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

- **This appeal 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 § 3142(f)(1)(C), § 924(c) gun case, § 922(g) gun case, or minor victim case listed in § 3142(f)(1)(E).**
- **If you have questions about when this appeal should be filed, please contact Alison Siegler (alisonsiegler@uchicago.edu) or Erica Zunkel (ezunkel@uchicago.edu).**

Defendant [CLIENT], by [his/her] attorney, [ATTORNEY], respectfully moves this Honorable Court to vacate Magistrate Judge [JUDGE NAME's] detention order pursuant to 18 U.S.C. § 3145(b) and order [CLIENT] released from custody pursuant to the Bail Reform Act (BRA) 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 directly address the question have recognized, the only permissible bases for detaining a defendant are the enumerated factors set out in § 3142(f). The concepts of "dangerousness" or "safety of the community" are simply not among the factors listed in § 3142(f) and are therefore not legitimate bases for detention at the Initial Appearance. The federal courts of appeals all reach this same conclusion. Further, data from the Administrative Office of the U.S. Courts show that there is an exaggerated concern over risk of flight in our system, and that the vast majority of released defendants do not flee.

In this case, the government has also not presented sufficient evidence that [CLIENT] poses a "serious risk" of flight to authorize detention under § 3142(f)(2)(A). Accordingly, [he/she] 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 [JUDGE NAME] held [CLIENT's] [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. Judge [JUDGE NAME] detained [CLIENT] as a danger to the community and a risk of flight pending a detention hearing. [Add any additional procedural history here.] This appeal follows.

## I. The BRA Only Authorizes Detention at the Initial Appearance When One of the § 3142(f) Factors is Met.

[CLIENT] is being detained in violation of the law. According to the plain language of § 3142(f), "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). None of the § 3142(f) factors are present in this case.[1] Ordinary "risk of flight" is not among the § 3142(f) factors. The statute and the

[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 presented no 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).

caselaw therefore prohibit any Court from holding a Detention Hearing and from detaining [CLIENT] pending trial.

**A. Supreme Court Precedent and the Plain Language of the BRA Prohibit a Court from Detaining the Defendant and Holding a Detention Hearing Without a § 3142(f) Factor.**

The Supreme Court's seminal opinion in *United States v. Salerno*, 481 U.S. 739 (1987), confirms that a Detention Hearing may only be held if one of the seven § 3142(f) factors is present. *See id.* at 747 ("Detention hearings [are] available if" and only if one of the seven § 3142(f) factors is present.). According to the Supreme Court, "[t]he Act operates <u>only</u> *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); *see also id.* at 747 ("The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious of crimes," specifically the crimes enumerated in § 3142(f)) (emphasis added). *Salerno* thus stands for the proposition that the factors listed in § 3142(f) serve as a gatekeeper, and only certain categories of defendants are eligible for detention in the first place. As the D.C. Circuit has held, "First, a [judge] must find one of six circumstances triggering a detention hearing…. [under] § 3142(f). Absent one of these circumstances, detention is not an option." *United States v. Singleton,* 182 F.3d 7, 9 (D.C. Cir. 1999).

If no § 3142(f) factor is met, several conclusions follow: the government is prohibited from seeking detention and there is no legal basis to detain the defendant at the Initial Appearance, jail the defendant, or hold a Detention Hearing. Instead, the court is required to release the defendant on personal recognizance under § 3142(b) or on conditions under § 3142(c).

Detaining [CLIENT] in this case without regard to the limitations in § 3142(f) raises serious constitutional concerns. The strict limitations § 3142(f) places on pretrial detention are part of what led the Supreme Court to uphold the BRA as constitutional. It was the § 3142(f) limitations, among others, 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." *Salerno*, 481 U.S. at 748.[2] Throughout its substantive Due Process ruling, the *Salerno* Court emphasized 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)(1). *Id.* (emphasis added); *see also United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (discussing the BRA's legislative history). An interpretation "of the [BRA] that allows danger to the community as the sole ground for detaining a defendant where detention was moved for only under (f)(2)(A) runs the risk of undercutting one of the rationales that led the *Salerno* Court to uphold the statute as constitutional." *United States v. Gibson*, 384 F. Supp. 3d 955, 963 (N.D. Ind. 2019).

**B. The Courts of Appeals Agree that Detention Is Prohibited When No § 3142(f) Factor is Present.**

Following the Supreme Court's guidance in *Salerno*, six courts of appeals agree that it is illegal to hold a Detention Hearing unless the government invokes one of the factors listed in 18

[2] 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." *Id.* at 749. 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.*

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, 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). For example, the First Circuit holds: "Congress did not intend to authorize preventive detention unless the judicial officer first finds that one of the § 3142(f) conditions for holding a detention hearing exists." *Ploof*, 851 F.2d at 11. The Fifth Circuit agrees. *See Byrd*, 969 F.2d at 109 ("A hearing can be held only if one of the . . . circumstances listed in (f)(1) and (2) is present," and "[d]etention can be ordered, therefore, only 'in a case that involves' one of the . . . circumstances listed in (f).") (quoting § 3142(f)).

Unfortunately, a practice has developed that results in defendants being detained in violation of the BRA, *Salerno*, and the Constitution. Specifically, it is common for the government to seek detention at the Initial Appearance on the ground that the defendant is either "a danger to the community," "a risk of flight," or both.[3] Because neither "danger to the community" nor ordinary "risk of flight" is a factor listed in § 3142(f), it is flatly illegal to hold a Detention Hearing on either of these grounds at the initial appearance.[4] The practice in this

[3] *See, e.g.*, *The Administration of Bail by State and Federal Courts: A Call for Reform*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 115th Cong. (Nov. 14, 2019), *Written Statement of Alison Siegler* at 8, https://docs.house.gov/meetings/JU/JU08/20191114/110194/HHRG-116-JU08-Wstate-SieglerA-20191114.pdf (presenting Congress with courtwatching data demonstrating that federal prosecutors regularly violate the BRA by requesting detention at the Initial Appearance on the impermissible ground of ordinary—not serious—risk of flight and by failing to provide any evidence to support the request).

[4] *See id.* at 7 ("Yet judges regularly detain people under [§ 3142(f)(2)(A)] in non-extreme, ordinary cases without expecting the government to substantiate its request or demonstrate that there is a 'serious risk' the person will flee.").

district must be brought back in line with the law. That will only happen if this Court demands that the government provide a legitimate § 3142(f) basis for every detention request.[5]

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

Generalized "danger to the community" is not a factor in § 3142(f). Every court to have addressed this issue agrees that it is illegal for a judge to detain someone at the Initial Appearance as a "danger" or a "financial danger." *Ploof*, 851 F.2d at 11 (where none "of the subsection (f)(1) conditions were met, pre-trial detention solely on the ground of dangerousness … is not authorized"); *Friedman*, 837 F.2d at 49; *Himler*, 797 F.2d at 160; *Byrd*, 969 F.2d at 110; *Twine*, 344 F.3d at 987. The Fifth Circuit in *Byrd* emphasized that even "a defendant who *clearly* may pose a danger to society cannot be detained on that basis alone." 969 F.2d at 110 (emphasis added). Without a § 3142(f) factor present, the court has no authority to detain [CLIENT] as a danger to the community. *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)].").

[FOR FRAUD CASES] 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). Even in cases where a § 3142(f) factor exists and a detention hearing is appropriate, at

[5] Perhaps the confusion arises because the BRA is not organized in the order in which detention issues arise in court. Although the question of detention at the Initial Appearance comes first in the court process, it is not addressed until § 3142(f). To make matters worse, § 3142(f) itself is confusing. The first sentence of § 3142(f) lays out the legal standard that must be met *at the Initial Appearance* before "the judicial officer shall hold a hearing"—meaning a Detention Hearing. Confusingly, the first sentence of § 3142(f) then goes on to reference the legal standard that applies at the next court appearance, *the Detention Hearing*. See § 3142(f) (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) then describes the procedures that apply at the Detention Hearing in depth.

the detention hearing stage 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. Any concerns that [CLIENT] poses an economic danger to the community cannot serve as a basis for holding a detention hearing or detaining [him/her] pending trial.

Because no § 3142(f)(1) or § 3142(f)(2) factor is met in [CLIENT's] case, detaining [him/her] is illegal.

## III. It is Illegal to Detain [CLIENT] At All Because Ordinary "Risk of Flight" is Not a Statutory Basis for Detention at the Initial Appearance.

It was improper to detain [CLIENT] and set a Detention Hearing on the government's bare allegation that [he/she] poses a "risk of flight" for three reasons. First, the plain language of the statute only permits detention at the Initial Appearance when the defendant poses a "*serious* risk" of flight, § 3142(f)(2)(A), but in this case the government merely alleged an *ordinary* risk of flight. Second, the government bears the burden of presenting some *evidence* to substantiate its allegation that a defendant is a serious risk of flight, but here the government has provided no such evidence. Third, to establish "serious risk" of flight the government must demonstrate that the defendant presents an "extreme and unusual" risk of willfully fleeing the jurisdiction if released, but the government has not met that burden here. Accordingly, it is improper to hold a Detention Hearing at all, let alone detain [CLIENT] for the duration of the case.

### A. Supreme Court Precedent and the Plain Language of the BRA Prohibit this Court from Detaining a Defendant as an Ordinary "Risk of Flight."

Ordinary "risk of flight" is not a factor 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. There is some risk of flight in every criminal case; "serious risk" of flight means something more. According to a basic canon of statutory interpretation, the term "*serious* risk" means that the risk must be more significant or extreme than an ordinary risk. *See, e.g.*, *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretative canons [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.") (citation omitted).

**B. It was Improper to Detain [CLIENT] Because the Government Has Provided No *Evidence* to Support its Claim that [CLIENT] is a Serious Risk of Flight.**

Where the government's only legitimate § 3142(f) ground for detention is "serious risk" of flight, the government bears the burden of presenting some *evidence* to support its allegation that a defendant poses a "serious risk" of flight rather than the ordinary risk attendant in any criminal case. A defendant "may be detained *only if the record supports a finding* that he presents a serious risk of flight." *Himler*, 797 F.2d at 160 (emphasis added); *see also United States v. Robinson*, 710 F. Supp. 2d 1065, 1088 (D. Neb. 2010) (criticizing the government for failing to present evidence of "serious risk" of flight at the Initial Appearance and saying "no information was offered to support [the] allegation"). After all, the statute only authorizes detention "*in a case that involves*" a "serious risk" that the person will flee. § 3142(f)(2)(A) (emphasis added). This contemplates a judicial finding about whether the case in fact involves a *serious* risk of flight.[6] The government must provide an evidentiary basis to enable the judge to

[6] Had Congress intended to authorize detention hearings based on a mere certification by the government, Congress could have enacted such a regime, just as they have done in other contexts. *See, e.g.*, 18 U.S.C. § 5032 (creating exception to general rule regarding delinquency proceedings if "the Attorney General, after investigation, certifies to the appropriate district court of the United States" the

make an informed decision, typically evidence that relates either to the defendant's history and characteristics or to the circumstances of the offense. The government has presented no such evidence here.

### C. Detaining a Defendant as a "Serious Risk of Flight" is Appropriate Only in "Extreme and Unusual Circumstances."

The BRA's legislative history makes clear that detention based on serious risk of flight is only appropriate under "extreme and unusual circumstances."[7] For example, the case relied on in the legislative history as extreme and unusual enough to justify detention on the grounds of serious risk of flight involved a defendant who was a fugitive and serial impersonator, had failed to appear in the past, and had recently transferred over a million dollars to Bermuda. *See Abrahams*, 575 F.2d at 4. The government must demonstrate that the risk of flight in a particular case rises to the level of extreme or unusual, and no such showing has been made here.

In addition, a defendant should not be detained as a "serious risk" of flight when the risk of non-appearance can be mitigated by conditions of release. The only defendants who qualify for detention under § 3142(f)(2) are those who are "[t]rue flight risks"—defendants the government

existence of certain circumstances); 18 U.S.C. § 3731 (authorizing interlocutory appeals by the government "if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding").

[7] *See Bail Reform Act of 1983: Rep. of the Comm. on the Judiciary*, 98th Cong. 48 (1983) ("Under subsection 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. . . . [T]hose [types] involving . . . a serious risk that the defendant will flee . . . *reflect the scope of current case law that recognizes the appropriateness of denial of release in such cases*.") (emphasis added) (citing *United States v. Abrahams*, 575 F.2d 3, 8 (1st Cir. 1978)—which held that only a "*rare case of extreme and unusual circumstances* . . . justifies pretrial detention"—as representing the "current case law"); *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").

can prove are likely to willfully flee the jurisdiction with the intention of thwarting the judicial process.[8]

## IV. In This Case, the Government Has Not Met Its Burden of Proving That [CLIENT] Poses a "*Serious*" Risk Of Flight 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.]

As in *United States v. Morgan*, 2014 U.S. Dist. LEXIS 93306 (C.D. Ill. July 9, 2014), "the facts fail to establish any risk of flight," let alone a risk serious enough to authorize a detention hearing. *Id.* at *17 ("[T]he defendant has lived at his current address for over seven years and has lived in the same community for his entire life. His mother and siblings also all live relatively close to his residence, as do his children and their mothers. . . . Additionally, nothing in his criminal history suggests that he ever failed to appear for a court hearing . . . ."); *see also Friedman*, 837 F.2d at 49–50 (reversing a detention order for "serious risk of flight" where defendant was a lifelong resident of the district, was married with children, had no prior

[8] *See, e.g.,* Lauryn Gouldyn, *Defining Flight Risk*, 85 U. Chi. L. Rev. 677, 724 (2017). 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.

record, had been steadily employed before his arrest, and had been on bond for related state charges without incident).

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.

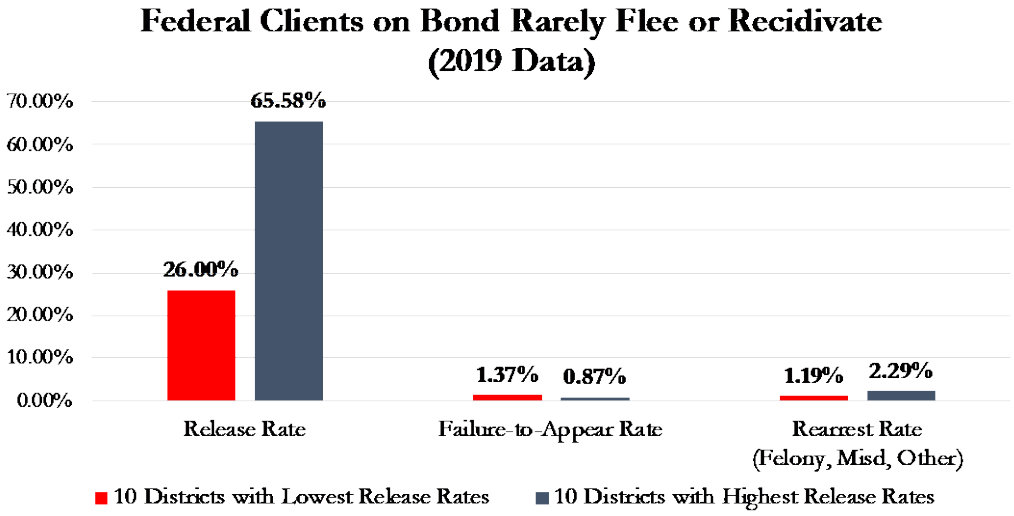
## V. Statistics Showing that It Is Extraordinarily Rare for Defendants on Bond to Flee or Recidivate Further Demonstrate that [CLIENT] Does Not Pose a Serious Risk of Flight.

The government's own data show that when release increases, crime and flight do not. In this case, this Court should be guided by AO statistics showing that nearly everyone released pending trial appears in court and doesn't reoffend. In fact, in 2019, 99% of released federal defendants nationwide appeared for court as required and 98% did not commit new crimes on bond.[9] Significantly, this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates.[10] Even in districts that release two-thirds of all federal defendants on bond, fewer than 1% fail to appear in court and 2% are

[9] App. 1, AO Table H-15 (Dec. 31, 2019), *available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H (showing a nationwide failure-to-appear rate of 1.2% and a rearrest rate of 1.9%).

[10] The data showing near-perfect compliance on bond is illustrated in the chart, "Federal Clients on Bond Rarely Flee or Recidivate." The districts with the highest and lowest release rates were identified using the version of AO Table H-14A for the 12-month period ending December 31, 2019. *See* App. 2, AO Table H-14A (Dec. 31, 2019), https://perma.cc/32XF-2S42. The failure-to-appear and rearrest rates for these districts were calculated using App 1, AO Table H-15. With regard to flight, the ten federal districts with the lowest release rates (average 26.00%) have an average failure-to-appear rate of 1.37%, while the ten districts with the highest release rates (average 65.58%) have an *even lower* failure-to-appear rate of 0.87%. *See* App. 1; App. 2. With regard to recidivism, the ten districts with the lowest release rates have an average rearrest rate on bond of 1.19%, while the ten districts with the highest release rates have an average rearrest rate of 2.29%. *See* App. 1; App. 2. The districts with the lowest release rates are, from lowest to highest, S.D. California, W.D. Arkansas, E.D. Tennessee, S.D. Texas, E.D. Missouri, N.D. Indiana, E.D. Oklahoma, W.D. Texas, W.D. North Carolina, C.D. Illinois; the districts with the highest release rates are, from lowest to highest, E.D. Michigan, E.D. Arkansas, D. New Jersey, E.D. New York, D. Maine, D. Connecticut, W.D. New York, W.D. Washington, D. Guam, D. Northern Mariana Islands. *See* App. 2.

rearrested while released.[11] The below chart reflects this data:




The bond statistics for this district likewise strongly suggest that [CLIENT] should be released. In this district, released federal defendants appeared for court [calculate percentage of defendants who failed to appear while released using Appendix 1, Table H-15]% of the time in 2019, and only [calculate percentage of defendants who were rearrested while released using Appendix 1, Table H-15]% of defendants were rearrested on release. *See* App. 1, AO Table H-15. Yet despite the statistically low risk of flight and recidivism that defendants like [CLIENT] pose, the government recommends detention in 77% of cases nationwide and in [find percentage associated with your district in using Appendix 3, Table H-3]% of cases in this district. *See* App. 3, AO Table H-3. Clearly the government's detention requests are not tailored to the low risk of flight and recidivism that defendants in this district and elsewhere pose.

[CLIENT] must be released because the government has not presented evidence that shows that [he/she] would be among the approximately 1% of defendants who fail to appear in

[11] *See* App. 1; App. 2.

court. Detaining [CLIENT] without evidence that they pose a "serious risk" of flight violates their constitutionally protected liberty interest.

## VI. 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 (1) 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/she] 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.

## VII. [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].

## VIII. 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.

**Note to Counsel re Section V Data and the Appendices**

- If you don't want to do the district-specific FTA/re-arrest calculations, you can cut that entire paragraph from Section V and leave the rest of that section as is.
- **To calculate the percentage of defendants in your district who failed to appear in court while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of failures to appear violations by going to the highlighted column, "FTA Violations."
    - Divide the total FTA Violations for your district by the total Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there was 1 FTA Violation and 262 Cases In Release Status. Divide 1 by 262, getting 0.0038. Multiply that value by 100 to get 0.38%.
- **To calculate the percentage of defendants in your district who were rearrested while on bond, use Appendix 1, Table H-15. Follow these steps:**
    - Find your district in the first column on the left, organized by circuit.
    - For your district, find the total number of released clients by going to the highlighted column "Cases in Release Status."
    - For your district, find the total number of people who violated bond by getting rearrested by going to the highlighted column, "Rearrest Violations."
        - Add up the 3 types of Rearrest Violations for your district by adding together the numbers in the columns titled Felony + Misdemeanor + Other. That sum represents the total Rearrest Violations for your district.
    - Divide the total Rearrest Violations for your district by the Cases In Release Status for your district.
    - Multiply the result by 100 to get the percentage.
    - Example: For D. Maine, there were 9 Felony Rearrests, 2 Misdemeanor Rearrests, and 0 Other. The sum of these three values is 11. That is the total number of Rearrest Violations. There are 262 Cases In Release Status. Divide 11 by 262, getting 0.0419. Multiply that value by 100 to get 4.19%.

# APPENDIX 1

# AO TABLE H-15 (Dec. 31, 2019)

*available at* Mot. for Bond, *United States v. Rodriguez*, No. 19-CR-77 (E.D. Wis. Apr. 2, 2020), ECF No. 41, Ex. 1, archived at https://perma.cc/LYG4-AX4H

# APPENDIX 2

## AO TABLE H-14A (Dec. 31, 2019)

https://perma.cc/32XF-2S42

# APPENDIX 3

## AO TABLE H-3 (Sept. 30, 3019)

https://www.uscourts.gov/sites/default/files/data_tables/jb_h3_0930.2019.pdf