No. 18-396

In the Supreme Court of the United States

BRITTAN HOLLAND, individually and on behalf of all others similarly situated; LEXINGTON NATIONAL INSURANCE CORPORATION,

Petitioners,

v.

KELLY ROSEN, Pretrial Services Team Leader; MARY COLALILLO, Camden County Prosecutor; GURBIR GREWAL, Attorney General of New Jersey; CHRISTOPHER S. PORRINO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether New Jersey, which authorizes monetary bail, but affirmatively requires courts to exhaust more restrictive non-monetary conditions before even considering monetary bail, unnecessarily restricts pretrial liberty in violation of the Eighth Amendment, Due Process Clause, or Fourth Amendment.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are criminal defense attorneys who represent criminal defendants in states that recently have or soon will roll back the right to monetary bail, including New Jersey, Maryland, and California. Amici's clients have often relied on the availability of non-excessive monetary bail to secure their pre-trial liberty while assuring their appearance at trial. Amici are therefore intimately familiar with the manner in which monetary bail has functioned as a liberty-preserving institution that protects the presumption of innocence. Amici are concerned that pre-trial systems like the New Jersey regime at issue in this case unconstitutionally remove monetary bail as an option for criminal defendants who would prefer it to other more liberty-restricting measures, such as house arrest and 24-hour electronic monitoring.

Amici include the following attorneys:

Frank P. Arleo (West Orange, NJ)

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[1] Pursuant to Rule 37.6, amici curiae affirm that no counsel for a party authored this brief in whole or in part. Power Bail Bonds, a licensed professional bail bond service, made a monetary contribution to this brief's preparation and submission. Aside from Power Bail Bonds, no person other than amici curiae, their members, and their counsel made a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amici curiae to file this brief. All parties consented to the filing of the brief.

Louis J. Shapiro (Los Angeles, CA)

Leslie Stolbof Sinemus (South Orange, NJ)

Brian G. Thompson (Baltimore, MD)

INTRODUCTION AND SUMMARY OF ARGUMENT

Monetary bail is one of the most firmly rooted institutions in Anglo-American law. Since long before the Founding, defendants have been able to secure their liberty before trial by posting bail either on their own or through a surety. The Eighth Amendment's prohibition on excessive bail grows directly out of that tradition. Defendants who have not yet been convicted of a crime are constitutionally entitled to be offered the least-restrictive means of protecting public safety and ensuring their appearance at trial. Indeed, this Court has emphasized that the Constitution's prohibition against excessive bail is essential to protecting the presumption of innocence. New Jersey's requirement that judges eschew monetary bail in favor of more onerous measures including house arrest and 24-hour electronic monitoring, by contrast, treats the presumed innocent more like the convicted guilty on parole or probation.

There are valid reasons why defendants might prefer monetary bail over other more liberty-restricting alternatives. Most people prefer not to be confined to their homes or constantly surveilled by the government. If given the option, and if they can afford it, many would thus rather post a sum of money with a court than subject themselves to fundamental intrusions on their privacy or ability to move freely. There is no constitutionally sound reason why states

should categorically prefer those more restrictive options over less restrictive options, when both would equally serve the government's interest in protecting the public and assuring the defendant's appearance at trial. In fact, they are prohibited from doing so.

It is thus imperative that this Court grant certiorari in this case and reverse the Third Circuit's decision upholding New Jersey's Criminal Justice Reform Act. New Jersey's law is emblematic of a growing trend of state laws prohibiting monetary bail in favor of more restrictive conditions of release. The New Mexico and Maryland courts have adopted similar rules, and the California legislature recently eliminated monetary bail as an option altogether. While these developments might arise from virtuous aspirations to reduce the amount of defendants unnecessarily incarcerated before trial, they have the natural tendency to impose greater restrictions on the liberty of many other defendants. Those consequences are both unconstitutional and unnecessary. If the goal is to provide adequate alternatives to defendants who cannot afford monetary bail, then states could grant defendants the choice between monetary and non-monetary conditions—or they could offer the non-monetary alternatives anytime a defendant demonstrates that he cannot afford the otherwise applicable bail amount. Either option would achieve the goal of reducing unwarranted pretrial detention without also imposing unnecessarily excessive conditions on defendants, like Mr. Holland, who would rather post bail.

ARGUMENT

I. Monetary Bail Is A Liberty-Preserving Institution That Protects The Presumption Of Innocence.

As Petitioners explain, the right to bail is deeply rooted in the Anglo-American legal tradition. The Eighth Amendment expressly proclaims: "Excessive bail shall not be required." U.S. Const. amend. VIII. This "excessive bail clause originates in the 1689 English Bill of Rights." William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 77 (1977). Consistent with that English tradition, for long before the Founding, the American colonies protected the right of the accused to secure their pre-trial liberty through a system of bail. In seventeenth-century Virginia, for instance, a defendant could obtain release before trial by providing "sufficient bayle" to the sheriff. *Id.* During the same period, Massachusetts "ordain[ed] that no one was to be restrained or imprisoned before conviction and sentence 'if he can put in sufficient security, Bayle or Mainprise for his appearance, and good behavior in the meantime.'" *Id.* at 79. In colonial Pennsylvania, an "early 18th century enactment made all prisoners bailable 'by one or more sufficient sureties, to be taken by one or more of the Judges or justices that have cognizance of the fact,'" except for those accused of a felony. *Id.* at 80.

Throughout this history, the overriding purpose of bail has been to protect the presumption of innocence by enabling a defendant to secure his release from detention, while assuring the public of his appearance for trial. Shortly after the Founding, Chief Justice Marshall, while riding circuit, explained that "[t]he

object of a recognizance is, not to enrich the treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty." *United States v. Feely*, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813). Nearly 150 years later, this Court noted that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Without the right to non-excessive bail, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* Because defendants are presumed innocent, the state cannot restrict the liberty of the accused any more than is necessary to achieve the state's valid interests in assuring their appearance at trial and protecting public safety.

Consistent with these principles, this Court has long recognized that excessive pre-trial restraints on a defendant's liberty are unconstitutional. In *Stack*, the Court held that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose" of assuring the defendant's appearance "is 'excessive' under the Eighth Amendment." *Id.* at 5. Three decades later, in *United States v. Salerno*, this Court reiterated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. 739, 755 (1987). Thus, "the Government's proposed conditions of release or detention [must] not be 'excessive' in light of … the interest the Government seeks to protect by means of that response." *Id.* at 754. Where the government seeks to ensure appearance at trial, the "conditions of release" may not exceed what is minimally necessary to achieve that goal.

II. Criminal Defendants Often Prefer Posting Bail To Other, More Intrusive Measures.

The New Jersey Criminal Justice Reform Act (CJRA) necessarily runs afoul of these constitutional limits. By categorically prohibiting the consideration of monetary bail unless all other potential conditions of release are insufficient, the law guarantees that in many circumstances the courts will be barred from imposing the least restrictive means of assuring a defendant's appearance at trial. While the CJRA's bail reform measures appear to be motivated by an effort to reduce the amount of defendants incarcerated due to an inability to post bail, *see* App-4, the solution has resulted in many criminal defendants suffering other unnecessary pre-trial intrusions on their liberty. In many cases, defendants (like Mr. Holland) would prefer monetary bail to house arrest and 24-hour monitoring. Yet, New Jersey's CJRA denies them that option by requiring courts to exhaust all other options—regardless of whether they are more liberty-restricting—before considering monetary bail.

Many defendants prefer the option of posting monetary bail to more onerous restrictions, like house arrest and 24-hour monitoring. Courts beyond the Third Circuit have recognized that monetary bail is not categorically more restrictive than other means of securing a defendant's appearance at trial. In *Pugh v. Rainwater*, the Fifth Circuit explained that any "argument favoring a specified priority sequence for the various forms of release overlooks the fact that its impact may vary under varying circumstances." 572 F.2d 1053, 1057 (5th Cir. 1978). For instance, "[a] moneyed visitor in a city far removed from his home"

might prefer to post monetary bail over other more burdensome restrictions that would require him to return frequently to the distant jurisdiction. *Id.* Moreover, just as detention in jail limits a defendant's ability to mount a full defense, defendants who receive restrictive conditions like house arrest "are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." *Stack*, 342 U.S. at 8 (Jackson, J., concurring). It is thus common sense—and the distinct experience of amici—that some criminal defendants would prefer to post monetary bail over the indignity of being confined to their home or electronically surveilled by the government before they have ever been convicted of a crime. Indeed, the CJRA's preference for house arrest and 24-hour surveillance over the traditional option of monetary bail treats the presumed innocent like the convicted guilty, by imposing measures that one normally expects to be attached to parole or probation.

By requiring New Jersey courts to leap-frog monetary bail in favor of more onerous conditions, the CJRA guarantees that those courts will frequently impose a condition of release that is more liberty-restricting than necessary to secure the defendant's appearance at trial, in direct conflict with this Court's holdings in *Stack*, 342 U.S. at 5, and *Salerno*, 481 U.S. at 754. The Third Circuit's suggestion that "the existence of a purportedly less restrictive means does not bear on whether the conditions are excessive" is thus confounding. App-30. *Stack* and *Salerno* could not be clearer that pre-trial conditions on release may not exceed the minimum necessary to secure the defendant's appearance at trial and protect the public. New Jersey has, by contrast, required that in many

circumstances judges must impose a more onerous restriction when monetary bail would be sufficient to achieve the state's interests.

That approach was not necessary to further the state's goal of avoiding the pre-trial detention of certain defendants who would be bail-eligible but could not afford even minimal bail. Rather than artificially taking one option off the table, and thereby imposing excessive release conditions on many other defendants, New Jersey could have achieved its objectives by affording defendants the choice between an appropriate bail amount or other nonmonetary conditions (or a combination of the two) when both would be sufficient to satisfy the state's interests. By eschewing monetary bail entirely, the CJRA illogically directs courts to deprive many defendants of a less liberty-restricting means of securing their release. In doing so, the state has violated the Constitution, and the Third Circuit's decision upholding that restriction directly conflicts with this Court's precedents and the decisions of other circuits. *See* Cert. Pet. 17-24.

III. Jurisdictions Around The Country Are Adopting Regimes, Like New Jersey's, That Deprive Defendants Of Their Right To Non-Excessive Bail.

While the New Jersey system is acutely problematic, it is emblematic of a growing trend. Many other states have adopted measures through legislation or judicial rule changes that relegate monetary bail to least-favored status or eliminate it altogether. *See, e.g.*, N.M. Ct. Rule 5-401(D)-(E) (New Mexico 2017); Md. Ct. Rule 4-216.1 (Maryland 2017); SB 10 (Cal. Aug. 28, 2018). And anti-bail activists are pushing similar

measures across the country. *See, e.g.*, U. Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, ACLU (Dec. 11, 2017), https://bit.ly/2v8qS6x. As a result, in jurisdictions beyond New Jersey, defendants are similarly forced to accept more onerous conditions of release when monetary bail would be sufficient. There is thus good reason for this Court to step in now to resolve the issue, rather than let it metastasize even further.

California recently enacted comprehensive bail reform legislation that goes into effect in October 2019. *See* SB 10 (Cal. Aug. 28, 2018). Rather than simply treating monetary bail as the least favored option, the bill eliminates it as an option altogether. Like New Jersey's CJRA, California's measure appears to be motivated by the desire to reduce the number of pre-trial defendants detained based on their inability to afford bail, but its result will be to impose greater intrusions on the liberty of many defendants. According to one press account, "[a]dvocates of abolishing bail contend[ed] that too many Californians remain stuck in custody because they cannot afford to bail out," but in order to account for the elimination of monetary bail as an option, the bill actually *expanded* the availability of "preventive detention." A. Koseff, *Bill to eliminate bail advances despite ACLU defection*, Sac. Bee (Aug. 20, 2018), https://bit.ly/2ByoD2Z. This whipsaw effect led previously supportive groups, like the ACLU, to oppose the bill by the time it was adopted. *Id.*; *see also* Human Rights Watch, *Human Rights Watch Opposes California Senate Bill 10, The California Bail Reform Act* (Aug. 14, 2018), https://bit.ly/2MELBJY ("The new SB10 is simply not bail reform; it replaces one harmful system with

another."); T. Fuller, *California is the First State to Scrap Cash Bail*, N.Y. Times (Aug. 29, 2018), https://nyti.ms/2Rg142u ("Even social justice organizations that are united in their criticism of the current system … claim[ed] it could lead to more people behind bars."). While those groups expressed surprise at the development, it is a natural result when one option for securing a defendant's release before trial is artificially removed from consideration.

The experience in Maryland also underscores the fact that deprioritizing monetary bail as an option often leads to greater intrusions on defendants' liberty. Last year, the Maryland Court of Appeals adopted new rules for pre-trial detention that, like the CJRA, requires judges to prefer non-monetary conditions, including "electronic monitoring" and "committing the defendant to the custody or supervision" of a third party, over monetary bail regardless of whether monetary bail would be an effective, less-restrictive option. Md. Ct. Rule 4-216.1(b) & (d)(2). The result of these reforms has been that *more* defendants are incarcerated before trial. *See* C. Blumauer, et al., *Advancing Bail Reform in Maryland: Progress and Possibilities* 13 (Feb. 27, 2018), https://bit.ly/2HoN0Op (showing an increase from 7% to 19% in misdemeanor defendants "held without bail"). And that effect has been felt disproportionately by minority defendants. *See id.* at 20 ("Black defendants are held without bail at higher rates than white defendants with a similar level charge."). Thus, by instructing judges to offer monetary bail only as a last resort, Maryland's policy has *decreased* the number of defendants who are able to secure their liberty before trial.

This increase in pre-trial detention is predictable when the alternatives to monetary bail are expensive and resource-intensive, like house arrest and electronic monitoring. New Jersey is already struggling to fund the new administrative costs necessitated by the CJRA's preference for non-monetary conditions over monetary bail. *See* S.P. Sullivan, *The good news: N.J. bail overhaul is working. The bad news: It's already going broke.*, NJ.com (Aug. 29, 2018), https://bit.ly/2NgU3PR ("[L]ike many bright ideas hatched in Trenton, the new system is already going broke."). State officials have "warned the new system is 'simply not sustainable' and faces a 'substantial annual structural deficit.'" *Id.* In particular, the use of "GPS monitoring bracelets"—as opposed to monetary bail through a surety that would guarantee the defendant's appearance—"proved particularly taxing on court staff" and "required 24-hour staffing." *Id.* The financial burden of administering a system that categorically prefers government monitoring over private sureties was predictable, and the consequences of the financial shortfall are perhaps even more so. As alternatives to monetary bail become financial infeasible, New Jersey judges, like Maryland's judiciary, will become increasingly more likely to order pretrial detention for more defendants.

Not only do these anti-bail systems conflict with the Constitution and this Court's jurisprudence, but they far overshoot their objectives. By all accounts, the goal of measures like those adopted by New Jersey, New Mexico, Maryland, and California is to reduce the amount of otherwise bailable defendants incarcerated before trial based solely on their inability to post bail. But states can achieve that goal without imposing

unconstitutionally excessive release conditions on other defendants. When monetary bail and a non-monetary condition of release would both ensure the defendant's appearance at trial, the court could afford the defendant the option of choosing between the two. Or if the court imposes a monetary bail amount that the defendant indicates he cannot afford, then the court could impose the non-monetary conditions instead. By categorically disfavoring bail, the CJRA prevents judges from considering the full range of available options for imposing the least-restrictive conditions necessary to assure a defendant's appearance and protect public safety. However well-intentioned, that policy violates the Constitution, and this case is an ideal vehicle for this Court to resolve the question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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