

Court of Appeals, State of Colorado 2 East 14th Avenue Denver, CO 80203	DATE FILED June 18, 2026 8:04 PM FILING ID: FB34BE9787D4A CASE NUMBER: 2025CA2183
Petition for Review from the District Court, Weld County Honorable Annette Kundelius, District Judge Case No. 25CR960	
The People of the State of Colorado, Plaintiff–Respondent v. Moises Rodriguez-Nunez, Defendant–Petitioner	Δ COURT USE ONLY Δ
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**BRIEF OF *AMICI CURIAE* CIVIL RIGHTS CORPS, AMERICAN
CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES
UNION OF COLORADO, PROFESSORS KELLEN R. FUNK AND
SANDRA G. MAYSON, AND KOREY WISE INNOCENCE
PROJECT IN SUPPORT OF PETITION FOR REHEARING**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 40, C.A.R. 28, C.A.R. 29, and C.A.R. 32 including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 29(d) and 40(b):

- It contains 935 words (not to exceed 950 words).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 40, C.A.R.28, C.A.R. 29, and C.A.R. 32.

/s/ Emma Mclean-Riggs
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INTRODUCTION

Civil Rights Corps and the American Civil Liberties Union litigate the constitutional law of pretrial detention nationwide. The ACLU of Colorado works to preserve the constitutional rights of Coloradans deprived of their liberty pretrial. Professors Funk and Mayson are experts on the legal history of bail. The Korey Wise Innocence Project at the University of Colorado Law School advocates for the wrongfully convicted and joins this amicus because pretrial detention is a leading cause of convictions of the innocent.

In a brief section of its opinion, the Court appears to decide complex, high-stakes constitutional issues counter to the great weight of national authority. Whatever Colorado's statutes provide, these constitutional rulings would be mistaken. The Court should modestly revise its opinion to eschew them.

ARGUMENT

1. Due Process and Equal Protection

Paragraphs 27-29 can be read to deny that courts are constitutionally required to determine whether a money bail order is attainable. Paragraph 30 implies courts *may* but *need not* consider less restrictive alternatives to unattainable money bail that results in detention. However, due process and equal protection require a court imposing secured money bail to determine whether the defendant can pay it and, if

not, whether less restrictive conditions reasonably ensure appearance and public safety. *See, e.g., Hernandez v. Sessions*, 872 F.3d 976, 992 (9th Cir. 2017); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 155, 161-65 (2020); *Brangan v. Commonwealth*, 477 Mass. 691, 699-710 (2017); *In re Humphrey*, 11 Cal. 5th 135, 151-52 (2021). The determination that there is no less restrictive alternative to detention must be made by clear and convincing evidence. *See, e.g., Valdez-Jimenez*, 136 Nev. at 166; *Humphrey*, 11 Cal. 5th at 153; *Wheeler v. State*, 864 A.2d 1058, 1065 (Md. App. 2005).

These principles are based on three lines of caselaw. First, due process and equal protection require determinations regarding ability-to-pay and less-restrictive alternatives when liberty is conditioned on payment for *convicted* defendants facing probation revocation, *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), and *a fortiori* for pretrial defendants whose liberty interest is not diminished by conviction, Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 35, *ODonnell v. Harris County*, 2017 WL 3536467, at *24 (5th Cir. Aug. 9, 2017). Second, pretrial liberty is a fundamental right under due process, so its deprivation must be justified by the absence of less restrictive alternatives. *United States v. Salerno*, 481 U.S. 739, 750 (1987). Finally, the Supreme Court has never upheld a standard of proof below clear-and-convincing-evidence for determinations

supporting confinement. *Addington v. Texas*, 441 U.S. 418, 432 (1979); *Santosky v. Kramer*, 455 U.S. 745, 756 (1982); *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992).

2. Right to Bail

Separately, the Court’s opinion holds that the trial court “violated [Rodriguez-Nunez’s] constitutional right to bail” by “explicitly setting a cash bond whose amount was so high that it functioned as a bond denial.” ¶ 20. But the opinion later appears to hold that a court may impose unattainable money bail without regard to whether article II, section 19 of the Colorado Constitution permits the defendant’s detention. ¶ 29. This latter holding would render section 19’s limits on detention a nullity, contradict its historical meaning,¹ and depart from how other states have analyzed materially identical clauses. *See Rodriguez-Nunez* at n.3 (noting Colorado’s similarity to New Mexico’s Constitution); *State ex. rel. Torrez v. Whitaker*, 410 P.3d 201, 219 (N.M. 2018) (“[A] money bond that a defendant cannot afford to post is a denial of the constitutional right to be released on bail for those who are not detainable . . . under the New Mexico Constitution.”); *In re Kowalczyk*,

¹ Right-to-bail clauses like Colorado’s were “originally intended to free almost every noncapital criminal defendant on a bail pledge within their means,” and “magistrates were under an obligation to find a way to release defendants who had a right to bail.” Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1843 (2024); *see also In re Kowalczyk*, 19 Cal. 5th 593, 626 n.22 (2026) (discussing the text’s historical meaning).

19 Cal. 5th 593, 625-26 (2026) (same); *Dubose v. McGuffey*, 179 N.E.3d 780, 784-85 (Ohio 2021) (same); *Simms v. Oedekoven*, 839 P.2d 381, 385-86 (Wyo. 1992) (same); *Mendenhall v. Sweat*, 158 So. 280, 281-82 (Fla. 1934). Indeed, as far as amici are aware, every other appellate opinion on whether an unattainable money bail order is the legal equivalent of outright detention has held that it is. *E.g.*, *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *United States v. Leisure*, 710 F.2d 422, 425 (8th Cir. 1983); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *Humphrey*, 11 Cal. 5th at 151; *Valdez-Jimenez*, 136 Nev. at 161.²

CONCLUSION

Rodriguez-Nunez appropriately requests deleting or revising paragraphs 27-30. In the alternative, the Court could clarify that its holdings regarding unattainability are only statutory, e.g., by deleting paragraph 28 and the first two sentences of paragraph 29. The Court should defer deciding these constitutional issues until a future case that requires their resolution provides a more fulsome

² *People v. Jones*, 176 Colo. 61 (1971) is not controlling here: its holding is expressly limited to sentencing credits, not pretrial money bail. *Id.* at 67 (not deciding whether there are “constitutional” “infirmities [in] our bail system”). Regardless, amici do not argue “monetary bail is unconstitutional [p]er se,” *id.* at 64—just that it must satisfy the constitutional limits on detention imposed by due process/equal protection and Colorado’s right to bail.

opportunity to consider them.

Respectfully submitted this 18th day of June, 2026.

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CERTIFICATE OF SERVICE

I certify that on June 18, 2026, I served a copy of this document on Andrew Sidley-MacKie, and Ashley Scott McCuaig, Blake Austin Madone, and Michael James Rourke of the Weld County District Attorney's Office via Colorado Courts E-Filing.

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