 725 ILCS 5/110-1.5.

7) **Iowa**

Authority: Iowa Code § 811.2(2)

Summary of requirements: "In determining which conditions of release will reasonably assure the defendant's appearance and the safety of another person or persons, the magistrate shall, on the basis of available information, take into account . . . the defendant's . . . financial resources."

8) **Kansas**

Authority: Kan. Stat. Ann. § 22-2802(8)

Summary of requirements: "In determining which conditions of release will reasonably assure appearance and the public safety, the magistrate shall, on the basis of available information, take into account . . . the defendant's . . . financial resources."

9) **Minnesota**

Authority: Minn. R. Crim. P. 6.02(2)(e)

Summary of requirements: "In determining conditions of release the court must consider . . . financial resources."

10) **New Mexico**

Authority: N.M. R. Crim. P. Dist. Ct. 5-401(C)

Summary of requirements: "In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider . . . the financial resources of the defendant."

11) **North Carolina**

Authority: N.C. Gen. Stat. § 15A-534(c)

Summary of requirements: "In determining which conditions of release to impose, the judicial official . . . . must, on the basis of available information, take into account . . . the defendant's . . . financial resources."

12) North Dakota

Authority: N.D. R. Crim. P. 46(a)(3)(C)

Summary of requirements: "In determining conditions of release that will reasonably assure appearance of a person, the magistrate, on the basis of available information, must consider . . . the person's . . . financial resources."

13) New Jersey

Authority: N.J. Stat. § 2A:162-20(c)(1)

Summary of requirements: "In determining in a pretrial detention hearing whether no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, or that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process, the court may take into account information concerning . . . the eligible defendant's . . . financial resources."

14) Ohio

Authority: Ohio Rev. Code Ann. § 2937.011(E)(4)

Summary of requirements: "[I]n determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including the . . . [t]he defendant's . . . financial resources."

15) South Carolina

Authority: S.C. Code Ann. § 17-15-30(A)(3)

Summary of requirements: "In determining conditions of release that will reasonably assure appearance, or if release would constitute an unreasonable danger to the community or an individual, a court may, on the basis of the following information, consider the nature and circumstances of an offense charged and the charged person's . . . financial resources."

16) South Dakota

Authority: S.D. Codified Laws § 23A-43-4

Summary of requirements: "In determining which conditions of release will reasonably assure appearance, a committing magistrate or court shall, on the basis of available information, take into account . . . the defendant's . . . financial resources."

17) Tennessee

Authority: Tenn. Code Ann. § 40-11-115(b)

Summary of requirements: "In determining . . . whether or not a defendant shall be released, and if so, the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of the community, the magistrate must consider . . . the defendant's financial resources."

18) Washington

Authority: Rev. Code Wash. § 10.21.050(3)(a)

Summary of requirements: "[I]n determining whether there are conditions of release that will reasonably assure the safety of any other person and the community, take into account the available information concerning . . . [t]he defendant's . . . financial resources."

19) Wyoming

Authority: Wyo. R. Crim. P. 46.1(d)(3)(A)

Summary of requirements: "The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning . . . [t]he person's . . . financial resources."

II. States that Require or Allow Bail-Setting Magistrates to Consider an Arrestee's Financial Condition.

1) Alabama

Authority: Ala. R. Crim. P. Rule 7.2(a)(3)(xiii)

Summary of requirements: If the court determines bail is necessary, "the court may impose the least onerous condition or conditions contained in Rule 7.3 (b) that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court may take into account . . . the defendant's financial condition."

2) Arkansas

Authority: Ark. R. Crim. P. 9.2(c)(ii)

Summary of requirements: "In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of wilful [sic] nonappearance including . . . his . . . financial condition."

3) Colorado

Authority: Colo. Rev. Stat. Ann. § 16-4- 103(3)(a)

Summary of requirements: "The type of bond and conditions of release shall be sufficient to reasonably ensure the appearance of the person as required and to protect the safety of any person or the community, taking into consideration the individual characteristics of each person in custody, including the person's financial condition."

4) **Idaho**

Authority: Idaho Crim. R. 46(c)(1)

Summary of requirements: "The determination of whether a defendant should be released on the defendant's own recognizance or admitted to bail, and the determination of the amount and conditions of bail, if any, may be made after considering . . . defendant's . . . financial condition."

5) **Mississippi**

Authority: Miss. R. Crim. P. 8.2(a)(13)

Summary of requirements: In setting bail amount, "the court shall impose the least onerous condition(s) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court shall take into account . . . the defendant's financial condition."

6) **Oklahoma**

Authority: *Brill v. Gurich*, 965 P.2d 404, 406 (Okla. Crim. App. 1998)

Summary of requirements: "Presently, the judges of this State are required to consider the guidelines set forth in 1979 in *Petition of Humphrey,* when setting the amount of bail. These guidelines include . . . [the arrestee's] financial condition."

7) **Oregon**

Authority: Ore. Rev. Stat. §§ 135.230; 135.245

Summary of requirements:

i. § 135.230 (defining "primary release criteria" to include "protection of the victim or public"; "nature of the current charge"; and likelihood "to appear," among other factors.

ii. § 135.245 ("If the magistrate, having given priority to the primary release criteria, 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 and, if the person is charged with an offense involving domestic violence, ensure that the person does not engage in domestic violence while on release.")

8) **Pennsylvania**

Authority: 234 Pa. Code Ch. 5, Rule 523(A)(2)

Summary of requirements: "To determine whether to release a defendant, and what conditions, if any, to impose, the bail authority shall consider all available information as that information is relevant to the defendant's appearance or nonappearance at subsequent proceedings, or compliance or noncompliance with the conditions of the bail bond, including information about . . . the defendant's . . . financial condition."

9) **Tennessee**

Authority: Tenn. Code Ann. § 40-11-118(b)(2)
Summary of requirements: "In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider . . . [t]he defendant's . . . financial condition; provided, that, the defendant's ability to pay shall not be considered."

III. States that Require or Allow Bail-Setting Magistrates to Consider a Bail Affordability or a Defendant's Ability to Pay.

1) **Alaska**

Authority: Alaska Stat. § 12.30.011(c)(8)

Summary of requirements: "In determining the conditions of release under this chapter, the court shall consider the . . . assets available to the person to meet monetary conditions of release."

2) **California**

Authority: Cal. Penal Code § 1275
Summary of requirements: "In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at trial or at a hearing of the case. The public safety shall be the primary consideration."
Amended by: *In re Humphrey*, 11 Cal. 5th 135, 143 (2021)
New requirement: According to the *In re Humphrey* court, "where a financial condition is . . . necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee "solely because" the arrestee "lacked the resources" to post bail." (quoting *Bearden v. Georgia* 461 U.S. 660, 667–68 (1983)).

3) **Hawaii:**

Authority: Haw. Rev. Stat. § 804-9

Summary of requirements: "The amount of bail rests in the discretion of the justice or judge . . . and shall be set in a reasonable amount based upon all available information, including . . . the defendant's financial ability to afford bail."

Amended by: 2019 Hi. Act 179 (added "shall be set in a reasonable amount based upon all available information, including . . . the defendant's financial ability to afford bail."

Prior requirement: "The amount of bail rests in the discretion of the justice or judge or the officers named in section 804-5; but should be so determined as not to suffer the wealthy to escape by the payment of a pecuniary penalty, nor to render the privilege useless to the poor. In all cases, the officer letting to bail should consider the punishment to be inflicted on conviction, and the pecuniary circumstances of the party accused." Haw. Rev. Stat. § 804-9 (2018).

4) **Indiana**

Authority: Ind. Code Ann. § 35-33-8-4(b)(2)

Summary of requirements: "In setting and accepting an amount of bail, the judicial officer shall consider the bail guidelines . . . and take into account all facts relevant to the risk of nonappearance, including . . . the defendant's ability to give bail."

5) **Kentucky**

Authority: Ky. Rev. Stat. § 431.525(1)(e)

Summary of requirements: "The amount of the bail shall be . . . [c]onsiderate of the financial ability of the defendant."

6) **Louisiana**

Authority: La. C.Cr.P. Art. 316(4)

Summary of requirements: "The amount of bail shall be fixed in an amount that will ensure the presence of the defendant, as required, and the safety of any other person and the community, having regard to . . . [t]he ability of the defendant to give bail."

7) **Maine**

Authority: 15 Me. Rev. Stat. § 1026(4)(C)

Summary of requirements: In setting bail, the judicial officer shall . . . take into account the available information concerning the . . . [t]he defendant's financial resources, including the ability of the defendant to afford a financial condition imposed by the judicial officer."

Amended by: 2021 Me. Ch. 327 (added "including the ability of the defendant to afford a financial condition imposed by the judicial officer" after "financial resources."

Prior requirement: "In setting bail, the judicial officer shall . . . take into account the available information concerning . . . [t]he defendant's financial resources." 15 Me. Rev. Stat. § 1026(4)(C)(4) (2020).

8) Maryland

Authority: Md. R. 4-216.1(b)(2) (2025)

Summary of requirements: "A decision by a judicial officer whether or on what conditions to release a defendant shall be based on a consideration of specific facts and circumstances applicable to the particular defendant, including the ability of the defendant to meet a special condition of release with financial terms."

Amended:

Prior requirement: Prior to 2017, Maryland Rules stated "[i]n determining whether a defendant should be released and the conditions of release, the judicial officer shall take into account the following information, to the extent available: . . . the defendant's . . . financial resources." Md. R. 4-216(e)(1)(C) (2016).

9) Massachusetts

Authority: Mass. Gen. Laws Ann. ch. 276, § 57

Summary of requirements: "Except in cases where the person is determined to pose a danger to the safety of any other person or the community under section 58A, bail shall be set in an amount no higher than what would reasonably assure the appearance of the person before the court after taking into account the person's financial resources; provided, however, that a higher than affordable bail may be set if neither alternative nonfinancial conditions nor a bail amount which the person could likely afford would adequately assure the person's appearance before the court."

Amending Statute: 2017 Mass. S.B. 2371(added all language in summary of requirements noted above)

Prior requirement: Prior versions of Massachusetts' bail law required magistrates to consider a defendant's "employment record," but did not mention financial resources or condition. Mass. Gen. Laws Ann. ch. 276, § 57 (2017).

10) Michigan

Authority: Mich. Ct. R. 6.106(F)(1)(f)

Summary of requirements: "In deciding which release to use and what terms and conditions to impose, the court is to consider relevant information, including . . . the defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail."

11) Missouri

Authority: Mo. R. Crim. P. 33.01(e)

Summary of requirements: "In determining whether to detain the defendant pursuant to subsection (d) or release the defendant with a condition or combination of conditions of release, if any, pursuant to subsection (c), the court shall base its determination on the individual circumstances of the defendant and the case . . .

[and] shall take into account . . . the defendant's . . . financial resources, including ability to pay."
Amended: June 30, 2019, eff. Jan. 1, 2020.
Prior requirement: "In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, take into account . . . the accused's . . . financial resources." 2016 Mo. Sup. Ct. R. 33.01.

12) Montana

Authority: Mont. Code Ann. § 46-9-301(6)

Summary of requirements: "In all cases in which bail is determined to be necessary, bail must be reasonable in amount and the amount must be . . . considerate of the financial ability of the accused."

13) Nebraska

Authority: Neb. Rev. Stat. § 29-901(3)

Summary of requirements: "If the judge determines that the defendant shall not be released on his or her personal recognizance, the judge shall consider the defendant's financial ability to pay a bond and shall impose the least onerous of the following conditions that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or the public at large."

Amended by: 2017 Neb. Laws L.B. 259, § 2
Prior language: Prior to 2017, this Nebraska bail statute included none of the above quoted summary of requirements. A separate statute required magistrates to consider "the defendant's . . . financial resources." Neb. Rev. Stat. § 29-901.01 (2016).

14) Nevada

Authority: Nev. Rev. Stat. Ann. § 178.498(2)

Summary of requirements: "In deciding the amount of bail to impose on a person, the court shall consider . . . [t]he financial ability of the defendant to give bail."

15) New Hampshire

Authority: N.H. Rev. Stat. Ann. § 597:2(III)(b)(3)

Summary of requirements: "In determining the amount of the unsecured appearance bond or cash or corporate surety bail, the court may consider all relevant factors bearing upon a person's ability to post bail."

Amended by: 2020 NH Ch. 12 (added all the language in the summary of requirements noted above).
Prior requirement: "In determining the amount of the unsecured appearance bond or cash or corporate surety bail under subparagraph II(a), if any, the court . . . [s]hall not impose a financial condition that will result in the pretrial detention of a person solely as a result of that financial condition." N.H. Rev. Stat. Ann. § 597:2(III)(b)(1) (2019).

16) New York

Authority: N.Y. CLS CPL 510.30

Summary of requirements: In determining bail amount, "the court must consider and take into account available information about the principal, including . . . [i]f monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond."

Amended by: 2019 N.Y. Ch. 59, § 5 (adding "[i]f monetary bail is authorized, according to the restrictions set forth in this title, the principal's individual financial circumstances, and, in cases where bail is authorized, the principal's ability to post bail without posing undue hardship, as well as his or her ability to obtain a secured, unsecured, or partially secured bond."

Prior requirement: When setting bail, "the court must, on the basis of available information, consider and take into account . . . [the principle's] employment and financial resources." 2018 NY CLS CPL § 510.30.

17) Rhode Island

Authority: R.I. Super. Ct. R. Crim. P. 46(c)

Summary of requirements: "If the defendant is admitted to bail, the terms thereof shall be such as in the judgment of the court will insure the presence of the defendant, having regard to . . . the financial ability of the defendant to give bail."

18) Texas

Authority: Tex. Code Crim. Proc. Art. 17.15(a)(4)

Summary of requirements: "The amount of bail and any conditions of bail to be required in any case in which the defendant has been arrested . . . are governed by the Constitution and the following rules: . . . [t]he ability to make bail shall be considered, and proof may be taken on this point."

19) Utah

Authority: Utah Code Ann. § 77-20-205(7)(a)

Summary of requirements: "If the magistrate or judge determines that a financial condition, other than an unsecured bond, is necessary to impose as a condition of release, the magistrate or judge shall, when determining the amount of the financial condition, refer to the financial condition schedule in Section 77-20-205.5 and consider the individual's risk of failing to appear and ability to pay."

Amended by: 2021 Utah Laws 2nd Sp. Sess. Ch. 4, § 16.

Prior requirement: Prior bail statutes in the Utah Code established that bail conditions must "reasonably" meet the purposes of bail (to ensure "the appearance of the accused"; "the integrity of the court process"; "safety" and to avoid contact between the defendant and witnesses or victims) but did not require magistrates to consider individualized factors when setting those conditions. Utah Code Ann. § 77-20-1 (2019).

20) Vermont

Authority: 13 Vt. Stat. Ann. § 7554(b)(1)

Summary of requirements: "In determining which conditions of release to impose . . . the judicial officer, on the basis of available information, shall take into account . . . the accused's employment; financial resources, including the accused's ability to post bail."

Amended by: 2017 Vt. Laws 164 (added requirements that magistrates consider "the accused's ability to post bail.")

Prior requirement: Prior to 2017, magistrates were only required to consider the accused's "employment" and "financial resources." 13 Vt. Stat. Ann. § 7554(b) (2017).

21) Virginia

Authority: Va. Code Ann. § 19.2-121(A)

Summary of requirements: "If the person is admitted to bail, the terms thereof shall be such as, in the judgment of any official granting or reconsidering the same, will be reasonably fixed to ensure the appearance of the accused and to ensure his good behavior pending trial. The judicial officer shall take into account . . . the financial resources of the accused or juvenile and his ability to pay bond."

22) West Virginia

Authority: W. Va. Code § 62-1C-1a(a)(3)(A)

Summary of requirements: "The amount of bail shall be fixed by the court or justice [magistrate] with consideration given to the seriousness of the offense charged, the previous criminal record of the defendant, his financial ability, and the probability of his appearance."

23) Wisconsin (permits consideration, but does not require)

Authority: Wis. Stat. Ann. § 969.01(4)

Summary of requirements: "Proper considerations in determining whether to release the defendant without bail, fixing a reasonable and not excessive amount of bail or imposing other reasonable conditions of release are . . . the ability of the arrested person to give bail."