COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

ESSEX, ss. NO. SJ-2016-
DIST. CT. NO. 1613CR003391

COMMONWEALTH

V.

JESSICA WAGLE

PETITION FOR RELIEF PURSUANT TO G.L. c. 211, § 3

Jessica Wagle, an impoverished woman who is currently held on a money bail she cannot afford, petitions this Court for relief under G.L. c. 211, § 3, freeing her from her unlawful detention and declaring that jailing a person simply because she is too poor to pay a sum of money violates the Massachusetts and Federal constitutional guarantees of equal protection and due process of law.

This Court and the United States Supreme Court have repeatedly articulated the fundamental principle that no person can be kept in jail solely because of her poverty. Although that basic rule has long been a pillar of our legal system, it is overlooked as a matter of daily practice in courtrooms and jails throughout the Commonwealth. This case is about the irrationality and harmfulness of wealth-based pretrial

detention. Such a practice is terrible for public safety and grossly unjust. It has no place in our society. Because Jessica Wagle is held in jail solely by virtue of the amount of money she has, she respectfully requests that this Court report her case to the full bench of the Court and, on remand, issue a judgment ending the practice of jailing people because they cannot afford money bail.

BACKGROUND

A. Procedural History

Jessica Wagle was arrested on July 15, 2016. She was released from the police station and was told to report to Lynn District Court on July 19, 2016 (Pet.App.1). On July 19, 2016, Ms. Wagle was arraigned in Lynn District Court and charged with Possession of a Class A controlled substance under G.L. c. 94C, § 34 (Pet.App.2). The Commonwealth moved under G.L. c. 276, § 58, that she be held subject to the payment of cash bail. The judge set bail in the amount of $250 (Pet.App.2). At no point during the proceedings did the judge inquire about or make a finding that Ms. Wagle had the ability to post bond in that amount (See Pet.App.5).

Ms. Wagle had already been determined to be indigent and received court-appointed counsel (Pet.App.2). She has no income and no bank account or assets (Pet.App.13-14, 21-22). Her family will not post her bail (Pet.App.14). Since July 19, 2016, she has been jailed at MCI-Framingham because she is unable to pay the $250 bail (Pet.App.14).

On August, 3, 2016, the Essex County Superior Court reviewed Ms. Wagle's bail pursuant to G.L. c. 276, § 58 (Pet.App.7). Prior to that hearing, Ms. Wagle filed a Motion for Release on own Recognizance in which she argued that holding her on a bail she cannot afford is a violation of her equal protection and due process rights under the State and Federal Constitutions (Pet.App.8-10). In support of that motion, Ms. Wagle submitted affidavits and other documents conclusively demonstrating that she cannot afford to post the $250 bail (Pet.App.11-24).

At the conclusion of the bail-review hearing, the Superior Court (Feeley, J.) declined to reduce Ms. Wagle's bail (Pet.App.6-7). The Court made no finding that Ms. Wagle has the financial ability to post the $250 bail (Aff. Shira Diner, ¶ 5). Instead, it based its refusal to reduce the bail on the legal conclusion

that the fact that a person cannot afford a bail amount does not make that bail unreasonable (Id.).

B. Defendant's Circumstances

Jessica Wagle lived in the Attleboro area with her parents, older sister, and younger brother as a child (Pet.App.11). When she was eleven years old, she moved to western Massachusetts with her mother to get away from a situation that was developing at her home (Id.). She returned to Attleboro, but the family situation did not improve (Id.). Although she had been a good student, the situation led Ms. Wagle to drop out of school after 10th grade (Pet.App.11-12). She took a GED class, but never took the exam (Pet.App.12). Ms. Wagle left her parents' home as a teenager and moved to the Lynn area (Id.).

When Ms. Wagle was 23, her mother died, and her relationship with her father is complicated (Id.). There have been periods of time when they are in touch and periods of time when they are not. Before Ms. Wagle was arrested in April 2015, she was planning to move back to Attleboro to live with her father but needed to tie up some loose ends in Lynn (Id.).

Since Ms. Wagle was a teenager, she has worked at a number of retail and service jobs, including at a

hotel and coffee shop (Id.). Until two years ago, she worked at Sears and she has also worked cleaning people's homes (Id.). Since she moved out of her parents' house, she has stayed with different friends for varying lengths of time but has not had a stable living situation (Pet.App.13).

For the past six years, Ms. Wagle has struggled with an addiction to heroin. She began using heroin under pressure from her then boyfriend (Id.). They are no longer dating (Id.). She has attended two treatment programs (Project Hope in Lynn and Women's View in Lawrence) but her lack of stable housing and employment has made it difficult for her to address her addiction (Id.). If she were released from jail, she would attempt to enter a treatment program to address her addiction, and a social service advocate from the Committee for Public Services would be available to help her find and get into an appropriate treatment program (Pet.App.14, 18).

ARGUMENT

I.

THE PETITIONER'S ONGOING PRETRIAL DETENTION IS UNLAWFUL BECAUSE (A) KEEPING HER IN JAIL SOLELY BECAUSE SHE IS UNABLE TO MAKE A MONETARY PAYMENT IS INCOMPATABLE WITH THE STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION AND DUE PROCESS, AND (B) THE STATE'S DEPRIVATION OF HER FUNDAMENTAL RIGHT TO LIBERTY IS NOT NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST AND THEREFORE CANNOT BE SQUARED WITH THE REQUIREMENTS OF SUBSTANTIVE DUE PROCESS.

This case raises an issue of fundamental importance to the Massachusetts justice system: Can a person be kept in a jail cell because she cannot make a monetary payment? Jessica Wagle is an impoverished person accused of possession of a Class A controlled substance, under G.L. c.94C §34. After her arrest and arraignment, she was determined eligible for immediate release. But she was told that her liberty would be conditioned on the payment of $250. Like many presumptively innocent people every day, she could not afford to buy her release. She has been kept in jail since. If she could afford to post $250, she would be released immediately.

As argued below, the Petitioner's detention is unlawful for two reasons. First, under settled Massachusetts and Federal law, jailing a person solely

because she is too poor to post bail is incompatible with the requirements of equal protection and due process. Second, depriving the Petitioner of her fundamental right to liberty violates her State and Federal rights to substantive due process because the deprivation is not narrowly tailored to achieve a compelling governmental interest.

A. Keeping a Person in a Jail Cell Because She Cannot Make a Monetary Payment Violates Equal Protection and Due Process.

1. The Basic Constitutional Principles

The rule that poverty and wealth status have no place in deciding whether a human being should be kept in a jail cell relies on some of the most fundamental principles in American law. See *Williams v. Illinois*, 399 U.S. 235, 241 (1970) ("[T]he Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons."). In *Griffin v. Illinois*, 351 U.S. 12, 19 (1956), the Supreme Court stated this principle in its most simple form: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." In *Douglas v. California*, 372 U.S. 353, 355 (1963), the Supreme Court applied this principle to an indigent person's appeal: "For there

can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." In the translated words on this Court's 1785 seal: "We sell justice to no one; we deny justice to no one." http://www.mass.gov/courts/court-info/sjc/about/ (last visited August 3, 2016).

These principles have been applied in a variety of contexts where the government has sought to keep a person in jail solely because of the person's inability to make a monetary payment. See, e.g., *Tate v. Short*, 401 U.S. 395, 398 (1971) ("[T]he Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."). In *Bearden v. Georgia,* 461 U.S. 660, 672-73 (1983), the Supreme Court explained that to "deprive [a] probationer of his conditional freedom simply because, through no fault of his own he cannot pay [a] fine … would be contrary to the fundamental fairness required by the Fourteenth Amendment." For this reason, the Court held that a necessary pre-condition for a State to jail an individual for non-payment of a monetary

obligation is an inquiry into that defendant's ability to pay. *Id.* at 672.

In *Williams v. Illinois*, 399 U.S. 235 (1970), the Supreme Court explained:

> But, as we said in *Griffin*, a law nondiscriminatory on its face may be grossly discriminatory in its operation. Here the Illinois statutes as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. *On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment….* By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

Id. at 242 (emphasis added, citation and quotation omitted). "Due process and equal protection principles converge in the Court's analysis in these cases." *Bearden*, 461 U.S. at 665.

Because of these cases, it has long been the law in Massachusetts and every Federal circuit that any kind of pay-or-jail system is unconstitutional when it

operates to jail the poor.[1] In *Frazier v. Jordan,* 457 F.2d 726, 728-29 (5th Cir. 1972), the court found that an alternative sentencing scheme of $17 dollars or thirteen days in jail was unconstitutional as applied to those who could not immediately afford the fine. Because those people would be sent to jail if they could not pay the $17 fine, the lower court's order of imprisonment was unconstitutional. *Id.* at 728. Put simply, *Frazier* condemned the practice because it created a system in which "[t]hose with means avoid imprisonment [but] the indigent cannot escape imprisonment." *Id.*; see also *Barnett v. Hopper*, 548

[1] See, e.g., *Commonwealth v. Gomes*, 407 Mass. 206, 212-213 (1990) ("Generally, 'the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'") (quoting *Tate v. Short*, 401 U.S. 395, 398)); *Commonwealth v. Payne*, 602 N.E.2d 594, 595 (Mass. App. Ct. 1992) ("What informs [*Bearden v. Georgia* and *Commonwealth v. Gomes*] is the idea that a person in collision with the government ought not to be punished for his poverty."); *Alkire v. Irving*, 330 F.3d 802 (6th Cir. 2003) (holding that an inquiry into ability to pay is "precisely what the Fourteenth Amendment requires."); *United States v. Estrada de Castillo*, 549 F.2d 583, 586 (9th Cir. 1976) ("[I]f a defendant, because of his financial inability to pay a fine, will be imprisoned longer than someone who has the ability to pay the fine, then the sentence is invalid."); *United States v. Hines*, 88 F.3d 661, 664 (8th Cir. 1996) ("A defendant may not constitutionally be incarcerated solely because he cannot pay a fine through no fault of his own.").

F.2d 550, 554 (5th Cir. 1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws."), vacated as moot, 439 U.S. 1041 (1978); *United States v. Santarpio*, 560 F.2d 448, 455 (1st Cir. 1977) (If a probationer were unable to pay a fine and attorneys fees, "revocation of probation for nonpayment would be patently unconstitutional.").[2]

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[2] The courts have consistently enforced these principles in various contexts. In *Commonwealth v. Canadyan*, for example, this Court decided a case involving the "tension between mandatory GPS monitoring of sex offenders released on probation, see G. L. c. 265, § 47, and the practical reality of homelessness--a circumstance facing an increasing number of former sex offenders." 458 Mass. 574, 577 (2010). Canadyan was unable to comply with his GPS condition because, "through no fault of his own," he could not afford a home where he could charge the device. *Id.* at 578. The Court held that "[i]n these circumstances, where there was no evidence of wilful noncompliance, a finding of violation of the condition of wearing an operable GPS monitoring device was unwarranted, and is akin to punishing the defendant for being homeless." *Id.* at 579, citing *Bearden v. Georgia,* 461 U.S. at 669 n. 10. See also *United States v. Flowers*, 946 F. Supp. 2d 1295, 1301, 1302 (M.D. Ala. 2013) (holding that a criminal defendant who could not afford the cost of release on home confinement monitoring could not be incarcerated for that reason because the constitutional guarantee of equal protection cannot tolerate a system where "a defendant identical to Flowers but with a thicker billfold would receive home confinement, while Flowers would receive prison");*United States v. Waldron*, 306

If poverty status has no place in determining sentencing outcomes or probation revocation, it has no place in pretrial release decisions. Just as it is unlawful to put a convicted person in jail because of her inability to make a monetary payment, it is unlawful to put a presumptively innocent person in jail for the same reason. The principle in *Williams*, *Tate*, and *Bearden* applies equally to pretrial and post-trial jailing. The "illusory choice" and the "different consequences … applicable only to those without the requisite resources," *Williams*, 399 U.S. 242, are the same.

In fact, in the context of pretrial arrestees, the rights at stake are even *more* significant because the liberty interest is not diminished by criminal conviction; the arrested person is presumed to be innocent. Justice Douglas, writing at the onset of the successful movement to vindicate this principle in the Federal criminal justice system, famously set

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F. Supp. 2d 623, 629 (M.D. La. 2004) ("It is well established that our law does not permit the revocation of probation for a defendant's failure to pay the amount of fines if that defendant is indigent or otherwise unable to pay. In other words, the government may not imprison a person solely because he lacked the resources to pay a fine.").

forth the core question: "To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.… Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" *Bandy v. United States*, 81 S. Ct. 197, 197-98 (1960).[3]

Attorney General Robert Kennedy led the movement emphatically to answer Justice Douglas's question in the negative and to remove that "invidious discrimination," *Williams*, 399 U.S. 242, from Federal courts.[4] The result was the elimination of the routine

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[3] Justice Douglas further explained: "It would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. The wrong done by denying release is not limited to the denial of freedom alone. That denial may have other consequences. In case of reversal, he will have served all or part of a sentence under an erroneous judgment. Imprisoned, a man may have no opportunity to investigate his case, to cooperate with his counsel, to earn the money that is still necessary for the fullest use of his right to appeal." *Id.* at 198 (citations omitted).

[4] Over fifty years ago, Kennedy testified that "[b]ail has become a vehicle for systematic injustice. Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest. They are not yet proven guilty. They may be no more likely

use of cash bonds in the District of Columbia and in Federal courts throughout the country. Those courts transitioned to a rigorous, evidence-based system of non-financial conditions. In particular, Congress passed Bail Reform Acts of 1966 and 1984, the latter of which codified the Equal Protection standard in clear terms: "The judicial officer may not impose a

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to flee than you or I. But, nonetheless, most of them must stay in jail because, to be blunt, they cannot afford to pay for their freedom… Plainly our bail system has changed what is a constitutional right into an expensive privilege." Aug. 4 1964, Testimony on Bail Legislation before the Senate Judiciary Committee, *available at* http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf. Many Federal judges, from Learned Hand to Skelly Wright condemned the evils of money bail. In his famous concurring opinion in *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963), Judge Skelly Wright wrote that:

> The result of this system in the District of Columbia is that most defendants, for months on end, languish in jail unable to make bond awaiting disposition of their cases….
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> When the long-delayed bail reforms finally become a reality, it is hoped that the accent will be on allowing defendants release on their own recognizance, with adequate and certain penalties for non-appearance. Today Fugitives do not go very far or maintain their status as such very long, so no money guarantee is required to insure their appearance when ordered.

financial condition that results in the pretrial detention of the person." 18 U.S.C. § 3142(c)(2).[5]

At the same time that the Federal government was reforming bail laws, Massachusetts passed its own laws to prevent indigent defendants from languishing in jail while awaiting trial because they could not pay money bail. "Massachusetts became a national leader in the bail reform movement, and was the first State to adopt legislation changing the presumption to one of release on personal recognizance rather than release on bail for offenses within the jurisdiction of the District Courts." *Commonwealth v. Ray*, 435 Mass. 249, 254 (2001). This presumption of release on personal recognizance was later expanded "to include all crimes except those punishable by death." *Id.*, citing St. 1971, c. 473, § 1. See also *Commesso v. Commonwealth*, 369 Mass. 368, 371 (1975) ("The bail reform act was intended to establish the right of the accused, in most circumstances, to be admitted to bail

[5] In signing the 1966 Bail Reform Act, President Lyndon B. Johnson emphasized that the law would "insure that defendants are considered as individuals-and not as dollar signs," and outlined the ways in which the use of money bail had previously "inflicted arbitrary cruelty." *Remarks at the Signing of the Bail Reform Act of 1966*, (June 22, 1966)*available at* http://www.presidency.ucsb.edu/ws/?pid=27666.

upon personal recognizance without surety" (citation and internal quotation marks omitted)). This presumption of release without posting bail remains in today's version of the bail statute. See G. L. c. 276 § 58. Despite this presumption, however, trial courts across the Commonwealth routinely condition a defendant's release on a cash payment without first ensuring that the defendant has the ability to pay.[6]

During this period of reform, the few courts that were asked to consider whether indigent people could be imprisoned solely because they were unable to pay a particular monetary bond perceived the vital

[6] In Fiscal Year 2015, over 33,862 Massachusetts defendants had their release from jail conditioned on the payment of a cash bond, and 11,589 of these defendants were kept in jail because they did not pay the cash bond amount. MASSACHUSETTS COURT SYSTEM, INITIAL ANALYSIS OF MASSCOURTS DISTRICT AND BOSTON MUNICIPAL COURTS PRE-TRIAL RELEASE EVENTS, 8 (April 5, 2016). Moreover, at least 1,605 defendants remained in jail because they did not make a payment of $500 or less. *Id.* at 7, 9. (According to the Massachusetts Court System's presentation, 10,563 defendants had bail set at under $500, and 84.8% of those defendants posted that bail amount. Based on this information, one could calculate that 15.2% of those defendants (or 1,605 defendants) remained in jail on a bond of less than $500. Because the study did not include data from the Barnstable and Brockton District Courts and the Central Division of the Boston Municipal Court, it is impossible to calculate the exact number of defendants who remained in jail because they were not able to pay a bond of $500 or less. *Id.*)

constitutional principles at stake. In *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (*en banc*), the Fifth Circuit answered Justice Douglas's question in the only Federal appellate opinion on the issue: "At the outset we accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." The panel opinion, *Pugh v. Rainwater*, 557 F.2d 1189, 1190 (5th Cir. 1977), had struck down altogether the Florida Rule of Criminal Procedure dealing with money bail because it is unconstitutional to keep an indigent person in jail prior to trial solely because of the person's inability to make a monetary payment. The *en banc* court agreed with the panel opinion's legal conclusion but reversed the panel's facial invalidation of the *entire* Florida Rule. *Rainwater*, 572 F.2d at 1057.

Rainwater's reasoning is easy to understand. The *en banc* court held that the Florida Rule itself did not *require* on its face the setting of monetary bail for arrestees and explained that, if such a thing were to happen to an indigent person, it would be unconstitutional. In other words, the court held that the Florida courts could not be expected to enforce

the new Rule--which had been amended during the litigation in that case--in a manner that violated the Constitution by requiring monetary payments to secure the release of an indigent person. The court explained the binding constitutional principles at stake:

> We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint. We do not read the State of Florida's new rule to require such a result.

Id. at 1058.[7] Summing up its reasoning, the *en banc* court held: "The incarceration of those who cannot [afford a cash payment], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057 (emphasis added).

Other State supreme courts have agreed with these principles, though they have not been asked to do so

[7] *Rainwater* further explained that it refused to require a priority to be given in all cases--including those of the non-indigent--to non-monetary conditions of release. The court noted that, at least for wealthier people, some might actually prefer monetary bail over release with certain other conditions, and that the court would not invalidate a State rule that allowed for those other conditions in appropriate cases. *Id.* at 1057.

very often. In *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994), the Alabama Supreme Court struck down a State statute that allowed for indigent arrestees to be held for 72 hours solely because they could not afford monetary payments to secure their release prior to their first appearance. The Court held:

> [A]n indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by cash bail, a bail bond, or property bail, must remain incarcerated for a minimum of three days, and perhaps longer, before being able to obtain [recognizance release]. *We conclude that, as written, article VII of the Act violates an indigent defendant's equal protection rights guaranteed by the United States Constitution, because the classification system it imposes is not rationally related to a legitimate governmental objective.*

Id (emphasis added) (quotations removed).[8] In *Blake*, the lower court was shocked by the system of detention

[8] *Blake* struck down the scheme holding indigent defendants on small cash bonds for at least 72 hours under even rational basis review. *Blake* inappropriately applied rational basis review even after correctly stating the legal rule that strict scrutiny must be applied to any government action that deprives a person of a fundamental right. *See Blake*, 642 So. 2d at 968. The difference is immaterial, though, because *Blake* correctly held that jailing indigent people who are otherwise deemed eligible for release solely because they cannot make small payments is not even rationally related to a legitimate government objective, let alone necessary to achieve a compelling one.

based on poverty that prevailed in Alabama at the time:

> The pretrial detention of this defendant accused of a misdemeanor for possibly five or six days because of defendant's lack of resources interferes with the right of liberty, the premise of innocent until proven guilty, and *shocks the conscience of this court*. If this defendant has $60 cash to pay a bondsman, he walks out of the jail as soon as he is printed and photographed … Absent property or money, the defendant must wait 72 hours for a hearing for judicial public bail. *Putting liberty on a cash basis was never intended by the founding fathers as the basis for release pending trial.*

Id. at 966 (emphases added). See also, e.g., *Robertson v. Goldman*, 369 S.E.2d 888, 891 (W.Va. 1988) ("[W]e have previously observed in a case involving a 'peace bond,' which we said was analogous to a bail bond, that if the appellant was placed in jail because he was an indigent and could not furnish [bond] while a person who is not an indigent can avoid being placed in jail by merely furnishing the bond required, he has been denied equal protection of the law." (internal quotation marks omitted)); *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979) ("A consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be

unconstitutional."). In *Lawson*, the court explained that Mississippi law provided for release without payment of money and that, following the ABA Standards, Mississippi courts should adopt a presumption of release on recognizance (at least in cases not involving "violent or heinous crimes"). See *id.* ("There is incorporated in these standards a presumption that a defendant is entitled to be released on order to appear or on his own recognizance."). The court declared that this presumption of non-monetary release "will go far toward the goal of equal justice under law." *Id.* at 1024.[9]

[9] The New Mexico Supreme Court recently addressed these issues at length in *State v. Brown*, 338 P.3d 1276 (N.M. 2014). The court concluded:

> Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release… If a defendant should be detained pending trial under the New Mexico Constitution, then that defendant should not be permitted any bail at all. Otherwise the defendant is entitled to release on bail, and excessive bail cannot be required.

Id. at 1292 (citations and internal quotation marks omitted).

2. A Return to Equal Protection and Due Process Principles

For many years, the use of money bail actually *increased*--largely under the radar--in many State courts.[10] For decades after *Rainwater*, no major challenges were brought to the use of money bail to detain the indigent on equal protection and due process grounds. Over the past year, however, Federal courts across the country have, in a series of cases, condemned the practice of requiring the payment of money bail without first determining that the defendant actually has the ability to pay. See, e.g.,

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[10] In 1996, 59% of felony defendants had to meet a financial condition in order to retain or regain their freedom from confinement. Timothy C. Hart & Brian A. Reaves, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 1996*, at 17 (1999). By 2009, the percentage of felony defendants subject to financial release conditions had climbed to 72%. Brian A. Reaves, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2009-Statistical Tables* 15, 20 (2013). About half of felony defendants subject to financial release conditions cannot meet them and remain in custody until the disposition of their cases. *Felony Defendants, 2009*, at 17. In 1990, the majority of felony defendants who were not detained while their cases were pending were released without financial conditions. In 2009, only 23% of felony defendants who were not jailed, were released on their own recognizance. Additionally, the average amount of money required to be paid as a condition of release has increased. Vera Institute of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 29 (Feb. 2015).

Jones v. City of Clanton, 2:15-cv-34-MHT (M.D. Ala. September 15, 2015) (issuing final judgment and opinion declaring secured money bail unconstitutional without a hearing into ability to pay); *Walker v. City of Calhoun*, --- F. Supp. 3d ---, 2016 WL 361612 (N.D. Ga., January 28, 2016) (granting class-wide preliminary injunction to stop the use of money bail to detain new arrestees without an inquiry into the arrestee's ability to pay); *Rodriguez v. Providence Community Corrections, Inc.*, --- F. Supp. 3d ---, 2015 WL 9239821 (M.D. Tenn. Dec. 17, 2015) (granting class-wide preliminary injunction ordering County government to cease using monetary bail to detain people accused of probation violations without an inquiry into their ability to pay); *see also, e.g., Thompson v. City of Moss Point*, 1:15-cv-182-LG (Doc. 18) (S.D. Miss. November 6, 2015) (declaring the use of secured money bail unconstitutional without prompt inquiry into ability to pay); *Pierce et al. v. City of Velda City*, 15-cv-570-HEA (E.D. Mo. 2015) (issuing a declaratory judgment that the use of secured money bail without an inquiry into ability to pay is unconstitutional as applied to the indigent and enjoining its operation), *Cooper v. City of Dothan*, 1:15-cv-425-WKW (M.D. Ala.

June 18, 2015) (issuing Temporary Restraining Order ordering immediate release of arrestee and holding that the City of Dothan's practice of preset secured money bond without an inquiry into ability to pay violated the Fourteenth Amendment).

In a landmark legal filing, the Department of Justice--citing its long commitment to the issue since Attorney General Kennedy led the abolition of wealth-based detention in Federal courts with the help of a consensus among Federal judges, Congress, and leading academics--announced its position that the use of secured money bail without an inquiry into ability to pay to keep indigent arrestees in jail "not only violates the Fourteenth Amendment's Equal Protection Clause, but also constitutes bad public policy." United States Department of Justice, Statement of Interest, *Varden et al. v. City of Clanton,* 15-cv-34 (M.D. Ala. 2015).[11]

[11] The Clanton case involved the use of a "bail schedule" that set monetary bail without an inquiry into ability to pay. The equal protection and due process problem with the use of a bail schedule and the use of discretionary amounts of money is the same: it violates equal protection and due process to set a money bail amount without a hearing into the person's ability to pay and a finding that the person can pay that amount. The Department of Justice has emphasized

Like the Federal courts and the Department of Justice, the American Bar Association's Standards for Criminal Justice condemn the inappropriate use of money bail, as imposed by the lower courts in this case, as having no place in American law. *American Bar Association Standards for Criminal Justice – Pretrial Release* (3rd ed. 2007) ("ABA Standards").[12] The ABA Standards, which this Court has looked to for

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that the problems with money bail extend beyond bail schedules: "[T]he same constitutional violations [as in Clanton] arise in other money bail systems, including those in which judges set cash bail amounts in one case after another without due consideration of a person's ability to pay. However the system is designed or administered, if the end result is that poor people are held in jail as a result of their inability to pay while similarly situated wealthy people are able to pay for their release, the system is unconstitutional." Lisa Foster, Director, Office for Access to Justice, *Remarks at ABA's 11th Annual Summit on Public Defense*, (Feb. 6, 2016) https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit. In a letter to courts nationwide, the Department of Justice again emphasized that these "basic constitutional principles" require that "[c]ourts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release." Vanita Gupta, Principal Deputy Assistant Attorney General, Civil Rights Division, and Lisa Foster, Director, Office for Access to Justice, *Joint "Dear Colleague" Letter* (March 14, 2016) https://www.justice.gov/crt/file/832461/download.

[12] Available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

guidance in dozens of cases, first began addressing post-arrest release procedures in 1968. The latest revision of the ABA Standards now constitutes one of the most comprehensive and definitive statements available on the issue of post-arrest release, setting forth clear, reasonable alternatives to detention based on money.

The ABA Standards condemn the use of money bail set in an amount greater than a person can afford:

> The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.

ABA Standards at § 10-1.4(e).

> Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.

ABA Standards at § 10-5.3(a). The ABA commentary to § 10-1.4(c) explains: "If the court finds that unsecured bond is not sufficient, it may require the defendant to post bail; *however, the bail amount must be within the financial reach of the defendant* and should not be at an amount greater than necessary to assure the

defendant's appearance in court." *Id.* at 44 (emphasis added).[13]

3. The Lower Court's Order Requiring that the Defendant be Jailed Unless She Pays Money She Cannot Afford Violates Her State and Federal Constitutional Rights Equal Protection and Due Process.

All of the "evils" of discrimination against the indigent, *Douglas*, 372 U.S. at 355, are present in this case. Since her arraignment, Ms. Wagle has been free to go home if only she could pay $250. The District Court and the Superior Court both determined that she is eligible for release, but they made her freedom contingent on something entirely outside her control. No person in her case made a finding that she could pay the amount of money asked of her--indeed, no one has even inquired.

Having determined that a defendant is eligible for pretrial release, the government cannot condition

[13] The ABA standards in general strongly emphasize the principle that no condition infringing on pretrial liberty should be imposed unless it is the least restrictive condition necessary: "Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond. Additional conditions should be imposed on release only when the need is demonstrated by the facts of the individual case…." ABA Standards § 10-1.4(a); § 10-1.4(c) (commentary) at 43-44.

the defendant's freedom on posting a bail that she cannot afford. To do so would be to commit the same violation condemned in *Tate*. See *Bearden*, 461 U.S. at 667-68 (holding that "if [a] State determines a fine or restitution to be the appropriate and adequate penalty for [a] crime, it may not thereafter imprison a person solely because he lacked the resources to pay it"). See also *Thompson v. City of Moss Point*, 1:15-cv-182-LG (Doc. 18) (S.D. Miss. November 6, 2015) ("No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond.").

The Supreme Court's most recent case on wealth-based detention provides further guidance for this Court because it emphasizes the importance of a rigorous inquiry into ability to pay before jailing a person for failing to meet a financial condition. In *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011), the

Supreme Court described the procedural requirements that must be followed when a State attempts to jail a person for non-payment. *Turner* held that South Carolina's incarceration of a man for unpaid child support payments was unconstitutional because the court had imprisoned him without an inquiry into ability to pay. *Id.* Whether the jailing is pursuant to probation revocation proceedings as in *Bearden*, pursuant to formal contempt proceedings as in *Turner*, or pursuant to pretrial detention proceedings as here, the Court explained the basic protections that the State must provide before jailing a person for non-payment of a monetary sum:

> Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the … proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 2519. The Court held that Turner's imprisonment was unconstitutional because the South Carolina court did not comply with the procedures that were essential to "fundamental fairness."

In the same way, if a judge orders a pretrial arrestee's release but conditions that release on a monetary payment, the judge must make "an express finding" that "the defendant has the ability to pay." *Id.* at 2519. Otherwise, the order of release would be automatically converted into an order of detention for an indigent person.

Massachusetts law is supposed to ensure that this cannot happen. Here, as in *Rainwater*, there is nothing facially improper with Massachusetts law. Massachusetts law offers immediate release to people like Ms. Wagle and even sets forth a presumption that they be released on recognizance. G.L. c. 276 § 58 ("A justice or a clerk or assistant clerk of the district court, a bail commissioner or master in chancery, in accordance with the applicable provisions of section fifty-seven, … shall admit such person to bail on his personal recognizance without surety unless said justice, clerk or assistant clerk, bail commissioner or master in chancery determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person before the court."). Although Massachusetts requires release on recognizance as a presumption absent

specific findings and requires the judge to consider "financial resources," G.L. c. 276 § 58., the law is not the reality for Ms. Wagle and people like her. It is routine practice throughout the Commonwealth that monetary bail is set shortly after arrest by a bail magistrate without any inquiry into ability to pay, let alone specific findings of necessity. Indigent people are then kept in jail until a formal adversarial proceeding. Those proceedings then routinely result, as here, in the setting of a money bail without specific findings that the person can afford to pay. The problem in Massachusetts is thus with how the law is ignored and misused to impose money bail as a requirement for release without first ensuring that the defendant has the ability to pay.[14]

Urgent action is needed by this Court to eradicate wealth-based detention. While some

[14] The Massachusetts legislature drafted bail legislation in such a way as to discourage the imposition of money as a condition of release. The Commonwealth's bail legislation "was not intended to give the courts discretion to deny bail but rather to establish the right of the accused, in most circumstances, to be admitted to bail upon personal recognizance without surety." *Commonwealth v. Roukous*, 2 Mass. App. Ct. 378, 382 (1974).

arrestees in Massachusetts hand cash to their jailors and are released immediately, poor arrestees charged with the same offenses languish in crowded jails. A system that jails the poor and frees the rich is not a system consistent with the "fundamental fairness," *Bearden* 461 U.S. at 673, enshrined in the Fourteenth Amendment and the Declaration or Rights. Accordingly, this Court should hold that jailing defendants because they are too poor to post bail violates their rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights.

B. Depriving The Petitioner Of Her Fundamental Right To Liberty Violates Her State And Federal Rights To Substantive Due Process Because The Deprivation Is Not Narrowly Tailored To Achieve A Compelling Governmental Interest.

1. Basic Due Process Principles.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and arts. 1, 10, and 12 of the Massachusetts Declaration of Rights protect "against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation omitted); *Cote-Whitacre v. Dep't of Pub.*

Health, 446 Mass. 350, 366 (2006). The right to pretrial liberty is a "fundamental" right. *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Aime v. Commonwealth*, 414 Mass. 667, 677 (1993) ("Freedom from governmental restraint lies at the heart of our system of government and is undoubtedly a fundamental right."); *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) (holding that release prior to trial is a "vital liberty interest"); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

Because "[f]reedom from bodily restraint is a fundamental liberty interest," any deprivation of that right must withstand "strict scrutiny," requiring that the deprivation be "narrowly tailored to further a legitimate and compelling governmental interest." *Kenniston v. Dep't of Youth Servs.*, 453 Mass. 179, 183 (2009). See also *Schilb v. Kuebel*, 404 U.S. 357, 365

(1971); *Commonwealth v. Bruno*, 432 Mass. 489, 503 (2000); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (*en banc*) (applying strict scrutiny to strike down Arizona bail law that required detention after arrest for undocumented immigrants accused of certain offenses). For that reason, the Supreme Court in *Salerno* and this Court in *Aime* applied the most careful scrutiny to a presumptively innocent person's loss of liberty.

In evaluating the Federal Bail Reform Act under its heightened scrutiny test for fundamental rights, the Supreme Court found that the Federal law survived because it addressed a "compelling" and "overwhelming" interest of preventing additional pretrial criminal activity by operating "only on individuals who have been arrested for a specific category of extremely serious offenses" and whom "Congress specifically found" to be especially dangerous and to pose a "particularly acute problem." *Salerno*, 481 U.S. at 750. Moreover, the Court relied on the specific aspects of the Federal law that made it narrowly tailored to achieve that compelling purpose: that, even as applied to defendants charges with the most serious Federal felony offenses, it required "a full-

blown adversarial hearing," representation by counsel, and a heightened evidentiary burden. *Id.* at 742, 750. The Court ultimately upheld the law because "Congress' careful delineation" required "written findings of fact and a statement of reasons" why an "arrestee presents an identified and articulable threat to an individual or the community." *Id.* at 751. Perhaps most importantly, the Supreme Court explained that, even if such showings were made, pretrial incapacitation was *still* not permitted unless a further showing was made: that "no condition or combination of conditions" could mitigate that specifically identified risk. *Id.* at 742, 754.

Similarly, in *Aime*, this Court described why orders resulting in pretrial detention must be applied only in "carefully limited" situations and only with rigorous procedural safeguards. 414 Mass. at 678-680. This Court explained that "[a] State may not enact detention schemes without providing safeguards similar to those which Congress incorporated into the Bail Reform Act." *Id.* at 680. This Court, citing *Salerno*, set forth the evidentiary and legal criteria that could justify the deprivation of such a "fundamental" human right to pretrial liberty.

First, pretrial detention of a presumptively innocent person should be allowed only in cases of "the most serious of crimes." *Salerno*, 481 U.S. at 747. No case from this Court or the Supreme Court approves of the use of small amounts of money to detain people in minor cases under the Due Process or Equal Protection Clauses, or under Massachusetts's "more emphatic guarantees in arts. 1, 10, and 14." See *Mendoza v. Commonwealth*, 423 Mass. 771, 780 (1996). A critical component of *Salerno* and *Aime* is that the balance of interests allowing deprivation of an individual's "fundamental" right begins to tilt in the government's favor only in "extremely serious" criminal cases.

Second, if an order of detention is entered, it can be issued only after a rigorous adversarial hearing with heightened evidentiary burdens. The harms are too great, both to the individual's core right to bodily freedom and to the future of the person's criminal case.

Third, there must be detailed written findings explaining the reasons that the person has to be fully incapacitated prior to being found guilty of a crime. These specific findings must include why no other

condition or combination of conditions can protect against specifically identified risks that the individual has been found to pose.

2. The Lower Court's De Facto Detention Order Is Not Narrowly Tailored.

Though not framed as an order of pretrial detention, the lower court's order was its functional equivalent. See *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether"); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) ("[T]he setting of bond unreachable because of its amount would be tantamount to setting no conditions at all."). Yet the court's order was not narrowly tailored to achieve its interest in ensuring that Ms. Wagle returns to court.

The court has at its disposal numerous non-financial alternatives that have worked well for years in other jurisdictions to guard against non-appearance. See *Commonwealth v. Weston W.*, 455 Mass. 24, 36 (2009) (under strict scrutiny standard, State must use "the least restrictive means available to vindicate [its] interest"); *Riggins v. Nevada*, 504

U.S. 127, 135 (1992) (due process requires consideration of "less intrusive alternatives" before criminal defendant can be deprived of liberty interest). These include text message and phone call reminders of court dates, regular meetings with a probation officer,[15] and, as a last resort, GPS monitoring.[16] Some jurisdictions use unsecured bond, which has been found to be *just as effective* at ensuring court appearance as secured money bail.[17] All

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[15] See Justice Policy Institute, "Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail," 27-36 (2012) (describing effective alternatives to bail for ensuring the attendance of criminal defendants in court). See also G.L. c. 276 § 87 (granting Massachusetts trial courts authority to set pretrial release conditions).

[16] It is also the case that our society has seen enormous changes that dramatically alter the landscape in which money bail used to be an incentive for people not to flee. *Pannell v. United States*, 320 F.2d 698, 699 (D.C. Cir. 1963) ("Today Fugitives do not go very far or maintain their status as such very long, so no money guarantee is required to insure their appearance when ordered."). This is even truer 50 years later, when everyone in our society exists more or less on an electronic grid, and it is difficult if not impossible to evade capture, especially for the poor, who tend not to have the resources to leave their community, let alone to flee the jurisdiction. The vast majority of criminal defendants are impoverished people who do not have the resources to take flight.

[17] *See* Michael Jones, PRETRIAL JUSTICE INSTITUTE, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (2013), available at http://www.pretrial.org/download/research/Unsecured%20

of these alternatives are cheaper, more effective, and far less intrusive than pretrial detention.

All over the country, jurisdictions have taken their constitutional obligations seriously and instituted post-arrest alternatives to the unjust system of jailing the poor and freeing those with means. In Washington, D.C., a large and busy urban jurisdiction, arrestees are released on recognizance with appropriate non-financial conditions. See D.C. Code § 23-1321. Clanton, Alabama, after being confronted with a Federal lawsuit raising similar arguments to those presented here, adopted a new policy in 2015 of releasing all arrestees on a $500 unsecured recognizance bond, allowing every new arrestee to be released on the promise to pay that amount should the person later fail to appear. See *Jones et al. v. City of Clanton*, 2:15-cv-34-MHT (M.D. Ala. 2015). The same has also happened in many other cities in Alabama, Louisiana, Mississippi, Georgia, Tennessee, and Kansas in response to Federal lawsuits.

Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf (discussing results of large study in Colorado finding that unsecured bonds were just as effective as secured bonds in assuring public safety and appearance in court).

The trial courts of the Commonwealth are free to choose reasonable non-financial conditions, but *Salerno* and *Aime* make clear that they may not, consistent with due process, use money to determine freedom or detention without ensuring that no other alternative is sufficient. An order of categorical detention based on money could never meet the stringent due process requirements for pretrial detention. The speculative benefits of a monetary bail are also too tenuous, and there are obvious alternatives to assure appearance. Moreover, when the defendant has not been shown to pose a danger to the community in a serious felony case, the small risk of non-appearance is not the kind of "overwhelming" and "compelling" interest sufficient to justify detention and the devastating harm to the accused's life and to the accused's case that accompany the fundamental right of liberty. In such cases, no presumptively innocent person should be held in jail prior to trial. See *Lee v. Lawson*, 375 So.2d at 1023. The balancing of these interests shifts if a person violates a condition of release or fails to appear. But the importance of that right means that everyone should

get that chance in cases not involving serious threats to the community.

Massachusetts has separate, robust statutory procedures for handling arrestees whom the Commonwealth believes pose a danger to the community. General Law c. 276 § 58A allows the Commonwealth to move to detain people in serious cases that involve the use or threatened use of violence. *Id.* at § 58A(1). This Court has explained that § 58A's carefully limited scope and full-blown safeguards, if applied rigorously, pass muster under *Salerno* and *Aime.* See *M*endoza v. Commonwealth, 423 Mass. 771, 792 (1996). Thus, the Commonwealth already has the tools necessary to protect the community from any arrestee who it shows is a danger to the community. Moreover, recognizing the equal protection requirements in the Constitution and the Declaration of Rights, § 58A allows for the imposition of a financial condition to the extent it might be necessary to ensure appearance, but in no event can that financial condition result in detention: "The judicial officer may not impose a financial condition that results in the pretrial detention of the person." G.L. c. 276, § 58A (2)(xiv).

Under Massachusetts law, if a person is released pursuant to non-financial conditions and fails to comply with those conditions--such as by failing to appear--a judge may order that the person's pretrial release be revoked or that more onerous conditions be imposed. See G.L. c. 276 § 58B ("A person who has been released after a hearing pursuant to sections 42A, 58, 58A or 87 and who has violated a condition of his release, shall be subject to a revocation of release and an order of detention"). In such cases, defendants can be held in custody without regard to how rich or poor they are, as long as the court provides appropriate procedural safeguards. See *Commonwealth v. Pagan*, 445 Mass. 315 (2005). Holding a person in custody after finding a knowing violation of release conditions is a far different proposition than preemptively speculating that they pose some risk in the future. In the case of a typical prosecution, the person's liberty rights are too vital to subject them to that speculation in the first instance.

3. The Lower Court's Order Does Not Further a Compelling Governmental Interest.

In addition to failing to ensure that its order was narrowly tailored, the lower court also failed to

advance any compelling governmental interest when it imposed a monetary bail that Ms. Wagle could not afford. The State's only legitimate interest in requiring a defendant to post bail is to achieve the societal benefits of pretrial release, while also giving the defendant a concrete incentive to return to court. See *Commonwealth v. Ray*, 435 Mass. 249, 255 n. 12 (2001) ("The purpose of bail is to assure the defendant's appearance in court."); *State v. Larson*, 374 N.W.2d 329, 331 (Minn. Ct. of Appeals 1985) ("The purpose of bail is to permit the release of a defendant by providing an incentive for him to appear at trial or forfeit the bail"). But if the bail amount is more than the person could ever pay and results in the person's detention, how can it further this governmental interest? For a destitute person, bail set in the amount of $15,000 is the same as bail set in the amount of $150. In what meaningful way is a larger number a greater incentive to the person who could never pay either? Setting a condition of release that is a physical impossibility for the arrestee to meet furthers no governmental interest, let alone a compelling interest.

In *Bearden*, the Supreme Court made clear that it would be difficult ever to find a legitimate State reason for jailing an indigent person for non-payment. In the post-conviction context, it explained that the State's interest in "ensuring that restitution be paid to the victims" is insufficient, because "[r]evoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming." *Bearden,* 461 U.S. at 670. Similarly, the State's interest in removing the defendant "from the temptation of committing other crimes" in order to protect society and rehabilitate him is also insufficient, as this would amount to "little more than punishing a person for his poverty." *Id.* at 671. Finally, although the State's interest in punishment and deterrence of others is a valid interest, it can be "served fully by alternative means," including extending the time for making payments, reducing the fine, or directing that the probationer perform public service in lieu of the fine. *Id.* at 671–72. In the pretrial context, the only valid State interest in a monetary bail is assuring future appearance after release. But, by

definition, that interest cannot be served through a monetary amount greater than the person can afford.

There is nothing wrong, of course, either under § 58 or in general, with the concept of giving a defendant an additional financial incentive to appear. When a person can afford to pay a sum, the thought of later losing that money for nonappearance might create an incentive to appear. But when a person has no assets--when bail is set without a finding that the person could pay the amount set and it operates to detain a person simply because the person cannot afford to make the payment through which that incentive to return is created--then it fails to serve any legitimate State interest.

This is fundamentally the same problem that troubled several judges in *Rainwater*. Four circuit judges wrote a powerful dissent in *Rainwater* warning of how money bail actually works in practice. Although the judges agreed with the constitutional principles announced by the majority that the Constitution forbids jailing the poor when they cannot afford monetary bail, they were concerned about the majority's faith in the lower Florida courts not to apply the new State Rule in unconstitutional ways to

detain the indigent. *Rainwater*, 572 F.2d 1067 ("I cannot escape the conclusion that the majority has chosen too frail a vessel for such a ponderous cargo of human rights.") (Simpson, J., dissenting).[18]

Decades of experience since *Rainwater* have confirmed that a more definitive condemnation of money bail is necessary. Otherwise, the illegal daily use of money bail as a matter of culture and practice will

[18] Some lower Federal court cases had, in the immediate aftermath of the Federal Bail Reform Act, suggested that monetary bail set according to the rigorous Federal procedures might not violate either the statute or the Eighth Amendment even if a person could not afford it. See, e.g., *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988) ("But a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement."). But none of these cases involved any challenge based on the Equal Protection Clause or Due Process Clauses, and they did not address the situation presented here: an unattainable bail requirement set in the absence of an ability-to-pay determination. *McConnell*'s purported basis for its *Eighth Amendment* assertion was a generic citation without explanation to *Rainwater*, a case that Ms. Wagle relies on and that holds that the use of money to detain the indigent would be unconstitutional under the Equal Protection Clause. Moreover, these Federal cases were largely decided before *Salerno* held that a "fundamental" right to pretrial liberty was stake. The open question of whether an unattainably high monetary amount is also "excessive" under the Eighth Amendment or a violation of the Federal statute is therefore a very different issue than whether the imposition of an impossible-to-meet bail amount, without an ability-to-pay determination, is equivalent to a pretrial detention order triggering the due process considerations outlined in *Salerno* and *Aime*.

continue to violate basic legal principles. This Court must prevent its use without a specific finding of ability to pay in order to ensure that a setting of money bail actually serves some legitimate governmental purpose.

II.

A PETITION UNDER G.L. C. 211, § 3, IS THE APPROPRIATE VEHICLE FOR DECIDING THIS CASE BECAUSE THERE HAS BEEN A SERIOUS VIOLATION OF THE PETITIONER'S SUBSTANTIVE RIGHTS THAT CANNOT BE REMEDIED UNDER THE ORDINARY REVIEW PROCESS, AND THE CASE PRESENTS AN ISSUE OF SYSTEMIC IMPORTANCE AFFECTING THE PROPER ADMINISTRATION OF THE COURTS.

Under G.L. c. 211, § 3, this Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided." To obtain relief under this statute, a criminal defendant generally "must demonstrate both [1] a substantial claim of violation of his substantive rights and [2] irremediable error, such that he cannot be placed in status quo in the regular course of appeal." *Ventresco v. Commonwealth*, 409 Mass. 82, 83 (1991) (citation and internal quotation marks omitted). This Court has also granted relief under G.L. c. 211, § 3, where the petition challenges "a repeated or systemic misapplication of the law." *Commonwealth v. Tobias T.*,

462 Mass. 1001 (2012). See, e.g., *Commonwealth v. Charles*, 466 Mass. 63, 89 (2013) ("We conclude that the legality of these proceedings presents a systemic concern that this court should resolve now through the exercise of its general superintendence powers under G. L. c. 211, § 3."); *Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep't*, 448 Mass. 57, 62 (2006) ("Accordingly, we conclude that the legality of this practice by the Housing Court Department is a systemic concern that this court should resolve through the exercise of its general superintendence powers under G.L. c. 211, § 3.").

The Defendant meets the requirements for relief under G.L. c. 211, § 3. First, relief is needed in order to prevent a violation of the Petitioner's substantive rights because, as discussed in detail above, the lower court's bail order has deprived her of her rights to equal protection and due process. Second, this "violation of [her] substantive rights and error that cannot be remedied under the ordinary review process." *Dunbrack v. Commonwealth*, 398 Mass. 502, 504 (1986). Indeed, for this precise reason, this Court has long recognized that the single justice has the authority under G.L. c. 211, § 3, to review trial-

court bail determinations. See *Commesso v. Commonwealth*, 369 Mass. 368, 373 (1975).

Relief under G.L. c. 211, § 3 is also appropriate because this petition presents an issue of systemic importance affecting the proper administration of the judiciary. The issue presented by this petition is not unique to this case. Rather, it arises every day in jails and courtrooms across the Commonwealth and ought to be settled by this Court. See affidavits of Attorneys in Charge of CPCS offices attached to the Affidavit of Shira Diner in Support of Petition for Relief Pursuant to G.L. c. 211. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. at 755. This Court has reaffirmed in powerful terms that pretrial liberty "is undoubtedly a fundamental right." *Aime v. Commonwealth*, 414 Mass. at 677. These are not empty slogans. Pretrial detention takes a devastating toll, almost always on the poor.

In the 1960's, led by the seminal work of Caleb Foote, there emerged an academic and policy consensus against wealth-based detention. The en banc court in Rainwater called this consensus "convincing" in 1978.

Rainwater, 572 F.2d at 1056 ("The punitive and heavily burdensome nature of pretrial confinement has been the subject of convincing commentary.").

In the intervening decades, the scholarly and policy consensus has become overwhelming. Money-based pretrial detention radically interferes with virtually all of a presumptively innocent person's most important human and civil rights. All over the country, poor people held on monetary bail that they cannot afford are far more likely to be convicted, either through an inability to prepare their defense[19] or through the pressure to take a guilty plea in minor cases to get out of jail.[20] People held on money bail

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[19] *See* Meghan Sacks & Alissa R. Ackerman, *Bail and Sentencing: Does Pretrial Detention Lead to Harsher Punishment?*, 25 CRIM. JUSTICE POLICY REV. 59, 63 (2012).

[20] See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492-2493 (2004) ("[P]retrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial."); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), *available at* https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808 (describing system of coerced guilty pleas at initial appearances in misdemeanor courts across the country); HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF NONFELONY LOW-INCOME DEFENDANTS IN NEW YORK CITY 3 (2010), available at http://www.hrw.org/sites/default/files/reports/us1210webwcover_ 0.pdf ("Most persons accused of low level

prior to trial receive longer sentences than those released because they are unable to maintain the kinds of ties to the community, education, family, and employment that judges consider when deciding how to punish.[21] To be sure, the pretrial loss of those vital

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offenses when faced with a bail amount they cannot make will accept a guilty plea…."); Meghan Sacks & Alissa R. Ackerman, *Pretrial detention and guilty pleas: if they cannot afford bail they must be guilty*, 25 CRIMINAL JUSTICE STUDIES 265 (2012) (finding that "defendants held in pretrial detention will plead guilty faster than those defendants released into the community prior to trial"); *see also* United States Senate, Committee on the Judiciary, Presiding Chairman Senator Grassley, *Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors* (May 15, 2015), available at http://www.judiciary.senate.gov/meetings/protecting-the-constitutional-right-to-counsel-for-indigents-charged-with-misdemeanors (discussing in depth the issue of coerced pleas of uncounseled misdemeanor defendants). See also, *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) ("The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent" (citations omitted)).).

[21] "When other relevant statistical controls are considered, defendants detained until trial or case disposition are 4.44 times more likely to be sentenced to jail and 3.32 times more likely to be sentenced to prison that defendants who are released at some point

aspects of a flourishing life--a job, children, housing--are independent harms of the highest order for any person wishing to pursue a flourishing life. Moreover, even just a few days in jail because of money bail can lead to a person losing a job or a shelter, throwing a person or a family into turmoil, especially if the family has minor children.[22] The injuries inflicted by wealth-based detention are not endured equally: the irrational racial disparities

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pending trial. The jail sentence is 2.78 times longer for defendants who are detained for the entire pretrial period, and the prison sentence is 2.36 times longer." Christopher T. Lowenkamp et al., Arnold Foundation, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013) http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf.

[22] In a study of women detained pretrial at MCI-Framingham, 65% of the respondents identified themselves as the primary caregiver to a child and 15% of respondents cared for an elderly parent or relative. Nicholas Cannata, Massachusetts Dept. of Correction, *Bail Survey: Pre-Trial Females at MCI-Framingham*, 2-3 (May 2015) http://www.mass.gov/eopss/docs/doc/research-reports/briefs-stats-bulletins/bail-survey-pretrial-females-mci-framingham-brief.pdf. Of the women surveyed, over a third were detained because they could not pay a cash bond and even among the women who could afford to make a monetary payment, many were detained because of logistical difficulties contacting relatives or accessing money. *Id.* at 2.

that result from the use of money bail are well documented.[23]

A silent component of money-based pretrial detention is the trauma and brutality inflicted in our jails. No analysis of pretrial detention policy can ignore what we have allowed our overcrowded jails to become. They are places of isolation, medical emergency,[24] unsafe living conditions,[25] unacceptably

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[23] "Criminologists and researchers have published over twenty five studies documenting racial disparities in bail determinations in states cases, Federal cases, and juvenile delinquency proceedings. . . . The problem is pervasive." Cynthia Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 LEGISLATION AND PUBLIC POLICY 919, 938-39 (2013). In fact, a recent study found "large racial and ethnic disparities in the population awaiting trial in jail" in Massachusetts. Alexander Jones and Benjamin Forman, Massachusetts Institute for a New Commonwealth, *Exploring the Potential for Pretrial Innovation in Massachusetts* 2 (2015) http://massinc.org/wp-content/uploads/2015/09/bail.brief_.3.pdf. Additionally, a study of 36,000 state felony cases found that "being Black increases a defendant's odds of being held in jail pretrial by 25%." Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 181 (2005).

[24] According to a Vera Institute of Justice report, "83 percent of jail inmates with mental illness did not receive mental health care after admission. The lack of treatment in a chaotic environment contributes to a worsening state of illness and is a major reason why those with mental illness in jail are more likely to be placed in solitary confinement, either as punishment for breaking rules or for their own protection since they are also more likely to be victimized." *Incarceration's Front Door: The Misuse of*

high suicide rates,[26] and lack of contact with family. Forcing people to risk all of these additional harms because they are too poor to post bail is cruel and irrational.

All of the suffering caused by needless money-based pretrial detention comes with significant additional social costs. The overwhelming consensus of experts is that Massachusetts will be safer by ceasing needlessly to detain the poor. In the decades since the Federal bail reform movement, law enforcement officials and researchers have learned more about the negative effects of post-arrest poverty

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Jails in America, 12 (Feb. 2015). People detained in local jails report high rates of health problems, and most jails do not provide adequate medical care. *Id.* at 17.

[25] A recent Massachusetts Department of Public Health audit found numerous health and safety violations in county jails that house pretrial detainees, ranging from 90 violations in Hampshire County's jail to 262 violations in the Worcester County jail. Shira Schoenberg, *Health and Safety Audits Find Hundreds of Violations at Western Massachusetts County Jails*, MassLive, Jan. 20, 2016, http://www.masslive.com/politics/index.ssf/2016/01/health_and_safety_audits_find_massachusetts_jail_violations.html.

[26] *See, e.g.*, Edward Donga, "Suicide at Plymouth jail highlights alarming problem in Massachusetts prisons," *The Patriot Ledger*, Oct. 27, 2014 (reporting that suicide rate among Massachusetts inmates "is almost double the national average").

detention. The National Institute of Corrections at the Department of Justice has led the way in highlighting the negative impacts of secured money bail on community safety. See United States Department of Justice, National Institute of Corrections, *Fundamentals of Bail* 28-29 (2014). First, it is enormously expensive to keep people in jail.[27] Money spent on needless pretrial detention is money that cannot be spent on helping communities flourish. Second, just 72 hours in jail after an arrest significantly increases the likelihood that even a low-risk person will recidivate and commit future crimes.[28] This is not surprising given that

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[27] In 2012, Massachusetts spent an average of $47,102 to incarcerate an inmate for a year. National Institute of Corrections, *Massachusetts: Overview of Correctional System*, available at http://nicic.gov/statestats/?st=ma. See also Frequently asked questions about the DOC, available at http://www.mass.gov/eopss/agencies/doc/faqs-about-the-doc.html (For "Fiscal Year 2014, the average cost per year to house an inmate in the Massachusetts DOC was $53,040.87").

[28] See, e.g., Arnold Foundation, *The Hidden Costs of Pretrial* Detention (2013) at 3, available at: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf (studying 153,407 defendants and finding that "when held 2-3 days, low risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours"); Arnold Foundation, *Pretrial Criminal Justice Research Summary*

just a few days in jail can destabilize a person's life and increase their exposure to factors that lead to recidivism, such as loss of economic opportunity, increased poverty, exposure to trauma, and shame. See DOJ, National Institute of Corrections, at 24-29;[29] see also, e.g., International Association of Chiefs of Police, Resolution (October 2014), 121st Annual Congress at 15-16 ("[D]efendants rated low risk and detained pretrial for longer than one day before their

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(2013) at 5, available at: http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf (finding that "low-risk defendants held 2-3 days were 17 percent more likely to commit another crime within two years" and that those detained "4-7 days yielded a 35 percent increase in re-offense rates.").

[29] A*vailable at* http://static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf. Summarizing the current state of research, the DOJ report, *id.* at 29, concluded:

> [R]esearchers found that low- and moderate-risk defendants held only 2 to 3 days were more likely to commit crimes and fail to appear for court before trial than similar defendants held 24 hours or less. As the time in jail increased, the researchers found, the likelihood of defendant misbehavior also increased. The study also found similar correlations between pretrial detention and long-term recidivism, especially for lower risk defendants. In a field of paradoxes, the idea that a judge setting a condition of bail intending to protect public safety might be unwittingly increasing the danger to the public—both short and long-term—is cause for radically rethinking the way we administer bail.

pretrial release are more likely to commit a new crime once they are released, demonstrating that length of time until pretrial release has a direct impact on public safety.").

CONCLUSION

For these reasons, the Petitioner respectfully requests the following relief:

(1) an order requiring that the lower court release her from custody pending the resolution of this petition or her underlying criminal case;

(2) an order reserving and reporting the case without decision for resolution by the Supreme Judicial Court for the Commonwealth; and

(3) an order, on remand from the Supreme Judicial Court for the Commonwealth, (a) declaring that the Petitioner's pretrial detention is unlawful for the reasons set forth above and (b) requiring that the lower court release her from pretrial detention.

Respectfully submitted,

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