IN THE
UNITED STATES DISTRICT COURT
FOR THE ____________ DISTRICT OF ________

UNITED STATES OF AMERICA)
)
v.) **Judge [NAME]**
) **No. XX-CR-XX**
[CLIENT])
)

DEFENDANT'S MOTION FOR PRETRIAL RELEASE IN PRESUMPTION CASE

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court release [him/her] on bond pursuant to the Bail Reform Act, 18 U.S.C. § 3142; *United States v. Salerno*, 481 U.S. 739 (1987); and *United States v. Dominguez*, 783 F.2d 702 (7th Cir. 1986). [CLIENT] has rebutted the presumption of detention with evidence that [short summary of evidence under 3142(g) that rebuts the presumption]. In support, [CLIENT] states as follows:

I. The Statutory Presumptions of Detention Should Be Viewed with Caution Because They Lead to High Rates of Detention for Low-Risk Defendants.

Congress enacted the statutory presumptions of detention in the Bail Reform Act of 1984 (BRA) "to detain high-risk defendants who were likely to pose a significant risk of danger to the community if they were released pending trial."[1] But the presumptions of detention have not worked as intended, and federal pretrial detention rates have increased dramatically since 1984.[2] Before the BRA, *less than two percent* of federal arrestees were jailed pending trial.[3] According to the Bureau of Justice Statistics, the detention rate across the country increased from 59% in

[1] Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 FEDERAL PROBATION 52, 56–57 (2017), archived at https://perma.cc/9HGU-MN2B.

[2] *Id.* at 53.

[3] U.S. Department of Justice, Bureau of Justice Statistics, *Pretrial Release and Detention: The Bail Reform Act of 1984* Table 1 (1988), archived at https://perma.cc/CS86-NJA8 (showing 1.7% of federal arrestees were detained pretrial in 1983).

1995 to 76% in 2010.[4] A recent study by the Administrative Office of the Courts (AO) attributed this "massive"[5] increase in detention rates to the presumptions of detention, especially as they are applied to low-risk defendants.[6] For example, the statutory presumptions in drug and firearm cases applied to *nearly half* of all federal cases each year.[7] If not for the presumptions of detention, low-risk defendants "might be released at higher rates."[8] Instead, the presumptions of detention have become "an almost de facto detention order in almost half of federal cases."[9]

[ONLY INCLUDE THIS PARAGRAPH IN A DRUG PRESUMPTION CASE] Relying on the groundbreaking findings of the AO study, the Judicial Conference's Committee on Criminal Law recently determined "that the § 3142(e) presumption was unnecessarily increasing detention rates for low-risk defendants, particularly in drug trafficking cases."[10] To address this problem, the Judicial Conference proposed significant legislative reform that would amend the presumption of detention in drug cases "to limit its application to defendants described therein whose criminal history suggests that they are at a higher risk of failing to appear or posing a danger to the community."[11] While the Judicial Conference's proposed legislation has not been enacted yet, this Court can certainly take it into account when evaluating the presumption of detention in this case.

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[4] Austin, *supra* note 1, at 53 (citing U.S. Department of Justice Bureau of Justice Statistics, *Pretrial Detention and Misconduct in Federal District Courts, 1995–2010* 1 (2013), archived at https://perma.cc/U2V5-GYYP).

[5] *Id.* at 61.

[6] *Id.* at 57.

[7] *Id.* at 55 (the drug presumption "applied to between 42 and 45 percent of [all federal] cases every year").

[8] *Id.* at 57.

[9] *Id.* at 61.

[10] *Report of the Proceedings of the Judicial Conference of the United States* 10 (September 12, 2017), archived at https://perma.cc/B7RG-5J78.

[11] *Id.*

The problems with the statutory presumptions of detention are important to [CLIENT's] motion because, as the AO study confirms, high federal pretrial detention rates come with significant and wide-ranging "social and economic costs."[12] For example, that study explains that "[e]very day that a defendant remains in custody, he or she may lose employment which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity."[13] Indeed, the economic harms stemming from being detained pretrial persist for years: even three to four years after their bail hearing, people released pretrial were still 24.9% more likely to be employed than those who were detained.[14] [IF CLIENT IS MALE: And these harms are not just limited to the detained person—once someone is incarcerated, the odds that his children become homeless increase by 95%, and the odds that his partner becomes homeless increase by 49%.[15]] The other emotional and psychological harms visited upon the children of incarcerated parents is well-documented.[16]

It is unsurprising, then, that another AO study found a relationship "between the pretrial detention of low-risk defendants and an increase in their recidivism rates, both during the pretrial

[12] *Id.* at 61.

[13] *Id.*; *see also* Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) FEDERAL PROBATION 39, 42 (2018), archived at https://perma.cc/LQ2M-PL83 (finding that for people detained pretrial for at least three days, 76% had a negative job-related consequence and 37% had an increase in residential instability).

[14] Will Dobbie, et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108(2) AMER. ECON. REV. 201, 204 (2018), archived at https://perma.cc/X77W-DAWV.

[15] *For* children, Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 74, 88 (2013); *for* partners, *see* Amanda Geller & Allyson Walker Franklin, *Paternal Incarceration and the Housing Security of Urban Mothers*, 76 Journal of Family and Marriage 411, 420 (2014), archived at https://perma.cc/G3NQ-NWH7.

[16] *See, e.g.*, Joseph Murray, et al., *Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis*, 138(2) PSYCHOLOGICAL BULLETIN 175, 186 (2012).

phase as well as in the years following case disposition."[17] Other, more recent studies, have confirmed that pretrial detention is criminogenic,[18] and cautioned that "lower crime rates should not be tallied as a benefit of pretrial detention."[19] One reason why pretrial detention is criminogenic is because jails' physical and mental health screening and treatment is often inadequate.[20] In addition, federal "pretrial detention is itself associated with increased likelihood of a prison sentence and with increased sentence length," even after controlling for criminal history, offense severity, and socio-economic variables. [21] These stark statistics must also be considered in light of the fact that 99% of federal defendants are not rearrested for a violent crime while on pretrial release.[22] In other words, pretrial detention imposes enormous costs on criminal defendants, their loved ones, and the community, in a counterproductive attempt to prevent crimes that are extremely unlikely to happen in the first place.

There are also significant fiscal costs associated with high federal pretrial detention rates. As of 2016, the average pretrial detention period was 255 days (although several districts

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[17] Austin, *supra* note 1, at 54 (citing Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pre-trial Detention on Sentencing Outcomes* (The Laura and John Arthur Foundation 2013), archived at https://perma.cc/8RPX-YQ78).

[18] Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718 (2017), archived at https://perma.cc/5723-23AS ("[D]etention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges, a finding consistent with other research suggesting that even short-term detention has criminogenic effects."); Arpit Gupta, et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. OF LEGAL STUDIES 471, 496 (2016) ("[O]ur results suggest that the assessment of money bail yields substantial negative externalities in terms of additional crime.").

[19] Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. OF LAW AND ECON. 529, 555 (2017).

[20] *See* Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Justice Statistics 9 (2014), archived at https://perma.cc/HGT9-7WLL (comparing healthcare in prisons and jails); *see also* Faye S. Taxman, et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 JOURNAL OF SUBSTANCE ABUSE TREATMENT 239, 247, 249 (2007), archived at https://perma.cc/G55Z-4KQH.

[21] James C. Oleson, et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime and Delinquency 313, 325 (2017), archived at https://perma.cc/QAW9-PYYV.

[22] Thomas H. Cohen, et al., *Revalidating the Federal Pretrial Risk Assessment Instrument: A Research Summary*, 82(2) FEDERAL PROBATION 23, 27 (2018), archived at https://perma.cc/8VM9-JH9T.

averaged over 400 days in pretrial detention).[23] Pretrial detention costs an average of $73 per day per detainee, while pretrial supervision costs an average of just $7 per day.[24] Thus, 255 days of pretrial detention would cost taxpayers an average of $18,615 per detainee, while pretrial supervision for the same time would cost an average of $1,785.[25]

II. [CLIENT] Should Be Released on Bond with Conditions.

This Court should [follow Pretrial Services' recommendation and] release [CLIENT] with conditions. In this case, the statute creates a rebuttable presumption "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(e)(3). However, release is warranted here because there are numerous facts under 18 U.S.C. § 3142(g) that rebut the presumption of detention and demonstrate that there are conditions of release that will reasonably assure both [CLIENT's] appearance in court and the safety of the community.

As the Supreme Court held in *United States v. Salerno*, 481 U.S. 739 (1987), "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *Id.* at 755. This presumption of release is encapsulated in the BRA, 18 U.S.C. § 3142. The statute states that the Court "shall order" pretrial release, § 3142(b), except in certain narrow circumstances. Even if the Court determines under § 3142(c) that an unsecured bond is not sufficient, the Court "shall order" release subject to "the least restrictive further conditions" that will "*reasonably assure*" the defendant's appearance in court and the safety of the community. § 3142(c)(1) (emphasis added). Under this statutory scheme, "it is only a 'limited group of offenders' who should be detained pending trial." *United States v. Shakur*, 817 F.2d 189, 195 (2d

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[23] Austin, *supra* note 1, at 53.
[24] *Id.*
[25] *Id.*

Cir. 1987) (quoting S. Rep. No. 98-225, at 7 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3189); *see also United States v. Byrd*, 969 F.2d 106, 110 (5th Cir. 1992) ("There can be no doubt that this Act clearly favors nondetention.").

III. The Presumption of Detention Can Be Easily Rebutted and, Once Rebutted, Must Be Considered Alongside All of the Evidence That Weighs in Favor of Release.

The law is clear that (1) very little is required for a defendant to rebut the presumption and (2) courts must weigh the rebutted presumption against every factor that militates in favor of release before detaining a defendant. Moreover, under controlling Seventh Circuit precedent, this Court is not allowed to detain a defendant in a presumption case based solely on evidence of past dangerousness, the nature of the crime charged, or the weight of the evidence.

A. Rebutting the Presumption

Under Seventh Circuit law, very little is required for a defendant to rebut the presumption of detention. A defendant simply needs to produce "some evidence that he will not flee or endanger the community if released." *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986). This "burden of production is not a heavy one." *Id.* Indeed, the presumption of detention is rebutted by "*[a]ny evidence* favorable to a defendant that comes within a category listed in § 3142(g) . . . including evidence of their marital, family and employment status, ties to and role in the community . . . and other types of evidence encompassed in § 3142(g)(2)." *Id.* (emphasis added). Any "evidence of economic and social stability" can rebut the presumption. *Id.* As long as a defendant "come[s] forward with some evidence" pursuant to § 3142(g), the presumption of flight risk and dangerousness is definitively rebutted. *Id.* ("Once this burden of production is met, the presumption is 'rebutted.'") (quoting *United States v. Jessup*, 757 F.2d 378, 384 (1st

Cir. 1985)).[26] The government bears the burden of *persuasion* at all times. *Id.*; *Jessup*, 757 F.2d at 384.

Other circuits have similarly held that a defendant can successfully rebut the presumption of detention simply by producing any evidence that the defendant is not a flight risk or danger to the community, and that the defendant need not produce much evidence to rebut the presumption. *See, e.g.*, *Jessup*, 757 F.2d at 384 (holding that a defendant only has a burden of production and only needs to produce "some evidence" to rebut the presumption); *United States v. Alatishe*, 768 F.2d 364, 371 (D.C. Cir. 1985) (stating that a defendant has a burden of production and only needs "to offer some credible evidence contrary to the statutory presumption"); *United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985) (stating that the burden of *persuasion* rests with the government, not the defendant).

In *Dominguez*, for example, the Seventh Circuit determined that the defendants had sufficiently rebutted the presumption of detention by introducing fairly minimal evidence about their employment and family ties. *Dominguez*, 783 F.2d at 706. Both defendants were Cuban immigrants who were not U.S. citizens but had been in the country lawfully for five years, and neither had a criminal record. *Id.* One of the defendants was married, had family members in the U.S., and was a welder who owned his own welding business. *Id.* The other was employed as a body shop mechanic. *Id.* These facts alone were sufficient for the Seventh Circuit to find that defendants had rebutted the presumption. *Id.* In fact, the court specifically noted that "[this] evidence of economic and social stability, coupled with the absence of any relevant criminal

[26] To rebut the presumption of flight risk, for example, a defendant does not "have to prove that he would not flee—i.e., he would [not] have to *persuade* the judicial officer on the point. [Instead], he would only have to introduce a certain amount of evidence contrary to the presumed fact." *Jessup*, 757 F.2d at 380–81; *accord Dominguez*, 783 F.2d at 707.

record" suggested that the defendants would not pose a danger to the community or a risk of flight. *Id.*

B. Weighing the Rebutted Presumption

After the presumption is rebutted, the Court must weigh the presumption against all of the other evidence about the defendant's history and characteristics that tilts the scale in favor of release. *See Dominguez*, 783 F.2d at 707 ("[T]he rebutted presumption is not erased. Instead it remains in the case as an evidentiary finding militating against release, to be weighed along with other evidence relevant to factors listed in § 3142(g)."). The Court should not give the presumption undue weight if evidence relating to other § 3142(g) factors supports release.

C. Forbidden Considerations in a Presumption Case

The Seventh Circuit has held that a judge may not detain a defendant in a presumption case based solely on (1) evidence of past dangerousness, (2) the nature and seriousness of the crime charged, or (3) the weight of the evidence against him.

First, even if the presumption is not rebutted, a judge is prohibited from detaining a defendant "based on evidence that he has been a danger in the past, except to the extent that his past conduct suggests the likelihood of future misconduct." *Dominguez*, 783 F.2d at 707. This means that, even when a defendant is charged with a serious crime or has a significant criminal history, there may be release conditions that will reasonably assure the safety of the community. *Id.*

Second, to rebut the presumption of dangerousness, a defendant need not "demonstrate that [the type of crime charged] is not dangerous to the community." *Dominguez*, 783 F.2d at 706. In *Dominguez*, the Seventh Circuit reversed a district court for expecting the defendants to "provide[] evidence that their participation in a narcotics distribution scheme was not a danger to

the community." *Id.* As the court explained: "Under the district court's interpretation, few if any defendants in narcotics cases could ever rebut the presumption of dangerousness and thereby defeat pretrial detention.." *Id.* Despite this clear precedent, judges sometimes detain defendants based solely on the dangerousness inherent in the offense with which they are charged, whether the offense is drug distribution, gun possession, or terrorism. Detention on that ground is improper in this circuit. Instead, this Court must analyze the defendant's individual characteristics under § 3142(g).

Third, the Court is forbidden from relying solely on the weight of the evidence to detain a defendant in a presumption case. A defendant is not required to "'rebut' the government's showing of probable cause to believe that he is guilty of the crimes charged. That showing is not really at issue once the presumptions . . . have been properly triggered." *Id.*

In sum, to rebut the presumption, a defendant simply needs to show is that there is "some evidence that he will not flee or endanger the community if released," and any evidence of the defendant's family ties, community ties, work history, or lack of criminal record can satisfy this requirement. *Id.* at 707.

IV. The Presumption of Detention Is Rebutted in This Case.

As detailed below, there is more than "some evidence that [CLIENT] will not flee or endanger the community if released." *Dominguez*, 783 F.2d at 707. Accordingly, the presumption is rebutted in this case. [FILL IN THE BELOW CATEGORIES BASED ON THE SPECIFICS OF YOUR CASE; ADD ADDITIONAL 3142(g) CATEGORIES AS NEEDED.] [CLIENT] has presented evidence that…

Family Ties

Ties to the Community

Employment History

No Criminal History/Limited Criminal History/Stale Criminal History

No History of Nonappearance

No History of Drug or Alcohol Abuse

V. Regardless of the Presumption, [CLIENT] Must Be Released Because the Government Has Not Proven That There Are No Conditions That Will Reasonably Assure Appearance and Safety.

Even if this Court finds that the presumption of detention is not rebutted, [CLIENT] should still be released because there are conditions that will reasonably assure the safety of the community and [CLIENT's] appearance in court. A defendant cannot be detained "unless a finding is made that no release conditions will 'reasonably assure . . . the safety of the community'" and the defendant's appearance in court. *Dominguez*, 783 F.2d at 707 (quoting § 3142(e)). Here, the government has not carried its high burden of proving by clear and convincing evidence that there are *no* release conditions that will reasonably assure the safety of the community. *See id.* at 708 n.8. The government also has not proved by a preponderance of the evidence that there are no conditions that would reasonably assure [CLIENT's] appearance in court. Thus, [CLIENT] cannot be detained.

The following conditions of release under § 3142(c)(1)(B), and any other conditions the Court deems necessary, will reasonably assure [CLIENT's] appearance in court and the safety of the community. [CHOOSE AMONG THE BELOW BASED ON THE SPECIFICS OF YOUR CASE.]

- Place [CLIENT] in custody of third-party custodian "who agrees to assume supervision and to report any violation of a release condition to the court"

[§ 3142(c)(1)(B)(i)] [Be sure to name the third-party custodian and explain why that person is appropriate.]

- Maintain or actively seek employment [(ii)]
- Maintain or commence an educational program [(iii)]
- Follow restrictions on "personal associations, place of abode, or travel" [(iv)]
  - Can include electronic monitoring, GPS monitoring, home detention (which allows defendant to leave for employment/schooling/etc.), home incarceration (re: 24-hour lockdown).
  - Can include residence at a halfway house or community corrections center.
- Avoid "all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense" [(v)]
- Report on a "regular basis" to PTS or some other agency [(vi)]
- Comply with a curfew [(vii)]
- Refrain from possessing "a firearm, destructive device, or other dangerous weapon" [(viii)]
- Refrain from "excessive use of alcohol" [(ix)]
- Refrain from "any use of a narcotic drug or other controlled substance . . . without a prescription" [(ix)]
- Undergo "medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency" [(x)] [If possible, research and suggest a program.]
- Post "property of a sufficient unencumbered value, including money" [(xi)]
- Post a "bail bond with solvent sureties" [(xii)]
- Require [CLIENT] to "return to custody for specified hours following release for employment, schooling, or other limited purposes" [(xiii)]
- "[A]<u>ny other condition</u> that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." [(xiv) (emphasis added)] [Think creatively about other conditions that will reasonably assure your CLIENT's presence in court and the safety of the community.]

VI. Conclusion

For these reasons, [CLIENT] respectfully requests that this Court find that the presumption has been rebutted and release [him/her] with conditions.

Dated: Respectfully submitted,

/s/ ______________________
[Attorney Name]
Attorney for [CLIENT]

WRITTEN WITH:
Alison Siegler & Erica Zunkel
Katerina Kokkas & Sam Taxy, Class of 2019
University of Chicago Law School
Federal Criminal Justice Clinic

CERTIFICATE OF SERVICE

The undersigned, [Attorney Name], hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

DEFENDANT'S MOTION FOR PRETRIAL RELEASE IN PRESUMPTION CASE

was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [date], to counsel/parties that are non-ECF filers.

/s/ ______________________
[Attorney name & contact information]

IN THE
UNITED STATES DISTRICT COURT
FOR THE __________ DISTRICT OF __________

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Judge [NAME]**
	)	**No. XX-CR-XX**
[CLIENT]	)	
	)	

DEFENDANT'S MOTION FOR IMMEDIATE RELEASE WITH CONDITIONS

[COUNSEL: This motion should be filed immediately after the initial appearance only in the rare case where (1) the government requested detention on the grounds of risk of flight/serious risk of flight, but not dangerousness; and (2) the charge is fraud, extortion, threats, or another charge not listed in § 3142(f)(1). This motion should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the initial appearance: bank robbery, other crime of violence, or terrorism case listed in § 3142(f)(1)(A), drug case listed in (f)(1)(C), 924(c) gun case, 922(g) gun case, or minor victim case listed in (f)(1)(E). If you have questions about when this motion should be filed, please contact Alison Siegler (alisonsiegler@uchicago.edu).]

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully requests that this Court order [his/her] release from custody pursuant to the Bail Reform Act and the Fifth Amendment's Due Process Clause. Supreme Court precedent makes it unconstitutional for a court to hold a detention hearing or detain a defendant at all when, as here, there is no basis for detention under 18 U.S.C. § 3142(f). As all six courts of appeals to have directly addressed the question have recognized, the only permissible bases for detaining a defendant are the enumerated factors set out in 18 U.S.C. § 3142(f). Under 3142(f), ordinary risk of flight is not a permissible basis for detention; rather, the statute only authorizes detention if there is a "*serious risk* that [the defendant] will flee." § 3142(f)(2)(A) (emphasis added). In this case, the government has not presented sufficient evidence that [CLIENT] poses a serious risk of flight. Accordingly, [CLIENT] must be released on bond immediately with appropriate conditions of release. *See* 18 U.S.C. §§ 3142(a)–(c). In support of this motion, [CLIENT] states as follows:

On [DATE], [CLIENT] was arrested on a criminal complaint charging [him/her] with [LIST CHARGES AND STATUTORY SECTIONS]. Magistrate Judge [JUDGENAME] held [his/her] [initial appearance/arraignment] on [DATE]. At that initial appearance, the government requested detention on the grounds that [CLIENT] posed [a risk of flight/a serious risk of flight]. Magistrate Judge [NAME] detained [CLIENT] as a risk of flight pending a detention hearing.

I. The Bond Statute Only Authorizes Pretrial Detention and a Detention Hearing When One of the Seven Factors Listed in § 3142(f) Is Met.

[CLIENT] is being detained in violation of the law because none of the seven § 3142(f) factors are met.[1] Supreme Court precedent and the plain language of the statute prohibit the court from holding a detention hearing and detaining a defendant for even one day when no § 3142(f) factor is present. Six courts of appeals as well as district courts in this circuit concur.

A. Supreme Court Law

In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Supreme Court upheld the Bail Reform Act, 18 U.S.C. § 3142, over a Fifth Amendment substantive Due Process challenge in part on the grounds that detention hearings could be held *only* under the limited circumstances set out in § 3142(f). As the *Salerno* Court held: "[t]he Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (*detention hearings available if* case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders)."

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[1] This case does not meet any of the five factors discussed in § 3142(f)(1), as it does not involve: (1) a crime of violence under (f)(1)(A); (2) an offense for which the maximum sentence is life imprisonment or death under (f)(1)(B); (3) a qualifying drug offense under (f)(1)(C); (4) a felony after conviction for two or more offenses under the very rare circumstances described in (f)(1)(D); or (5) a felony involving a minor victim or the possession/use of a firearm under (f)(1)(E).

The government has also not presented any evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a "serious risk that [the defendant] will flee" under (f)(2)(A); or (2) a "serious risk" that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B).

Salerno, 481 U.S. at 747 (emphasis added). The Supreme Court thus held that the factors listed in § 3142(f) serve as a gatekeeper. Only certain categories of defendants are eligible for detention at all, and the government is definitively prohibited from seeking detention if no (f) factor is met. Likewise, *Salerno* makes clear that when no § 3142(f) factor is present, a court is prohibited from holding a detention hearing and is required to release the defendant on conditions.

The constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). If courts detain defendants without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional. In holding that the Act did not violate substantive Due Process, the *Salerno* Court focused on the fact that § 3142(f) "carefully limits the circumstances under which detention may be sought." *Id.* at 747. It was these limitations in 3142(f), and several other aspects of the Act, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Id.* at 748. The *Salerno* Court further relied on the limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that "the government's interest in preventing crime by arrestees is both legitimate and compelling." To reach this conclusion, the Court contrasted the Bail Reform Act with a statute that "permitted pretrial detention of any juvenile arrested on any charge" by pointing to the gatekeeping function of § 3142(f): "The Bail Reform act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates ***only*** *on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).*" *Id.* at 750 (emphasis added). The Court emphasized that Congress "specifically found that these individuals" arrested for offenses enumerated in § 3142(f) "are far more likely to be responsible for dangerous acts in

the community after arrest." *Id.* In fact, throughout its substantive Due Process ruling, the Court continued to emphasize that the only defendants for whom the government can seek detention are those who are "already indicted or held to answer for a *serious* crime," meaning the "extremely serious offenses" listed in § 3142(f). *Id.* (emphasis added).

B. The Plain Language of § 3142(f)

The gatekeeping role § 3142(f) plays is also clear from the plain language of the statute. Subsection 3142(f) says, "the judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors listed in § 3142(f)(1) & (f)(2). Moreover, the plain language of § 3142(e) authorizes a judge to "order the detention of the person" only "after a [detention] hearing pursuant to the provisions of subsection (f) of this section."

The Bail Reform Act is difficult to parse because the statute is not organized in the order in which detention issues arise in court. Instead, the first pretrial release issue to arise at the Initial Appearance hearing—whether there is a legal basis for detention—is not addressed until § 3142(f), which comes halfway through the statute. To make matters worse, § 3142(f) itself is confusing, in that it is entitled "Detention hearing" but in fact speaks to *both* the legal standard that applies at the Initial Appearance hearing and to the legal standard that applies at the Detention Hearing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before a court can detain a defendant, introducing the limited circumstances under which "the judicial officer shall hold a hearing"—meaning a detention hearing. If none of the 7 circumstances enumerated in § 3142(f) are present *at the Initial Appearance*, the judge is not authorized to hold a detention hearing or detain the defendant at all. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies *at the Detention Hearing*, explaining that the purpose of the Detention Hearing is "to

determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." The long paragraph in § 3142(f) that follows § 3142(f)(2)(B) describes the procedures that apply at the Detention Hearing in depth.[2]

C. Circuit and District Court Caselaw

Following the Supreme Court's guidance in *Salerno*, six courts of appeals agree that it is illegal to detain a defendant—or even to hold a detention hearing—unless the government establishes one of the factors listed in 18 U.S.C. § 3142(f). *See, e.g.*, *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Twine,* 344 F.3d 987 (9th Cir. 2003); *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

When the government requests detention at an initial appearance hearing, the judge must first determine whether there is a permissible statutory basis for detention under § 3142(f). *See Friedman*, 837 F.2d at 48 ("A motion seeking such detention is permitted only when the charge is for certain enumerated crimes . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice.") (citing 18 U.S.C. § 3142(f)(1)–(2)); *Byrd*, 969 F.2d at 109 ("A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (f)(2) is present."). Unless the statutory threshold set out in § 3142(f) is met, "detention is not an option." *Singleton*, 182 F.3d at 9; *Byrd*, 969 F.2d at 109 ("Detention can be ordered, therefore, only in a

[2] In some districts, the U.S. Attorney's Office explicitly acknowledges the gatekeeping function served by § 3142(f) by routinely filing a motion at the Initial Appearance that lists the government's legal basis for detention under § 3142(f). *See* Ex. A, Motion for Detention (WDWA). That motion reads, "This case is eligible for a detention order because this case involves (check all that apply)," and provides a checkbox for each § 3142(f) factor.

case that involves one of the . . . circumstances listed in (f).").

Although the Seventh Circuit has yet to address the question, courts within this circuit agree that a defendant cannot be detained at all—not even for a day—unless one of the circumstances enumerated in § 3142(f) is met. In *United States v. Morgan*, Magistrate Judge Hawley in the Central District of Illinois surveyed the appellate cases and concluded: "If none of the factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained." *United States v. Morgan*, No. 14-CR-10043, 2014 WL 3375028, at *14 (C.D. Ill. July 9, 2014) (holding that detention on dangerousness grounds in a fraud case was improper). In *United States v. Mays,* Magistrate Judge Gilbert recently concluded that "there is authority for the proposition that the government is entitled to a detention hearing (and up to 3 days to prepare for that hearing absent good cause) only if it shows that the charged crime is one of the offenses enumerated in 18 U.S.C. 3142(f)(1)." *United States v. Mays*, 18-CR-737, Dkt. No. 7 (N.D. Ill. Nov. 8, 2018). Other courts within this circuit agree. *See, e.g.*, *United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 966 (E.D. Wis. 2008) ("Unless the case falls within one of the above categories in § 3142(f), the court may not detain the defendant."); *United States v. Sweet*, 87-CR-544, 1987 WL 15384 (N.D. Ill. 1987) (finding that "[t]he statute does not provide for a hearing under § 3142(f) except in the cases enumerated in § 3142(f)(1) and (f)(2)" and ordering defendant released because "this case does not come within either § 3142(f)(1) or (f)(2)").

Unfortunately, in Chicago and elsewhere, a cultural norm has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being illegally detained in violation of the statute and their constitutional rights. Specifically, at virtually every initial appearance hearing where the government is requesting detention, the Assistant United States Attorney asserts that the defendant is either "a danger to the community," "a risk of flight," or both.

However, neither "danger to the community" nor ordinary "risk of flight" is a factor listed in § 3142(f). Accordingly, it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. And yet, every day, defendants are detained on these bases. The practice in this district must be brought back in line with the law. That will only happen if this Court and other judges in this district demand that the government provide a legitimate § 3142(f) basis for every detention request.

II. It is Illegal to Detain [CLIENT] At All Because the Government Has Not Presented Evidence that [He/She] Poses a "Serious Risk" of Flight.

It was improper to detain [CLIENT] on the government's bare allegation that [he/she] poses a "risk of flight" because that is not a factor enumerated in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a "*serious* risk" of flight. "[S]erious risk" of flight in § 3142(f)(2)(A) means something more than ordinary risk of flight. The Supreme Court and the Seventh Circuit require courts to follow a very basic canon of statutory interpretation: "We must read a statute to give effect to each word so as to avoid rendering any words meaningless, redundant, or superfluous." *Witzke v.* Femal, 376 F.3d 744, 753 (7th Cir. 2004); *see also Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 2009) ("'One of the most basic interpretative cannons' is 'that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Moreover, where the government's only legitimate § 3142(f) ground for detention is "serious risk" of flight, the government bears the burden of presenting *evidence* to support its allegation that a defendant poses a "serious risk" of flight rather than the ordinary risk attendant in any criminal case. "When . . . the safety of the community is not at issue, a court must first determine whether the government has shown, by a preponderance of the evidence, the existence

of a *serious risk* that the defendant will flee." *United States v. Marinez-Patino*, 2011 WL 902466, at *3 (N.D. Ill. Mar. 14, 2011) (emphasis added).

In order to detain a defendant as a "serious risk" of flight under 3142(f)(2)(A), the government must present evidence that the defendant presents an "extreme and unusual" risk of willfully fleeing the jurisdiction if released. Because the government has not met its burden in this case, [CLIENT] may not be detained under 3142(f)(2)(A).

A. The Legislative History of the Bail Reform Act Makes Clear That Detaining a Defendant as a "Serious Risk of Flight" is Appropriate Only in "Extreme and Unusual Circumstances."

While § 3142(f)(2) does not spell out the standard of proof for "serious risk" of flight, the legislative history of the Bail Reform Act unequivocally demonstrates that Congress intended "serious risk of flight" to be a very demanding standard, and expected courts to detain on that ground only in "extreme and unusual circumstances." The Senate and the House Judiciary Committee reports concur that:

> Under subsection [3142]f(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases.*

Bail Reform Act of 1983: Report of the Committee on the Judiciary, S Rep No 98-147, 98th Cong, 1st Sess. 48 (1983) (emphasis added). The footnote accompanying this text points to *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978), as representing the "scope of the current case law." In *Abrahams*, the First Circuit held that, before detaining a defendant as a risk of flight, the government must show that a "<u>rare case of extreme and unusual circumstances</u>." *Id.* at 8 (emphasis added); *see also Gavino v. McMahon*, 499 F.2d 1191, 1995 (2d Cir. 1974) (holding that in a noncapital case the defendant is guaranteed the right to pretrial release except in

"extreme and unusual circumstances"); *United States v. Kirk* 534 F.2d 1262, 1281 (8th Cir. 1976) (holding that bail can only be denied "in the exceptional case.").

Applying this rule to the defendant in *Abrahams*, the court emphasized just how demanding a standard "extreme and unusual circumstances" is. The defendant in *Abrahams* posed an almost preposterously high risk of fleeing the jurisdiction. He was an escaped state prisoner from New Jersey, and a fugitive from state court in California where he had jumped bail after giving a false last name. 575 F.2d at 4. He was a serial impersonator with multiple known aliases, and three previous convictions in state and federal court. Id. At his original bail hearing in this case he had given a false name and lied about his criminal history, had originally failed to appear, and to top it all off, had recently transferred 1.5 million dollars to Bermuda. Id. Under these extreme facts the court *deliberated* before finally holding that "[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."

By incorporating the *Abrahams* standard into "serious risk of flight," Congress painted a clear picture of the kind of extreme factual circumstances required to even merit a detention hearing on the ground of serious risk of flight under § 3142(f)(2). To interpret "serious risk of flight" as an ambiguous, undemanding catchall term, or to conflate it with "risk of non-appearance" is to deliberately ignore Congress' intended limitations.

B. The Government Has Not Met Its Burden to Show That [CLIENT] Poses an "Extreme and Unusual" Risk of Fleeing the Jurisdiction.

In order "to show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave [the jurisdiction] through some type of voluntary act." *Marinez-Patino*, 2011 WL 902466, at *12 (citations omitted). The only defendants who qualify for detention under 3142(f)(2) are those "[t]rue flight risks"—defendants the government can prove are likely to willfully flee the jurisdiction with the intention of

thwarting the judicial process. *See, e.g.*, Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).

An amorphous risk of local nonappearance does not rise to the level of a *serious* risk of flight. "[T]o conflate risk of flight and assuring appearance would have the effect of reading out of the BRA the threshold showing that there is a serious risk that the defendant will flee." *Marinez-Patino*, 2011 WL 902466, at *5 (holding that defendant facing deportation was not a serious flight risk under § 3142(f)(2)(A)). The government must present evidence that the defendant will fail to appear because they have intentionally fled the jurisdiction.[3]

In this case the government has not offered [any/sufficient] evidence that [CLIENT] presents a serious risk of willfully fleeing the jurisdiction.

C. The Government Has Not Presented "Extreme and Unusual Circumstances" and Has Not Met Its Burden To Prove That [CLIENT] Presents a "Serious Risk" Of Fleeing the Jurisdiction Under § 3142(f)(2)(A)

[CLIENT] must be released immediately on conditions because the government [did not argue that [CLIENT] posed a "serious risk" of flight and] did not present any evidence whatsoever to establish that "there is a serious risk that the [defendant] will flee" the jurisdiction under § 3142(f)(2)(A). Although the defense bears no burden of proof, it is clear from [CLIENT'S] history and characteristics that [he/she] does not pose a serious risk of flight. [DISCUSS FACTS HERE THAT SHOW NO SERIOUS RISK OF FLIGHT: TIES TO COMMUNITY, FAMILY, EMPLOYMENT, PAST COURT APPEARANCES, FTAs ARE STALE, OTHER EVIDENCE OF STABILITY.]

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[3] This rule is sound policy, as the risk of a defendant becoming either a "local absconder" (who intentionally fails to appear but remains in the jurisdiction), or a "low-cost non-appearance" (who unintentionally fails to appear), can be addressed by imposing conditions of release like electronic monitoring, GPS monitoring, and support from pretrial services. *See* Gouldyn, 85 U. Chi. L. Rev. at 724.

Because [CLIENT] does not present a "serious risk" of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

D. There Is No Other Basis to Detain [CLIENT] as a Serious Risk of Flight in this Case.

The potential penalty in this case is not a legitimate basis for finding a serious risk of flight. There is no evidence Congress intended courts to de facto detain any client facing a long prison sentence. Indeed, many federal defendants face long sentences—being a defendant in a run-of-the-mill federal case cannot possibly be an "extreme and unusual circumstance." Even at the detention hearing, where the standard for finding risk of flight is lower, Congress did not authorize courts to evaluate potential penalty when considering risk of flight. *See* § 3142(g) (listing as relevant factors the nature and seriousness of the charge, (2) the weight of the evidence against the defendant, and (3) the history and characteristics of the defendant); *Friedman*, 837 F.2d at 50 (in "cases concerning risk of flight, we have required *more* than evidence of the commission of a serious crime and the fact of a potentially long sentence to support finding risk of flight") (emphasis added).

[USE IF CLIENT HAS A CRIMINAL RECORD BUT NO BOND FORFEITURES]
Additionally, a criminal record also does not automatically render a client a serious risk of flight. To the contrary, evidence that a defendant has complied with court orders in the past supports a finding that he is *not* a serious risk of flight. *See, e.g.*, *United States v. Williams*, 1988 WL 23780, at *1 (N.D. Ill. Mar. 8, 1988) (defendant who made regular state court appearances in the past deemed not a serious flight risk).

[USE THIS PARAGRAPH IN FRAUD CASE] The mere fact that [CLIENT] is charged with an economic crime likewise does not render [him/her] a serious risk of flight. "In economic

fraud cases, it is particularly important that the government proffer more than the fact of a serious economic crime that generated great sums of ill-gotten gains . . . [;] evidence of strong foreign family or business ties is necessary to detain a defendant." *United States v. Giordano*, 370 F. Supp. 2d 1256, 1264 (S.D. Fla. 2005). The government has not presented any evidence that [CLIENT] intends to flee or has anywhere to flee to, meaning that "many of the key factors that would warrant detention in an economic fraud case are absent here." *Id.* at 1270.

III. Detaining [CLIENT] as a Serious Risk of Flight Is Not Only Legally Unsupported, but Is Also Harmful and Unnecessary.

A. A Few Days of Detention Can Have Disastrous Consequences on a Defendant's Life.

Congress was correct to cabin pretrial detention to "extreme and unusual circumstances," because even very short periods of detention have been shown to seriously harm defendants. For example, according to a recent study published by the Administrative Office of the U.S. Courts, 37.9% of federal defendants detained fewer than three days reported have a negative outcome at work (such as losing their job). Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82(2) Federal Probation 39, 42 (2018), archived at https://perma.cc/LQ2M-PL83. Likewise, 29.9% of people detained fewer than three days reported that their housing became less stable. *Id.* In other words, a substantial minority of people held for only one or two days federal cases still lose their jobs or their housing as a result of the brief detention.

The first few days of detention can also be dangerous. According to the Bureau of Justice Statistics, between 38% and 45% of all jailhouse rapes perpetrated on a male victim happen within three days of admission. Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008–09*, Bureau of Justice Statistics (2010), 22–23, archived at

https://perma.cc/H33S-QFPK. Over 40% of people who die in jail die within their first week. Margaret Noonan, et al., *Mortality in Local Jails and State Prisons, 2000–14—Statistical Tables*, Bureau of Justice Statistics 8 (2015), archived at https://perma.cc/B9CN-ST3K. Despite the trauma and danger inherent in the first few days of a jail stay, jails' physical and mental health screening and treatment is often inadequate. *See* Laura M. Maruschak, et al., *Medical Problems of State and Federal Prisoners and Jail Inmates*, Bureau of Justice Statistics 9, 10 (2014), archived at https://perma.cc/HGT9-7WLL (comparing healthcare in prisons and jails); *see also* Faye S. Taxman, et al., *Drug Treatment Services for Adult Offenders: The State of the State*, 32 Journal of Substance Abuse Treatment 239, 247–49 (2007), archived at https://perma.cc/G55Z-4KQH. In sum, detaining [CLIENT] for even one or two days in this case is not just illegal—it could also jeopardize [his/her] physical, financial, and mental wellbeing.

B. Many Conditions of Release Have Been Proven to Effectively Manage Ordinary Risk of Flight or Nonappearance.

Any concerns the Court may have about local nonappearance can be allayed by imposing any number of conditions of release that empirically have been shown to reduce the risk of local nonappearance. For example, a study conducted in New York state courts found that text message reminders were able to reduce failures to appear by up to 26 percent, translating to 3,700 fewer arrest warrants per year. *See* Brice Cooke et al, *Text Message Reminders Decreased Failure to Appear in Court in New York City*, Abdul Latif Poverty Action Lab (2017), archived at https://perma.cc/JCW7-JVZW. Holistic pre-trial services focused on providing social services and *support* to clients also reduce the risk of non-appearance across all risk levels in state systems. *See generally* Christopher Lowenkamp and Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*, John and Laura Arnold Foundation, Special Report (2013), archived at https://perma.cc/R3F3-KZ76. Beyond the traditional role of Pretrial Services, this

could include providing funding for transportation to court, providing childcare on court dates, and assisting clients in finding stable housing, employment or education. *See generally* John Clark, *The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage*, Pretrial Justice Institute (2014), archived at https://perma.cc/5C8C-7HJK.

Moreover, scholars and courts agree that electronic monitoring is especially effective at reducing risk of flight. *See, e.g.*, Samuel R. Wiseman, *Pretrial Detention and the Right to the Monitored*, 123 Yale L. J. 1344, 1347–48 (2014) ("Increasingly sophisticated remote monitoring devices have the potential to sharply reduce the need for flight-based pretrial detention . . . . [T]he question of finding other ways of ensuring a non-dangerous defendant's presence at trial is one not of ability, but of will. . . ."); *id.* at 1368–74 (citing studies in both European and American contexts to demonstrate that electronic monitoring is at least as effective as secured bonds at deterring flight, and that it comes at far reduced cost to both the defendant and the government); *United States v. O'Brien*, 895 F2d 810, 814-16 (1st Cir 1990) (describing reduction in flight rate from monitoring program and concluding that "evidence concerning the effectiveness of the bracelet alone [] arguably rebuts the presumption of flight").

IV. [CLIENT] Requests Immediate Release with Conditions

Because there is no basis to detain [CLIENT], [he/she] should be released immediately under the following conditions: [INSERT CONDITIONS TAILORED TO CASE]. These conditions will "reasonably assure" [CLIENT'S] appearance and the safety of the community. § 3142(c). [ADD BRIEF EXPLANATION OF BASES FOR CONDITIONS].

V. Conclusion

For these reasons, [CLIENT] respectfully requests that [he/she] be released with conditions this Court deems appropriate, under §§ 3142(a)–(c). Because the government has provided no permissible basis for pretrial detention under § 3142(f), continuing to detain [CLIENT] violates the law.

Dated: [April 24, 2019]

Respectfully submitted,

By: /s/ ____________
[ATTORNEY]
Attorney for [CLIENT]

WRITTEN WITH:
Alison Siegler & Erica Zunkel
Keri Coble, Katerina Kokkas, Caroline Sabatier, and Samuel Taxy, Class of 2019
Claire Rogerson, Class of 2020
University of Chicago Law School
Federal Criminal Justice Clinic

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

DEFENDANT'S MOTION FOR IMMEDIATE RELEASE WITH CONDITIONS

was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [April 24, 2019], to counsel/parties that are non-ECF filers.

/s/__________
[Attorney name & contact information]

IN THE
UNITED STATES DISTRICT COURT
FOR THE __________ DISTRICT OF ________________

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Judge [NAME]**
	)	**No. XX-CR-XX**
[CLIENT]	)	
	)	

DEFENDANT'S APPEAL OF MAGISTRATE JUDGE'S DETENTION ORDER AND REQUEST FOR IMMEDIATE RELEASE WITH CONDITIONS

[COUNSEL: This motion should be filed immediately after the initial appearance only in the rare case where (1) the government requested detention either on the basis of danger to the community or on the dual grounds of danger to the community & risk of flight; and (2) the charge is fraud, extortion, threats, or another charge not listed in § 3142(f)(1). This appeal should not be filed in the following types of cases because a § 3142(f)(1) factor authorizes detention at the initial appearance: bank robbery, other crime of violence, or terrorism case listed in § 3142(f)(1)(A), drug case listed in (f)(1)(C), 924(c) gun case, 922(g) gun case, or minor victim case listed in (f)(1)(E). If you have questions about when this motion should be filed, please contact Alison Siegler (alisonsiegler@uchicago.edu).]

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully moves this Honorable Court to vacate Magistrate Judge [JUDGENAME's] detention order pursuant to 18 U.S.C. § 3145(b) and order [him/her] released from custody pursuant to the Bail Reform Act and the Fifth Amendment's Due Process Clause. Supreme Court precedent makes it unconstitutional for a court to hold a detention hearing or detain a defendant at all when, as here, there is no basis for detention under 18 U.S.C. § 3142(f). As all six courts of appeals to have directly addressed the question have recognized, "danger to the community" is not a permissible basis for detaining [CLIENT] because it is not one of the enumerated factors set out in 18 U.S.C. § 3142(f). In addition, ordinary risk of flight is not a permissible basis for detention; rather, the statute only authorizes detention if there is a "*serious risk* that [the defendant] will flee." § 3142(f)(2)(A) (emphasis added). In this case, the government has not presented sufficient evidence that

[CLIENT] poses a serious risk of flight. Accordingly, [CLIENT] must be released on bond immediately with appropriate conditions of release. *See* 18 U.S.C. §§ 3142(a)–(c). This appeal arises under 18 U.S.C. § 3145(b), which provides for de novo review of a magistrate judge's detention order. In support of this appeal, [CLIENT] states as follows:

On [DATE], [CLIENT] was arrested on a criminal complaint charging [him/her] with [LIST CHARGES AND STATUTORY SECTIONS]. Magistrate Judge [JUDGENAME] held [his/her] [initial appearance/arraignment] on [DATE]. At that initial appearance, the government requested detention on the grounds that [CLIENT] was a danger to the community and a risk of flight. Magistrate Judge [JUDGENAME] detained [CLIENT] as a danger to the community and a risk of flight pending a detention hearing. This appeal follows.

I. The Bond Statute Only Authorizes Pretrial Detention and a Detention Hearing When One of the Seven Factors Listed in § 3142(f) Is Met.

[CLIENT] is being detained in violation of the law because none of the seven § 3142(f) factors are met.[1] Supreme Court precedent and the plain language of the statute prohibit the court from holding a detention hearing and detaining a defendant for even one day when no § 3142(f) factor is present. Six courts of appeals as well as district courts in this circuit concur.

A. Supreme Court Law

In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the Supreme Court upheld the Bail Reform Act, 18 U.S.C. § 3142, over a Fifth Amendment substantive Due Process challenge in

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[1] This case does not meet any of the five factors discussed in § 3142(f)(1), as it does not involve: (1) a crime of violence under (f)(1)(A); (2) an offense for which the maximum sentence is life imprisonment or death under (f)(1)(B); (3) a qualifying drug offense under (f)(1)(C); (4) a felony after conviction for two or more offenses under the very rare circumstances described in (f)(1)(D); or (5) a felony involving a minor victim or the possession/use of a firearm under (f)(1)(E).

The government has also not presented any evidence to establish that this case meets either of the two additional factors discussed in § 3142(f)(2): (1) a "serious risk that [the defendant] will flee" under (f)(2)(A); or (2) a "serious risk" that the defendant will engage in obstruction or juror/witness tampering under (f)(2)(B).

part on the grounds that detention hearings could be held *only* under the limited circumstances set out in § 3142(f). As the *Salerno* Court held: "[t]he Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious crimes. *See* 18 U.S.C. § 3142(f) (*detention hearings available if* case involves crime of violence, offenses for which the sentence is life imprisonment or death, serious drug offenders, or certain repeat offenders)." *Salerno*, 481 U.S. at 747 (emphasis added). The Supreme Court thus held that the factors listed in § 3142(f) serve as a gatekeeper. Only certain categories of defendants are eligible for detention at all, and the government is definitively prohibited from seeking detention if no (f) factor is met. Likewise, *Salerno* makes clear that when no § 3142(f) factor is present, a court is prohibited from holding a detention hearing and is required to release the defendant on conditions.

The constitutionality of the Bail Reform Act depends on this gatekeeping function of § 3142(f). If courts detain defendants without regard to the limitations in § 3142(f), the Act as applied becomes unconstitutional. In holding that the Act did not violate substantive Due Process, the *Salerno* Court focused on the fact that § 3142(f) "carefully limits the circumstances under which detention may be sought." *Id.* at 747. It was these limitations in 3142(f), and several other aspects of the Act, that led the Court to conclude that the Act was "regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause." *Id.* at 748. The *Salerno* Court further relied on the limitations in § 3142(f) in another component of its substantive Due Process ruling, its conclusion that "the government's interest in preventing crime by arrestees is both legitimate and compelling." To reach this conclusion, the Court contrasted the Bail Reform Act with a statute that "permitted pretrial detention of any juvenile arrested on any charge" by pointing to the gatekeeping function of § 3142(f): "The Bail Reform

act, in contrast, narrowly focuses on a particularly acute problem in which the Government interests are overwhelming. The Act operates ***only*** *on individuals who have been arrested for a specific category of extremely serious offenses. 18 U.S.C. § 3142(f).*" *Id.* at 750 (emphasis added). The Court emphasized that Congress "specifically found that these individuals" arrested for offenses enumerated in § 3142(f) "are far more likely to be responsible for dangerous acts in the community after arrest." *Id.* In fact, throughout its substantive Due Process ruling, the Court continued to emphasize that the only defendants for whom the government can seek detention are those who are "already indicted or held to answer for a *serious* crime," meaning the "extremely serious offenses" listed in § 3142(f). *Id.* (emphasis added).

B. The Plain Language of § 3142(f)

The gatekeeping role § 3142(f) plays is also clear from the plain language of the statute. Subsection 3142(f) says, "the judicial officer shall hold a [detention] hearing" only "in a case that involves" one of the seven factors listed in § 3142(f)(1) & (f)(2). Moreover, the plain language of § 3142(e) authorizes a judge to "order the detention of the person" only "after a [detention] hearing pursuant to the provisions of subsection (f) of this section."

The Bail Reform Act is difficult to parse because the statute is not organized in the order in which detention issues arise in court. Instead, the first pretrial release issue to arise at the Initial Appearance hearing—whether there is a legal basis for detention—is not addressed until § 3142(f), which comes halfway through the statute. To make matters worse, § 3142(f) itself is confusing, in that it is entitled "Detention hearing" but in fact speaks to *both* the legal standard that applies at the Initial Appearance hearing and to the legal standard that applies at the Detention Hearing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before a court can detain a defendant, introducing the limited

circumstances under which "the judicial officer shall hold a hearing"—meaning a detention hearing. If none of the 7 circumstances enumerated in § 3142(f) are present *at the Initial Appearance*, the judge is not authorized to hold a detention hearing or detain the defendant at all. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies *at the Detention Hearing*, explaining that the purpose of the Detention Hearing is "to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community." The long paragraph in § 3142(f) that follows § 3142(f)(2)(B) describes the procedures that apply at the Detention Hearing in depth.[2]

C. Circuit and District Court Caselaw

Following the Supreme Court's guidance in *Salerno*, six courts of appeals agree that it is illegal to detain a defendant—or even to hold a detention hearing—unless the government establishes one of the factors listed in 18 U.S.C. § 3142(f). *See, e.g.*, *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Friedman*, 837 F.2d 48, 49 (2d Cir. 1988); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992); *United States v. Twine,* 344 F.3d 987 (9th Cir. 2003); *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

When the government requests detention at an initial appearance hearing, the judge must first determine whether there is a permissible statutory basis for detention under § 3142(f). *See Friedman*, 837 F.2d at 48 ("A motion seeking such detention is permitted only when the charge

[2] In some districts, the U.S. Attorney's Office explicitly acknowledges the gatekeeping function served by § 3142(f) by routinely filing a motion at the Initial Appearance that lists the government's legal basis for detention under § 3142(f). *See* Ex. A, Motion for Detention (WDWA). That motion reads, "This case is eligible for a detention order because this case involves (check all that apply)," and provides a checkbox for each § 3142(f) factor.

is for certain enumerated crimes . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice.") (citing 18 U.S.C. § 3142(f)(1)–(2)); *Byrd*, 969 F.2d at 109 ("A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (f)(2) is present."). Unless the statutory threshold set out in § 3142(f) is met, "detention is not an option." *Singleton*, 182 F.3d at 9; *Byrd*, 969 F.2d at 109 ("Detention can be ordered, therefore, only in a case that involves one of the . . . circumstances listed in (f).").

Although the Seventh Circuit has yet to address the question, courts within this circuit agree that a defendant cannot be detained at all—not even for a day—unless one of the circumstances enumerated in § 3142(f) is met. In *United States v. Morgan*, Magistrate Judge Hawley in the Central District of Illinois surveyed the appellate cases and concluded: "If none of the factors in either § 3142(f)(1) or (f)(2) are met, then the defendant may not be detained." *United States v. Morgan*, No. 14-CR-10043, 2014 WL 3375028, at *14 (C.D. Ill. July 9, 2014) (holding that detention on dangerousness grounds in a fraud case was improper). In *United States v. Mays,* Magistrate Judge Gilbert recently concluded that "there is authority for the proposition that the government is entitled to a detention hearing (and up to 3 days to prepare for that hearing absent good cause) only if it shows that the charged crime is one of the offenses enumerated in 18 U.S.C. 3142(f)(1)." *United States v. Mays*, 18-CR-737, Dkt. No. 7 (N.D. Ill. Nov. 8, 2018). Other courts within this circuit agree. *See, e.g., United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 966 (E.D. Wis. 2008) ("Unless the case falls within one of the above categories in § 3142(f), the court may not detain the defendant."); *United States v. Sweet*, 87-CR-544, 1987 WL 15384 (N.D. Ill. 1987) (finding that "[t]he statute does not provide for a hearing under § 3142(f) except in the cases enumerated in § 3142(f)(1) and (f)(2)" and ordering defendant released because "this case does not come within either § 3142(f)(1) or (f)(2)").

Unfortunately, in Chicago and elsewhere, a cultural norm has developed that contravenes the Bail Reform Act and *Salerno* and results in defendants being illegally detained in violation of the statute and their constitutional rights. Specifically, at virtually every initial appearance hearing where the government is requesting detention, the Assistant United States Attorney asserts that the defendant is either "a danger to the community," "a risk of flight," or both. However, neither "danger to the community" nor ordinary "risk of flight" is a factor listed in § 3142(f). Accordingly, it is flatly illegal to detain a defendant on either of these grounds at the initial appearance. And yet, every day, defendants are detained on these bases. The practice in this district must be brought back in line with the law. That will only happen if this Court and other judges in this district demand that the government provide a legitimate § 3142(f) basis for every detention request.

II. It Is Illegal to Detain [CLIENT] as a Danger to the Community

First, the plain text of § 3142(f) does not authorize detention on generalized dangerousness grounds. Second, interpreting the Bail Reform Act to authorize detaining someone for being a "danger to the community," although "danger to the community" is not listed in § 3142(f), would contradict *Salerno* and render the Act unconstitutional under the Fifth Amendment. Third, the same six courts of appeals that hold that there must be a § 3142(f) factor present to justify detention also uniformly agree that "the statute does not authorize detention of the defendant based on danger to the community." *Himler*, 797 F.2d at 160; *see also Byrd*, 969 F.2d at 110 ("[A] defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention."); *Friedman*, 837 F.2d at 49 ("[T]he Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice or an indictment for the offenses enumerated [in the statute]."); *Ploof*, 851

F.2d at 9–12; *Singleton*, 182 F.3d at 9 (citing *Ploof*, 851 F.2d at 11); *Twine*, 344 F.3d at 987 (agreeing with *Himler*, *Ploof*, and *Byrd*).

Courts within this circuit have reached the same conclusion. As in this case, the government in *Morgan* raised generalized dangerousness as a basis for detention. Based on its analysis of the statute, the *Morgan* court concluded that detention is only appropriate when one of the factors in § 3142(f) is met and that "danger to the community" is not a valid basis for detention. *United States v. Morgan*, 2014 WL 3375028, at *14 (C.D. Ill. July 9, 2014) ("§ 3142(f) specifies certain conditions under which a detention hearing shall be held, and the grounds in [§ 3142(f)] limit a dangerousness finding to instances of the kind listed therein."). The court agreed with the conclusion in *Himler* that "[t]he statute does not authorize the detention of the defendant based on danger to the community." *Morgan*, 2014 WL 3375028 at *7, *12–*13 (quoting *Himler*, 797 F.2d at 160). The court explained that both the First and Third Circuits have "held that a person's threat to the safety of any other person or the community, in the absence of one of the six specified circumstances, could not justify detention under the Act." *Id.* at *12 (quoting *Byrd*, 969 F.2d at 109). The court accordingly ordered Mr. Morgan's immediate release. *Id.* at *16.

Without a § 3142(f) factor present, the court may not detain [CLIENT] as a danger to the community, economic or otherwise. *See Friedman*, 837 F.2d at 49 ("The Bail Reform Act does not permit detention on the basis of dangerousness in the absence of risk of flight, obstruction of justice, or an indictment for the offenses enumerated [in § 3142(f)(1)]."). The fraud charge in [CLIENT's] case is not among the enumerated offenses in § 3142(f)(1), nor is potential economic harm a basis for detention under § 3142(f). *See supra* note 1. Even in cases where a § 3142(f) factor exists and a detention hearing is appropriate, courts "rarely conclude that the

economic harm presented rises to the level of danger of the community for which someone should be detained." *United States v. Madoff*, 586 F. Supp. 2d 240, 253–54 (S.D.N.Y. 2009) (releasing Madoff on conditions despite concerns that he posed an economic danger). Regardless, potential economic harm to the community cannot be weighed against a defendant when the case does not involve a § 3142(f) factor. Because no § 3142(f)(1) or § 3142(f)(2) factor is met in [CLIENT's] case, any concerns that she poses an economic danger to the community cannot serve as a basis for holding a detention hearing or detaining her pending trial.

III. It is Illegal to Detain [CLIENT] At All Because the Government Has Not Presented Evidence that [He/She] Poses a "Serious Risk" of Flight.

It was improper to detain [CLIENT] on the government's bare allegation that [he/she] poses a "risk of flight" because that is not a factor enumerated in § 3142(f). By its plain language, § 3142(f)(2)(A) permits detention and a hearing only when a defendant poses a "*serious* risk" of flight. "[S]erious risk" of flight in § 3142(f)(2)(A) means something more than ordinary risk of flight. The Supreme Court and the Seventh Circuit require courts to follow a very basic canon of statutory interpretation: "We must read a statute to give effect to each word so as to avoid rendering any words meaningless, redundant, or superfluous." *Witzke v.* Femal, 376 F.3d 744, 753 (7th Cir. 2004); *see also Bloch v. Frischholz*, 587 F.3d 771, 785 (7th Cir. 2009) ("'One of the most basic interpretative cannons' is 'that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Moreover, where the government's only legitimate § 3142(f) ground for detention is "serious risk" of flight, the government bears the burden of presenting *evidence* to support its allegation that a defendant poses a "serious risk" of flight rather than the ordinary risk attendant in any criminal case. "When . . . the safety of the community is not at issue, a court must first

determine whether the government has shown, by a preponderance of the evidence, the existence of a *serious risk* that the defendant will flee." *United States v. Marinez-Patino*, 2011 WL 902466, at *3 (N.D. Ill. Mar. 14, 2011) (emphasis added).

In order to detain a defendant as a "serious risk" of flight under 3142(f)(2)(A), the government must present evidence that the defendant presents an "extreme and unusual" risk of willfully fleeing the jurisdiction if released. Because the government has not met its burden in this case, [CLIENT] may not be detained under 3142(f)(2)(A).

A. The Legislative History of the Bail Reform Act Makes Clear That Detaining a Defendant as a "Serious Risk of Flight" is Appropriate Only in "Extreme and Unusual Circumstances."

While § 3142(f)(2) does not spell out the standard of proof for "serious risk" of flight, the legislative history of the Bail Reform Act unequivocally demonstrates that Congress intended "serious risk of flight" to be a very demanding standard, and expected courts to detain on that ground only in "extreme and unusual circumstances." The Senate and the House Judiciary Committee reports concur that:

> Under subsection [3142]f(2), a pretrial detention hearing may be held upon motion of the attorney for the government or upon the judicial officer's own motion in three types of cases. The first two types of cases, those involving either a serious risk that the defendant will flee, or a serious risk that the defendant will obstruct justice, or threaten, injure, or intimidate a prospective juror or witness, or attempt to do so, *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases*.

Bail Reform Act of 1983: Report of the Committee on the Judiciary, S Rep No 98-147, 98th Cong, 1st Sess. 48 (1983) (emphasis added). The footnote accompanying this text points to *United States v. Abrahams*, 575 F.2d 3 (1st Cir. 1978), as representing the "scope of the current case law." In *Abrahams*, the First Circuit held that, before detaining a defendant as a risk of flight, the government must show that a "rare case of extreme and unusual circumstancesat 8 (emphasis added); *see also Gavino v. McMahon*, 499 F.2d 1191, 1995 (2d Cir. 1974) (holding

that in a noncapital case the defendant is guaranteed the right to pretrial release except in "extreme and unusual circumstances"); *United States v. Kirk* 534 F.2d 1262, 1281 (8th Cir. 1976) (holding that bail can only be denied "in the exceptional case.").

Applying this rule to the defendant in *Abrahams*, the court emphasized just how demanding a standard "extreme and unusual circumstances" is. The defendant in *Abrahams* posed an almost preposterously high risk of fleeing the jurisdiction. He was an escaped state prisoner from New Jersey, and a fugitive from state court in California where he had jumped bail after giving a false last name. 575 F.2d at 4. He was a serial impersonator with multiple known aliases, and three previous convictions in state and federal courtAt his original bail hearing in this case he had given a false name and lied about his criminal history, had originally failed to appear, and to top it all off, had recently transferred 1.5 million dollars to Bermuda. Id. Under these extreme facts the court *deliberated* before finally holding that "[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."

By incorporating the *Abrahams* standard into "serious risk of flight," Congress painted a clear picture of the kind of extreme factual circumstances required to even merit a detention hearing on the ground of serious risk of flight under § 3142(f)(2). To interpret "serious risk of flight" as an ambiguous, undemanding catchall term, or to conflate it with "risk of non-appearance" is to deliberately ignore Congress' intended limitations.

B. The Government Has Not Met Its Burden to Show That [CLIENT] Poses an "Extreme and Unusual" Risk of Fleeing the Jurisdiction.

In order "to show that there is a serious risk that a defendant will flee, the government must show that the defendant would seek to leave [the jurisdiction] through some type of voluntary act." *Marinez-Patino*, 2011 WL 902466, at *12 (citations omitted). The only defendants who qualify for detention under 3142(f)(2) are those "[t]rue flight risks"—defendants

the government can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process. *See, e.g.,* Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017).

An amorphous risk of local nonappearance does not rise to the level of a *serious* risk of flight. "[T]o conflate risk of flight and assuring appearance would have the effect of reading out of the BRA the threshold showing that there is a serious risk that the defendant will flee." *Marinez-Patino*, 2011 WL 902466, at *5 (holding that defendant facing deportation was not a serious flight risk under § 3142(f)(2)(A)). The government must present evidence that the defendant will fail to appear because they have intentionally fled the jurisdiction.[3]

In this case the government has not offered [any/sufficient] evidence that [CLIENT] presents a serious risk of willfully fleeing the jurisdiction.

C. The Government Has Not Presented "Extreme and Unusual Circumstances" and Has Not Met Its Burden To Prove That [CLIENT] Presents a "Serious Risk" Of Fleeing the Jurisdiction Under § 3142(f)(2)(A)

[CLIENT] must be released immediately on conditions because the government [did not argue that [CLIENT] posed a "serious risk" of flight and] did not present any evidence whatsoever to establish that "there is a serious risk that the [defendant] will flee" the jurisdiction under § 3142(f)(2)(A). Although the defense bears no burden of proof, it is clear from [CLIENT'S] history and characteristics that [he/she] does not pose a serious risk of flight. [DISCUSS FACTS HERE THAT SHOW NO SERIOUS RISK OF FLIGHT: TIES TO COMMUNITY, FAMILY, EMPLOYMENT, PAST COURT APPEARANCES, FTAs ARE STALE, OTHER EVIDENCE OF STABILITY.]

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[3] This rule is sound policy, as the risk of a defendant becoming either a "local absconder" (who intentionally fails to appear but remains in the jurisdiction), or a "low-cost non-appearance" (who unintentionally fails to appear), can be addressed by imposing conditions of release like electronic monitoring, GPS monitoring, and support from pretrial services. *See* Gouldyn, 85 U. Chi. L. Rev. at 724.

Because [CLIENT] does not present a "serious risk" of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

D. There Is No Other Basis to Detain [CLIENT] as a Serious Risk of Flight in this Case.

The potential penalty in this case is not a legitimate basis for finding a serious risk of flight. There is no evidence Congress intended courts to de facto detain any client facing a long prison sentence. Indeed, many federal defendants face long sentences—being a defendant in a run-of-the-mill federal case cannot possibly be an "extreme and unusual circumstance." Even at the detention hearing, where the standard for finding risk of flight is lower, Congress did not authorize courts to evaluate potential penalty when considering risk of flight. *See* § 3142(g) (listing as relevant factors the nature and seriousness of the charge, (2) the weight of the evidence against the defendant, and (3) the history and characteristics of the defendant); *Friedman*, 837 F.2d at 50 (in "cases concerning risk of flight, we have required *more* than evidence of the commission of a serious crime and the fact of a potentially long sentence to support finding risk of flight") (emphasis added).

[USE IF CLIENT HAS A CRIMINAL RECORD BUT NO BOND FORFEITURES] Additionally, a criminal record also does not automatically render a client a serious risk of flight. To the contrary, evidence that a defendant has complied with court orders in the past supports a finding that he is *not* a serious risk of flight. *See, e.g.*, *United States v. Williams*, 1988 WL 23780, at *1 (N.D. Ill. Mar. 8, 1988) (defendant who made regular state court appearances in the past deemed not a serious flight risk).

[USE THIS PARAGRAPH IN FRAUD CASE] The mere fact that [CLIENT] is charged with an economic crime likewise does not render [him/her] a serious risk of flight. "In economic

fraud cases, it is particularly important that the government proffer more than the fact of a serious economic crime that generated great sums of ill-gotten gains . . . [;] evidence of strong foreign family or business ties is necessary to detain a defendant." *United States v. Giordano*, 370 F. Supp. 2d 1256, 1264 (S.D. Fla. 2005). The government has not presented any evidence that [CLIENT] intends to flee or has anywhere to flee to, meaning that "many of the key factors that would warrant detention in an economic fraud case are absent here." *Id.* at 1270.

Because [CLIENT] does not present a "serious risk" of flight, neither § 3142(f)(1) nor § 3142(f)(2) is satisfied, a detention hearing is not authorized, and [he/she] cannot be detained under the law.

IV. [CLIENT] Requests Immediate Release with Conditions

Because there is no basis to detain [CLIENT], [he/she] should be released immediately under the following conditions: [INSERT CONDITIONS TAILORED TO CASE]. These conditions will "reasonably assure" [CLIENT'S] appearance and the safety of the community. § 3142(c). [ADD BRIEF EXPLANATION OF BASES FOR CONDITIONS].

V. Conclusion

For these reasons, [CLIENT] respectfully asks this Court to vacate the detention order and order [him/her] released on conditions this Court deems appropriate under §§ 3142(a)–(c). Because the government has provided no permissible basis for pretrial detention under § 3142(f), continuing to detain [CLIENT] violates the law.

Dated: [April 24, 2019]

Respectfully submitted,

By: */s/* __________
[ATTORNEY]
Attorney for [CLIENT]

WRITTEN WITH:
Alison Siegler & Erica Zunkel
Keri Coble, Katerina Kokkas, Caroline Sabatier, and Samuel Taxy, Class of 2019
Claire Rogerson, Class of 2020
University of Chicago Law School
Federal Criminal Justice Clinic

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

DEFENDANT'S APPEAL OF MAGISTRATE JUDGE'S DETENTION ORDER AND REQUEST FOR IMMEDIATE RELEASE WITH CONDITIONS

was served pursuant to the district court's ECF system as to ECF filers, and was sent by first-class mail/hand delivery on [April 24, 2019], to counsel/parties that are non-ECF filers.

/s/__________
[Attorney name & contact information]