

SC95946

**IN THE
SUPREME COURT OF THE STATE OF MISSOURI**

STATE OF MISSOURI
Plaintiff/Respondent

vs.

FAUSTINO LOPEZ-MATIAS
Defendant/Appellant.

RESPONDENT'S BRIEF

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ARGUMENT

I.

The Motion Court was correct to deny Defendant's request for bail pursuant to Section 544.470.2 RSMo, which creates a presumption because of Defendant's status as an alien unlawfully present in the United States that the conditions of release offered under Section 544.455 RSMo would be insufficient to assure Defendant's appearance in court. Article I, Section 32 empowers the court to enforce special conditions or even deny bail in non-capital offenses in order to ensure the safety of persons and to ensure the Defendant's appearance at court. As such, the presumption and subsequent denial of bail pursuant to Section 544.470.2 RSMo, is consistent with the plain language of the Missouri Constitution Article I, Section 32, and Article I, Section 20 and is therefore not unconstitutional *per se*.

The Defendant currently stands charged with one count of forgery, one count of operating a vehicle without a valid license, and one count of exceeding the posted speed limit by 16-19 m.p.h. in Camden County in case 16CM-CR01724. Because of his status as an alien unlawfully present in the United States, a presumption was created, pursuant to §544.470.2 RSMo., that the conditions of release offered in § 544.455 RSMo. would not reasonably ensure Defendant's appearance at court and his bond was denied.

Defendant asserts that a plain language interpretation of Section 544.470.2 RSMo, conflicts with Article I, Section 20 of the Missouri Constitution as it may result in the denial of bond for non-capital offenses, and because of that conflict that § 544.470.2 is unconstitutional *per se*.

Article I, § 20 provides, “That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.” *Mo. Const. art. I, § 20*. While the State agrees that the defendant is not charged with a capital offense, and that taken in isolation a plain language reading of Article I, § 20, would entitle him to bail, Defendant ignores the plain and unambiguous provisions of Article I § 32.2¹, which provides, “Notwithstanding section 20 of article I of this Constitution, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may deny bail or may impose special conditions which the defendant and surety must guarantee.” *Mo. Const. art. I, § 32*.

This Court has previously dealt with the plain language interpretation of Article I § 20 and its modification through Article I §32 in *State v. Jackson* holding, “[p]ursuant to this provision, as well as under [the Supreme] Court's Rule 33.01, Missouri courts can impose conditions on bail to protect others as well as to secure defendant's return or even deny bail if the State shows that the defendant poses a danger² to the victim or public.” *State v. Jackson*, 384 S.W.3d 208, 215–16 (Mo. 2012).

Contrary to the Defendant’s assertion the Missouri Constitution does not guarantee bail to all persons not charged with a capital crime. Through Article I §32 of the Missouri

¹ This language is also echoed § 544.457 RSMo.

² While not addressed in Defendant’s brief, State would advocate that the State has made a showing that Defendant does indeed pose a danger to the community. On the probable cause statement Officer Greg Berry asserts that the Defendant poses a danger to the community because he was operating a motor vehicle without a valid license, at an excessive speed, while in the possession of a fraudulent social security card that Defendant admitted to purchasing and which contained his signature.

Constitution, Missouri courts may deny bail to persons who are not charged with a capital offense if there is a showing that the defendant poses a danger. Denial of bond under § 544.470.2 RSMo does not conflict with Article I §§20 and 32 of the Missouri Constitution and is therefore not unconstitutional *per se*.

II.

The Motion Court was correct to deny Defendant's request for bail pursuant to Section 544.470.2 RSMo, which creates a presumption that because of Defendant's status as an alien unlawfully present in the United States that the conditions of release offered under Section 544.455 RSMo would be insufficient to assure Defendant's appearance in court. Section 544.470.2 RSMo imposes no new criminal offenses, imposes no registration requirements, or in any other way trespasses into the field of immigration and alien registration; moreover, compliance with Section 544.470.2 RSMo poses no obstacle to the accomplishment of the full purposes of Congress. As such, Section 544.470.2 RSMo is not preempted by Federal Immigration Law.

Defendant correctly asserts that Congress has the power to preempt State law. The Supremacy Clause allows Congress the power to preempt state through three main avenues: First, through an express preemption provision. Second, when the congress has established exclusive governance of a field by laying a "framework of regulation 'so pervasive...that Congress left no room for States to supplement it' or where 'federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 132 S. Ct. 2492, 2495, 183

L. Ed. 2d 351 (2012) (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447.). Finally, state laws are preempted when they conflict with federal law—including when they stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*, (*quoting Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581. Pp. 2501 – 2507.).

However, “[i]n preemption analysis, courts should assume that “ ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’” *Arizona*, 132 S.Ct. at 2501 (*quoting Rice*, 331 U.S. at 230, 67 S.Ct. 1146); *see Connelly*, 927 S.W.2d at 851. When, as here, it is alleged that preemption applies in an area... that has been traditionally occupied by the states, a preemption review starts with this assumption. *White v. Medical Review Consultants*, 831 S.W.2d 662, 664 (Mo.App.1992).” *State v. Diaz-Rey*, 397 S.W.3d 5, 9 (Mo. Ct. App. 2013).

Defendant asserts that because §544.470.2 RSMo creates a presumption which is based on an alien’s unlawful status in the United States that it betrays its intention to regulate in the field of immigration—a field that is wholly occupied by the Federal Government. However, when a statute is challenged it is not enough to cry preemption—it must be examined individually under the preemption principles. *Arizona* at 2501.

Arizona makes clear that the Federal government has “broad, undoubted power over the subject of immigration and the status of aliens.” *Id.* at 2493. The Federal

governance covers, among other things: alien registration, criminalization of certain activities, designation of which aliens may be removed and the procedures for doing so. Moreover, the Federal regulatory system preempts statutes which attempt to “curtail or complement” federal law or “enforce additional or auxiliary regulations.” *Hines* 132 S.Ct. 2492 at 2495.

Unlike the provisions reviewed in *Arizona*, Section 544.470.2 creates no new criminal offenses, it does not impose any registration requirements, it does not allow for a separate cause to detain or arrest individuals, nor does it function as a method for the State to identify and detain potentially deportable aliens and hold them to that end. Instead, Section 544.470.2 functions on the very foundation of the idea of bail, “...to insure the defendant's appearance and submission to the judgment of the court.” *Reynolds v. United States*, 80 S. Ct. 30, 32, 4 L. Ed. 2d 46 (1959). “Consistent with this purpose, Missouri law and this Court's rules provide that the purpose of bail is to ‘reasonably assure the appearance of the accused.’ *Section 544.455, RSMo Supp.2011; Rule 33.01.*” *State v. Jackson*, 384 S.W.3d 208, 215 (Mo. 2012).

As in the case at hand, Missouri courts face a potential host of problems with aliens who are unlawfully present—they are by definition a populous which lives “under the radar.” Difficulty identifying Defendants can be exacerbated by fraudulent identification; the ability to check criminal records is severely hampered or impossible; there can be no legal employment; and law enforcement faces substantial difficulties in their ability to identify, locate, and re-apprehend those aliens who do not appear. It is in recognition of these problems that section 544.470.2 RSMo was enacted.

While section 544.470.2 does specifically apply to unlawfully present aliens, it does not trespass into the field of immigration or alien registration as belied by the fact that as soon as the court case is resolved there is no further duty to detain, verify, or any other activity. Nor does Section 544.470.2 RSMo pose any obstacle to the accomplishment of the full purposes of Congress. As noted in *State v. Diaz-Rey*, there is nothing about one's status as an unlawfully present alien that would entitle a Defendant to special distinctions. 397 S.W.3d 5, 9(E.D. Mo. 2013). Pursuant to Missouri Article I § 32 and Sections 544.455 and 544.470 RSMo, a judge may deny bail if they determine that the Defendant does not meet the conditions for release—the most basic being that they cannot be reasonably assured that the Defendant will appear for court. Defendant makes no argument against the constitutionality of this judicial power in general

III.

The Motion Court was correct to deny Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that because of Defendant's status as an alien unlawfully present in the United States that the conditions of release offered under Section 544.455 RSMo would be insufficient to assure Defendant's appearance in court. Section 544.470.2 RSMo., does not deprive Defendant of his substantive right of due process as it serves a regulatory purpose and serves a legitimate and compelling governmental interest which is narrowly tailored.

The court in *United States v. Salerno* makes clear that the deprivation of a Defendant's liberty while awaiting trial is a fundamental right. 481 U.S. 739, 751, 107 S.

Ct. 2095, 2102, 95 L. Ed. 2d 697 (1987). As such, “‘The Due Process Clause...provides heightened protection against government interference with certain fundamental rights and liberty interests,’ *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (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).” *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014).

In order to survive a substantive due process claim the court in *Salerno* required two determinations: First, does the statute “violate substantive due process because the pretrial detention it authorizes constitutes impermissible punishment before trial;” and Second, is any infringement on the Defendant’s fundamental liberty interest narrowly tailored to serve a compelling state interest.” *Id.* at 746-751.

A. Section 544.470.2 RSMo Does Not Constitute Impermissible Punishment Prior To Trial.

“As an initial matter, the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. *Bell v. Wolfish*, [441 U.S. 520], at 537, 99 S.Ct., at 1873. To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent. *Schall v. Martin*, 467 U.S., at 269, 104 S.Ct., at 2412. Unless Congress 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].’ ” *Ibid.*, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169, 83 S.Ct. 554, 567–568, 9 L.Ed.2d 644 (1963).”

United States v. Salerno, 481 U.S. 739, 746–47, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987).

Unlike Arizona Proposition 100, Defendant agrees that there is scant legislative history from which a potentially punitive intent to Section 544. 470.2 RSMo. may be inferred. Absent such a showing, the punitive or regulatory distinction hinges on whether the statute appears excessive in relation to the alternative purpose assigned to it. *Salerno* at 747. In *Salerno* the court affirmed the “pressing societal problem” the dangers defendants who were on pretrial release posed to the community. *Id.* It also found that by limiting the detention to a certain class of individuals who posed a specific threat, offering a hearing, and limiting the length of pretrial detention by offering the defendant a speedy trial the statute was not excessive in the purpose assigned to it and was regulatory in nature. *Id.* 747-748.

In the case at hand, we are not only faced with a defendant who presents the same risks as those addressed in the Senate Report in *Salerno*, but also one whose status as an unlawful alien presents further risks as a potential flight risk. Furthermore, like the statute in *Salerno* Section 544.470.2 is limited to a specific class of individuals who pose a specific threat.³ A Defendant is entitled to a hearing under Section 544.455 RSMo and Section 544.470.2 RSMo. Finally, as in *Salerno*, “[a] defendant who is denied bail

³ The plain text of the Section 544.470.2 RSMo sets out that only aliens who are unlawfully present are subject to pretrial detention because of the risk that there are insufficient safeguards to assure their appearance in court.

because he poses a danger to a crime victim, witness, or the community shall, upon written request filed at arraignment, be entitled to a trial which begins within one hundred twenty days of his arraignment or within one hundred twenty days of an order granting a change of venue, whichever occurs later.” Section 544.676 RSMo.

B. Any Infringement on Defendant’s Fundamental Liberty Interest Is Narrowly Tailored to Serve a Compelling State Interest.

It is well established that the State “has a compelling interest in assuring that arrestees, including undocumented immigrants, appear for trial.” *Lopez-Valenzuela* at 792. Like the statute in *Salerno*, RSMo §544.470.2 only applies to a very specific class of individuals. Moreover, “[t]he Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee.” *Id.* at 750. As previously mentioned, the defendant is afforded the right to hearing under sections 544.455 and 544.470.2. Finally, while the Government's general interest in preventing crime is compelling, this interest is heightened “when the Government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community. Under these narrow circumstances, society's interest in crime prevention is at its greatest.” *Salerno* at 750. As such, Section 544.470.2 ought to survive Defendant’s Due Process claim as the statute is narrowly tailored to serve a compelling State interest and does not constitute impermissible punishment.

CONCLUSION

The Motion Court was correct to deny Defendant's request for a reasonable bond pursuant to Section 544.470.2 RSMo., which creates a presumption that because of Defendant's status as an alien unlawfully present in the United States that the conditions of release offered under Section 544.455 RSMo would be insufficient to assure Defendant's appearance in court.

Despite Defendant's multiple attacks Section 544.470.2 RSMo stands as constitutional. Section 544.470.2 RSMo is consistent with the plain language of the Missouri Constitution Article I, Sections 20 and 32. Furthermore, Section 544.470.2 RSMo is not preempted by Federal Immigration Law as it imposes no new criminal offenses, imposes no registration requirements, or in any other way trespasses into the field of immigration and alien registration; moreover, compliance with Section 544.470.2 RSMo poses no obstacle to the accomplishment of the full purposes of Congress. Finally, Section 544.470.2 RSMo., does not deprive Defendant of his substantive right of due process as it serves a regulatory purpose and serves a legitimate and compelling governmental interest which is narrowly tailored. As such, the State asks that this court uphold Section 544.470.2 and continue to deny Defendant bond.

Respectfully Submitted,



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

The undersigned hereby certifies that on this 28th 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 2,820 words.

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