



## SENATE JUDICIARY COMMITTEE – Opponent Testimony, SJR 5, May 24<sup>th</sup>, 2022

Chairman Manning, Vice Chair McColley, Ranking Member Thomas, and members of the committee, thank you for holding this hearing and for the opportunity to provide written testimony.

### **TESTIMONY IN OPPOSITION TO SJR 5**

We want to thank the committee and the sponsor of SJR 5 for their dedication to ensuring Ohio's pre-trial system achieves better results that make our communities safer.

Americans for Prosperity believes that any pre-trial system should: 1) be based on an individual's risk, not their financial status; 2) allow for high-risk defendants to be detained when they are a threat to public safety or flight; and 3) preserve the Constitutional rights of everyone accused of a crime.

While we appreciate the intent of SJR 5, the proposal will not achieve the stated goals above and are likely in conflict with not only the Ohio Constitution, but the US Constitution as well.

Fortunately, there are solutions already presented to the legislature that would prioritize risk of the individual over their financial means; thereby providing a safer Ohio and reducing unnecessary pretrial incarceration.

### ***Constitutional Issues***

In summary, the two proposals would require the court, when establishing an amount of bail, to consider the possibility that the defendant will commit another crime if released and would overrule the Ohio Supreme Court's ruling in *DuBose v. McGuffey*.<sup>1</sup> In that case, the Ohio Supreme Court ruled that the sole purpose of cash bail is to ensure a person's attendance in

subsequent court proceedings and that public safety is not something that can be considered. The reason for this is simple: Ability to pay bail is a poor indicator of a person's risk to the community and should only be considered when determining whether someone should be detained pre-trial or what non-financial conditions of release should be placed on them. The Court came to this conclusion based not only on the Ohio Constitution, Ohio case law, Ohio statutes, and Ohio Rules of Criminal Procedure, but also based on precedent from the United States Supreme Court's interpretations of the US Constitution.

The DuBose Court cites two US Supreme Court cases, *Stack v. Boyle*, 342 U.S. 1 and *United States v. Salerno*, 481 U.S. 739 in support of their conclusion that the risk of future crimes cannot be a consideration when imposing a certain **amount** of cash bail. "Bail is excessive when it is higher than is reasonably calculated to serve the government's interest in ensuring the accused's appearance at trial." <sup>2</sup> In *Stack*, the court ruled that the bail amounts imposed on the defendants was in violation of the 8<sup>th</sup> Amendment's "excessive bail" clause because it was not based on standards relevant to appearance in court of the individual defendants.

The dissent in *DuBose* correctly states that judges can still consider public safety when making certain pre-trial determinations. However, as the majority in *DuBose* explains, public safety can only be considered when determining 1) whether someone should be detained pre-trial; and 2) non-financial conditions of release. The dissent also cite *US v. Salerno* in support of its argument. However, *Salerno* actually supports the *DuBose* court's ruling. *Salerno* dealt with a defendant **who was not offered** bail pre-trial, in part due to his potential risk to the community, not whether an amount of bail was excessive. The *Salerno* court stated this was Constitutional because safety to the public is an appropriate consideration when determining whether bail should be afforded to a defendant at all, not when determining the amount. As *Salerno* explicitly states, the *Stack* court was considering the amount of bail, not whether someone should be detained or not and therefore the *Stack* Court only had to determine whether bail "...was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial."<sup>3</sup>

Nothing disallows Ohio courts to consider the seriousness of the offense or a defendant's criminal history. However, based on federal and state law, judges cannot consider future crimes being committed when imposing a specific amount of bail.

### ***Policy Issues***

Not only is setting higher bail amounts based on a potential risk of future crime unconstitutional, but it is also not effective policy. Studies show that higher bail amounts do not increase public safety and only exacerbate disparate impacts of pre-trial determinations between those with means and those without.<sup>4</sup>

If the purpose of these two policy proposals is to either 1) make defendants less risky on release because they paid more bail, the evidence doesn't back this argument; or 2) impose higher bail amounts in order to detain someone due to lack of resources, then these proposals are in violation of the US and Ohio Constitutions.

Instead, Ohio should look to prioritize risk over one's ability to pay to increase public safety and ensure more just pre-trial system. Focusing on cash bail still allows those with means to remain free and commit further crimes while someone who is low to no risk to the community sits in jail due to financial shortcomings.

Current bills being considered in the General Assembly (SB 182 & HB 315), including one in this very committee, expand opportunities for judges to detain an individual pre-trial if no conditions of release would assure the safety of an individual or organization. This approach places safety, not wealth as the primary factor in pre-trial decisions. Thank you.

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*Americans for Prosperity (AFP) exists to recruit, educate, and mobilize citizens in support of the policies and goals of a free society at the local, state, and federal level, helping every American live their dream – especially the least fortunate. AFP has millions of activists across the nation, a local infrastructure that includes 35 state chapters, and has received financial support from more than 100,000 Americans in all 50 states. For more information, visit [www.AmericansForProsperity.org](http://www.AmericansForProsperity.org).*