No. _____

IN THE

Supreme Court of the United States

COUNTY OF MARICOPA; JOSEPH M. ARPAIO, Maricopa County Sheriff; WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioners,

v.

ANGEL LOPEZ-VALENZUELA; ISAAC CASTRO-ARMENTA,

Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Salerno*, 481 U.S. 739 (1987), this Court upheld provisions of the federal Bail Reform Act of 1984 denying bail to those charged with serious felonies, noting that the fact the Act required individualized assessments of likelihood to appear and/or not commit additional crimes was "sufficient" to overcome a Due Process challenge. Sixteen years later, in *Demore v. Kim*, 538 U.S. 510 (2003), this Court upheld a statute denying bail to whole categories of criminal illegal aliens facing removal proceedings, holding that individualized assessments were not required.

In 2006, Arizona voters overwhelmingly approved a constitutional amendment, Proposition 100, rendering ineligible for bail individuals who are charged with one of the four most serious categories of felonies, and for whom there is both probable cause that the person is illegally present in the United States and evident proof of guilt of the felony charged.

The Ninth Circuit in this case held that Proposition 100 is facially unconstitutional, holding that *Salerno* allowed denial of bail is permissible "only" after an individualized assessment. The Ninth Circuit also rejected Arizona's assertion of heightened flight risk for the select category of offenders for whom Proposition 100 denies bail because there was no empirical evidence in the record to support Arizona's claim. The issues presented are:

1. Did the Ninth Circuit err in holding, contrary to this Court's decision in *Demore,* that under *Salerno* a denial of bail is permissible "only" after individualized assessments of flight risk or future

dangerousness, thereby barring categorical denials of bail such as Arizona's Proposition 100 and calling into question categorical bans on bail in non-capital cases that exist in seventeen other states (and perhaps even calling into question categorical bans on bail in capital cases that exist in an additional twenty-two states)?

2. When adopting a categorical ban on bail for illegal aliens charged with serious felonies, may a State rely on logical assumptions, testimonial evidence of front-line prosecutors, and other anecdotal evidence that is in conformity with the empirical evidence of heightened flight risk by those unlawfully present in this country contained in studies conducted elsewhere, similar to what this Court has approved in analogous contexts, *see City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51–52 (1986), or must the State conduct its own empirical analysis that is both jurisdiction- and category-specific in order to meet the requirements of Due Process?

3. Because among those categorically denied bail by Arizona's Proposition 100 are individuals charged with capital crimes, whom the Ninth Circuit recognized could categorically be denied bail, did the Ninth Circuit err in holding that Proposition 100 was *facially* unconstitutional, contrary to *Salerno*'s requirement that a statute is facially invalid only if "no set of circumstances exists under which the Act would be valid"?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, County of Maricopa, Maricopa County Sheriff Joseph M. Arpaio, and Maricopa County Attorney William G. Montgomery, respectfully petition for a writ of certiorari to review the judgment the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals is reported at 770 F.3d 772 and reprinted in the Appendix ("Pet.App.") at 1a-76a. The panel opinion of the court of appeals is reported at 719 F.3d 1054 and reprinted at Pet.App. 77a-128a. The order of the district court granting defendants' motion for summary judgment is unpublished but reprinted at Pet.App. 129a-151a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals, en banc, was entered on October 15, 2014. Pet.App. 1a. This Court has jurisdiction under 28 U.S.C. §§ 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1

No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Ariz. Const. art. II, § 22(A)(4)

A. All persons charged with crime shall be bailable by sufficient sureties, except:

* * *

4. For serious felony offenses as prescribed by the legislature if the person charged has entered or

remained in the United States illegally and if the proof is evident or the presumption great as to the present charge.

A.R.S. § 13-3961(A)(5)

A. A person who is in custody shall not be admitted to bail if the proof is evident or the presumption great that the person is guilty of the offense charged and the offense charged is one of the following:

* * *

5. A serious felony offense if there is probable cause to believe that the person has entered or remained in the United States illegally.

For the purposes of this paragraph:

(a) The court shall consider all of the following in making a determination that a person has entered or remained in the United States illegally:

(i) Whether a hold has been placed on the arrested person by the United States immigration and customs enforcement.

(ii) Any indication by a law enforcement agency that the person is in the United States illegally.

(iii) Whether an admission by the arrested person has been obtained by the court or a law enforcement agency that the person has entered or remained in the United States illegally.

(iv) Any information received from a law enforcement agency pursuant to § 13-3906.

(v) Any evidence that the person has recently entered or remained in the United States illegally.

(vi) Any other relevant information that is obtained by the court or that is presented to the court by a party or any other person.

(b) "Serious felony offense" means any class 1, 2, 3 or 4 felony or any violation of § 28-1383.

STATEMENT OF THE CASE

Eight years ago, the people of Arizona, by referendum, overwhelmingly approved Proposition 100 by a 78% majority vote. That measure, now codified at Ariz. Const. art. II, § 22, and Ariz. Rev. Stat. ("A.R.S.") § 13-3961(A)(5), denies bail to individuals charged with serious felonies where "the proof is evident or the presumption great that the person is guilty of the offense charged" and "there is probable cause to believe that the person has entered or remained in the United States illegally."

Shortly after the law was adopted, the Arizona Court of Appeals upheld it against federal Due Process and Equal Protection facial challenges, relying *inter alia* on the reasonable determination accepted by this Court in *Demore v. Kim*, 538 U.S. 510, 528 (2003), that aliens subject to deportation pose a flight risk and consequently may be subjected to pretrial detention. *Hernandez v. Lynch*, 167 P.3d 1264, 1271-72 (Ariz. Ct. App. 2007). The Arizona Supreme Court denied discretionary review of that decision in April 2008, and until the Ninth Circuit's en banc decision below, Arizona had been operating its bail system pursuant to Proposition 100's restrictions on bail ever since.

Respondent Angel Lopez-Valenzuela was arrested and charged with the crime of dangerous drug transportation and/or offer to sell, a Class 2 felony under Arizona criminal law. A.R.S. § 13-3407(A)(7). Pet.App. 81a-82a. Respondent Isaac Castro-Armenta was arrested and charged with Class 2, 3, and 4 felonies including aggravated assault with a deadly weapon, kidnaping, and assisting a criminal syndicate. Pet.App. 82a. At their respective initial appearances, a court commissioner found probable cause that each was unlawfully present in the United States and that the proof was evident or the presumption great that each was guilty of the felony crimes with which they were charged. Accordingly, each was denied bail pursuant to Proposition 100.

Neither Respondent requested a hearing to challenge the probable cause or evident proof of guilt determinations, as they were entitled to do under Arizona Rule of Criminal Procedure 7.4(b). Instead, they brought this combined class action complaint and habeas corpus action in federal court, challenging the constitutionality of Proposition 100.

The U.S. District Court for the District of Arizona and a panel of the U.S. Court of Appeals for the Ninth Circuit agreed with the prior decision of the Arizona Court of Appeals and upheld the law against Respondents' constitutional challenges. The District Court held that Proposition 100 was neither punitive in purpose nor "excessive in relation to the government's legitimate interest in controlling flight risk of people accused of certain felonies" because "[t]he Arizona legislature and Arizona voters made the *logical assumption* that a person who is unlawfully present in the United States may not appear for trial.

Pet.App. 142a (emphasis added). Applying the analysis set out by this Court in *Salerno*, the district court specifically found that although "Proposition 100 reaches a larger number of crimes than the Act" at issue in *Salerno*, "given the goal of targeting *flight* risk, not dangerousness, it is not excessive." Pet.App. 143a. It also expressly found "that Arizona's Proposition 100, like the Act [at issue in *Salerno*], 'focuses on a particularly acute problem in which the [g]overnment interests are overwhelming.'" *Id.* (quoting *Salerno*, 481 U.S., at 750).

The original Ninth Circuit panel conducted a de novo review of the record, and likewise determined that "neither the legislative history nor the voter materials and media coverage would support the argument that Proposition 100 was motivated by a punitive rather than a regulatory purpose." Pet.App. 83a, 88a. It also found Proposition 100 to be "nothing more than an extension of Arizona's existing pretrial detention scheme to include defendants the state believes present a significant flight risk, thus 'narrowly focus[ing] on a particularly acute problem in which the Government interests are overwhelming.'" Pet.App. 92a (quoting *Salerno,* 481 U.S. at 750).

Nevertheless, a limited en banc panel of the Ninth Circuit reversed, holding over strong dissents by Circuit Judges Tallman and O'Scannlain that the law was unconstitutional, in part because the "record contains no findings, studies, statistics or other evidence (whether or not part of the legislative record) showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents." Pet.App. 21a. Although the en banc panel saw "no reason to

revisit" the district court's conclusion that Proposition 100 was not motivated by an improper punitive purpose, Pet.App. 35a, and "[did] not question that Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial," Pet.App. 18a, it held that Proposition 100 was not "carefully limited," as it believed *Salerno* requires, *id.* In the en banc panel's view, this Court upheld the pretrial denial of bail authorized by the Bail Reform Act "only" because 1) Congress sought to address a "'particularly acute problem'"; 2) the Act applied only to "'a specific category of extremely serious offenses'"; and 3) "the Act required a 'full-blown adversary hearing'" to determine whether there were no conditions of release that could reasonably assure the safety of the community." Pet.App. 19a (quoting *Salerno*, 481 U.S., at 750).

The en banc panel rejected the District Court's finding that Proposition 100 *did* address a "particularly acute problem." *Id.* at 19a-22a. It also held that even if "a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny," Proposition 100 was unconstitutional because it was not "carefully limited" and did not provide for an "individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk." Pet.App. 23a, 25a, 32a. Finally, the en banc panel held that Proposition 100 was "facially unconstitutional." Pet.App. 32a. Although it acknowledged that persons "could be detained consistent with due process under a different categorical statute," it nevertheless held that "the *entire statute* fails [*Salerno's*] decision rule and would thus be invalid in all of its

applications." *Id.* (quoting Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301, 331 (2012) (emphasis added by en banc panel). In dissent, Judge Tallman, joined by Judge O'Scannlain, disputed the en banc panel majority's reading of *Salerno*, its holding that *Salerno* applied strict scrutiny, and its rejection of this *Court*'s holding in *Demore* upholding categorical denials of bail in immigration removal hearings. Pet.App. 54a-57a, 63a. Judge Tallman also disagreed with the majority's application of even the misinterpreted *Salerno*, noting that Proposition 100 is "carefully limited," and that the majority could conclude that "unmanageable flight risk by undocumented immigrants . . . has not been shown to exist" only "by ignoring all evidence to the contrary." *Id.*, at 58a.

Judge O'Scannlain also dissented separately to take issue with the majority's consideration of the claims under substantive due process rather than the explicit constitutional provision dealing with excessive bail, the Eighth Amendment, as required by this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989). Pet.App. 66a-67a. Although he acknowledged that *Salerno* addressed whether the Due Process Clause barred a denial of bail based on future dangerousness or punitive purposes, he noted that "[b]oth claims were grounded in the Court's substantive due process precedents," whereas the claim here, "whether the Proposition 100 bail laws are constitutionally 'excessive' based on flight risk," is a claim implicated by the Eighth Amendment (though, in his view, the Eighth Amendment "does not . . . restrict *legislative* [as opposed to judicial] discretion to declare

certain crimes nonbailable." Pet.App. 68a-69a, 75a (emphasis added).

The Ninth Circuit en banc panel subsequently denied Maricopa County's request for a stay and a remand to introduce more evidence on the issue of increased flight risk than the lower courts had believed necessary. Order Denying Motion for Stay, at 1; *see also* Pet.App. 92a (panel majority noting that "[t]here is no requirement that a legislature support an intuitive proposition borne out by anecdotal evidence with statistical studies").

An application for a stay pending review on certiorari was temporarily granted on November 7, 2014, by Justice Kennedy as Circuit Justice, then denied by this Court on November 13, 2014, with a statement from Justice Thomas, joined by Justice Scalia, urging this Court to afford to the States the same "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding" state laws unconstitutional that it gives to decisions of lower courts "holding federal statutes unconstitutional." *Maricopa Cnty., Ariz. v. Lopez-Valenzuela*, 135 S. Ct. 428 (2014) (Thomas, J., statement respecting denial of stay) (citing, *e.g.*, *United States v. Bajakajian*, 524 U. S. 321, 327 (1998)).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Is Contrary to This Court's Precedent.

A. The Ninth Circuit misread *United States v. Salerno* and its decision is inconsistent with *Demore v. Kim.*

The Ninth Circuit en banc panel held that, under this Court's decision in *United States v. Salerno*, 481 U.S. 739, 746-48 (1987), an individualized hearing to determine either flight risk is all but required before bail can be denied prior to trial for non-capital offenses. *See* Pet.App. 19a, 24a. It also held that the right not to be subjected to pre-trial detention is a fundamental liberty interest subject to heightened scrutiny. *Id.* at 15a. Those holdings misread *Salerno* and are incompatible with this Court's subsequent decision in *Demore v. Kim*, 538 U.S. 510 (2003).

First, as the dissent below pointed out, Pet.App. 55a, *Salerno* did not recognize a fundamental liberty interest in pre-trial bail. *Salerno* described the asserted right much more narrowly: "it was the right to bail *after* 'the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community,'" Pet.App. 55a (quoting *Salerno*, 481 U.S., at 751). Avoiding such a threat was deemed by the *Salerno* Court to be "sufficiently weighty" to warrant "subordinat[ing the arrestee's liberty interest] to the greater needs of society." *Salerno*, 481 U.S., at 751. "As to *that* right, the Court said: 'we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Pet.App. 55a (quoting *Salerno*, 481 U.S, at 751).

Second, *Salerno* held that the "extensive safeguards" required by the federal Bail Reform Act's individualized hearing process "*suffice[d]* to repel a facial challenge," 481 U.S., at 752 (emphasis added), but contrary to the en banc panel's interpretation, it did not hold that those safeguards were *required*. Indeed,

the Court specifically noted that the procedural safeguards specified in the Bail Reform Act were "more exacting than those [the Court] found sufficient in the juvenile context," *id*. (citing *Schall v. Martin*, 467 U.S. 253, 275-81 (1984)), and that "they far exceed what [the Court] found necessary to effect limited postarrest detention in *Gerstein v. Pugh*," *id.* (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)). In other words, *Salerno* specifically recognized that the procedures set out in the Bail Reform Act were sufficient, but not necessary, for the Act's pre-trial detention requirement to survive a facial constitutional challenge. It did not foreclose the possibility that a denial of bail for certain categories of crimes[1] and certain categories

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[1] Because *Salerno* noted that the provisions of the Bail Reform Act allowing for pre-trial denial of bail were "carefully limit[ed] . . . to the most serious of crimes," the Ninth Circuit purported to distinguish *Salerno*'s approval of pre-trial detention on the ground that Arizona's Proposition 100 is not so limited, covering "not only serious offenses but also relatively minor ones, such as unlawful copying of a sound recording, altering a lottery ticket with intent to defraud, tampering with a computer with the intent to defraud and theft of property worth between $3,000 and $4,000." Pet.App. 23a. But in addition to serious crimes for which a capital sentence or life imprisonment were possible—things also covered by the Arizona law—the statute at issue in *Salerno* allowed for pretrial detention without bail for such minor crimes as transmitting a virus or unauthorized access causing damage to ten or more computers, 18 U.S.C. § 3142(f) (incorporating 18 U.S.C. § 2332b(g)(5)(B), in turn incorporating 18 U.S.C. § 1030(a)(5)), and importation of relatively small amounts of controlled substances under 21 U.S.C. § 951 *et seq.* It also permitted pre-trial detention of any person not lawfully admitted to the United States if "such person may flee or pose a danger to any other person or the community." 18 U.S.C. § 3142(d).

of high-flight-risk individuals where "the proof is evident or the presumption great that the person is guilty of the offense charged" and "there is probable cause to believe that the person has entered or remained in the United States illegally," such as Proposition 100 establishes, could also be constitutional.

This Court confronted the issue of categorical denials of bail in *Demore*, and expressly upheld the detention of deportable aliens prior to their removal proceedings without individualized hearings to assess flight risk. *Demore*, 538 U.S., at 513. In reaching that conclusion, this Court rejected the identical arguments accepted by the en banc panel below. Kim had argued that the federal law under which he was detained prior to his removal proceeding violated due process "because the INS had made no determination that he posed either a danger to society or a flight risk." *Id.*, 538 U.S., at 514; *compare* Pet.App. 19a, 24a. The *Demore* Court rejected that claim. It also rejected the holding of the court of appeals in that case, but accepted by the Ninth Circuit here, discounting the flight risk concern on the ground that "not all aliens detained . . . would ultimately be deported." *Demore*, 538 U.S., at 515; *compare* Pet.App. 23a, 24a ("even if *some* undocumented immigrants pose an unmanageable flight risk," many do not). And it reiterated its rejection of a claim unsuccessfully pressed in *Carlson v. Landon*, 342 U.S. 524, 543 (1952), that the categorical ban could not be applied on grounds of future dangerousness even to those for whom there was a specific finding of nondangerousness, concluding that a denial of bail in such circumstances "was permissible 'by reference to the legislative scheme . . . .'" *Demore*, 538 U.S., at 525.

The fact that the Ninth Circuit en banc panel invalidated an important state constitutional provision enacted with overwhelming support by the sovereign people of Arizona, based on a substantial misreading of this Court's decision in *Salerno* and in conflict with this Court's decision *Demore,* is itself worthy of certiorari. *See* Rule 10(c) (indicating that certiorari is considered when a "United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *see also Maricopa Cnty., Ariz. v. Lopez-Valenzuela*, 135 S. Ct. 428 (2014) (Thomas, J., statement regarding denial of stay) (urging this Court to afford to the States the same "strong presumption in favor of granting writs of certiorari to review decisions of lower courts holding" state laws unconstitutional that it gives to decisions of lower courts "holding federal statutes unconstitutional") (citing, *e.g.*, *United States v. Bajakajian*, 524 U. S. 321, 327 (1998)).

B. At the very least, the issues presented by this case are important and, if not already settled by *Demore,* are at least open.

If *Demore* controls, as Petitioners believe it does, the Court should grant review and summarily reverse the judgment of the Ninth Circuit. But even if *Demore* does not directly control because that case arose in the related but not identical context of deportation removal proceedings, the issues presented by this case are nonetheless important enough to warrant this Court's review. As noted in Section III below, forty states have categorical denials of bail of one sort or another. Eighteen of those categorically deny bail in

specified circumstances for noncapital offenses. The en banc panel of the Ninth Circuit expressly recognized that "[w]hether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question." Pet.App. 25a. Whether, and to what extent, the denial of bail for noncapital offenses is even subject to heightened scrutiny is an important constitutional question "that [apart from *Demore*] has not been, but should be, settled by this Court." Rule 10(c). And even if heightened scrutiny does apply, whether the denial of bail to those charged with serious felonies who are unlawfully present in the United States would survive heightened scrutiny because of the real risk that such individuals will fail to appear for trial is likewise an important constitutional question "that has not been, but should be, settled by this Court." Rule 10(c).

II. The Ninth Circuit's Decision Is In Conflict Both With Arizona State Court Decisions and the New Hampshire Supreme Court.

A. The Ninth Circuit's en banc decision below invalidating Arizona's bail constitutional amendment and statute conflicts with a decision by the Arizona Appellate Court upholding those same provisions.

Shortly after it was adopted in 2006, the Arizona state courts *upheld* Arizona's Proposition 100 against the identical federal constitutional challenges presented here. *Hernandez v. Lynch*, 167 P.3d 1264, 1271-72 (Ariz. Ct. App. 2007), *review denied* (April 22, 2008). Arizona officials thus find themselves required by a state constitutional provision upheld by their

state courts to deny bail to those charged with serious felonies who are unlawfully present in the United States, and barred from complying with the no-bail requirement by the decision by the Ninth Circuit en banc panel below invalidating that same provision.

As Rule 10(a) indicates, this Court often grants certiorari when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort." Rule 10(a). Although the Arizona decision with which the Ninth Circuit's en banc panel decision conflicts was rendered by an intermediate appellate court, that Arizona decision became final when the Arizona Supreme Court—the state court of last resort—declined discretionary review. The Arizona Supreme Court has noted that "denial of review usually attests our approval of the result reached by the court of appeals," even if "it does not necessarily indicate our approval of the legal analysis contained in the opinion." *Hagen v. U.S. Fid. & Guar. Ins. Co.*, 675 P.2d 1310, 1310 (Az. 1984).[2] The purpose underlying

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[2] To be sure, the Arizona Supreme Court has also noted that "denial of a petition for review has no precedential value," *Calvert v. Farmers Ins. Co. of Arizona*, 697 P.2d 684, 690 n.5 (Az. 1985), but *Calvert* arose in an entirely different context, addressing whether a statute reenacted after an interpretation by an intermediate appellate court must be interpreted in light of that appellate court decision. *Calvert* did not purport to repudiate the assertion in *Hagan* that "denial of review usually attests [the Arizona Supreme Court's] approval of the result reached by the court of appeals." Nor did it repudiate *Hagan*'s comparison of a denial of review by the Arizona Supreme Court to a summary dismissal by this Court. *Hagan*, 675 P.2d, at 1310 (citing *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*,

Rule 10(a)'s concern with conflicts between the federal and state court systems is therefore applicable here, just as it is in the related context of 28 U.S.C. § 1257, in which this Court's jurisdiction to review judgments "rendered by the highest court of a State" has been extended to include judgments of state intermediate courts of appeal if the state's highest court has denied discretionary review. *See American Ry. Express Co. v. Levee* , 263 U.S. 19, 20-21 (1923); *see also* Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE, Ch. 3.13, pp. 179-80 (10th ed. 2013).

As the leading Supreme Court practice treatise has recognized, a conflict between federal and state courts on a constitutional question "may be particularly compelling when it pits a highest state court against the court of appeals whose circuit includes that state." Shapiro, *et al.*, SUPREME COURT PRACTICE, Ch. 4.25, p. 298 (citing *Johnson v. California*, 545 U.S. 162, 164 (2005)). Certiorari to resolve this conflict is therefore particularly warranted.[3]

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439 U.S. 463, 477 n.20 (1979)). As this Court noted in the *Confederated Bands* footnote cited by *Hagan*, such decisions are "rulings on the merits" binding on the lower courts even though they do not "have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits." *Confederated Bands*, 439 U.S., at 477 n.20 (citing, *e.g.*, *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975)).

[3] The conflict in governing authority remains viable even if, as Respondents asserted in their opposition to Petitioners' Stay Application, "there is every indication that the Arizona state courts have decided to follow the Ninth Circuit's ruling." To our knowledge, no Arizona Court has followed the Ninth Circuit's decision and repudiated the Arizona appellate court decision in *Hagan*, and the fact that "the Commissioner responsible for bail

B. The Ninth Circuit's decision also conflicts with a decision from the New Hampshire Supreme Court.

In *State v. Furgal*, 13 A.3d 272 (N.H. 2010), the New Hampshire Supreme Court explicitly rejected the Due Process challenge to a categorical pretrial denial of bail statute accepted by the en banc panel of the Ninth Circuit below. New Hampshire has a general rule that "all persons arrested for an offense shall be eligible to be released pending judicial proceedings." N.H. RSA 597:1 (2001). It categorically exempts from that general rule "certain categories of arrestees," including those charged with a crime punishable by life in prison if the State can show that "the proof is evident or the presumption great" that the defendant will be convicted—the same standard employed by Arizona's Proposition 100. *Furgal*, 13 A.3d at 275 (2010) (citing N.H. RSA 597:1–c). In such cases, "the defendant must be held without bail pending trial." *Id.*

The law was challenged on the contention that "to satisfy due process, a trial court must consider the defendant's individual flight risk before denying bail." *Id.*, 13 A.3d, at 279. After noting that it had "not discovered any precedent that requires a court to consider the specific circumstances of each defendant's

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hearings" *in Maricopa County*—a named party directly subject to the Ninth Circuit's order—has scheduled bail hearings in compliance with the Ninth Circuit's judgment says nothing about how the conflict will play out elsewhere in the state. The "state courts are not bound by decisions of federal circuit courts." *Weatherford ex rel. Michael L. v. State*, 81 P.3d 320, 324 (Az. 2003).

risk of flight before denying bail," the court explained that "from the beginning of the bail system, an exception to the rule favoring bail was made for persons accused of serious crimes that focused the inquiry solely on the evidence of the defendant's guilt. *Id.* (citing W. Witmore, A BIBLIOGRAHICAL SKETCH OF THE LAWS OF THE MASSACHUSETTS COLONY FROM 1630 TO 1686, p. 37 (1890)). The court then concluded that, "[g]iven this long history of bail permitting courts in a narrow category of cases to focus exclusively upon the evidence of the defendant's guilt, the individualized inquiry for which the defendant argues cannot be said to be 'implicit in the concept of ordered liberty.'" *Id.* (citing F. Thorpe, 5 AMERICAN CHARTERS CONSTITUTIONS AND ORGANIC LAWS 3061 (1906)).

In addition, the New Hampshire Supreme Court rejected the very reading of this Court's decision in *Salerno* that was accepted by the Ninth Circuit below, namely that *Salerno* mandates individualized inquiries. *Id.*, at 278-79; *compare* Pet.App. 23a-24a ("It was *only* '[u]nder these narrow circumstances,'" namely, specific categories of serious offenses and "*case-by-case determinations* of the need for pretrial detention," "that the Court held that society's interest was sufficient to outweigh the 'individual's strong interest in [pretrial] liberty.'") (emphasis added).

Granted, Arizona's Proposition 100 reaches a broader list of serious felonies than New Hampshire's law upheld in *Furgal*, but the Ninth Circuit's reasoning rejecting categorical denials of bail in all but (perhaps) capital offenses, based on its interpretation that *Salerno* permits denial of bail "only" after a case-by-case determination, is at odds with the reasoning of *Furgal*. Such conflicts between a federal circuit court

and a state supreme court are frequently the basis for a grant of certiorari. *See, e.g.*, *Turner v. Rogers*, 131 S. Ct. 2507, 2514 (2011); *Jones v. Flowers*, 547 U.S. 220, 225 (2006); *Martinez v. Court of Appeal*, 528 U.S. 152, 155 (2000). The conflict between the Ninth Circuit's decision below and the New Hampshire Supreme Court, particularly when added to the direct conflict between the Ninth Circuit's decision and that of the Arizona state courts, warrants review by this Court.

III. The Ninth Circuit's Ruling Calls Into Question Categorical Bans On Bail that Exist In Six Other States In the Ninth Circuit and Thirty-four States Across the Country.

As the Ninth Circuit en banc panel recognized, most States have categorical bans on bail of one sort or another—that is, bans that operate because of the nature of the offense and not because of any individualized determination of flight risk or future dangerousness. A large number—twenty-two—categorically deny bail to those charged with capital offenses. Pet.App. 29a-30a n.10 (citing Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Idaho Const. art. I, § 6; Kan. Const. Bill of Rights § 9; Ky. Const. § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10; Minn. Const. art. I, § 7; Miss. Const. art. 3, § 29; N.J. Const. art. I, ¶ 11; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. 2, § 8; Tenn. Const. art. I, § 15; Tex. Const. art. I, § 11; Wash. Const. art. I, § 20; Wyo. Const. art. 1, § 14). Six states extend that categorical

ban to include offenses punishable by life imprisonment or "up to life in prison." Pet.App. 30a n.11 (citing Fla. Const. art. I, § 14; Ill. Const. art. I, § 9; Mass. Gen. Laws ch. 276, § 20D; Nev. Const. art. 1, § 7; and Pa. Const. art. I, § 14 (life); N.H. Rev. Stat. Ann. § 597:1-c ("up to life")). Two others extend the categorical bans further to include treason. *Id.* (citing Ind. Const. art. 1, § 17; Or. Const. art. I, § 14). Nebraska adds serious sexual offenses. *Id.* (citing Neb. Const. art. I, § 9). Rhode Island adds offenses involving dangerous weapons and certain controlled substance offenses. *Id.* (citing R.I. Const. art. I, § 9). South Carolina adds in certain violent offenses. *Id.* (citing S.C. Const. art. I, § 15). Three States—New Mexico, Michigan, and Utah—include certain repeat felony offenders or felony offenses committed while out on bail, probation, or parole. *Id.* (citing N.M. Const. art. II, § 13; Mich. Const. art. I, § 15); Utah Const. art. I, § 8). Maryland has a categorical ban on bail for arrestees charged with escaping from a correctional facility. *Id.* (citing Md. Code Ann., Crim. Proc. § 5-202).

Although a few of these state laws appear to be driven at least in part by concerns about future dangerousness, *see* Mich. Const. art. I, § 15; Neb. Const. Art. I, § 9; N.M. Const. art. II, § 13; R.I. Const. art. I, § 9; S.C. Const. art. I, § 15; Utah Const. art. I, § 8, most appear on their face to be motivated by concerns that bail is not sufficient to overcome the risk that the arrestee will fail to appear for trial, either because of the seriousness of the offense or, as in the case of Maryland, prior conduct of the arrestee that indicates flight risk quite apart from the seriousness of the offense.

In line with Maryland's denial of bail to a category of offenders (namely, prison escapees), three additional States have in the last decade added provisions denying bail to a class of offenders charged with serious felonies who are particularly likely to be flight risks—those who are unlawfully present in the United States. Arizona adopted the law at issue here by constitutional referendum in 2006. Missouri added its law in 2008, specifying that any person charged with a bailable offense "shall continue to be committed to the jail and remain until discharged by due course of law" if "the person cannot prove his or her lawful presence," because of the "presumption" that bail "shall not reasonably assure the appearance of the person as required if the circuit judge or associate circuit judge reasonably believes that the person is an alien unlawfully present in the United States." Mo. Ann. Stat. § 544.470(2) (added by H.B. 2366, 94th Gen. Assembly, 2d Sess. 2008).[4] And Alabama added its law denying bail to any person "charged with a crime for which bail is required" if that person "is determined to be an alien unlawfully present in the United States" in 2011. "[S]uch person shall be con-

[4] *But see* Corrected Brief of Appellants, No. 11-16487, Doc. 22-3, Addendum B at B-6 to B-7 (9th Cir. Oct. 28, 2011), citing Tr. Trans., *Missouri v. Villegas-Cortez*, No. 09BU-CR01091-01 (Cir. Ct. of Buchanan Cnty, 5th Dist., Div. 3, Sept. 21, 2009) (state trial court denying government motion to revoke bail because it thought the law "would be a violation of the Missouri constitution and the federal constitution, but certainly Missouri constitution which does provide that every defendant has the right to bail except in capital offenses").

sidered a flight risk and shall be detained until prosecution or until handed over to federal immigration authorities." Ala. Code § 31-13-18(b) (added by Act 2011-535, H.B. No. 56, § 19).[5]

That makes forty States that have some form of categorical denial of bail based on legitimate risk of flight or future dangerousness. None of these State laws provide for individualized determinations of flight risk before bail is denied, as the Ninth Circuit en banc panel has now required of Arizona. Although the twenty-two States that categorically denial bail for capital offenses would probably be safe under the Ninth Circuit's ruling because, as the en banc panel noted, "[i]t has generally been thought . . . that capital offenses may be made categorically nonbailable because 'most defendants facing a possible death penalty would likely flee regardless of what bail was set,'" Pet.App. 26a (quoting *United States v. Kennedy*, 618 F.2d 557, 558-59 (9th Cir. 1980) (per curiam)), the remaining eighteen States are not. *See* Pet.App. 25a ("Whether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question" (citing *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006)).

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[5] Alabama has subsequently stipulated that its law would violate *the Alabama Constitution* to the extent it denied bail to persons arrested for non-capital crimes regardless of their immigration status. *See* Dismissal Order and Stipulated Permanent Injunction, *Hispanic Interest Coal. of Alabama v. Bentley*, No. 5:11-CV-2484-SLB (N.D. Ala. Nov. 25, 2013), at 2 n.4 (noting concession by the State that Section 31-13-18(b) could only be applied to capital offenses because Article 1, Section 16 of the Alabama Constitution specifies "That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses").

This Court has frequently granted certiorari to review a Circuit Court holding that "brings into question the constitutionality" of statutes in force in a large number of States. *New York v. O'Neill*, 359 U.S. 1, 3 (1959); *see also, e.g., New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 385 (2000); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 650 (2003); *Smith v. Doe*, 538 U.S. 84, 89-90, 92 (2003). This Court has also granted certiorari even when the State law at issue went a step further than the laws of other states—as the en banc panel believed the laws in Arizona, Missouri, and Alabama have done. *See Santosky v. Kramer*, 455 U.S. 745, 749-51 (1982). Whether the laws in Missouri, Alabama, and Arizona are outliers or not, the en banc panel's determination that a categorical denial of bail is "only" permissible after a "case-by-case determination," Pet.App. 24a reaches much broader than those three states. Whether the Ninth Circuit is correct in its holding that individualized hearings are required is therefore an issue that warrants this Court's review.

IV. The Ninth Circuit's Decision Not to Credit Arizona's Concerns About Flight Risk of Illegal Immigrants, Even After Individualized Assessments, Because the Concerns Were Not Supported By *Empirical* Evidence In *This* Legislative Record, Imposes a Novel and Burdensome Requirement on the States.

A. Logical assumptions and anecdotal evidence, particularly when supported by empirical evidence relied on by Congress

in an analogous context, should have been sufficient to sustain Arizona's Proposition 100 even absent jurisdiction- and category-specific empirical evidence.

Both the district court and the original Ninth Circuit panel relied on numerous statements in the legislative history of Proposition 100—those made in the legislature when the initiative was proposed, and those made during the ballot campaign—referencing Arizona's common-sense concern with the risk of flight by those charged with serious felonies who are not lawfully present in this country. For example, Russell Pearce, the bill's sponsor, noted during House floor debate: "[I]f you are in this country illegally and commit a serious crime, . . . you are a flight risk, you've got no roots, you can go home any day . . . ." Pet.App. 139a. Testifying before the Senate Judiciary Committee, he explicitly asserted that there "is a *much greater* [flight] risk" for individuals who are "not in this country legally and have no roots." Pet.App. 85a (quoting Senate Judiciary Committee Meeting on H.B. 2389, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005)) (emphasis added).

Official ballot statements made the same flight-risk point. *See*, *e.g.*, Janice K. Brewer, Secretary of State. *Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006*, p. 13 (Statement of Rep. Pearce: "With few real ties to the community and often completely undocumented by state agencies, any illegal aliens can easily escape prosecution for law breaking simply because they are so difficult to locate"), *available at* http://www.azsos.gov/election/2006/info/PubPamphlet/english/

Prop100.htm, cited at Pet.App. 87a; *id*., at 13-14 (Ballot Statement of Maricopa County Attorney Andrew Thomas: "Far too many illegal immigrants accused of serious crimes have jumped bail and slipped across the border in order to avoid justice in an Arizona courtroom").

The news coverage of the ballot campaign similarly reported about the flight risk concern. Pet.App. 87a (quoting Moses Sanchez, *Research Immigration Issues Before Voting*, Ariz. Republic, Oct. 11, 2006, at 19) ("An illegal immigrant is, without a doubt, a high [flight] risk because of the ability to come in and go out of the country when they please."); Pet.App. 88a (quoting Maricopa County Attorney statement on Lou Dobbs Tonight (CNN television broadcast Oct. 13, 2006) ("Arizona has a tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding and not facing trial for their crimes, either because they jump bail after they are let out, or because, when they are let out on bail, the federal government deports them.")

The district court did note that "No one came forward [during the legislative hearings] with [empirical] evidence to support [Representative Pearce's] claim that people who are unlawfully present in the United States are categorically more of a flight risk than people who are not unlawfully present," and further that Defendants also did not present such evidence in the litigation. Pet.App. 139a. But the district court discounted that lack of empirical evidence in the legislative record, noting "that the Arizona Legislature–unlike the United States Congress–comprises 'citizen legislators' who do not have access to the type of resources, both in terms of money and

staff, that federal legislators do. *Id.* Instead, summarizing the testimonial and anecdotal evidence, the district court found that the "Arizona legislature and Arizona voters made the *logical assumption* that a person who is unlawfully present in the United States may not appear for trial." Pet.App. 142a (emphasis added).

The Ninth Circuit en banc panel rejected these evidentiary findings of the district court (which had been affirmed by the original panel) because "the record contains no findings, studies, statistics or other evidence (whether or not part of the legislative record) showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents." Pet.App. 21a; *see also* Pet.App. 20a n.5 (noting that although Congress had empirical evidence when adopting the statute upheld in *Demore* demonstrating that, "even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight, . . . [s]uch evidence is lacking here") (internal citations omitted).

As the original panel noted, however, "There is no requirement that a legislature support an intuitive proposition borne out by anecdotal evidence with statistical studies." Pet.App. 92a n.10. "Moreover," it added, this Court "has previously acknowledged that there is support for the proposition that criminal aliens pose a greater flight risk." *Id.* (citing *Demore*, 538 U.S., at 519 ("more than 20% of deportable criminal aliens failed to appear for their removal hearings")). And it further noted that, in an analogous context, this Court has held that a city is entitled to

rely on the experiences of other cities and was not required to conduct new studies or gather independent evidence when enacting a zoning ordinance challenged on First Amendment grounds. *Id.* (citing *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51–52 (1986).

The issue that warrants this Court's consideration, therefore, is whether jurisdiction- and even category-specific *empirical* evidence is required for a law such as Arizona's Proposition 100 to be constitutionally valid, or whether instead a State may rely on "logical assumptions," testimonial evidence of front-line prosecutors, and other anecdotal evidence, particularly when the non-empirical evidence and logical assumptions comport with empirical evidence relied upon by Congress in analogous contexts. Given that the Ninth Circuit's holding reaches well beyond the particular statute at issue here and significantly undermines a critically important policy judgment by the State, review by this Court is all the more important.

B. Individualized determinations are woefully inadequate in assessing flight risk of illegal aliens charged with serious felonies.

Even more troubling is the suggestion by the Ninth Circuit's en banc panel that Proposition 100 would be unconstitutional even if Arizona had conducted jurisdiction- and category-specific empirical studies confirming its logical assumptions about increased flight risk of those covered by Proposition 100, because Proposition 100 lacked individualized assessments. Pet.App. 25a. Respondents have advanced

that view as well. In their opposition to the stay application filed with this Court on November 10, 2014, for example, Respondents contended the Ninth Circuit's judgment posed no irreparable harm to the People of Arizona because, under that judgment, "Arizona state courts will now make individualized determinations as to whether an accused individual poses an unmanageable flight risk, just as they did before Proposition 100 was passed; *those who do pose such a risk will not be released*." Resp. in Opp. to Stay App., at 1 (emphasis added).

As this Court recognized in *Demore*, however, it is not that simple. Evidence considered by Congress while it was debating the categorical ban on bail for illegal aliens pending removal proceedings showed that more than 20% of illegal aliens released on bond who apparently had received individualized assessments for flight risk failed to appear for their deportation hearings. *Demore*, 538 U.S., at 519; *see also id.* ("The Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings *when those aliens were determined not to present an excessive flight risk or threat to society*") (emphasis added, citing 8 U.S.C. § 1252(a) (1982 ed.); *id.*, at 520 ("*even with individualized screening*, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight") (emphasis added); *id.*, at 528 ("Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully"); *cf. id.*, at 519 n.4 (noting that "for

aliens not evaluated for flight risk at a bond hearing, the prehearing skip rate doubled to 40%").

Indeed, the report of the Senate Committee on Governmental Affairs that led to the categorical bail ban upheld in *Demore* presented a stark picture. The Immigration and Naturalization Service "is unable to even identify most of the criminal aliens eligible for deportation," the report noted, and its "file system, which is name based, cannot reliably be used to identify criminal aliens because of the widespread use of aliases by such aliens." S. Rep. 104-48, 2 (April 7, 1995). Moreover, "[u]ndetained criminal aliens with deportation orders *often abscond* upon receiving a final notification from the INS that requires them to voluntarily report for removal," the report added, noting that the final notification for deportation "is humorously referred by some INS personnel as the 72 hours 'run notice.'" *Id.*, at 2-3.

If the national studies upon which Congress relied demonstrated that individualized assessments of flight risk by those unlawfully present in the United States were insufficient to guarantee appearance at a *mere* removal hearing, surely Arizona's judgment that individualized assessments are insufficient to guarantee appearance of unlawful aliens at a criminal proceeding that would upon conviction yield prison sentences of from 1 year to life in prison or even capital punishment was owed greater deference than it was given by the Ninth Circuit, particularly in light of the fact that Arizona's policy judgment was considered important enough to be added to the state constitution.

V. The Ninth Circuit's Determination that Proposition is "Facially Invalid," Despite Clearly Constitutional Applications, Is Contrary to *Salerno* and Conflicts with Several Circuit Courts in an Area that Remains "Hopelessly Befuddled."

A. The Ninth Circuit en banc panel's holding of facial invalidity erroneously applied an "overbreadth" analysis that is improper outside of the First Amendment context.

The Ninth Circuit en banc panel acknowledged that individuals "could be detained consistent with due process under a different categorical statute," Pet.App. 32a—apparently a reference to its recognition earlier in the opinion that bail can constitutionally be denied to a category of offenders charged with capital crimes. *See* Pet.App. 26a ("It has generally been thought . . . that capital offenses may be made categorically nonbailable because 'most defendants facing a possible death penalty would likely flee regardless of what bail was set.'" (quoting *United States v. Kennedy*, 618 F.2d 557, 558-59 (9th Cir. 1980) (per curiam)). But *this statute* denies bail to just such a category of offenders. *See* A.R.S. § 13-3961(A)(5)(b) (defining "serious felony offense" subject to the no-bail requirement to include "any class 1 . . . felony"); A.R.S. § 13-1105(D) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by §§ 13-751 and 13-752"). And it also denies bail to those charged with many of the same categories of "extremely serious offenses" that were covered by the Bail Reform Act upheld in *Salerno*: crimes of

violence, sex trafficking, crimes for which the maximum sentence is life imprisonment or death, drug crimes with a maximum term of imprisonment of ten years or more, terrorism, and certain repeat felony offenders, among others. *Salerno*, 481 U.S., at 747; *compare*, *e.g.*, A.R.S. § 13-1104 (second degree murder, a Class 1 felony), § 13-1304 (kidnapping, a Class 2 felony with which Respondent Castro-Armento was charged), § 13-1804(A)(1) (theft by extortion, threating bodily injury or death with a deadly weapon, a Class 2 felony with which Respondent Castro-Armento was charged), § 13-3407(A)(2),(4),(7) (drug possession with intent to sell, drug manufacturing, drug importation, the Class 2 felonies with which Respondent Lopez-Valenzuela was charged), § 13-3212 (child prostitution, a Class 2 felony), § 13-2308.1 (acts of terrorism, a Class 2 felony), § 13-1207 (assault while in custody, a Class 2 felony), § 13-2312 (racketeering (the crime at issue in *Salerno*), a Class 3 felony), § 13-1204 (aggravated assault, a Class 3 felony), § 13-2323 (participating in or assisting a human smuggling organization, Class 2 or 3 felonies, respectively).

Indeed, even if one were to assume that bail could not categorically be denied for a few of the more minor Class 4 felonies covered by Proposition 100, the law clearly has a "plainly legitimate sweep," and is therefore immune to a facial attack even by those on this Court who "have criticized the *Salerno* formulation." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)).

Despite the numerous, clearly constitutional applications of Arizona's Proposition 100, the Ninth Circuit en banc panel held that Proposition 100 was "facially unconstitutional" because it was "not 'carefully limited' as *Salerno*'s heightened scrutiny test requires." Pet.App. 32a. The holding, derived from a law review article,[6] that Proposition 100 is facially invalid despite these valid applications is flatly contrary to this Court's description of facial challenges in *Salerno*: "The fact that [a law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Salerno*, 481 U.S., 745 (1987).

Even if this were mere error correction, *see* Rule 10 (noting that this Court will "rarely" grant review "when the asserted error" by a lower court "consists of . . . the misapplication of a properly stated rule of law"); *but see* Section V.B, *infra*, certiorari would be warranted here because, as this Court has noted, "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, 552 U.S., at 451; *see also id.* ("We must keep in mind that '"[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people"' (quoting *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329 (2006)))."

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[6] Pet.App. 32a (quoting Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301, 331 (2012)).

B. There is a great deal of confusion among the lower courts about *Salerno*'s holding regarding the difference between facial and as-applied challenges.

As noted above, the Ninth Circuit en banc panel held, based on a law review article, that Proposition 100 was facially unconstitutional despite acknowledged constitutional applications. But that same law review article pointed out that this "Court has explicitly acknowledged that there is much confusion over the definitions and attributes of facial, as-applied, and overbreadth challenges." Keller & Tseytlin, *supra* n.6, at 307 (citing *United States v. Stevens*, 559 U.S. 460, 472 (2010)); *see also Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014) ("Confusion abounds over the scope of as-applied and other types of First Amendment challenges that a plaintiff can pursue when challenging a statute") (citing Keller & Tseytlin, *supra* n.6, at 307).

Here's how Keller and Tesytlin describe the problem:

> Unsurprisingly, lower courts are in a state of disarray over the interaction between facial, as-applied, and overbreadth challenges. As one Fifth Circuit judge recently noted, "[c]ontroversy among Supreme Court Justices and doubt among the lower courts regarding the 'no set of circumstances' language has persisted since that phrase first appeared in *United States v. Salerno* . . . ."[7] . . .

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[7] [FN45] *Sonnier v. Crain*, 613 F.3d 436, 462-63 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part).

A canvassing of the circuit opinions since 2010 confirms that courts remain hopelessly befuddled in this area. Some have confidently applied the *Salerno* standard for in toto invalidation,[8] while others have held that this standard remains open.[9] One court suggested that facial challenges are "discouraged,"[10] while another explained that "[a]lthough there is judicial disfavor of facial challenges, there is no proscription on such challenges."[11] A different court said that "[i]n recent years, the Supreme Court has sharply distinguished between facial and as-applied challenges, stringently limiting the availability of the former,"[12] whereas multiple Fifth Circuit opinions have cited the Supreme Court's recent *Citizens United v. Federal Elections Commission* opinion as evidence that

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[8] [FN48] *Sonnier v. Crain*, No. 09-30186, 2011 WL 452085, at *1-2 (5th Cir. 2011) (per curiam) (order denying petition for panel rehearing) (on file with the Virginia Law Review Association), *withdrawn*, 634 F.3d 778 (5th Cir. 2011); *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206, 1208 n.4 (11th Cir. 2010) (per curiam).

[9] [FN49] *United States v. Comstock*, 627 F.3d 513, 518-19 (4th Cir. 2010); *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 117 (D.C. Cir. 2010); *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 355-56 (5th Cir. 2010); *Lozano v. City of Hazelton*, 620 F.3d 170, 202 n.25 (3d Cir. 2010).

[10] [FN50] *Gallagher v. Magner*, 619 F.3d 823, 841 (8th Cir. 2010).

[11] [FN51] *Educ. Media Co. at Va. Tech. v. Swecker*, 602 F.3d 583, 588 n.3 (4th Cir. 2010).

[12] [FN52] *IMS Health Inc. v. Mills*, 616 F.3d 7, 24 n.19 (1st Cir. 2010).

there is no sharp line between facial and as-applied challenges.[13] The Second Circuit questioned whether "the identified test" for prevailing on "a facial challenge" is "only a variation on as-applied analysis."[14] A split panel of the Ninth Circuit attempted to reconcile overbreadth challenges, *Salerno*, and strict scrutiny, but with little success.[15] And a split panel of the Fifth Circuit disputed the interaction between *Salerno*, its alternatives, and intermediate scrutiny—three times in the same case (once in the panel opinion,[16] then in an opinion denying panel rehearing,[17] and again in an

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[13] [FN53] *In re Cao*, 619 F.3d 410, 439 (5th Cir. 2010) (en banc) (Jones, C.J., concurring in part and dissenting in part) ("[T]he line between facial and as-applied challenges is not well defined.") (internal quotations omitted); *Sonnier v. Crain*, 613 F.3d 436, 463 (5th Cir. 2010) (Dennis, J., concurring in part and dissenting in part) ("[T]he Supreme Court in *Citizens United v. FEC* has contradicted the erroneous idea that there is one single test for all facial challenges.").

[14] [FN54] *United States v. Farhane*, 634 F.3d 127, 138-39 (2d Cir. 2011).

[15] [FN55] *United States v. Alvarez*, 617 F.3d 1198, 1215-18 (9th Cir. 2010); *id.* at 1235 (Bybee, J., dissenting).

[16] [FN56] *Sonnier*, 613 F.3d at 443-49; *id.* at 449-70 (Dennis, J., concurring in part and dissenting in part).

[17] [FN57] *Sonnier v. Crain*, No. 09-30186, 2011 WL 452085, at *1-2 (5th Cir. 2011) (per curiam) (order denying petition for panel rehearing) (on file with the Virginia Law Review Association), *withdrawn*, 634 F.3d 778 (5th Cir. 2011); *id.* at *2-6 (Dennis, J., dissenting from the denial of panel rehearing).

> opinion granting panel hearing in part[18]). The dissenting judge in the denial of panel rehearing also argued that Justice Stevens' "plainly legitimate sweep" test for facial invalidity is different from overbreadth analysis and *Salerno*.[19]

Keller & Tseytlin, *supra* n.6, at 312-14.

The Ninth Circuit's current foray into this morass, the decision under consideration here, conflicts most directly with the Third Circuit's decision in *Diop v. ICE/Homeland Sec.*, 656 F.3d 221 (3d Cir. 2011). In that case, which involved 8 U.S.C. § 1226(c)—the same categorical denial of bail statute upheld in *Demore* against a facial challenge—the Third Circuit held that a particular application of the law violated Due Process because the nearly three-year detention at issue was no longer reasonably necessary to further the government's purpose of ensuring presence at a removal hearing. *Id.*, at 233. The Third Circuit expressly noted that its prior decision in *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001), holding that 8 U.S.C. § 1226(c) "was unconstitutional in all circumstances unless all aliens detained pursuant to that statute received an individualized bond hearing"—a holding very similar to the Ninth Circuit's holding in this case—"was overruled by the Supreme Court in *Demore*." *Diop*, 656 F.3d, at 233 n.11.

Whether the difference between the denial of bail prior to removal proceedings at issue in *Diop* and the

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[18] [FN58] *Sonnier v. Crain*, 634 F.3d 778, 778-79 (5th Cir. 2011) (per curiam); *id.* at 779 (Dennis, J., concurring in part and dissenting in part).

[19] [FN59] *Sonnier*, 2011 WL 452085, at *3-6 (Dennis, J., dissenting from the denial of panel rehearing).

denial of bail prior to criminal prosecution at issue here makes the two cases distinguishable or not, the fact that the lower courts are clearly in a "state of disarray over the interaction between facial, as-applied, and overbreadth challenges," Keller & Tseytlin, *supra* n.6, at 312, makes the Ninth Circuit's "facially unconstitutional" holding worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

770 F.3d 772

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL LOPEZ-VALENZUELA; ISAAC CASTRO-ARMENTA, *Plaintiffs–Appellants*, v. JOSEPH M. ARPAIO, Maricopa County Sheriff, in his official capacity; COUNTY OF MARICOPA; WILLIAM GERARD MONTGOMERY, Maricopa County Attorney, in his official capacity, *Defendants–Appellees*.	No. 11–16487 D.C. No. 2:08-cv-00660-SRB OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted En Banc
March 18, 2014—San Francisco, California

Filed October 15, 2014

Before: Alex Kozinski, Chief Judge, and Diarmuid O'Scannlain, Sidney R. Thomas, M. Margaret McKeown, Raymond C. Fisher, Marsha S. Berzon, Richard C. Tallman, Jay S. Bybee, Milan D. Smith, Jr., Jacqueline H. Nguyen, and Paul J. Watford, Circuit Judges.

Opinion by Judge Fisher;
Concurrence by Judge Nguyen;
Dissent by Judge Tallman;
Dissent by Judge O'Scannlain

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OPINION

FISHER, Circuit Judge, with whom KOZINSKI, Chief Judge, and THOMAS, McKEOWN, BERZON, BYBEE, M. SMITH and NGUYEN, Circuit Judges, join in full, and with whom WATFORD, Circuit Judge, joins except as to section III.B.2:

Arizona law categorically forbids granting undocumented immigrants arrested for a wide range of felony offenses any form of bail or pretrial release, even if the particular arrestee is not a flight risk or dangerous. We must decide whether such an absolute denial comports with the substantive component of the Due Process Clause of the Fourteenth Amendment. We hold that it does not.

I.

In 2006, Arizona voters overwhelmingly approved an amendment to their state constitution known as Proposition 100.[1] Proposition 100 mandates that Arizona state courts may not set bail "[f]or serious felony offenses as prescribed by the legislature if the person

[1] The Arizona legislature passed the legislation and referred it to the voters in May 2005. The voters approved Proposition 100 in November 2006.

charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." Ariz. Const. art. 2, § 22(A)(4). In a separate enactment, the Arizona legislature defined "serious felony offenses" as any class 1, 2, 3 or 4 felony or aggravated driving-under-the-influence offense. *See* Ariz. Rev. Stat. Ann. § 13–3961(A)(5)(b).

The Proposition 100 bail determination is made at an initial appearance, which under Arizona law occurs within 24 hours of arrest. See Ariz. R. Crim. P. 4.1(a). At the initial appearance, the court must deny bail, irrespective of whether the arrestee poses a flight risk or a danger to the community, "if the court finds (1) that the proof is evident or the presumption great that the person committed a serious offense, and (2) probable cause that the person entered or remained in the United States illegally." Ariz. R. Crim. P. 7.2(b). An arrestee deemed ineligible for bail at the initial appearance may move for reexamination, and a hearing on such motion "shall be held on the record as soon as practicable but not later than seven days after filing of the motion." Ariz. R. Crim. P. 7.4(b). At the follow-up proceeding, known as a *Simpson/Segura* hearing, see *Simpson v. Owens*, 85 P.3d 478 (Ariz. Ct. App. 2004); *Segura v. Cunanan*, 196 P.3d 831 (Ariz. Ct. App. 2008), the arrestee can dispute whether there is probable cause that he or she entered or remained in the United States illegally, but may not refute Proposition 100's irrebuttable presumption that he or she poses an unmanageable flight risk. Once the court determines that there is probable cause to believe an arrestee has entered or remained

in the United States unlawfully, the court has no discretion to release the arrestee under any circumstances, even if the court would find—and the state would concede—that the particular arrestee does not pose a flight risk or danger to the community.

In 2008, plaintiffs Angel Lopez–Valenzuela and Isaac Castro-Armenta filed a class action complaint against Maricopa County, the Maricopa County Sheriff, the Maricopa County Attorney and the Presiding Judge of the Maricopa County Superior Court, challenging the constitutionality of Proposition 100 and its implementing laws and rules ("the Proposition 100 laws"). At the time the complaint was filed, both plaintiffs were charged with state crimes and held in Maricopa County jails as a result of orders finding that they had entered or remained in the United States illegally. The complaint proposed a plaintiff class consisting of "All persons who have been or will be held ineligible for release on bond by an Arizona state court in Maricopa County pursuant to Section 22(A)(4) of the Arizona Constitution and Ariz. Rev. Stat. § 13–3961(A)(5)."

The plaintiffs alleged that the Proposition 100 laws violate the United States Constitution in a number of ways. As relevant here, they alleged that the Proposition 100 laws violate the substantive due process guarantees of the Fourteenth Amendment on two theories: (1) arrestees have a liberty interest in being eligible for release on bond pending resolution of criminal charges and the Proposition 100 laws are not narrowly tailored to serve a compelling governmental interest; and (2) the laws impermissibly impose punishment before trial. The plaintiffs also alleged violations

of the procedural due process guarantees of the Fourteenth Amendment, the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel, the Excessive Bail Clause of the Eighth Amendment and the Supremacy Clause, alleging that the Proposition 100 laws are preempted by federal law. They sought an order declaring the Proposition 100 laws unconstitutional, enjoining the enforcement of those laws and affording each of them an individualized bail hearing at which they may be considered for release, taking into account particularized facts about whether release would pose an unacceptable risk of flight or danger to the community.

In a December 2008 order, the district court granted the plaintiffs' motion for class certification, certifying a class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The court also granted the defendants' motion to dismiss the plaintiffs' preemption claims under Rule 12(b)(6).

The parties filed cross motions for summary judgment. In a March 2011 order, the district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for partial summary judgment on the plaintiffs' substantive due process, procedural due process, Eighth Amendment and Sixth Amendment claims. *See* Fed. R. Civ. P. 56. The plaintiffs thereafter voluntarily dismissed their Fifth Amendment claim. The district court then entered a final judgment, from which the plaintiffs timely appealed, challenging the Rule 12(b)(6) dismissal of their preemption claims and the adverse summary judgment rulings on their substantive due process, procedural due process, Eighth Amendment and Sixth Amendment claims.

After a divided three judge panel of this court affirmed the judgment of the district court, a majority of nonrecused active judges voted in favor of rehearing en banc. *See Lopez–Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1073 (9th Cir. 2013), *reh'g en banc granted*, 741 F.3d 1015 (9th Cir. 2014). We have jurisdiction under 28 U.S.C. § 1291, and we now reverse.[2]

II.

We review de novo a district court's grant or denial of summary judgment. *See Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1041 (9th Cir. 2011). We also review de novo a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). We review a challenge to the constitutionality of a statute de novo as well. *See United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002).

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[2] Although we assume that the named plaintiffs are no longer in pretrial detention, no one has suggested that this case has become moot as a consequence. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987 (9th Cir. 2007) (en banc) ("With regard to mootness, the Supreme Court held that the 'cases or controversies' requirement of Article III—which requires a plaintiff with a live case or controversy, not only at the time of filing and at the time of class certification, but also when a court reviews the case—is satisfied by 'a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 (1975))).

III.

The plaintiffs contend that the Proposition 100 laws violate substantive due process. We agree.

A.

The Supreme Court has long recognized constitutional limits on pretrial detention. The Court has prohibited excessive bail, *see Stack v. Boyle*, 342 U.S. 1, 4-5 (1951), required a judicial determination of probable cause within 48 hours of arrest, *see Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), barred punitive conditions of pretrial confinement, *see Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979), prohibited pretrial detention as punishment, *see United States v. Salerno*, 481 U.S. 739, 746-48 (1987); *Schall v. Martin*, 467 U.S. 253, 269-74 (1984), and held that restrictions on pretrial release of adult arrestees must be carefully limited to serve a compelling governmental interest, *see Salerno*, 481 U.S. at 748-51.

In the first of these cases, *Stack v. Boyle*, the Court observed that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." 342 U.S. at 4. The Court noted 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," id., and it held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose [of assuring the presence of the accused at trial] is 'excessive' under the Eighth Amendment," *id*. at 5.

In *Gerstein v. Pugh*, the Court recognized that "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, . . . impair his family relationships" and affect his "ability to assist in preparation of his defense." 420 U.S. at 114, 123. The Court held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id*. at 114. This probable cause determination is "necessary to effect limited postarrest detention," *Salerno*, 481 U.S. at 752, and ordinarily must occur within 48 hours of arrest, *see McLaughlin*, 500 U.S. at 56.

A few years later, in *Bell v. Wolfish*, the Court emphasized that, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt." 441 U.S. at 535. Accordingly, the Court held that "the Due Process Clause protects a detainee from . . . conditions and restrictions of pretrial detainment" that "amount to punishment of the detainee." *Id*. at 533, 535. The Court outlined a two-pronged test for determining when conditions and restrictions of pretrial detention amount to punishment, focusing first on whether the restrictions were imposed for a punitive purpose and, if not, on whether the restrictions are excessive in relation to a legitimate regulatory purpose:

> A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determina-

> tion generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Id. at 538-39 (alterations, footnotes, citations and internal quotation marks omitted).

Five years later, in *Schall v. Martin*, the Court considered the substantive due process implications of a state law authorizing pretrial detention of juvenile offenders found to present "a serious risk" of committing a crime pending their juvenile court proceedings. 467 U.S. at 255. As it would later do in *Salerno*, the Court applied a two-part substantive due process inquiry. First, relying on general due process principles, the Court considered whether the law constituted an impermissible infringement of the juveniles' liberty interest. *See Schall*, 467 U.S. at 263-68. The Court recognized that juveniles have a "substantial" interest in "freedom from institutional restraints," *id*. at 265, but that interest had to be "qualified by the recognition that juveniles, unlike adults, are always in some form of custody," *id*. Accordingly, in lieu of heightened scrutiny, the Court required the state to

show only that the challenged law served a "legitimate interest." *Id*. at 266. This standard was satisfied because "[s]ociety has a legitimate interest in protecting a juvenile from the consequences of his criminal activity—both from potential physical injury which may be suffered when a victim fights back or a policeman attempts to make an arrest and from the downward spiral of criminal activity into which peer pressure may lead the child." *Id*.

Second, relying on the two-pronged test articulated in *Bell*, the Court considered whether the challenged law violated substantive due process by imposing confinement as punishment. *See id*. at 269-74. Applying the first prong of the *Bell* test, the Court found no evidence that the law was intended as punishment. *See id*. at 269. Turning to the second prong, the Court concluded that the law was not excessive in relation to the state's legitimate regulatory purpose in protecting juveniles from the consequences of their criminal activity, because the detention was "strictly limited in time" (to a maximum possible detention of 17 days) and the conditions of confinement were regulatory rather than punitive. *Id*. at 269-71. The Court also found persuasive that every state in the country permitted preventive detention of juveniles accused of crime, *see id*. at 267, 274, citing "the widely shared legislative judgment that preventive detention serves an important and legitimate function in the juvenile justice system," *id*. at 272.

Three years later, in *United States v. Salerno*, the Court rounded out this series of pretrial detention cases by considering the substantive due process implications of a federal law authorizing pretrial detention of adult arrestees. *Salerno* involved a challenge

to a provision of the federal Bail Reform Act of 1984 requiring pretrial detention of arrestees charged with certain serious felonies if the government demonstrated by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(e). As it had in *Schall*, the Court applied a two-part substantive due process inquiry, albeit in the reverse order.

First, relying on *Bell* and *Schall*, the Court considered whether the Act violated substantive due process by authorizing "punishment before trial." *Salerno*, 481 U.S. at 746. Under the first *Bell* prong, the Court found no evidence that Congress had authorized pretrial detention for a punitive purpose. *See id*. at 747. Rather, Congress had authorized detention for the legitimate regulatory purpose of "preventing danger to the community." *Id*. Turning to *Bell*'s second prong, the Court held that "the incidents of pretrial detention" were not "excessive in relation to the regulatory goal Congress sought to achieve," because: (1) the Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes," including "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders"; (2) "[t]he arrestee is entitled to a prompt detention hearing" at which the arrestee could seek bail; and (3) "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id*. Accordingly, the Court held "that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment

before trial in violation of the Due Process Clause." *Id.* at 748.

Second, as in *Schall*, the Court also applied general due process principles and considered whether the law constituted an impermissible infringement of arrestees' liberty interest. *See id.* at 748-51. Whereas *Schall* had applied a deferential standard of review, however, *Salerno* applied heightened scrutiny. The Court noted that, "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755. It cited "the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Id.* at 749. It recognized that the Act implicated "the individual's strong interest in liberty." *Id.* at 750. And it was careful "not [to] minimize the importance and fundamental nature of this right." *Id.* But the Court concluded that the Bail Reform Act satisfied heightened scrutiny because it both served a "compelling" and "overwhelming" governmental interest "in preventing crime by arrestees" and was "carefully limited" to achieve that purpose. *Id.* at 749-50, 755. The Act was sufficiently tailored because it "careful[ly] delineat[ed] . . . the circumstances under which detention will be permitted." *Id.* at 751. It: (1) "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming," *id.* at 750; (2) "operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses"—individuals that "Congress specifically found" were "far more likely to be responsible for dangerous acts in the community after arrest," *id.*; and (3) afforded arrestees "a full-blown adversary hearing" at which the government

was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person," *id*. It satisfied heightened scrutiny because it was a "carefully limited exception," *id*. at 755, not a "scattershot attempt" at preventing crime by arrestees, *id*. at 750.

B.

Salerno and *Schall* establish the substantive due process framework that governs here. We first consider whether the Proposition 100 laws satisfy general substantive due process principles. Because the Proposition 100 laws regulate adults rather than juveniles, we apply *Salerno*'s heightened scrutiny rather than *Schall*'s more deferential review. We then consider in the alternative whether the Proposition 100 laws violate due process, under *Bell*, *Schall* and *Salerno*, by imposing punishment before trial. To succeed on their facial challenge, the plaintiffs must show that the Proposition 100 laws are unconstitutional in all of their applications. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (*citing Salerno*, 481 U.S. at 745); *see also id*. ("While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted)); *United States v. Stevens*, 559 U.S. 460, 472 (2010).

1.

We first consider whether the Proposition 100 laws satisfy general substantive due process principles.

The governing substantive due process standard is a familiar one. "The Due Process Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997), "forbid[ding] the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292, 302 (1993).

We apply heightened scrutiny here because the Proposition 100 laws infringe a "fundamental" right. *Salerno*, 481 U.S. at 750. The defendants' brief suggests that the Proposition 100 laws do not implicate a fundamental right, because "[b]ail . . . is not a fundamental . . . constitutional right," but *Salerno* made clear that what is at stake here is "the individual's strong interest in liberty," and the Court was careful "not [to] minimize the importance and fundamental nature of this right." *Id.* (emphasis added). If there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny. *See Flores*, 507 U.S. at 301-02; *id.* at 316 (O'Connor, J., concurring); *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992); *id.* at 93 (Kennedy, J., dissenting). *Salerno* and the cases that have followed it have recognized that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary

governmental action." *Foucha*, 504 U.S. at 80. Thus, "[t]he institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." *Flores*, 507 U.S. at 316 (O'Connor, J., concurring). As the Court explained in *Salerno*, 481 U.S. at 755, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."); *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution."). Thus, the Proposition 100 laws will satisfy substantive due process only if they are "narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302 (citing *Salerno*, 481 U.S. at 746).[3]

That the Proposition 100 laws regulate persons when there is probable cause to believe they have "entered or remained in the United States illegally," Ariz. Const. art. 2, § 22(A)(4), does not alter the analysis, as the defendants concede. The Due Process Clauses of the Fifth and Fourteenth Amendments protect

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[3] At oral argument, the defendants conceded that *Salerno* applied heightened scrutiny and that heightened scrutiny applies here.

every person within the nation's borders from deprivation of life, liberty or property without due process of law. *See Mathews v. Diaz*, 426 U.S. 67, 77 (1976). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Id*.[4]

We also bear in mind that, regardless of whether an arrestee is a citizen, a lawful resident or an undocumented immigrant, the costs to the arrestee of pretrial detention are profound. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein*, 420 U.S. at 114. And it may affect "the defendant's ability to assist in preparation of his defense." *Id*. at 123. As the Supreme Court stated in *Stack*, 342 U.S. at 4, the "traditional right to freedom before conviction permits the unhampered preparation of a defense." *See also* ABA Standards for Criminal Justice: Pretrial Release 29 (3d. ed.2007) (citing "considerable evidence that pretrial custody status is associated with the ultimate outcomes of cases, with released defendants consistently faring better than defendants in detention").

In this case, the defendants argue that the Proposition 100 laws satisfy substantive due process be-

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[4] *See also Zadvydas*, 533 U.S. at 718 (Kennedy, J., dissenting) ("As persons within our jurisdiction, . . . aliens are entitled to the protection of the Due Process Clause."); *cf. Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

cause they serve the state's substantial interest in ensuring that persons accused of crimes are available for trial. They argue that pretrial detention is a constitutionally acceptable means of furthering that interest. And they contend that Proposition 100's *categorical* denial of bail to undocumented immigrants, without any individualized determination of flight risk, is justified because undocumented immigrants *in general* pose an unmanageable flight risk. The district court accepted this rationale, concluding that "[t]he Arizona legislature and Arizona voters made the logical assumption that a person who is unlawfully present in the United States may not appear for trial." We disagree.

We do not question that Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial. *See Salerno*, 481 U.S. at 749 (noting that "an arrestee may be incarcerated until trial if he presents a risk of flight"); *Bell*, 441 U.S. at 534 (recognizing the government's "substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences," and "that confinement of such persons pending trial is a legitimate means of furthering that interest"). The plaintiffs properly conceded this point at oral argument.

We do, however, reject the proposition that the Proposition 100 laws are carefully limited, as *Salerno* requires. *Salerno* concluded that the challenged provisions of the Bail Reform Act satisfied the tailoring requirement of heightened scrutiny because they created a "*narrowly focuse[d]*," "*carefully limited* exception" to the "'general rule' of substantive due process

that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Salerno*, 481 U.S. at 749-50, 755 (emphasis added). The Act thus satisfied the heightened scrutiny standard because Congress had chosen a "*careful delineation* of the circumstances under which detention will be permitted" rather than adopting a "scattershot attempt" at advancing the government's interest in preventing crime by arrestees. *Id*. at 750–51 (emphasis added).

In holding the Act sufficiently tailored to satisfy heightened scrutiny, *Salerno* focused on three considerations. First, that the challenged provisions addressed "a particularly acute problem." *Id*. at 750. Second, that "[t]he Act operates only on individuals who have been arrested for a specific category of extremely serious offenses," where Congress had "specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest." *Id*. Third, that the Act required "a full-blown adversary hearing" at which the government was required to "convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id*. None of those considerations exist here.

a. The Proposition 100 Laws Do Not Address a Particularly Acute Problem.

First, the record does not support the argument that the Proposition 100 laws addressed "a particularly acute problem." *Salerno*, 481 U.S. at 750. The Bail Reform Act at issue in Salerno addressed an "alarming problem of crimes committed by persons on release." *Id*. at 742 (quoting S. Rep. No. 98-225, at 3

(1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3185) (internal quotation marks omitted). The record in *Salerno* contained empirical evidence establishing that the legislation addressed "a pressing societal problem," *id*. at 747 (citing S. Rep. No. 98-225, at 4-8, 1984 U.S.C.C.A.N. at 3186-91), and the law operated only on individuals "Congress specifically found . . . are far more likely to be responsible for dangerous acts in the community after arrest," *id*. at 750 (citing S. Rep. No. 98-225, at 6-7, 1984 U.S.C.C.A.N. at 3188-90). This evidence figured prominently in the Court's decision to uphold the Bail Reform Act.

Similarly, in *Demore v. Kim*, 538 U.S. 510 (2003), where the Court upheld a federal immigration statute providing for mandatory detention of certain convicted criminal aliens during the brief period of their civil removal proceedings, the record contained evidence that the legislation addressed a particularly acute problem. The Court emphasized and discussed at length the considerable evidence in the record, much of it quantitative, showing that the legislation applied to persons who were both dangerous and at risk of flight. *See id*. at 518-21, 528.[5]

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[5] "One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%— nearly half—were arrested multiple times before their deportation proceedings even began." *Demore*, 538 U.S. at 518. Another study showed that "[o]nce released, more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id*. at 519. Congress also had empirical evidence that, "even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight." *Id*. at 520; *see also id*. at 528. Such evidence is lacking here.

Here, there is no evidence that the Proposition 100 laws were adopted to address a particularly acute problem. In contrast to *Salerno* and *Demore*, the record contains no findings, studies, statistics or other evidence (whether or not part of the legislative record) showing that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents. The absence of such evidence both distinguishes this case from *Salerno* and supports the conclusion that Proposition 100 laws are not carefully limited, as they must be to survive heightened scrutiny under *Salerno*.[6]

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[6] In arguing that Proposition 100 addressed a particularly acute problem, Judge Tallman focuses on two factors: (1) statements made in support of Proposition 100 by then-Maricopa County Attorney Andrew Thomas; and (2) that Arizona voters approved the Proposition by a wide margin. Neither argument is persuasive.

As part of the 2006 campaign in favor of Proposition 100, County Attorney Thomas asserted that "[f]ar too many illegal immigrants accused of serious crimes have jumped bail and slipped across the border in order to avoid justice in an Arizona courtroom." He also told *Lou Dobbs Tonight* that Arizona had a "tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding, and not facing trial for their crimes, either because they jump bail after they are out, or because, when they are let out on bail, the federal government deports them." The record does not substantiate Thomas' claims, however, and he is not a credible source. He was disbarred in 2012 for using his office to destroy political enemies, filing malicious and unfounded criminal charges, committing perjury and engaging in a host of other crimes, and the state bar committee found that he had "outrageously exploited power," "flagrantly fostered fear," "disgracefully misused the law" and "dishonored, desecrated, and defiled" the public trust. *In re Thomas*, No. PDJ–2011–9002 (Before the Presiding Disciplinary Judge of the Supreme Court of Arizona, Apr. 10, 2012) (Opinion

Contrary to Judge Tallman's reading of our opinion, we neither "demand" findings, studies, statistics or other evidence showing that undocumented immigrants pose an unmanageable flight risk nor impose an "empirical data requirement" on the defendants. Dissent at 802–03. We do not hold Proposition 100 "void . . . for want of evidence," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000), but rather that the Proposition 100 laws are not "carefully limited" under *Salerno*. Whether Proposition 100 "narrowly focuses on a particularly acute problem" is part of that inquiry. *Salerno*, 481 U.S. at 750; *see also Foucha*, 504 U.S. at 81. Thus, although we do not require the defendants to produce evidence or point to legislative findings, the absence of any credible showing that the Proposition 100 laws addressed a particularly acute problem is one factor quite relevant to demonstrating that the laws are not carefully limited.

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and Order Imposing Sanctions), at p. 245, *available at* http://www.azcourts.gov/mediaroom/HighProfileCaseUpdate.aspx (last visited July 10, 2014). Although Judge Tallman relies heavily on Thomas' comments (Dissent at 798–99, 801 & n. 4), the defendants tellingly do not even mention them.

That Arizona voters approved Proposition 100 by a large margin (Dissent at 798, 801 & n. 5, 801, 802) also does not show that the legislation addressed a particularly acute problem. At most, the vote shows that voters *perceived* a problem, not that one actually existed. Moreover, as discussed below in part III.B.2 and in Judge Nguyen's concurrence, there is substantial evidence that Arizona voters approved Proposition 100 at least in part for reasons other than a perceived problem of flight risk—to punish undocumented immigrants for perceived immigration and criminal violations.

b. The Proposition 100 Laws Are Not Limited to a Specific Category of Extremely Serious Offenses.

Second, the Proposition 100 laws are not limited to "a specific category of extremely serious offenses." *Salerno*, 481 U.S. at 750; *cf. Demore*, 538 U.S. at 517–18, *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). Instead, they encompass an exceedingly broad range of offenses, including not only serious offenses but also relatively minor ones, such as unlawful copying of a sound recording, altering a lottery ticket with intent to defraud, tampering with a computer with the intent to defraud and theft of property worth between $3,000 and $4,000.

c. The Proposition 100 Laws Do Not Require a Full-blown Adversary Hearing at Which the State Is Required to Prove that an Individual Arrestee Presents an Unmanageable Flight Risk.

Finally, even if *some* undocumented immigrants pose an unmanageable flight risk or undocumented immigrants on average pose a greater flight risk than other arrestees, Proposition 100 plainly is not carefully limited because it employs an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk. In *Salerno*, the regulatory scheme was limited to arrestees who actually posed a danger to the community. First, it was limited to "individuals who have been arrested for a specific category of extremely serious offenses"—who Congress found were "far more likely to be responsible

for dangerous acts in the community after arrest." *Salerno*, 481 U.S. at 750. Second, even for arrestees falling within that specific category, the scheme provided case-by-case determinations of the need for pretrial detention. Each arrestee was entitled to a "full-blown adversary hearing," at which the government was required to prove by "clear and convincing evidence" that the individual presented "a demonstrable danger to the community" and that "no conditions of release c[ould] reasonably assure the safety of the community." *Id*. It was only "[u]nder these narrow circumstances" that the Court held that society's interest was sufficient to outweigh the "individual's strong interest in [pretrial] liberty." *Id*.

In contrast, Proposition 100 is not narrowly focused on those arrestees who actually pose the greatest flight risk. Demonstrably, many undocumented immigrants are not unmanageable flight risks. The record includes examples of undocumented immigrants who were arrested before Proposition 100, granted bail or released on their own recognizance, and appeared at their court dates and trials. Yet even these individuals were needlessly remanded into state custody following Proposition 100's passage.

In *Hernandez v. Lynch*, 167 P.3d 1264 (Ariz. Ct. App. 2007), for example, police found a social security card and a resident alien card in Hernandez's wallet after arresting him for possessing an open container of alcohol within the passenger compartment of a motor vehicle. *See id*. at 1265. Hernandez admitted that the cards were forged, that he had purchased them for $5,000 and that he had procured them in order to work and buy food. *See id*. at 1266. The state charged him with two counts of knowingly possessing forged

instruments with intent to defraud, a class 4 felony. *See id*. He was released on his own recognizance after an initial appearance hearing. When he appeared voluntarily for his preliminary hearing, however, he was automatically denied bail by operation of Proposition 100. *See id*. He ultimately pled guilty to solicitation to commit forgery, a class 6 felony, and was placed on probation for one year. *See id*. Proposition 100 categorically eliminates any opportunity for persons such as Mr. Hernandez to show that, notwithstanding their immigration status, they do not pose a flight risk. Indeed, it mandates pretrial detention even when the state *concedes* that the arrestee does not pose a flight risk.[7]

Whether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question. *See United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("Neither *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime. To the contrary, *Salerno* . . . upheld the constitutionality of a bail system where pretrial defendants could be detained only if the need to detain them was demonstrated on an individualized basis."). Lawmakers may rely on "reasonable presumptions and generic rules," *Demore*, 538 U.S. at 526; *Flores*, 507

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[7] Proposition 100, for example, covers foreign citizens who have no legal right to return to their home countries. Conversely, Proposition 100 *excludes* from coverage individuals who would seem *more likely* to flee—such as foreign citizens who are in this country lawfully as tourists and persons having dual citizenship.

U.S. at 313, when a regulation "involves no deprivation of a 'fundamental' right," *Flores*, 507 U.S. at 311, but "'administrative convenience' is a thoroughly inadequate basis for the deprivation of core constitutional rights," *id*. at 346 (Stevens, J., dissenting); *see Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972). As the defendants conceded at oral argument, irrebuttable presumptions are disfavored.

Thus, at minimum, to survive heightened scrutiny any such categorical rule, requiring pretrial detention in all cases without an individualized determination of flight risk or dangerousness, would have to be carefully limited. The state's chosen classification would have to serve as a convincing proxy for unmanageable flight risk or dangerousness. It has generally been thought, for example, that capital offenses may be made categorically nonbailable because "most defendants facing a possible death penalty would likely flee regardless of what bail was set." *United States v. Kennedy*, 618 F.2d 557, 558-59 (9th Cir. 1980) (per curiam).[8]

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[8] We do not, as Judge Tallman writes, "effectively preclud[e] the use of irrebuttable presumptions in the bail context." Dissent at 803. Rather, we conclude that whether a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question, and then assume without deciding that such a rule would be constitutional were it adequately tailored. Our conclusion that this is an open question is clearly correct, given that neither the Supreme Court nor any federal court of appeals has addressed the question. The closest case is *Hunt v. Roth*, 648 F.2d 1148 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982), where the Eighth Circuit held that a provision of the Nebraska Constitution categorically denying bail to persons charged with certain sexual offenses vi-

There is no evidence that undocumented status correlates closely with unmanageable flight risk. The defendants speculate that undocumented immigrants pose a greater flight risk than lawful residents because they supposedly lack strong ties to the community and have a "home" in another country to which they can flee. But this assumption ignores those undocumented immigrants who do have strong ties to their community or do not have a home abroad. As our own court's immigration docket reveals, many undocumented immigrants were brought here as young children and have no contacts or roots in another country. Many have "children born in the United States" and "long ties to the community." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). A recent study of undocumented immigrants in California, published by the Center for the Study of Immigrant Integration at the University of Southern California, found that, "contrary to popular misperceptions," undocumented immigrants are "a fairly settled population." M. Pastor & E. Marcelli, *What's at Stake: Undocumented Californians, Immigration Reform, and*

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olated the Excessive Bail Clause of the Eighth Amendment because it employed an irrebuttable presumption rather than requiring an individualized determination of flight risk. In language that one might apply here as well, the Eighth Circuit held that "[t]he fatal flaw in the Nebraska constitutional amendment is that the state has created an irrebuttable presumption that every individual charged with this particular offense is incapable of assuring his appearance by conditioning it upon reasonable bail or is too dangerous to be granted release." *Hunt*, 648 F.2d at 1164. *Hunt*, however, was later vacated as moot, so it remains the case that no federal appellate court has yet addressed in a precedential decision whether a categorical denial of bail comports with the Constitution.

Our Future Together 9 (May 2013), *available at* http://csii.usc.edu/undocumentedCA.html (last visited July 28, 2014). The researchers found that "nearly 50 percent of undocumented immigrants have been in the country for more than 10 years, and over 17 percent of household heads are homeowners." *Id*.

Moreover, although the defendants consistently refer to undocumented immigrant arrestees as "flight risks," the pertinent inquiry is whether the arrestee is an *unmanageable* flight risk. There are a variety of methods to manage flight risk, such as bond requirements, monitoring and reporting requirements. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 13–3967(D). Proposition 100 completely ignores these tools for managing flight risk, instead mandating incarceration in every case.

Before Proposition 100 passed, Arizona had an extensive bail scheme designed to help ensure that arrestees appear for trial. *See* Ariz. Const. art. 2, § 22(A)(3); Ariz. Rev. Stat. Ann. § 13–3967(B). These procedures already required judges to consider factors such as "[t]he accused's family ties, employment, financial resources," "length of residence in the community," "[w]hether the accused has entered or remained in the United States illegally" and "[w]hether the accused's residence is in this state, in another state or outside the United States." Ariz. Rev. Stat. Ann. § 13–3967(B)(4), (8), (11)-(12). There is no evidence that this set of regulations, addressing flight risk on a case-by-case basis, was inadequate to protect the state's compelling interest in ensuring undocumented immigrant arrestees' appearance at trial. *Cf. Demore*, 538 U.S. at 520, 528 (noting that Congress chose a mandatory detention rule only after evidence showed that individualized screening had failed to address

the problem of convicted criminal detainees in large numbers failing to appear at their removal hearings). Furthermore, Arizona added the last two of these considerations—"[w]hether the accused has entered or remained in the United States illegally" and "[w]hether the accused's residence is in this state, in another state or outside the United States," Ariz. Rev. Stat. Ann. § 13–3967(B)(11)-(12)—only in June 2006, a few months before Proposition 100 was submitted to the state's voters. *See* 2006 Ariz. Legis. Serv. Ch. 380 (H.B. 2580) (West). Arizona gave these provisions no chance to succeed before resorting to mandatory detention in every case. Thus, although Judge Tallman's dissent asserts that individualized assessments of flight risk have been tried and failed (Dissent at 798, 803, 804), neither assertion is borne out by the record.

The Proposition 100 laws also do not reflect a "widely shared legislative judgment." *Schall*, 467 U.S. at 272. The federal criminal justice system does not categorically deny bail to undocumented immigrant arrestees. *See generally* 18 U.S.C. § 3142; *see id*. § 3142(d).[9] Most states that categorically prohibit bail at all do so only for capital offenses[10] or for other very

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[9] Pre-adjudication eligibility for bail is also the norm in federal removal proceedings. *See* 8 U.S.C. § 1226(a). Federal law mandates detention during removal proceedings only for "a limited class of deportable aliens—including those convicted of an aggravated felony." *Demore*, 538 U.S. at 517–18; *see* 8 U.S.C. § 1226(c).

[10] *See* Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Idaho Const. art. I, § 6; Kan. Const. Bill of Rights § 9; Ky. Const. § 16; La.

serious crimes.[11] Other than Arizona, only Missouri singles out undocumented immigrants for the categorical denial of bail. See Mo. Ann. Stat. §

Const. art. I, § 18; Me. Const. art. I, § 10 (current or former capital offenses nonbailable); Minn. Const. art. I, § 7; Miss. Const. art. 3, § 29; N.J. Const. art. I, ¶ 11; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. 2, § 8; Tenn. Const. art. I, § 15; Tex. Const. art. I, § 11; Wash. Const. art. I, § 20; Wyo. Const. art. 1, § 14.

[11] *See* Fla. Const. art. I, § 14 (capital offenses and offenses punishable by life imprisonment nonbailable); Ill. Const. art. I, § 9 (capital offenses and offenses punishable by life imprisonment nonbailable); Ind. Const. art. 1, § 17 (murder and treason nonbailable); Md. Code Ann., Crim. Proc. § 5–202 (prohibiting pretrial release for an arrestee charged with escaping from a correctional facility); Mass. Gen. Laws ch. 276, § 20D (capital offenses and offenses punishable by life imprisonment nonbailable); Mich. Const. art. I, § 15 (murder, treason, repeat violent felonies and felonies committed while out on bail, probation or parole for a prior violent felony nonbailable); Neb. Const. art. I, § 9 (murder, treason and serious sexual offenses nonbailable); Nev. Const. art. 1, § 7 (capital offenses or murders punishable by life imprisonment without possibility of parole nonbailable); N.H. Rev. Stat. Ann. § 597:1-c (offenses "punishable by up to life in prison" nonbailable); N.M. Const. art. II, § 13 (capital offenses and certain repeat felony offenders nonbailable); Or. Const. art. I, § 14 (murder and treason nonbailable); Pa. Const. art. I, § 14 (capital offenses or offenses punishable by life imprisonment nonbailable); R.I. Const. art. I, § 9 (offenses punishable by life imprisonment, offenses involving dangerous weapons by arrestees previously convicted of other offenses and certain controlled substance offenses nonbailable); S.C. Const. art. I, § 15 (capital offenses, offenses punishable by life imprisonment and certain violent offenses nonbailable); Utah Const. art. I, § 8 (capital offenses and felony offenses committed while out on bail, probation or parole for prior felony offense nonbailable).

544.470(2).[12] The American Bar Association's Standards for Criminal Justice do not make any offenses categorically nonbailable. They provide that "only defendants charged with dangerous or violent crimes or, in certain cases, with other serious crimes, may even be considered for detention," and they state that "[a] decision to detain should be made only upon a clear showing of evidence that the defendant poses a danger to public safety or a risk of non-appearance that requires secure detention." ABA Standards for Criminal Justice: Pretrial Release 35, 51 (3d ed.2007).

In an attempt to establish that the Proposition 100 laws satisfy due process, the defendants rely heavily on *Demore v. Kim*. This reliance is misplaced. *Demore* did uphold a categorical denial of bail without an individualized determination of flight risk or dangerousness for certain convicted criminal aliens briefly detained during their civil deportation proceedings. *Demore*, however, applied rational basis review, not heightened scrutiny, because it involved federal regulation of immigration. *See Demore*, 538 U.S. at 521-

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[12] Alabama formerly categorically denied bail to undocumented immigrants as well, see Ala. Code § 31–13–18(b), but the state has concluded that § 31–13–18(b) violates the Alabama Constitution, and the law is no longer in force. *See* Dismissal Order and Stipulated Permanent Injunction, *Hispanic Interest Coal. of Alabama v. Bentley*, No. 5:11–CV2484–SLB (N.D. Ala. Nov. 25, 2013), at 2 n.4 ("The State Defendants further represent that in light of Article 1, Section 16, of the Alabama Constitution, they understand that Section 19(b) of H.B. 56 (Ala. Code § 31–13–18(b)) can only be applied to deny bail to persons arrested for a capital crime, and cannot be applied to deny bail to individuals arrested for or charged solely with non-capital crimes, regardless of their immigration status.").

28. Such regulations have to meet only "the (unexacting) standard of rationally advancing some legitimate governmental purpose," *Flores*, 507 U.S. at 306; *see also Fiallo v. Bell*, 430 U.S. 787, 793 (1977); *Mathews*, 426 U.S. at 79-80, not the heightened scrutiny required under *Salerno*. *Demore*, moreover, involved a class of detainees who had already been convicted of serious crimes, *see* 538 U.S. at 513, a "very limited" period of detention, *id*. at 529–30 & n.12, and extensive evidence and findings establishing the need for the policy, *see id*. at 513, 518-20, 528.

In sum, we hold that the Proposition 100 laws do not satisfy the heightened substantive due process scrutiny *Salerno* requires. Although the state has a compelling interest in assuring that arrestees, including undocumented immigrants, appear for trial, Proposition 100 is not carefully limited to serve that interest.

We further hold that the laws are facially unconstitutional. *See Wash. State Grange*, 552 U.S. at 449. Because Proposition 100 is not "carefully limited" as *Salerno*'s heightened scrutiny test requires, "the *entire statute* fails [*Salerno*'s] decision rule and would thus be invalid in all of its applications." Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301, 331 (2012) (emphasis added). Even persons who could be detained consistent with due process under a different categorical statute, or who would be detained under Proposition 100 if it afforded an individualized determination, could successfully challenge the Proposition 100 laws on the same grounds relied on in our opinion, namely, failure to provide either a valid categorical exclusion from bail

or an individualized determination. *See Foucha*, 504 U.S. at 80-83 (invalidating in toto a statute that categorically required commitment of all people found not guilty by reason of insanity as a violation of substantive due process (citing *Salerno*, 481 U.S. at 747–51, 755)); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 376 (2010) (Roberts, C. J., concurring) (explaining that facial invalidation is appropriate when, "[g]iven the nature of th[e] claim and defense, . . . any other [plaintiff] raising the same challenge would also win"); *Keller & Tseytlin*, *supra*, at 322 ("[E]very person has the right not to be subject to an unconstitutional law—that is, a law that violates a textual decision rule.").[13] There exists, therefore, "'no set of circumstances . . . under which [the Proposition 100 laws] would be valid.'" *Wash. State Grange*, 552 U.S. at 449 (quoting *Salerno*, 481 U.S. at 745).

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[13] Keller and Tseytlin explain that "the Supreme Court has created various constitutional decision rules to enforce the Constitution's provisions and constrain lower courts as they adjudicate constitutional disputes." Keller & Tseytlin, *supra*, at 320. The authors identify "two broad categories of decision rules: textual decision rules and enforcement decision rules." *Id*. at 322. Textual decision rules "require courts to examine the statutory text enacted by the legislature or the circumstances surrounding that text's enactment." *Id*. Enforcement decision rules, by contrast, "direct courts to examine the particular facts surrounding the executive's or the judiciary's enforcement of a statute instead of the statutory text itself." *Id*. at 324. *Salerno*'s heightened scrutiny substantive due process test, which we apply here, is a textual decision rule, and application of such a rule will lead to in toto invalidation where, as here, "the litigants' arguments and the courts' inquiries focused on the entire statutory coverage." *Id*. at 339.

Furthermore, the Proposition 100 laws have been fully implemented, so there is no possibility that Arizona or Maricopa County will implement them in a narrower, constitutional manner, *cf. Wash. State Grange*, 552 U.S. at 450, and the defendants have not suggested any "reasonable" or "readily apparent" narrowing construction that would make the laws constitutional, *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)) (internal quotation marks omitted). Accordingly, the laws are facially unconstitutional.

2.

We next consider whether the Proposition 100 laws violate substantive due process by imposing punishment before trial. *See Salerno*, 481 U.S. at 746. "To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *Id*. at 747. "Unless [the legislature] expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Id*. (alterations and internal quotation marks omitted).

To discern legislative intent, the district court considered both (1) the legislative record before the Arizona legislature that passed and referred Proposition 100 to the voters and (2) statements made during the referendum drive and in election materials. The court concluded that the legislative record "suggests that Proposition 100 may have been motivated by a

desire to punish for past crimes, but there is also evidence that legislators considered the issue of flight risk." Similarly, the court concluded that the "voter materials contained some official statements reflecting a punitive purpose, but ultimately the message was mixed." And the court ultimately concluded that "the record as a whole does not support a finding that Proposition 100 was motivated by an improper punitive purpose." Given the mixed nature of the evidence of legislative and voter intent, and the difficulty in attributing motives to the electorate, we see no reason to revisit those conclusions on appeal. By assuming without deciding that Proposition 100 does not have a punitive purpose, however, we do not minimize the considerable evidence of punitive intent found in this record.[14] There is strong evidence that Proposition

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[14] A partial summary of that evidence: State Representative Russell Pearce, the bill's sponsor, stated that Proposition 100 "just simply bridges the gap, a loophole in the law that would allow people who are not in this country [ ] legally who have no business to be released if they commit any crime, they have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally." *Senate Judiciary Committee Meeting on H.B. 2389 and HCR 2028*, 47th Leg., 1st Regular Sess. (Ariz. 2005). Said Pearce, "[B]ad enough you're illegal but you commit a serious crime you ought not to be bondable." *Id.* He added: "[T]his bill targets very simply those who commit serious, serious [criminal] acts in our community. A very responsible bill to protect our citizens from those who would enter our country illegally and commit serious crimes against us. . . ." *Id*. Rep. Pearce promoted the bill on the ground that "all illegal aliens in this country ought to be detained, debriefed and deported." *Id*. He reiterated: "If you're in this country illegally you ought to be detained [and] deported[.] [E]nd of story," and he defended the bill as a "reasonable approach" to border security. *Id*. State Representative Ray Barnes expressly promoted the bill on

100 was motivated at least in significant part by a desire to punish undocumented immigrants for (1) entering and remaining in the country without authorization and (2) allegedly committing the charged offense.[15]

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the assumption that "the mere fact that they're here undocumented [means] that the crime has already been committed." *House Judiciary Committee Meeting on H.B. 2389*, 47th Leg., 1st Regular Sess. (Ariz.2005). State Senator Jack Harper said, "what part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything." *Senate Judiciary Committee Meeting on H.B. 2389 and HCR 2028*, 47th Leg., 1st Regular Sess. (Ariz. 2005). In a hearing on a bill to implement Proposition 100 after its passage, State Representative John Kavanagh said: "I'm amazed that we provide bail to anybody who's arrested for a crime that's an illegal alien. . . . I therefore support this bill as a first step to what we should be really doing and that's deporting anybody here illegally." *House Floor Meeting on S.B. 1265*, 48th Leg., 1st Regular Sess. (Ariz. 2007).

[15] Denying an arrestee bail for either of these reasons would be impermissible. Being present in the United States without authorization is not a crime, *see Arizona v. United States*, 132 S. Ct. at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."), and even if it were, only the federal government would be permitted to impose punishment for it, *see id*. at 2509 ("[I]t would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."). And bail could not be denied to punish arrestees for their charged, but unproven, crimes. *See Bell*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a [defendant] may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Salerno*, 481 U.S. at 746 (citing *Bell* for the proposition that pretrial detention violates substantive due process when it constitutes "impermissible punishment before trial").

Nevertheless, assuming that Proposition 100 was adopted for the permissible regulatory purpose of managing flight risk, "the punitive/regulatory distinction turns on whether" Proposition 100 "appears excessive in relation to the alternative purpose assigned to it." *Salerno*, 481 U.S. at 747 (alterations and internal quotation marks omitted). As discussed earlier, *Salerno* held that the Bail Reform Act was not excessive where it addressed a "pressing societal problem," "carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes" and entitled the arrestee to "a prompt detention hearing" at which an individualized determination of dangerousness was required. *Id*. By contrast, Proposition 100 is excessive in relation to its stated legitimate purpose because it purports to deal with a societal ill—unmanageable flight risk posed by undocumented immigrants as a class—that has not been shown to exist. Even if we assume that a problem exists, Proposition 100 employs a profoundly overbroad irrebuttable presumption, rather than an individualized evaluation, to determine whether an arrestee is an unmanageable flight risk. As discussed, this mechanism necessarily results in the deprivation of liberty even where not necessary to ensure appearance at trial, because undocumented immigrants who do not pose a flight risk or who pose a manageable one are categorically denied bail based solely on their status. Given this severe lack of fit between the asserted nonpunitive purpose and the actual operation of the law, we conclude that Proposition 100's bail provisions are punitive rather than regulatory. Thus, the Proposition 100 laws facially violate substantive due process by imposing punishment before trial.

IV.

To conclude, Proposition 100 categorically denies bail or other pretrial release and thus requires pretrial detention for every undocumented immigrant charged with any of a broad range of felonies, regardless of the seriousness of the offense or the individual circumstances of the arrestee, including the arrestee's strong ties to and deep roots in the community. The defendants maintain that this unusual, sweeping pretrial detention statute, directed solely at undocumented immigrants, comports with substantive due process. It does not. The Supreme Court has made clear that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. The "narrowly focuse[d]" pretrial release statute upheld in Salerno provided a "careful delineation of the circumstances under which detention will be permitted." *Id.* at 750–51. In contrast, the Proposition 100 laws do not address an established "particularly acute problem," are not limited to "a specific category of extremely serious offenses," and do not afford the individualized determination of flight risk or dangerousness that *Salerno* deemed essential. *Id.* at 750. These laws represent a "scattershot attempt" at addressing flight risk and are not narrowly tailored to serve a compelling interest. *Id.* In addition, and for the same reasons, the challenged laws are excessive in relation to the state's legitimate interest in assuring arrestees' presence for trial. They therefore impermissibly impose punishment before an adjudication of guilt. For these reasons, we hold that the Proposition 100 laws violate the substantive component of the Due Process Clause of the Fourteenth Amendment on these two

independent grounds. Because we hold that the laws facially violate substantive due process, we do not reach the plaintiffs' procedural due process, Eighth Amendment, Sixth Amendment and preemption claims.[16] The judgment of the district court is reversed.

REVERSED AND REMANDED.

NGUYEN, Circuit Judge, concurring:

I agree with the majority that Proposition 100 violates substantive due process. However, the majority assumes, without deciding, that Proposition 100 was *not* motivated by an improper punitive purpose. I write separately to address the extraordinary record of legislative intent, which I believe demonstrates

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[16] We disagree with Judge O'Scannlain's argument that the Proposition 100 laws must be evaluated under the Excessive Bail Clause of the Eighth Amendment rather than the substantive component of the Due Process Clause of the Fourteenth Amendment. Dissent at 805–07. The Supreme Court applied substantive due process review to bail-denial schemes in *Salerno* and *Schall*. Judge O'Scannlain would distinguish those cases on the ground that they involved the denial of bail for dangerousness rather than flight risk, but the Supreme Court has never recognized—or even suggested—that distinction. *See, e.g., Zadvydas*, 533 U.S. at 690 (citing *Salerno* as setting out the general standard for detention in criminal cases); *Foucha*, 504 U.S. at 83 (citing *Salerno* as setting out the general standard for the "pretrial detention of arrestees"). As Judge O'Scannlain recognizes, Dissent at 807, the parties also have not "thorough[ly] brief[ed]" the Eighth Amendment issues. For these reasons, we properly rely on substantive due process rather than the Eighth Amendment to address Proposition 100's constitutionality.

that Proposition 100 was intentionally drafted to punish undocumented immigrants for their "illegal" status, even if they pose no flight risk or danger to the community. This record also sheds light on why the law's provisions are excessive in so many respects. Acknowledging the improper legislative purpose in this case not only aids our substantive due process analysis, but also reaffirms our constitutional commitment to provide due process to all, regardless of immigration status.

I

The Supreme Court has instructed that "[t]o determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *United States v. Salerno*, 481 U.S. 739, 747 (1987) (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)). Absent evidence of express intent to punish, the analysis depends on whether the restrictions are reasonably connected to a legitimate purpose, and whether they appear excessive in relation to that purpose. *Bell v. Wolfish*, 441 U.S. 520, 538–39 (1979); *Salerno*, 481 U.S. at 747. However, whether a statute is intended as punitive, or excessive in relation to some legitimate purpose, are not analytically distinct inquiries. One informs the other:

> Thus, if a particular restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer

> that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Bell, 441 U.S. at 539 (footnote omitted). Conceptually, this makes sense. Because the ultimate question is whether or not a statute constitutes impermissible punishment, we may consider both what legislators had to say about the law they crafted, and the extent to which the law was drawn accordingly.

Significantly, "the mere invocation of a legitimate purpose will not justify particular restrictions and conditions of confinement amounting to punishment." *Schall*, 467 U.S. at 269. Even if the restrictions "serve legitimate regulatory purposes, it is still necessary to determine whether the terms and conditions of confinement under [the challenged statute] are in fact compatible with those purposes." *Id*. (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

These inquiries do not lend themselves to a rigid, formulaic approach. Rather, "each case has turned on its own highly particularized context." *Flemming v. Nestor*, 363 U.S. 603, 616 (1960). Where the record of legislative intent is inconclusive, the Supreme Court has not hesitated to consider—rather expansively, in fact—the nature and history of the restraint, among other factors. *Mendoza-Martinez*, 372 U.S. at 168–69. *See also Bell*, 441 U.S. at 538 ("The factors identified in Mendoza–Martinez provide useful guideposts in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word.").

The facts of this case illustrate precisely why legislative intent and tailoring have been considered two sides of the same coin. I therefore turn to some of the record evidence that informs my judgment regarding the unconstitutionality of Proposition 100.

II

A

Proposition 100 was sponsored by former State Representative Russell Pearce. Introducing the bill to the Senate Judiciary Committee, Representative Pearce noted that a majority of Americans "want the border secured, [and] our laws enforced," and described Proposition 100 as a "very reasonable approach" to accomplishing those ends.[1] *Senate Judiciary Committee Meeting on H.B. 2389 and H.C.R. 2028*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). He described the purpose of Proposition 100: "[W]hen people are in this country illegally and they commit a serious felony they ought not to be bondable. . . ." *Id.* Although he alluded generally to

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[1] According to Pearce, Proposition 100 was originally part of a package of legislation intended to "secure the borders." The package also included: the Fair and Legal Employment Act, Ariz.Rev.Stat. § 23–212, which imposes penalties on employers for hiring undocumented immigrants; Proposition 102, Ariz. Const. art. II, § 35, a constitutional amendment to deny undocumented immigrants standing to recover in civil suits; Proposition 103, Ariz. Const. art. XXVIII, § 2, declaring English as the official language of Arizona; and Proposition 300, Ariz.Rev.Stat. §§ 15–191.01, 15–232, 15–1803, 15–1825, 46–801, 46–803, which prohibits undocumented aliens from receiving child care assistance, and those enrolled in public community colleges and universities from receiving the benefit of in-state tuition rates and financial aid, or participating in adult education classes.

the supposed dangers that "violent aliens" pose to the public, he did not cite a single example or any other evidence of the problem,[2] and instead elaborated:

> I mean, you know bad enough you're illegal but you commit a serious crime you ought not to be bondable unless you're released after prosecution, after you do your time to ICE and then to be deported. In fact, all illegal aliens in this country ought to be detained, debriefed, and deported. . . .

Id. He continued:

> Violent criminals in our society who, again, may not be brought to justice if they're released and should not be released first of all, according to federal law, but they're to be deported, so seriously, they've committed [a] serious crime, I think that this just simply bridges the gap, a loophole in the law that would allow people who are not in this country [ ]legally who have no business to be released if they commit any crime, *they have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally*.

Id. (emphasis added). Maricopa County Attorney Andrew Thomas, whose office played a central role in drafting Proposition 100, also testified before the

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[2] The record reflects that Proposition 100's sponsors and supporters also presumed that undocumented immigrants are *categorically* more dangerous than other arrestees. In these proceedings, however, appellees have wisely abandoned this premise because it is completely unsubstantiated.

Committee. Thomas explained the purpose of the bill as follows:

> I believe it is time to end the first class tickets that we have been giving from our jails for serious criminals. . . . [C]ertain serious criminals currently enjoy this simply because of their status as illegal immigrants and I believe that we need to take action to put an end to this.

Id. In his testimony, Thomas, much like Representative Pearce, alluded to "numerous examples of serious and violent criminals that Maricopa County Attorney's Office has prosecuted in the past that have escaped justice"—but also could not cite a single case to support his position.[3] Testifying later in these proceedings, Thomas again could not identify a single such case, and further conceded that his office did not possess any data or information illustrating the problem.

During the same Judiciary Committee hearing, State Senator Bill Brotherton raised concerns about the breadth of the bill. Senator Brotherton gave an example—a student who overstayed his or her visa

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[3] The only specific case Thomas discussed was that of Oscar Garcia Martinez, who, according to Thomas, was released on bail, and *deported by the federal government*, rendering him unavailable to the state. *Id*. Sometime later Martinez apparently reentered, and was present at a confrontation that resulted in the shooting of a police officer by a third party. *Id*. However troubling Martinez's case may be, it certainly does not demonstrate that undocumented immigrants pose a greater flight risk, given that it was the federal government that rendered Martinez absent.

and was charged with pirating music online would automatically be denied bail, even though a judge might not consider such a defendant a flight risk. *Senate Judiciary Committee Meeting on H.B. 2389 and H.C.R. 2028*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). Representative Pearce dismissed this concern as an attempt to "muddy the waters," *id*., and reiterated the intent of the bill:

> The fact that we would continue to try to put some veil over what's really happening and try to paint this face of this poor student who overstays his visa, everybody knows what this is targeting. This is, you know, and my issue is very simple. This bill doesn't go as far as it ought to go. This is a very modest bill. If you're in this country illegally you ought to be detained, deported[,] end of story.

Id. Similarly, when Senator Brotherton expressed his concern that altering a lottery ticket ought not to be a non-bondable offense, State Senator Jack W. Harper interjected:

> *To that point, what part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything let alone a Class 1, 2, or 3 felony*. . . . We need to just get off the subject of lottery ticket[s] because fraudulently altering lottery tickets is a crime and *they shouldn't make bail for anything*, so let's just move on.

Id. (emphases added). Ultimately, the Committee amended the legislation to specify that, should the ballot measure pass, the Legislature would reserve to itself the task of defining "serious felony offense." To

that end, Representative Pearce introduced legislation that would define "serious felony offense" as entailing any class 1, 2, 3, or 4 felony, as well as aggravated driving under the influence. *House Floor Meeting on H.B. 2580*, Mar. 7, 2006, 47th Leg., 2nd Regular Sess. (Ariz. 2006). That bill was eventually passed by the Legislature, and signed into law.

Months later, Proposition 100 was referred to the state's voters. The ballot materials did not inform voters of the definition of "serious felony offense," or that it included many non-violent offenses. Instead, in a statement of support on the ballot, Representative Pearce warned voters of "[l]arge, well-organized gangs of illegal aliens," and the need to keep such "dangerous thugs in jail rather than releasing them onto the streets." Publicity Pamphlet Issued by Janice K. Brewer, then-Arizona Secretary of State, Ballot Propositions & Judicial Performance Review, General Election, Nov. 7, 2006, *available at* http://www.azsos.gov/election/2006/info/pubpamphlet/english/Prop100.htm. Maricopa County Attorney Thomas urged voters[4]:

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[4] Thomas also claimed: "Other examples of illegal immigrants who made bail and avoided prosecution for serious crimes include accused child predators, armed robbers, drug dealers and other accused criminals." *Id.* The only example Thomas provided, however, was the case of Oscar Martinez. *See supra* at note 3. And, as another legislator later correctly noted, "[t]hose individuals who are accused of committing heinous crimes [such as those cited by Proposition 100's supporters] are already denied bail under current state statutes...." *House Floor Meeting on S.B. 1265*, June 7, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007) (statement of Rep. Krysten Sinema).

> Thanks to an amendment approved overwhelmingly by voters in 2002, the Arizona Constitution now denies bail to defendants accused of rape and child molestation. This proposition similarly would deny bail to illegal immigrants who pose a clear danger to society and who too often use our border as an escape route. Our state constitution was not intended to "bail out" illegal immigration. I urge you to vote yes to end this abuse of our criminal justice system.

Id. Don Goldwater, a gubernatorial candidate, placed this statement on the ballot:

> I commit to you that, as your Governor, I will apply all legal measures to protect and defend Arizonans from the illegal invasion. This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduced the level of crime in our neighborhoods.
>
> It is embarrassing to have our state lead the nation in crime. Unfortunately, the current governor has vetoed ten separate bills sent to her desk the legislature that were written to protect you from illegal immigration.

Id. By contrast, the sole statement of opposition to Proposition 100, signed by several individuals, cautioned:

> Prop 100 would . . . create a sub-class of people within the justice system based solely on race or national origin, and unnecessarily penalize people who pose little or no risk to the community. This proposition would do nothing more

> than institutionalize bias and discrimination in the justice system, at taxpayer expense.

Id. Voters approved the constitutional amendment.

After the popular vote, follow-on legislation was introduced that would have lowered the standard of proof applicable to the determination of immigration status from "proof evident and presumption great," to "preponderance of the evidence." Pearce rose on the floor of the House to oppose the bill because, in his view, it did not lower the standard even further, to "probable cause." In his opposition, Pearce repeatedly emphasized the immigrants' "illegal" status:

> You don't need to make that kind of a standard for preponderance or anything else to the charge[,] they are here illegally. . . . they are here illegally, they have no business being released no [matter] what the charge in reality because they're a flight risk. They're here illegally. They need to be turned over to ICE . . . .

House Floor Meeting on S.B. 1265, June 7, 2007, 48th Leg., 1st Regular Sess. (Ariz.2007). Representative John Kavanagh raised similar arguments. *Id*. Ultimately, the measure to set the burden of proof at "preponderance of the evidence" failed. Days later, discussing an amendment to lower the standard to "probable cause," Representative Kavanagh explained his support for the latter:

> I'm amazed that we provide bail to anybody who's arrested for a crime that's an illegal alien. I think anybody, regardless if it's serious or a minor crime [,] should be denied bail. . . . We should deny bail to anybody here illegally who's

> picked up. I therefore support this bill as a first step to what we should be really doing and that's deporting anybody here illegally.

House Floor Meeting on S.B. 1265, June 13, 2007, 48th Leg., 1st Regular Sess. (Ariz.2007). The amendment lowering the standard of proof to "probable cause" passed.

While this is by no means an exhaustive survey of the evidence of punitive intent to be found in the record, the foregoing summary at least conveys the tenor of the legislative debates and ballot materials. The hostility directed toward undocumented immigrants based solely on their status could not be more obvious.

B

I acknowledge, of course, that there are references in the record to flight risk—indisputably, a legitimate objective of regulation, Salerno, 481 U.S. at 749, 107 S.Ct. 2095; Bell, 441 U.S. at 534, 99 S.Ct. 1861—and more specifically, the unsupported premise that undocumented immigrants inherently pose a greater flight risk than other arrestees.[5] But there is nothing

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[5] For example, in one exchange, Representative Pearce asked: "[W]ouldn't you agree that somebody that's not in this country legally probably is a greater flight risk than somebody who is, who has roots here and is a citizen here?" *House Floor Meeting on S.B. 1265*, June 7, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007). State Representative Pete Rios, who previously served as the first Latino president of Arizona's State Senate, responded: "I know of some people in this country who don't have proper documentation that probably have deeper roots in the state of Arizona than I do. They've been here for a couple of generations, they've got grandkids, so I mean that, in itself, I think does not determine whether or not one is a flight risk." *Id.*

unusual about a "mixed" legislative record; legislators and voters often take positions for diverse reasons.

Indeed, the very concept of legislative intent can be "elusive," *Mendoza-Martinez*, 372 U.S. at 168, and

> [j]udicial inquiries into [legislative] motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed. Moreover, the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.

Flemming, 363 U.S. at 617. But recognizing the perils of second-guessing legislative intent does not relieve us of the responsibility to ascertain the law's purpose, particularly here because, in my view, the overriding legislative intent is so apparent. *See Salerno*, 481 U.S. at 747 (in evaluating restrictions on liberty, "we first look to legislative intent").

That there are references to flight risk, as noted by the dissent, illustrates why the Supreme Court has prescribed a mutually-reinforcing, twin-pronged framework for analysis. *See Bell*, 441 U.S. at 539. To the extent there is any doubt about the purpose of Proposition 100, the statements in the legislative record further support the conclusion, consistent with the majority's analysis of its various provisions, that the law was intended as punishment.

This principle rings true at a general level—naturally, the law's drafting and design sheds light on its

purpose, and vice versa—but it also informs my analysis of the law's specific provisions. For example, a number of Proposition 100's excesses, including the evident overbreadth of the critical term "serious felony offense," were pointed out to the bill's sponsors in Committee. As noted above, Senator Brotherton drew attention to the specific examples of illegal downloading and alteration of a lottery ticket to emphasize the law's excessive reach. *See Senate Judiciary Committee Meeting on H.B. 2389 and H.C.R.2028*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). Yet, Proposition 100's sponsors declined to narrow the definition of covered "serious felonies," which renders "an exceedingly broad range of offenses" non-bondable. Maj. Op. at 784. Why Senator Brotherton's concerns regarding Proposition 100's excessiveness were brushed aside is plain from the record—because, as expressed by the bill's supporters, "illegal aliens" "shouldn't make bail for anything." *Senate Judiciary Committee Meeting on H.B. 2389 and H.C.R.2028*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). The legislative debate over the standard of proof is also illustrative. Statements such as, "I'm amazed that we provide bail to anybody who's arrested for a crime that's an illegal alien," *House Floor Meeting on S.B. 1265*, June 13, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007), strongly suggest that the standard of proof was lowered in order to target undocumented immigrants as such, without respect to flight risk.

I agree with the majority that we do not affirmatively require formal legislative findings or other evidence, yet may find the absence of such a record to be

significant.[6] Maj. Op. at 784. I also readily acknowledge that there may be many cases where the mixed record renders legislative intent too elusive, or otherwise unknowable. This case, however, is not one of them. Intentionally meting out pretrial punishment for charged but unproven crimes, or the nonexistent crime of being "in this country illegally,"[7]7 is without question, a violation of due process principles. *Mendoza-Martinez*, 372 U.S. at 167; *Bell*, 441 U.S. at 539.

III

"[I]t is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts considered to be void," *Fletcher v. Peck*, 6 Cranch 87, 128 (1810) (Marshall, C. J.), and I do not reach that conclusion lightly. However, the unequivocal expressions of penal intent in the record, viewed together with the excesses of the law's various provisions, lead me to conclude that Proposition 100 is facially unconstitutional.

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[6] Nobody disputes that there is no such evidence in the record. The dissent observes that undocumented immigrants reportedly commit a disproportionate share of felonies in Arizona. Tallman dissent at 801 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012)). But even assuming that is true, it does not suggest undocumented immigrants overall are more likely to flee than other arrestees, nor does it shed light on the flight risk posed by any given individual defendant.

[7] The majority correctly points out that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2505.

TALLMAN, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting:

In striking down Proposition 100, the majority sets aside the policy judgment of the Arizona legislature and nearly 80 percent of Arizona's voting electorate, telling the State it really doesn't have an illegal immigration problem adversely affecting its criminal justice system. But Arizonans thought Proposition 100 was the solution to an ineffective bail system that was letting too many illegal aliens avoid answering for their serious felony charges. They were concerned that these offenders, who often lack community ties, too often skirt justice by fleeing the state or the country before trial. Plaintiffs–Appellants Lopez-Valenzuela and Castro-Armenta are good examples. Between the two of them they were charged with aggravated assault with a deadly weapon, kidnapping, theft by extortion, assisting a criminal syndicate, and transportation of a dangerous drug.

Today's holding leaves Arizona nowhere to turn. For years before Arizona passed Proposition 100, it tried to assess flight risk based on family ties, employment, and length of residency in the community on an individualized basis. Immigration status was assuredly a critical consideration in this assessment, even well before Proposition 100's enactment. The majority ignores reality to suggest otherwise. Yet despite these individualized flight-risk assessments, the Maricopa County Attorney explained in 2006 that Arizona still had a "tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding, and not facing trial for their crimes." *Lou Dobbs Tonight* (CNN television broadcast Oct. 13, 2006). Faced with this continuing problem, Arizona

took a logical next step by denying bail to illegal aliens who commit serious felony offenses. Because Proposition 100 is not excessive in relation to Arizona's compelling regulatory interest in ensuring that illegal aliens who commit serious felony offenses stand trial, I respectfully dissent.

I

A

The majority's errors begin with its substantive due process framework. It applies what it calls "*Salerno*'s heightened scrutiny" to Proposition 100. Maj. Op. at 780; *see United States v. Salerno*, 481 U.S. 739 (1987). Under this test, it says, the law survives only when it is "narrowly tailored to serve a compelling state interest." Maj. Op. at 781. This is strict scrutiny. *See, e.g., Green v. City of Tucson*, 340 F.3d 891, 896 (9th Cir. 2003) (Fisher, J.) (Under "strict scrutiny," "the statute will be upheld only if the state can show that the statute is narrowly drawn to serve a compelling state interest."). However, you will not find strict scrutiny mentioned, let alone applied, anywhere in *Salerno*.[1]

The majority mistakenly applies strict scrutiny by misreading *Salerno*, which addressed the considera-

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[1] If you find it peculiar that the Supreme Court would apply strict scrutiny without telling us, you have good reason. It certainly knows how to say that it is applying strict scrutiny when it does so. *See, e.g., Johnson v. California*, 543 U.S. 499, 507 (2005) (explaining that it is applying "strict scrutiny"); *Bush v. Vera*, 517 U.S. 952, 976 (1996) (same); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (same); *Bernal v. Fainter*, 467 U.S. 216, 227 (1984) (same).

tion of danger to the community in bail determinations, as holding that the Bail Reform Act implicated a fundamental liberty interest. *Salerno* held just the opposite. The Court acknowledged that liberty, in its broadest sense, is a fundamental right. *Salerno*, 481 U.S. at 750. It explained, however, that the right asserted in *Salerno* was more limited; it was the right to bail *after* "the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Id*. at 751. As to *that* right, the Court said: "we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id*. (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Thus, rather than holding that liberty is a fundamental right in all instances, the Court held that the liberty right "under the[ ] circumstances" of the Bail Reform Act was *not* fundamental. *Id*.

The Court's narrow construction of the liberty interest at stake in *Salerno* is consistent with its instruction that "'[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations and internal quotations omitted). Thus, we must "carefully formulat[e]" the liberty interest, *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997), and define it "*narrowly*," *Flores v. Meese*, 913 F.2d 1315, 1330 (9th Cir. 1990) (emphasis supplied). Only then can we determine whether the asserted right is fundamental.

The majority ignores that instruction and concludes that the Bail Reform Act and Proposition 100 impinge on some generalized fundamental liberty right. In fact, the majority makes no effort to even define the right at stake. But it isn't simply "liberty" as the majority would have it. Rather, Proposition 100 implicates an arrestee's alleged right to bail where the proof is evident or the presumption great that the arrestee committed a serious felony offense,[2] and there is probable cause to believe the arrestee has entered or remained in the United States illegally. That is, the right is not merely to be free from detention, but to be free from detention "under these circumstances." *Salerno*, 481 U.S. at 751.

In my view, this asserted right is not "so rooted in the traditions and conscience of our people as to be ranked fundamental." *Id.*; *see*, *e.g.*, *Demore v. Kim*, 538 U.S. 510, 522 (2003) (stating, in approving the detention of aliens awaiting deportation, that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens"); *Carlson v. Landon*, 342 U.S. 524, 545 (1952) ("The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases[.]"); *United States v. Edwards*, 430 A.2d 1321, 1327 (D.C. App. 1981) ("[A] fundamental right to bail was not universal among the colonies or among the early states;" "the language of several state constitutions

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[2] "Serious felony offense" is statutorily defined as "any class 1, 2, 3 or 4 felony or [aggravated driving under the influence]." Ariz. Rev. Stat. Ann. § 13–3961(A)(5)(b).

explicitly limiting the power of the judiciary to set excessive bail negates any suggestion that the excessive bail clause was intended to restrict the definition of bailable offenses by the legislature."), *cert. denied*, 455 U.S. 1022 (1982). Because the right is not fundamental, strict scrutiny does not apply.[3]

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[3] Given that the Court in *Salerno* said that the right at issue was not fundamental, *id.* at 751, and never applied strict scrutiny, how does the majority divine that strict scrutiny applies to Proposition 100? Apparently from a couple of fractured Supreme Court opinions that hint, but do not hold, that *Salerno* may have meant something it never said. *See Flores*, 507 U.S. at 302 (including *Salerno* in a string cite about defining "substantive due process"); *Foucha v. Louisiana*, 504 U.S. 71, 80-83 (1992) (discussing *Salerno* but not elucidating its standard). I am not convinced.

Flores cited *Salerno* merely for the proposition that there is "a substantive component" to the Constitution's due process guarantee. *Flores*, 507 U.S. at 302-03. Surely the majority would not suggest that the other cases cited in the same string cite—*Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)—applied strict scrutiny to any fundamental right. Moreover, the page of *Salerno* cited simply defines "substantive due process"; it does not mention fundamental rights or strict scrutiny. *See* 481 U.S. at 746. Similarly, *Foucha* cites the same page of *Salerno* for the same limited proposition, surrounded by citations to cases that merely describe substantive due process. 504 U.S. at 80 (citing *Zinermon v. Burch*, 494 U.S. 113 (1990); *Salerno*, 481 U.S. at 746; and *Daniels v. Williams*, 474 U.S. 327 (1986)). True, *Foucha* discusses *Salerno* at greater length, but for the circumstances in which a person can be detained because he poses "a danger to others or to the community," not because of flight risk. *Id.* at 81.

B

Whatever substantive due process standard *Salerno* provides—and I concede that there is some ambiguity—Proposition 100 meets it. Nobody disputes that "Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial." Maj. Op. at 782. And Proposition 100 is "careful[ly] delineat[ed]" and "carefully limited"—it is even "narrowly focuse[d]." *Salerno*, 481 U.S. at 750-51, 755. Several fundamental errors in the majority's opinion lead it to conclude otherwise.

First, by ignoring all evidence to the contrary, the majority concludes that "unmanageable flight risk posed by undocumented immigrants . . . has not been shown to exist." Maj. Op. at 791. Tell that to the Maricopa County Attorney who, from his vantage on the front line just a month before the Proposition 100 vote, thought flight risk among illegal aliens in Arizona was "*a tremendous problem*." *Lou Dobbs Tonight* (CNN television broadcast Oct. 13, 2006) (emphasis supplied).[4] The majority insists that the record does not substantiate this claim, but the claim—by the

[4] The prosecutor also testified before the Arizona Senate Judiciary Committee, explaining that there were "numerous examples of serious and violent criminals that [the] Maricopa County Attorney's Office has prosecuted in the past that have escaped justice because they have [ ] slipped back across the border after they've been released." *Senate Judiciary Committee Meeting on H.B. 2389*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005).

Maricopa County Attorney no less—is part of the record.[5] It is one thing for my colleagues to declare that Proposition 100 is an excessive measure to address Arizona's flight problem; reasonable minds can disagree. It is quite another for an Article III court to tell Arizona, based on this record and considering the majority vote of the Arizona legislature and electorate in favor of Proposition 100, that its perceived problem is not really a problem. Maj. Op. at 791. Even the Arizona courts have concluded that "Proposition 100 reflects that [the Arizona] electorate and Legislature perceived pretrial detention as a potential solution to a pressing societal problem." *Hernandez v. Lynch*, 167 P.3d 1264, 1274 (Ariz. Ct. App. 2007) (internal quotations and citations omitted). They are the ones who have to live with it.

Second, the majority takes issue with Proposition 100 not being a widely shared legislative judgment because few states categorically deny bail for illegal aliens. Maj. Op. at 787–88. While factually true, perspective here is critical. As an initial matter, novelty alone does not render a law unconstitutional. *See Ewing v. California*, 538 U.S. 11, 24 (2003) (holding that defendant's sentence under California's novel "three strikes" law was not unconstitutional). In *Ewing*, the Supreme Court explained that "[t]hough

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[5] The majority responds to the Maricopa County Attorney's statements by attempting to discredit his testimony through extra-record evidence not cited to or relied on by any party. Maj. Op. at 783–84, n. 6. Of course, the majority cannot so easily impeach the four out of five Arizona voters who must live with the problem the majority concludes does not exist.

three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding." Id. My colleagues give no deference to the policy judgment of the Arizona legislature or the democratic views of the electorate.

Moreover, we cannot judge this case with blinders on. Arizona faces unique challenges as one of four states bordering Mexico. Indeed, "Arizona bears many of the consequences of unlawful immigration. . . . Unauthorized aliens who remain in the State comprise, by one estimate, almost six percent of the population." *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). "[I]n the State's most populous county, these aliens are reported to be responsible for a disproportionate share of serious crime." *Id*. I find it hardly surprising that other states have not enacted their own Proposition 100 laws. Kansas, for example, may have its share of illegal immigrants, but certainly not to the extent of Arizona. More importantly, only four states—Arizona among them—provide serious felony offenders with such a quick and convenient route into Mexico.[6] Thus, while Proposition 100 may be relatively unique among the fifty states, that's nothing more than a reflection of Arizona's unique flight risk problem and geography.

Third, the majority mistakenly demands "findings, studies, statistics or other evidence . . . showing

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[6] The majority's argument also ignores a host of practical concerns facing border states like Arizona, such as the time and expense in trying to apprehend felony fugitives in Mexico and elsewhere, and the cumbersome and lengthy extradition process required to bring fugitives back to Arizona to face justice.

that undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents." Maj. Op. at 783. Arizona is not required to support its legislative judgment with empirical studies. This is a slippery slope on which the majority is quick to tread, and one which threatens the delicate balance between the judiciary and the people we serve.

While we have imposed empirical fact-finding requirements in a few contexts,[7] those are the exceptions to the rule. *See*, *e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 21 (2005) ("[W]e have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech." (citations omitted)). Indeed, the Supreme Court has explained that "[w]hile Congressional findings are certainly helpful . . . the absence of particularized findings does not call into question Congress' authority to legislate." *Id*. We have never held that a state legislature—let alone a state's voting electorate, as here—must prove its flight-risk concerns with empirical data. Nor have we been instructed to require

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[7] The most prevalent example is in the context of content-based regulations under the First Amendment. *See Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009). But even in the First Amendment context, the Supreme Court has explained that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 378 (2000). I find it neither novel nor implausible that a border state struggles to prevent serious felony offenders who are in the country illegally from fleeing before trial. The majority decrees that Arizonans will just have to live with it.

supporting data in connection with pretrial detention schemes—not in *Salerno* and not in *Demore*.[8] The majority's empirical data requirement, imposed today by judicial fiat, is particularly inappropriate and dangerous in this case, where Arizona voters passed Proposition 100 by a whopping 78 percent. *See Nixon*, 528 U.S. at 394 (observing, even under the heightened requirements of First Amendment challenges, that a 74-percent statewide vote passage rate "certainly attested to the perception" that the challenged law was necessary to remedy the state's identified concern).

Finally, the majority errs by effectively precluding the use of irrebuttable presumptions in the bail context. Proposition 100 "plainly is not carefully limited," says the majority, "because it employs an overbroad, irrebuttable presumption rather than an individualized hearing" to assess flight risk. Maj. Op. at 784. That conclusion relies on the premise that individualized hearings would solve Arizona's troubles. In *Demore*, the Supreme Court upheld a categorical bail prohibition in part because individualized hearings

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[8] In *Salerno*, the Supreme Court merely mentioned, in a single sentence and without any hint of a requirement, that Congress made findings in enacting the Bail Reform Act. 481 U.S. at 750. In *Demore*, the respondent argued that Congress had no evidence that individualized bond hearings would be ineffective, but the Court observed that Congress had evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens absconding. 538 U.S. at 528. *Demore* did not hold that congressional fact-finding was required; but even if we read in such a requirement, Arizona's legislators met that requirement by taking testimony to that effect. *See Senate Judiciary Committee Meeting on H.B. 2389*, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005).

had proven unsuccessful. 538 U.S. at 528. Here, like in *Demore*, Arizona has already tried determining flight risk on an individualized basis, considering factors such as family ties, employment, and length of residency in the community. If you believe the record—and Plaintiffs-Appellants have given us no reason not to—the pressing problem of illegal aliens absconding before trial survived these individualized hearings. Thus, Proposition 100's lack of individualized flight risk determinations cannot render its irrebuttable presumption excessive. *See Demore*, 538 U.S. at 528.

Applying well-established substantive due process principles to this record reveals that Proposition 100—while distasteful to some—survives substantive due process review.

II

The majority also errs by finding Proposition 100 impermissibly punitive, although it purports to leave untouched the district court's factual conclusion that Proposition 100 was not intended to impose punitive restrictions. *Salerno* provides the two-part test to determine whether the pretrial detention scheme at issue constitutes "impermissible punishment or permissible regulation." *Salerno*, 481 U.S. at 747. First, we look to legislative intent to determine whether the legislature "expressly intended to impose punitive restrictions." *Id*. Second, we ask "whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Id*. (alterations and internal quotation marks omitted). In other words, in the absence of an

express punitive intent, "the punitive/regulatory distinction turns on" whether the pretrial detention scheme is "excessive in relation to the regulatory goal [the legislature] sought to achieve." *Id*.

Reviewing the record as a whole, including legislative history and election-related materials, it is clear that Arizona legislators and voters passed Proposition 100 as a regulatory measure to ensure illegal aliens who commit serious felony offenses stand trial. But don't just take my word for it, *see Lopez-Valenzuela v. Cnty. of Maricopa*, 719 F.3d 1054, 1060-61 (9th Cir. 2013) (reviewing the record de novo); District Judge Susan Bolton and the Arizona Court of Appeals conducted their own independent review of the record and reached the same conclusion, *Lopez-Valenzuela v. Maricopa Cnty.*, No. 08–00660, at 10 (D. Ariz. March 29, 2011) ("Having reviewed the voluminous evidence submitted in this case, the Court finds that the record as a whole does not support a finding that Proposition 100 was motivated by an improper punitive purpose."); *Hernandez*, 167 P.3d at 1273 ("[W]e hold that the purpose behind Proposition 100 was not to punish illegal aliens, but to prevent them from fleeing before trial."). The majority wisely declines to disturb these findings. Maj. Op. at 790 ("[W]e see no reason to revisit those conclusions on appeal."). Yet my colleagues spend several pages attempting to impeach them.

Turning to the second step, we all agree that "Arizona has a compelling interest in ensuring that persons accused of serious crimes, including undocumented immigrants, are available for trial." Maj. Op. at 782. But the majority concludes that Proposition 100 is excessive in relation to its purpose. Maj. Op. at 791. It isn't.

Proposition 100, like the Bail Reform Act, "carefully limits the circumstances under which detention may be sought." *Salerno*, 481 U.S. at 747. Two threshold requirements must be met before an individual can be denied bail pursuant to Proposition 100. First, the court must find, at the arrestee's initial appearance, that there is probable cause to believe that the arrestee has entered or remained in the United States illegally. Ariz. R. Crim. P. 7.2(b). But more than that, the court must also find that the proof is evident or the presumption great that the individual committed a "serious felony offense." *Id.*: Ariz. Const. art. II § 22(4).

An arrestee is also able to challenge this initial determination by "mov[ing] for reexamination of the conditions of release." Ariz. R. Crim. P. 7.4(b). Upon such a motion—and whether or not the arrestee alleges new facts—a hearing must be held on the record "as soon as practicable but not later than seven days after filing of the motion." *Id.* These procedural and substantive protections make Proposition 100 far from a "scattershot attempt to incapacitate those who are merely *suspected*" of being in the country illegally or of committing a serious felony offense. *Salerno*, 481 U.S. at 750 (emphasis supplied).

For years, Arizona tried making individualized flight-risk determinations for aliens alleged to have committed serious felony offenses. That system didn't solve Arizona's particularly acute flight-risk problem. Its voters then overwhelmingly approved Proposition 100 as a measured response in light of the state's prior efforts. How can that be excessive?

III

The majority does not reach Plaintiffs-Appellants' remaining claims because it doesn't have to. However, I remain convinced that the district court properly awarded Defendants-Appellees summary judgment on those claims as well. I stand by the reasons set forth in that opinion. *See Lopez–Valenzuela*, 719 F.3d at 1064-73. For all these reasons, I respectfully dissent.

O'SCANNLAIN, Circuit Judge, dissenting:

Today, the majority divines, under the rubric of substantive due process, that Arizona's categorical denial of bail is "excessive" notwithstanding the State's interest in mitigating flight risk. Remarkably, the majority scarcely mentions the Constitution's command that "[e]xcessive bail shall not be required." U.S. Const. amend. VIII.

I respectfully dissent from our expansion of substantive due process and neglect of express constitutional text.[1]

I

A

"[R]eluctant to expand the concept of substantive due process," *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992), the Supreme Court held in *Graham v. Connor*, 490 U.S. 386 (1989), that "[w]here

[1] Because I believe that the majority's substantive due process analysis is wrong as well as unnecessary, I also join Judge Tallman's dissent.

a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (alteration in original) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.)). "*Graham* . . . requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (emphasis added) (citing *Graham*, 490 U.S. at 394).

The majority flouts this requirement. It "first" analyzes the Proposition 100 laws under "general substantive due process principles," Maj. Op. at 780, 780–90, then considers whether the Proposition 100 laws violate the specific due process prohibition on imposing punishment before trial, *id.* at 780, 789-91. My colleagues in the majority decline to consider—ever—whether the Proposition 100 laws violate the Eighth Amendment. *Id.* at 791-92 & n. 16.

One would hardly know, after reading the majority's forty-three page opinion—analyzing whether Arizona's denial of bail was excessive in light of the flight risk posed by illegal immigrants—that, under the Eighth Amendment of the Constitution itself,

"[e]xcessive bail shall not be required."[2] Indeed, one might think that "[t]he Court has prohibited excessive bail." Maj. Op. at 777 (emphasis added).

B

To be sure, specific constitutional provisions do not preclude recognition of substantive due process rights that touch on related subjects. *Lewis*, 523 U.S. at 843 ("Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment."); *see*, *e.g.*, *Lanier*, 520 U.S. at 272 n.7 (*Graham* did "not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments."). Not every conceivable constitutional dispute regarding bail is resolved by the Eighth Amendment. But the question whether denying bail to illegal immigrants based on flight risk is unconstitutionally excessive is posed, precisely, by the Excessive Bail Clause. *See Stack*, 342 U.S. at 4-5.

The majority relies primarily on *United States v. Salerno*, 481 U.S. 739 (1987), to justify its substantive due process inquiry, but I suggest that it has not read that case carefully enough. *Salerno* does not excuse the majority's disregard of the Eighth Amendment, because this case, unlike *Salerno*, concerns detention *based on flight risk*.

Two substantive due process arguments against the Bail Reform Act of 1984 were rejected in *Salerno*: The Court analyzed whether "the Due Process Clause

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[2] A sharp-eyed reader might spot the majority's brief gestures toward the Eighth Amendment's prohibition in its discussion of *Stack v. Boyle*, 342 U.S. 1 (1951). Maj. Op. at 777–78.

prohibits pretrial detention on the ground of danger to the community." *Id*. at 748. And the Court considered whether it was unconstitutional "because the pretrial detention it authorizes constitutes impermissible punishment before trial." *Id*. at 746. Both claims were grounded in the Court's substantive due process precedents; they required the Court to decide whether the Bail Reform Act violated already established due process rights. *See id*. at 749-51 (detention based on dangerousness) (citing, *inter alia*, *Schall*, 467 U.S. 253, *Addington v. Texas*, 441 U.S. 418 (1979), and *Carlson v. Landon*, 342 U.S. 524 (1952)); *id*. at 746-47 (punishment before trial) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Schall v. Martin*, 467 U.S. 253 (1984)). Neither claim implicated the Eighth Amendment inquiry proper to this case-whether the Proposition 100 bail laws are constitutionally "excessive" based on flight risk.

1

As to its "general substantive due process principles," the majority misreads *Salerno* by conflating detention based on dangerousness, which the Court considered, with detention based on flight risk, which the Court did not. In *Salerno*, the Court rejected the "categorical imperative"—advanced by the Second Circuit—that the Due Process Clause "prohibits pretrial detention on the ground of danger to the community." *Id*. at 748 (emphasis added). Because due process does not "erect[ ] an impenetrable 'wall' " to such detention, the Court reasoned "that the present statute providing for pretrial detention on the basis of dangerousness must be evaluated in precisely the same man-

ner"—applying means-end scrutiny—"that we evaluated the laws in the cases discussed above." *Id*. at 748-49 (emphasis added).

Nothing in *Salerno* suggests that detention based on flight risk should be evaluated in the same manner. *See id*. at 749 (Detainees "concede and the Court of Appeals noted that an arrestee may be incarcerated until trial if he presents a risk of flight.").[3] Indeed, the Eighth Amendment secures the specific right not to be required to post excessive bail in light of flight risk. *See Stack*, 342 U.S. at 4-5. The majority's substantive due process inquiry is thus inappropriate under *Graham*. *See*, *e.g.*, *John Corp. v. City of Houston*, 214 F.3d 573, 582 (5th Cir.2000) ("The purpose of *Graham* is to avoid expanding the concept of substantive due process where another constitutional provision protects individuals against the challenged governmental action.").

2

The Court's substantive due process jurisprudence indeed secures the specific right to be free from punishment before trial. *E.g.*, *Schall*, 467 U.S. at 269. But the majority misapplies that jurisprudence, asking under substantive due process questions properly considered under the Eighth Amendment and thereby displacing specific constitutional text.

Our role is to question whether a particular "disability is imposed for the purpose of punishment." *Bell*

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[3] Thus, the distinction between denial of bail for dangerousness and denial of bail based on flight risk is "recognized" in *Salerno* itself, *contra* Maj. Op. at 792 n.16, the majority's misinterpreted dicta notwithstanding, *cf.* Tallman Dissent at 800 n.3.

v. Wolfish, 441 U.S. 520, 538 (1979). To decide whether the legislative purpose was punitive, in the absence of an "express intent to punish," we must discern whether pretrial detention is "excessive in relation to the alternative purpose assigned [to it]." *Id.* Answering that question, *Salerno* considered the "*incidents* of pretrial detention" under the Bail Reform Act—such as prompt detention hearings and whether pretrial detainees were housed separately from post-conviction detainees—and concluded that they did not reveal an improper punitive purpose. 481 U.S. at 747 (emphasis added). By contrast, the majority here considers the *substance* of Proposition 100—categorical denial of bail—and decides it is excessive notwithstanding the heightened risk of flight, the very question properly considered under the Eighth Amendment.[4]

C

The Supreme Court tells us not to rely on generalized substantive due process "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125. The majority's incautious expansion of substantive due process confirms the wisdom of such advice.

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[4] The majority's confusion is also evident in what meaning it affords a finding of "excessiveness." In *Schall*, 467 U.S. at 269, and in *Salerno*, 481 U.S. at 747, excessiveness *may* indicate an improper punitive purpose. In the majority's view, however, "excessiveness" is an independent constitutional violation under substantive due process. *See* Maj. Op. at 790–91. Here, the majority assumes "that Proposition 100 was adopted for the permissible regulatory purpose of managing flight risk." *Id.* at 790. Under substantive due process, that should have been the end of the inquiry.

Grounded in neither text nor history, the majority's due process inquiry simply replaces legislative and popular judgment with its own, at least until Arizona provides sufficiently robust statistical analysis to suit.

If we must remove "a difficult question of public policy . . . from the reach of the voters" of Arizona, *Schuette v. Coal. to Defend Affirmative Action*, —— U.S. ——, 134 S.Ct. 1623, 1637, 188 L.Ed.2d 613 (2014), we should pay them the respect of grounding our decision in the textual guarantees of the Constitution, not the nebulous haze of substantive due process.

II

The question we *ought* to have considered is whether the Eighth Amendment contains any substantive restrictions on Arizona's authority to declare certain classes of crimes or criminals nonbailable, and, if so, whether Proposition 100 violates such restrictions.[5] Without thorough briefing on such questions from the parties, but guided by sparse discussion in Supreme Court precedent, I offer a tentative answer.

In Carlson, the Supreme Court rejected the proposition that the Eighth Amendment required certain detainees to be admitted to bail:

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[5] For the purposes of this dissent, I assume the Excessive Bail Clause has been incorporated against the States. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 & n. 12 (2010) (citing *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (noting that the Excessive Bail Clause "has been assumed to have application to the States")).

> The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. *The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country.*

342 U.S. 524, 545-46 (1952) (emphasis added) (footnotes omitted). In *Salerno*, the Court reserved the question "whether the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail." 481 U.S. at 754.[6]

As noted in *Carlson*, the Eighth Amendment echoes the English Bill of Rights of 1689. *Compare* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), *with* English Bill of Rights 1689 (declaring that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). But "bail was

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[6] Lopez and Castro rely, as did the detainees in *Salerno*, on *Stack*'s dictum that "[b]ail set at a figure higher than an amount reasonably calculated to [to assure the presence of the accused] is 'excessive' under the Eighth Amendment." 342 U.S. at 5. But that standard addresses how the Eighth Amendment constrains courts. It does not answer how, if at all, the Amendment constrains legislatures.

not an absolute right in England." William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Albany L. Rev. 33, 77 (1977). The English Bill of Rights did not restrain Parliament from declaring which classes of crimes were bailable. *See* Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 Geo. L. J. 1139, 1155-58 (1972); *see also Duker*, *supra*, at 81. Of course, "that Parliament classified certain offenses as nonbailable is not an absolute indication that Congress was to enjoy the same power" under the Eighth Amendment, "to define bailable and nonbailable offenses." *Hunt v. Roth*, 648 F.2d 1148, 1159 (8th Cir. 1981), *vacated sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982).

Early American constitutions suggest, nonetheless, that their prohibitions of "excessive bail" limited the judiciary, not the legislature. *E.g.*, Md. Const. of 1776, § 22 ("That excessive bail ought not to be required . . . by the courts of law."); N.H. Const. of 1784, art. I, § 33 ("No magistrate or court of law shall demand excessive bail or sureties. . . ."); *see generally*, Duker, *supra*, at 79-83. "[B]y the time of the formulation of the Bill of Rights by the first Congress of the United States, the experience in America had been to grant bail in cases which were bailable, *as determined by the legislature*." *Id*. at 83 (emphasis added). Legislatures were free to declare horse stealing, for example, bailable or not. *Compare* Caleb Foote, *The Coming Constitutional Crisis: Part I*, 113 U. Pa. L. Rev. 959, 976-77 (1965) (describing the failure by one vote of Jefferson's bill to render horse theft bailable), with Duker, *supra*, at 82 & n. 293 (noting that Georgia's

legislature denied bail for horse stealing despite constitutional guarantee that "excessive bail" shall not be "demanded").

The First Congress's debates over the Bill of Rights contain no hint that the originally understood meaning of the Eighth Amendment's Excessive Bail Clause was any different from the right guaranteed by the same words in the English Bill of Rights or the State constitutions. *Carlson*, 342 U.S. at 545 & n. 44; *see also* Duker, *supra*, at 85-86.

I tentatively conclude, therefore, based on the text of the Constitution and the history of the right to bail, that the Eighth Amendment secures a right to reasonable bail where a court has discretion to grant bail. *Cf. Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 573-74 (1833) (Story, J.) ("The [E]ighth [A]mendment is addressed to courts of the United States exercising criminal jurisdiction, and is doubtless mandatory to them and a limitation upon their discretion."). It does not, however, restrict legislative discretion to declare certain crimes nonbailable. *See* Duker, *supra*, at 86-87 ("Although the amendment limits the discretion of the courts in setting bail, Congress is free to determine the cases for which bail shall be allowed, or whether it shall be allowed at all."); Meyer, *supra*, at 1194 (The Constitution "reserved for Congress the right to make legislative changes [to bail] whenever required by changed circumstances."). I have found no evidence to suggest that the Excessive Bail Clause, as originally understood, limited legislative discretion.[7]

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[7] Even Professor Foote, foremost proponent of the view that the Eighth Amendment was "meant to provide a constitutional right to bail," conceded that "the underlying right to the remedy of bail

III

During Congress's debates on the Bill of Rights, the only comment on the Excessive Bail Clause was by Samuel Livermore, Representative for New Hampshire, "who remarked: 'The clause seems to have no meaning to it, I do not think it necessary. What is meant by the terms excessive bail? Who are the judges . . . ?' "[8]8 Ignoring the first question, regrettably, the majority firmly answers the second: "We are."

On the majority's chosen ground, Judge Tallman has the better of the argument, so I happily join his dissent. But I regret the majority's impulse to clash in the *terra incognitia* of substantive due process. Guided by text and history, we might have found surer footing by applying the Excessive Bail Clause.

I respectfully dissent.

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itself . . . was omitted" from the Constitution, albeit through "inadvertence." Foote, *supra*, at 968, 987. I agree with the perceptive law student who dismissed Foote's argument as supported by "little more than speculation about the workings of the minds of George Mason and the Framers," and "flawed" speculation at that. Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 Colum. L. Rev. 328, 340 (1982).

[8] Duker, *supra*, at 86 (quoting 1 Cong. Deb. 754 (Gales & Seaton eds. 1834)).

APPENDIX B

719 F.3d 1054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Angel Lopez-Valenzuela; Isaac Castro-Armenta, *Plaintiffs–Appellants*, v. Joseph M. Arpaio, Maricopa County Sheriff, in his official capacity; County of Maricopa; William Gerard Montgomery, Maricopa County Attorney, in his official capacity, *Defendants–Appellees*.	No. 11–16487 D.C. No. 2:08-cv-00660-SRB OPINION

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Argued and Submitted
October 19, 2012—San Francisco, California

Filed June 18, 2013

Before: Raymond C. Fisher, Richard C. Tallman, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge Fisher

Counsel

Cecillia D. Wang (argued) and Kenneth J. Sugarman, American Civil Liberties Union Foundation Immigrants' Rights Project, San Francisco, CA; Andre I. Segura and Esha Bhandari, American Civil Liberties Union Foundation Immigrants' Rights Project, New York, NY; Daniel Pochoda, American Civil Liberties Foundation of Arizona, Phoenix, AZ, for Plaintiffs–Appellants.

Timothy J. Casey (argued), Schmitt Schneck Smyth Casey & Even, P.C., Phoenix, AZ, for Defendants–Appellees Maricopa County and Joseph M. Arpaio.

Bruce P. White and Anne C. Longo, Deputy County Attorneys, Maricopa County Civil Services Division, Phoenix, AZ, for Defendant–Appellee William Montgomery.

OPINION

TALLMAN, Circuit Judge:

In 2006, Arizona voters overwhelmingly approved an amendment to their state constitution known as "Proposition 100." It commands that Arizona state courts may not set bail "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." Ariz. Const. art. II, § 22(A)(4) (as amended). Felony arrestee plaintiffs Angel Lopez-Valenzuela and Isaac Castro-Armenta filed a class action in the United States District Court for Arizona seeking declaratory, injunctive, and habeas relief

challenging the constitutionality of Proposition 100 and its implementing statute and rules. They argue that the new criminal procedures violate the substantive and procedural due process guarantees of the Fourteenth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Sixth Amendment right to counsel. They further claim that the Arizona law is preempted by federal immigration law. The district court granted summary judgment and partial dismissal in favor of the Arizona state officials named in the suit. We affirm.

I

Voters approved the November 2, 2006, ballot measure by a margin of 78 percent to 22 percent. Prior to passage of Proposition 100, Article II, Section 22 set forth several exceptions to the general presumption that persons charged with crimes are entitled to bail. These exceptions were for particularly serious offenses such as murder or sexual abuse of children or other indicia of dangerousness. To ensure the defendant's presence throughout his criminal prosecution, amended Article II, Section 22 now provides that no bail may be set "[f]or serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." Ariz. Const. art. II, § 22(A)(4). Proposition 100 does not contain a definition of "serious felony offense." To make that determination we must look to the general laws of Arizona. Prior to Proposition 100's passage, the Arizona Legislature passed House Bill 2580, defining "serious felony offense," should Proposition 100 be adopted by the electorate, as any Class 1, 2, 3, or 4 felony or aggravated

driving-under-the-influence offense. Ariz. Rev. Stat. Ann. § 13–3961(A)(5)(b).

In the early days after Proposition 100's enactment there was confusion over the standard of proof that should apply to the determination of immigration status for bail purposes during an initial appearance ("IA").[1] Some IA commissioners were applying a "proof evident/presumption great" standard to both the criminal charge and the immigration status determination. To resolve the uncertainty, on April 3, 2007, the Chief Justice of the Arizona Supreme Court issued Administrative Order 2007–30. Admin. Order No. 2007–30, *available at* http://www.azcourts.gov/portals/22/admorder/orders07/2007–30.pdf (last visited June 10, 2013). The Order set the standard of proof for IA immigration status determinations as probable cause. *Id.* But the Order also directed that if a commissioner found probable cause to believe that a defendant had entered or remained in the United States illegally, a follow-up evidentiary hearing on whether bail should be denied was to be held within twenty-four hours. *Id.* At that hearing, known as a

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[1] A person arrested for a felony crime in Arizona must be taken before a judicial officer for an initial review to ascertain probable cause to justify the arrest (if made by a peace officer without an arrest warrant) and to make a preliminary determination as to whether the person will be detained or released on various conditions. Ariz. R. Crim. P. 4.1, 4.2. The task in Maricopa County is routinely handled by court commissioners. *See Superior Court Criminal Department,* THE JUDICIAL BRANCH OF ARIZONA, MARICOPA COUNTY, http://www.superiorcourt.maricopa.gov/SuperiorCourt/CriminalDepartment/innovation.asp# a (last visited June 10, 2013).

Simpson/Segura hearing,[2] defendants would be "entitled to representation by counsel, and to present evidence, testimony, and witnesses, by proffer or otherwise, to provide evidence on the defendant's behalf." *Id.* The standard of proof for immigration status at the *Simpson/Segura* hearing was to be the "proof evident/presumption great" standard. *Id.*

Before Administrative Order 2007–30 could be implemented, however, the Arizona Legislature passed Senate Bill 1265, codifying the probable cause standard for the immigration status determination. Ariz. R. Crim. P. 7.2(b). In the wake of the Bill's passage, the Chief Justice rescinded Administrative Order 2007-30 and adopted amendments to the Arizona Rules of Criminal Procedure recognizing the probable cause standard for immigration status determinations. *See Segura,* 196 P.3d at 840 (detailing the history of Proposition 100, Administrative Order 2007–30, and Senate Bill 1265). The current Rules now provide that the bail determination must be made at the initial appearance, that "any party" may move for a reexamination of release conditions imposed at the initial appearance, and that a hearing on such motion "shall be held on the record as soon as practicable but not later than seven days after filing of the motion." Ariz. R. Crim. P. 7.4(b).

Plaintiff-Appellant Angel Lopez-Valenzuela was arrested and charged with the crime of dangerous drug transportation and/or offer to sell, a Class 2 felony under Arizona criminal law. Ariz. Rev. Stat. Ann.

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[2] *Simpson v. Owens,* 85 P.3d 478 (Ariz. Ct. App.2004); *Segura v. Cunanan,* 196 P.3d 831 (Ariz. Ct. App. 2008).

§ 13–3407(A)(7). Because the IA commissioner found probable cause to believe him to be in the United States illegally, he was denied bail pursuant to the Proposition 100 laws. Plaintiff-Appellant Isaac Castro-Armenta was arrested and charged with Class 2, 3, and 4 felonies including aggravated assault with a deadly weapon, kidnaping, and assisting a criminal syndicate. Probable cause was also found to believe that Castro-Armenta was in the United States illegally and he too was denied bail under Proposition 100.

The two arrestees then filed a combined class action complaint and habeas corpus petition seeking declaratory and injunctive relief to strike down the Proposition 100 laws and to restrain the state's bail enforcement policies and practices. The district court granted Plaintiffs' motion to certify their lawsuit as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2), and by the same order granted Defendants' Rule 12(b)(6) motion to dismiss their claim that Proposition 100 was preempted by federal immigration laws. *Lopez-Valenzuela v. Maricopa County,* No. 08–00660 (D. Ariz. Dec. 9, 2008) (order certifying class and granting partial dismissal).[3] The parties filed cross-motions for summary judgment on the remaining claims and the district court entered final judgment granting Defendants' motion as to five of the remaining six counts in their Complaint. The court subsequently dismissed without prejudice (per Plaintiffs'

[3] The class was defined as "[a]ll persons who have been or will be ineligible for release on bond by an Arizona state court in Maricopa County pursuant to Section 22(A)(4) of the Arizona Constitution and A.R.S. § 13–3961(A)(5)."

request) the final count addressing the Fifth Amendment right against self-incrimination.[4] *Lopez–Valenzuela v. Maricopa County,* No. 08–00660 (D. Ariz. Mar. 19, 2011) (order granting summary judgment and dismissal).

II

We review de novo a district court's grant or denial of summary judgment. *Russell Country Sportsmen v. U.S. Forest Serv.,* 668 F.3d 1037, 1041 (9th Cir. 2011). We also review de novo a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Cousins v. Lockyer,* 568 F.3d 1063, 1067 (9th Cir. 2009). We review a challenge to the constitutionality of a statute de novo as well. *United States v. Gonzales,* 307 F.3d 906, 909 (9th Cir. 2002).

A

We must first determine whether Proposition 100 bail laws create an impermissible scheme of punishment in violation of the federal Constitution's Due Process Clause. We evaluate substantive due process challenges to bail statutes under the framework articulated in *United States v. Salerno,* 481 U.S. 739 (1987). The Supreme Court there instructed us that "[t]o determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *Id.* at 747. Absent an express intent on the part of the legislature to punish, "the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable

[4] The Fifth Amendment claim is not before us on appeal.

for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Id.* (internal citations and quotation marks omitted). In other words, under this two-pronged approach, even where a legislature does not express a clear punitive intent a bail regulation may still be unconstitutional if it is excessive in relation to its legitimate alternative purpose.

The Arizona Legislature made no formal findings on the purpose of Proposition 100. Absent such findings, courts can look to the legislative record as well as to statements made in election materials circulated to the voters who approved it to determine legislative intent. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188, 196–97, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003). Having reviewed all of the evidence, we are convinced, as was the district court, that the record as a whole does not show that Proposition 100 was motivated by an improper punitive purpose.

It is undisputed that during committee hearings on the Proposition 100 laws, several legislators made statements about controlling illegal immigration. For example, then-Representative Russell Pearce, the sponsor of the Proposition 100 bill, speaking in a March 2005 Arizona Senate Judiciary Committee hearing, stated: "[B]ad enough you're illegal but you commit a serious crime you ought not to be bondable unless you're released after prosecution, after you do your time to ICE and then to be deported. In fact, all illegal aliens in this country ought to be detained, debriefed and deported." *Senate Judiciary Committee Meeting on H.B. 2389,* Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). Senator Jack Harper,

speaking at the same hearing, declared: "[W]hat part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything let alone a Class 1, 2, or 3 felony." *Id.* However, in this March 28 committee meeting alone, Pearce mentioned flight risk and public safety as the primary reasons behind the Proposition 100 laws three different times. For example:

> The aim of the bill is to keep those folks who are a threat to our society, again there's several criteria for release on bail as you know currently. . . . This simply adds to that criteria because one of the risks, one of the factors involv[ed] in setting bond currently is flight risk. If you are not in this country legally and have no roots . . . their flight risk is a much greater risk.

Id.

Representative Pearce again discussed flight risk during a House Floor Meeting. *House Floor Meeting on H.B. 2580,* Mar. 7, 2006, 47th Leg., 2nd Regular Sess. (Ariz. 2006). He mentioned flight risk and public safety five times during the June 7, 2007, House Floor Meeting on the companion Senate Bill. *House Floor Meeting on S.B. 1265,* June 7, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007). Other Representatives mentioned flight risk and public safety as motiving factors three more times in the same legislative meeting. Thus, while it is clear from the record that Arizona lawmakers were concerned with the effects of illegal immigration when they were debating the Proposition 100 laws, a fair reading of the record does not support Plaintiffs-Appellants' argument that Proposi-

tion 100's primary purpose is to punish and deter immigration offenses.[5]

Nor do the materials provided to voters demonstrate a clear punitive purpose. The official voter information guide contained four statements in favor and one against Proposition 100. Publicity Pamphlet Issued by Janice K. Brewer, then Arizona Secretary of State, *Ballot Propositions & Judicial Performance Review, General Election, November 7, 2006,* 13–14, *available at* http://www. azsos.gov/election/2006/info/PubPamphlet/english/Prop100.htm. A statement by Don Goldwater, a candidate for Arizona Governor reads in part: "This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neigh-

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[5] The dissent suggests that Plaintiffs–Appellants need not "prove that punishment was the sole or even the predominant purpose of the legislation" in order for us to hold that it is impermissibly punitive. Dissent at 1075, n.2. Not only are the cases cited for this proposition not on point, but the dissent fails to acknowledge the presumption of constitutionality which we are required to apply. *See Flemming v. Nestor,* 363 U.S. 603, 617 (1960) ("We observe initially that only the clearest proof could suffice to establish the unconstitutionality of a statute on [the ground that it is motivated by a punitive purpose]. . . . [T]he presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.") (citation, alteration marks, and internal quotation marks omitted); *Alaska Packers Ass'n v. Indus. Accident Comm'n,* 294 U.S. 532, 543 (1935) (applying "the presumption of constitutionality which attaches to every state statute").

borhoods." *Id.* at 14. But a statement by Representative Pearce reads: "With few real ties to the community and often completely undocumented by state agencies, any illegal aliens can easily escape prosecution for law breaking simply because they are so difficult to locate." *Id.* at 13. The Maricopa County Attorney wrote: "Far too many illegal immigrants accused of serious crimes have jumped bail and slipped across the border in order to avoid justice in an Arizona courtroom." *Id.* at 13-14. The other supporting statements also invoked "flight risk." *See id.* On balance, we agree with the district court that the ballot materials to which voters were exposed are, at best, arguably neutral on the question of punitive intent.

Likewise, the media coverage of Proposition 100 leading up to the November 2006 election cited in the record does not establish a punitive purpose. Although one Arizona newspaper piece described Proposition 100 as one of "a foursome of ballot measures aimed at curbing illegal immigration," Brady McCombs, *Four Propositions on Entrants Out in Front,* ARIZ. DAILY STAR, Oct. 29, 2006, at B2, another editorial stated that "An illegal immigrant is, without a doubt, a high [flight] risk because of the ability to come and go out of the country when they please." Moses Sanchez, *Research Immigration Issues Before Voting,* ARIZ. REPUBLIC, Oct. 11, 2006, at 19. And in the same video where a CNN correspondent discussed "four ballot measures that will further crack down on illegal aliens in the state," the Maricopa County Attorney said: "Well, Arizona has a tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding, and not facing trial for their crimes, either because they jump

bail after they are let out, or because, when they are let out on bail, the federal government deports them." *Lou Dobbs Tonight* (CNN television broadcast Oct. 13, 2006). Reviewing the record, neither the legislative history nor the voter materials and media coverage would support the argument that Proposition 100 was motivated by a punitive rather than a regulatory purpose. Proposition 100 survives the first prong of the *Salerno* substantive due process test.

B

The second prong of the *Salerno* substantive due process test asks that we examine whether Proposition 100 is excessive in relation to its legitimate alternative purpose. 481 U.S. at 747. Proposition 100's legitimate—indeed its compelling—purpose is ensuring that defendants remain in the United States to stand trial for alleged felony violations of Arizona's criminal laws. Thus, the correct inquiry under *Salerno* is whether Proposition 100 is "reasonably related to [the] legitimate governmental objective" of controlling the flight risk of defendants accused of certain state-law felonies. *Bell v. Wolfish,* 441 U.S. 520, 539 (1979). We hold that it is.

Plaintiffs-Appellants argue that Proposition 100 is excessive in relation to its goal because it precludes any individualized determinations of flight risk and covers a broad range of offenses, including some that might result in non-custodial sentences. In essence, they argue, a Proposition 100 status determination serves as a proxy for an individualized finding of flight risk because while a defendant held nonbondable under Proposition 100 can seek an individualized

Simpson/Segura hearing, the judicial officer will determine only that there is proof evident or presumption great that the defendant committed a Class 1 through 4 felony and probable cause to believe that the defendant entered or remained in the country illegally. *See Segura,* 196 P.3d at 843 (explaining that "*Simpson* identified what is necessary to fully litigate a no-bail determination"); *Simpson v. Owens,* 85 P.3d 478, 494 (Ariz. Ct. App. 2004) ("Arizona law does not require that a risk of flight or a risk of recidivism be considered before bail is denied.").[6]

Denial of bail without individualized consideration of flight risk or dangerousness is not unusual. After all, the vast majority of states categorically deny the right to bail to persons charged with capital crimes, and at least eight states categorically deny bail to those charged with crimes punishable by life imprisonment.[7] Missouri has a bail provision similar to Arizona's Proposition 100 laws whereby judges are to

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[6] The dissent compares the denial of bail in this context to the removal by the state of an unwed father's children after the death of their mother. We think it worth noting that an irrebuttable presumption that all unwed fathers are unsuitable parents is hardly in the same category as Arizona's studied decision to withhold bail from those the government has shown by a proof evident/presumption great standard have committed Class 1 through 4 state-law felonies.

[7] *See* Ala. Const. art. I, § 16; Alaska Const. art. I, § 11; Ark. Const. art. 2, § 8; Cal. Const. art. I, § 12; Colo. Const. art. II, § 19; Conn. Const. art. I, § 8; Del. Const. art. I, § 12; Fla. Const. art. I, § 14 (categorical denial of bail to those charged "with a capital offense or an offense punishable by life imprisonment"); Idaho Const. art. I, § 6; Ill. Const. art. I, § 9 (categorical denial of bail to those charged with a capital offense or offense punishable by life imprisonment); Ind. Const. art. 1, § 17 (categorical

presume that no set of bail conditions can reasonably assure a defendant's appearance if the judge reasonably believes that the defendant "is an alien unlawfully present in the United States." Mo. Rev. Stat. § 544.470(2). Defendants held without bail under Missouri's statute are given the opportunity to prove their lawful presence in the United States but if unable to do so are held without bail, irrespective of any

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denial of bail to those charged with "murder or treason"); Kan. Const. Bill of Rights § 9; Ky. Const. § 16; La. Const. art. I, § 18; Me. Const. art. I, § 10 (categorical denial of bail for "any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution ... whatever the punishment of the crimes may be"); Mass. Gen. Laws ch. 276, § 20D (categorical denial of bail to those charged with a capital offense or offense punishable by life imprisonment); Mich. Const. art. I, § 15 (categorical denial of bail for charges of murder, treason, repeat violent felonies, and felonies committed while out on bail, probation, or parole for a prior violent felony); Minn. Const. art. I, § 7; Miss. Const. art. 3, § 29; Mo. Const. art. I, § 20; Neb. Const. art. I, § 9 (categorical denial of bail for murder, treason, and rape); Nev. Const. art. 1, § 7 (categorical denial of bail to those charged with a capital offense or offense punishable by life imprisonment); N.H. Rev. Stat. § 597:1–c (categorical denial of bail for any offense "punishable by up to life in prison"); N.J. Const. art. I, § 11; N.M. Const. art. II, § 13; N.D. Const. art. I, § 11; Ohio Const. art. I, § 9; Okla. Const. art. 2, § 8; Or. Const. art. I, § 14 (murder and treason); Pa. Const. art. I, § 14 (capital offenses or offenses punishable by life imprisonment); R.I. Const. art. I, § 9 (offenses punishable by life imprisonment, offenses involving dangerous weapons by defendants previously convicted of other offenses, and certain controlled substance offenses); S.C. Const. art. I, § 15 (capital offenses, offenses punishable by life imprisonment, and certain violent offenses); Tenn. Const. art. I, § 15; Utah Const. art. I, § 8 (capital offenses, felony offenses committed while out on bail, probation, or parole for prior felony offense); Wash. Const. art. I, § 20; Wyo. Const. art. 1, § 14.

individualized considerations of flight risk. *Id.* Arizona's Proposition 100 laws, therefore, are neither unprecedented nor unique.

Many states deny bail for those accused of a wide range of offenses (including certain drug offenses, sexual assault offenses, crimes of violence, and repeat felonies) after an individualized showing of flight risk or dangerousness,[8] yet not all states require such individualized determinations. Notably, Arizona is one of the states that categorically denies bail to persons charged with certain particularly serious crimes without requiring individualized determinations of flight risk or dangerousness. *See* Ariz. Const. art. II, § 22 ("All persons charged with crime shall be bailable by sufficient sureties, except: 1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great."); *Simpson,* 85 P.3d at 494 ("Arizona law

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[8] California's constitution is illustrative:

> A person shall be released on bail by sufficient sureties, except for:
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> . . . (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others."

Cal. Const. art. I, § 12.

does not require that a risk of flight or a risk of recidivism be considered before bail is denied.").[9] Thus, Proposition 100 is nothing more than an extension of Arizona's existing pretrial detention scheme to include defendants the state believes present a significant flight risk, thus "narrowly focus[ing] on a particularly acute problem in which the Government interests are overwhelming." *Salerno,* 481 U.S. at 750.[10]

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[9] Citing *Simpson,* the New Hampshire Supreme Court upheld a similar categorical pretrial detention scheme in *State v. Furgal,* 13 A.3d 272 (2010). The court rejected the defendant's assertion that *Salerno* requires a court to consider the specific circumstances of each defendant's risk of flight before denying bail. *Id.* at 279 ("Given this long history of bail permitting courts in a narrow category of cases to focus exclusively upon the evidence of the defendant's guilt, the individualized inquiry for which the defendant argues cannot be said to be 'implicit in the concept of ordered liberty.'").

[10] The dissent complains that Arizona has failed to put forward "findings, studies, statistics or other evidence" demonstrating that illegal immigrants pose a heightened flight risk. Dissent at 1076. There is no requirement that a legislature support an intuitive proposition borne out by anecdotal evidence with statistical studies. Otherwise, any state law or local ordinance with an arguably punitive impact would require scientific studies to withstand a due process challenge. Moreover, the Supreme Court has previously acknowledged that there is support for the proposition that criminal aliens pose a greater flight risk. *See Demore v. Kim,* 538 U.S. 510, 519 (2003) (noting that the record showed that "more than 20% of deportable criminal aliens failed to appear for their removal hearings"); *cf. City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 51-52 (1986) (finding that city was entitled to rely on the experiences of other cities and was not required to conduct new studies or gather independent evidence when enacting a zoning ordinance challenged on First Amendment grounds).

The record in this case includes committee hearing discussions

The Court of Appeals of Arizona embraced this justification when it upheld Proposition 100 against a constitutional challenge in *Hernandez v. Lynch,* 167 P.3d 1264 (Ariz. Ct. App. 2007). Quoting *Salerno,* the Arizona court explained that "our electorate and Legislature 'perceived pretrial detention as a potential solution to a pressing societal problem.' " *Id.* at 1274. Addressing the argument that Proposition 100 encompasses a broad range of crimes, including those often resulting in non-custodial sentences, the court pointed out that "the types of offenses . . . are no less serious than those encompassed by the [federal detention statute upheld in *Demore*]." *Id.* at 1275.[11][11] "Proposition 100 denies bail to illegal aliens charged

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on the "numerous examples of serious and violent criminals that [the] Maricopa County Attorney's Office has prosecuted in the past that have escaped justice because they have either slipped back across the border after they've been released on bail or they've been deported by the federal government after they were released on bail. . . ." If the dissent is not satisfied by the anecdotal evidence presented in the Arizona Legislature on this subject, it is unclear why it is comfortable with the anecdotal evidence in the record of "examples of undocumented immigrants who were arrested before Proposition 100, granted bail and appeared at their court dates and trials." Dissent at 1077.

[11] *Demore* upheld detention without bail of aliens subject to deportation—an administrative proceeding without the more substantial risks inherent when facing a serious felony criminal prosecution. Furthermore, *Demore* upheld these detentions pursuant to 8 U.S.C. § 1226(c) without requiring individualized determinations of flight risk or dangerousness. 538 U.S. at 515-16. If the federal government can detain aliens subject to deportation for months while their administrative proceedings are pending, Arizona is within constitutional bounds if it chooses to incarcerate pre-trial those illegal aliens it has arrested on probable cause for committing serious felony offenses.

with Class 1, 2, 3 and 4 felonies, the least of which is punishable by a minimum of one year in prison." *Id.*

Arizona's substantial interest in ensuring that those charged with serious state-law crimes are available to answer for them is undeniable. To strike down Proposition 100 on the grounds that it violates substantive due process would require us to find that Proposition 100 "is not reasonably related to a legitimate goal" and is "arbitrary and purposeless" such that we "may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted." *Bell,* 441 U.S. at 539. Although *Salerno* requires an individualized determination of dangerousness for nonbondability decisions under the federal Bail Reform Act of 1984, our analysis of Arizona's Proposition 100 need not parallel *Salerno* 's analysis of the federal Act. This is so because Proposition 100 seeks to target flight risk rather than dangerousness.

In pursuit of this undeniably legitimate goal, Proposition 100 reaches a larger number of crimes than the Bail Reform Act and allows for denial of bail on a showing of unlawful presence. However, simply because the decision to deny bail pursuant to Proposition 100 is arrived at differently than it would be under federal law does not mean that Proposition 100 necessarily violates substantive due process. Balancing the individual's right to liberty with Arizona's compelling interest in assuring appearance at trial, "we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Salerno,* 481 U.S. at 751 (citing *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934)). Be-

cause Proposition 100 is reasonably related to the legitimate goal of controlling flight risk, we hold that it is not excessive in violation of substantive due process under the Constitution of the United States.

III

"When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. . . . This requirement has traditionally been referred to as 'procedural' due process." *Salerno,* 481 U.S. at 746 (citing *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976)). The felony arrestees assert that the Proposition 100 laws violate procedural due process by failing to provide a meaningful opportunity for accused persons to contest their status determinations. Specifically, Plaintiffs-Appellants argue that the probable cause standard applied to immigration status determinations at both the initial appearance and any subsequent *Simpson/Segura* hearing is constitutionally inadequate. They also challenge Defendants-Appellees' implementing policies and practices as procedurally deficient and error-prone. We believe Proposition 100 survives both of these challenges.

A

"[A] judicial determination of probable cause is a prerequisite to any extended restraint on the liberty of an adult accused of crime." *Schall v. Martin,* 467 U.S. 253, 274-75 (1984) (citing *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975)). Plaintiffs-Appellants ask us to hold that immigration status inquiries in Proposition 100 cases are fundamentally incompatible with a probable cause standard of proof because immigration

status is a technical legal question requiring application of the federal Immigration and Nationality Act rather than a probabilistic inquiry. They request the use of a heightened standard "that takes into account the complexity of the question and the exceptionally strong liberty interest at stake." Corrected Brief of Appellants at 46, No. 11-16487 (Nov. 2, 2011). The argument asks too much at the initial appearance and ignores the procedural protections should a request be made for a review hearing seven days later.

Where the United States seeks to hold a dangerous defendant without bail, the federal Bail Reform Act places the burden of proof on the government to show by clear and convincing evidence that the defendant poses a danger such that "no condition or combination of conditions will reasonably assure the safety of any other person and the community. . . ." 18 U.S.C. § 3142(f)(2). The Act is silent about the standard of proof required when the government seeks pretrial detention due to flight risk, but we have held that under the Act flight risk must only be shown by the lower "clear preponderance of the evidence" standard. *See United States v. Motamedi,* 767 F.2d 1403, 1406 (9th Cir. 1985). In practice, temporary detention is frequently ordered by federal magistrate judges at the initial appearance subject to review at a subsequent detention hearing where the parties are better prepared to litigate the issue.

The district court here found that the difference between Arizona's probable cause standard for Proposition 100 status determinations and the federal "clear preponderance" standard for flight risk determinations does not amount to a procedural due pro-

cess violation, and we agree. States are entitled to determine the laws that govern their criminal justice systems, and the Arizona Legislature spoke clearly when it passed Senate Bill 1265 codifying the probable cause standard. This is especially true in light of the prior confusion that had surrounded the standard of proof for Proposition 100 status determinations. Taking account of this confusion, as well as the complexity of status determinations and the strong liberty interests at stake, the Arizona Legislature nevertheless felt that the probable cause standard was constitutionally adequate. The fact that Congress chose to set a higher standard of proof for dangerousness determinations under federal bail law does not render any less legitimate Arizona's choice regarding the standard of proof that best achieves its goal of preventing flight before trial. Arizona's probable cause standard for Proposition 100 status determinations does not violate the United States Constitution.

B

In *Simpson v. Owens,* the Court of Appeals of Arizona established that due process requires an accused "be provided a [bail] hearing, ... during which he [or she] must be given an opportunity to be heard at a meaningful time and in a meaningful manner," 85 P.3d at 487 (internal citations and quotation marks omitted). Drawing from the procedures outlined in *Salerno,* the *Simpson* court explained that in an Arizona bail hearing the accused is entitled to counsel, has the right to examine and cross-examine witnesses, to review in advance witnesses' prior written statements, and that the court must make a determination on the record. *Id.* at 492–93.

Plaintiffs-Appellants nevertheless claim that procedures employed both at initial appearances and bail hearings in Arizona violate procedural due process guarantees and lead to incorrect status determinations. Specifically, they note that in Maricopa County sheriff's deputies question arrestees, check various databases including federal immigration databases, and then list on Post–It notes the docket numbers of those they deem nonbondable, delivering those notes to the prosecution and the court who generally give the notes conclusive effect at initial appearances. Proposition 100 defendants are not permitted to see the evidence the deputies submit in support of a finding of nonbondability under Proposition 100, either at the initial appearance or at the *Simpson/Segura* hearing (if one is requested), and arrestees are not informed during the initial appearance of their right to an evidentiary hearing on bondability.

The concern with the procedures employed by sheriff's deputies at initial appearances is best addressed by looking to the remedial procedures already in place in Arizona via *Simpson/Segura* hearings. The Court of Appeals of Arizona struck a balance between the state's interest in detaining certain arrestees and the arrestees' fundamental liberty interests when it declared that "[i]nitial appearances serve the limited function of providing some check on the ability of the state to hold a defendant, but they continue to be ill-suited to support conclusive findings affecting a defendant's liberty." *Segura,* 196 P.3d at 841. *Simpson/Segura* hearings are available in Arizona precisely because

> [i]t would be a rare occasion when an adequate bail hearing could be conducted at the initial

> appearance for a [Proposition 100] offense. . . . [I]t is not feasible for the bail hearing to take place at the time of the initial hearing if for no other reason than that the accused must be given adequate notice to prepare for the hearing.

Simpson, 85 P.3d at 495. Thus, any deficiencies in the probable cause determination made at an initial appearance—due to deputies' Post-It notes or otherwise—can be cured at a *Simpson/Segura* hearing. Indeed, that is exactly what such hearings are for.

Plaintiffs-Appellants contend that Proposition 100 defendants are not permitted to see the evidence submitted in support of a finding of nonbondability under Proposition 100. A review of the record reveals that Maricopa County's Section 287(g)-certified deputies[12] must refuse to provide documents to defendants or their attorneys regarding immigration status because those documents are federal immigration documents and under federal law are not discoverable until immigration proceedings are commenced against the alien by the U.S. Department of Homeland Security.

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[12] The Section 287(g) program allows state and local law enforcement entities to enter into partnerships with U.S. Immigration and Customs Enforcement ("ICE") in order to receive delegated authority to assist in immigration enforcement within their respective jurisdictions. Under the program, local officers are trained to enforce immigration law as authorized through Section 287(g) of the Immigration and Nationality Act. *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,* U.S. Department of Homeland Security, http://www.ice.gov/news/library/factsheets/287g.htm (last visited June 10, 2013).

There is no indication from the record that the sheriff deliberately withholds information from Proposition 100 defendants or otherwise deprives them of a fair opportunity to litigate their status determinations at *Simpson/Segura* hearings; therefore, we hold that procedural due process guarantees are not violated.

Plaintiffs-Appellants also claim that arrestees are not informed during the initial appearance of their right to an evidentiary hearing on bondability. That may well be true. It does not appear that the IA commissioners regularly inform the arrestees of their right to such hearings. Although translations are provided at the hearings, some arrestees do not speak English. Many are unrepresented at their initial appearances, and if indigent they may not meet with appointed counsel for some time after their Proposition 100 status determinations. During this period they will be detained pursuant to Proposition 100 while they wait to meet with their appointed attorneys, and may not know that they can request a *Simpson/Segura* hearing to challenge their status determinations until they speak with their lawyers.

Nevertheless, whether or not they are immediately aware of it, Arizona Rule of Criminal Procedure 7.4(b) provides detainees a right to request a prompt bond hearing, and the hearing must take place within seven days of the request. Arizona's Rules of Criminal Procedure give criminal trials priority over civil trials, so even a detainee who fails to request a *Simpson/Segura* hearing is entitled to be tried within 150 days of arraignment. *Hernandez,* 167 P.3d at 1275. The Supreme Court in *Demore* approved detention of illegal aliens for periods longer than that. 538 U.S. at 529-

31. In light of Arizona's legitimate and compelling interest in controlling flight risk, the pretrial detention of arrestees who, it bears repeating, the government must demonstrate by a proof evident/presumption great standard committed Class 1 through 4 state-law felonies, does not violate procedural due process simply because arrestees are not informed at their initial appearances of the existence of Rule 7.4(b).[13] While Arizona's initial appearance procedures may not be ideal, they are not fundamentally unfair so as to violate the Constitution.

IV

We turn next to Plaintiffs-Appellants' argument that Proposition 100's categorical bail prohibition is arbitrary and unreasonable in violation of the Eighth Amendment. The Excessive Bail Clause of the Eighth Amendment provides that, "[e]xcessive bail shall not be required," U.S. Const. amend. VIII, cl. 1, but as the Supreme Court observed in *Salerno,* "[t]his Clause, of course, says nothing about whether bail shall be available at all." 481 U.S. at 752. "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." *Carlson v. Landon,* 342 U.S. 524, 545 (1952). To determine whether a particular legislative denial

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[13] We note that this issue could be resolved if the commissioners would inform the arrestees of their right to a *Simpson/Segura* hearing at the initial appearance. Although perhaps advisable, we nonetheless conclude that the failure of the commissioners to do so as a standard practice does not amount to a due process violation. Once counsel appear to represent arrestees, these lawyers will presumably know and request a hearing when they believe it appropriate to do so.

of bail violates the Excessive Bail Clause, we "look to the valid state interests bail is intended to serve for a particular individual and judge whether bail conditions are excessive for the purpose of achieving those interests." *Galen v. Cnty. of L.A.,* 477 F.3d 652, 660 (9th Cir. 2007). Because we have determined that Proposition 100 is not excessive in relation to Arizona's interest in ensuring that illegal alien criminal defendants appear for trial, it follows that Proposition 100 does not violate the Excessive Bail Clause.

Plaintiffs-Appellants point to pre-*Salerno* authority as support for their position that Proposition 100 categorically denies bail arbitrarily and unreasonably. *Hunt v. Roth,* 648 F.2d 1148, 1162 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt,* 455 U.S. 478, 481 (1982), held that the Nebraska constitution's categorical denial of bail to those charged with certain sex offenses violated the Eighth Amendment because it did not allow for individualized determinations of suitability for pretrial release. But *Hunt,* just as *Salerno,* dealt with a case in which the government's interest was "protecting society from [persons accused of offenses]," *id.* at 1163, and "[t]he state [did] not contend that an absolute denial of bail to all persons charged with forcible rape is rationally related or necessary to assuring their appearance at trial." *Id.* at 1162. Thus, unlike Proposition 100, the Nebraska law was focused on dangerousness rather than flight risk. Plaintiffs-Appellants point to no cases holding that a legislature's decision to categorically deny bail in the interest of assuring presence at trial is arbitrary or unreasonable in violation of the Eighth Amendment. Because Proposition 100 bail conditions are not excessive in light of Arizona's legitimate interests and bail

is not denied arbitrarily or unreasonably, the Proposition 100 laws do not violate the Eighth Amendment Excessive Bail Clause.

V

Plaintiffs-Appellants contend that Proposition 100 has complicated initial appearances in Arizona to such a degree that they have become an adversarial and critical stage of proceedings triggering the Sixth Amendment right to counsel. The Maricopa County Attorney's Office staffs IA proceedings, although prosecutors are only called in to the IA courtroom if needed. Maricopa County sheriff's deputies occasionally testify at IAs to address questions from the court regarding an arrestee's Proposition 100 status. After the passage of Proposition 100, the indigent defense agency in Maricopa County began sending attorneys to IAs, but the practice was halted after Maricopa County decided not to fund county-paid counsel for that purpose.

Initial appearances in Arizona must take place within 24 hours of an arrest. Ariz. R. Crim. P. 4.1(a). The proceedings are brief and no plea is entered. During the proceedings the IA commissioner must: ascertain the defendant's name and address; inform the defendant of the charges, the right to counsel, and the right to remain silent; determine whether probable cause exists to believe that a crime was committed (if the arrest was made without a warrant); appoint counsel if the defendant is eligible; and determine release conditions, including a Proposition 100 status determination if appropriate. Ariz. R. Crim. P. 4.2(a).

Both we and the Supreme Court of Arizona have

held that there is no constitutional right to an attorney at initial appearances. *See United States v. Perez,* 776 F.2d 797, 800 (9th Cir. 1985), *overruled on other grounds by United States v. Cabaccang,* 332 F.3d 622, 634-35 (9th Cir. 2003) (en banc); *State v. Cook,* 724 P.2d 556, 561 (Ariz. 1986). Plaintiffs-Appellants argue that in light of the immigration status determinations that now may take place at IAs, these pre-Proposition 100 precedents no longer apply.

We employ a three-factor test to determine whether an event constitutes a critical stage of a prosecution. If (1) "failure to pursue strategies or remedies results in a loss of significant rights," (2) "skilled counsel would be useful in helping the accused understand the legal confrontation," or (3) "the proceeding tests the merits of the accused's case," then the proceeding is a critical stage triggering the right to counsel. *United States v. Bohn,* 890 F.2d 1079, 1080-81 (9th Cir. 1989) (citing *Menefield v. Borg,* 881 F.2d 696, 698-99 (9th Cir. 1989)). Applying this test, IAs in Arizona—even those that include Proposition 100 status determinations—do not trigger the right to counsel.

Given the administrative nature of Arizona's IA proceedings, it is unlikely that a defendant unrepresented by counsel would fail to pursue a strategy or remedy during the initial appearance and thereby lose significant rights. The only strategies or remedies available to a defendant who seeks to avoid pretrial detention are to deny either the crime(s) alleged or that the defendant has entered or remained in the United States illegally. But, as no plea is entered at an IA and the "initial appearance provides no opportunity for a defendant to present evidence or make any argument regarding the law or evidence," *Segura,*

196 P.3d at 841, these are not remedies available at the initial appearance. Rather, these are remedies available after the initial appearance at a *Simpson/Segura* hearing, by which point counsel will have been appointed. Thus, Proposition 100 initial appearances do not run afoul of the first factor of the *Bohn* test.

Likewise, due to the administrative nature of IAs in Arizona, skilled counsel would not be useful in helping the accused understand the legal confrontation. Record transcripts of Maricopa County IAs demonstrate that IA commissioners are doing what Rule 4.2(a) requires. Skilled counsel is unnecessary to help an accused understand the purely administrative matters covered during an IA—in fact the appointment of counsel is one of the tasks performed at the first appearance. "To require that counsel be appointed before the judge asks routine questions such as the defendant's name and financial ability would be self-defeating." *Perez,* 776 F.2d at 800. Proposition 100 procedures therefore survive the second factor of *Bohn*'s "critical stage" test.

Finally, Proposition 100 status determinations at IAs do not test the merits of the accused's case such that *Bohn*'s third factor is implicated. No plea is entered, and any discussion of immigration status is undertaken for the sole purpose of determining whether a defendant is nonbondable under Proposition 100. The IA transcripts cited to by Plaintiffs-Appellants support this reading. For example, when one defendant's interpreter said that "[defendant] has spoken to his solicitor and she is getting the case ready for asylum," the commissioner responded, "You can certainly discuss that matter with your solicitor and until your

asylum petition is approved . . . there is probable cause to believe that you're in the country illegally at this time. . . . [A]t this time, because of your immigration status, you're not entitled to bond. . . ." Plaintiffs-Appellants have not put forward any evidence demonstrating that a defendant's statements about immigration status at an IA are being used in subsequent federal criminal prosecutions for illegal entry or reentry, or in subsequent state criminal prosecutions where unlawful immigration status is an element of the offense. Accordingly, they have failed to show that Proposition 100 determinations at initial appearances are critical stages that trigger the Sixth Amendment right to counsel.

VI

Proposition 100 laws are neither expressly nor impliedly preempted by federal immigration law. While it is true that many state laws addressing immigration are preempted by federal law, the Supreme Court has said that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted" by the federal government's broad and exclusive constitutional power to regulate immigration. *De Canas v. Bica,* 424 U.S. 351, 355 (1976). Plaintiffs-Appellants argue that Proposition 100 is preempted because it attempts to regulate immigration, intrudes into fields exclusively occupied by federal congressional action, and conflicts with the federal Immigration and Nationality Act. Each of these arguments is unavailing.

A

It is "[a] fundamental principle of the Constitution . . . that Congress has the power to preempt state

law." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372 (2000). And it is beyond doubt that "[t]he authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government." *Takahashi v. Fish & Game Comm'n,* 334 U.S. 410, 416 (1948) (citing *Fong Yue Ting v. United States,* 149 U.S. 698, 713 (1893)); *see* U.S. CONST. art. I, § 8, cl. 4 (Congress has authority to "establish an uniform Rule of Naturalization"). Were the Proposition 100 laws actual regulations of immigration—that is, were they to actually function as a determination of who should or should not be admitted or allowed to remain in the United States—they would be preempted. *See De Canas,* 424 U.S. at 355. But, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration. . . ." *Id.* The Proposition 100 laws neither determine who should be admitted to the United States nor prescribe conditions under which legal entrants may remain. Rather, those who are subject to detention under the Proposition 100 laws are being detained because of the crime they are accused of committing. Arizona state officials are not directly facilitating immigration removals and their immigration status decisions for the purposes of Proposition 100 are not binding in subsequent proceedings within the federal immigration system.

Plaintiffs-Appellants argue that Proposition 100 is nevertheless preempted because it creates a state-law category of persons who have "entered or remained in the United States illegally." Ariz. Const. art. II, § 22(A)(4). Arizona's implementing statute directs courts making Proposition 100 status determinations to consider, among other things, "[a]ny . . . relevant information that is obtained by the court or that is

presented to the court by a party or any other person." Ariz. Rev. Stat. Ann. § 13–3961(A)(5)(a)(vi). Plaintiffs-Appellants claim that Proposition 100 status determinations amount to state-law determinations of immigration status without regard to federal immigration law and federal status determinations. Undeniably, "[t]he States enjoy no power with respect to the classification of aliens." *Plyler v. Doe,* 457 U.S. 202, 225 (1982) (citing *Hines v. Davidowitz,* 312 U.S. 52 (1941)). On this basis, Plaintiffs-Appellants point to several federal district court cases in which state law immigration classifications were deemed preempted. Each of these cases, however, is distinguishable.

In *Equal Access Education v. Merten,* 305 F.Supp.2d 585, 603 (E.D. Va.2004), the court held that a Virginia higher education admissions policy denying admission to illegal aliens would violate the Supremacy Clause only if the institutions implementing the policy were relying on state rather than federal immigration standards. In *League of United Latin American Citizens v. Wilson,* 908 F.Supp. 755, 772 (C.D. Cal. 1995), the court deemed parts of a California voter-approved initiative preempted, reasoning that portions of the initiative were an impermissible regulation of immigration because "the [immigration status] classification ... *is not in any way tied to federal standards.*" Likewise, in *Hispanic Interest Coalition of Alabama v. Bentley,* No. 5:11–cv–02484–SLB, 2011 WL 5516953, at *23 (N.D. Ala. Sept. 28, 2011), *vacated as moot in part by* 691 F.3d 1236, 1242 (11th Cir. 2012), the court preliminarily enjoined some provisions of Alabama's House Bill 56 because their implementation would impermissibly create

state classifications of aliens.

Although it is true that Arizona's implementing statute directs courts making Proposition 100 status determinations to consider "any . . . relevant information," it also commands consideration of "[w]hether a hold has been placed on the arrested person by the United States immigration or customs enforcement." Ariz. Rev. Stat. Ann. § 13–3961(A)(5)(a)(i). Thus, contrary to Plaintiffs-Appellants' assertions, Arizona state courts are not authorized to make state-law determinations of immigration status without regard to federal status determinations. Unlike in *Wilson,* the state-law determination here is tied to federal standards. Furthermore, evidence in the record shows that Maricopa County Sheriff's Office Section 287(g)-certified deputies cross-reference ICE databases when making Proposition 100 recommendations at initial appearances. Finally, the screening questionnaire administered by the deputies to determine whether an arrestee is subject to Proposition 100 includes questions such as, "Do you have any applications or petitions pending with U.S. CIS?"[14] and, "Have you been removed, deported, excluded or VR'd[15] before from the

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[14] United States Citizenship and Immigration Services processes applications to adjust the immigration status of aliens present in the United States, including adjustments through the issuance of Green Cards granting Lawful Permanent Resident Status. *See generally U.S. Immigration Online*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.immigration direct.com/ (last visited June 10, 2013).

[15] "VR" here refers to Voluntary Departure (or Removal), a benefit extended to illegal aliens who are permitted to waive deportation proceedings by agreeing to immediately leave the United

U.S.?"

This evidence demonstrates that Arizona state officials are not attempting to create a new state-law classification for those who have "entered or remained in the United States illegally," but rather are seeking to determine whether arrestees are in violation of federal immigration law. As the Supreme Court recently held in *Arizona v. United States,* 132 S. Ct. 2492, 2508 (2012), Congress has "encouraged the sharing of information about possible immigration violations," and federal law permits "a policy requiring state officials to contact ICE as a routine matter." Because Proposition 100 neither regulates immigration nor impermissibly creates state-law immigration classifications, we hold that Proposition 100 is not constitutionally preempted.

B

Plaintiffs-Appellants next argue that Proposition 100 intrudes on a field exclusively occupied by federal law because it imposes mandatory detention under state law of persons suspected of committing federal immigration law offenses. In support of this claim, Plaintiffs-Appellants cite to myriad federal Immigra-

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States upon apprehension by Immigration and Customs Enforcement officers such as the United States Border Patrol. *See Glossary,* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9e258fa29935f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD (last visited June 10, 2013).

tion and Naturalization Act provisions related to federal immigration detention and removal. *De Canas v. Bica,* 424 U.S. 351 (1976), provides the framework for the resolution of this argument. *De Canas* teaches, "we will not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws." 424 U.S. at 357. Instead, "[o]nly a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion." *Id.* (internal citations and quotation marks omitted).

The INA provisions cited by Plaintiffs-Appellants regulate detention for immigration violations, while Proposition 100 regulates pretrial detention for those arrested for committing Class 1 through 4 state felonies and aggravated driving-under-the-influence offenses. Plaintiffs-Appellants have not shown that Congress intended to effect a "complete ouster of state power" with respect to bail determinations for state-law crimes. Accordingly, we hold that Proposition 100 is not field preempted.

C

Finally, Plaintiffs-Appellants argue that even if Proposition 100 is not field preempted, it nevertheless "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *De Canas,* 424 U.S. at 363 (internal citations and quotation marks omitted). Following the Supreme Court's directive that "[i]mplied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with

federal objectives" and that "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act," *Chamber of Commerce of U.S. v. Whiting,* 131 S. Ct. 1968, 1985 (2011), we hold that Proposition 100 does not conflict with federal law.

Plaintiffs-Appellants claim that the Proposition 100 laws impose incarceration for unlawful presence in the United States in opposition to Congress's judgment as to when aliens should or should not be detained for immigration violations. But Proposition 100 regulates only the bail determinations for state-law crimes and does not impose incarceration for federal immigration law violations. While it is true that in certain instances Proposition 100 may mandate the pretrial detention of a person who would be deemed bondable by a federal immigration judge, such detention is not meant to punish an alleged immigration violation but rather to ensure presence in Arizona to stand trial for alleged state-law crimes.

Plaintiffs-Appellants cite to *Arizona v. United States* as support for their argument that state officers cannot deprive noncitizens of their liberty based upon purported immigration violations without running afoul of conflict preemption principles. Admittedly, the *Arizona* court wrote that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." 132 S. Ct. at 2509. But Proposition 100 does not permit state officials to hold aliens *because* of their unlawful presence. Rather, it permits them to hold those arrested based on probable cause for commit-

ting serious state-law felonies to ensure they will remain here to answer the charges. Plaintiffs-Appellants' declaration that "[b]ut for their purported immigration violations, individuals subjected to Proposition 100 would be eligible for bail like any other defendant under Arizona law," Corrected Brief of Appellants at 62, No. 11–16487 (Nov. 2, 2011), could just as easily be expressed as "but for their commission of state-law felonies, those unlawfully present in the United States would not be detained under Proposition 100." Proposition 100 is not conflict preempted.

VII

The Arizona Legislature and Arizona voters passed the Proposition 100 laws to further the state's legitimate and compelling interest in seeing that those accused of serious state-law crimes are brought to trial. At oral argument, counsel for both sides urged us to rule on the constitutional issues presented by passage and implementation of Arizona's constitutional amendment based on the record presented to the district court. After reviewing the record, we are satisfied that Plaintiffs-Appellants have not succeeded in raising triable issues of fact as to whether Proposition 100 and its implementing procedures violate the substantive and procedural due process guarantees of the United States Constitution's Fourteenth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Sixth Amendment right to counsel, nor whether the Proposition 100 laws are preempted by federal immigration law.

Accordingly, the judgment of the district court is **AFFIRMED.**

FISHER, Circuit Judge, dissenting:

Due process guarantees that individuals arrested for a crime are entitled to bail pending determination of their guilt or innocence, with some limited exceptions. Arizona, however, has decided to deny pretrial bail to all persons arrested for a range of felony crimes who are in the United States without authorization, theorizing they are likely to flee the country solely because of their immigration status. Without any evidence that unauthorized immigrants released on bail have been or are less likely to appear for trial compared to arrestees who are lawful residents, the majority accepts Arizona's unsupported assertion that *all* unauthorized immigrants necessarily pose an unmanageable flight risk, such that a blanket denial of bail is not an "excessive" tool to combat flight risk. As revealed by Proposition 100's legislative history and scope, however, Arizona is plainly using the denial of bail as a method to punish "illegal" immigrants, rather than simply as a tool to help manage arrestees' flight risk. "It is axiomatic that 'due process requires that a pretrial detainee not be punished.'" *Schall v. Martin,* 467 U.S. 253, 269 (1984) (alteration omitted) (quoting *Bell v. Wolfish,* 441 U.S. 520, 535 n.16 (1979)). Because this bail-denial scheme contravenes the Constitution's fundamental prohibition on punishment before determination of guilt in a criminal trial, I dissent.

I. SUBSTANTIVE DUE PROCESS

Proposition 100 categorically denies bail and thus requires pretrial detention for every undocumented immigrant charged with any of a broad range of felonies, regardless of the seriousness of the offense or the

individual circumstances of the defendant, including the defendant's strong ties to and deep roots in the community. The state maintains—and the majority holds—that this unique, sweeping pretrial detention statute, directed solely at undocumented immigrants, comports with substantive due process because it has a permissible purpose and is reasonably related to the state's interest in preventing pretrial flight. I respectfully disagree.

Under *United States v. Salerno,* 481 U.S. 739 (1987), a restriction on bail violates substantive due process if it either (1) has a punitive purpose or (2) imposes an excessive restriction on liberty in relation to a permissible regulatory purpose.

> To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. Unless [the legislature] expressly intended to impose punitive restrictions, the punitive/regulatory distinction turns on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it.

Id. at 747 (citation, alterations and internal quotation marks omitted). Although preventing flight risk is a permissible regulatory purpose, *see id.* at 749; *Bell,* 441 U.S. at 536, Arizona's indiscriminate pretrial detention law is unconstitutionally punitive under both prongs of *Salerno.* I address each in turn.

A. Legislative Purpose

First, the record plainly shows that lawmakers designed Proposition 100—at least in large part—to punish undocumented immigrants for being in the United States unlawfully:

• State Representative Russell Pearce, the bill's sponsor, stated that Proposition 100

> just simply bridges the gap, a loophole in the law that would allow people who are not in this country [ ]legally who have no business to be released if they commit any crime, they have no business being released if they commit no crime, no additional crime [be]cause they're already in this country illegally.

Senate Judiciary Committee Meeting on H.B. 2389, Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005). Notably, and contrary to Pearce's suggestion, being "in this country illegally" is not a crime. *See Arizona v. United States,* 132 S. Ct. 2492, 2505 (2012).

• Rep. Pearce promoted the bill on the ground that "all illegal aliens in this country ought to be detained, debriefed and deported." *Id.* He reiterated: "If you're in this country illegally you ought to be detained [and] deported [.] [E]nd of story," and defended the bill as a "reasonable approach" to border security.[1] *Id.*

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[1] To Rep. Pearce, Proposition 100 would punish undocumented immigrants for two wrongs: being present in the United States unlawfully and committing (more accurately, being arrested for) a felony. *See Senate Judiciary Committee Meeting on H.B. 2389,* Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005) ("[B]ad enough you're illegal but you commit a serious crime you ought not to be bondable."); *id.* ("[T]his bill targets very simply those who commit serious, serious [criminal] acts in our community. A

• State Representative Ray Barnes expressly promoted the bill on the (again, erroneous) assumption that "the mere fact that they're here undocumented [means] that the crime has already been committed." *House Judiciary Committee Meeting on H.B. 2389,* Jan. 27, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005).

• State Senator Jack Harper said, "what part of illegal don't we understand? Illegal aliens shouldn't be able to get bond for anything." *Senate Judiciary Committee Meeting on H.B. 2389,* Mar. 28, 2005, 47th Leg., 1st Regular Sess. (Ariz. 2005).

• In a hearing on a bill to implement Proposition 100 after its passage, State Representative John Kavanagh said: "I'm amazed that we provide bail to anybody who's arrested for a crime that's an illegal alien. . . . I therefore support this bill as a first step to what we should be really doing and that's deporting anybody here illegally." *House Floor Meeting on S.B.*

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very responsible bill to protect our citizens from those who would enter our country illegally and commit serious crimes against us."). Both of Pearce's reasons are impermissibly punitive. Bail cannot be denied to punish immigrants for being in the country illegally. Nor can it be denied to punish them for charged, but unproven, crimes. *See Bell,* 441 U.S. at 535 ("[U]nder the Due Process Clause, a [defendant] may not be punished prior to an adjudication of guilt in accordance with due process of law."); *Salerno,* 481 U.S. at 746 (citing *Bell* for the proposition that pretrial detention violates substantive due process when it constitutes "impermissible punishment before trial"). As the Supreme Court has recognized, "Arizona may have understandable frustrations with the problems caused by illegal immigration," *Arizona v. United States,* 132 S.Ct. at 2510, but punishing undocumented immigrants by denying them bail is not a permissible expression of that frustration.

1265, June 13, 2007, 48th Leg., 1st Regular Sess. (Ariz. 2007).

The majority correctly observes that some statements in the legislative record refer to flight risk rather than punishment. Fairly viewed, however, the legislative record *as a whole* clearly shows that legislators were motivated *at least in large part* by an overriding desire to punish undocumented immigrants for being in the country unlawfully—i.e., that lawmakers "intended to impose punitive restrictions" on undocumented immigrants. *Salerno,* 481 U.S. at 747.[2] The plaintiffs therefore have established a due process violation under *Salerno* 's first prong.[3]

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[2] *Salerno* does not require the plaintiffs to prove that punishment was the sole or even the predominant purpose of the legislation. Even if that were a requirement, however, the plaintiffs have satisfied it here. *Cf. McCreary Cnty. v. ACLU of Ky.,* 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."); *City of Indianapolis v. Edmond,* 531 U.S. 32, 46-47 (2000) (holding that a checkpoint program with an impermissible primary purpose violated the Fourth Amendment even though the program served lawful secondary purposes); *Bush v. Vera,* 517 U.S. 952, 959 (1996) (plurality opinion) (concluding that in a "mixed motive" case challenging race-conscious redistricting on equal protection grounds, strict scrutiny would apply only if race was the "predominant factor" in drawing the districts).

[3] This, of course, is not the first time Arizona's concerns about illegal immigration have resulted in impermissible legislation. *See, e.g., Arizona v. United States,* 132 S. Ct. at 2503, 2505, 2507 (striking down alien-registration and criminal provisions targeting undocumented immigrants as preempted by federal law);

B. Excessiveness

Even if Proposition 100 were enacted for the regulatory purpose of managing flight risk, it would still violate substantive due process under *Salerno* 's second prong, because it restricts substantially more liberty than necessary to achieve the state's legitimate interest. *See Salerno,* 481 U.S. at 747. The state's premise that immigration status and flight risk are closely linked is unsubstantiated. Furthermore, even if there is some link, the state's blanket denial of bail is an excessive and overbroad tool to prevent flight risk.

To conduct a meaningful excessiveness analysis, we must compare the magnitude of the societal problem being addressed against the severity of the chosen remedy. The societal ill Proposition 100 targets is not flight risk generally, but rather the *increased* flight risk supposedly posed by undocumented immigrants, the only individuals the proposition covers.[4] The defendants have failed to establish that this soci-

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Valle Del Sol, Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013) (enjoining day laborer provisions targeting undocumented immigrants as a violation of the First Amendment).

[4] Before Proposition 100 passed, Arizona had an extensive bail scheme designed to help ensure that arrestees appear for trial. *See* Ariz. Const. art. II, § 22 (West Nov. 27, 2006 version); Ariz. Rev. Stat. § 13–3967(B). These procedures already required judges to consider the arrestee's immigration status when making bail determinations. *See* Ariz. Rev. Stat. § 13–3967(B)(11)–(12). The defendants have not shown that this set of regulations, addressing flight risk on a case-by-case basis, was inadequate to protect the state's legitimate interest in ensuring arrestees' appearance at trial.

etal problem exists, much less demonstrate its magnitude.

Unlike the defendants in *Salerno* and *Demore v. Kim,* 538 U.S. 510 (2003)—who presented data to back up their claims that the bail schemes under review addressed "a particularly acute problem," *Salerno,* 481 U.S. at 750; *see also Demore,* 538 U.S. at 518-20—the defendants here have failed to present any findings, studies, statistics or other evidence showing that undocumented immigrants actually posed a significantly greater flight risk than lawful residents before implementation of Proposition 100.[5]

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[5] Neither *Demore* 's holding nor the statistics cited therein helps establish the constitutionality of pretrial detention in criminal cases. *Demore* approved the brief detention of an alien pending *removal* proceedings when the alien had *already been convicted* of an enumerated crime. *See Demore,* 538 U.S. at 513. The periods of detention at issue in *Demore* were short—an average of 47 days if the alien did not appeal the decision of the Immigration Judge, or four months if the alien appealed. *See id.* at 529. The time between an arrest and a criminal trial can last far longer. Before passing the law at issue in *Demore,* Congress reviewed several studies concerning recidivism rates of criminal aliens and their rates of failure to appear for subsequent removal hearings. *See id.* at 518-20. These studies, however related to *convicted* immigrants appearing for their *removal* proceedings; they do not provide support for Proposition 100, which ostensibly rests on *arrested* immigrants appearing for their *criminal* proceedings. Congress also had specific reason to conclude that, under the circumstances at issue in *Demore,* case-by-case determinations of suitability for release would be ineffectual. *See id.* at 528. Importantly, the Supreme Court approved the brief detention of criminal aliens in *Demore* in recognition of Congress' "broad power over naturalization and immigration," which allows Congress to "regularly make [ ] rules that would be unacceptable if applied to citizens." *Id.* at 521. The states do not have plenary power over naturalization and immigration.

Despite the lack of any supporting data, Arizona, the district court and the majority have all *assumed* that undocumented immigrants pose a greater flight risk than other arrestees. When the chosen remedy is so draconian as to categorically deny bail to anyone who is *probably* an undocumented immigrant, the justification should be demonstrated factually, rather than supported by only unsubstantiated assumptions and anecdotes. If undocumented immigrants actually demonstrated a substantially greater flight risk before Proposition 100, defendants had five years to gather and present data to back up such a claim. They have presented nothing of the sort to support their assertion that Proposition 100 addresses "a pressing societal problem." *Salerno,* 481 U.S. at 747.

On the other side of the scale from the state's interest in ensuring appearance at trial is a profound infringement on liberty interests: automatic detention in jail without the possibility of bail, simply based on an arrestee's presumed status as an undocumented immigrant. Such a denial of bail implicates "a basic and significant liberty interest in not being confined pending trial." *United States v. Motamedi,* 767 F.2d 1403, 1414 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part). "The consequences of prolonged [pretrial] detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). "Pretrial detention may hamper the preparation of a defense by limiting the defendant's access to his attorney and to potential witnesses for the defense." *Motamedi,* 767 F.2d at 1414 (Boochever, J.,

concurring in part and dissenting in part) (citing *Stack v. Boyle,* 342 U.S. 1, 4 (1951)).

Even if the defendants could show that undocumented immigrants pose a greater flight risk on average than lawful residents, Proposition 100 is fatally flawed because it uses the disfavored mechanism of an irrebuttable presumption, rather than an individualized hearing, to determine whether an arrestee is an unmanageable flight risk. In *Salerno,* the regulatory scheme was limited to arrestees who actually posed a danger to the community. First, it was limited to "individuals who have been arrested for a specific category of extremely serious offenses"—who Congress found were "far more likely to be responsible for dangerous acts in the community after arrest." *Salerno,* 481 U.S. at 750. Second, even for arrestees falling within that specific category, the scheme provided case-by-case determinations of the need for pretrial detention. Each arrestee was entitled to a "full-blown adversary hearing," at which the government was required to prove by "clear and convincing evidence" that the individual presented "a demonstrable danger to the community" and that "no conditions of release c[ould] reasonably assure the safety of the community." *Id.* It was only "[u]nder these narrow circumstances" that the Court held that society's interest was sufficient to outweigh the "individual's strong interest in [pretrial] liberty." *Id.*

In contrast, Proposition 100 is not narrowly focused on those arrestees who actually pose the greatest flight risk. Plainly, *some* undocumented immigrants do not pose unmanageable flight risks. The record includes examples of undocumented immigrants who were arrested before Proposition 100,

granted bail and appeared at their court dates and trials. Yet even these individuals were needlessly remanded into state custody following Proposition 100's passage.[6] Proposition 100 eliminates the opportunity for comparable arrestees to show that, notwithstanding their immigration status, they do not pose a flight risk.[7]

The Arizona legislature surmised that undocumented immigrants pose a greater flight risk than lawful residents because they supposedly lack strong ties to the community and have a "home" in another

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[6] The majority finds it odd that I am "comfortable" with this anecdotal evidence but not comfortable with Arizona's anecdotal evidence of undocumented immigrants evading justice by leaving the United States. Maj. Op. at 1063 n. 10. But I do not suggest that anecdotal evidence cannot inform legislation; rather, I believe anecdotal evidence, *standing alone,* cannot support an irrebuttable presumption affecting substantial rights. I mention the anecdotal evidence of some undocumented immigrants posting bail and continuing to appear for their court dates and trial not to suggest a per se rule that undocumented immigrants should receive bail. On the contrary, I cite this evidence to illustrate the need for an individualized inquiry regarding the flight risks posed by particular undocumented immigrants, whose behavior in the face of criminal charges is not as homogeneous as Arizona assumes it to be.

[7] Unlike the Bail Reform Act provision *Salerno* upheld, which applies only to a narrow category of extremely serious offenses, *see Salerno,* 481 U.S. at 750-51, Proposition 100 applies to anyone arrested for a Class 1, 2, 3 or 4 felony or aggravated driving under the influence. This broad list of crimes includes nonviolent offenses such as unlawful copying or sale of sound recordings, *see* Ariz. Rev. Stat. § 13-3705, altering a lottery ticket with intent to defraud, *see id.* § 5-566, and tampering with a computer with the intent to defraud, *see id,* § 13-2316. Non-custodial sentences are possible for several of these crimes.

country to which they can flee, but this ignores those undocumented immigrants who have strong ties to their community and no home abroad. Many undocumented immigrants, for example, have "children born in the United States" and "long ties to the community." *Arizona v. United States,* 132 S. Ct. at 2499.[8] Moreover, although the defendants consistently refer to undocumented immigrant arrestees as "flight risks," the pertinent inquiry is whether the arrestee is an *unmanageable* flight risk. There are a variety of methods to manage flight risk, such as bond requirements, monitoring and reporting requirements. *See, e.g.,* Ariz. Rev. Stat. § 13–3967(D). Proposition 100 ignores these tools for managing flight risk, instead mandating incarceration in every case.

The Constitution disfavors irrebuttable presumptions like Proposition 100's categorical denial of bail. *See Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 645-46 (1974); *Vlandis v. Kline,* 412 U.S. 441, 446 (1973). In *Stanley v. Illinois,* 405 U.S. 645 (1972), an

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[8] A recent study of undocumented immigrants in California, conducted by the Center for the Study of Immigrant Integration at the University of Southern California, found that, "contrary to popular misconceptions," undocumented immigrants "are a fairly settled population." Undocumented Californians, Immigration Reform, and Our Future Together (May 2013), available at http://csii.usc.edu/documents/whats_at_stake_for_the_state.pdf. The researchers found that 50 percent of undocumented immigrants have been in the United States for more than 10 years; 17 percent of those who are household heads are homeowners; and millions more have U.S.-born children. *See id.* at 9, 15. These data about Arizona's neighboring state cast grave doubt on Arizona's irrebuttable presumption that undocumented immigrants lack strong ties to the community.

unwed father's children were removed by the state after the children's mother died, based on the state's use of a conclusive presumption that unwed fathers were unsuitable, neglectful parents. *See id.* at 646-47. The Court acknowledged that "[i]t may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents," but it noted that even if true on average, there were exceptions: "all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.* at 654. So too here. Even assuming undocumented immigrants pose a greater flight risk on average (not established, as discussed above), some by definition do not. Proposition 100 therefore results in far more arrestees being denied bail than necessary, making it plainly excessive in relation to its stated purpose.

Contrary to the majority's assertion, categorical denials of bail for non-capital crimes are rare.[9] The majority identifies only eight states that categorically deny bail for crimes punishable by life in prison. Maj. Op. at 1062. Whether even these laws are constitutional is hardly a settled question, having never been declared such by the Supreme Court or a federal appellate court. But even these eight states do not go as

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[9] Assuming categorical denials of bail for capital offenses are constitutional (although no federal appellate court has yet so decided), such a result would likely be based on the Anglo–American legal tradition, which has a unique history of denying bail in capital cases. *See Hunt v. Roth,* 648 F.2d 1148, 1159-60 (8th Cir. 1981) (discussing the historical basis for the denial of bail for capital crimes), *vacated as moot sub nom. Murphy v. Hunt,* 455 U.S. 478 (1982). Similar historical underpinnings do not support categorical denial of bail for other crimes or, as here, on the basis of immigration status.

far as Arizona. The majority identifies only one other state that categorically denies bail to undocumented immigrant arrestees.[10]

Even before Proposition 100, Arizona went further than most states in restricting bail, categorically denying bail not only to those arrested for capital crimes or crimes subject to life in prison, but also to those arrested for certain sexual crimes not subject to life imprisonment. Maj. Op. at 1063 (citing Ariz. Const. art. II, § 22). The majority takes comfort in Arizona's expansive use of categorical denial of bail, saying "Proposition 100 is nothing more than an extension of Arizona's existing pretrial detention scheme." Maj. Op. at 1063. The more appropriate reaction would be that Proposition 100, which is a major expansion of categorical bail denial, reflects a serious devaluation of the presumption of innocence and the constitutional principle that arrestees may not be punished before judgment of guilt.

In sum, Proposition 100 is excessive in relation to its stated legitimate purpose for two independent reasons. First, it purports to deal with a societal ill that has not been shown to exist at all. Second, even if we assume that undocumented immigrants pose a greater flight risk on average than lawful residents,

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[10] Of course, even if Arizona's bail scheme were better represented among the states, a challenged law does not become constitutional simply because it has company. *See, e.g., Lawrence v. Texas,* 539 U.S. 558, 570 (2003) (striking down a Texas law criminalizing homosexual intercourse, even though similar laws existed in nine states); *Loving v. Virginia,* 388 U.S. 1, 6 (1967) (striking down a Virginia statute prohibiting interracial marriages, although Virginia was one of 16 states to have such a prohibition).

Proposition 100 is fatally flawed because it uses the disfavored mechanism of an irrebuttable presumption, rather than an individualized hearing, to determine whether an arrestee is an unmanageable flight risk. This mechanism necessarily results in the deprivation of far more liberty than necessary to ensure appearance at trial, because even undocumented immigrants who do *not* pose a flight risk or who pose a *manageable* one will be categorically denied bail based on their status alone. Proposition 100 fails *Salerno's* second prong and facially violates substantive due process.

II. REMAINING CLAIMS

Because I conclude that Proposition 100 on its face violates substantive due process, I do not address the plaintiffs' procedural due process, Eighth Amendment, Supremacy Clause and as-applied claims, though some of them appear meritorious.

III. CONCLUSION

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . , when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests" of the person whose rights are at stake. *Stanley,* 405 U.S. at 656-57. By employing a no-bail scheme that conclusively equates unlawful immigration status with unmanageable flight risk, Arizona is needlessly locking up undocumented immigrant arrestees awaiting trial under the guise of ensuring their appearance at trial, even though many of these individuals would voluntarily appear for trial if released on bail and

could demonstrate such willingness if provided the opportunity, or other methods exist to assure their appearances. The excessiveness and overbreadth of this scheme, particularly in light of its legislative history, reveal that the real purpose of Proposition 100 was to use the categorical denial of bail to punish arrestees—for their assumed undocumented status and for their suspected but unproven crimes.

I would hold that Proposition 100 violates substantive due process because it fails both prongs of the *Salerno* test, either one of which is sufficient to find Arizona's categorical denial of bail here unconstitutional. I therefore respectfully dissent.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Angel Lopez-Valenzuela; Isaac Castro-Armenta, *Plaintiffs*, v. Maricopa County; Joseph M. Arpaio, Maricopa County Sheriff, in his official capacity; William G. Montgomery, Maricopa County Attorney, in his official capacity, *Defendants*.	No. CV 08-660-PHX-SRB **ORDER**

The Court now considers Plaintiffs Angel Lopez-Valenzuela, Isaac Castro-Armenta, and the certified class's Motion for Summary Judgment ("Pls.' MSJ") (Doc. 203) and Defendants Maricopa County and Joseph Arpaio's Motion for Partial Summary Judgment ("Defs.' MSJ") (Doc. 198), which has been joined by Defendant William Montgomery, in his capacity as Maricopa County Attorney. [1] The Court heard oral argument on these Motions on December 13, 2010. (*See*

[1] Defendants' MSJ was joined by Defendant Richard Romley, who was then the Maricopa County Attorney. (Doc. 204, Joinder at 1-2.) Defendant William Montgomery is the current Maricopa

Doc. 232, Minute Entry.)

I. BACKGROUND

On November 2, 2006, Arizona voters approved a ballot measure known as Proposition 100, which was referred to the ballot by the Arizona Legislature and amended the Arizona Constitution to provide that no bail may be set "[f]or serious felony offenses as prescribed by the legislature if the person charged entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge." (Pls.' Separate Statement of Facts in Supp. of Pls.' MSJ ("PSOF") ¶ 11 (citing Ariz. Const. art. II, § 22(A)(4)); *see also* Defs.' Statement of Facts in Supp. of Defs.' MSJ ("DSOF") ¶ 1.)[2] Proposition 100 began as House Bill 2389, which was introduced by then-Arizona State Representative Russell Pearce. (PSOF ¶¶ 1-7.) As passed by the voters, Proposition 100 did not contain a definition of "serious felony offense." (*Id.* ¶ 6.) The Legislature had previously passed House Bill 2580, defining "serious felony offense" for purposes of Proposition 100 as any Class 1, 2, 3, or 4 felony. (*Id.* ¶¶ 8, 10.) On April 3, 2007, the Arizona Supreme Court issued an administrative order, stating that, in applying Proposition 100, the

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County Attorney. (*See* Doc. 235, Notice of Name Change & Substitution of Maricopa Cnty. Att'y.)

[2] In this Order, the Court cites to the PSOF where the facts contained therein are undisputed for purposes of these Motions or where the Court finds that the reference to evidence in the fact is accurate, is accurately characterized, and supports the factual proposition offered by Plaintiffs. The Court cites to the DSOF where appropriate, but as the DSOF is a less comprehensive document, citations to the PSOF are more frequent.

standard of proof for a finding that a defendant has entered or remained in the United States unlawfully is probable cause; that standard was later codified by statute. (*Id.* ¶ 59; DSOF ¶ 9.)

The Maricopa County Sheriff's Office ("MCSO") and Maricopa County Attorney's Office ("MCAO") developed policies to implement Proposition 100. (PSOF ¶ 61.) While in custody and without receiving a *Miranda* warning, arrestees are asked to complete a questionnaire, which includes questions about legal status in the United States. (*Id.* ¶¶ 62-63, 65.) MCSO deputies appear and testify at Proposition 100 Initial Appearances ("IAs"), where initial bail determinations are made. (*Id.* ¶¶ 69-71.) At an IA, the judicial officer must ascertain the defendant's name and address, inform the defendant of the charges against him, tell the defendant of his rights to counsel and to remain silent, appoint counsel if the defendant is eligible, and determine whether bail is appropriate. *See Segura v. Cunanan*, 196 P.3d 831, 836 (Ariz. Ct. App. 2008). Although prior to Proposition 100, neither prosecutors nor defense attorneys regularly appeared at IAs, after the passage of Proposition 100, the Maricopa County Attorney's Office ("MCAO") began requiring prosecutors to cover IAs or to be available to appear at IAs to make arguments when appropriate. (PSOF ¶¶ 79-81.) After Proposition 100 took effect, the head of the Maricopa County agency charged with public defender and other indigent defense services opined that appointed defense counsel was now necessary at IAs. (*Id.* ¶ 73.) However, Maricopa County made a policy determination to prohibit the use of county funds to provide appointed counsel for indigent defendants at Proposition 100 IAs and directed

the county indigent defense agencies to stop having defense counsel appear at IAs. (*Id.* ¶ 74.)[3]

Pursuant to several decisions of the Arizona Court of Appeals, detainees have a right to request a prompt bond hearing, but they are not routinely informed of this right during their IAs. (*Id.* ¶ 96); *see also Segura*, 196 P.3d at 837-39, 841, 843; *Simpson v. Owens*, 85 P.3d 478, 491-92 (Ariz. Ct. App. 2004). *Simpson/Segura* hearings must be held within seven days of the request. Ariz. R. Crim. P. 7.4(b). Judicial officers presiding over IAs do not issue oral or written statements of reasons for holding defendants nonbondable. (PSOF ¶ 98.) Defendants are not permitted to see the evidence the MCSO submits in support of the Proposition 100 nonbondability finding, either at the IA or at a later bond hearing. (*Id.* ¶ 101.) Until the Arizona Supreme Court set the standard for determining whether a person entered or remained in the United States at probable cause, a higher standard was being applied at IAs. (*Id.* ¶ 59; DSOF ¶¶ 8-9.) Before the Arizona Supreme Court's administrative order was issued, Proposition 100 defendants who later had *Simpson*/*Segura* hearings succeeded in obtaining bond 94% of the time. (PSOF ¶ 104.) Since the probable cause standard was instituted, the prosecution has virtually a 100% success rate in obtaining and upholding determinations of nonbondability. (*Id.* ¶ 105.)

Plaintiffs' Complaint contains seven claims, six of

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[3] The vast majority of criminal defendants in Maricopa County, as in many places, are indigent. (*Id.* ¶ 76.)

which remain.[4] Plaintiffs claim that Proposition 100 and its implementing procedures are unconstitutional because they: (A) violate the substantive due process guarantee of the Fourteenth Amendment (Count One); (B) violate the procedural due process guarantee of the Fourteenth Amendment on account of the probable cause standard (Count Two) and the procedures at the IA (Count Three); (C) violate the Fifth Amendment right against self-incrimination (Count Four); (D) violate the Sixth Amendment right to counsel (Count Five); and (E) violate the Excessive Bail Clause of the Eighth Amendment (Count Six). (*See* Compl. ¶¶ 55-77.) Plaintiffs seek declaratory and injunctive relief, as well as attorneys' fees and costs pursuant to 42 U.S.C. § 1988. (*Id.* at 22-23.) Plaintiffs now move for summary judgment on Counts One, Two, Three, and Six, as well as Count Five, in the alternative. (Pls.' MSJ at 1-2.) Plaintiffs reserve Count Four for trial. (*Id.* at 2 n.1.) Defendants Maricopa County and Sheriff Arpaio move for partial summary judgment on Counts One, Two, Three, Five, and Six. (Defs.' MSJ at 1-2.)

II. LEGAL STANDARDS AND ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine issues of material fact

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[4] The Court previously dismissed Count Seven in an Order signed by the Court on December 8, 2008. (*See* Doc. 47, Dec. 8, 2008, Order at 10-14.)

remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson*, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

B. Facial Challenge vs. As-Applied Challenge

Plaintiffs challenge Proposition 100 both on its face and as applied to the members of the certified class.[5] (*See* Pls.' MSJ at 15, 28.) "A facial challenge to

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[5] The Court certified a class in this matter defined as follows: "[a]ll persons who have been or will be ineligible for release on bond by an Arizona state court in Maricopa County pursuant to

a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Supreme Court later observed, in considering a facial challenge, "[S]ome Members of the Court have criticized the *Salerno* formulation, [but] all agree that a facial challenge must fail where a statute has a 'plainly legitimate sweep.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7 (1997) (Stevens, J., concurring in judgments)). In deciding a facial challenge, courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449-50 (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)).

C. Substantive Due Process: Count One

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To prevail on a claim for a violation of the Due Process Clause, a plaintiff must show (1) that the defendant deliberately abused his power without any reasonable justification, in aid of any government interest or objective, and only to oppress, in a way that shocks the conscience (substantive due process) *or* (2) that the defendant denied the plaintiff a specific right protected

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Section 22(A)(4) of the Arizona Constitution and A.R.S. § 13-3961(A)(5)." (Dec. 8, 2008, Order at 19.)

by the federal constitution, without procedures ensuring fairness (procedural due process). *Sandin v. Conner*, 515 U.S. 472, 483-484 (1995); *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process rights are those that are not otherwise constitutionally protected but are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal quotation marks and citations omitted).

The Supreme Court established the standard for evaluating substantive due process challenges to bail statutes in *Salerno*. *See* 481 U.S. at 746-47. *Salerno* sets forth two tests to determine whether a bail statute imposes punishment before trial, which is unconstitutional, or, instead, simply serves a regulatory purpose and is intended to ensure the appearance of the person for trial. *Id.*; *see also Bell v. Wolfish*, 441 U.S. 520, 535-37 & n.16 (1979) (explaining the policy behind the due process analysis of conditions or restrictions of pretrial detention). "To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent." *Salerno*, 481 U.S. at 747 (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)). If the legislature did not have an express intent to punish, then "the punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* (internal quotation and citation omitted). In other words, where a legislature does not express a punitive intent,

a bail regulation can still be unconstitutional if it is excessive in relation to a legitimate alternative purpose, such as flight risk or danger to the community.

1. Intent to Punish

Plaintiffs argue that "the effect and purpose of Proposition 100 is to jail defendants as a punishment for past immigration violations, rather than to ensure their appearance at trial." (Pls.' MSJ at 6.) Plaintiffs contend that the categorical bar to individualized bail determinations reflects an improper legislative intent. (*Id.* at 6-7.) In support of this argument, Plaintiffs have submitted extensive evidence of the pertinent legislative history. (*See* PSOF ¶¶ 12-27.) Although Proposition 100 was passed as a voter referendum, the Court looks to the legislative record, as well as to statements made during the referendum drive and in election materials, in determining legislative intent. *See City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 196-97 (2003). Statements of legislators are not given "controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of [the legislature's] intent." *Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984)). Statements made by the sponsor of a piece of legislation "deserve[] to be accorded substantial weight in interpreting [a] statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (citations omitted).

Plaintiffs point to numerous portions of the legislative record they claim indicate "Proposition 100's punitive nature." (Pls.' MSJ at 7-10.) During commit-

tee hearings on the prospective law, several legislators made statements related to the goal of controlling unauthorized immigration and securing the border. (*See, e.g.*, Doc. 188, Decl. I of Tyler Cook ("Cook Decl. I"), Ex. A; Doc. 186, Decl. I of Sharon Breslin, Ex. A; Doc. 192, Decl. II of Angela Liebl ("Liebl Decl. II"), Ex. A; Doc. 185, Decl. of Jesutine Breidenbach, Ex. A.) Then-Representative Russell Pearce, the sponsor of the bill, made many statements that suggest that his goal in drafting the legislation was to address the "serious problems in this country with violent aliens." *E.g.*, Liebl Decl. II, Ex. A at 3:22-23.) Mr. Pearce stated during a House Judiciary Committee Meeting, "These people are not in our country legally and have no roots, have committed a serious crime while violating our sovereignty and shouldn't be here in the first place. And yes, I think it rises to a different level than folks who commit crimes . . . ." (Cook Decl. I, Ex. A at 5:7-10.) Plaintiffs assert that the animating purpose behind Proposition 100 was to punish people who are in the country without authorization for their *previous* crime of unlawfully entering or remaining in the United States, rather than an appropriate bail consideration such as flight risk or dangerousness. (Pls.' MSJ at 7.)

The Arizona Legislature made no formal findings regarding the purpose of Proposition 100. The legislative history suggests that Proposition 100 may have been motivated by a desire to punish for past crimes, but there is also evidence that legislators considered the issue of flight risk. For instance, immediately after making the statement quoted above, Mr. Pearce said, "We already have pretty good bail requirements, but again, one of them is . . . flight risk[,] and this goes

directly toward that flight risk, the issue relevant to bondability." (Cook Decl. I, Ex. A at 5:10-12; *see also id.* at 3:16-18 (Mr. Pearce: "[I]f you are in this country illegally and commit a serious crime, . . . you are a flight risk, you've got no roots, you can go home any day . . . .").) During the same hearing, another legislator asked Mr. Pearce, "[D]o you have any evidence to show that foreign nationals . . . pose more of a flight risk than U.S. citizens?" (*Id.* at 4:7-9.) No one came forward at the time with evidence to support his claim that people who are unlawfully present in the United States are categorically more of a flight risk than people who are not unlawfully present, nor have Defendants in this matter presented evidence to that effect. (*See* PSOF ¶¶ 32-40.) However, the Court agrees with Defendants that the Arizona Legislature–unlike the United States Congress–comprises "citizen legislators" who do not have access to the type of resources, both in terms of money and staff, that federal legislators do. (*See* Mot. Hr'g Tr. 25:2-4, Dec. 13, 2010 ("Hr'g Tr.").)

Defendants point to Mr. Pearce's deposition testimony in this case as evidence of his proper purpose in drafting and sponsoring Proposition 100. (Defs.' Resp. to Pls.' MSJ at 8.) Mr. Pearce's statements during his deposition regarding flight risk are contradicted by other portions of the same deposition. In addition, the Court assigns significantly greater weight to evidence from the legislative history that demonstrates the legislature's purpose at the time Proposition 100 was debated and referred to the voters than to the post hoc deposition testimony of the law's sponsor. (*See* Docs. 180-82, Decl. of Andre I. Segura & Attach. ("Segura Decl."), Ex. E, Pearce Dep., vol. 1, 49:11-50:13; Segura

Decl., Ex. F, Pearce Dep., vol. 2, 12:1-14, 25:12-22, 43:20-44:4, 86:3-12, 115:20-116:3.); *cf. Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 579 (1995) ("Material not available to the lawmakers is not considered, in the normal course, to be legislative history. After-the-fact statements . . . are not a reliable indicator of what Congress intended when it passed the law . . . ."); *Wash. Cnty. v. Gunther*, 452 U.S. 161, 176 n.16 (1981) (observing that the Supreme Court is "normally hesitant to attach much weight to comments made [by legislators] after the passage of the legislation," and, because the statements at issue were contradictory, "giv[ing] them no weight at all" (citation omitted)); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977) (assigning "little if any weight" to after-the-fact statements of legislators).

The Court considers the materials and media to which voters were exposed to be neutral on the question of punitive intent. The voter materials contained some official statements reflecting a punitive purpose, but ultimately the message was mixed.[6] The official voter information guide provided voters with four statements in favor of Proposition 100 and one against. Mr. Pearce's statement said, "Illegal aliens that commit a crime [sic] are an extremely difficult challenge for law enforcement and growing threat to our citizens. Large, well-organized gangs of illegal aliens have flooded many neighborhoods with violence to the point that Arizona now has the highest crime

[6] In considering a voter referendum such as this one, it is appropriate for courts to look to voter materials as a means of assessing motive. *See, e.g.*, *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696-98 (9th Cir. 1997).

rate in the nation." (Doc. 183, Decl. of Anne Lai, Ex. EE at 1.) A candidate for governor submitted a statement in favor of Proposition 100, saying, "This Ballot Measure addresses one area that needs to be resolved in this fight to secure our borders and reduce the level of crime in our neighborhoods." (*Id.* at 2.) The voter pamphlet also discussed flight risk, though: "Illegal immigrants accused of committing serious felonies in Arizona should not be allowed to make bail and flee the country before standing trial for their crimes." (*Id.* at 1.) Plaintiffs have submitted news articles from the pertinent time period, one of which describes Proposition 100 as one of "a foursome of ballot measures aimed at curbing illegal immigration." (Segura Decl., Ex. A at 1.)[7] But other news coverage addressed flight risk. (*See id.*, Ex. B at 1 ("An illegal immigrant is, without a doubt, a high [flight] risk because of the ability to come in and go out of the country when they please."); *id.*, Ex. D at 4 (Andrew Thomas: "Arizona has a tremendous problem with illegal immigrants coming into the state, committing serious crimes, and then absconding and not facing trial for their crimes, either because they jump bail after they are let out, or because, when they are let out on bail, the federal government deports them.").) The Court finds that the voter materials and media coverage do not establish that Proposition 100 has a punitive purpose.

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[7] It is also proper for courts to look to contemporaneous media coverage when considering the constitutionality of a voter referendum. *See, e.g.*, *City of L.A. v. Cnty. Of Kern*, 509 F. Supp. 2d 865, 876-80 (C.D. Cal. 2007), *rev'd on other grounds*, 581 F.3d 841 (9th Cir. 2009).

Having reviewed the voluminous evidence submitted in this case, the Court finds that the record as a whole does not support a finding that Proposition 100 was motivated by an improper punitive purpose. While some statements by legislators relate to controlling illegal immigration, other pieces of evidence show that Proposition 100's purpose is regulatory. Moreover, Proposition 100 was ultimately approved by Arizona voters, so that reduces somewhat the importance of the legislative record. Proposition 100 does not violate *Salerno*'s first test.

2. Excessive in Relation to Legitimate Interest

The Court further concludes that Proposition 100 is not excessive in relation to the government's legitimate interest in controlling flight risk of people accused of certain felonies. The Arizona legislature and Arizona voters made the logical assumption that a person who is unlawfully present in the United States may not appear for trial. (*See, e.g.*, Cook Decl. I, Ex. A at 5:10-12; *see also id.* at 3:16-18 (Mr. Pearce: "[I]f you are in this country illegally and commit a serious crime, . . . you are a flight risk, you've got no roots, you can go home any day . . . .").)

In *Salerno*, the Supreme Court upheld the federal Bail Reform Act (the "Act") against a substantive due process challenge, noting that the Act "limits the circumstances under which detention may be sought to the most serious of crimes." 481 U.S. at 747 (analyzing 18 U.S.C. § 3142(f), which makes available a detention hearing if the case involves "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat

offenders"). However, the Act focused on a different rationale for holding a person nonbondable, namely "that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *Id.* at 741 (quoting 18 U.S.C. § 3142(e)(1)). The parties agree that Proposition 100 is aimed only at flight risk, not dangerousness. (*See* Hr'g Tr. 6:5-9.)

Therefore, the analysis in *Salerno* concerning the scope of the Act's reach is not analogous to the instant matter. *See* 481 U.S. at 747-51. Proposition 100 reaches a larger number of crimes than the Act, but, given the goal of targeting flight risk, not dangerousness, it is not excessive. The government has the burden of proof under the Act to demonstrate a person's dangerousness by clear and convincing evidence, but Proposition 100 is not concerned with dangerousness, so a less stringent standard is also not excessive. *Compare* A.R.S. § 13-3961(A)(5), *with* 18 U.S.C. § 3142(f)(2). Ultimately, the Supreme Court in *Salerno* concluded that the Act appropriately balanced the individual's right to liberty with the government's compelling interest. 481 U.S. at 750-51. Likewise, the Court finds that Arizona's Proposition 100, like the Act, "focuses on a particularly acute problem in which the [g]overnment interests are overwhelming." *Id.* at 750.

For reasons discussed more fully below, the Court also concludes that the procedural protections afforded to defendants subject to Proposition 100 keep it from being excessive in relation to the goal of assuring appearance at trial. A defendant may move for a hearing pursuant to *Segura*, 196 P.3d at 837-39, 841, 843, and *Simpson*, 85 P.3d at 491-92, and the hearing must be conducted within seven days of the motion.

See Ariz. R. Crim. P. 7.4(b). The Arizona Court of Appeals has held that these hearings satisfy substantive due process standards, and this Court agrees. *See Segura*, 196 P.3d at 843-44; *Hernandez v. Lynch*, 167 P.3d 1264, 1270-75 (Ariz. Ct. App. 2008); *Simpson*, 85 P.3d at 482-95. Like the Arizona Court of Appeals, this Court finds "that Proposition 100 is a legitimate regulatory provision ensuring that [unlawfully present aliens] accused of certain serious felonies appear to stand trial and that it does not cast an unreasonably wide net." *Hernandez*, 167 P.3d at 1270 (citing *Simpson*, 85 P.3d at 486).[8] Therefore, no triable issues of fact remain. The Court grants Defendants summary judgment on Count One of the Complaint.

D. Procedural Due Process: Counts Two and Three

Plaintiffs also move for summary judgment on their procedural due process claims, Counts Two and Three. (Pls.' MSJ at 17-19.) "When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner. This requirement has traditionally been referred to as 'procedural' due process." *Salerno*, 481 U.S. at 746 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Court finds

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[8] Moreover, the Arizona Rules of Criminal Procedure give criminal trials priority over civil trials in terms of timing and establish that defendants in custody are entitled to be tried within 150 days of arraignment. *See* Ariz. R. Crim. P. 8.1(a), 8.2(a)(1). While this time limit is subject to certain exceptions and exclusions, those extensions are largely within the control of the defendant. *E.g.*, Ariz. R. Crim. P. 8.2(a)(3); 8.2(d); 8.4; 8.5. Therefore, pretrial detention is, by its nature, relatively brief.

that Proposition 100 does not deprive Plaintiffs of their procedural due process rights.

In *Salerno*, the Supreme Court emphasized the significant "procedural safeguards" in place that permitted judges applying the Act to make an individualized determination in each case. *See id.* at 742-43. The Act requires a prompt, adversarial detention hearing, wherein the detainee has the right to counsel, may testify on his own behalf, may "present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing." *Id.* at 751; *see also* 18 U.S.C. § 3142(f)-(g). The judicial officer making the detention determination under the Act "is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community." *Salerno*, 481 U.S. at 751-52 (citing 18 U.S.C. § 3142(g)). The judicial officer must issue written findings of fact and a written statement of reasons if he or she decides to detain the individual. *Id.* at 752 (citing 18 U.S.C. § 3142(i)). The government must prove that a defendant is a danger to the community by clear and convincing evidence, pursuant to the Act. *Id.* (citing 18 U.S.C. § 3142(f)). A determination of detention under the Act is immediately appealable. 18 U.S.C. § 3142(c).

In *Simpson*, the Arizona Court of Appeals held that "at least most of the procedural protections enunciated in *Salerno*" are necessary for a state bail provision to comply with procedural due process. 85 P.3d at 492. The issue here is whether defendants subject to Proposition 100 must be afforded those protections

at the IA or whether the right to move for a *Simpson*/*Segura* hearing is sufficient to assure adequate procedural due process. The Court finds that *Simpson*/*Segura* hearings provide enough process to protect the rights of people subject to Proposition 100. An IA is, by its nature, brief, but a defendant who moves for a full bail hearing has the right to counsel, may testify on his own behalf, may present other evidence, and may cross-examine witnesses for the government. *See Segura*, 196 P.3d at 240.

> The competing interests at stake are a defendants liberty and the government's need to ensure his presence for trial. On balance each of these interests is protected by allowing a defendant to be held after an [IA] for a reasonable period of time while both parties are given the opportunity to prepare for a full hearing on the no-bail determination.

Id. (citing *Hernandez*, 167 P.3d at 1272-75)). The Arizona Rules of Criminal Procedure require that any *Simpson*/*Segura* hearing be held "not later than seven days after filing of the motion," so any detention between an IA and a full hearing will be brief. *See* Ariz. R. Crim. P. 7.4(b). Like in *Salerno*, "these extensive safeguards suffice to repel a facial challenge." 481 U.S. at 752.

The Court also finds that the use of the probable cause standard does not violate procedural due process. As discussed above, the Act applies the clear and convincing standard only to determinations of dangerousness; a preponderance of the evidence standard is applied to flight risk. *See* 18 U.S.C. § 3142(f)(2); *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir.

1991) ("On a motion for pretrial detention, the government bears the burden of showing by a preponderance of the evidence that the defendant poses a flight risk, and by clear and convincing evidence that the defendant poses a danger to the community."(citing *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985))). Clear and convincing is a significantly higher standard than either probable cause or preponderance of the evidence. The Court finds that the difference between a preponderance of the evidence standard and a probable cause standard does not amount to a procedural due process violation.

No genuine issue of material fact remains as to whether Proposition 100 is implemented in a fair manner. *See Salerno*, 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335). Accordingly, Defendants are entitled to summary judgment on Counts Two and Three of Plaintiffs' Complaint.

E. Eighth Amendment: Count Six

The Eighth Amendment provides, "Excessive bail shall not be required." U.S. Const. amend. VIII, cl. 1. "This Clause, of course, says nothing about whether bail shall be available at all." *Salerno*, 481 U.S. 752. The *Salerno* court observed that "'the very language of the [Eighth] Amendment fails to say that all arrests must be bailable.'" *Id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545-46).

> The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release not be 'excessive' in light of the perceived evil. . . . [T]o determine whether the Government's response is excessive, we must compare that response against

> the interest the Government seeks to protect by means of that response.

Id. The Court has already concluded that Proposition 100 is not excessive in relation to the goal of ensuring that criminal defendants appear for trial. The reasoning related to substantive due process, *supra*, applies equally in the Eighth Amendment context. *Cf. United States v. Portes*, 786 F.2d 758, 766 (7th Cir. 1985) (holding that the Eighth Amendment does not create a constitutional right to bail and that Congress and the states may regulate bail determinations); *United States v. Moore*, 607 F. Supp. 489, 493 (N.D. Cal. 1985) (observing that, while "legislative determinations regarding the right to bail cannot be arbitrary," the Eighth Amendment does not prevent legislatures from making certain offenses nonbailable). Therefore, Proposition 100 does not violate the Eighth Amendment, and Defendants are entitled to summary judgment on Count Six of the Complaint.

F. Sixth Amendment: Count Five

In the alternative, Plaintiffs move for summary judgment on their Sixth Amendment challenge to Maricopa County's policy of not permitting appointed defense counsel at Proposition 100 IAs. (Pls.' MSJ at 20.) Plaintiffs argue that "Proposition 100 fundamentally changed the nature of [IAs], making them more complex and triggering the need for counsel." (*Id.*) The Supreme Court "has held that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194 (2008) (citing

Brewer v. Williams, 430 U.S. 387, 398-399 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986)). The right to counsel attaches when "a prosecution is commenced," which can be marked by a "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 198 (internal quotations and citations omitted). Once the right to counsel attaches, "counsel must be appointed within a reasonable amount of time," and the defendant "is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212. "[C]ritical stages [are] proceedings between an individual and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or . . . meeting his adversary." *Id.* at 212 n.16 (internal quotations and citations omitted).

The Ninth Circuit Court of Appeals identified three factors "useful in determining whether an event" is a critical stage:

> First, if failure to pursue strategies or remedies results in a loss of significant rights, then Sixth Amendment protections attach. Second, where skilled counsel would be useful in helping the accused understand the legal confrontation, we find that a critical stage exists. Third, the right to counsel applies if the proceeding tests the merits of the accused's case.

United States v. Bohn, 890 F.2d 1079, 1080-81 (9th Cir. 1989) (quoting *Menefield v. Borg*, 881 F.2d 696, 698-99 (9th Cir. 1989)). The Arizona Supreme Court has held that, "[i]n Arizona, an initial appearance is a

proceeding at which a person is advised of his right to counsel and steps are taken toward obtaining counsel for subsequent proceedings. Hence, no right to an attorney exists at the initial appearance on the day of the arrest." *State v. Cook*, 724 P.2d 556, 561 (1986).

The Court finds that Proposition 100 IAs are not critical stages of the prosecution. In Arizona, an IA–even a Proposition 100 IA–is not a preliminary hearing. An IA must take place within 24 hours of an arrest. Ariz. R. Crim. P. 4.1(a). If the person was arrested without a warrant, a complaint must be filed within 48 hours of the IA. Ariz. R. Crim. P. 4.1(b).

> At the person's [IA] the magistrate must do certain prescribed things, including: ascertaining the defendant's true name and address, informing the defendant of the charges, informing the defendant of the right to counsel and the right to remain silent, determining whether probable cause exists for the purpose of release from custody, appointing counsel if the defendant is eligible, and determining the release conditions, if any.

Segura, 196 P.3d at 836. No plea is entered at the IA. *Cf. White v. Maryland*, 373 U.S. 59, 60 (1963). If a complaint is filed after the IA, a preliminary hearing to determine probable cause is held no later than 10 days after the IA if the defendant is in custody, unless the defendant waives the hearing. Ariz. R. Crim. P. 5.3(a).

Thus, IAs are brief, administrative proceedings at which the defendants' "failure to pursue strategies or remedies" does not "result[] in a loss of significant rights." *Bohn*, 890 F.2d at 1080. Moreover, the Court

finds that "skilled counsel" is unnecessary to help "the accused understand the legal confrontation" because the matters at issue are largely ministerial and, in fact, include the appointment of counsel if appropriate. *See id.* at 1081.

Finally, IAs do not "test[] the merits of the accused's case." *Id.* No genuine issue of material fact remains as to Plaintiffs' Sixth Amendment claim; Defendants are entitled to summary judgment on Count 5 of the Complaint.

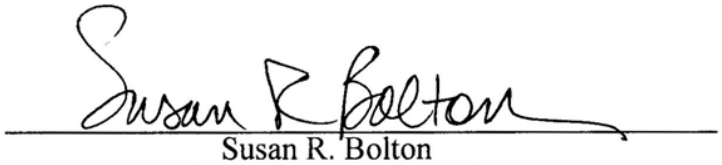
III. CONCLUSION

For the reasons stated above, the Court finds that no triable issues of fact remain as to Counts One, Two, Three, Five, and Six of Plaintiffs' Complaint and grants Defendants summary judgment on those five claims.

IT IS ORDERED denying Plaintiffs Angel Lopez-Valenzuela, Isaac Castro-Armenta, and the certified class's Motion for Summary Judgment (Doc. 203).

IT IS FURTHER ORDERED granting Defendants Maricopa County and Joseph Arpaio's Motion for Partial Summary Judgment (Doc. 198). The Clerk is directed to enter judgment in this matter in favor of Defendants with respect to Counts One, Two, Three, Five, and Six of the Complaint.

DATED this 29th day of March, 2011.



Susan R. Bolton
United States District Judge