No. 18-809

In the Supreme Court of the United States

CURTIS T. LOVELACE, PETITIONER,

v.

ILLINOIS, RESPONDENT.

On Petition for a Writ of Certiorari to the Illinois Appellate Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When bail is set in a criminal case, an Illinois defendant can secure pretrial release by (1) depositing the full amount of the bail, all of which is returned upon performance of the bond conditions, or (2) depositing 10% of the bail, all but 10% of which (amounting to 1% of the specified bail) is returned after trial. *See* 725 Ill. Comp. Stat. § 5/110-7, -8. In *Schilb v. Kuebel*, 404 U.S. 357 (1971), this Court held that this 1% bond fee is an administrative fee that neither violates due process nor equal protection, even if charged to acquitted persons.

Petitioner was charged with murder and his bail was set at several million dollars. Before trial, petitioner's friends posted bond in the amount of 10% of his bail with the clerk of court and petitioner was released from custody. Following petitioner's acquittal, the clerk retained the 1% bond fee from the money deposited by those friends. Petitioner — who paid no portion of the bond fee — now claims that the bail statute is unconstitutional. The questions presented are:

1. Whether this Court should overturn *Schilb* and hold that the bond fee lacks any rational basis and, thus, violates the Due Process and Equal Protection Clauses.

2. Whether this Court should overturn *Schilb's* holding that the bond fee is an administrative fee, and instead hold that it is a punishment that violates the Excessive Fines Clause, even though the fee is not contingent on a conviction.

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INTRODUCTION

Petitioner asks this Court to consider whether the 1% Illinois bond fee violates the Due Process, Equal Protection, and Excessive Fines Clauses. But nearly fifty years ago, in *Schilb v. Kuebel*, 404 U.S. 357 (1971), this Court held that the Illinois bond fee is an administrative fee (i.e., not a fine) and does not violate due process or equal protection even when applied to acquitted persons. Petitioner neither identifies a split in authority nor provides any basis for overturning that longstanding precedent. Moreover, even if this Court were inclined to revisit *Schilb*, this case presents a poor vehicle for doing so because (1) petitioner lacks standing to challenge the bond fee, and (2) the record has not been adequately developed to assess his arguments.

STATEMENT

1. In August 2014, an Illinois grand jury indicted petitioner for the first degree murder of his first wife, Cory Lovelace. Pet. App. 3a.[1] The State contended that petitioner smothered Cory with a pillow, while petitioner claimed that the thirty-eight-year-old mother of four died of natural causes.

2. In cases in which bail is set, Illinois defendants can secure their pretrial release by (1) depositing the full amount of the bail with the clerk of court, all

[1] "Pet. __" refers to the petition for a writ of certiorari and "Pet. App. __" to its appendix; "R__" refers to the report of proceedings and "C__" to the common law record.

of which is returned upon performance of the bond conditions; or (2) depositing only 10% of the specified bail, subject to the clerk's retention of a fee equal to 1% of the total bail after trial. *See* 725 Ill. Comp. Stat. § 5/110-7, -8.

3. The trial court initially set petitioner's bail at $5 million. Pet. App. 3a. Petitioner did not post bond and remained in custody through his first trial, which ended in a hung jury in February 2016. *Ibid.*

4. Before his second trial, petitioner filed an unopposed motion to reduce his bail to $3.5 million, stating that his "friends and supporters" were "willing and able" to post "the cash needed for a $3.5 million bond." *Ibid.* The court granted the motion in June 2016, subject to certain conditions, including that petitioner wear and pay for (from the bond) a monitoring device and have no contact with Erika Gomez, his second wife, whom he allegedly abused. Pet. App. 4a; C219; R1673. Rich Herr and the law firm Beckett & Webber deposited $350,000 (10% of the bail amount), and petitioner was released from custody. Pet. App. 4a-5a.[2]

In September 2016, the trial court granted petitioner's motion for change of venue. Pet. App. 4a. In March 2017, after a two-week trial, the jury found petitioner not guilty. *Ibid.*

The trial court *sua sponte* entered an order noting that bond had been "posted for [petitioner] by others,"

[2] Beckett & Webber did not represent petitioner in this case.

and that the bond, "after applicable fees, needs to be returned." Pet. App. 4a-5a. The court's "proposed" refund schedule suggested that the $350,000 cash bond be returned to Herr and the law firm, minus $35,000 (the 1% bond fee) and $5,433.75 (for electronic monitoring expenses). Pet. App. 5a. The court set a hearing to allow any "interested parties" to object to the proposed order. *Ibid*.

At that hearing, petitioner's counsel acknowledged that petitioner did not pay any portion of the bond and emphasized that petitioner was not asking that any money be returned to him. R1873-75 (bond money "belongs to [Herr and the law firm]. That's not in dispute."). Petitioner asked the court to vacate the bond fee and return the money (except for the $5,433.75 electronic monitoring costs) to Herr and the law firm. R1874-76.

The trial judge acknowledged that he had discretion to reduce the bond fee, but he declined to do so, observing that the fee not only insures compliance with conditions of bond, but also helps defray expenses of the bond system. R1881. The judge did not recall a case in which the full bond fee was not imposed; the bond fee was "one of the ways" the clerk of court funded its office; and petitioner's trials had lasted four weeks with the change of venue causing "additional expenses." R1182. Further, petitioner had cited no authority in support of his request and, after conducting independent research, the judge found no case supporting petitioner's position. *Ibid.* Accordingly, the court

ordered that (1) $5,433.75 would be withheld for electronic monitoring expenses; (2) the clerk of court would retain $35,000 to cover the 1% bond fee; and (3) the remaining $309,566.25 would be returned to Herr and Beckett & Webber. R1882-83; Pet. App. 8a.

5. Petitioner appealed, raising various challenges to the bond fee, including claims that it violated the Due Process, Equal Protection, and Excessive Fines Clauses. The state appellate court affirmed, noting that petitioner's constitutional arguments had already been considered and rejected by this Court in *Schilb v. Kuebel*, 404 U.S. 357 (1971). Pet. 16a-29a. The Illinois Supreme Court denied petitioner's ensuing petition for leave to appeal. Pet. App. B.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to address whether imposing the 1% Illinois bond fee on acquitted persons violates the Due Process, Equal Protection, and Excessive Fines Clauses. But this case is not the proper vehicle to address those issues for two reasons: (1) petitioner has failed to establish he has standing to challenge the bond fee, and (2) the record has not been adequately developed to assess his arguments. Further, this Court has held that the Illinois bond fee is an administrative fee (not a fine) and does not violate due process or equal protection, and petitioner provides no basis for overturning that longstanding precedent. *See Schilb v. Kuebel*, 404 U.S. 357 (1971).

I. This case is a poor vehicle for addressing petitioner's claims.

Even if the questions presented otherwise warranted certiorari, this case is a poor vehicle for resolving them for two independent reasons.

First, because he did not pay it and has no obligation to pay it, petitioner fails to establish that he has standing to challenge the bond fee. To establish standing, petitioner "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, (3) and that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To prove an "injury in fact," petitioner must establish that his alleged injury is both "concrete" and "particularized."

Id. at 1548. To be "concrete," the injury "must actually exist." *Id.* To be "particularized," the injury "must affect the plaintiff in a personal and individual way." *Id.* (quotations omitted); *see also Hollingsworth v. Perry*, 570 U.S. 693, 705, (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way' . . . He must possess a 'direct stake in the outcome' of the case").

Petitioner has no such injury because he paid no portion of the bond fee. *See Hollingsworth*, 570 U.S. at 705 (petitioners lacked standing where lower court "had not ordered them to do or refrain from doing anything"). Indeed, petitioner emphasized in the state court proceedings below that he did not want the court to give the money to him — he wanted the court to return the bond fee directly to Herr and Beckett & Webber because he had no claim to the money. R1875-76. Moreover, petitioner does not allege that he has a contractual obligation to reimburse Herr or Beckett & Weber; were he to raise such an allegation now, (1) the validity of the purported obligation would present an issue of state law; and (2) it still would be unclear that petitioner had suffered any injury, as he is apparently judgment proof given his claim that he is "indigent." Pet. 3, 9. In sum, because petitioner has not alleged any personal injury, he lacks standing to assert a claim on his own behalf or on behalf of those who paid the bond fee. *Hollingsworth*, 570 U.S. at 708 ("[E]ven when we have allowed litigants to assert the interests of others, the litigants themselves still 'must have suffered an injury in fact'").

Second, and independently, the record has not been adequately developed for this Court to assess petitioner's arguments. Petitioner's claims rest in large part on his contention that the bond fees are used for purposes unrelated to the actual costs of administering the bond system. *See* Pet. 6-8, 11-13. But as the state appellate court observed, "no evidence was presented at the hearing or on appeal as to what the actual costs of administration of the bail bond system are or what factors impact that administration." Pet. App. 10a-11a. And petitioner conceded in his state appellate brief that "[i]t is unclear precisely how the 'bail bond costs' are used by the government[.]" Pet. State App. Ct. Br. at 19. Thus, petitioner failed to develop an adequate record for this Court to assess his arguments.

II. This Court's settled precedent precludes relief on petitioner's claims.

A. *Schilb* forecloses petitioner's claims.

Notwithstanding petitioner's assertion to the contrary, *see* Pet. 1, this case is squarely governed by *Schilb v. Kuebel*, 404 U.S. 357 (1971).

Schilb rejected a defendant's claim that Illinois's bond fee statute violated due process as applied to acquitted persons. *Id.* at 370-71. As the Court emphasized, the 1% fee "is an administrative fee," charged to "guilty and innocent alike," and "not a cost of prosecution." *Ibid.* And that conclusion "is supported" by the "long-established Illinois rule against the imposition of costs of prosecution upon an acquittal or discharged criminal defendant." *Id.* at 371 (citation omitted).

Schilb also rejected the defendant's equal protection argument, holding that there is a rational basis for charging a 1% bond fee to individuals who choose the 10% bond option. *Id.* at 368-71. And this Court's conclusion that section 110-7 imposes "an administrative fee," *Schilb*, 404 U.S. at 371, forecloses petitioner's "excessive fine" claim. Accordingly, settled law precludes petitioner's present claims.

B. Petitioner does not contend that there is a lower court split, that *Schilb* has proven unworkable, or that the state court decision conflicts with *Schilb*.

Petitioner has not identified a split in the lower courts regarding *Schilb* or the constitutionality of bond fee statutes. This lack of disagreement counsels against granting certiorari. *See* Sup. Ct. R. 10.

Furthermore, petitioner does not contend that *Schilb* has proven unworkable or that the state court's decision conflicts with *Schilb*, nor could he credibly do so. The state appellate court discussed *Schilb* at length and faithfully applied it by rejecting petitioner's claims. Pet. App. 16a-21a.

C. Petitioner provides no basis to overturn *Schilb*.

This Court should decline petitioner's invitation to "revisit" *Schilb*. Pet. 11. Because petitioner does not contend that the bond fee encroaches on a fundamental right, due process requires only that the Illinois statute be rationally related to a legitimate governmental interest. *Washington v. Glucksberg*, 521 U.S.

721, 728 (1997). To prevail under rational basis review, petitioner must "'negative every conceivable basis which might support [the law],'" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993), an especially difficult task, given that "legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Ibid.*

Further, stare decisis is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotations omitted). In asking the Court to revisit the constitutionality of Illinois's bail statute (the relevant provisions of which have remained virtually unchanged in the nearly fifty years since *Schilb* was decided), petitioner does not acknowledge, much less come close to carrying, his burden to establish "a 'special justification' — over and above the belief 'that the precedent was wrongly decided.'" *Ibid.*

1. Petitioner does not contend that the bond fee statute has no rational basis.

Petitioner does not specifically dispute the rational bases for the bond fee identified in *Schilb* nor does he otherwise contend that the statute lacks any rational basis. *See* Pet. 11-13. That alone is reason to deny certiorari.

Nor do petitioner's due process arguments warrant this Court's review. At bottom petitioner's claim rests on his self-serving notion that it is somehow unfair to "charg[e] an indigent, acquitted person" the 1%

bond fee. Pet. 8, 11-12. But such generalized fairness arguments do not directly address, let alone negate, the rational bases for the statute this Court identified in *Schilb*. *See Beach Commc'ns*, 508 U.S. at 314 (party challenging statute has the burden to negate every conceivable rational basis).

In any event, notions of "fairness" do not favor petitioner as he believes. As this Court explained in *Schilb*, the bond fee statute directly and dramatically lowered costs to defendants and ended the exploitive system that bondsmen had operated in Illinois. *Schilb*, 404 U.S. at 359-60, 366. Indeed, absent the bond fee statute, petitioner (or, more accurately, his supporters) would have been subject to a significantly *higher* bond fee. *See id.* at 366 (noting that without the statute, Schilb's fee would have been ten times higher). Given that the Illinois bond fee statute dramatically lowers costs to all defendants, the State incurred costs of administering petitioner's bail, and petitioner (a former prosecutor) enjoyed the benefit of his bargain, it cannot be said that vague notions of "fairness" require this Court to overrule *Schilb*.

Petitioner incorrectly argues that, since *Schilb* was decided, Illinois has charged defendants dramatically higher bond fees. Pet. 11. The bond fee remains 1% of the total bail, as set by statute. *See* 725 Ill. Comp. Stat. § 5/110-7(f). Petitioner's bond fee was larger in dollar amount simply because Schilb was charged with minor traffic offenses fifty years ago, while petitioner was recently charged with the much more serious offense of first degree murder.

Petitioner's argument that the bond fee is "charged on top of a fee to cover the costs of servicing the bail," Pet. 11, is not properly before this Court because the state appellate court concluded that it was forfeited by petitioner's failure to raise it in the trial court. Pet. App. 11a; *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (*per curiam*) ("'We ordinarily 'do not decide in the first instances issues not decided below.'").

Petitioner's further observation that some other states charge higher bond fees than Illinois suggests, at most, that the Illinois bond fee is reasonable and rational, and not that the Illinois statute is unconstitutional. Pet. 12. To the extent that other jurisdictions charge allegedly unjustifiable fees, the proper course is for defendants in those states to challenge those statutes themselves in separate actions, not to revisit the constitutionality of the Illinois statute.[3]

[3] For similar reasons, petitioner's amici and secondary sources — which focus on bail bond fees in other states, fees unrelated to bail bonds, and the constitutionality of bail itself — do not provide a basis for granting certiorari in this case. Pet. 7-8, 16. Notably, one of petitioner's few sources that does specifically refer to the Illinois bond system — an issue brief from the Council of Economic Advisors for President Obama's White House — praises the Illinois bond system for expanding pre-trial release and offering defendants substantial savings. White House Council of Econ. Advisers, *Fines, Fees and Bail*, at 8 (2015) (cited in Pet. 16).

And petitioner's assertion that *Schilb* was decided "in the context of an equal protection, not a due process, challenge," Pet. 12, is simply wrong: Schilb "attack[ed] the statutory 1% charge" on both "due process and equal protection grounds," and this Court affirmed the dismissal of both claims, *Schilb*, 404 U.S. at 358-59, 370-71.

2. None of petitioner's cases supports overturning *Schilb*.

Like his "fairness" argument, petitioner's cited cases do not support overturning *Schilb*. *See* Pet. 6-7, 8-9 (citing *Tumey*, *Ward*, and *Nelson*).

In *Tumey v. Ohio*, 273 U.S. 510, 520-23 (1927), this Court held that a statutory scheme providing that the trial judge was compensated only if the case resulted in a conviction and fine violated due process because it deprived defendants of their right to a fair trial. That holding is not inconsistent with *Schilb* because the bond fee does not compensate judges and it is charged to everyone who selects the 10% bond option regardless of whether they are convicted.

Ward v. Monroeville, 409 U.S. 57 (1972) is similarly inapposite. *Ward* held that a defendant's right to a fair trial was violated because the trial judge (who was also the mayor) had a clear interest in finding the defendant guilty given that the fines imposed by the court funded more than one-third of the village's budget and the judge, in his capacity as mayor, was responsible for the village's finances. *Id.* at 58-60. No such concerns about a trial judge's impartiality exist

under Illinois's bond statute where the bond fee is imposed on guilty and innocent alike, and trial judges are not responsible for managing the clerk of court's finances.

Nelson v. Colorado, 137 S. Ct 1249 (2017), is inapposite as well. In *Nelson*, the defendants were convicted of various crimes and sentenced to pay restitution and certain costs. *Id.* at 1252-53. After their convictions were vacated and the State decided not to retry the cases, the defendants sought the return of the money exacted from them as part of their (now invalidated) sentences. *Id.* at 1253. Colorado law, however, required the defendants to commence a separate civil proceeding and prove their innocence "by clear and convincing" evidence to recoup any money exacted from them, "upon, and as a consequence of, [their] conviction." *Id.* at 1252, 1254-55. But because the presumption of innocence is restored once a conviction is vacated, this Court concluded that Colorado could not retain "funds taken from [the defendants] solely because of their now-invalidated convictions." *Id.* at 1256. The Colorado statute violated procedural due process because a State "may not impose anything more than minimal procedures on the refund of exactions *dependent upon a conviction* subsequently invalidated." *Id.* at 1258 (emphasis added). Here, by contrast, the bond fee is not "dependent upon a conviction," but rather is an administrative fee that is charged to anyone — acquitted, guilty, or a third-party payor — who chooses Illinois's 10% bail bond option

prior to trial. Thus, petitioner's cases are inapposite and provide no basis for certiorari review.

III. Petitioner's remaining arguments do not warrant certiorari.

Petitioner notes in passing that Illinois law limits the bond fee to $100 for defendants charged in counties with a population of over three million people, Pet. 13; 725 ILCS 5/110-7(f),[4] but does not specifically argue that this provision violates equal protection, and any such claim would fail because he cannot prove that the provision lacks a rational basis. As the state appellate court correctly observed, the more populous the county, the more sources of revenue — including general revenue — that are available to cover the costs of operating the local bond system. Pet. App. 23a. And the more populous the county, the more people who post bail, which can result in various economies of scale that reduce the costs of operating the bond system. Enactment of this cap is evidence that Illinois is attempting to decrease bond costs to defendants, not that the statute lacks a rational basis. *See Schilb*, 404 U.S. at 364 ("state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time").

Lastly, petitioner's alternative argument that the bond fee is actually a "fine" that violates the Excessive Fines Clause of the Eighth Amendment is meritless.

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[4] Only one county in Illinois — Cook County, where Chicago is located — has a population of over three million people. Pet. App. 23a.

Pet. 14. The Excessive Fines Clause limits the government's power to exact payments "'as a punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327 (1998). But, as *Schilb* correctly concluded, the Illinois bond fee is "an administrative cost imposed upon all those, guilty and innocent alike, who seek the benefit of [the 10% bond option]." 404 U.S. at 370-71. Indeed, as this case shows, the bond fee is applied not only to acquitted persons but also to third-parties who pay the bond on their behalf, even though they have not been charged with (let alone convicted of) a crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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