ALEC Fights for Cash Bail, Leading Defendants to Jail

ALEC Continues To Manipulate State Legislation For The Benefit Of Its Private Donors. Resulting In Increased Rates Of Incarceration, Again.

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Introduction

A. ALEC's Current Target: Stopping Pre-trial Bail Reform

Across America, the American Legislative Exchange Council ("ALEC") continues its fight to perpetuate mass incarceration for the benefit of its corporate donors who profit from it. Currently, ALEC is working to achieve this goal by halting pre-trial bail reform, and it is doing so with reckless disregard for the apparent consequences. ALEC has drafted and endorsed numerous pieces of legislation that unequivocally benefit the cash bail industry. While ALEC's hard work has proven effective and beneficial for its donors, it has been extremely detrimental to defendants. The United States Supreme Court has characterized the pre-trial process as "the most

critical period of the proceedings."[1] Hence, ALEC's efforts to influence this area should be heavily scrutinized.

ALEC promotes cash bail within our criminal justice system in direct opposition of public and judicial sentiment, as well as a statutory presumption favoring non-monetary alternatives. Also, ALEC fights for cash bail despite its contributions to: (1) increased pre-trial jail populations, composed primarily of poor African Americans, (2) higher likelihoods of conviction among pre-trial detainees, and (3) longer post-conviction sentences for these detainees.[2] While these are only some of the immediate repercussions, there are also many indirect consequences. These include, for example: (1) higher incarceration costs;(2) job loss and a lower likelihood of future employment for detainees; and (3) physical and mental trauma suffered while awaiting trial behind bars.[3] It is important to remember, defendants are subjected to these consequences regardless of their guilt. Cash bail practices also infringe upon the defendant's right to due process and equal protection under the law. Further, there are numerous non-monetary release alternatives available that

[1] Powell v. Alabama, 287 U.S. 45, 57 (1932).

[2] Will Dobbie, Jacob Goldin, Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges**, Princeton University (Sept. 2017), https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf.

[3] *Id.*

are just as effective at ensuring the defendant's appearance at trial and protecting the community.

Notwithstanding these facts, cash bail continues to be the preferred method of pretrial release, thanks primarily to ALEC.[4] But, fortunately, a nationwide bail reform movement is gaining momentum.[5] The most effective way to implement this reform is to enact state statutes that: (1) prohibit commercial bail bondsman, (2) establish pre-trial service agencies, and (3) prioritize non-monetary pre-trial release.[6] Currently, the biggest obstacle to this reform movement is ALEC.[7] Accordingly, to begin reforming our pretrial system, we must first put a stop to ALEC's unfettered reign over state legislature. Before discussing this issue in more detail, it is crucial to understand what ALEC is and how it controls America's legislative process at the state level.

I. BACKGROUND

A. What ALEC Claims to Be

[4] Will Dobbie, Jacob Goldin, Crystal Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges**, at 1, Princeton University (July 2016), https://www.princeton.edu/~wdobbie/files/bail.pdf.

[5] Jessica Reichert and Alysson Gatens, *An Examination of Illinois and National Pretrial Practices, Detention, and Reform Efforts*, ICJIA.STATE.IL.US (June 7, 2018), http://www.icjia.state.il.us/articles/an-examination-of-illinois-and-national-pretrial-practices-detention-and-reform-efforts.

[6] Thanithia Billings, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337, 1362-63 (2016).

[7] *Id.*

According to ALEC's website, "[t]he American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism."[8] To the untrained eye, ALEC is just another political organization. Upon closer inspection, however, their corrupted ideals and sinister business methods come to light. ALEC claims to be a "forum for stakeholders to exchange ideas and develop real, state-based solutions to encourage growth, preserve economic security and protect hardworking taxpayers."[9] But: (1) who are these "stakeholders," (2) what are these "state-based solutions," and (3) what type of growth and economic security is being pursued?

B. What ALEC Really Is: "Stakeholders"

By "stakeholders" ALEC is referring to state legislators, privately owned corporations, and advocacy groups, who are brought together to draft model legislation specifically crafted for their benefit.[10] Then, they return home and thrust these model bills through the legislative process with false claims regarding the motive behind the bill and its consequences.[11] Currently,

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[8] THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (hereinafter "ALEC"), https://www.alec.org/, (last visited Nov. 5, 2018).

[9] *Id.*

[10] Brendan Greenley and Alison Fitzgerald, *Pssst… Wanna Buy a Law?*, BLOOMBERG BUSINESSWEEK (December 1, 2011), https://www.bloomberg.com/news/articles/2011-12-01/pssst-dot-wanna-buy-a-law.

[11] *Id.*

25 percent of the country's state legislators are also members of ALEC, while the U.S. House of Representatives is home to 92 ALEC alumni and 9 serve in the Senate.[12] This gives ALEC significant control over the legislative process and enables them to manipulate its policies for the benefit of its donors.

As an example of ALEC's influence over state legislature, and its ramifications, consider what happened to a young man named Trayvon Martin. On February 26, 2012, Trayvon Martin was gunned down on a Florida street when he was only 17 years old.[13] After a long and controversial trial, the nation watched as the shooter, George Zimmerman, was acquitted of all charges on July 13, 2013.[14] Many searched for answers, unsure how Mr. Zimmerman escaped unscathed after taking the life of such a young man.[15] To investigate, we turned to members of the jury, to shed light on their "not guilty" verdict.[16] In an interview with CNN, a member of the jury stated that "[b]ecause of the heat of the moment and the stand your ground [law or statute]… he had a right to defend himself."[17] The stand your ground law is

[12] *Id.*

[13] Nicole Flatow, *Zimmerman Juror Says Panel Considered Stand Your Ground In Deliberations: 'He Had A Right To Defend Himself'*, THINKPROGRESS.ORG (July 16, 2013), https://thinkprogress.org/zimmerman-juror-says-panel-considered-stand-your-ground-in-deliberations-he-had-a-right-to-defend-10e55e0750bf/.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Flatow, *supra* note 13.

a self-defense law that allows an individual to respond with deadly force whenever they feel threatened, with no duty to attempt to retreat.[18] This law is not found in every state and, accordingly, the nation wondered how it came to be in Florida. Eventually, it was discovered that the law originated with the NRA and, of course, ALEC.[19]

It all began when the NRA's Lobbying President, Marion Hammer, attended an ALEC meeting and presented the model bill to state legislators.[20] The NRA pushed this bill believing that a pro self-defense bill would increase gun sales.[21] Eventually, this pitch reached ALEC members Dennis Baxley, a Florida State Representative, and Durell Peaden, a Florida State Senator.[22] These two state legislators, both of which conveniently received large scholarships from ALEC's corporate sponsors, quickly returned home to Florida to co-sponsor this ALEC model bill.[23] Finally, this bill reached Jeb Bush, Florida's current Governor, who signed the bill into law.[24] Then, as shown above, this law permitted Mr. Zimmerman to walk away after wrongfully pursuing a young man, against the advice of law enforcement, physically engaging and then shooting him, resulting in his untimely death.[25]

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[18] *Id.*
[19] *Id.*
[20] Greenley, *supra* note 10.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Flatow, *supra* note 13.

All because a corporation wanted to increase their revenue stream without regard to the consequences. As you can see, evaluating which companies are involved and what ideas are governing ALEC's agenda is crucial to prevent results like this. To understand the control these corporations have over ALEC, it is important to understand how ALEC is funded.

ALEC acquires funding through (1) corporate membership and taskforce dues and (2) legislative "scholarships."[26] Naturally, ALEC is elusive when it comes to reporting funding, especially when it involves corporate members, which includes about 300 corporations paying almost 99 percent of their $7 million budget.[27] An ALEC membership costs roughly $25,000 annually, not including additional sponsorships.[28] For example, "[a]t ALEC's 2010 annual meeting… each paid $100,000 to be "president level" sponsors.[29] Additionally, for a seat on a task force, corporations can pay from $3,000 to $10,000.[30] Corporate members also donate to state scholarship funds to "reimburse" legislators who travel to meetings.[31] With corporations spending all this money to be involved with ALEC, it begs the question, what is in it for them?

[26] Greenley, *supra* note 10.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

C. What ALEC Really Is: "State-Based Solutions"

ALEC claims to provide these corporations with "state-based solutions."[32] Ultimately, this translates to providing these corporations with a means to control state legislature and pass advantageous legislation in areas that affect their business.[33] ALEC's individual task forces develop ALEC's model bills.[34] Within each task force, a majority decision is required to move forward, effectively giving corporate members veto power over model bills that eventually become state law.[35] "About 1,000 times a year, a state legislator introduces a bill from ALEC's library," and "[a]bout 200 times a year, one of them becomes law."[36] Each bill carries its own consequences and, therefore, it is important to monitor the motives underlying each of them.

D. What ALEC Really Is: "Growth" and "Economic Security"

ALEC strives to aid its donors by "providing growth and economic security," even for ones that profit from increased rates of incarceration.[37] In this regard, ALEC has three corporate sponsors who profit in this manner: (1) private prisons, (2) private bail companies, and (3) other private corporations.[38] Corecivic, Geo Group, and the American Bail Coalition

[32] ALEC, *supra* note 8.
[33] Greenley, *supra* note 10.
[34] *Id.*
[35] Greenley, *supra* note 10.
[36] *Id.*
[37] ALEC, *supra* note 8.
[38] Greenley, *supra* note 10.

("ABC") are ALEC's biggest contributors generating profits directly from incarceration.[39] Hence, the only "growth" these companies are worried about is growing incarceration rates and, thereby, their profits. Accordingly, they entrust ALEC to provide this economic security by manipulating state legislature. To better understand this relationship between ALEC and private prison and bail companies, we have to travel back to the 1980s.

II. HISTORY

A. The Beginning: Prison Privatization

A journey through ALEC's historic relationship with incarceration begins with the privatization of our nation's prison system. Prison "privatization" is essentially the transfer of prison functions from our government to privately-owned corporations.[40] These functions can include: (1) ownership and operation of the facility; (2) contracting out essential services, such as healthcare, telecommunications, or food service; or (3) contracting out prison labor.[41]

Initially, our government chose privatization to combat overcrowding that was exacerbated in the 1980's by a political emphasis on "tough on crime" initiatives.[42] A 1988 report stated that

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[39] *Id.*

[40] Dana Joel, *A Guide to Prison Privatization*, THE HERITAGE FOUNDATION (May 24, 1988), https://www.heritage.org/node/21802/print-display.

[41] *Id.*

[42] *Id.*

> [m]ore than two thirds of the states are facing serious overcrowding problems, and many are operating at least 50 percent over capacity. Some 41 states… are under court order to relieve the overcrowding.[43]

Our government supported private prisons because they were supposedly cheaper to operate, higher quality, and improved the local economy through job creation.[44] Moreover, private companies could raise money faster due to a less cumbersome bond issuance process, with no need for voting approval.[45] According to a 2016 report, "[w]hile voters supported criminal justice policies… voters rejected an average of 60 percent of prison bond referenda in the 1980's."[46]

Hence, with more money raised in a shorter period of time, private companies could build prisons at a faster rate and better keep up with the growing incarceration rate. The first state-level private prison opened in Kentucky in 1986, but over the past 40 years private prisons have expanded to 29 other states.[47] As of 2014, "131,000 inmates are held in private prison

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[43] *Id.*

[44] Megan Mumford, Diane Schanzenbach, Ryan Nunn, *The Economics of Private Prisons*, HAMILTONPROJECT.ORG (October 20, 2016), http://www.hamiltonproject.org/papers/the_economics_of_private_prisons.

[45] *Id.*

[46] *Id.*

[47] Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISONPOLICY.ORG (January 25, 2017), https://www.prisonpolicy.org/reports/money.html.

facilities."[48] Over time, the supposed benefits of private prisons were shown to not be true.[49] By that time, however, it was too late. Private companies were already too engrained in the process and had realized the amount of money that could be made, approximately 182 billion each year.[50] This raises the questions: (1) what were these "tough on crime" initiatives that exacerbated prison populations and led to substantial growth within our private prison industry; and (2) where did they come from?

B. ALEC's Contribution to Privatization

Most have associated the beginning of being "tough on crime" with President Nixon's war on drugs.[51] During the following years, the United States adopted many anti-crime policies, including: (1) mandatory minimum sentencing, (2) truth in sentencing, and (3) three strike laws.[52]

Implementation of minimum sentencing, as the name suggests, required courts to impose minimum sentences for certain crimes without regard to the circumstances.[53] Next, truth in sentencing laws prevented inmates from being eligible for probation or parole, even long after they

[48] *Id.*
[49] *Id.*
[50] Wagner, *supra* note 47.
[51] David Shapiro, *Banking On Bondage: Private Prisons and Mass Incarceration* at 15, ACLU.ORG (November 2, 2011), https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration.
[52] *Id.*
[53] *Id.*

would have been considered "rehabilitated."[54] And finally, three strike laws, which subjected defendants convicted of three crimes to 25 years to life in prison, regardless of the circumstances.[55]

With the unapologetically harsh nature of these laws, it is not surprising that incarceration rates have sky rocketed following their enactment. Since then, the number of people incarcerated in the United States grew by 700% and, currently, the United States incarcerates approximately 2.3 million people."[56] So, who drafted these laws that have essentially created the highest incarceration rate in the world? Unsurprisingly, the answer is ALEC.[57]

Over time, ALEC was able to have these laws enacted in 27 states by manipulating state legislators.[58] ALEC's efforts to perpetuate mass incarceration have proven extremely profitable for private prison companies, big banks that invested into them, and everyday companies that exploit prison labor.[59] Over the next 40 years, ALEC was able to shield their involvement in our state legislature and its impact on our criminal justice system from the public.

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[54] *Id.*
[55] *Id.*
[56] Shapiro, *supra* note 51, at 15.
[57] *Id.*
[58] *Id.*
[59] Shapiro, *supra* note 51, at 14.

C. ALEC is Forced to Find a New Way to Incarcerate

Fortunately, however, ALEC's previously unchallenged reign came crashing down in 2013 when the Trayvon Martin and Stand Your Ground law scandal leaked to the public and outcries against ALEC echoed across America.[60] Following this backlash, over 400 state legislators and 75 companies refused to renew their memberships with ALEC, resulting in $3.9 million in lost dues.[61] Included within those separating from ALEC were CoreCivic and Geo Group.[62]

Additionally, in 2016, the U.S. Department of Justice Attorney General, Sally Yates, wrote to the Federal Bureau of Prisons advocating against private prisons.[63] Her letter states as follows:

> Private prisons… compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and… they do not maintain the same level of safety and security. The rehabilitative services

[60] *Banking on Bondage: Private Prisons and Mass Incarceration,* ACLU, (Nov. 2, 2011), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf.

[61] *Id.*

[62] *Id.*

[63] Sally Yates, *Memorandum For the Acting Director Federal Bureau of Prisons,* JUSTICE.GOV, (August 18, 2016), https://www.justice.gov/archives/opa/file/886311/download.

> that the Bureau provides… have proved difficult to replicate and outsource, and these services are essential to reducing recidivism and improving public safety.[64]

Following this letter, the Department of Justice announced it would stop utilizing private prisons.[65] That ban, however, was overturned by Yates's predecessor, Jeff Sessions.[66] With all the negative aspects of private prisons, why would Jeff Sessions recommend overturning the ban? Attorney General Jeff Sessions justified his actions by indicating that Sally Yates's memorandum "changed long-standing policy and practice, and impaired the Bureau's ability to meet the future needs of the federal correctional system."[67] Upon further investigation, however, it appears he had received substantial campaign contributions from ALEC's largest donor, Koch Industries.[68]

Regardless of the reasoning behind his decision, America continues to utilize private prisons.[69] We have, however, begun to acknowledge the consequences of being too "tough on crime" and are slowly moving toward

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[64] *Id.*

[65] Christopher Dean Hopkins, *Private Prisons Back in Mix For Federal Inmates As Sessions Rescinds Order*, NPR.ORG (Feb. 23, 2017), https://www.npr.org/sections/thetwo-way/2017/02/23/516916688/private-prisons-back-in-mix-for-federal-inmates-as-sessions-rescinds-order.

[66] *Id.*

[67] *Id.*

[68] Center for Responsive Politics, *Contributors 2007-2012*, OPENSECRETS.ORG, https://www.opensecrets.org/members-of-congress/contributors?cid=N00003062&cycle=2012 (last visited Oct. 17, 2019.

[69] Hopkins, *supra* note 65.

a more rehabilitative approach with regard to punishment and sentencing.[70] In fact, in 2016, the incarceration rate in America fell to its lowest level in over 20 years.[71] Thus, ALEC must find a new way to keep inmates behind bars. Their chosen method: fighting to perpetuate cash bail and, thereby, the incarceration that it causes. Before discussing this issue further, it is important to understand the cash bail process in general.

III. ANALYSIS

A. The Bail Process

Following an arrest, an individual is taken into police custody, and their information is processed, regardless of underlying.[72] After "booking," the next step is arranging their release from police custody to await trial.[73] Aside from non-monetary alternatives, this process generally entails setting a bail amount, unless it is denied altogether.[74] "Setting bail" refers to the method by which a certain amount of money is paid to obtain release.[75]

Obtaining pre-trial release is very important, as the pre-trial process can be extremely drawn out and time consuming.[76] While the Ninth

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[70] Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States, 2016*, BJS.GOV, (April 2018) https://www.bjs.gov/content/pub/pdf/cpus16.pdf

[71] *Id.*

[72] Steve Keller, *State must reform speed-trial system*, JUSTICE.GOV, (April 1, 2018), https://www.justice.gov/archives/opa/file/886311/download.

[73] *Id*.

[74] *Id.*

[75] *Id.*

[76] *Id.*

Amendment entitles an individual to a speedy trial in all criminal prosecutions, the pre-trial process does not fall within this Amendment.[77] Moreover, section 3161, of Title 18, of the United States Code states: "[i]n any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall… set the case for trial."[78] With our nation's criminal court dockets being so overcrowded, "earliest practicable time" essentially means no time in the near future.[79] Currently, in most of the United States, the average defendant's wait time for trial is between one and a half to two years.[80]

When posting bail, an individual is generally given two options: either pay the full amount or pay a fee, usually 10 percent of the full amount, and hire a bail bondsman.[81] This practice is referred to as "cash bail."[82] Alternatively, if they do not want to pay or cannot afford either option, they are detained until trial.[83] When facing this decision, anyone who can afford

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[77] U.S. CONST. amend. IX.
[78] Time Limits and Exclusions, 18 U.S.C. § 3161 (2018).
[79] *Id.*
[80] Keller, *supra* note 72.
[81] Spike Bradford, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* at 10, JUSTICEPOLICY.ORG (September 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf
[82] *Id.*
[83] *Id.*

to will hire a bail bondsman, mainly because they desire release but cannot afford to pay the entire bail amount.

Upon hiring the bail bondsman, the arrestee also signs an agreement that they will show up to court or be liable for the full bail amount.[84] To protect themselves, bondsman require proof that the individual has enough assets to pay the full bail amount.[85] This "proof" can include: bank statements, deeds to property, or insurance coverage to underwrite the bail amount.[86] If the bonded individual does not appear at trial, the entire bond amount is forfeited.[87] If, on the other hand, they do appear at trial, no part of the bondsman's fee is returned and the bond agreement is terminated.[88]

This involvement of the bondsman provides no extra incentives for defendants to appear at trial.[89] This has been directly acknowledged by the United States Supreme Court, which stated:

> [T]he cash bail system failed to provide an incentive to the defendant to comply with the terms of the bond. Whether or

[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Schilb v. Keubel, 404 U.S. 357, 373 (1971).

> not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman.[90]

The cash bail industry claims the risks involved, and costs accrued, in insuring defendants show up for trial justifies retaining the initial fee.[91] And now, consequently, our criminal justice system has created a new avenue to generate profits from increased incarceration.

B. Size of the Cash Bail Industry

Over time, commercial bail practices have grown dramatically.[92] Currently, the industry is supported by 30 insurance companies, employs approximately 15,000 people, and generates around $2 billion in business annually.[93] This industry is spear headed by the American Bail Coalition ("ABC").[94] ABC is "a trade association made up of national bail insurance companies who are responsible for underwriting criminal bail bonds."[95]

All across America, huge amounts of bail premiums are being levied against defendants, even the ones who are innocent.[96] A study performed in

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[90] *Id.*
[91] *See* Bradford, *supra* note 81.
[92] *Id.* at 24.
[93] *Id.*
[94] *Id.*
[95] THE AMERICAN BAIL COALITION, http://www.americanbailcoalition.org/, (last visited Nov. 5, 2018).
[96] Michael Wilson, *Pretrial Justice: How Much Does It Cost?*, UNIVERSITY.PRETRIAL.ORG, (January 2017), https://portal.ct.gov/-/media/Malloy-Archive/Reimagining-Justice/Reimagining-Justice---Pretrial-justice-at-what-cost-PJI-2017.pdf?la=en.

Maryland found that from 2011 to 2015, $256 million in bail premiums had been paid, $75 million by defendants who were found not guilty or had their cases dropped.[97] But, not all defendants can afford bail, even with a bondsman.[98] In Los Angeles, between 2012 and 2016, $19 billion was levied in monetary bail during booking proceedings, which resulted in over $190 million in nonrefundable bail deposits.[99] Not surprisingly, "70 percent of the amount levied was not paid… which left 223,336 people in LAPD custody prior to arraignment."[100] As you can see, cash bail results in the incarceration of huge numbers of pre-trial defendants, regardless of guilt, simply because they cannot afford bail. This becomes increasingly important when considering the size of America's pre-trial population.

C. Cash Bail Leads Defendants to Jail

In 2014, over 11.4 million people were admitted into local jails… composed mostly of un-convicted, pretrial inmates.[101] As of 2016, 70 percent of local jail populations were made up of individuals being held pretrial, up

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[97] *Id.*

[98] Isaac Bryan, Terry Allen, Kelly Hernandez, and Margaret Dooley-Sammuli, *The Price of Freedom: Bail in the City of L.A.*, MillionDollarHoods.org (December 4, 2017), http://milliondollarhoods.org/wp-content/uploads/2017/10/MDH_Bail-Report_Dec-4-2017.pdf.

[99] *Id.*

[100] Bryan, *supra* note 98.

[101] Todd Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, BJS.GOV, (June 2015), https://bjs.gov/content/pub/pdf/jim14.

from only 56 percent of jail inmates being un-convicted in 2000.[102] This is counter to Supreme Court sentiment, which states, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[103]

In order to decrease pre-trial jail populations, and to curb the negative consequences and costs associated with it, our criminal justice system must decrease dependence on cash bail.[104] "As operated within the law, for profit bail bonding is a system that exploits low income communities; is ineffective at safely managing pretrial populations; distorts judicial decision-making; and, gives private insurance agents almost unlimited control over the lives of people they bond out."[105]

Cash bail inherently discriminates against poorer defendants, and the industry continues to increase the amount required for release.[106] The Eighth Amendment states "[e]xcessive bail shall not be required."[107] Although unaffordability does not make bail excessive, our Supreme Court has held: "bail set at a figure higher than an amount reasonably calculated to ensure the

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[102] Bernadette Rabuy and Danial Kapf, *Prisons of Poverty: Uncovering the pre-incarceration incomes of the imprisoned*, PRISONPOLICY.ORG (July 9, 2015), https://www.prisonpolicy.org/reports/income.html.

[103] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1035 (Ct. App. 2018) (quoting *United States v. Salerno*, 481 U.S. 739, 752 (1987)).

[104] Bradford, *supra* note 81, at 11.

[105] *Id.*

[106] Thomas Cohen and Brian Reaves, *Pretrial Release of Felony Defendants in State Court (State Court Processing Statistics, 1990-2004)*, BJS.GOV (November 2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf.

[107] U.S. CONST. amend. VIII.

defendant's presence at trial is 'excessive.'"[108] Furthermore, the United States Code states that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."[109]

Despite this, a 2018 study found that the average bail amount is over $55,000 while the average income for inmates prior to incarceration is a little over $7,000.[110] Obviously, this amount is excessive with regard to the defendant's average pre-incarceration income and compelling their appearance at trial. Also, this amount directly results in pre-trial incarceration.[111] The Bureau of Justice has specifically indicated that "[t]here is a direct relationship between the bail amount and the probability of release."[112] Across the United States, 50 percent of defendants are unable to post bail even when it is set at $5,000 or less.[113] Even when bail is set at $500, less than 40 percent of pretrial defendants ultimately secure release.[114] Moreover, in New York City specifically, 85 percent of defendants cannot

[108] Walker v. City of Calhoun, 2018 U.S. App. LEXIS 23570, 2018 WL 400052, at *19 (11th Cir. Aug. 22, 2018). (quoting *United States v. Salerno*, 481 U.S. 739, 752 (1987)).

[109] Release or Detention of a Defendant Pending Trial, 18 U.S.C. § 3142(b) (2018).

[110] Dobbie, *supra* note 4, at 1.

[111] *Id.*

[112] Cohen, *supra* note 106.

[113] Dobbie, *supra* note 4, at 1.

[114] Michael Jones, *Unsecured Bonds: The As Effective And Most Efficient Pretrial Release Option* at 13, SEMANTICSCHOLAR.ORG (October 2013), https://pdfs.semanticscholar.org/5444/7711f036e000af0f177e176584b7aa7532f7.pdf.

afford $500 bail.[115] Currently, almost 9 out of 10 pretrial inmates are incarcerated simply because they could not afford bail.[116] In deciding whether cash bail discriminates against the poor, consider this example presented by the Eleventh Circuit:

> [T]wo people, one who has money and the other who does not. They are arrested for the same crime at the same time under the same circumstances. …[T]hese two would have the identical bail amount …. The person who has money pays it and walks away. The indigent can't pay, so he goes to jail.[117]

Clearly, by emphasizing monetary conditions, cash bail disparately impacts poorer communities, resulting in increased pretrial detention rates among these individuals.[118] This occurrence can also negatively impact the outcome of the defendant's ultimate trial.[119]

D. Cash Bail: More Convictions, Longer Sentences, and More Crime

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[115] Cherise Burdeen, *The Dangerous Comino Effect of Not Making Bail*, THEATLANTIC.COM (April 12, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906/.

[116] Cohen, *supra* note 106.

[117] Walker v. City of Calhoun, 2018 U.S. App. LEXIS 23570, 2018 WL 400052, at *56-57 (11th Cir. Aug. 22, 2018). (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (Ct. App. 1978)).

[118] Cohen, *supra* note 106.

[119] Mary Phillips, *A Decade of Bail Research in New York City,* at 115, PRISONPOLICY.ORG (August 2012), https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf.

Cash bail, by exacerbating pretrial detention, results in higher likelihoods of conviction, longer sentences, and an increased recidivism rate.[120] A case study, performed in Brooklyn and Manhattan from 2002 through 2012, illustrates this phenomenon, stating: "[d]efendants who were detained pretrial were more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to jail or prison than their counterparts who were at liberty during the pretrial period."[121] This study expressly indicated that "[p]retrial detention had an adverse effect on every case outcome that was examined."[122] A 2018 study of pretrial detention also confirmed this, claiming: "released defendants are significantly less likely to be found guilty of an offense, to plead guilty to a charge, and to be incarcerated following case disposition."[123]

In the New York study, individuals detained throughout the pretrial process were 40 percent more likely to be convicted.[124] This result is somewhat due to the stigma of being incarcerated and its effect on a defendant's trial.[125] Peter Goldberg, executive director for the Brooklyn Bail Fund, has indicated as such, stating: "[j]udges end up looking at folks who

[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] Dobbie, *supra* note 4, at 20.
[124] Phillips, *supra* note 119, at 117.
[125] *Id.*

are in [jail] as more likely to be guilty, and so do grand juries."[126] Another contributing factor is that those who cannot afford bail are coerced into pleading guilty, regardless of their innocence, to obtain release.[127] A 2018 study found that defendants detained pre-trial are 42.6 percent more likely to plead guilty simply because the alternative is being locked up behind bars until trial.[128]

With regard to post-conviction incarceration, defendants detained until trial were almost 75 percent and 70 percent more likely to be incarcerated post-conviction for non-felony and felony crimes, respectively.[129] Also, these defendants spent an average of 85 and 500 more days behind bars for non-felony and felony cases, respectively.[130] While there are other relevant factors, pretrial detention proved to have an "additional effect" that was "especially strong in pushing cases towards a conviction" and "had a statistically significant effect on sentence length, even after control for charge severity and type, as well as numerous other factors."[131] One causal factor is that detained defendants are less likely to receive plea

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[126] Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, THEMARSHALLPROJECT.ORG (September 6, 2015), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder.

[127] Dobbie, *supra* note 4, at 19.

[128] *Id.*

[129] Phillips, *supra* note 119, at 117.

[130] *Id.* at 119

[131] Phillips, *supra* note 119, at 115.

offers following detention because detention itself gives prosecutors enough leverage over them.[132] Also, they have no opportunity to demonstrate good behavior while on release.[133] The New York study discussed this, stating:

> [P]retrial release results in less harsh sentences. Release gives the defendant a chance to prove that he or she can behave responsibly. A released defendant can get a job, support his family, stay out of trouble, and demonstrate that he is turning his life around. This gives the defense attorney some positive things to tell the judge prior to sentencing.[134]

Increased pre-trial detention, caused by cash bail, also increases future crime.[135] Research shows, the number of days in pretrial detention are directly correlated with increases in new crimes.[136] One explanation is that periods of incarceration significantly limit employment availability and, thereby, alternative means of earning an income.[137] A 2018 study found "[i]nitial pretrial release increases the probability of employment in the formal labor market… 24.9 percent."[138] The study went on, claiming:

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[132] *Id.* at 118
[133] *Id.*
[134] *Id.*
[135] Christopher Lowenkamp, Marie VanNostrand, and Alexander Holsinger, *The Hidden Costs of Pretrial Detention* at 10, ARNOLDFOUNDATION.ORG (November, 2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.
[136] *Id.*
[137] Dobbie, *supra* note 4, at 22.
[138] *Id.*

"pretrial release may decrease future crime through the channel of increased labor market attachment."[139] Accordingly, releasing defendants under non-monetary conditions, as opposed to incarcerating them, will ultimately reduce future crime. This increased pre-trial incarceration also results in other negative consequences outside the courtroom.

E. Other Negative Effects of Cash Bail

In lower socioeconomic communities, if a defendant can somehow afford bail, they will likely not have enough money left over to hire an attorney. This results in an even more substantial burden on the public defender system. If that individual cannot afford bail amount, however, periods of incarceration can cause (1) issues with familial relationships, (2) loss of employment, medical insurance, or housing, or (3) physical and mental trauma resulting from incidents that occur while they are behind bars.[140] Chief United States District Judge Rosenthal concurs, stating: "[c]umulative disadvantages mount for already impoverished… defendants who cannot show up to work, maintain their housing arrangement, or help their families because they are detained."[141]

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[139] *Id.*
[140] Dobbie, *supra* note 4, at 1.
[141] Odonnell v. Harris County, 892 F.3d 147, 174-75 (5th Cir. 2018).

Additionally, pre-trial detention as a result of cash bail has racially disparate impacts as well.[142] African Americans between the ages of 18 and 29, receive significantly higher bail amounts and, thus, are less likely to be released prior to trial.[143] Also, for African American males specifically, the average annual income, prior to detention, was 64 percent lower than their counterparts.[144] This makes it less likely that they can afford bail, even with a bondsman. And, if they can, less money left over after the bondsman's fee. As a result, a 2018 study found that, among its participants, over 60 percent of those detained until trial were African American.[145]

An example of the consequences of cash bail involves a young man named Kalief Browder. Mr. Browder was arrested in 2010, charged with petty theft, and received a surprisingly high bail amount of $3,000.[146] His family was unable to afford to pay his bail and Mr. Browder was detained in Rikers Island.[147] He remained incarcerated for three years as his pre-trial process continued to drag on.[148] While behind bars, Mr. Browder suffered

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[142] Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* at 15*l*, JusticePolicyInstitute.org (September 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

[143] *Id.*

[144] Rabuy, *supra* note 22.

[145] Dobbie, *supra* note 4, at 11.

[146] Alysia Santo, *No Bail, Less Hope: The Death of Kalief Browder*, THEMARSHALLPROJECT.ORG (September 6, 2015), https://www.themarshallproject.org/2015/06/09/no-bail-less-hope-the-death-of-kalief-browder.

[147] *Id.*

[148] *Id.*

physical abuse and spent much of his time in solitary confinement.[149] Eventually, the charges against Mr. Browder were dropped and he was released.[150] Tragically, Mr. Browder hanged himself within two years of release due to mental trauma he suffered while incarcerated.[151] Unfortunately, there are many examples like this happening all across our nation. According to a member of the Board of Corrections, use of cash bail in minority communities "essentially results in an incarceration because they nor their family have the financial wherewithal to post any bail."[152] Fortunately, these occurrences can be reduced by deemphasizing cash bail, an approach that is supported by both judicial and public sentiment.

F. Judicial and Public Sentiment Oppose Cash Bail

Our judiciary has slowly, but surely, begun to realize the folly of our pretrial system's emphasis on monetary release conditions. With regard to court fines, our Supreme Court has held,

> [T]o convert the fine into a prison sentence without "inquiring into the reasons for the failure to pay" or finding that "alternate measures were not adequate to meet the State's interests"… would deprive [the plaintiff] of his… freedom

[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*

> simply because, through no fault of his, he could not pay the fine.[153]

Accordingly, our pre-trial system must consider "the reasons why a defendant cannot pay and of alternative measures prior to imprisonment."[154] More recently, in Louisiana, three defendants challenged the manner in which their court collected debts.[155] This court found in favor of the plaintiffs, reasoning that "not inquiring into plaintiff's ability to pay before they are imprisoned… violates the Fourteenth Amendment."[156] While these cases did not deal with pre-trial detention, the Fifth Circuit has bridged that gap, stating: "the distinction between post-conviction detention… and pretrial detention… is one without a difference" and, in the context of pretrial detention, "the liberty interest of the defendant, who is presumed innocent, is even greater."[157]

More recently, a number of courts have handed down decisions regarding pretrial detention directly. For example, in Texas, defendants alleged they were detained because they were too poor to afford bail.[158] In this case, judges counter-argued the difference in treatment was a disparate

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[153] Caliste v. Cantrell, 2018 U.S. Dist. LEXIS 131271, 2018 WL 3727768, at *23 (E.D. La. 2018). (quoting Bearden v. Georgia, 461 U.S. 660 (1983)).

[154] *Id.* at *25-26

[155] *Id.*

[156] Cain v. City of New Orleans, 281 F. Supp. 3d 624, *57 (E.D. La. 2017).

[157] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1028 (Ct. App. 2018).

[158] Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018).

impact and could not give rise to Equal Protection liability.[159] In response, the court disagreed, stating: "the County… purposefully detained misdemeanor defendants… otherwise eligible for release, but… unable to pay secured financial conditions."[160] This court ultimately held in favor of the plaintiffs, indicating: "a system allowing the release of only… arrestees who can pay… and detaining those who cannot… violates equal protection."[161] A holding supported by the Fifth Circuit: "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[162] Based on these decisions, the defendant's financial situation must be considered when securing release and cash bail because it inherently discriminates based on a wealth, is disfavored by our judiciary. In fact, the Fifth Circuit has expressly held "equal protection standards require a presumption against money bail."[163]

In another example in Louisiana, it was alleged that the Criminal Judge sets a $2,500 minimum bail without considering "whether a lower bond amount or an alternative condition of release might be appropriate."[164] The

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[159] *Id.*

[160] *Id.*

[161] Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (Ct. App. 1978)).

[162] Walker v. City of Calhoun, 2018 U.S. App. LEXIS 23570, 2018 WL 400052, at *56-57 (11th Cir. Aug. 22, 2018). (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (Ct. App. 1978)).

[163] *Id.*

[164] Caliste v. Cantrell, 2018 U.S. Dist. LEXIS 131271, 2018 WL 3727768, at *2 (E.D. La. 2018).

plaintiff argues this "violates their rights against wealth-based detention and right to pretrial liberty."[165] Here, the court held in favor of the plaintiff and found, in pretrial detention hearings Due Process requires: (1) inquiry into the ability to pay and (2) consideration of non-monetary alternatives.[166] Moreover, in California, a defendant claimed his pretrial bail was set without inquiry into his financial situation or a non-monetary alternative, which violates Due Process.[167] This court ultimately held in favor of the plaintiff, claiming:

> [A] court may not order pretrial detention unless it finds either that the defendant has the financial ability but failed to pay… or that the defendant is unable to pay that amount and no less restrictive conditions of release would be sufficient to reasonably assure such appearance.[168]

Clearly, courts recognize the detrimental effect of cash bail and favor non-monetary alternatives.

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[165] *Id.* at *3.

[166] *Id.* at *28.

[167] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1026 (Ct. App. 2018).

[168] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1026 (Ct. App. 2018).

In conjunction with our judiciary, public sentiment is also against cash bail and favors alternatives.[169] A recent study showed 84 percent American voters prefer community-based programs as opposed to incarceration.[170] Also, 60 percent of voters agree we should not require individuals charged with low-level, nonviolent crimes to post any type of bail.[171] Along with judicial and public sentiment, there is even a statutory presumption against the use of cash bail.[172]

G. Statutory Presumption Against Cash Bail

Based on federal law, cash bail was meant to be a last resort within our criminal justice system.[173] According to U.S.C. Title 18, § 3142, a defendant shall be released under non-monetary conditions unless "such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[174] And, as you will see, non-monetary conditions are just as effective at securing appearance and protecting public safety. Accordingly, the Fifth Circuit interpreted this provision to mean "if the offense is not made statutorily

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[169] Melissa Neal, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUSTICEPOLICYINSTITUTE.ORG (September 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

[170] *Id.*

[171] *Id.*

[172] Release or Detention of a Defendant Pending Trial, 18 U.S.C. § 3142(b) (2018).

[173] *Id.*

[174] *Id.*

unbailable, the presumption is release pending trial."[175] So, what non-monetary release alternatives are available and how do we deemphasize cash bail in order to prevent the pretrial incarceration and subsequent negative effects associated with it?

IV. PROPOSAL

A. Stop ALEC, Eliminate Cash Bail, and Prioritize Non-Monetary Alternatives

Across America there is a nationwide movement toward non-monetary forms of release to combat the negative effects of cash bail.[176] The most effective way to further this movement is through the passage of state legislation that: (1) prohibits commercial bail bondsman, (2) establishes pretrial service agencies ("PSA"), and (3) prioritizes non-monetary alternatives.[177] Examples of such tactics are Wisconsin and Washington, D.C.[178] First, Wisconsin enacted statutes eliminating commercial bondsman and mandating bail only be set at an amount necessary to ensure appearance in court.[179] Next, Washington, D.C. passed legislation establishing PSAs.[180]

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[175] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1031 (Ct. App. 2018).
[176] Reichert, *supra* note 5.
[177] Billings, *supra* note 6, at 1362-63.
[178] *Id.*
[179] *Id.*
[180] *Id.*

These tactics allowed these states to move away from cash bail, which resulted in less pretrial detention.[181]

Any effort to implement these reforms will face enormous opposition from the bail industry and, thereby, ALEC. Accordingly, to have any hope at reforming our pretrial system, we must eliminate ALEC's foothold over our legislative process. First, I will introduce the non-monetary alternatives that are available and demonstrate their effectiveness. Then, I will show how ALEC is fighting against them and working to perpetuate cash bail, despite its negative consequences.

B. Available Non-Monetary Alternatives

There are numerous non-monetary alternatives available, including: pretrial risk assessments, pretrial service agencies, court notification systems, release on recognizance, conditional release, third-party custody, unsecured bonds, signature bonds, and electronic monitoring.[182] In short, these alternatives permit release without requiring money from defendants up front while ensuring they return for trial.[183] The underlying purpose of our pretrial system is to "increase public safety and ensure court appearances while

[181] *Id.*
[182] Reichert, *supra* note 5.
[183] *Id.*

protecting individual rights."[184] Accordingly, these are the criteria with which cash bail and its alternatives must be compared.

C. Alternatives: Increasing Public Safety and Ensuring Court Appearances

Regarding public safety and court appearances, the District Court of the Southern District of Texas has stated, "money bail… does not meaningfully add to assuring misdemeanor defendants' appearance at hearings or absence of new criminal activity during pretrial release."[185] Similarly, in support of non-monetary alternatives, the Fifth Circuit stated: "[m]oney bail… has no logical connection to protection of the public."[186] Opponents to bail reform will argue that non-monetary alternatives lead to a higher likelihood of defendants failing to appear at court and a higher rate of pretrial re-arrest. Studies have shown, however, that is simply not the case.

In a 2013 study comparing the effect of secured and unsecured bonds, it was found that 88 percent of defendants released on unsecured bonds appeared at trial as compared to 81 percent for individuals released on secured bonds.[187] This fact is increasingly important because the use of unsecured bonds also results in a significantly higher rate of release.[188] That

[184] *Id.*
[185] Odonnell v. Harris County, 892 F.3d 147, 166 (5th Cir. 2018).
[186] In re Humphrey, 2018 Cal. App. LEXIS 64, 2018 WL 550512, at *1029 (Ct. App. 2018).
[187] Jones, supra note 114, at 11.
[188] *Id.*

same 2013 study found that individuals offered unsecured bonds were released 88 percent of the time while those offered secured bonds were only released 46 percent of the time.[189] Studies showing differing results are skewed by unrelated factors.[190] For example, defendants with minor charges are more likely to be released under non-monetary conditions and more likely to not appear at trial.[191]

Regarding pretrial crime rates, the Bureau of Justice has found that the manner of release has no effect on subsequent pretrial crimes.[192] Based on pretrial statistics, individuals released on surety bond were rearrested 16 percent of the time, while defendants released on recognizance, on conditional release, or under an unsecured bond were rearrested 17, 15, and 14 percent of the time, respectively.[193] A fact also found in a 2018 study which stated: "[w]e find no detectable effect of initial pretrial release on new crime."[194] That study went on to indicate "our results suggest that it may be welfare enhancing to use alternatives to pretrial detention."[195]

To illustrate the sufficiency of cash bail alternatives, Kentucky, for example, eliminated cash bail in 1976 and passed legislation in 2001

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[189] Jones, *supra* note 114, at 12.
[190] *Id.*
[191] *Id.*
[192] Cohen, *supra* note 106.
[193] *Id.*
[194] Dobbie, *supra* note 4, at 3.
[195] *Id.* at 26.

prioritizing the utilization of pretrial services agencies.[196] A PSA provides two main services to the court: (1) collecting information about pretrial defendants and reporting release recommendations, and (2) supervising released pretrial defendants and informing the court of any violations.[197] Since that time, Kentucky has maintained defendant appearance rates of above 90 percent and re-arrest rates of released defendants below 8 percent.[198] Another example, Washington, D.C., eliminated cash bail and since then has maintained a 90 percent appearance rate among released defendants, of which 91 percent were not re-arrested during their release.[199] Thus, non-monetary alternatives are capable of ensuring appearance at trial and adequately protecting our society from subsequent pretrial crimes.

D. Alternatives: Protecting Individual Rights

When securing pretrial release from custody, the rights of each defendant are of paramount importance. This process "requires a delicate balancing of the vital interests of the state with those of the individual."[200] In support of pretrial release, the court in *Caliste v. Cantrell* held:

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[196] Bradford, *supra* note 81, at 44.
[197] Billings, *supra* note 6, at 1360.
[198] Bradford, *supra* note 81, at 44.
[199] Pretrial Services Agency for the District of Columbia, *Performance Measures*, PSA.GOV (June 30, 2015), https://www.psa.gov/?q=data/performance_measures.
[200] Walker v. City of Calhoun, 2018 U.S. App. LEXIS 23570, 2018 WL 400052, at *20 (11th Cir. Aug. 22, 2018). (quoting *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (Ct. App. 1978)).

> [T]he consequences to the defendant from an erroneous pretrial detention are certain and grave. The potential harm to society… is speculative, because pretrial detention is based on the possibility, rather than the certainty, that a particular defendant will fail to appear. Moreover, society… has no interest in erroneously detaining a defendant who can give reasonable assurances that he will appear.[201]

Accordingly, our criminal justice system must emphasize non-monetary release to promote individual liberty by reducing the rate of pretrial detention, along with costs associated with it.

E. Alternatives: Reducing Incarceration Costs

On average, it costs around $100 per day to incarcerate a defendant until trial, as opposed to as little as $2.50 per day under a pretrial service program.[202] Pretrial detention costs taxpayers over $14 billion each year [203] In California alone, pretrial detention costs make up more than half of their annual budget, approximately $1.8 billion each year.[204] A 2018 study performed a cost-benefit analysis accounting for: jail expenses, costs of

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[201] Caliste v. Cantrell, 2018 U.S. Dist. LEXIS 131271, 2018 WL 3727768, at *29 (E.D. La. 2018).

[202] Michael Wilson, *Pretrial Justice: How Much Does It Cost?*, UNIVERSITY.PRETRIAL.ORG (January 2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd.

[203] *Id.*

[204] Dobbie, *supra* note 4, at 3.

apprehending defendants, costs of future crime, and economic impacts on defendants.[205] Ultimately, this study found that "[t]he net benefit of pretrial release at the margin is between $55,143 and $99,124 per defendant."[206]

These costs would be avoided by emphasizing non-monetary alternatives that promote release. For example, in 2007 Broward County, Florida, eliminated cash bail and prioritized the use of pretrial services.[207] This resulted in: (1) a significant reduction in pre-trial jail populations and (2) over $20 million dollars in jail-related savings over only the next year.[208] So, not only do non-monetary alternatives enhance individual liberty, while maintaining court appearances and protecting public safety, they also save taxpayers money. Surprisingly, however, cash bail is currently the preferred method of pretrial release, due in part to the efforts of ALEC.

F. ALEC is Keeping Cash Bail Alive

In 2014, of 800,000 individuals admitted to local jails but eligible for bail, less than 8 percent were released under supervision, while the other 92 percent were placed under monetary bail.[209] Similarly, in a 2018 study, 94.4 percent of those detained were detained under monetary bail.[210] So, with cash

[205] Dobbie, *supra* note 4, at 3.
[206] *Id.*
[207] Billings, *supra* note 6, at 1338.
[208] *Id.*
[209] Todd Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, BJS.GOV (June 2015), https://bjs.gov/content/pub/pdf/jim14.
[210] Dobbie, *supra* note 4, at 11.

bail having so many negative consequences, judicial and public sentiment calling for reform and a statutory presumption favoring alternatives, why is it so prevalent? Once again and unsurprisingly, the chief proponent of this detrimental system is ALEC.[211]

The bail industry is described as "big business with the power, money, and organization to affect policy and practice in the criminal justice system."[212] And, it has done just that. Bail companies have spent millions lobbying politicians against reform, totaling over $3 million in campaign contributions since 2000.[213] This strategy, unfortunately, appears to be effective.

For example, in North Carolina in 2012, legislation was passed placing limitations on pretrial service centers and mandating minimum bail amounts.[214] It was later discovered that six of the ten legislators who had sponsored that bill had received upwards of $10,000 from the bail industry.[215] Another example, in Florida, where legislation in 2009 restricted eligibility for pretrial services and the legislators involved had received over $11,000 from bail-related donors.[216]

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[211] American Bail Coalition, *2010 Newsletter*, ASC-USI.COM (October 2010), http://www.americanbailcoalition.org/documents/ABC_Newsletter.pdf.
[212] Bradford, *supra* note 81, at 26.
[213] *Id.* at 27.
[214] *Id.* at 28.
[215] *Id.*
[216] *Id.* at 29.

Along with political contributions, the bail industry has also employed ALEC to draft and promote legislation that is advantageous to their industry.[217] The American Bail Coalition joined forces with ALEC in 1993.[218] Since 1995, many ABC executives have served as members of ALEC, including: (1) Dennis Bartlett, ABC Executive Director and member of ALEC's Public Safety and Elections Task Force, (2) Jerry Watson, legal counsel for ABC and former Chairman of ALEC's Private Enterprise board, and (3) William Carmichael, chairman of ALEC's criminal justice task force and Chairman of ABC.[219] Currently, William Carmichael is the main connection between ALEC and the bail industry. Along with his positions at ALEC and ABC, Mr. Carmichael is also President and CEO of the American Surety Company, America's largest bail company.[220]

G. How ALEC Fights for Cash Bail

ABC's mission statement claims they stand for "[m]aximizing releases of defendants from jail."[221] Their joint ventures with ALEC to manipulate state legislatures, however, paint an entirely different picture. The manner in which ABC and ALEC work together to influence legislation is rather straight forward. ALEC, with the help of ABC, designs, develops, and

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[217] American Bail Coalition, *supra* note 211.
[218] *Id.*
[219] American Bail Coalition, *supra* note 211.
[220] *Id.*
[221] THE AMERICAN BAIL COALITION, http://www.americanbailcoalition.org/, (last visited Nov. 5, 2018).

drafts the national agenda for the cash bail industry in the form of "model bills." Then, these model bills are lobbied to state legislatures by ALEC with help from state bail associations within ABC. Mr. Carmichael described ALEC's role perfectly when he stated, "ALEC's unique ability to provide not only a forum for our industry to interact with leadership of State Legislatures but to allow for us to have a seat at the table and provide input on issues critical to our markets is unparalleled."[222]

In ABC's 2010 newsletter their relationship with ALEC, stating, "[d]uring its two-decade involvement with ALEC, ABC has written 12 model bills fortifying the cash bail industry," even indicating that the purpose of these model bills was to "offset the threat posed to cash bail."[223] Among other things, these 12 model ALEC bills: (1) mandate monetary bail for certain crimes *(Anti-Crime Act)*, (2) make it easier for bondsman to avoid forfeiture *(Bail Bond Expiration Act, Bail Forfeiture Relief and Remission Act)*, (3) make it harder for the court to recover payment from bail bondsman *(Bail Forfeiture Payments Notification Act)*, (4) create strict record keeping requirements for pretrial service agencies *(Citizens Right to Know Act)*, and (5) actually "eliminate pretrial service agencies" altogether *(Uniform Bail Act)*.[224] These model bills are specifically designed by ALEC and ABC to aid

[222] American Bail Coalition, *supra* note 211.
[223] ALEC, *supra* note 8.
[224] ALEC, *supra* note 8.

private bail companies by not only directly benefitting their business but also making it more difficult for pretrial service agencies to operate.

The Bail Forfeiture Relief and Remission Act, for example, allows a bail agent "a remission period to recover a fugitive that has skipped bail, even after the time deadline."[225] Another policy, the Bail Forfeiture Notification Act, requires an already burdened court to "send prompt notice of bail forfeiture to the surety, depositor of money, and bail agent" and that the forfeiture can be dropped for failure to comply.[226] In California and New Jersey alone, over $250 million in forfeitures have not been collected as a result of this Act.[227]

Next, the Citizens Right to Know Act, which places an undue burden on pretrial release services and cuts their budget by 25 percent or suspends their services indefinitely for non-compliance.[228] The Act demands that "pretrial service agencies reveal their: budgets and staffing, number and kind of release recommendations made, number of defendants released and under what type of bond, number of times a defendant has been released, his FTA

[225] American Legislative Exchange Council, *Bail Forfeiture Relief and Remission Act*, ALEC.org (January 9, 2014), https://www.alec.org/model-policy/bail-forfeiture-relief-and-remission-act/.

[226] American Legislative Exchange Council, *Bail Forfeiture Notification Act*, ALEC.org (January 9, 2014), https://www.alec.org/model-policy/bail-forfeiture-notification-act/.

[227] Bradford, *supra* note 81, at 35.

[228] American Legislative Exchange Council, *Citizens Right to Know: Pretrial Release Act*, ALEC.org (January 9, 2014), https://www.alec.org/model-policy/citizens-right-to-know-pretrial-release-act/.

record, and crimes committed while on release."[229] It is important to point out that there are no equivalent reporting standards within the bail industry, and relevant public data surrounding it is virtually non-existent. This is likely due to political lobbying efforts against such reporting requirements.

Third, the Uniform Bail Act, which states: "the presence of the accused is not necessary when bail is initially set."[230] Accordingly, under this Act, bail may be set without allowing the defendant to present why they cannot afford bail or why non-monetary alternatives would be sufficient. Moreover, this Act requires predetermined bail where it is "impractical or undesirable to bring an accused before a judicial officer."[231] The Eleventh Circuit specifically stated, "[a]ny bail or bond scheme that mandates payment of prefixed amounts for different offenses…, without any consideration of indigence or other factors, violates the Equal Protection Clause."[232] Also, these "bail schedules" were struck down by the Supreme Court in *United States v. Salerno*.[233] Moreover, under this Act, "[t]here shall be no bail to secure the pretrial release of an accused other than commercial, cash, or

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[229] *Id.*

[230] American Legislative Exchange Council, *Uniform Bail Act*, ALEC.ORG (January 9, 2014), https://www.alec.org/model-policy/uniform-bail-act/.

[231] *Id.*

[232] Walker v. City of Calhoun, 2018 U.S. App. LEXIS 23570, 2018 WL 400052, at *8 (11th Cir. Aug. 22, 2018).

[233] United States v. Salerno, 481 U.S. 739, 752 (1987)

personal bonds."[234] With regard to release under a personal bond, there are strict limitations, including: not being held in custody for 24 hours or ever being "convicted of a prior criminal offense."[235] In practice, this Act effectively requires the use of cash bail.

One specific example of the impact of ABC and ALEC's relationship can be found in Georgia in 2010 and involved Len Walker, then Georgia State Representative, and Michael Hough, then ALEC's Public Safety & Elections Task Force Director.[236] Together, with the encouragement of ABC, these two men propelled legislation *(H.B. 889)* that "set forth a list of felonies crimes for which an offender would not be eligible for release on their own recognizance or through funded pretrial release."[237] Obviously, this legislation unequivocally benefits the private bail industry. A fact ABC openly acknowledges in their newsletter: "enactment of H.B. 889 is clearly good for bail agents" and "Atlanta bail agents have already noticed an increase in business."[238]

H. Cash Bail: Reaping the Benefits of ALEC

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[234] American Legislative Exchange Council, *Uniform Bail Act*, ALEC.ORG (January 9, 2014), http://www.alec.org/model-policy/uniform-bail-act

[235] *Id.*

[236] American Bail Coalition, *2010 Newsletter*, ASC-USI.COM (October 2010), http://www.asc-usi.com/userfiles/BailResources/ABC_Newsletter%20V1.pdf

[237] American Bail Coalition, *supra* note 211.

[238] *Id.*

Since ALEC began their fight for cash bail: (1) the percentage of defendants released on recognizance has decreased from above 39 percent to almost 25 percent, (2) the percentage of defendants released under cash bail increased from under 25 percent to over 45 percent, and (3) the average bail amount increased from just over $25,000 to over $55,000.[239] Also, the number of people in jail with "pretrial" status has more than doubled.[240] Needless to say, ALEC has been very beneficial for the bail industry. In their annual newsletter ABC praises ALEC, referring to them as the cash bail industry's "life preserver" and stating: "ABC's investment in ALEC has reaped rewarding dividends… for America's cash bail industry."[241]

CONCLUSION

ALEC claims to be a forum for stakeholders to develop state-based solutions to encourage growth and preserve economic security.[242] In actuality, they are a forum for private companies and state legislators to develop ways to perpetuate the use of cash bail in our criminal justice system to grow pre-trial jail populations and preserve the revenue streams of jail and bail companies.

[239] Cohen, *supra* note 106.
[240] *Id.*
[241] American Bail Coalition *supra* note 211.
[242] ALEC, *supra* note 8.

ALEC's influence over our state legislature has kept cash bail alive, in direct opposition of public and judicial sentiment, as well as a statutory presumption against it. The most effective way to combat cash bail is through enacting state legislation that: (1) prohibits the use of commercial bail bondsman, (2) establishes pre-trial service agencies, and (3) prioritizes non-monetary alternatives. The focus of ALEC's battle for cash bail is to inhibit pretrial service agencies and overshadow these non-monetary alternatives by manipulating state legislature. Hence, to reform our pretrial system we have to eliminate the control ALEC has over our legislative process.

Although ALEC's efforts for cash bail have generated massive profits for its donors within the jail and bail industry, it has cost taxpayers billions and defendants even more. By sustaining cash bail, ALEC is effectively: (1) tearing defendants from their families and removing their ability to support them, (2) denying them due process and equal protection, and (3) increasing their likelihood of conviction and the length of their sentence post-conviction. Further, utilizing cash bail punishes defendants, not based on guilt, but based on their ability to purchase freedom from the cash bail industry. A freedom which is, supposedly, engrained within the fabric of our country.

The United States claims to be "one nation, under God, indivisible, with liberty and justice for all."[243] According to ALEC and their campaign for cash bail, however, liberty and justice only come to those who can afford to pay for it. For more than 40 years, the United States has stood by and watched ALEC manipulate our state government, corrupt our criminal justice system, and perpetuate mass incarceration. Now, with regard to pretrial bail reform, we are presented with another opportunity to fight back and protect our Nation's citizens. The question is, will we?

[243] Francis Bellamy, *The Pledge of Allegiance*, THE YOUTH'S COMPANION (September 8, 1892), http://www.ushistory.org/documents/pledge.htm.