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**Cash Bail and Individualized Ability to Pay:
The Key to Ending Ohio’s Wealth-Based Detention Crisis.**

PATRICK HIGGINS*

“The trial court has the power to order that such defendants be held without bail, but as clearly explained in the majority opinion, the way to do that is to follow the procedure in R.C. 2937.222, not to set a bail amount so high that the defendant cannot afford it . . . [t]he fact that a defendant might have committed a terrible crime does not allow us to ignore the law.”¹ The law here includes the constitutional prohibitions against excessive bail.² The Supreme Court of Ohio’s mandate that courts follow the law for setting bail lasted 309 days before being undermined by politically fueled backlash.³ That case, *DuBose v. McGuffey*, became a flashpoint around the state and kicked off a series of events marked by politics getting in the way of good pretrial policy – a theme that we see in Ohio and across the nation. While there is a whole host of good bail policies to be considered in Ohio, it is imperative that practitioners, judges, and lawmakers consider individualized ability to pay and where it fits into the state’s pretrial system.

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1. *DuBose v. McGuffey*, 195 N.E.3d 951, 961 (Ohio 2022) (Donnelly, J., concurring).
2. Ohio Const., art. I, § 9.
3. *Id.*

I. INTRODUCTION

What began centuries ago as a violence prevention tactic in the age of brute force, legal justice eventually became the world of cash bail as we know it.⁴ Across the country and right here in Ohio, cash bail—a term generally used to describe monetary conditions of release before one’s trial—perpetuates a two-tiered system of justice in which those with financial resources can purchase their liberty while their counterparts of lesser means cannot.⁵ Take, for example, a hypothetical situation in which two individuals—identical in every way, including their accused crimes—are different only in the amount of money available in their checking accounts. In many Ohio courts, one of these individuals can post their bond, while the other will remain behind bars.⁶ This means the individual of lesser means cannot report to work, pick their children up from school, or engage in many of the life activities that most take for granted. Put another way, is a \$10,000 bond the same to a minimum wage earner as it is to a C-suite executive? No! So why do we accept this as a part of the status quo in our pretrial system? While these situations are hypothetical, similar stories play out every day across Ohio, with real people paying the price.

Ohio’s bail system has been worthy of reform for some time. For as long as Ohio’s bail system has needed reform, there has existed an ideologically diverse group of reformers who have been working to make Ohio’s bail system function in a way that is fairer to all people rather than only those with financial means. A wholesale change in how we think about bail is necessary, and Ohio must move away from its reliance on monetary conditions of release. In the interim, and especially since the *DuBose* decision and its backlash, a focus on individualized ability to pay is imperative as Ohio grapples with its wealth-based detention system and the disproportionate impact it has on Black and low-income communities around the state.⁷

4. See William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34, 119 (1977); *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966-67 (1961); Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INSTITUTE 1, 1 (2010).

5. *Ohio Could Save Big By Implementing Bail Reform: A Fiscal Impact Analysis*, ACLU OF OHIO 1, 1 (Sept. 2020) [hereinafter *Ohio Could Save Big*].

6. *Id.* (stating many Ohio courts and jails use bond schedules when a judicial officer is not available. Bond schedules specify the money bond amount an accused individual can post to be released from jail. These schedules list certain offenses or offense levels and corresponding money bond amounts).

7. See generally *id.*

II. THE PURPOSE OF CASH BAIL VS. THE REALITIES OF OHIO'S WEALTH-BASED DETENTION SYSTEM

The use of monetary conditions of release before trial has a longstanding foundation in ensuring that individuals accused of crimes return to court.⁸ Despite this longstanding nature, jurisdictions across the state and country use bail as a mechanism for detaining legally innocent people before their trial dates.⁹ Monetary conditions of release have shifted away from the question of “what amount guarantees your appearance in court?” and instead reflect a more daunting question: “can you afford your freedom?” The latter is an acceptance of a status quo in which wealth becomes a proxy for public safety and worthiness of liberty. Such a situation necessitates an individualized ability to pay inquiry.¹⁰

The notion that monetary conditions of release are intended to secure the return of the accused is clear in the language of the Ohio Revised Code¹¹ as well interpretation by the Supreme Court of Ohio.¹² Furthermore, the concept is grounded in the bedrock of the Ohio and U.S. Constitutions, both of which prohibit the imposition of excessive bail.¹³ The Supreme Court of the United States, through its interpretation of the Eighth Amendment, is clear regarding the purpose of bail, defining excessive bail as any amount that is “higher than the amount reasonably calculated” to ensure the accused will return to court.¹⁴ Yet, there are thousands of people in Ohio jails pretrial every single day.¹⁵ Many of these people cannot afford to pay the monetary conditions of their release and are left with habeas corpus—where they carry the burden of proof—as the proper vehicle by which to raise an excessive bail claim.¹⁶ When people accused of crimes cannot afford an excessive bail, they experience wealth-based detention.¹⁷

The imperative of individualized ability to pay determinations is rooted in Ohio's wealth-based detention problem. Ohio's overreliance on financial conditions of release yields ghastly results for communities already bearing

8. Sandra van den Heuvel et al., *A Means to an End: Assessing Ability to Pay Bail*, Vera Institute of Justice 1, 1 (Dec. 2019).

9. Sandra van den Heuvel et al., *A Means to an End: Assessing Ability to Pay Bail*, VERA INSTITUTE OF JUSTICE (Dec. 2019).

10. *Id.*

11. OHIO REV. CODE ANN. § 2937.22(A) (West 2009) (“Bail is security for the appearance of an accused to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at a specific time or any time to which a case may be continued, and not depart without leave.”).

12. See *Dubose*, 195 N.E.3d at 955 (citing *State ex rel. Sylvester v. Neal*, 14 N.E.3d 1024) (“The sole purpose of bail is to ensure a person’s attendance in court.”).

13. U.S. CONST. amend. VIII; OHIO CONST. art. 1, § 9.

14. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

15. *Ohio Could Save Big*, *supra* note 5, at 5.

16. *Chari v. Vore*, 744 N.E.2d 763, 767 (Ohio 2001).

17. *Ohio Could Save Big*, *supra* note 5, at 9.

the heavy burdens of our criminal legal system.¹⁸ This is a significant departure from the purpose of financial conditions of release and necessitates action to bring about its end. On any given day, there are as many as 12,000 legally innocent people held in Ohio's jails pretrial, many of whom remain there simply because they cannot afford the financial conditions of their release.¹⁹ The implications for low-income and Black people in Ohio jails is staggering.²⁰ A 2020 analysis conducted by the American Civil Liberties Union of Ohio ("ACLU") found the following:²¹

- 63% of pretrial jail bed usage was for people charged with a misdemeanor or non-person felony.
- People charged with a misdemeanor in Euclid or Cleveland municipal courts with a bond amount over \$2,500 stayed in jail 2.3 times longer than those with a bond amount under \$2,500.
- In Cuyahoga County, felony defendants who have a cash or surety bond stay in jail thirteen times longer than those released on a personal bond.
- In Franklin County, nearly 70% of defendants charged with a misdemeanor either posted bond or were released on their own recognizance. On average, these individuals spent fewer than five days in jail. The 30% of defendants charged with a misdemeanor who were not released on their own recognizance and did not post bond spent more than thirteen days in jail pretrial, which is nearly three times longer.
- People booked into jail and charged with a felony in Athens, Vinton, and Cuyahoga Counties and with a bond amount of over \$10,000 spend three to five times longer in jail than those with a bond amount of under \$10,000.
- In all jurisdictions, Black people were more likely be charged and booked than white people.
- In Cuyahoga County, Black people were less likely to receive a personal bond and more likely to have a bond set above \$10,000, even when looking at crimes within the same category.
- Black people were nearly seven times more likely than white people to be in jail pretrial on a felony charge.

18. *Id.* at 9-10.

19. *Id.* at 5.

20. *See generally id.*

21. *See generally id.*

The people held in Ohio jails before their trials were predominantly poor and Black.²² As is the case across the criminal legal system, this data regarding incarcerated people does not reflect Ohio's demographics as a whole, and the disparities fall onto the shoulders of poor and Black individuals, families, and communities.²³ The above data is exacerbated by the fact that the longer someone spends in jail before trial, the more their life unravels, and the worse their expected case outcomes become.²⁴ While individualized ability to pay determinations will not end the race disparities that pervade our criminal legal system from start to finish, they will certainly be part of the remedy in the pretrial context.

III. "WHAT ABOUT THE MURDERERS?"

This article begins with an excerpt from Supreme Court of Ohio Justice Donnelly's concurring opinion in *DuBose v. McGuffey*, "[t]he fact that a defendant might have committed a terrible crime does not allow us to ignore the law."²⁵ When discussing pretrial release and affordability of cash bail, naysayers and whatabouters retreat to a common refrain "what about the murderers?" This argument is rooted in the false premise that courts and prosecutors must retain the ability to set unattainably high bond amounts to detain the "worst of the worst."

The answer to this in Ohio is quite simple. First, a person's wealth is not a proxy for their risk to the community.²⁶ Setting a high bond for a person that the court does not want to release only detains the person who does not have access to that amount of money while liberating the accused person with access to the necessary number of resources.²⁷ Second, Ohio law anticipates the need to detain certain individuals while protecting their rights with due process.²⁸

There is a very worthy debate about the harms of policy reform when advocates pick who is deserving and not-deserving of pretrial liberty. This is especially true in the debate over Ohio's pretrial detention statute, R.C. 2937.222. However, this statute is the antidote to the common fearmongering

22. *Ohio Could Save Big*, *supra* note 5, at 3.

23. See Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INSTITUTE OF JUSTICE 1, 1, 6-7 (Apr. 2019).

24. See *id.* at 1, 6-7.

25. *Dubose*, 195 N.E.3d at 961 (Donnelly, J., concurring).

26. *Id.* at 958.

27. *Ohio Could Save Big*, *supra* note 5, at 9.

28. See OHIO REV. CODE ANN. § 2937.222(A), (B) (West) (the Ohio statute that permits a hearing to deny bail entirely when a person is *accused* of certain offenses and the judge finds by clear and convincing evidence that the proof is evident and the presumption great that the accused committed the offense with which they are charged, the accused poses a substantial risk of serious physical harm to any person or the community, and that no release conditions will reasonably assure the safety of that person and the community).

over individuals who judges and prosecutors fear are too dangerous to return to the community before their trial date. R.C. 2937.222 sets out a list of individuals who may be denied bail based on their charges:

On the motion of the prosecuting attorney or on the judge's own motion, the judge shall hold a hearing to determine whether an accused person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree,²⁹ a violation of section 2903.06 of the Revised Code,³⁰ a violation of section 2903.211³¹ of the Revised Code that is a felony, or a felony OVI offense shall be denied bail.

Still, hearings conducted under R.C. 2937.222 are rare while the expedient option of unattainable—and unconstitutionally high—cash bail remains a top tier tool of choice.³² This is, at least in part, due to the extra burden placed on courts and prosecutors to conduct these hearings, making financial conditions of release a path of less resistance.³³ This burden, because of the process that it provides to those accused but not convicted of crimes, is well worth the extra effort. Judicial economy is essential, but not at the expense of liberty interests held by those not yet convicted of crimes.³⁴ This is one of the key takeaways from the short-lived period of preferred pretrial law following *DuBose*. The political maneuvers to lessen its impact since the decision reinforce the imperative outcome that individualized ability to pay be top-of-mind when considering financial conditions of release.

29. See *id.* at § 2937.222(A) (West); See generally Sara Andrews, *Crime List by Felony Level*, OHIO CRIMINAL SENTENCING COMMISSION 1 (Oct. 19, 2015) (illustrating the list of cases that fall under this descriptor is lengthier than it seems at first glance. It includes first- and second-degree felony charges of the following crimes: aggravated murder; murder; voluntary manslaughter; felonious assault; kidnapping; trafficking in persons; rape; aggravated arson; terrorism; aggravated robbery; aggravated burglary; improperly discharging a firearm; permitting child abuse; abduction; sexual battery; robbery; inducing panic; escape; burglary; and endangering children where abuse, torture, excessive or unwarranted physical discipline is alleged).

30. See generally OHIO REV. CODE ANN. § 2903.06 (West) (penalizing acts such as aggravated vehicular homicide).

31. See generally *id.* at § 2903.11 (West 2016) (penalizing the act of menacing by stalking).

32. Jordan Laird, *The tool Ohio prosecutors, judges must use—for now—to get dangerous suspects detained*, THE COLUMBUS DISPATCH (Jul. 6, 2022), <https://www.dispatch.com/story/news/courts/2022/07/06/bail-reform-ohio-prosecutors-judges-unhappy-preventative-detention/7701553001>.

33. *Id.*

34. *DuBose*, 195 N.E.3d at 973 (DeWine, J., dissenting).

IV. A BRIEF HISTORY OF RECENT BAIL REFORM ATTEMPTS AND ATTACKS IN OHIO

May 2021 saw the introduction of bipartisan, companion bail reform legislation in the Ohio General Assembly.³⁵ Supporting the legislation was a broad coalition of organizations and individuals³⁶ who agreed on a balanced, evidence-based package of reforms that would have fundamentally changed Ohio's wealth-based detention system for the fairer, particularly because of its presumption against the imposition of monetary conditions of release. The proposed legislative changes were data-driven, garnering a wide array of support.³⁷ The approach of the legislation was multifold and featured a gating process that released accused individuals with the least restrictive means deemed necessary at a hearing and with right to counsel guaranteed throughout³⁸:

- A presumption of release on recognizance within twenty-four hours of arrest;³⁹
- Release on non-monetary conditions when the court finds, by clear and convincing evidence, that any less restrictive conditions would not reasonably assure the safety of any person or organization and would not assure the appearance of the accused at a future date and time during which the accused is required to appear before the court, release with non-financial conditions at a hearing within forty-eight hours of arrest;⁴⁰
- A presumption that any condition of release be non-monetary, overcome only by clear and convincing evidence that the accused will not appear at a future date and time during which the accused is required to appear before the

35. See generally H.B. 315, 134th Gen. Assemb., Reg. Sess. (Ohio 2021); S.B. 182, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

36. See generally *Endorsements for SB 182 and HB 315 - Bail Reform*, ACLU OF OHIO (Mar. 25, 2022) (containing a downloadable PDF of proponents of the legislation such as the ACLU of Ohio; Americans for Prosperity; Arnold Ventures; The Bail Project; The Buckeye Institute; the U.S. Justice Action Network; and others at <https://www.acluohio.org/sites/default/files/fielddocuments/bailbillendorsementone-pager2022-0303.pdf>).

37. See generally *BAIL REFORM ADVOCATES UNITED IN STAUNCH SUPPORT FOR SUB. HOUSE BILL 315, URGE SWIFT ADVANCEMENT OF CRITICAL BILL TO ENHANCE PUBLIC SAFETY AND IMPROVE PRETRIAL FAIRNESS*, ACLU OF OHIO (May 11, 2022), <https://www.acluohio.org/en/press-releases/bail-reform-advocates-united-staunch-support-sub-house-bill-315-urge-swift>.

38. See generally H.B. 315, 134th Gen. Assemb. (Ohio 2021); S.B. 182, 134th Gen. Assemb. (Ohio 2021).

39. H.B. 315, 134th Gen. Assemb., Reg. Sess., at 162 (Ohio 2021).

40. *Id.* at 162, 167, 69 (stating the legislation required conditions of release to be the least restrictive means necessary and included conditions ranging from not committing another offense to electronic monitoring (at no cost to the accused)).

court. Courts setting monetary conditions of release are prohibited from setting a bond amount that the accused persons are unable to afford;⁴¹

- Possibility of pretrial detention if the defendant is charged with an eligible offense and requisite findings made at a hearing requested by the court or prosecutor.⁴²

Had it been successful, the proposed legislation would have flipped the script of how bail works in Ohio by making a person's actual risk the determining factor in whether they were released before trial rather than the amount of money in their bank account. Such reforms are backed by ample research and likely would have reduced incarceration among Ohio's pretrial jail population significantly while retaining a focus on both public safety and the rights of the accused.⁴³

It was about halfway through the two-year term of the 134th Ohio General Assembly that the Supreme Court of Ohio issued its decision in *Dubose v. McGuffey*.⁴⁴ The decision lit the fuse for the engine that would eventually send Ohio in a backward direction (in the eyes of reformers) regarding the consideration given by courts when setting monetary conditions of release.⁴⁵ Although the *DuBose* majority opinion endorsed a straightforward reading of the law recognizing that unconstitutionally high monetary conditions of release are not the proper tool for pretrial detention, the decision drew sharp dissent inside and out of the Court.⁴⁶ While some dissenters focused their opinions on the standard of review employed by the Court, another focused their ire on a talking point that was fundamental to the later, political battle cry: "what the majority does today will make Ohio communities less safe."⁴⁷

Almost as soon as the ink dried on the *DuBose* decision, the backlash was off to a fervent start. Within a matter of months, members of the Ohio General Assembly introduced joint resolutions to rebuke the decision.⁴⁸ Those members and their allies occupying various benches and other elected seats around the state were on the campaign trail and advocating for a

41. *Id.* at 169-70 (stating the legislation contained instructions for an individualized ability to pay inquiry).

42. *See id.* at 57-58, 208. *See generally* S.B. 182, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (stating House Bill 315 and Senate Bill 182 both added offenses to those eligible for pretrial detention, including felony violation of a protection order and domestic violence).

43. *See Ohio Could Save Big*, *supra* note 5.

44. *See generally DuBose*, 195 N.E.3d 951.

45. *Id.*

46. *Id.*

47. *Id.* at 958 (DeWine, J., dissenting).

48. Nick Evans, *Lawmakers roll out proposed constitutional amendment that could increase cash bail*, OHIO CAPITAL JOURNAL, 1, 1-2 (Mar. 30, 2022), <https://ohiocapitaljournal.com/2022/03/30/law-makers-roll-out-proposed-constitutional-amendment-that-could-increase-cash-bail/>.

legislative and electoral repeal of *DuBose* under the guise that cash bail is an effective tool in keeping communities safe.⁴⁹ Their proposal, a pair of joint resolutions that were moved through the General Assembly at a breakneck pace,⁵⁰ took the form of State Issue 1. The Issue proposed the following to voters:

- Require Ohio courts, when setting the *amount*⁵¹ of bail, to consider public safety, including the seriousness of the offense, as well as a person’s criminal record, the likelihood a person will return to court, and any other factor the Ohio General Assembly may prescribe.
- Remove the requirement that the procedures for establishing the amount and conditions of bail be determined by the Supreme Court of Ohio.⁵²

Ohio voters passed State Issue 1 with a yes vote totaling over 75%.⁵³ In doing so, voters rejected the premise of *DuBose* and insisted that Ohio courts consider public safety when setting the amount of bail.⁵⁴ Its passage followed months of campaign ads endorsing Issue 1 while demonizing bail reform. As a result of this setback in the trajectory of positive bail reform in Ohio, thousands of people remain in jails pretrial waiting for a fairer system that does not exploit their wealth—or lack thereof—as a proxy for public safety.⁵⁵

V. A PATH FORWARD

The Ohio and U.S. Constitutions both prohibit excessive bail.⁵⁶ Neither the Ohio General Assembly’s actions nor the support for the State Issue 1 at the ballot box in November 2022 changed this prohibition or the longstanding

49. *Id.*

50. *See generally* H.J.R. 2, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); S.J.R. 5, 134th Gen. Assemb., Reg. Sess. (Ohio 2022); Frank Larose, *General Assembly Initiated Constitutional Amendment*, OHIO SECRETARY OF STATE, <https://www.ohiosos.gov/legislation-and-ballot-issues/putting-an-issue-on-the-ballot/general-assembly-initiated-constitutional-amendment/> (stating that joint resolutions are a process by which the Ohio General Assembly can propose a constitutional amendment to Ohio voters).

51. H.J.R. Issue 1, 134th Gen. Assemb. (Ohio 2022) (emphasis added) (author commenting at the request of State Issue 1 opponents, the phrase “amount of bail” was inserted at the Ohio Ballot Board meeting on August 22, 2022, to clarify that the intent of the amendment was to tie the amount of monetary conditions of release to a public safety interest).

52. *Id.*

53. Laura A. Bischoff, *Ohio State Issue 1 passes overwhelmingly*, THE ENQUIRER (Nov. 8, 2022, 9:24 PM), <https://www.cincinnati.com/story/news/politics/elections/2022/11/09/ohio-election-results-2022-ohio-issue-169561814007/>. [hereinafter *Ohio State Issue 1*]

54. *Id.*

55. *Ohio Could Save Big*, *supra* note 5, at 5.

56. U.S. CONST. amend. VIII; OHIO CONST. art. 1, § 9.

principles that underpin it.⁵⁷ Neither *Stack* nor *Salerno* are overturned.⁵⁸ *DuBose* was attacked through political and electoral work in 2022, but neither changed the rights guaranteed by our constitution.⁵⁹ R.C. 2937.222 remains a tool that allows courts and prosecutors to deny bail while protecting the Due Process rights of the accused.⁶⁰ What remains to be seen is how courts interpret the mandate that they shall consider public safety when setting bail while also honoring the prohibition against excessive bail—any amount more than what is necessary to bring a person back to court.

Certainly, time will tell, through litigation and legislation, what comes of Ohio's current bail system. What will remain true is that a criminal legal system in which liberty is based on wealth will remain deserving of reform. Among the imperatives here is an individualized ability to pay determination and the end to wealth-based detention. Recently, other state courts have taken up and endorsed the importance of one's ability to pay before setting monetary conditions of release.⁶¹ States like Illinois continue their implementation of data-driven pretrial reform, some of which target the use of cash bail altogether.⁶² Ohio has not yet embraced such transformative change, but it has its own model for doing pretrial reform safely and impactfully in the General Assembly.⁶³ It is also preparing to gather data that will inform future policy changes.⁶⁴ July 2023 marked the statutory beginning of Ohio's Task Force on Bail.⁶⁵ The Task Force on Bail will be comprised of six members of the Ohio General Assembly who will oversee the collection of daily jail and pretrial data over the course of two months so that lawmakers can work from their own cache of data in addition to that which has already been presented by reformers.⁶⁶ Until this data collection and reform can be accomplished, the lives of people detained in Ohio jails hang in the balance. It is with this in mind that Ohio must recognize the

57. See generally Bischoff, *supra* note 53.

58. See generally *United States v. Salerno*, 481 U.S. 739 (1987); *Stack*, 342 U.S. 1.

59. See generally Bischoff, *supra* note 53; Evans, *supra* note 48.

60. See OHIO REV. CODE ANN. § 2937.222 (West).

61. See generally *Criminal Law Money Bail California Supreme Court Holds Detention Solely Because of Inability to Pay Bail Unconstitutional In re Humphrey*, 482 P.3d 1008 (Cal. 2021), 135 HARV. L. REV. 912, 916 (2022) (quoting Footnote 46, "California joins a small but growing number of jurisdictions affording such protections.").

62. See Jessica Reichert, Aaron Zivic, and Karen Sheley, *The 2021 SAFE-T Act: ICJIA Roles and Responsibilities*, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY. Available at <https://icjia.illinois.gov/researchhub/articles/the-2021-safe-t-act-icjia-roles-and-responsibilities>.

63. See generally Am. Sub. S.B. 134th Cong. No. 202 (2023).

64. *Id.*

65. *Id.*

66. *Id.* (The Task Force on Bail will have members appointed from the majority and minority caucuses in each chamber and will collect data regarding the number of people jailed, how many of those are held pretrial, and the level of charges for individuals held in all of Ohio's 88 counties).

imperative of considering one's ability to pay when setting monetary conditions of release.

Ohio's most recent attempt at pretrial reform left a framework for individualized ability to pay determinations:

- A presumption that any condition of release be non-monetary, overcome only by clear and convincing evidence that the accused will not appear at a future date and time during which the accused is required to appear before the court.⁶⁷
- Courts setting monetary conditions of release are prohibited from setting a bond amount that the accused person is unable to afford.⁶⁸
- Courts setting monetary conditions of release are required to conduct an individualized inquiry into the person's ability to pay. That inquiry will result in a maximum bond amount of 25% of monthly income,⁶⁹ less monthly expenses.⁷⁰

Individualized ability to pay consideration is one necessary step in the fight for pretrial fairness in Ohio. Even with individualized ability to pay determinations, monetary conditions of release remain less effective than some non-monetary measures for getting people back to court.⁷¹ Furthermore, any monetary condition of release, even that which is deemed "affordable" by a court, may be a significant source of financial hardship.⁷² It is for this reason that Ohio must set financial conditions of release only with an individualized ability to pay inquiry while also moving away from the practice altogether.

67. H.B. 315, 134th Gen. Assem., Reg. Sess. (Ohio 2021), lines 4970-4974.

68. *Id.* at lines 4978-79.

69. The information necessary to do this analysis is already collected from the vast majority of accused people as many are indigent and complete a financial disclosure form that determines their eligibility for representation by a public defender or court-appointed counsel.

In Ohio H.B. 315, monthly income included the accused's monthly income after taxes and the accused spouse's monthly income after taxes, if applicable, and other sources of income, including poverty-based public assistance. *Id.* at lines 5039-42.

70. In Ohio H.B. 315, monthly expenses included rent, mortgage, total utilities, health care expenses, loan payments, credit card payments, education expenses, employment expenses, transportation expenses, childcare expenses, child support, spousal support, fines, court costs, and restitution. *Id.* at lines 5042-47.

71. Jason Tashea, *Text-message reminders are a cheap and effective way to reduce pretrial detention*. ABA JOURNAL (Jul. 17, 2018). Available at https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail.

72. *After Cash Bail: A Framework for Reimagining Pretrial Justice*, THE BAIL PROJECT (2020). Available at <https://perma.cc/9Y7F-6KZS>.

VI. CONCLUSION

Bail reform remains not just worthy of Ohio's attention, but imperative because of the human and monetary costs associated with the status quo. The status quo of wealth-based detention is unfair and unjust. The race disparity rampant in the criminal legal system dangerously couples with Ohio's wealth-based detention system, doubling down on the impact borne by Ohio's Black and low-income communities.⁷³ This is especially true in light of the *DuBose* decision, and the backlash that resulted from it.⁷⁴ This doubling down on the policies that yield wealth-based detention necessitates change in the short and long term. Among the necessary changes is a focus on an accused person's ability to pay when setting monetary conditions of release. Practitioners, judges, and lawmakers have designs and tools to make these changes, and it is incumbent on them to get to work.

73. *Ohio Could Save Big*, *supra* note 5, at 1, 3, 5.

74. *Dubose*, 195 N.E.3d 951.