

SC95946

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IN THE  
SUPREME COURT OF THE STATE OF MISSOURI

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**FAUSTINO LOPEZ-MATIAS**

DEFENDANT

v.

**STATE OF MISSOURI,**

PLAINTIFF.

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**DEFENDANT'S BRIEF**

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## JURISDICTIONAL STATEMENT

Defendant Faustino Lopez-Matias requests that he be granted reasonable bail in the amount of \$5,000.00 surety or \$500.00 cash, subject to the usual terms and conditions applicable to a Defendant charged with the offense of forgery. Defendant makes this request pursuant to Missouri Supreme Court Rule 33.09. Defendant was denied bail based on Section 544.470.2<sup>1</sup>, which is unconstitutional in that it purports to regulate in the preempted field of immigration and alien registration, that it deprives Defendant of his right to substantive due process, and that it directly contradicts the Missouri Constitution.

Because this case involves the validity of a statute or provision of the Constitution of this state, jurisdiction is vested in this Court. **Mo. Const. art. V § 3, (as amended 1982).**

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<sup>1</sup> After diligent search, counsel has been unable to locate any Missouri case authority directly addressing §544.470.2, making this a matter of first impression before this Court.

## STATEMENT OF FACTS

On September 3, 2016, Sergeant Greg Berry of the Linn Creek, Missouri Police Department arrested Defendant. A complaint was filed in the Associate Circuit Court of Camden County, case number 16CM-CR01724, alleging that Defendant had committed the class C felony of forgery by possessing a fraudulent social security card. The honorable Matthew Hamner issued an arrest warrant which was served upon Defendant on September 3, 2016. Bail was denied.

On September 9, 2016, Defendant filed a motion to set bond. The honorable Aaron Koeppen heard and denied the motion on September 13, 2016. Judge Koeppen announced in open court that the reason he denied the motion was Section 544.470.2's prohibition of bail for those defendants reasonably believed by the Court to be unlawfully present in the United States.

On September 16, 2016, Defendant made application for bail to this Court pursuant to Missouri Supreme Court rule 33.09.

## POINTS RELIED ON

- I. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 is directly contradicted by the plain language of Article I, Section 20 of the Missouri Constitution which provides that all persons not charged with capital offenses shall be entitled to bail. Defendant is an alien who could not prove his lawful presence in the United States, who stands accused of forgery, a non-capital offense, and who has been denied bond due to the presumption created by section 544.470.2.**

*State ex rel. Nixon v. Kinder*, 89 S.W.3d 454 (Mo. banc 2002)

Mo. Const. art. I §20

Mo. Rev. Stat. §544.470.2 (2011)

- II. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to**

**continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 unconstitutionally regulates in the field of immigration and alien registration, a field completely occupied by an extensive framework of federal regulation so pervasive that it leaves no room for state action. Defendant, an alien who could not prove his lawful presence in the United States, was denied bond due to the presumption created by section 544.470.2 RSMo.**

*Arizona v. United States*, 132 S. Ct. 2492 (2012)

*Hines v. Davidowitz*, 312 U.S. 52 (1941)

U.S. Const. art. VI, cl. 2

Mo. Rev. Stat. §544.470.2 (2011)

**III. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 deprived Defendant of his right to substantive due process by failing to adhere to limitations imposed upon bail statutes by the United States**

**Supreme Court. To be constitutional, statutes which limit the right to bail must address a particularly acute problem, must operate only on individuals who have been arrested for a specific category of extremely serious offenses, and must require a full-blown adversary hearing at which the State must convince a judge that no conditions of release can reasonably assure the safety of the community or any person. Section 544.470.2 does not address a particularly acute problem, operates on undocumented aliens who are accused of any crime rather than a specific category of extremely serious offenses, and has no requirement for an adversarial hearing to determine whether any conditions could reasonably assure Defendant's appearance and the safety of the community.**

*Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9<sup>th</sup> Cir. 1976)

*United States v. Salerno*, 481 U.S. 739 (1987)

U.S. Const. amend. XIV §1

Mo. Const. art. I §10

Mo. Rev. Stat. §544.470.2 (2011)

## ARGUMENT

This case requires the interpretation of both the United States and Missouri Constitutions, as well as the determination of whether §544.470.2 is unconstitutional, all of which are subject to *de novo* review. *State v. Jackson*, 384 S.W.3d 208, 211 (Mo. banc 2012) and *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006) (internal citations and quotations omitted in both instances).

**I. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 is directly contradicted by the plain language of Article I, Section 20 of the Missouri Constitution which provides that all persons not charged with capital offenses shall be entitled to bail. Defendant is an alien who could not prove his lawful presence in the United States, who stands accused of forgery, a non-capital offense, and who has been denied bond due to the presumption created by section 544.470.2.**

A. The Plain Language of §544.470.2 Contradicts the Plain Language of Article I §20 of the Missouri Constitution, Rendering the Statute *per se* Unconstitutional.

“The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute. A court will look beyond the plain meaning of the statute only when the language is ambiguous or would lead to an absurd or illogical result.” *Akins v. Director of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (internal citations omitted).

Even though statutes are cloaked in a presumption of constitutionality, an appellate court may find a statute unconstitutional if it clearly contravenes a specific constitutional provision. *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006). “If a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid. *State ex rel. Nixon v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002) (citing *State ex rel. Upchurch v. Blunt*, 810 S.W.2d 515, 516 (Mo. banc 1991)).

B. The Language of Both §544.470.2 and art. I §10 is Unambiguous.

“If the person [whom the judge believes to be an alien unlawfully present in the United States] cannot prove his or her lawful presence, the person shall continue to be committed to the jail and remain until discharged by due course of law.” §544.470.2 **RSMo.** Giving effect to this unambiguous language produces a result which is neither absurd nor illogical. Every unlawfully present alien is to be denied bond on any offense unless and until he or she is able to prove that his or her presence is lawful.

Article I, §20 of the Missouri Constitution provides that all persons shall be bailable except in cases of capital offenses. **Mo. Const. art. I §20.** This sentiment is

reflected in this Court's Rules of Criminal Procedure. "Any person charged with a bailable offense shall be entitled to release pending trial." **Sup. Ct. R. 33.01**. These provisions are, again, unambiguous. This Court need not resort to complex rules of construction to determine that neither "All persons shall be bailable" nor "Any person charged with a bailable offense" place any limitation based on citizenship or immigration status. They both mean everybody.

C. The Statute Conflicts With the Constitution.

§544.470.2 limits the availability of bail to those individuals who can prove their lawful presence in the United States. Article I §20 permits no such limitation. A conflict exists, and a statute cannot survive a conflict with a constitutional provision. Because the plain language of §544.470.2 directly conflicts with Article I §20, the statute is unconstitutional *per se*.

**II. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 unconstitutionally regulates in the field of immigration and alien registration, a field completely occupied by an extensive framework of federal regulation**

so pervasive that it leaves no room for state action. Defendant, an alien who could not prove his lawful presence in the United States, was denied bond due to the presumption created by section 544.470.2 RSMo.

A. Congress Has the Power to Preempt State Law

“There is no doubt that congress may withdraw specified powers from the States.” *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). “Federal law shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” *Id.*, (quoting U.S. Const. art. VI, cl. 2).

State laws are preempted when they conflict with federal law. *Id.*, at 2501. This includes cases in which compliance with both federal and state regulations is a physical impossibility as well as cases in which the state law stands as an obstacle to the accomplishment of the full purposes of Congress. *Id.*

State law must also give way to federal law on the basis of field preemption. “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Id.*, (internal citations omitted). “The intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Id.* “When Congress occupies an entire field...even complementary state regulation is

impermissible.” *Id.*, at 2502. “Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.” *Id.*

#### B. The Federal Government Has Fully Occupied the Field Of Immigration

In 1940, the United States Congress developed a complete and comprehensive system for alien registration. *Id.*, at 2501-02. “Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.” *Id.*, at 2502. Congress displayed its intent “to preclude States from complementing the federal law, or enforcing additional or auxiliary regulations.” *Id.*, at 2503. Any state law purporting to complement federal immigration law or to enforce additional or auxiliary regulations on immigration is preempted by federal law. *Id.*

#### C. The Federal Interest in Regulating All Facets of Immigration Is So Dominant

That It Precludes Enforcement of State Laws on the Same Subject.

When the federal government has established rules and regulations effecting “the rights, privileges, obligations or burdens of aliens,” that law is the supreme law of the land and no state can add to its force and effect. *Hines v. Davidowitz*, 312 U.S. 52, 62-3 (1941). Because the federal government represents the collective interests of the several states, it is “entrusted with the full and exclusive responsibility for the conduct of affairs with foreign sovereignties.” *Id.*, at 63. “For local interests, the several States of the Union

exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.” *Id.*

“One of the most important and delicate of all international relationships...has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.” *Id.*, at **64**. In addition to treaty obligations, a body of customs has been developed defining certain duties of governments, the primary purpose of which have been “to avoid injurious discrimination in either country against citizens of the other.” *Id.*, at **65**. “The regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, the act of Congress, or the treaty, is supreme.” *Id.*, at **66**. States cannot enforce additional or auxiliary regulations. *Id.*, at **66-7**.

D. §544.470.2 Is Preempted By Federal Law.

§544.470.2 denies certain aliens the right to pre-trial release when accused of a non-capital criminal offense, a right afforded to every other person in the United States. It places the additional or auxiliary burden of proving lawful presence upon any defendant whom a judge believes to be an unlawfully present alien. If, as the United States Supreme Court has held, the “rights, privileges, obligations or burdens of aliens” are subject to the sole governance of the federal government, §544.470.2 must give way to the larger federal body of law. It is preempted.

The emphasis placed upon unlawfully present aliens by the Missouri statute betrays its infringement upon the field of immigration and alien registration. By adopting the statute, the Missouri General Assembly has attempted to regulate in a field from which states are precluded. Because of this trespass onto the exclusive demesne of the United States Congress, §544.470.2 is unconstitutionally invalid and may not be enforced by Missouri Courts.

E. The Eastern District Cases

In support of its contention that §544.470.2 is constitutional, the State has previously cited six cases from the Missouri Court of Appeals, Eastern District, all decided on April 2, 2013<sup>2</sup> (hereinafter, the “Eastern District Cases”). Those cases fall well off-point and must be afforded scant weight by this Court. In those cases the Court of Appeals correctly reversed the circuit court’s ruling that Missouri’s criminal forgery statute was preempted by federal law when applied to undocumented aliens.

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<sup>2</sup> *State v. Diaz-Rey*, 397 S.W.3d 5

*State v. Colunga-Dominguez*, 396 S.W.3d 455

*State v. Lara-Gonzales*, 396 S.W.3d 456

*State v. Lara-Gutierrez*, 397 S.W.3d 3

*State v. Miranda-Estevez*, 397 S.W.3d 2

*State v. Morales*, 397 S.W.3d 1

In *State v. Diaz-Rey*, the first of the Eastern District cases to be ruled upon and the only one given a full opinion, the defendant was charged with forgery for using a false social security number on an employment document. **397 S.W.3d 5, 7 (E.D. Mo. 2013)**. Mr. Diaz-Rey, relying upon *Arizona v. United States*, which had invalidated a law imposing a criminal penalty upon unauthorized alias for seeking or engaging in employment, argued that §570.090 RSMo. (Missouri’s forgery statute) was likewise unconstitutional as applied. *Id.* He moved for dismissal on the basis that Missouri’s regulation of employment by undocumented aliens was preempted by federal law. *Id.* The circuit court agreed, dismissed the case, and the State appealed. *Id.*, **at 8**.

The Eastern District distinguished §570.090, finding that the Missouri law “is a state law of general applicability that uniformly applies to all persons as members of the general public, and makes no distinctions between aliens and non-aliens.” *Id.*, **at 9**. “As a general matter, such laws are not preempted simply because a class of persons subject to federal regulation may be affected.” *Id.* (**internal citation omitted**).

If any person, whether citizen, documented alien, or illegal alien, had attempted to use a writing as genuine when, in fact, it was not genuine, that person would face liability under Missouri’s forgery law. The immigration status of those accused of the crime had nothing to do with its commission except, perhaps, to serve as motive. By enacting and enforcing a criminal prohibition against forgery, Missouri made no attempt to regulate in the field of immigration (or any other field) which the United States Congress had fully

occupied or in which there was a dominant federal interest. The forgery statute was not preempted. *Id.*, at 10.

§544.470.2 poses a different problem. Unlike §570.090, it specifically and exclusively targets aliens. It fails the simple test suggested by the *Diaz-Rey* Court: the applicability of a statute solely to those persons already subject to exclusive federal regulation is a strong indicator that it must be preempted. Missouri has explicitly regulated within the field of immigration. By specifically and exclusively targeting unlawfully present aliens, Missouri has legislated in a field in which Congress has left no room for state action.

**III. The Motion Court erred in denying Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that no condition of pre-trial release shall reasonably assure the appearance in court of any person whom the Judge reasonably believes to be an alien unlawfully present in the United States, and which requires said alien to continue to be committed to the jail and remain until he can either prove his lawful presence or is discharged by due course of law. Section 544.470.2 deprived Defendant of his right to substantive due process by failing to adhere to limitations imposed upon bail statutes by the United States Supreme Court. To be constitutional, statutes which limit the right to bail must address a particularly acute problem, must operate only on individuals who have been arrested for a specific category of extremely serious offenses,**

**and must require a full-blown adversary hearing at which the State must convince a judge that no conditions of release can reasonably assure the safety of the community or any person. Section 544.470.2 does not address a particularly acute problem, operates on undocumented aliens who are accused of any crime rather than a specific category of extremely serious offenses, and has no requirement for an adversarial hearing to determine whether any conditions could reasonably assure Defendant’s appearance and the safety of the community.**

A. The Due Process Clause of the United States Constitution limits pre-trial detention.

“The Supreme Court has long recognized constitutional limits on pretrial detention.” *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 777 (9<sup>th</sup> Cir. 2014)<sup>3</sup>. Individuals, even though accused of crimes, have a strong, fundamental interest in liberty. *Salerno*, at 751. “In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *Id.*, at 755.

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<sup>3</sup> The United States Supreme Court stayed the mandate from the Ninth Circuit on November 7, 2014 (135 S.Ct. 475). That stay was vacated on November 13, 2014 (135 S.Ct. 428). In the Opinion vacating the stay, Justice Thomas, joined by Justice Scalia, wrote that he saw “no reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.” *Id.*

No state may “deprive any person of life, liberty, or property, without due process of law.” **U.S. Const. amend. XIV, §1.** “The Due Process Clause...provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Lopez-Valenzuela*, at 780 (quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997)). The government may not “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.” *Lopez-Valenzuela*, at 780 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)) (emphasis in original).

The *Salerno* Court identified three criteria to be used in determining whether or not a bail provision satisfies the requirements of substantive due process: (1) the challenged statute must address a particularly acute problem; (2) the statute may operate only on individuals who have been arrested for a specific category of extremely serious offenses; (3) the statute must require a full-blown adversary hearing at which the State must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. *Lopez-Valenzuela*, at 779-80 (citing *Salerno*).

B. Arizona Proposition 100.

In *Lopez-Valenzuela*, the Ninth Circuit address Arizona Proposition 100, a statute nearly identical, but substantially more limited and focused in scope, to §544.470.2. So similar are the two statutes that the Ninth Circuit noted “Other than Arizona, only Missouri singles out undocumented immigrants for the categorical denial of bail.” *Id.*, at 787-88. Proposition 100 prohibited any form of bail or pre-trial for a wide range of felony

offenses if the defendant was found to be an undocumented immigrant. *Id.*, at 775. “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...probable cause that the person entered or remained in the United States illegally.” *Id.* “The court has no discretion to release the arrestee under any circumstances.” *Id.*

The Ninth Circuit found that Proposition 100 did not satisfy any of the *Salerno* criteria. The court found no evidence from the record that “undocumented immigrants as a group pose either an unmanageable flight risk or a significantly greater flight risk than lawful residents. *Id.*, at 783. It found that Proposition 100 was not limited to the requisite category of extremely serious offenses, but instead encompassed a wide variety of offenses including “unlawful copying of a sound recording [and] altering a lottery ticket with intent to defraud.” *Id.*, at 784. Finally, the Court found no requirement for a full-blown adversary hearing at which the State was required to provide that an individual arrestee presented an unmanageable flight risk. *Id.* In so finding, the Court specifically noted “there is no evidence that undocumented status correlates closely with unmanageable flight risk.” *Id.*, at 786. The Court emphasized that the flight risk must be “unmanageable” and highlighted the numerous methods of managing flight risk “such as bond requirements, monitoring and reporting requirements.” *Id.*

The Ninth Circuit held that Proposition 100 facially violated the substantive component of the Due Process Clause of the Fourteenth Amendment and invalidated the statute. *Id.*, at 792. The Court declined to reach the procedural due process, Eighth

Amendment, Sixth Amendment, and preemption claims because it found the due process violation dispositive. *Id.*

C. §544.470.2 Violates Substantive Due Process for the Same Reasons as Proposition 100.

§544.470.2 does not address a particularly acute problem. No evidence has been presented in this case or in the scant legislative history of 2008 House Bill 1549, which added paragraph 2 to §544.470, that supports the proposition that the mere fact of undocumented status correlates to a higher flight risk or risk to the safety of the community. Neither is the Missouri Statute limited to a specific category of extremely serious offenses. Indeed, going even further than Proposition 100, §544.470.2 operates on every offense, whether felony or misdemeanor. Finally, while §544.470.2 seems to implicitly permit a hearing, it makes no requirement of a “full-blown adversary hearing at which the State must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.”

Section 544.470.2 is facially invalid in that it deprives a defendant of his constitutionally protected right to substantive due process, and may not be enforced.

## CONCLUSION

Section 544.470.2 is unconstitutional. It is preempted by the immigration and alien registration scheme put in place by the United States Congress, it deprives undocumented aliens of their right to substantive due process, and it directly contradicts the Missouri Constitution. It cannot serve as the basis for denial of bond. Defendant asks this honorable Court to find that Defendant is entitled to release.

“If the higher court finds that the accused is entitled to release...the court shall make an order setting or modifying conditions for the release of the accused.” **Sup. Ct. R. 33.09(b)**. Defendant asks this Court to set bail at \$5,000.00 professional surety, or \$500.00 cash, with such conditions as this Court may deem reasonable to secure his appearance at future court dates.

Respectfully submitted,



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**CERTIFICATION OF SERVICE  
AND OF COMPLIANCE WITH RULE 84.06(B) AND (C)**

The undersigned hereby certifies that on this 14<sup>th</sup> Day of November, 2016, one true and correct copy of the foregoing brief was served via the electronic filing system on:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 4,301 words.

Respectfully submitted,



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