No.19-A-_

IN THE SUPREME COURT OF THE UNITED STATES

JEAN BOUSTANI,

Applicant

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR BAIL

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TO THE HONORABLE RUTH BADER GINSBURG, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Applicant Jean Boustani moves under 18 U.S.C. § 3141 and Rule 22 of the Supreme Court for release on bail pending trial in the United States District Court for the Eastern District of New York. Mr. Boustani, a 40-year old Lebanese national, has been detained at the Metropolitan Detention Center in Brooklyn, New York since January 2, 2019. His application squarely presents the question of whether a defendant may be deprived of his liberty pretrial even though he has proposed release conditions which more than "reasonably assure his appearance"—the sole consideration permitted by the Bail Reform Act—simply based on policy concerns that the conditions he proposes are not equally available to rich and poor alike. There is undoubted unfairness in our country's pretrial detention practices and the manner in which they can differently treat the rich and the poor. But that unfairness cannot be resolved by incarcerating a defendant who can afford to pay for a reasonable and appropriate condition of release, in disregard of what must be the paramount interest—the interest of an individual who is presumed innocent in not being deprived of his liberty.

Mr. Boustani respectfully requests expedited consideration of this application in light of his continued detention and the reversible legal error made by both the District Court and Court of Appeals when considering his bail applications.

Your Honor has authority to release Mr. Boustani on bail pursuant to the Bail Reform Act. This Court will exercise its authority to grant bail when a defendant brings a meritorious challenge to a pretrial detention order as "violating statutory and constitutional standards." *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *see also Ward v. United States*, 76 S. Ct. 1063, 1066 (1956) (Frankfurter, J.) ("An error of principle in the denial of bail, an indisputable question of law, calls for correction,

whether the matter comes before the whole Court . . . or before an appropriate Circuit Justice.") (citation omitted).

In Mr. Boustani's case, the courts below plainly disregarded the text and purpose of the Bail Reform Act, as well as the constitutional requirements for pretrial detention. Under the Act, there is a statutory presumption that a non-dangerous defendant should be released pretrial. 18 U.S.C. § 3142(b). Only if a court finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required . . . shall [the court] order the detention of the [defendant] before trial." *Id.* § 3142(e)(1). Any interpretation of the Bail Reform Act that would permit pretrial detention while conditions exist that can reasonably assure a defendant's appearance in court—absent an independent compelling interest for detaining the defendant other than prevention of flight—would run counter to the Excessive Bail Clause of the Eighth Amendment. *See United States v. Salerno*, 481 U.S. 739, 754-55 (1987).

In this case, Mr. Boustani went beyond the statutory requirement of "reasonable assurance" and offered to use his wealth to provide for conditions that would virtually guarantee his appearance at trial. Those conditions included, among other things, 24/7 armed private security. Rather than consider the efficacy of Mr. Boustani's proposed conditions of release to assure his appearance—as both the Bail Reform Act and the Constitution require—the courts below categorically objected to Mr. Boustani's proposed conditions on policy grounds. Ultimately, the courts below ignored the Bail Reform Act's requirement of release where conditions exist that would "reasonably assure" the defendant's appearance. They based their decision to detain Mr. Boustani on their view that it is unfair to permit a wealthy foreign defendant to be released under a condition that poorer defendants cannot afford, even though, were it not for his wealth and his Lebanese nationality, Mr. Boustani would never have been considered a flight risk in the first

place. Such policy considerations, whether meritorious or not, have no place in determining whether to order pretrial detention under the Bail Reform Act. Because the courts below ignored the standards set forth in the Act—standards which must be met for pretrial detention to be constitutional—this Court should intervene.

Your Honor should therefore exercise your authority to grant Mr. Boustani's pretrial release on bail or refer this matter to the full Court.

STATEMENT

On January 1, 2019, Mr. Boustani departed Lebanon for a vacation with his wife in the Dominican Republic. Upon arrival, Mr. Boustani was detained, expelled without process, placed on a flight to New York, and arrested at John F. Kennedy Airport. Pursuant to a Sealed Indictment, the Government charged Mr. Boustani with participating in wire fraud, securities fraud, and money laundering conspiracies, all in connection with work he performed years earlier for his employer in the African nation of Mozambique. Mr. Boustani was unaware of the charges when he was arrested and had no opportunity to voluntarily surrender. Several other defendants, all foreign citizens, have also been charged in this case. Only one has appeared to face charges and has pleaded guilty to one count of conspiracy to commit money laundering. App. 235-36. That codefendant, Detelina Subeva, a wealthy foreign national who faces a potentially substantial prison sentence, is currently released on bail. App. 275-77.

On January 2, 2019, at his presentment before Magistrate Judge Peggy Kuo, the Government argued that Mr. Boustani is a flight risk because he is a citizen of Lebanon with financial means. Magistrate Judge Kuo ordered Mr. Boustani detained, but granted him leave to submit a specific bail package. App. 63. On January 8, 2019, Mr. Boustani applied for bail before District Judge William F. Kuntz. App. 33. Mr. Boustani proposed a bail package with strict

conditions of release that included, among other things, supervision under 24/7 armed private security paid at his own expense. App. 34-35.

On February 4, 2019, the District Court denied Mr. Boustani's application for bail ("February 4 Order"). App. 32-50. The District Court's opinion focused almost exclusively on why Mr. Boustani was a flight risk and devoted minimal analysis to whether conditions existed which would reasonably assure his appearance. The District Court concluded that the amount of cash that Mr. Boustani offered as collateral did not appear sufficient, but it did not impose a higher amount. App. 46-47. The District Court also found that Mr. Boustani's surrender of his passports did not mitigate his risk of flight because the Government alleged that while abroad Mr. Boustani secured UAE work visas with inaccurate job descriptions for his alleged co-conspirators. App. 47. The District Court did not explain how Mr. Boustani would be able to fraudulently obtain travel documents in the United States (where he knows no one and has never been in his life)—let alone flee—while under GPS monitoring, confined to a Manhattan apartment, with limited access to visitors, and under the supervision of private security 24 hours a day, all release conditions that Mr. Boustani proposed.

The District Court also categorically rejected the use of home detention supervised by private security as a condition of release on a number of policy grounds. First, the District Court suggested that private security guards who receive payment from a defendant would face a "clear conflict of interest" and therefore could not reasonably assure the defendant's presence in court, despite the fact that a defendant has never absconded in any of the numerous cases Mr. Boustani identified in which supervision under private security was a condition of release. App. 47-48. Second, the District Court observed that there were "several issues related to use of force," and questioned whether the waiver of liability that Mr. Boustani signed was enforceable. App. 48-49.

Finally, the District Court expressed concern that release under supervision of private security would permit a "wealthy defendant[]" to "lawfully buy [his] way out of incarceration by constructing [his] own prison" and that Mr. Boustani's "release could very well produce disparate treatment based on wealth, as other co-defendants may not currently possess the financial capacity to pay for the private jail solution [Mr. Boustani] requests," even though those co-defendants appear to have means and most may never appear in this case. App. 49.

On February 11, 2019, Mr. Boustani submitted an emergency appeal to the United States Court of Appeals for the Second Circuit. Oral argument took place on March 5, 2019 before a panel that included Judges Susan L. Carney, Reena Raggi, and Robert D. Sack. App. 130-95. The Circuit panel expressed discomfort with the District Court's conclusion that no conditions could reasonably assure Mr. Boustani's future appearance in court. For example, when the Government told the panel that its "position" was "that no set of conditions would reasonably assure [Mr. Boustani's] appearance," Judge Sack responded, "I find that disturbing." App. 170. Judge Carney commented that, since the standard of the Bail Reform Act is whether any conditions of release would reasonably assure a defendant's presence, she was "hav[ing] some difficulty understanding why these extraordinary conditions that are outlined [in Mr. Boustani's proposed bail package] wouldn't [reasonably assure his presence]." App. 172.

While expressing deep reservations about Mr. Boustani's detention, the panel also criticized defense counsel for not approaching the District Court with an amended set of bail conditions—which included increased cash collateral and an extradition waiver—that Mr. Boustani was prepared to accept before he filed an appeal. App. 138. The Court of Appeals accordingly affirmed the District Court's decision, but expressly permitted Mr. Boustani to "present an amended bail package" to the District Court. App. 31. In its order, the Court of

Appeals reminded the District Court that, when reviewing a new bail application, the Government bore the burden of proving, by a preponderance of the evidence, both that Mr. Boustani is an "actual" risk of flight and that "no condition[s]" would reasonably assure his appearance. *Id.*

On March 19, 2019, Mr. Boustani submitted a new bail package to the District Court. App. 11. Endeavoring to address the District Court's concerns, Mr. Boustani agreed to waive extradition from anywhere in the world and increased the amount of cash collateral, pledging to post $2 million from his own accounts and $7 million from his father—a transfer of assets that imposed an extraordinary moral and financial incentive for Mr. Boustani to appear, as these funds are used to support Mr. Boustani's wife, his 5-year old son, his elderly parents, and his wife's elderly parents, none of whom are in a position to support themselves. App. 12.

On March 28, 2019, the District Court again denied Mr. Boustani bail, via a short, oral order that was entered via minute entry on April 10, 2019 ("March 28 Order"):

> The amended bail application is denied. It is not sufficient. This defendant is still a flight risk. I am not approving it. The defendant has not satisfied the moral issue, does not persuade the Court, as is asserted by the Willkie Farr firm, and I do not believe that putting people in countries that do not have extradition with the United States in any way, shape or form ensures that they will appear for trial. Obviously the Willkie Farr firm is absolutely free to take an appeal, as they did before, with respect to this, but I think the issues are important. I think it is clear that this defendant continues to be a flight risk. I do not think that the issues were adequately addressed, and I am not persuaded by the moral suasion arguments that have come forward by the Willkie Farr law firm in this case. App. 17.

At the same hearing in which it denied Mr. Boustani bail, the District Court set trial to commence on October 7, 2019. App. 17. Therefore, unless bail is granted in this case, Mr. Boustani will be detained for over 10 months before his trial begins. Mr. Boustani has not waived his speedy trial

right and, to date, the District Court has rebuffed Mr. Boustani's request for a speedy trial. App. 29.

On April 18, 2019, Mr. Boustani filed another emergency motion for bail with the Court of Appeals seeking to vacate the District Court's March 28 Order. Oral argument was scheduled on May 14, 2019 before Judges Jose A. Cabranes, Peter W. Hall, and Timothy C. Stanceu (sitting by designation). Like the District Court, the Circuit panel failed to focus on how the conditions proposed by Mr. Boustani would be insufficient to reasonably assure his appearance at trial. Instead, the panel questioned the propriety of using private security as a condition of release under the Bail Reform Act. Judge Hall, for example, stated, "I'm concerned that if I say you are free on bond and you can be subject to surveillance by—and supervision by armed guards whom you have hired who are on your payroll, so to speak, I've got to let you go?" App. 198-99. Judge Cabranes similarly expressed concern that permitting private security as a condition of release would "create[] a two-tiered system for bail, where people who have the means to provide for a private [security] service . . . can somehow get bail and live comfortably, while . . . those with fewer means have to be detained[.]" App. 201. On May 16, 2019, the Court of Appeals denied Mr. Boustani's motion to vacate the District Court's detention order in a short order that did not provide any further insight into the panel's reasoning or explain why the proposed conditions of release were insufficient to reasonably assure Mr. Boustani's appearance. App. 2.

REASONS FOR GRANTING THE APPLICATION

I. THE DENIAL OF MR. BOUSTANI'S PRETRIAL RELEASE APPLICATION IN THE COURTS BELOW VIOLATED THE BAIL REFORM ACT AND THE EIGHTH AMENDMENT TO THE CONSTITUTION.

When Congress enacted the Bail Reform Act in 1984, it recognized that pretrial detention is an "extraordinary remedy" that should be reserved for only a very "limited group of offenders."

See S. Rep. No. 98-225, at 7 (1984) as reprinted in 1984 U.S.C.C.A.N. 3182, 3189. The Bail Reform Act therefore requires a court to order the pre-trial release of a defendant on a personal recognizance bond "unless the [court] determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). Even if the court determines that a defendant's release on unsecured bond presents a risk of flight, a defendant must still be released "subject to the least restrictive further condition, or combination of conditions, that [the court] determines will reasonably assure the appearance of the person as required . . . ." *Id.* § 3142(c)(1)(B). Such conditions specifically may include release "in[to] the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community." *Id.* § 3142(c)(1)(B)(i). Only if "no condition or combination of conditions will reasonably assure the appearance of the person as required . . . shall [the court] order the detention of the [defendant] before trial." *Id.* § 3142(e)(1). Thus, the statutory presumption, in the absence of certain exceptions not applicable here, is that a defendant will be released pending trial. *See Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (Ginsburg, J.) (noting that, under the Bail Reform Act, "bail [is] presumptively available for accused awaiting trial."). To overcome that presumption, the government bears the burden of demonstrating, and the court of finding, both that a defendant is a flight risk and that no conditions of release will reasonably secure his appearance at trial.[1]

[1] *See, e.g.*, *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) ("Because the law thus generally favors bail release, the government carries a dual burden in seeking pre-trial detention. First, it must establish by a preponderance of the evidence that the defendant, if released, presents an actual risk of flight. Assuming it satisfies this burden, the government must then demonstrate by a preponderance of the evidence that no condition or combination of conditions could be imposed on the defendant that would reasonably assure his presence in court.") (internal citations omitted); *see also United States v. Ailon-Ailon*, 875 F.3d 1334, 1336 (10th Cir. 2017) (holding that "[i]f the court determines that there is such a risk [of flight], the government must prove at the second step of the

The need to rule out the efficacy of any proposed release conditions is based not only in the Bail Reform Act, but also in the Constitution. As this Court explained in *United States v. Salerno*, absent a compelling interest other than prevention of flight, the Eighth Amendment prohibits the setting of bail at a level above that necessary to reasonably assure a defendant's appearance: "when the Government has admitted that its only interest is in preventing flight, *bail must be set* by a court at a sum designed to ensure that goal, and no more." *Salerno*, 481 U.S. at 754-55 (emphasis added) (contrasting the obligation to set bail in risk-of-flight cases to instances in which "Congress has mandated detention on the basis of a compelling interest other than prevention of flight," *i.e.*, dangerousness, because in those instances "the Eighth Amendment does not require release on bail."). Requiring pretrial release when conditions exist that can reasonably assure a defendant's appearance, and the Government has demonstrated no other compelling interest in seeking detention other than prevention of flight, is consistent with this Court's holdings that under the Eighth Amendment bail should only be denied "for the strongest of reasons." *See Truong Dinh Hung v. United States,* 439 U.S. 1326, 1328-29 (1978) (Brennan, J.) ("The question for my independent determination is thus whether the evidence justified the courts below in reasonably believing that there is a risk of applicant's flight. In making that determination, I am mindful that '[t]he command of the Eighth Amendment that '[e]xcessive bail shall not be required . . .' at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons.'") (citations and internal quotation marks omitted); *Stack*, 342 U.S. at 5 ("Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose [of assuring that

process that there is no condition or combination of conditions that will reasonably assure the [defendant's] appearance . . .") (citation and internal quotation marks omitted); *United States v. Castro-Inzuna*, No. 12-30205, 2012 WL 6622075, at *1 (9th Cir. Jul. 23, 2012) (reversing detention order because the government failed to "me[e]t its burden of showing, by a preponderance of the evidence, that no condition or combination of conditions will reasonably assure the [defendant's] appearance") (citation and internal quotations omitted); *United States v. Stone*, 608 F.3d 939, 946 (6th Cir. 2010) ("[T]he government's ultimate burden is to prove that no conditions of release can assure that the defendant will appear and to assure the safety of the community.").

a defendant will stand trial] is 'excessive' under the Eighth Amendment."); *Campbell v. Johnson*, 586 F.3d 835, 843 (11th Cir. 2009) ("Under *Salerno*, the test for excessiveness is whether the terms of release are designed to ensure a compelling interest of the government, and no more."); *Agunobi v. Thornburgh*, 745 F. Supp. 533, 537 (N.D. Ill. 1990) (holding that, under *Salerno*, when the Government's justification for detaining aliens convicted of aggravated felonies was "to foreclose the possibility that aliens . . . would abscond pending their deportation hearing," failure to provide a bail determination violated the Eighth Amendment).

The courts below committed reversible legal error when they failed to explain or articulate how, in Mr. Boustani's case, his proposed bail conditions would fail to reasonably assure his appearance. *See, e.g.*, *United States v. Nwokoro,* 651 F.3d 108, 111-12 (D.C. Cir. 2011) (remanding bail determination back to district court when the district court failed to explain how "no condition or combination of conditions could reasonably assure the appearance of appellant at trial"); *United States v. Berrios-Berrios*, 791 F.2d 246, 251 (2d Cir. 1986) (holding that it is reversible error when the district court "fail[s] to explain on the record" how the Government "had shown that no condition[s]" would assure the defendant's appearance, even when the defendant was found to be a risk of flight).

In its March 28 Order, the District Court concluded that Mr. Boustani is a "flight risk," due to his wealth and the fact that he is a foreign national from a country without an extradition treaty to the United States. But it did not explain how the proposed bail conditions, which include (1) a $20 million recognizance bond secured by $2 million in cash from Mr. Boustani and $7 million cash from his father, (2) surrender of travel documents, (3) GPS monitoring, (4) restricted travel and visitation, (5) waiver of challenge to extradition, and (6) round-the-clock supervision under private security, would fail to reasonably assure Mr. Boustani's appearance in court. The

District Court simply did not analyze the efficacy of any of these release conditions when issuing its March 28 Order. In its February 4 Order, in addition to categorically opposing private security as a condition of release, the District Court concluded that the amount of cash that Mr. Boustani agreed to post as collateral was insufficient and that forfeiture of his passports did not mitigate his risk of flight since he had assisted others in obtaining UAE work visas that had inaccurate information about their occupations. App. 46-47. In response to these concerns, Mr. Boustani amended his bail package to increase the amount of cash collateral and executed a waiver in which he agreed not to challenge extradition to the United States. App. 12. Despite this, in the March 28 Order, the District Court still did not explain why the additional cash collateral was insufficient or how Mr. Boustani could possibly fake travel documents and escape the United States while under GPS monitoring and 24/7 security. Rather, what motivated the District Court's decision was the perceived inequity of permitting a defendant of means to use his wealth to provide for conditions that would reasonably assure his appearance—not the lack of efficacy of those conditions, which is the only possible legal basis for pretrial detention.

The District Court purported to reject private security as a condition of release for three reasons. First, the District Court found that paid private security guards would be conflicted. App. 47-48. In response to this concern, Mr. Boustani offered to pay the private security firm a year's worth of fees in advance. App. 12. The District Court neither considered that proposal nor addressed the fact that, notwithstanding any purported conflict, the Government identified no situation in which pretrial release conditioned on private security has ever failed to secure a defendant's appearance in court. To the contrary, as Mr. Boustani pointed out to the District Court, in the Second Circuit alone there were at least a dozen cases in which pretrial release was conditioned on private security, and the defendants in those cases attended every court appearance.

See App. 122-129. The District's Court's conflict of interest analysis also ignored that the Government routinely approves of individuals or entities paying independent third parties to monitor them without raising concerns that those third parties are conflicted. For example, companies and entities regularly enter into non-prosecution agreements, settlement agreements, and consent decrees with the Government on the condition that they retain an independent monitor.[2] The American Bar Association's standards governing such monitorships recognize that the monitor may receive reasonable compensation from the supervised entity without becoming inherently conflicted. American Bar Association, Monitorship Standard 24-4.1(1)(a) ("Except for reasonable fees and expenses, the Monitor should not accept anything of value from the Host Organization, unless the value is nominal or it mitigates costs to the Host Organization."). The reason why private security guards and independent monitors are not inherently conflicted by receiving payments from the people that they are supposed to supervise is the same: their reputations and future business rely on them carrying out their supervisory role responsibly.

Second, the District Court expressed concern that a waiver of liability for the use of force might be unenforceable. App. 48. The District Court made this finding without any evidence that

[2] *See, e.g.*, Brian A. Benczkowski, Assistant Attorney General, Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference (Oct. 12, 2018) (noting that one-third of all corporate resolutions in the Department of Justice's Fraud Section involves imposition of a corporate monitor); Non-Prosecution Agreement Between the Department of Justice and Fresenius Medical Care AG & Co. KGaA 3, 5, and Attachment C (February 25, 2019) https://www.justice.gov/opa/press-release/file/1148951/download?utm_medium=email&utm_source=govdelivery, (conditioning non-prosecution agreement on the company retaining an Independent Compliance Monitor for a term of two years); Press Release, Dep't of Justice, *Walmart Inc. and Brazil-Based Subsidiary Agree to Pay $137 Million to Resolve Foreign Corrupt Practices Act Case*, (June 20, 2019), https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt ("Walmart entered into a three-year non-prosecution agreement and agreed to retain an independent corporate compliance monitor for two years"); *In re Grassi & Co.*, Exchange Act Release No. 79,368, at 29 (Nov. 1, 2016) (requiring company to retain an "Independent Consultant" to conduct a review of the company's quality controls in order to resolve an SEC enforcement action and ordering that "[t]he Consultant's compensation and expenses shall be borne exclusively by" the company); Press Release, Securities and Exchange Commission, *Teva Pharmaceutical Paying $519 Million to Settle FCPA Charges*, (Dec. 22, 2016) https://www.sec.gov/news/pressrelease/2016-277.html (noting that under a deferred prosecution agreement with the Department of Justice and a settlement agreement with the SEC, "Teva must retain an independent corporate monitor for at least three years").

private security guards had ever been required to use force to ensure a defendant's appearance in court to begin with, let alone cite to any cases in which such a waiver was struck down by a court. In fact, the law of New York, where Mr. Boustani would be located under private security supervision, permits private persons, including private security, to use physical force to prevent a defendant from jumping bail. *See* N.Y.C.P.L.R. § 140.30 (permitting private citizens to effect a citizen's arrest "for a felony when the [arrestee] has in fact committed such felony" and "for any offense when the [arrestee] has in fact committed such offense in [the arrestor's] presence."); N.Y. Penal Law § 35.30(4)("A private person acting on his or her own account may use physical force . . . upon another person when and to the extent that he or she reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense and who in fact has committed such offense."); *see also Watkins v. Sears Roebuck & Co.*, 735 N.Y.S.2d 75 (N.Y. App. Div. 2001) (private security guard's use of force to apprehend a fleeing shoplifter was reasonable as a matter of law). Since Mr. Boustani would violate federal law if he attempted to jump bail, *see* 18 U.S.C. § 3146, private security guards would be justified under New York law in using reasonable force to prevent him from fleeing and to execute his arrest. *United States v. Swarovski*, 557 F.2d 40, 47 (2d Cir. 1977) (authority granted in New York's citizen's arrest statute permits private persons to make arrests for violations of both New York and federal criminal law). Even without the waiver that Mr. Boustani is willing to provide, private security guards and their employer would be free from civil liability for any injuries that Mr. Boustani sustained from the justifiable use of force exercised against Mr. Boustani as he attempted to escape. *See Watkins*, 735 N.Y.S.2d at 75 (dismissing action for assault and battery brought against store for injuries sustained after security guard broke shoplifter's leg as he tried to escape).

Finally, the District Court reasoned that it would be inequitable to permit Mr. Boustani to "lawfully buy [his] way out of incarceration by constructing [his] own prison," App. 49. This concern about wealth disparity is plainly irrelevant to determining whether the proposed conditions of Mr. Boustani' s release would "reasonably assure [his] appearance" in court. 18 U.S.C. § 3142(e)(1). Although the Court of Appeals did not publish a written opinion describing the reasoning for its May 16 order affirming Mr. Boustani's detention, oral argument revealed that the Circuit panel harbored the same equity concerns as the District Court about private security as an appropriate condition of release. *See, e.g.*, App. 198-99 (Cabranes, J.) (expressing concern that permitting a wealthy defendant to be released on the condition of private security would "create[] a two-tier system for bail, where people who have the means to provide for a private [security] service . . . can somehow get bail and live comfortably, while . . . those with fewer means have to be detained[.]"). Rejection of Mr. Boustani's bail conditions on these grounds is impermissible under the text of the Bail Reform Act. And a general concern about wealth disparity cannot possibly be a "compelling interest[]" that, under *Salerno*, could justify pretrial detention notwithstanding a defendant's Eighth Amendment interests. 481 U.S. at 754-55. If it were, then defendants would not be released on cash bail at all, given the unfairness of cash bail to the poor. *See, e.g.*, *United States v. Dreier*, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009) (Rakoff, J.) ("It cannot be gainsaid that many kinds of bail conditions favor the rich, and, conversely, that there are many defendants who are too poor to afford even the most modest of bail bonds or financial conditions of release. This is a serious flaw in our system. But it is not a reason to deny a constitutional right to someone who, for whatever reason, can provide reasonable assurances against flight.").

The District Court and Court of Appeals failed to address the elephant in the room—that neither the Government nor the courts below identified a single case in which a defendant released

under the condition of private security had absconded. Indeed, in the dozen cases that Mr. Boustani has brought to the District Court's attention, defendants released under private security have made all of their court appearances. *See* App. 122-129. This includes cases involving defendants who, like Mr. Boustani, are wealthy foreign nationals from countries without extradition treaties with the United States. *Id.* In order to justify Mr. Boustani's detention, the District Court needed to explain how Mr. Boustani's case is different from these similarly situated defendants and why the conditions he proposed, as well as any other conditions the court could potentially impose, could not reasonably assure his appearance. *See United States v. Totora*, 922 F. 2d 880, 895 (1st Cir. 1990) (Breyer, C. J. concurring) (rejecting the argument that, under the Bail Reform Act, "the district court lacks the legal power to create and to impose a kind of 'pre-trial house arrest' upon a defendant . . ."); *United States v. Esposito*, 749 F. App'x 20, 24 (2d Cir. 2018) (holding that pre-trial release condition that required arrestee to pay for private security guards to be stationed outside his residence was a lawful condition to ensure arrestee's presence at trial); *Sabhnani*, 493 F.3d at 77-78 (permitting District Court to consider home confinement under supervision of private security guards as a condition of release); *United States v. Patriarca*, 948 F.2d 789, 794 (1st Cir. 1991) (upholding as a valid release condition that the defendant finance an elaborate home video monitoring system himself). To date, no court has addressed that fundamental question in Mr. Boustani's case. For that reason, Mr. Boustani's detention order cannot stand.

II. MR. BOUSTANI'S APPLICATION FOR PRETRIAL RELEASE IS PROPERLY BEFORE YOUR HONOR.

Where the District Court and Court of Appeals have made a legal error in applying the Bail Reform Act, either the full Court or an individual Justice may review the decisions of the lower courts de novo. *Ward*, 76 S. Ct. at 1066 ("An error of principle in the denial of bail, an indisputable question of law, calls for correction, whether the matter comes before the whole Court . . . or before

an appropriate Circuit Justice.") (internal citation omitted); *Sellers v. United States*, 89 S. Ct. 36, 37 (1968) (Black, J.) (granting application for bail pending appeal and holding that "[w]hile the decisions of the District Judge and [Court of Appeals] denying bail are entitled to respect," an individual Supreme Court Justice is "nonetheless authorized . . . to make an independent determination of the applicant's request for relief") (internal citations omitted); 2 Fed. Crim. App. § 8:133 (March 2019) ("Where the lower court has made a legal error or improperly interpreted the Bail Reform Act, the Supreme Court will be more likely to intervene. That is because such issues involve legal questions reviewable de novo, rather than the evaluation of the facts of the case or of the individual defendant's personal circumstances."); Stephen M. Shapiro, et. al., *Supreme Court Practice* § 17.16 n.74 (10th ed. 2013) ("When a release or detention order entered below reveals an error in legal principle, either the Circuit Justice or the whole Court has the power to take corrective action.").

Rule 22 of this Court provides that the proper procedural mechanism for petitioning for pretrial bail before the Supreme Court is by "application . . . addressed to the Justice allotted to the Circuit from which the case arises," Rule 22.3, and then the "Justice to whom an application for . . . bail is submitted may refer it to the Court for determination." Rule 22.5; *see, e.g.*, *McDonnell v. United States*, No. 15A218 (Aug. 31, 2015) (Roberts, C.J.) (referring application for bail pending timely filing and disposition of a petition for writ of certiorari to the full court); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (considering pretrial bail application that was filed with Justice Douglas and referred by Justice Douglas to the full court).

An individual United States Supreme Court Justice is also authorized to grant pretrial release under the Bail Reform Act. Section 3141 of Title 18 provides that a "judicial officer" who is "authorized to order the arrest of a person" under 18 U.S.C. § 3041 shall order that an arrested

person before her "be released or detained, pending judicial proceedings" in accordance with the standards of the Bail Reform Act. Section 3041, in turn, defines a "judicial officer" to include "any justice or judge of the United States. . ." *See also* 18 U.S.C. § 3156(a)(1) (stating that the term "judicial officer means . . . any person or court authorized pursuant to section 3041 . . . to detain or release a person before trial or sentencing or pending appeal in a court of the United States"). "Thus, a Justice [of the Supreme Court] is empowered by statute to release or detain a defendant at any stage of federal criminal proceedings." *Supreme Court Practice*, § 17.15; *Id.* at § 17.16 (noting that, while not the usual practice, Supreme Court Justices "have the power to release prisoners or order their detention, even before trial. . ."). The Bail Reform Act did not remove an individual Justice's ability to grant bail upon application or to remand a detention order back to the lower courts, as several Justices had done before 1984. *See, e.g.*, *Noto v. United States*, 76 S. Ct. 255 (1955) (Harlan, J.) (fixing pretrial bail as interim relief when petitioner's trial was less than eight weeks away); *Sellers*, 89 S. Ct. at 39 (granting bail pending appeal in the Court of Appeals); *Truong Dinh Hung*, 439 U.S. at 1330 (granting bail pending appeal in the Court of Appeals); *Cohen v. United States*, 82 S. Ct. 8, 9 (1961) (Douglas, J.) (granting bail pending an appeal in the Court of Appeals); *Febre v. United States*, 396 U.S. 1225, 1226 (1969) (Harlan, J.) (remanding denial of bail pending appeal where the District Court did not explain its reasons for denying bail).

Mr. Boustani's bail application is properly before Your Honor. First, both the District Court and Court of Appeals have considered and ruled on Mr. Boustani's bail application. *See Supreme Court Practice*, § 17.16 ("At minimum the applicant [for bail before the Supreme Court] must show that efforts to secure relief were pursued not only in the federal district court but also in the appropriate court of appeals.").

Second, application to Your Honor for interim relief under Rule 22 of this Court is the appropriate mechanism to seek relief—as opposed to petition for writ of certiorari—because relief for Mr. Boustani in this case must be expedited in order to be effective. *Stack*, 342 U.S. at 4 (holding that where pretrial bail is challenged as excessive "relief . . . must be speedy if it is to be effective"). The indictment against Mr. Boustani alleges counts of wire fraud, securities fraud, and money laundering conspiracy for conduct arising out of work that Mr. Boustani performed in Mozambique. The Government has already produced to defense counsel over one million pages of documentary evidence, a voluminous amount of material that will be impossible for defense counsel to review with Mr. Boustani during visiting hours at the detention center where he is being held. All of the alleged wrongdoing occurred, and most of the relevant witnesses are located, overseas. Should Mr. Boustani be released on bail, he can participate in discussions with potential overseas experts and other witnesses via video conference, something he cannot do from jail. Therefore, if relief is not granted, Mr. Boustani, who is presumed to be innocent, will spend over 10 months in detention before trial commences and will be unable to meaningfully contribute to his own defense based on the erroneous legal conclusions of the courts below. *See id.* at 4 ("Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.") (internal citation omitted).

Finally, for the reasons described above, Mr. Boustani's application to Your Honor challenges only the erroneous legal conclusions of the courts below and thus does not "turn[] on what may fairly be called 'facts'" such that Your Honor would be required "to exercise an independent judgment as though [Your Honor] were sitting in the district court" as a factfinder.

Ward, 76 S. Ct. at 1066. The only question for Your Honor to consider is whether the courts below failed to apply the required statutory and constitutional standards before ordering Mr. Boustani's pretrial detention. Because the courts below did not consider how Mr. Boustani's proposed bail conditions would fail to reasonably assure his appearance in court, the answer to that question is yes, and the detention order against Mr. Boustani should be vacated.

CONCLUSION

Mr. Boustani respectfully requests that this Court grant his release on bail pending trial or remand to the District Court for reconsideration.

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Respectfully submitted,

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