

Pretrial Detention by a Preponderance: The Constitutional and Interpretive Shortcomings of the Flight-Risk Standard

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Pretrial detention seriously restricts the physical liberty of presumptively innocent people who have yet to be tried and convicted. The Bail Reform Act (BRA) imposes several procedural requirements that must be satisfied before a judge can order the pretrial detention of a federal defendant. At a detention hearing, the BRA allows a judge to order the pretrial detention of an arrestee who poses either a danger to the community or a flight risk. The BRA states unequivocally that a finding of dangerousness must be supported by clear and convincing evidence, but the statute is silent as to the evidentiary standard for establishing a defendant's flight risk. In the absence of statutory guidance, the courts of appeals have utilized a "preponderance of the evidence" standard.

This Comment contends that the preponderance standard for flight risk is unconstitutional and interpretively incorrect. In cases involving similar government restrictions on physical liberty, the Supreme Court has generally required at least a "clear and convincing evidence" standard to comport with due process. Using these cases as a baseline, this Comment applies the Mathews v. Eldridge due process framework to reveal the constitutional infirmity of the preponderance standard for pretrial flight risk.

In making the interpretive argument for a clear and convincing evidence standard, this Comment dissects the BRA's legislative history and statutory evolution to show that Congress intended for flight risk and dangerousness to be considered under equivalent standards. This Comment concludes by making a constitutional avoidance argument: there exists (1) a serious question as to the constitutional validity of the preponderance standard for flight risk and (2) a plausible interpretation of the BRA—that flight risk ought to be proven by clear and convincing evidence—that avoids those constitutional concerns.

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INTRODUCTION

Pretrial detention—the jailing of presumptively innocent people who have yet to be tried and convicted—is supposed to be reserved for the most serious cases. As the Supreme Court emphasized in *United States v. Salerno*,¹ “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”² Bail—the pretrial release of a defendant, sometimes with conditions attached to secure one’s appearance in court—is an important safeguard of this fundamental American liberty. The *Salerno* Court noted that the Bail Reform Act of 1984³ (BRA), which governs federal pretrial detention, “carefully limits

¹ 481 U.S. 739 (1987).

² *Id.* at 755.

³ Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3141–3150).

the circumstances under which detention may be sought to the most serious of crimes” in order to preserve the liberty of defendants awaiting trial.⁴ Although the BRA authorizes detention in some circumstances, it establishes a “clear preference for pretrial release.”⁵ Bail is supposed to be the rule, and pretrial detention the exception.

In practice, however, federal pretrial detention “is in crisis.”⁶ The “exception has now swallowed the rule, becoming a built-in bias for incarceration that feeds the federal system’s colossal detention rates and stark racial disparities.”⁷ Over the last forty years, the pretrial detention rate has risen from 17% to 75%,⁸ disproportionately impacting people of color.⁹ Against this backdrop, recent scholarship has focused on substantive problems with the text of the BRA and its application in practice.¹⁰

Yet one aspect of the BRA has received scant academic or judicial attention: the evidentiary standard for detaining a defendant who poses a flight risk. The BRA currently authorizes pretrial detention upon a finding at a detention hearing that the arrestee poses either a danger to the community or a risk of nonappearance at trial.¹¹ To detain a person based on dangerousness, the statute provides that “[t]he facts the judicial officer uses . . . shall be supported by clear and convincing evidence.”¹² Notably, the statute does not specify an evidentiary standard for evaluating an arrestee’s flight risk. In the absence of statutory instruction, the federal courts of appeals have concluded that flight risk must be

⁴ *Salerno*, 481 U.S. at 747.

⁵ Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1278 (2021).

⁶ Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION 46 (July 2020), <https://perma.cc/GA48-BY6Z>.

⁷ Alison Siegler & Kate M. Harris, *How Did the “Worst of the Worst” Become 3 out of 4?*, N.Y. TIMES (Feb. 24, 2021), <https://perma.cc/JN6N-LKVL>.

⁸ See Didwania, *supra* note 5, at 1264.

⁹ See *id.* at 1266.

¹⁰ See generally, e.g., Amaryllis Austin, *The Presumption for Detention Statute’s Relationship to Release Rates*, 81 FED. PROB. 52 (2017) (criticizing the presumptions of detention codified at 18 U.S.C. § 3412(e) that attach to certain charges); Erica Zunkel & Alison Siegler, *The Federal Judiciary’s Role in Drug Law Reform in an Era of Congressional Dysfunction*, 18 OHIO ST. J. CRIM. L. 283 (2020) (exposing the statutory drug presumption as overbroad and ineffective); Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063 (2018) (scrutinizing the overreliance on financial conditions of release); Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643 (2020) (critiquing unaffordable bail); Didwania, *supra* note 5 (identifying race- and gender-based disparities in federal pretrial detention).

¹¹ See 18 U.S.C. § 3142(f).

¹² 18 U.S.C. § 3142(f).

proven by the less demanding “preponderance of the evidence” standard.¹³ This Comment argues that, as a constitutional and interpretive matter, the pretrial flight-risk determination must be evaluated under a “clear and convincing evidence” standard.¹⁴

The preponderance standard not only makes it easier to jail presumptively innocent people but also increases the likelihood of erroneous detentions.¹⁵ What’s more, pretrial detention imposes severe consequences on people held prior to trial, regardless of whether the detention is legally valid. The average length of federal pretrial detention is eight months, with some districts’ averages exceeding two and a half years.¹⁶ During that time, detainees “can lose their jobs, their homes, their health, and even their children,” all while detention “increases the likelihood of conviction and results in longer federal sentences.”¹⁷ A preponderance standard makes these consequences substantially more likely; as the Supreme Court has recognized, “Increasing the burden of proof is one way to . . . reduce the chances that inappropriate [detentions] will be ordered.”¹⁸

This Comment explains why the current preponderance standard for flight risk is unconstitutional and interpretively incorrect. Part I briefly discusses the history of bail in the United States, the mechanics of the BRA, and the development of the preponderance standard among the circuits. Part II argues that the preponderance standard for flight risk is unconstitutional. The Supreme Court’s due process jurisprudence has required a clear and convincing evidence standard for forms of nonpunitive detention analogous to pretrial jailing. Part III makes the interpretive argument for a clear and convincing evidence standard. It begins by illuminating that several aspects of the BRA—including the statute’s history and structure—point toward a clear and convincing evidence threshold. It concludes by applying the constitutional avoidance canon to this interpretive question; the preponderance standard raises a serious constitutional question that can be avoided by a plausible construction of the statute.

¹³ See, e.g., *United States v. Motamedi*, 767 F.2d 1403, 1406–07 (9th Cir. 1985).

¹⁴ See Siegler & Zunkel, *supra* note 6, at 51 n.102 (noting that the preponderance standard may fail constitutional scrutiny).

¹⁵ See *Addington v. Texas*, 441 U.S. 418, 427 (1979) (holding that in civil commitment proceedings, the preponderance standard does not satisfy due process).

¹⁶ Siegler & Zunkel, *supra* note 6, at 47 (citing Austin, *supra* note 10, at 53).

¹⁷ *Id.*

¹⁸ *Addington*, 441 U.S. at 427 (explaining the due process rationale for adopting a higher evidentiary standard in civil commitment proceedings).

I. BACKGROUND: LEGAL HISTORY OF THE BRA AND FLIGHT-RISK STANDARD

This Part describes the historical and statutory context of the preponderance standard for the pretrial flight-risk assessment. It first explores the history of bail and the enactment of the BRA before situating the flight-risk determination within the statutory scheme. It concludes by discussing the reasoning that circuits have used in selecting a preponderance standard for flight-risk determinations.

A. Origin of the 1984 BRA

Bail was an integral part of Anglo-American criminal procedure long before the BRA.¹⁹ Although the Framers did not include an express right to bail in the Constitution²⁰ (and prohibited only *excessive* bail via the Eighth Amendment),²¹ the states continued a long tradition of allowing pretrial release subject to financial conditions.²² A judge would require a defendant to secure personal surety for an amount that would be forfeited should the defendant fail to appear in court.²³ A defendant would have “a friend or neighbor take a pledge, backed by property, and assume responsibility for him until trial.”²⁴ Eventually, the bail system became commercialized; rather than having a personal acquaintance secure their bonds, defendants turned to commercial bail bondsmen.²⁵

Before Congress overhauled the bail system in 1966, persons charged with noncapital offenses had “an absolute right to be admitted to bail” granted by statute.²⁶ The Supreme Court had recognized the fundamental importance of pretrial release: “This

¹⁹ See Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 916–19 (2013) (surveying the history of bail in the United States since 1776).

²⁰ Eric J. Maier, Comment, *Schrödinger’s Cell: Pretrial Detention, Supervised Release, and Uncertainty*, 84 U. CHI. L. REV. 1425, 1431 (2017).

²¹ See U.S. CONST. amend. VIII.

²² Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What’s Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 713 (2019) (noting that state constitutions in “the early days of the republic” frequently included a right to bail).

²³ Maier, *supra* note 20, at 1431.

²⁴ Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1324 (2012).

²⁵ *Id.* at 1329.

²⁶ *United States v. Weiss*, 233 F.2d 463, 465 (7th Cir. 1956).

traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”²⁷ The Court emphasized that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”²⁸ Even before the BRA, some members of the Court acknowledged that the right to pretrial freedom could outweigh a defendant’s flight risk: “[B]ail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice.”²⁹

Leading up to 1966, however, the commercial bondsman system came under increasing scrutiny for failing to adequately incentivize defendants to show up to trial.³⁰ In an effort to resolve this issue, Congress passed the Bail Reform Act of 1966³¹ (1966 BRA) to allow the pretrial release of defendants under conditions other than financial collateral, such as restrictions on travel or association.³² The statute required the release of persons charged with noncapital offenses unless “such a release [would] not reasonably assure the appearance of the person as required.”³³ The 1966 BRA limited the purpose of bail to securing one’s appearance at trial.³⁴ In this way, the 1966 BRA altered the bail process by allowing judges to order pretrial detention in noncapital cases if release would be inadequate to reasonably secure an arrestee’s appearance at trial.³⁵ The 1966 BRA “was *not* attempting to deal with evaluating defendants’ dangerousness during the bail inquiry,”³⁶ just their risk of nonappearance.

²⁷ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

²⁸ *Id.*

²⁹ *Id.* at 8 (Jackson, J., concurring).

³⁰ See Betsy Kushlan Wanger, Note, *Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act*, 97 YALE L.J. 320, 324 (1987) (“The pecuniary commitment of a commercial bail bondsman did not necessarily reflect the defendant’s own stake in appearing at trial or in ceasing to engage in criminal activity.”).

³¹ Pub. L. No. 89-465, 80 Stat. 214 (1966), amended by 18 U.S.C. §§ 3141–3150.

³² See Maier, *supra* note 20, at 1432, 1434–35.

³³ Bail Reform Act of 1966 § 3146(a), 80 Stat. at 214.

³⁴ See Maier, *supra* note 20, at 1433.

³⁵ *Id.*

³⁶ Mani S. Walia, *Putting the “Mandatory” Back in the Mandatory Detention Act*, 85 ST. JOHN’S L. REV. 177, 192 (2011) (emphasis added); see also H.R. REP. NO. 89-1541, at 3 (1966), as reprinted in 1966 U.S.C.C.A.N. 2293, 2296 (“[P]retrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused.”).

By 1984, nonappearance was no longer Congress's sole concern on the matter of pretrial release. Congress sought to "address the alarming problem of crimes committed by persons on release."³⁷ Amending the earlier BRA, the 1984 BRA dramatically shifted the federal bail landscape by permitting judges to consider both a defendant's flight risk and dangerousness in the detention decision.³⁸

B. Mechanics of the BRA

Although the 1984 BRA sought in part to address the dangerousness of defendants released before trial, it creates a presumption of release in most cases by limiting the types of offenses that qualify for detention.³⁹ The BRA splits the bail process into two stages: an initial appearance hearing and a detention hearing.⁴⁰ Generally, arrestees are to be released at the initial appearance subject to the least restrictive conditions that will reasonably assure their appearance and the safety of the community.⁴¹ These conditions include employment requirements, curfew, and restrictions on the possession of firearms.⁴²

To proceed from the initial appearance to the detention hearing—and ultimately to detain a defendant—a judge must find certain predicates satisfied at the initial appearance. In other words, arrestees must be released at the initial appearance except in specific circumstances that permit a judge to hold a subsequent detention hearing. In § 3142(f), the BRA identifies five categories of charged offenses that render a defendant eligible for a detention hearing: most drug and gun crimes, offenses involving a minor victim, crimes of violence and terrorism, offenses with a maximum penalty of life in prison or death, and certain instances of recidivism.⁴³ A judge may also proceed from an initial appearance to a detention hearing in cases involving "a serious risk that

³⁷ S. REP. NO. 98-225, at 3 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3185. Despite this alarmism, the Senate Report emphasized that this group of dangerous releasees was "small but identifiable." *Id.* at 6.

³⁸ See Walia, *supra* note 36, at 193–97 (arguing that the 1984 BRA departed from the 1966 BRA by allowing judges to consider dangerousness before ordering release).

³⁹ Didwania, *supra* note 5, at 1278 (2021); see also 18 U.S.C. § 3142(b)–(c).

⁴⁰ See Siegler & Zunkel, *supra* note 6, at 49 (citing *Salerno*, 481 U.S. at 747); see also *Bail*, 50 GEO. L.J. ANN. REV. CRIM. PROC. 394, 397–400 (2021) [hereinafter *Bail*].

⁴¹ See 18 U.S.C. § 3142(b), (c)(1)(B).

⁴² See 18 U.S.C. § 3142(c)(1)(B).

⁴³ See 18 U.S.C. § 3142(f)(1); Siegler & Zunkel, *supra* note 6, at 48.

such person will flee”⁴⁴ or “a serious risk that such person will obstruct or attempt to obstruct justice.”⁴⁵ The five offense categories, combined with flight-risk and obstruction categories, create seven factors that authorize a pretrial detention hearing. A finding of general dangerousness is *not* a consideration at the initial appearance stage and is therefore not a valid basis for a judge to proceed to a detention hearing.⁴⁶ If none of the seven factors is present, pretrial release is obligatory and a court may not hold a detention hearing.⁴⁷ In this sense, § 3142(f) “serve[s] as a gatekeeper to [pretrial] detention.”⁴⁸

If one of the seven factors *is* met at the initial appearance, the judge is authorized to conduct a detention hearing.⁴⁹ At this hearing, the government bears the burden of persuading the judicial officer that no condition of release would reasonably assure the defendant’s appearance or the safety of the community.⁵⁰ A defendant “has the right to be represented by counsel,” “cross-examine witnesses,” and “present information by proffer or otherwise” (allowing defendants to tell the court what the evidence would show without having to present the evidence itself).⁵¹

⁴⁴ 18 U.S.C. § 3142(f)(2)(A); *see also* Siegler & Zunkel, *supra* note 6, at 48–49.

⁴⁵ 18 U.S.C. § 3142(f)(2)(B). The consideration of whether a defendant is a serious flight risk under § 3142(f)(2)(A) or poses a serious risk of obstruction of justice under § 3142(f)(2)(B) is separate from the flight-risk determination at issue in this Comment. Section 3142(f)(2)(A)–(B) lists factors that may allow a judge to proceed from the initial appearance to a detention hearing. This Comment addresses the flight-risk standard at the detention hearing—not at the initial appearance.

⁴⁶ Siegler & Zunkel, *supra* note 6, at 48 (“[T]he statute and case law make clear that neither ‘danger to the community’ nor ordinary ‘risk of flight’ [as opposed to *serious* risk of flight] is a legitimate basis for detention at the Initial Appearance Hearing.”).

⁴⁷ *Id.* at 49 (“[A] person may only be detained at the Initial Appearance if one of these seven § 3142(f) factors is present.”); *id.* (“When no § 3142(f) factor is met, the judge is flatly prohibited from holding a Detention Hearing; the [arrestee] must be released.”); *Bail, supra* note 40, at 397 (“As the Supreme Court held in *United States v. Salerno*, ‘The Bail Reform Act *carefully limits the circumstances under which detention may be sought* to the most serious of crimes,’ specifically the offenses and circumstances listed in § 3142(f).” (emphasis in original) (quoting *Salerno*, 481 U.S. at 747)).

⁴⁸ Siegler & Zunkel, *supra* note 6, at 49; *see also* *The Administration of Bail by State and Federal Courts: A Call for Reform: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 116th Cong. 5 (2019) (statement of Alison Siegler, Dir. Fed. Crim. Just. Clinic, Univ. of Chi. L. Sch.) [hereinafter *Administration of Bail*] (“Caselaw further supports § 3142(f)’s role as a gatekeeper. . . . [E]very court of appeals to address the issue agrees that it is illegal to detain someone—or even hold a Detention Hearing—unless the government affirmatively invokes one of the § 3142(f) factors.”); *Administration of Bail, supra*, at 5 n.10 (collecting cases).

⁴⁹ Siegler & Zunkel, *supra* note 6, at 48–49.

⁵⁰ *Id.* at 52; Didwania, *supra* note 5, at 1281; *see also* 18 U.S.C. § 3142(e).

⁵¹ 18 U.S.C. § 3142(f).

In light of these procedures, the Supreme Court upheld the facial constitutionality of the BRA in *Salerno*, confirming that it allows only narrow exceptions to the norm of pretrial release.⁵² The Court determined that pretrial detention is “regulatory”⁵³ rather than punitive, thereby allowing less stringent protections of the defendant’s liberty than those required at trial. For example, the Court implicitly suggested that pretrial detention does not require the “beyond a reasonable doubt” standard.⁵⁴ It also held that “preventing danger to the community is a legitimate regulatory goal.”⁵⁵ According to the Court, the detention hearing protects the defendant’s due process rights via several procedural safeguards while preserving the government’s legitimate interest in community safety.⁵⁶

One such procedural protection is the requisite burden of proof for detaining someone prior to conviction. The BRA explicitly says that a finding of dangerousness at the detention hearing “shall be supported by clear and convincing evidence.”⁵⁷ The *Salerno* Court recognized this protection as central to its decision upholding the BRA’s constitutionality.⁵⁸ In contrast, the BRA contains no specified evidentiary standard for assessing “whether there are conditions of release that will reasonably assure the appearance of such person as required.”⁵⁹ The Court in *Salerno* did not meaningfully discuss flight risk, nor did it clarify an evidentiary threshold for proving such a risk. In the absence of an explicit flight-risk standard, the circuits have unanimously

⁵² See *Salerno*, 481 U.S. at 755.

⁵³ *Id.* at 746–47.

⁵⁴ *Cf. id.* at 750–51 (citing with approval the clear and convincing evidence standard).

⁵⁵ *Id.* at 747.

⁵⁶ See *id.* at 748–51.

⁵⁷ 18 U.S.C. § 3142(f) (“The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence.”).

⁵⁸ See *Administration of Bail*, *supra* note 48, at 5 (“A key reason the Supreme Court upheld the Bail Reform Act as constitutional in *United States v. Salerno* was because the statute only authorizes detention at the Initial Appearance under certain limited circumstances.”); *id.* at 7 (“The *Salerno* Court further relied on the narrow limitations in § 3142(f) in another component of its substantive Due Process ruling.”); see also *Salerno*, 481 U.S. at 750–51.

⁵⁹ 18 U.S.C. § 3142(f). This Comment generally refers to the appearance assessment as the flight-risk determination, although some scholarship has criticized the conflation of intentional flight and unintentional nonappearance. See, e.g., Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729–30 (2018).

read in a preponderance of the evidence standard but have not supported this conclusion with rigorous analysis.⁶⁰

C. Development of the Preponderance Standard in the Circuits

Although the courts of appeals have collectively applied a preponderance of the evidence standard to flight-risk determinations, a close examination of the development of the standard among the circuits reveals the tenuous foundation of this consensus.

The Ninth Circuit's decision in *United States v. Motamedi*⁶¹ is the most thorough and influential defense of the preponderance standard. Most significantly, the court presumed that the statute's silence as to the flight-risk standard was a deliberate decision given the BRA's express application of a clear and convincing evidence standard to the dangerousness determination.⁶² The majority found support for this argument in the fact that § 3143 of the BRA requires convicted persons to disprove both danger and flight risk by clear and convincing evidence to obtain bail pending sentencing or appeal.⁶³ The court also concluded that because other pretrial processes are typically governed by a preponderance standard, Congress intended that standard to apply automatically in the absence of statutory instruction to the contrary.⁶⁴

Motamedi's holding also ostensibly rested on the 1984 BRA's statutory evolution; the court found that Congress's silence as to a flight-risk standard "evinces a legislative intent to incorporate the standard applicable to this determination under the 1966 Act."⁶⁵ The court acknowledged that the 1966 BRA also had not expressed an evidentiary standard for flight risk but nevertheless concluded that the 1966 BRA's "balancing approach normally implies utilization of the preponderance standard."⁶⁶

⁶⁰ See Siegler & Zunkel, *supra* note 6, at 51 n.102 (collecting cases).

⁶¹ 767 F.2d 1403 (9th Cir. 1985).

⁶² See *id.* at 1406.

⁶³ *Id.*; see also 18 U.S.C. § 3143(a).

⁶⁴ *Motamedi*, 767 F.2d at 1407.

⁶⁵ *Id.* at 1406.

⁶⁶ *Id.* at 1406–07. The BRA's statutory evolution is addressed below in Part III, but the balancing-approach argument fails to hold water. All standards of proof require balancing the evidence. The 1984 BRA's dangerousness standard is illustrative: dangerousness must be proven by clear and convincing evidence, but judges are directed to balance the factors set forth in § 3142(g). Compounding other issues with its reasoning, the *Motamedi* court failed to identify any cases concluding that a balancing of factors typically implies a preponderance standard. True, a preponderance standard requires balancing, but so do all evidentiary standards.

The other opinion to have thoroughly considered the flight-risk standard—*United States v. Chimurenga*⁶⁷—relied on variations of these arguments. It first concluded that the “legislative history does not suggest that any [heightened flight-risk standard] was contemplated”⁶⁸ before holding that “[p]roof by a preponderance of the evidence is the standard usually used in pretrial proceedings.”⁶⁹

Subsequent appellate opinions have relied on *Motamedi* and *Chimurenga* to establish a preponderance standard for flight-risk determinations with little further analysis.⁷⁰ The Seventh Circuit addressed this issue for the first time in *United States v. Portes*.⁷¹ Its reasoning is contained in a single sentence: “We adopt the position taken by the other circuits that congressional silence means acquiescence in the traditional preponderance of the evidence standard.”⁷² In *United States v. Orta*,⁷³ the Eighth Circuit established that flight risk ought to be proven by a preponderance of the evidence, but the entirety of its reasoning can be found in a footnote: “The statute does not expressly state the appropriate evidentiary standard necessary to support a finding of propensity for flight, indicating the preponderance of evidence standard usually applied in pretrial proceedings is appropriate.”⁷⁴ The Eleventh Circuit adopted a preponderance standard with similar brevity: “Under the Act, however, the clear and convincing evidence standard applies only to a determination [of danger].”⁷⁵ Despite the explosion of pretrial detention in recent years, courts

⁶⁷ 760 F.2d 400 (2d Cir. 1985).

⁶⁸ *Id.* at 406. Notably, the court did not cite to any legislative history. *But see Motamedi*, 767 F.2d at 1411 (Boochever, J., concurring in part and dissenting in part) (finding that the BRA’s legislative history shows that “Congress believed that its explicit provision for the burden of proof on dangerousness factors paralleled the current (and continued) standard for proof on flight risk factors”).

⁶⁹ *Chimurenga*, 760 F.2d at 406 (first citing *United States v. Matlock*, 415 U.S. 164, 177–78 (1974); and then citing *Lego v. Twomey*, 404 U.S. 477, 488–89 (1972)).

⁷⁰ *See, e.g.*, *United States v. Orta*, 760 F.2d 887, 891 n.20 (8th Cir. 1985) (en banc); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Vortis*, 785 F.2d 327, 328–29 (D.C. Cir. 1986); *United States v. Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991); *United States v. Martir*, 782 F.2d 1141, 1146 (2d Cir. 1986); *see also, e.g.*, *United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985).

⁷¹ 786 F.2d 758 (7th Cir. 1985).

⁷² *Id.* at 765.

⁷³ 760 F.2d 887 (8th Cir. 1985) (en banc).

⁷⁴ *Id.* at 891 n.20.

⁷⁵ *Medina*, 775 F.2d at 1402.

have continued to rely on these dated cases without meaningful reconsideration.⁷⁶

But even if the courts are correct that Congress has spoken to this issue (albeit through silence), “countervailing constitutional constraints” set a floor on the permissible standard of proof.⁷⁷ When a person’s physical liberty is at stake, the Constitution requires a standard more stringent than a preponderance of the evidence.

II. THE DUE PROCESS ARGUMENT

When Congress fails to prescribe a burden of proof—as in the case of the pretrial flight-risk standard—it falls to the judiciary to resolve the issue within the contours of the Constitution.⁷⁸ The determination of the appropriate flight-risk standard is of particular constitutional importance given that pretrial detention results in an immediate withdrawal of physical liberty.

“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause.”⁷⁹ And the Due Process Clause directly circumscribes the quantum of evidence required to authorize such a deprivation of liberty. The Supreme Court has elaborated that “in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected but also a societal judgment about how the risk of error should be distributed between the litigants.”⁸⁰

In *Mathews v. Eldridge*,⁸¹ the Supreme Court held that whether a certain procedure comports with due process depends on three factors: the affected interest of the private party, the likelihood of an erroneous outcome under the procedural scheme at

⁷⁶ See, e.g., *United States v. Keeton*, No. 20-10162, 2020 WL 4805479, at *1 (9th Cir. June 17, 2020) (citing *Motamedi*, 767 F.2d at 1406); *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (citing *Chimurenga*, 760 F.2d at 405).

⁷⁷ *Steadman v. SEC*, 450 U.S. 91, 95 (1981).

⁷⁸ Cf. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (explaining in a securities law case the Court’s role in prescribing the appropriate standard of proof when both Congress and the Constitution are silent).

⁷⁹ *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

⁸⁰ *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

⁸¹ 424 U.S. 319 (1976).

issue, and the government's countervailing interest in maintaining the challenged procedure.⁸² The Court relies on this framework in challenges to evidentiary standards authorizing nonpunitive detention.

Applying *Mathews* to the BRA demonstrates the constitutional infirmity of the preponderance standard for flight risk.⁸³ A defendant's interest in avoiding pretrial detention is more significant than analogous contexts in which the Court has required the use of a clear and convincing evidence standard. In contrast, the government's interest in reducing flight risk by maintaining the preponderance standard is appreciably less compelling than the government's interest in securing community safety.

This Part applies the three-part *Mathews* framework to the preponderance standard for pretrial flight risk. Section A addresses the "private interest that will be affected"—namely, an arrestee's interest in pretrial liberty.⁸⁴ In particular, by considering the Court's due process jurisprudence in the civil commitment context, the Section shows that the importance of an arrestee's liberty interest requires a clear and convincing evidence standard. Section B considers the risk of an erroneous deprivation under a preponderance standard. An elevated evidentiary standard mitigates the possibility of errors intrinsic to the flight-risk assessment. Section C evaluates the government's countervailing interests in maintaining the preponderance standard for flight risk; it concludes that, because the government's primary interest in community safety is sufficiently secured by a clear and convincing evidence standard, that standard adequately protects the government's interest in assuring appearance at trial. Section D returns to *Salerno's* implications for due process analysis as applied to pretrial detention.

⁸² *Id.* at 335.

⁸³ Courts have previously applied the *Mathews* framework to other aspects of the BRA. For example, in *United States v. Jessup*, 757 F.2d 378 (1st Cir. 1985), the First Circuit invoked *Mathews* to decide whether the presumptions of detention contained in § 3142(e) violate the Due Process Clause. *Id.* at 384–87 (citing *Mathews*, 424 U.S. at 335). In *Salerno*, the Supreme Court affirmatively cited *Mathews* for the proposition that the BRA must comport with procedural due process. 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335). Relatedly, the *Motamedi* dissent applied *Addington* (which in turn relied on *Mathews*) to conclude that the BRA requires a clear and convincing standard for flight risk. *Motamedi*, 767 F.2d at 1413–14 (Boochever, J., concurring in part and dissenting in part) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

⁸⁴ *Mathews*, 424 U.S. at 335.

A. The Defendant's Interest: The Significant Deprivations of Pretrial Detention

Under the first *Mathews* factor, an individual's private interests weigh heavily in determining what process she is constitutionally owed. In applying this factor to forms of government restraint analogous to pretrial detention, the Supreme Court has generally concluded that physical restrictions on liberty require at minimum a clear and convincing evidence standard.

In *Addington v. Texas*,⁸⁵ the Supreme Court discussed the appropriate evidentiary standard required by the Due Process Clause to authorize civil commitment (the involuntary hospitalization of a mentally ill, dangerous person). Like pretrial detention, civil commitment is a significant curtailment of an individual's physical liberty but does not involve "state power . . . exercised in a punitive sense."⁸⁶ Applying the *Mathews* framework in considering the requisite standard of proof, the Court identified two central interests of individuals facing civil commitment. First, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."⁸⁷ Second, civil commitment "can engender adverse social consequences to the individual. Whether we label this phenomen[on] 'stigma' or choose to call it something else . . . it can have a very significant impact."⁸⁸

The *Addington* Court recognized that the choice between evidentiary standards has practical and symbolic consequences: "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."⁸⁹ It went on to explain that the preponderance standard appropriately applies to typical civil proceedings given society's relatively minimal interest in the outcome of a case involving monetary claims.⁹⁰ In contrast, due process requires proof beyond a reasonable doubt in criminal cases because the defendant's liberty interests are so significant that "our society imposes almost the entire risk of error upon itself."⁹¹ The intermediate clear and convincing evidence standard applies in

⁸⁵ 441 U.S. 418 (1979).

⁸⁶ *Id.* at 428.

⁸⁷ *Id.* at 425.

⁸⁸ *Id.* at 426.

⁸⁹ *Id.* at 423; *see also id.* at 426.

⁹⁰ *Addington*, 441 U.S. at 423.

⁹¹ *Id.* at 424.

“quasi-criminal” cases in which the “interests at stake . . . are deemed to be more substantial than mere loss of money.”⁹² As such, “the ‘clear and convincing’ standard . . . is required [for civil commitment] to meet due process guarantees.”⁹³ *Foucha v. Louisiana*⁹⁴—applying the same reasoning and balancing of factors—bolstered this conclusion by holding that “the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence.”⁹⁵

Courts have relied on this civil-commitment line of cases to require a clear and convincing evidence standard when one’s “[f]reedom from imprisonment” is at issue.⁹⁶ Extending *Addington* to the immigration context, for example, lower courts have held that “the government must prove by clear and convincing evidence that continued detention is justified” pending a removal decision.⁹⁷ In these immigration cases, courts have applied the same standard to flight-risk assessments despite the fact that immigrants are likely to have substantial foreign ties.⁹⁸ Importantly, these courts recognize that, like in *Addington*, “when someone stands to lose an interest more substantial than money, we protect that interest by holding the Government to a higher standard of proof.”⁹⁹

The foregoing cases illustrate the magnitude of the interests at stake in pretrial detention. Most relevant is a defendant’s liberty interest, which remains significant regardless of the particular type or source of restraint.¹⁰⁰ The Supreme Court has unambiguously established that the Due Process Clause’s protection of physical freedom applies broadly to “government custody, detention, or other forms of physical restraint.”¹⁰¹ And in *Salerno*,

⁹² *Id.*

⁹³ *Id.* at 433.

⁹⁴ 504 U.S. 71 (1992).

⁹⁵ *Id.* at 86.

⁹⁶ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁹⁷ *Singh v. Holder*, 638 F.3d 1196, 1200 (9th Cir. 2011).

⁹⁸ *See id.* at 1203 (“[T]he government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond.”); *see also* *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 213 (3d Cir. 2020) (applying the *Mathews* framework).

⁹⁹ *German Santos*, 965 F.3d at 213–14.

¹⁰⁰ *See* *Siegler & Zunkel*, *supra* note 6, at 51 n.102 (“People have a fundamental liberty interest in not being confined pending trial, and the Fifth Amendment requires that any deprivation of liberty be attended by robust procedural protections.” (citing *Mathews*, 424 U.S. at 332)).

¹⁰¹ *Zadvydas*, 533 U.S. at 690.

the Court emphasized “the individual’s strong interest in liberty” prior to trial.¹⁰²

Pretrial detention engenders consequences beyond the curtailment of one’s physical liberty. Like people who face the stigma associated with civil commitment, a person detained before trial will be associated with criminality, regardless of the ultimate outcome of his or her case. Judge Robert Boochever’s *Motamedi* dissent—applying *Mathews* in considering the pretrial flight-risk standard—recognized that pretrial detention “result[s] in permanent stigma and loss of reputation to the defendant.”¹⁰³ This stigma accompanies other serious consequences. Pretrial detention can cause detainees to lose their jobs, their housing, and even their children.¹⁰⁴ For example, one study found that those detained prior to trial for just three days had a 76.1% chance of experiencing disruption in employment and a 37.2% chance of experiencing residential instability.¹⁰⁵

The practical consequences of pretrial detention are even greater than those in the civil commitment context—even if a defendant is ultimately acquitted. First, the duration of pretrial detention has risen sharply in recent years, resembling indefinite civil commitment. In 2016, for example, the average pretrial detention period was 255 days, with several districts averaging over four hundred days.¹⁰⁶ In 2019, the Eastern District of New York’s average duration of pretrial detention was an alarming 884 days.¹⁰⁷ Even so, the increasing length of detention is not a necessary condition for requiring a heightened evidentiary standard. Courts have recognized that even a relatively short pretrial detention does not alleviate the constitutional concerns with a

¹⁰² *Salerno*, 481 U.S. at 750.

¹⁰³ *Motamedi*, 767 F.2d at 1414 (Boochever, J., concurring in part and dissenting in part); cf. *Santosky*, 455 U.S. at 756 (requiring heightened due process protections when an individual may suffer stigmatic consequences when detained); *Addington*, 441 U.S. at 426 (reasoning the same in the civil commitment context).

¹⁰⁴ Siegler & Zunkel, *supra* note 6, at 47 & nn.21–24 (collecting studies).

¹⁰⁵ Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82 FED. PROB. 39, 41–42 (2018).

¹⁰⁶ Austin, *supra* note 10, at 53.

¹⁰⁷ Admin. Off. of the U.S. Cts., *Pretrial Services Detention Summary: Days, Average and Median for the 12 Month Period Ending September 30, 2019*, U.S. CTS. (Sept. 30, 2019), <https://perma.cc/646M-WY2Y>.

preponderance standard: “[W]hen a party stands to lose his liberty, even temporarily, we hold the Government to a higher burden of proof.”¹⁰⁸

Second, pretrial detention can causally influence the ultimate disposition of the defendant’s criminal case by signaling dangerousness to decision makers and undermining a defendant’s ability to participate in crafting a defense. As Professor Stephanie Didwania has explained, “pretrial detention immediately affects a defendant’s case, leading to a longer sentence, an increased likelihood of pleading guilty, and a reduced probability of receiving a sentencing reduction.”¹⁰⁹ A pretrial detainee is also more likely to be convicted of a criminal offense.¹¹⁰ Another study finds that “[p]retrial detention increases a defendant’s likelihood of conviction by 55%, guilty plea by 46%, and incarceration sentencing by 88%,”¹¹¹ even when controlling for confounding factors.¹¹² The causal pathways are numerous. Detention “may inadvertently signal dangerousness or culpability to court officials who determine guilt.”¹¹³ Moreover, detention significantly curtails a defendant’s ability to converse with his or her lawyer, gather evidence, and devise a trial strategy.¹¹⁴ While detained, defendants are unable to maintain employment or otherwise remain involved in their communities, factors that bear directly on defendants’ ultimate sentences.¹¹⁵

It is difficult to overstate the implications of these facts on the *Mathews* due process determination.¹¹⁶ Unlike civil

¹⁰⁸ *German Santos*, 965 F.3d at 214 (citing *Salerno*, 481 U.S. at 741).

¹⁰⁹ Didwania, *supra* note 5, at 1264.

¹¹⁰ See Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224–26 (2018).

¹¹¹ Ellen A. Donnelly & John M. MacDonald, *The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration*, 108 J. CRIM. L. & CRIMINOLOGY 775, 805 (2019).

¹¹² *Id.* at 804; see also Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 251–52 (2018) (“All of these studies controlled for factors not associated with bail that could affect the likelihood of conviction and release, including, for example, race, age, gender, prior offenses, and number of charged offenses. . . . [Pretrial detention is] a factor driving the higher conviction rates for pretrial detainees.”).

¹¹³ Donnelly & MacDonald, *supra* note 111, at 789.

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See generally Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 AM. L. & ECON. REV. 24 (2020) (finding that federal pretrial release reduces sentence length, increases the probability of receiving a sentence below the recommended sentencing range, and lessens the probability that a defendant will receive a mandatory minimum sentence); Emily Leslie & Nolan G. Pope, *The Unintended*

commitment, pretrial detention affects a defendant's likelihood of criminal conviction and length of post-conviction imprisonment.¹¹⁷ Due process protections afforded to defendants at trial are insufficient to remedy the disparities created between those who are released pretrial and those who are detained.¹¹⁸ At sentencing, a person detained prior to trial will have a more difficult time showing, for example, his involvement in the community or ability to maintain employment than someone who was released prior to trial. The procedural protections at trial cannot retroactively remedy this dilemma. These conclusions further illustrate that even if pretrial detention is temporally limited, its consequences are indefinite.

The first *Mathews* factor—the affected private interest—weighs strongly in favor of a heightened evidentiary standard. A defendant's interest in avoiding pretrial detention is perhaps even greater than a person's interest in avoiding civil commitment. Comparison aside, however, restraints on liberty alone are often sufficient to require at least a clear and convincing evidence standard. An arrestee's interest in avoiding pretrial detention is substantial and far greater than those at stake in run-of-the-mill civil litigation.¹¹⁹

B. The High Risk of Erroneous Detention

The second prong of the *Mathews* framework, which evaluates the risk that a defendant will be erroneously deprived of her liberty under the challenged procedure, also provides strong support for applying a clear and convincing evidence standard to the flight-risk determination. Indeed, the Supreme Court has explicitly recognized that “the preponderance standard creates the risk of increasing the number of individuals erroneously [detained].”¹²⁰

Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments, 60 J.L. & ECON. 529 (2017) (showing that pretrial detainment increases the probability of conviction and increases recidivism).

¹¹⁷ See Wiseman, *supra* note 112, at 245 (emphasizing the “strong empirical evidence” that “pretrial detention is correlated to both an increased likelihood of conviction and lengthier average sentences”).

¹¹⁸ See *Motamedi*, 767 F.2d at 1414 (Boochever, J., concurring in part and dissenting in part) (“[T]he injuries consequent upon pretrial confinement may not be repairable upon a subsequent acquittal.”).

¹¹⁹ Cf. *Addington*, 441 U.S. at 424 (concluding that a heightened evidentiary standard is necessary when the interests at stake are “more substantial than mere loss of money”).

¹²⁰ Cf. *id.* at 426 (describing the civil commitment context).

In the civil-commitment context, the Court recognized that a preponderance standard would intolerably elevate the risk of mistakenly depriving someone of her liberty. “[A] factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.”¹²¹ Connecting that risk of erroneous deprivation with the necessary evidentiary standard, the Court continued: “Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.”¹²²

By way of contrast, the Supreme Court has upheld a preponderance standard for the continued commitment of defendants who have been acquitted by reason of insanity. Because insanity is an affirmative defense, defendants typically stipulate to the truth of the underlying criminal allegations; defendants also bear the burden of proving the affirmative defense (often by a preponderance of the evidence). Accordingly, “[a] verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness.”¹²³ Those acquitted of insanity are then hospitalized on the basis of their mental health status, which must have been proven under a preponderance standard—not the typical beyond a reasonable doubt standard governing criminal trials. The Court has found that the hospitalization of insanity acquittees does not significantly increase the risk of an erroneous deprivation despite the fact that the defendant must establish insanity by only a preponderance of the evidence. Under this scheme, there is a sort of double protection—first, the government must prove the elements of a crime beyond a reasonable doubt (although often accomplished through a defendant’s plea of not guilty by reason of insanity), and second, the defendant must establish insanity by a preponderance of the evidence. In these cases, then, the preponderance standard is not the sole basis for institutionalizing a defendant.¹²⁴

¹²¹ *Id.* at 427.

¹²² *Id.*

¹²³ *Jones v. United States*, 463 U.S. 354, 363–64 (1983).

¹²⁴ *See generally id.*

This rule owes its origins to *Jones v. United States*.¹²⁵ Under the Washington, D.C., statute at issue, defendants could be acquitted by reason of insanity if insanity was proven by a preponderance of the evidence.¹²⁶ An acquittal, however, would not mean that the defendant went free: “If he successfully invokes the insanity defense, he is committed to a mental hospital.”¹²⁷ The statute required periodic hearings to assess the acquittee’s eligibility for release, “at which he [would have] the burden of proving by a preponderance of the evidence that he [was] no longer mentally ill or dangerous.”¹²⁸ Michael Jones had pleaded not guilty by reason of insanity to petit larceny, a misdemeanor with a maximum sentence of one year in prison.¹²⁹ The government did not contest the plea of not guilty by reason of insanity, and the court committed Jones to a mental hospital.¹³⁰

At his second release hearing, which occurred more than a year after Jones’s commitment, Jones argued that he should be released automatically because his hospitalization had exceeded the maximum possible sentence for the underlying crime he would have otherwise served.¹³¹ Jones asserted that his ongoing detention was unconstitutional under *Addington* given that “the judgment of not guilty by reason of insanity did not constitute a finding of present mental illness and dangerousness [] because it was established only by a preponderance of the evidence.”¹³²

The Court rejected Jones’s due process argument.¹³³ Although insanity acquittees retain liberty interests similar to those of individuals subject to civil commitment, the risk of erroneous deprivation is limited by the due process protections at trial. Under the D.C. statute, an insanity-based acquittal establishes that “the defendant committed an act that constitutes a criminal offense.”¹³⁴ Unlike in civil commitment proceedings, “[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.”¹³⁵ In *Jones*, the Court concluded that this trial determination is more

¹²⁵ 463 U.S. 354 (1983).

¹²⁶ *Id.* at 356.

¹²⁷ *Id.*

¹²⁸ *Id.* at 357.

¹²⁹ *Id.* at 359–60.

¹³⁰ *Jones*, 463 U.S. at 360.

¹³¹ *Id.*

¹³² *Id.* at 362.

¹³³ *Id.* at 367–68.

¹³⁴ *Id.* at 363.

¹³⁵ *Jones*, 463 U.S. at 364.

protective of a defendant's due process rights than in a civil commitment proceeding, so a preponderance standard is appropriate for the commitment of defendants acquitted by reason of insanity.¹³⁶ The beyond a reasonable doubt standard thus acts as a gatekeeper to reaching the insanity determination—unlike in ordinary cases of civil commitment or pretrial detention.

Unlike in *Jones*, where the hospitalization occurred *after* trial or a plea, in the pretrial detention context subsequent due process protections at trial do not ameliorate the risk of an erroneous *pre-trial* deprivation of liberty. Several intrinsic features of the BRA and the flight-risk determination substantially elevate the possibility of an unsound detention under a preponderance standard. The lower standard affords nearly unbounded leeway for a judge to evaluate a defendant's flight risk.

Judges are susceptible to a variety of different decision-making errors and biases. First, judges make decisions that reflect intentional risk aversion, creating a de facto presumption of detention. In particular, judges “retain the incentive to be too cautious releasing people pretrial because some released people will commit new crimes.”¹³⁷ Even when there is little evidence of danger, judges may still be unwilling to release a defendant, incentivizing them to turn to the lower preponderance standard to circumvent the clear and convincing evidence standard for dangerousness. Empirical research shows that judges are hesitant to release even those with light criminal records.¹³⁸ Scholars have attributed this failure to the difficulty of changing court culture, which illustrates the need for greater procedural limits on pretrial detention.¹³⁹ The preponderance standard allows judges to eschew a defendant's individualized arguments against pretrial detention, especially given judges' crushing workloads and severe time constraints.¹⁴⁰

Second, judges often rely on subjective intuitions rather than concrete evidence when deciding whether to detain a defendant

¹³⁶ *Id.*

¹³⁷ Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1140 (2018).

¹³⁸ See Brandon L. Garrett, *Federal Criminal Risk Assessment*, 41 CARDOZO L. REV. 121, 130–31 (2019).

¹³⁹ See, e.g., Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends over the Last Decade*, 82 FED. PROB. 3, 12 (2018).

¹⁴⁰ See Brandon L. Garrett & John Monahan, *Judging Risk*, 108 CALIF. L. REV. 439, 482 (2020).

based on a flight risk.¹⁴¹ Those subjective intuitions are not racially neutral. Instead, “detention decisions are susceptible to bias, and the results are consistent with stereotyping that particularly harms minority men.”¹⁴² The preponderance standard allows different judges to come to vastly different conclusions about a defendant’s flight risk, all else equal. Even individual judges vary in their own conclusions between similarly situated defendants.¹⁴³ A clear and convincing evidence standard would go some way toward ameliorating this risk, as a finding that a defendant poses a flight risk would need to be an individualized assessment “that an arrestee presents an identified and articulable” risk of nonappearance, much like the current dangerousness standard.¹⁴⁴

The rise of quantitative risk-assessment tools amplifies rather than mitigates the pervasive systemic bias in pretrial detention decisions. Such tools frequently reflect racially disparate assumptions about the risks posed by certain defendants.¹⁴⁵ Moreover, risk-assessment tools may solidify the general trend toward risk aversion because of the inability of these measures to consider a court’s capacity to impose conditions of release that minimize the flight risk.¹⁴⁶ Many of these tools also fail to disaggregate the flight-risk inquiry from the dangerousness inquiry.¹⁴⁷

A preponderance standard, then, allows judges utilizing risk-assessment tools to bypass the clear and convincing evidence standard for dangerousness by relying on an aggregate measure of risk that fails to distinguish between dangerousness and flight risk. Notably, pretrial risk-assessment tools are rarely binding on judges.¹⁴⁸ The misaligned incentives of judges discussed above therefore allow judges to protect themselves with risk-assessment tools when the measures favor detention but ignore them when those tools favor release—“colloquially, it’s a ‘covering your ass’ problem.”¹⁴⁹ A clear and convincing evidence standard would help address this issue by requiring each judge to find an “identified

¹⁴¹ See Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 867 (2020); cf. *Santosky*, 455 U.S. at 762 (“[N]umerous factors combine to magnify the risk of erroneous factfinding . . . [including] imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.”).

¹⁴² Didwania, *supra* note 5, at 1315.

¹⁴³ Gouldin, *supra* note 141, at 867.

¹⁴⁴ *Salerno*, 481 U.S. at 751.

¹⁴⁵ See Note, *supra* note 137, at 1132.

¹⁴⁶ See Gouldin, *supra* note 141, at 902–03.

¹⁴⁷ *Id.* at 895–96.

¹⁴⁸ See Note, *supra* note 137, at 1140–41.

¹⁴⁹ *Id.* at 1140.

and articulable”¹⁵⁰ risk that often cannot be reflected in mere percentages.

A third issue with the current detention hearing procedures is that “[j]udges are vested with almost unreviewable discretion in making pretrial release decisions, and they are not otherwise held accountable for over detention or for over management of risk when it occurs.”¹⁵¹ As a consequence, not only are defendants practically unable to seek review and recourse for questionable detention decisions, but judges’ risk aversion and biases become normalized and entrenched.

Still other aspects of the pretrial flight-risk assessment create the possibility for unjustified detentions. When parties to a proceeding are indigent or belong to minority groups, “such proceedings are often vulnerable to judgments based on cultural or class bias.”¹⁵² Moreover, the detention hearing procedures and the preferences of particular judges are “likely much better known to government representatives than to detainees,” creating the risk that prosecutors can rely on the idiosyncrasies of individual judges to obtain detention of an arrestee.¹⁵³ Further, it is difficult to introduce evidence of a negative—it is far easier for the government to produce cause for concern than it is for an arrestee to produce evidence negating flight risk.¹⁵⁴

Further, erroneous detentions reduce the ability of the rest of the criminal process to comport with procedural due process. As discussed in the preceding Section, pretrial detention decisions can affect the disposition of a defendant’s ultimate criminal case. Because detention hinders defendants’ ability to meet with lawyers, gather exculpatory evidence, prepare for trial, maintain employment, and demonstrate ties to the community, “pre-trial detention may increase the risk of wrongful convictions and wrongful case outcomes, such as receiving a more severe sanction than warranted on the basis of the evidence.”¹⁵⁵ Additionally, pretrial detention “may increase the incentive for defendants to plead guilty to additional time in prison simply so that they can

¹⁵⁰ *Salerno*, 481 U.S. at 751.

¹⁵¹ Gouldin, *supra* note 141, at 868.

¹⁵² *Santosky*, 455 U.S. at 763.

¹⁵³ *Hernandez-Lara v. Lyons*, 10 F.4th 19, 31 (1st Cir. 2021).

¹⁵⁴ *See id.* (“[P]roving a negative . . . can often be more difficult than proving a cause for concern.”).

¹⁵⁵ Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1421 (2017).

be freed.”¹⁵⁶ By causing erroneous pretrial detentions, a low standard for flight risk may directly cause erroneous convictions and case outcomes, magnifying the gravity of this *Mathews* factor.

These issues remain despite the other due process protections contained in the BRA.¹⁵⁷ Where, as here, the private interests at stake are considerable, “the social cost of even occasional error is sizable.”¹⁵⁸ Notably, the Supreme Court has continued to require a clear and convincing evidence standard for civil commitment even in the presence of other robust procedural protections.¹⁵⁹ The risk of erroneous pretrial detention decisions—and corresponding convictions, sentences, and plea bargains—is considerable and warrants a clear and convincing evidence standard.

C. The Government’s Limited Interest in Maintaining the Preponderance Standard

The government’s interest in reducing flight risk counterbalances a defendant’s interest in a heightened standard. The government’s interest is *not* in preventing danger or securing community safety, unlike in civil commitment—those goals should be accomplished through the dangerousness inquiry.¹⁶⁰ In addition, “the [BRA’s] language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community,”¹⁶¹ not just in violent criminal activity. Congress intended “the concern about safety [to] be given a broader construction than merely danger of harm involving physical violence.”¹⁶² As a consequence, the dangerousness prong—not the flight-risk prong—is meant to protect the government’s interest in preventing recidivism, violent and nonviolent alike.

¹⁵⁶ *Id.* at 1419.

¹⁵⁷ Recent empirical work has questioned the efficacy of these protections. *See, e.g.*, Siegler & Zunkel, *supra* note 6, at 46–48.

¹⁵⁸ *Santosky*, 455 U.S. at 764.

¹⁵⁹ For example, the statute at issue in *Santosky* granted indigent parents, among other things, the right to an attorney, adequate notice, and appeal. *See id.* at 777–80 (Rehnquist, J., dissenting) (outlining the several due process protections codified in the statute at issue).

¹⁶⁰ *See generally* Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016) (arguing that flight risk and danger must be analyzed independently under the BRA).

¹⁶¹ S. REP. NO. 98-225, at 12.

¹⁶² *Id.*; *see also* United States v. Madoff, 586 F. Supp. 2d 240, 251–52 (S.D.N.Y. 2009) (finding that the dangerousness inquiry encompasses economic harm); United States v. Reynolds, 956 F.2d 192, 192–93 (9th Cir. 1992) (same).

The government has a stronger interest in preventing a defendant's flight if the defendant is likely to commit further crimes. But because Congress set the standard for detention based on dangerousness at clear and convincing evidence, it would be a mistake to conclude that the government's interest in preventing flight because of the potential for recidivism warrants only a preponderance standard. Right off the bat, then, the government's strongest interest in pretrial detention is not pertinent here.

Instead, the government's interest in preventing flight is largely cabined to administrative and enforcement costs.¹⁶³ But those interests are relatively trivial. And the Supreme Court is skeptical of the administrative-costs justification for less stringent procedural protections: “[T]he Constitution recognizes higher values than speed and efficiency. . . . [T]he Bill of Rights in general, and the Due Process Clause in particular, . . . were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency.”¹⁶⁴ In the pretrial detention context, these administrative burdens are “shorter-term,” and defendants who abscond are “not likely to evade justice permanently.”¹⁶⁵ Empirical research also demonstrates that defendants are exceedingly likely to appear for court and that other solutions are highly effective in securing appearance.¹⁶⁶ Even when contrasting jurisdictions with high and low release rates, released federal defendants fail to appear in court only around 1% of the time.¹⁶⁷ “In the information age, it is difficult for a person to completely abscond, and interventions as simple as text-messaging reminders have proven effective in reducing failures to appear.”¹⁶⁸ Notably, although “[a]ssuming that offense seriousness correlates

¹⁶³ See Gouldin, *supra* note 59, at 734 (“[N]onappearances trigger nuisance costs. These include the administrative costs of rescheduling court dates. . . . [T]he government may also incur some expense locating and rearresting defendants.”).

¹⁶⁴ Stanley v. Illinois, 405 U.S. 645, 656 (1972).

¹⁶⁵ Gouldin, *supra* note 59, at 732.

¹⁶⁶ *Id.*

¹⁶⁷ Siegler & Zunkel, *supra* note 6, at 47 fig.1; *id.* (“In 2019, 99 percent of released federal defendants nationwide appeared for court as required. . . . What is really remarkable is that this near-perfect compliance rate is seen equally in federal districts with very high release rates and those with very low release rates.”).

¹⁶⁸ Didwania, *supra* note 5, at 1319; see also Gouldin, *supra* note 59, at 727; John Logan Koepke & David G. Robinson, *Danger Ahead: Risk Assessment and the Future of Bail Reform*, 93 WASH. L. REV. 1725, 1765 (2018) (“Small changes in the administration of bail can have a substantial impact on failure to appear rates in a jurisdiction. Many of these reforms are relatively low-cost and low-tech, such as text message reminders about upcoming court dates.”).

to flight risk has intuitive appeal, [] decades of bail studies challenge that claim.”¹⁶⁹ In fact, “defendants charged with more serious offenses . . . do not, in fact, fail to appear at higher rates.”¹⁷⁰

One might suppose that, administrative costs aside, nonappearances undermine the government’s strong interest in maintaining the integrity of the criminal system. The low rates of nonappearance, however, show that this concern is also minimal. For example, “technology and improved interjurisdictional coordination have diminished the prospect of successful flight.”¹⁷¹ Reducing pretrial detention might also improve the integrity of the judicial system. A preponderance standard suggests that “society has a minimal concern with the outcome” of the proceeding despite the harms that accrue from pretrial detention.¹⁷² Pretrial detention “damages the credibility of the entire system. Our communities come to see courts not as places of justice, where evidence is carefully weighed.”¹⁷³ Instead, pretrial detention hearings become “places where poor people are abused.”¹⁷⁴

Even to the extent that meaningful nonappearance costs exist, such concerns are mitigated by the fact that pretrial detention is on average ten times more expensive than supervised release.¹⁷⁵ The benefits of expanding pretrial release might compensate for any nonappearance costs. What’s more, pretrial detention in one case may increase the risk of future nonappearances in other cases,¹⁷⁶ suggesting that a heightened evidentiary standard might actually be more protective of the government’s interest than the status quo.¹⁷⁷ In any case, even a charitable reading reveals that the government’s interests are minimal when compared to the risks of erroneous jailing, social stigma, loss of employment and housing, wrongful conviction, and skewed sentencing.

¹⁶⁹ Gouldin, *supra* note 59, at 705.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 727.

¹⁷² *Addington*, 441 U.S. at 424.

¹⁷³ John Raphling, *Efficient Injustice: Too Much Pretrial Incarceration Damages the Integrity of Our Courts*, 57 *JUDGES’ J.* 14, 17 (2018).

¹⁷⁴ *Id.*

¹⁷⁵ *See Austin*, *supra* note 10, at 53.

¹⁷⁶ Gouldin, *supra* note 141, at 873 (“[E]ven brief jail stays undermine other system goals by increasing the likelihood of future nonappearance and future offending.”); *see also* Yang, *supra* note 155, at 1426 (“[D]efendants who are detained before trial are over ten percentage points more likely to be rearrested for a new crime up to two years after the initial arrest.”).

¹⁷⁷ Nor would there be appreciable administrative costs related to the detention hearings themselves. *See, e.g., Santosky*, 455 U.S. at 767 (“Nor would an elevated standard of proof create any real administrative burdens for the State’s factfinders.”).

The “[Supreme] Court has mandated an intermediate standard of proof—‘clear and convincing evidence’—when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’”¹⁷⁸ While the defendant’s interests in avoiding pretrial detention are far greater than the mere loss of money, the government’s interests are largely pecuniary. It is also not clear that the government’s interests are better protected by a preponderance standard, as pretrial detention is more expensive than conditions of release and may increase the risk of future nonappearance. The government’s interests, including administrative costs, are sufficiently protected under a clear and convincing evidence standard.

D. *Salerno*’s Implications for Due Process

The Supreme Court’s reasoning in *Salerno*, which upheld the government’s authority to seek pretrial detention for dangerous defendants, supports the position that flight risk requires a clear and convincing evidence standard. Although the *Salerno* Court was not confronted with the question of the requisite evidentiary standard for flight risk,¹⁷⁹ the BRA’s clear and convincing evidence standard for dangerousness “was one of the reasons that the *Salerno* Court specifically cited for upholding the constitutionality of the Bail Reform Act.”¹⁸⁰

Since *Salerno*, many procedural due process protections—such as the Speedy Trial Act’s¹⁸¹ limitation on the duration of detention and the § 3142(f) factors as gatekeepers to capricious detention—have eroded. Pretrial detention is no longer a “carefully limited exception”¹⁸²—it has instead become the rule.¹⁸³ Consider *Salerno*’s reliance on “stringent time limitations” on pretrial

¹⁷⁸ *Id.* at 756 (quoting *Addington*, 441 U.S. at 424).

¹⁷⁹ See *Salerno*, 481 U.S. at 745 (“The fact that the Bail Reform Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.”).

¹⁸⁰ Gouldin, *supra* note 160, at 837; see also *Salerno*, 481 U.S. at 751 (“When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”).

¹⁸¹ Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified as amended at 18 U.S.C. §§ 3161–3174).

¹⁸² *Salerno*, 481 U.S. at 755.

¹⁸³ See Siegler & Harris, *supra* note 7; Siegler & Zunkel, *supra* note 6, at 46; Yang, *supra* note 155, at 1401.

detention.¹⁸⁴ As illuminated in Part II.A, the length of pretrial detention has become incredibly protracted, with some districts averaging more than two years. Another limit that has weakened in recent years is the § 3142(f) gatekeeper, which authorizes a judge to move from an initial appearance to a detention hearing in only limited circumstances.¹⁸⁵ Research has shown that the § 3142(f) factors, which are supposed to cabin pretrial detention to the most serious cases, are no longer an effective limit on pretrial detention. One study found that 10% of detentions did not satisfy a § 3142(f) prerequisite, “rendering the resulting detention illegal.”¹⁸⁶ Thus, the due process protections that animated the Court’s decision in *Salerno* have largely dissipated. Scholars have warned that “the law as it operates in practice has become untethered from the law as written in the statute.”¹⁸⁷ The erosion of the due process protections that were more effective at the time of *Salerno* makes elevating the evidentiary standard for flight risk crucial; retaining a preponderance standard exposes arrestees to serious liberty deprivations without adequate protection.

That said, even if the other procedural protections in the BRA were robust, the *Mathews* factors would still require a clear and convincing evidence standard. An arrestee’s interest in pretrial liberty is considerable, especially given the downstream consequences that amass from incarceration prior to a finding of guilt. The flight-risk assessment in general—and the preponderance standard in particular—entail an intolerable likelihood of an erroneous detention. Especially because the government’s interest is in avoiding largely speculative costs, maintaining the preponderance standard will continue to burden defendants’ liberty interests in a manner irreconcilable with due process under *Mathews*.

III. THE INTERPRETIVE ARGUMENT

The previous Part showed why the preponderance standard for pretrial flight risk is unconstitutional. The courts’ adoption of this unconstitutional standard is even less defensible when one considers the interpretive justifications for a clear and convincing

¹⁸⁴ *Salerno*, 481 U.S. at 747.

¹⁸⁵ See *supra* note 48 and accompanying text.

¹⁸⁶ Siegler & Zunkel, *supra* note 6, at 48.

¹⁸⁷ *Id.* at 46.

evidence threshold. The statutory construction question addressed by this Comment arises not from an ambiguous word or phrase but from the absence of statutory language altogether. Section 3142(f) sets forth the procedures for a detention hearing that govern a judge's determination of a defendant's dangerousness or flight risk. But the detention hearing procedures in § 3142(f) specify an evidentiary standard only for proving dangerousness—not flight risk.

The endeavor here, then, is not to ascertain the meaning of a particular statutory provision but to fill the gap left by Congress.¹⁸⁸ The assumption made by the *Motamedi* court that “Congress acts with deliberation, rather than by inadvertence, when it drafts a statute” is inapposite.¹⁸⁹ The text of § 3142(f) suggests that Congress did not act deliberately; if it had, it would have drafted an explicit evidentiary standard for flight risk instead of trusting courts to divine congressional intent from its silence. But regardless of whether Congress's omission of a flight-risk standard was intentional or inadvertent, the statute is ambiguous, which requires an analysis of the context surrounding the BRA's enactment to resolve this issue.

This Part begins by explaining that Congress in all likelihood intended flight risk to be governed by a clear and convincing evidence standard. In particular, Section A addresses the BRA's legislative history, which indicates that Congress intended flight risk and danger to be considered under equivalent evidentiary standards. Section B examines the statutory evolution of the BRA, illustrating that Congress was primarily concerned with dangerousness when amending the BRA in 1984. Consequently, it is illogical to infer that Congress intended for a *lower* evidentiary standard to govern flight risk. Section C clarifies the pre-1984 pretrial detention standard. Specifically, flight risk under the 1966 BRA was governed by an evidentiary standard more stringent than a preponderance of the evidence. Congress's silence, therefore, can be read as an intent to incorporate the heightened pre-1984 standard. Section D responds to the structuralist counterargument that, because Congress specified a clear and convincing evidence standard for both flight risk and dangerousness in § 3143, its silence in § 3142(f) espouses an intent to differentiate the pretrial flight-risk standard from the pretrial

¹⁸⁸ See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (“Where Congress has not prescribed the appropriate standard of proof . . . we must prescribe one.”).

¹⁸⁹ *Motamedi*, 767 F.2d at 1406.

danger standard. Section E concludes by making the constitutional avoidance argument for a clear and convincing evidence standard. The best interpretation of the BRA is that flight risk must be governed by clear and convincing evidence, but because of the serious constitutional arguments discussed in Part II, that interpretation need not be the most straightforward reading of the statute.

A. Flight Risk in the BRA's Legislative History

Though the BRA's legislative history addresses dangerousness almost exclusively, it also shows that Congress intended for dangerousness and flight risk to be governed by equivalent evidentiary standards.

Considering legislative history in this context is uniquely appropriate and necessary. First, when a statute fails to specify an evidentiary standard, the Supreme Court has recognized the importance of the statute's legislative history.¹⁹⁰ Indeed, legislative history is particularly instructive when the statutory text is silent.¹⁹¹ In most cases, "the authoritative statement is the statutory text,"¹⁹² but here, legislative history does not supplant clear (or even ambiguous) statutory text. Accordingly, "[t]he proper method of determining whether Congress intended two different standards . . . is to look at the legislative history."¹⁹³ Second, the Supreme Court has considered legislative history when construing the BRA specifically,¹⁹⁴ and the circuits have followed its lead.¹⁹⁵ Third, unlike in many cases, the BRA's legislative history

¹⁹⁰ See *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (beginning the analysis of the burden of proof issue with a discussion of legislative history).

¹⁹¹ See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (noting that legislative history is useful primarily when meaning of statutory text is not plain); *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (supporting the use of legislative history when the text is unclear).

¹⁹² *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

¹⁹³ *Motamedi*, 767 F.2d at 1411 (Boochever, J., concurring in part and dissenting in part).

¹⁹⁴ See, e.g., *Salerno*, 481 U.S. at 747.

¹⁹⁵ See, e.g., *Orta*, 760 F.2d at 890 (evaluating the BRA's legislative history when construing the phrase "reasonably assure"); *United States v. Fortna*, 769 F.2d at 243, 251 (5th Cir. 1985) (considering the BRA's legislative history in interpreting the § 3142(e) presumptions of detention); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986) (relying on legislative history in applying § 3142(f)); *United States v. Dillard*, 214 F.3d 88, 95 (2d Cir. 2000) ("Because the meaning of the [BRA] on this point is open to dispute, we look for further guidance to legislative history.").

is not contradictory or murky, making it a useful interpretive aid.¹⁹⁶

The BRA's legislative history indicates that Congress intended both danger and flight risk to be assessed under a clear and convincing evidence standard. The primary House Report declares that flight risk should be subject to the same evidentiary standard as dangerousness: "[T]he burden of establishing that a defendant is dangerous [or] a flight risk is on the prosecution. This burden can be met only by the submission of clear and convincing evidence to the court."¹⁹⁷ The main Senate Report also expresses a clear intent to treat flight risk and danger equivalently: the "provisions of [S]ection 3142[] place[] the consideration of defendant dangerousness on an *equal footing* with the consideration of appearance."¹⁹⁸ The Report further establishes that "the danger a defendant may pose to others should receive at least as much consideration in the pretrial release determination as the likelihood that he will not appear for trial."¹⁹⁹

Although the Senate Report is silent as to the evidentiary standard for flight-risk determinations, it does express its purpose in applying a clear and convincing standard to dangerousness: "Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, . . . the facts on which the judicial officer bases a finding [of dangerousness] . . . must be supported by clear and convincing evidence."²⁰⁰ The

¹⁹⁶ Cf. *Allapattah*, 545 U.S. at 568 (criticizing the application of legislative history when it is "murky, ambiguous, and contradictory").

¹⁹⁷ H.R. REP. NO. 98-1121, at 27 (1984). The original quote from this Report says that "the burden of establishing that a defendant is dangerous *on* a flight risk is on the prosecution." *Id.* (emphasis added). Other scholarship has treated this as a typographical error. See Robert S. Natalini, Comment, *Preventive Detention and Presuming Dangerousness Under the Bail Reform Act of 1984*, 134 U. PA. L. REV. 225, 233 (1985) (correcting "on" to "or" when quoting this sentence from the legislative record). The phrase "dangerous on a flight risk" makes little practical sense and does not appear anywhere else in the Report. The paragraph is generally about how the 1984 BRA "not only codifies existing authority to detain persons who are serious flight risks . . . but also creates new authority to detain persons who pose especially serious dangers." H.R. REP. NO. 98-1121, at 27.

Further, no other piece of legislative history—nor any other case or article—uses the phrase "dangerous *on* a flight risk." But cases and scholarship do use the phrase "dangerous or a flight risk." See, e.g., *United States v. Hammond*, 44 F. Supp. 2d 743, 746 (D. Md. 1999); Timothy E. Eidle, "Goodbye *Guadalupe*": *United States v. Montalvo-Murillo and the Struggle to Construct a Remedy for an Untimely Pretrial Detention Hearing Under the Bail Reform Act of 1984*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 451, 475 (1991).

¹⁹⁸ S. REP. NO. 98-225, at 12 (emphasis added).

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 22.

Report further emphasizes “the importance of the defendant’s interest in remaining at liberty prior to trial.”²⁰¹ Even the Department of Justice recognized the constitutional justification for a clear and convincing evidence standard. As Deputy Attorney General James Knapp testified before the House Judiciary Committee, “[W]e require clear and convincing evidence [and] . . . something tangible in a particular case” given the difficulties in predicting a defendant’s future behavior.²⁰² Congress’s rationale for imposing a clear and convincing standard is based on a foundational constitutional protection of liberty, an interest that is not unique to the community safety context. This liberty interest—remaining free prior to trial—applies with equal force to defendants detained as flight risks.

B. Dangerousness: Congress’s Predominant Concern

The fact that the legislative history pertains almost entirely to dangerousness further suggests that the flight-risk standard was intended to be clear and convincing evidence. It would be illogical to conclude that Congress, which was concerned primarily with addressing the dangerousness of pretrial releasees, was satisfied with a clear and convincing evidence standard for danger but desired a constitutionally dubious standard for flight.

To understand why the legislative history primarily addresses the dangerousness provisions of the BRA, it is helpful to understand the statutory evolution of bail reform from 1966 to 1984. Under the 1966 BRA, judges were barred from considering community safety and defendants’ dangerousness when deciding whether to release someone on bail.²⁰³ Nevertheless, Congress passed a 1970 statute for Washington, D.C., allowing pretrial detention to secure community safety.²⁰⁴ The 1984 BRA built on the D.C. statute, radically altering the federal pretrial detention process by authorizing judges to consider defendants’ risk to the community.²⁰⁵ The 1984 BRA sought to address the “[c]onsiderable criticism [that] ha[d] been leveled at the Bail Reform Act [of 1966]

²⁰¹ *Id.* at 7.

²⁰² *Bail Reform Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on Judiciary*, 98th Cong. 233 (1984) (statement of James Knapp, Deputy Att’y Gen. of the United States); see also *Administration of Bail*, *supra* note 48, at 18 (noting Knapp’s comments).

²⁰³ S. REP. NO. 98-147, at 32 (1983).

²⁰⁴ D.C. CODE ANN. § 23-1322 (1970) (amended 2017).

²⁰⁵ See Maier, *supra* note 20, at 1433.

. . . because of its failure to recognize the problem of crimes committed by those on pretrial release.”²⁰⁶ In sum, the fact that the legislative history “pertains almost exclusively to the dangerousness provisions . . . is unsurprising since the dangerousness provisions were a radical and controversial change in the law.”²⁰⁷

This statutory evolution explains the general sentiment pervading the legislative history that “[t]he question of whether dangerousness should be a sufficient justification for pretrial detention is the single most difficult bail issue.”²⁰⁸ The Senate Report, discussing the clear and convincing evidence standard for dangerousness, similarly clarifies that “[w]here there is a strong probability that a person will commit additional crimes if released, the need to protect the community becomes sufficiently compelling that detention is, on balance, appropriate.”²⁰⁹ As another Senate Report notes, the 1984 BRA was intended almost entirely to “address such problems as [] the need to consider community safety.”²¹⁰

The legislature’s overriding concern with community safety corroborates that the clear and convincing evidence standard was also intended to govern flight-risk determinations. Congress, despite a near exclusive concern with community safety, nevertheless imposed on the prosecution an elevated standard to prove that a defendant is sufficiently dangerous to warrant pretrial detention. It is highly improbable that Congress would have intended a less stringent standard where the government interest was less significant than community safety—especially because the liberty interests recognized by Congress apply equally to defendants detained as flight risks. The legislative history inarguably shows that Congress viewed community safety as the most important goal of the 1984 BRA. The legislative history at no point suggests that flight risk was a weightier interest that demanded a lower burden of proof to protect it.

The fact that Congress was predominantly concerned with danger undermines the conclusion reached by several circuits that the BRA’s omission of a flight-risk standard was deliberate. There are several reasons not to give such undue weight to the

²⁰⁶ S. REP. NO. 98-225, at 5.

²⁰⁷ *Motamedi*, 767 F.2d at 1411 (Boochever, J., concurring in part and dissenting in part).

²⁰⁸ H.R. REP. NO. 98-1121, at 11.

²⁰⁹ S. REP. NO. 98-225, at 7.

²¹⁰ S. REP. NO. 98-147, at 1.

BRA's silence here. First, it is entirely plausible that Congress overlooked this or failed to correct its imprecise drafting. Pretrial detainees are a paradigmatic example of a group underrepresented in the political process and thus unable to effectively advocate for their interests. Criminal defendants are "politically unpopular," "usually poor, disproportionately ethnic minorities," and "a small and scattered portion of the population, which makes it hard for them to be an effective interest group."²¹¹ This political imbalance makes it unlikely that "errors and accidents of drafting are caught and corrected."²¹² Even if someone recognized that the statute failed to specify an evidentiary standard for flight risk, someone had to "care enough about the problem to spend political capital fixing it[] and have political capital to spend."²¹³ The text and structure of the BRA itself suggests that Congress was imprecise when drafting its provisions.²¹⁴ It is therefore plausible—if not likely—that the failure to prescribe a flight-risk standard was an oversight rather than the result of rigorous contemplation, especially given Congress's narrow focus on dangerousness in drafting the BRA.

Second, even if Congress's silence was deliberate, one could plausibly infer given the statutory evolution from the 1966 BRA to the 1984 BRA that Congress applied an explicit clear and convincing evidence standard to dangerousness for emphasis rather than to differentiate flight risk from dangerousness.²¹⁵ Congress may have feared that, in the absence of an explicit standard, courts would assume that the overwhelming emphasis on community safety implied a lower evidentiary threshold.

In addition, the legislature would not have intended to provide a loophole for courts and prosecutors to circumvent the

²¹¹ Joshua Kleinfeld, *Textual Rules in Criminal Statutes*, 88 U. CHI. L. REV. 1791, 1800–01 (2021).

²¹² *Id.* at 1800.

²¹³ *Id.* at 1802.

²¹⁴ As Professors Alison Siegler and Erica Zunkel have articulated, the BRA is "badly organized, difficult to follow, and does not proceed in a logical order. . . . [T]he relevant provision comes in the middle of the statute—in subsection (f)—rather than towards the beginning." Siegler, *supra* note 48, at 9. Moreover, "one part of § 3142(f) discusses the legal standard for the Initial Appearance hearing, while another part lists the standards and procedures for the Detention Hearing." *Id.*

²¹⁵ See *Motamedi*, 767 F.2d at 1411 (Boochever, J., concurring in part and dissenting in part) ("Another possible inference, however, is that the two standards are the same but that Congress believed it necessary to state explicitly the standard for the new dangerousness provision, because the clear and convincing evidence standard for the flight risk determination would carry over from prior law.").

heightened standard for proving dangerousness by allowing judges to detain defendants as flight risks. Evidence of dangerousness and evidence of flight risk often overlap. In fact, the BRA instructs judges to consider identical factors in both the dangerousness and flight-risk evaluations.²¹⁶ Consequently, the preponderance standard for flight can (and does) render ineffective the clear and convincing evidence safeguard applied to allegedly dangerous defendants. Even if evidence of dangerousness is insufficient to surpass the clear and convincing evidence threshold, that same evidence may be enough to satisfy the preponderance standard for flight risk. That allows judges to circumvent an important procedural safeguard, especially because “judges can be expected to take advantage of loopholes in pretrial procedures. . . . [J]udges and prosecutors retain the incentive to be too cautious releasing people pretrial because some released people will commit new crimes.”²¹⁷ Congress’s overriding concern with dangerousness in enacting the 1984 BRA shows that Congress did not intend a preponderance standard for flight risk. Congress protected its central goal—community safety—under a clear and convincing evidence standard. It is illogical to infer that Congress would have authorized a standard more likely to impinge on defendants’ strong liberty interests without an even weightier countervailing governmental interest.

C. The Pre-1984 Pretrial Detention Standard

According to some courts, Congress’s silence pertaining to the flight-risk burden of proof evinces an intent to apply the standard that governs other pretrial proceedings: a preponderance of the evidence.²¹⁸ This position overlooks the most relevant Supreme Court precedent and misreads the pre-1984 standard.

For one, the Supreme Court—in the year preceding the enactment of the 1984 BRA—announced, “[W]e have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake.”²¹⁹ As discussed in Part II.A, the Court recognized that restraints on physical liberty, such as involuntary commitment proceedings and deportation cases, fall into this category.²²⁰ The precedential backdrop against

²¹⁶ See 18 U.S.C. § 3142(g).

²¹⁷ Note, *supra* note 137, at 1140.

²¹⁸ See, e.g., *Motamedi*, 767 F.2d at 1407; *Orta*, 760 F.2d at 891 n.20.

²¹⁹ *Herman & MacLean*, 459 U.S. at 389.

²²⁰ See *id.* (collecting cases).

which the BRA was drafted thus shows that a clear and convincing evidence standard was required in cases where physical liberty was at stake.

Second, although no cases directly address the requisite evidentiary standard for detention based on flight under the 1966 BRA, a close analysis of cases between 1966 and 1984 shows that courts were applying a more stringent standard than a preponderance of the evidence. The First Circuit, for example, explained, "Only in the rarest of circumstances can bail be denied altogether."²²¹ The court applied that principle in *United States v. Abrahams*.²²² There, the defendant was "an escaped felon" who "did not hesitate to flee to Florida and forfeit \$100,000 to avoid the removal hearing."²²³ This overwhelming evidence of flight led the First Circuit to conclude that "[t]his is the rare case of extreme and unusual circumstances that justifies pretrial detention without bail."²²⁴ The Second Circuit similarly recognized that pretrial bail was required in all but "extreme and unusual circumstances."²²⁵ In *United States v. Leisure*,²²⁶ the Eighth Circuit took a parallel approach. The court reversed an order denying bail despite the "very serious and extremely violent crimes" allegedly committed by the defendants.²²⁷ The Court held that "[d]enial of pretrial [release] . . . must [] be limited to the exceptional case."²²⁸ In the related context of bail pending appeal, the Supreme Court construed § 3148 of the 1966 BRA to require "substantial evidence" that an appellant is a flight risk to order detention.²²⁹ The Sixth Circuit extended that standard to pretrial detention in *United States v. Graewe*,²³⁰ where it held that there must be "substantial evidence" to deny pretrial bail.²³¹

Finally, the reliance on the preponderance standard for other pretrial proceedings is inapposite to pretrial detention; these other proceedings "concern the admissibility of evidence at trial,

²²¹ *United States v. Schiavo*, 587 F.2d 532, 533 (1st Cir. 1978) (per curiam) (citation omitted).

²²² 575 F.2d 3 (1st Cir. 1978).

²²³ *Id.* at 8.

²²⁴ *Id.*

²²⁵ *Gavino v. MacMahon*, 499 F.2d 1191, 1195 (2d Cir. 1974).

²²⁶ 710 F.2d 422 (8th Cir. 1983).

²²⁷ *Id.* at 426.

²²⁸ *Id.*

²²⁹ *Harris v. United States*, 404 U.S. 1232, 1235–36 (1971).

²³⁰ 689 F.2d 54 (6th Cir. 1982).

²³¹ *Id.* at 58.

not an immediate deprivation of the defendant's liberty."²³² Although the admissibility of evidence may later influence the disposition of a criminal case, these pretrial proceedings are attenuated from the ultimate deprivation of liberty—unlike detention hearings. Consequently, it is likely that the 1966 BRA required a more stringent standard than a preponderance for pretrial detention.

D. The Relationship and Differences Between Pretrial and Post-Conviction Detention

Several courts established a preponderance standard for proving pretrial flight in part because in an adjacent statutory provision (§ 3143(a), governing post-conviction bail pending sentencing or appeal), "Congress expressly required the defendant to negate both danger to the community and flight risk by clear and convincing evidence."²³³ A closer examination of the BRA's legislative history and statutory evolution exposes the infirmity of this argument.

First, pretrial and post-conviction detention implicate separate constitutional and societal interests. The general presumption of pretrial release under § 3142 is inverted in the post-conviction context under § 3143. That is, the BRA's pretrial detention provisions create a "presumption of release for most offenses."²³⁴ But in the post-conviction context, a defendant "shall" be detained "*unless* the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger."²³⁵ This difference is explained by Congress's expressed constitutional concerns with detaining a presumptively innocent person prior to trial—concerns that are no longer relevant once a defendant has been convicted.²³⁶

Second, the statutory history of the BRA undermines the notion that Congress intended to treat flight risk differently in the pretrial and post-conviction contexts. Congress relied closely on

²³² *Motamedi*, 767 F.2d at 1410 (Boochever, J., concurring in part and dissenting in part) (citing *United States v. Matlock*, 415 U.S. 164, 177–78 (1974); *Lego v. Twomey*, 404 U.S. 477, 488–89 (1972)). *Matlock* concerned the voluntariness of a consent search as it relates to the admissibility of evidence. 415 U.S. at 177. *Lego* similarly applied a preponderance standard to the admissibility of a potentially coerced confession. 404 U.S. at 489.

²³³ *Motamedi*, 767 F.2d at 1406; *see also* *United States v. Vortis*, 785 F.2d 327, 328 (D.C. Cir. 1986); 18 U.S.C. § 3143(a).

²³⁴ *Siegler & Zunkel*, *supra* note 6, at 50.

²³⁵ 18 U.S.C. § 3143(a)(1) (emphasis added).

²³⁶ S. REP. NO. 98-225, at 7, 22.

the 1966 BRA in drafting the 1984 provisions on *post-conviction* release, but it significantly departed from the 1966 *pretrial* framework when drafting the 1984 provisions by adding a new consideration—dangerousness.

The pretrial provisions of the 1966 BRA did not allow a consideration of dangerousness. Congress fundamentally altered the purpose of pretrial detention when drafting the pretrial provisions of the 1984 BRA by adding dangerousness as an entirely new consideration. But in the post-conviction provisions, the 1966 BRA allowed judges to consider *both* “risk of flight [and] danger.”²³⁷ In amending the post-conviction provisions in the 1984 BRA, Congress relied primarily on the preexisting statutory framework without adding to, or subtracting from, the relevant considerations—flight risk and dangerousness. Congress, in enacting the 1984 BRA, may not have meaningfully contemplated the difference between § 3142(f) (pretrial) and § 3143(a) (post-conviction), because the language in § 3143(a) considering both flight risk and dangerousness was already present in the 1966 statute. Congress devoted all of its attention to whether and how the 1984 BRA should address pretrial dangerousness.

Third, the legislative history shows that the underlying justifications authorizing pretrial and post-conviction detention are different. As the Senate Report explains, the justifications for pretrial detention are not based on the common punitive theories of deterrence or retribution.²³⁸ Conversely, deterrence *does* animate the BRA’s presumption of detention in the post-conviction context.²³⁹ Courts drew inferences from the textual differences between the pretrial and post-conviction provisions of the BRA—but they compared apples to oranges. Congress recognized that pretrial and posttrial detention serve different purposes, which blunts the inferences that can be drawn from the textual differences between § 3142(f) and § 3143(a).

The fact that the BRA sets a clear and convincing evidence standard for *post-conviction* flight risk does not mean that Congress intended a preponderance standard for *pretrial* flight risk. The differences in language may be attributable to substantive differences in the operation and underlying justifications of

²³⁷ Bail Reform Act of 1966 § 3148.

²³⁸ S. REP. NO. 98-225, at 8 (“[P]retrial detention is not intended to promote the traditional aims of punishment such as retribution or deterrence.”).

²³⁹ *Id.* at 26 (“[R]elease of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law.”).

each provision rather than to congressional intent to create different evidentiary standards.

E. Constitutional Avoidance

The BRA's legislative history and statutory evolution, as well as its overall context, demonstrate that the appropriate flight-risk standard is clear and convincing evidence. But even so, the foregoing interpretive analysis and conclusion are not required to fully justify that conclusion. An elevated standard is at least a plausible interpretation of the statute, and it avoids the constitutional criticisms raised in Part II.

1. Constitutional avoidance is especially applicable to the BRA.

The core premise of the constitutional avoidance canon is that courts should interpret statutes, when possible, to avoid alternative interpretations that would raise serious constitutional concerns. In the words of Professor Adrian Vermeule, "Avoidance is perhaps the preeminent canon of federal statutory construction; its pedigree is so venerable that the Supreme Court invoked a version of it even before *Marbury v. Madison*."²⁴⁰ The Supreme Court has expressed that it is "*obligated* to construe [a] statute to avoid [constitutional] problems"²⁴¹ and that avoidance is a "cardinal principle" of statutory interpretation.²⁴²

The canon has been defended on several grounds, including as a proxy for legislative intent.²⁴³ Some scholars and judges have also theorized that the avoidance canon "rests [] upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature."²⁴⁴ Both justifications have particular relevance to pretrial detention. The "reasonable presumption that Congress did not intend the alternative [interpretation] which raises serious constitutional doubts"²⁴⁵ is even stronger in the context of the BRA because the statute's legislative history indicates that Congress

²⁴⁰ Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997).

²⁴¹ *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (emphasis added).

²⁴² *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

²⁴³ See *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

²⁴⁴ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 249 (2012).

²⁴⁵ *Clark*, 543 U.S. at 381.

was highly attentive to the constitutional issues raised by pretrial detention.²⁴⁶ Applying the avoidance canon gives effect to Congress's espoused intent that the BRA "be construed as limited by the constitutional provisions."²⁴⁷ In contrast, failing to apply the avoidance canon may precipitate future conflicts between the judiciary and Congress—conflicts that Congress specifically intended to avert by thoroughly considering relevant constitutional issues in advance.

2. An alternative interpretation need only be plausible to trigger avoidance.

The avoidance canon instructs that if there are two conceivable interpretations of a statute and one would raise serious doubts as to its constitutionality, the court should adopt the other.²⁴⁸ In cases involving a serious constitutional doubt, courts are more willing than usual to depart from the most straightforward reading of the text. Indeed, courts have embraced alternative readings so long as they are "fairly possible"²⁴⁹ or "*plausible*."²⁵⁰ As Justice Antonin Scalia opined, "our cases have been careful to note[that] the narrowing construction must be 'fairly possible,' 'reasonable,' or not 'plainly contrary to the intent of Congress.'"²⁵¹ The Court has been willing to "bend over backwards" to adopt even strained interpretations that avoid constitutional doubts.²⁵²

In *Bond v. United States*,²⁵³ for example, the Court interpreted the Chemical Weapons Convention Implementation Act of 1998,²⁵⁴ which prohibits the knowing possession or use of "any

²⁴⁶ See S. REP. NO. 98-225, at 8–10.

²⁴⁷ *Motamedi*, 767 F.2d at 1412 (Boochever, J., concurring in part and dissenting in part) (citing S. REP. NO. 98-225, at 2–11).

²⁴⁸ See *Clark*, 543 U.S. at 380–81. Although some scholars have attempted to taxonomize constitutional avoidance decisions as strong avoidance and weak avoidance, "[t]he Supreme Court uses both of these types of avoidance, [and] it has not yet formally distinguished them." Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1285–86 (2016).

²⁴⁹ *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (quoting *Jennings*, 138 S. Ct. at 842).

²⁵⁰ *Jennings*, 138 S. Ct. at 843 (emphasis in original) (quoting *Clark*, 543 U.S. at 381).

²⁵¹ *Skilling v. United States*, 561 U.S. 358, 423 (2010) (Scalia, J., concurring) (first quoting *Boos v. Barry*, 485 U.S. 312, 331 (1988); then quoting *Hooper v. California*, 155 U.S. 648, 657 (1895); and then quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

²⁵² Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 525 (2018).

²⁵³ 572 U.S. 844 (2014).

²⁵⁴ Pub. L. No. 105-277, 112 Stat. 2681 (codified at 18 U.S.C. § 229).

chemical weapon.”²⁵⁵ The statute defines chemical weapon to include devices designed “to cause death or other harm through toxic properties of [] toxic chemicals.”²⁵⁶ Under the Act, “toxic chemicals” encompasses “any chemical which . . . can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production.”²⁵⁷ Carol Bond, having discovered her husband’s extramarital affair with her closest friend, spread toxic chemicals over surfaces that her friend was likely to touch.²⁵⁸ Bond was convicted under the Act for possessing and using a chemical weapon.²⁵⁹

On first impression, it might appear that the statute clearly applied to Bond—she possessed a toxic chemical for the purpose of causing harm to another. But Bond argued that the Act “exceeded Congress’s enumerated powers and invaded powers reserved to the States by the Tenth Amendment.”²⁶⁰ Despite the clarity of the statute, the Court—applying the avoidance canon—construed the Act to avoid reaching purely local conduct: “But even with its broadly worded definitions, we have doubts that a treaty about *chemical weapons* has anything to do with Bond’s conduct.”²⁶¹

The willingness of courts to adopt even strained interpretations of statutes in the presence of serious constitutional questions is the result of the “high stakes” involved in a constitutional ruling.²⁶² In such cases, “courts have a high threshold for what counts as ‘clear.’”²⁶³ As a consequence, “courts require a great deal of epistemological justification before acting on the premise that a statute means *X* where reading the statute to mean *X* would raise serious constitutional concerns.”²⁶⁴

²⁵⁵ 18 U.S.C. § 229(a)(1).

²⁵⁶ 18 U.S.C. § 229F(1)(B).

²⁵⁷ 18 U.S.C. § 229F(8)(A).

²⁵⁸ *See Bond*, 572 U.S. at 852.

²⁵⁹ *See id.* at 853.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 856 (emphasis in original).

²⁶² Doerfler, *supra* note 252, at 552 (“[C]ourts agree that cases involving constitutional challenges are unambiguously high stakes.”).

²⁶³ *Id.* at 568–69.

²⁶⁴ *Id.* at 529; *see also id.* (“Readings that would otherwise be reasonably regarded as ‘tortured’ thus become epistemologically available owing to the heightened practical stakes.”).

3. Under the avoidance canon, the BRA must be interpreted as requiring a clear and convincing evidence standard for flight risk.

The preponderance standard for flight risk raises serious constitutional doubts by “plac[ing] in issue substantial eighth and fifth amendment questions.”²⁶⁵ The current flight-risk standard is likely constitutionally defective, especially given the justifications for a clear and convincing evidence standard relied on in the civil commitment line of cases.²⁶⁶ In those cases, the Supreme Court unambiguously reached the constitutional question by ruling expressly on the Due Process Clause, demonstrating the gravity of the constitutional issues here. Even to the extent that pretrial detention is distinguishable from civil commitment, the issues are similar enough to demonstrate that there is at least a serious constitutional doubt as to the permissibility of the pretrial preponderance standard. Given the clarity with which the Court has found the preponderance standard to be constitutionally infirm in similar instances of nonpunitive detention, the preponderance standard for flight risk creates serious constitutional doubt, regardless of whether avoidance can “be triggered by any constitutional doubt . . . or only by very grave doubts.”²⁶⁷

A construction of the BRA that avoids the constitutional issue—a clear and convincing evidence standard—is “fairly possible.”²⁶⁸ The BRA is entirely silent regarding the flight-risk standard, so a clear and convincing evidence standard would not contradict the statutory text. The strongest interpretive argument against the clear and convincing evidence standard—that Congress must have intended a different standard to apply to flight risk because § 3143(a) applies a clear and convincing evidence standard to *both* danger and nonappearance—is based on a weak assumption about congressional intent. Other sources indicate that Congress intended the narrower construction. As such, even if the clear and convincing evidence standard is not the most obvious interpretation, it is at the very least plausible, which is all that constitutional avoidance requires.

²⁶⁵ *Motamedi*, 767 F.2d at 1409 (Boochever, J., concurring in part and dissenting in part).

²⁶⁶ See *supra* Part II.A.

²⁶⁷ Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2117 (2015).

²⁶⁸ *Preap*, 139 S. Ct. at 971 (quoting *Jennings*, 138 S. Ct. at 842).

The alternative interpretation is not only fairly possible, but perhaps even the more accurate interpretation.²⁶⁹ But even if a preponderance standard is more faithful to the statute's text, the clear and convincing evidence standard should be adopted pursuant to the avoidance canon. As Judge Boochever surmised, "A close question of statutory construction would be presented if constitutional considerations were ignored. The balance, however, even in that narrow context, favors use of a clear and convincing evidence standard."²⁷⁰

In sum, the constitutional doubt raised by the application of *Mathews* can—and must—be avoided by a plausible construction of the statute requiring a clear and convincing evidence standard for flight risk.

CONCLUSION

When the circuits adopted the preponderance standard, pretrial detention was a relatively limited exception to the norm of pretrial liberty. Given the due process protections contained in the BRA, as well as Congress's myopic focus on dangerousness, it is easy to understand the nonchalance with which courts concocted the evidentiary threshold for flight risk.

In the years since the enactment of the BRA and the judicial creation of a preponderance standard, however, pretrial detention has transformed from the "carefully limited exception"²⁷¹ to the norm. The "exception has now swallowed the rule," as more than three-fourths of federal defendants are jailed before a determination of guilt.²⁷² Not only is pretrial detention a serious intrusion on one's physical liberty but it also directly impacts the likelihood of a guilty plea or conviction and the possibility of a longer sentence.²⁷³

The current state of pretrial detention warrants increased attention to the conditions that make this crisis possible, including the misguided creation of a preponderance standard for flight risk. The extant standard is both unconstitutional and interpretively erroneous. Due process, in this instance, requires a standard more stringent than a preponderance, and the courts'

²⁶⁹ See *supra* Part III.A–D.

²⁷⁰ *Motamedi*, 767 F.2d at 1409 (Boochever, J., concurring in part and dissenting in part).

²⁷¹ *Salerno*, 481 U.S. at 755.

²⁷² Siegler & Harris, *supra* note 7.

²⁷³ See Didwania, *supra* note 5, at 1264.

haphazard attempts to discern congressional intent misconstrue or elide evidence that Congress likely intended a clear and convincing evidence standard for flight risk. And even if these constitutional and interpretive arguments are not insuperable, statutory ambiguity and constitutional doubt compel application of the avoidance canon, independently requiring a clear and convincing evidence standard for flight risk.

The establishment of the preponderance standard for flight risk was wrong in 1985, and it remains wrong today. It is time to reconsider that standard. Only a clear and convincing evidence threshold vindicates the statutory and due process rights to which presumptively innocent individuals are entitled.