

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 REPLY BRIEF**

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## **JURISDICTIONAL STATEMENT**

Defendant Faustino Lopez-Matias incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

## **STATEMENT OF FACTS**

Defendant Mr. Lopez-Matias incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

## ARGUMENT

- I. Section 544.470.2 cannot be harmonized with either Article I §20 or §32 of the Missouri Constitution because it categorically denies bail to all undocumented aliens regardless of whether or not those persons can be shown to be a danger to a crime victim, the community, or any other person.**

Respondent relies upon Article I §32 for the purpose of constitutionally harmonizing §544.470.2 RSMo. **(Resp.Br. 2)**. Respondent further contends that Defendant has ignored the plain and unambiguous language of Article I §32.2. **(Resp.Br. 2)**. Defendant has not ignored that language; it simply does not apply to him.

§544.470.2 precludes Defendant from receiving a hearing to determine if he “poses a danger to a crime victim, the community, or any other person,” because even if the State fails to convince the judge that Defendant is a danger to the community, the judge lacks the authority to set bail. §544.470.2 is not unconstitutional because it *may* result in the denial of bond for non-capital offenses, but because it *must* result in the denial of bond for anyone who cannot prove his or her legal presence.

Respondent argues that “Contrary to Defendant’s assertion, the Missouri Constitution does not guarantee bail to all persons not charged with a capital crime.” **(Resp.Br. 2)**. Respondent is incorrect. “The Missouri Constitution guarantees to all persons the right to bail except for capital offenses.” *In re Conrad*, 944 S.W.2d 191,201 **(Mo. banc 1997)**. “Because this is a constitutional right, it is neither dependent upon, nor

may it be limited by, state statute or court rule.” *Id.*, (citing *Kinder v. Richeson*, 264 S.W. 982, 984 (Mo. banc 1924)).

As to the numerous threats to the community cited by Respondent (**Resp.Br.2 FN2**) including first offense driving without a valid license<sup>1</sup>, speeding 72 miles per hour in a 55 mile per hour zone, and allegedly possessing a fraudulent social security card, none of these threats is the sort that could not be managed by the imposition of appropriate bail conditions. Unfortunately for Mr. Lopez-Matias, his inability to prove his lawful presence moots any argument he may present that he is not an unmanageable danger to the community.

**II. Section 544.470.2 imposes an additional burden upon aliens – that of proving lawful status prior to being allowed bail when accused of a criminal charge. The statute also interferes with the accomplishment of Congress’ purpose to regulate all facets of the conduct of aliens within the United States. Those trespasses place the statute beneath the lens of the Supremacy Clause of the United States Constitution and results in its preemption.**

Respondent correctly concedes that the Congress has the power to preempt state law by fully occupying a particular field of regulation. (**Resp.Br. 3**). Respondent also concedes that the Federal Government has fully occupied the field of immigration and the status of aliens. (**Resp.Br. 4-5**). Respondent’s analysis of §544.470.2, however, which concludes that the statute does not impose any additional burdens on aliens, is flawed.

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<sup>1</sup> For which offense jail time is not an allowable punishment. **Mo. Rev. Stat. §302.020.3**

States are not permitted to establish rules which effect “the rights, privileges, obligations or burdens of aliens.” *Hines v. Davidowitz*, 312 U.S. 52, 62-3 (1941).

§544.470.2 imposes an additional obligation or burden upon an alien accused of a crime. He must, if questioned, prove his lawful presence before being afforded the opportunity for bail.

Respondent also describes the “host of problems with aliens who are unlawfully present” faced by Missouri Courts. (**Resp.Br. 5**). Respondent, however, cites no case, no legislative history, no authority whatsoever for these conclusory statements. Respondent claims that §544.470.2 was created to address these problems. (**Resp.Br. 5**). None of these reasons are cited in the scant legislative history of House Bill 1549, the bill which added subsection 2 to §544.470. The purpose of that bill was “to repeal sections 8.283, 302.720, and 544.470, RSMo, and to enact in lieu thereof twenty-four new sections relating to illegal aliens, with penalty provisions, and an effective date for certain sections.” **H.B. 1549, 1771, 1395 & 2366, (truly agreed and finally passed) 94<sup>th</sup> Gen. Assemb. (Mo. 2008).**

Respondent declares that §544.470.2 does not “pose any obstacle to the accomplishment of the full purpose of Congress.” Respondent fails to note the Federal Government’s “full and exclusive responsibility for the conduct of affairs with foreign sovereignties.” *Hines*, at 63. This responsibility the several states to act with one voice through the federal government to administer the rights and obligations of citizens of another country within the United States, and ultimately “to avoid injurious



discrimination in either country against the citizens of the other.” *Id.*, at 65. If that is, indeed, the full purpose of Congress, §544.470.2 stands athwart it.

**III. Respondent’s argument that §544.470.2 survives heightened scrutiny by being narrowly tailored to achieve a compelling interest must fail. The statute is not narrowly tailored, it addresses no acute problem, and does not afford a meaningful adversarial hearing as required by U.S. Supreme Court jurisprudence.**

Defendant and Respondent agree that pre-trial detention is not *per se* punitive. (Resp.Br. 6). The parties likewise agree that the right to release pre-trial is fundamental (Resp.Br. 6), and receives heightened protection. (Resp. Br. 7). Any governmental interference that fundamental liberty interest must be narrowly tailored to serve a compelling state interest. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9<sup>th</sup> Cir. 2014). The questioned statute must address a particularly acute problem, it must operate only on individuals who have been arrested for a specific category of extremely serious offenses, and it must require a full-blown adversarial hearing at which the government must convince a neutral judge by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person. *Id.*, at 782.

§544.470.2 cannot survive that heightened scrutiny. The statute does not address a particularly acute problem. Despite Respondent’s assertions to the contrary, there is no evidence, either in the court below or in the legislative history, of any increased flight risk on the part of undocumented aliens. The 9<sup>th</sup> Circuit similarly found no evidence of a

particularly acute problem with Arizona Proposition 100, writing “the record contains no findings, studies, statistic 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.” *Id.*, at 783.

Respondent argues that §544.470.2 is narrowly tailored because it “only applies to a very specific class of individuals.” (**Resp.Br. 9**). This does not accurately reflect the holding in *Salerno*, which requires a statute to “detain without bail only those individuals who have been arrested for a specific category of extremely serious offenses.” *United States v. Salerno*, 481 U.S. 739, 710-11 (1987). The 9<sup>th</sup> Circuit overturned Proposition 100 because it encompassed “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.” *Lopez-Valenzuela*, at 784. Missouri’s statute operates on all offenses, whether felony or misdemeanor. It is not narrowly tailored.


Respondent mistakenly asserts that the defendant is entitled to a hearing under §544.470.2. There is no such requirement in the statute, unless and until the alien can establish his or her lawful presence to the satisfaction of the judge. The Missouri statute fails to satisfy the third *Salerno* criteria.

## CONCLUSION

Section 544.470.2 cannot be harmonized with either Article I §20 or §32 of the Missouri Constitution because it categorically denies bail to all undocumented aliens. The statute imposes an additional burden upon aliens – that of proving lawful status prior to being allowed bail when accused of a criminal charge – and it interferes with the accomplishment of Congress’ purpose to regulate all facets of the conduct of aliens within the United States. Finally, §544.470.2 fails to satisfy heightened scrutiny because it is not narrowly tailored to achieve a compelling interest.

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 29<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 1,690 words.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Timothy R. Cisar', written over a horizontal line.

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