No.

IN THE
Supreme Court of the United States

MICHAEL LEE FOSTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has not assessed the Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150, governing pretrial release for persons accused of federal crimes, since the 1980s, despite the growing number of presumptively innocent Americans jailed pretrial. In *United States v. Salerno*, 481 U.S. 739 (1987), the Court upheld the Act's constitutionality because Congress found certain serious offenders likely to re-offend yet carefully limited detention by requiring case-specific determinations. After *Salerno*, Congress amended the Act to include new offenses subject to a rebuttable presumption of detention but made no findings to support its further erosion of the norm that liberty should be preserved before conviction. Here, although Michael Foster is accused of committing post-*Salerno* offenses for which detention is initially presumed, the Act nonetheless required his release with the "least restrictive" conditions that "reasonably assure" community safety. 18 U.S.C. § 3142(c)(1). The Sixth Circuit concluded: (1) release conditions must effectively guarantee safety, and no "failsafe" exists to prevent re-offending behavior when, as here, allegations involve the internet because, outside of jail, the internet is ubiquitous, and (2) the global COVID-19 pandemic does not alter that calculation.

Does a categorical presumption of pretrial detention for internet-related offenses violate the Bail Reform Act and offend the Due Process and Excessive Bail Clauses of the U.S. Constitution? Should a pandemic weigh in favor of granting pretrial release?

PARTIES TO THE PROCEEDINGS

Michael Lee Foster, petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the plaintiff-appellee below.

RELATED PROCEEDINGS

1. United States District Court (E.D. Tenn.):
   A. *United States v. Foster*, No. 2:19-CF-193 (E.D. Tenn. Jan. 3, 2020) (magistrate judge's order of detention pending trial)
   B. *United States v. Foster*, No. 2:19-CF-193 (E.D. Tenn. Apr. 2, 2020) (magistrate judge's order of detention pending trial)
   C. *United States v. Foster*, No. 2:19-CR-00193-DCLC (E.D. Tenn. May 22, 2020) (district court order denying defendant's motion to revoke magistrate judge's detention order)

2. United States Court of Appeals (6th Cir.):
   A. *United States v. Foster*, No. 20-5548, 2020 U.S. App. LEXIS 22724 (6th Cir. July 20, 2020) (order affirming denial of pretrial release)
   B. *United States v. Foster*, No. 20-5548, 2020 U.S. App. LEXIS 26978 (6th Cir. Aug. 24, 2020) (order denying petition for rehearing en banc)

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Michael Lee Foster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

ORDERS BELOW

The order of the district court is unreported and reproduced at App. 9a.[1] The Sixth Circuit's order is unreported and reproduced at App. 1a. The Sixth Circuit's order denying rehearing en banc is unreported and reproduced at App. 36a.

JURISDICTION

The Sixth Circuit issued its decision on July 20, 2020. A timely petition for rehearing en banc was

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[1] "App." refers to the petition index; "R." refers to docket entries in the Sixth Circuit.

denied on August 24, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides: "[N]or shall any person…be deprived of life, liberty, or property, without due process of law…."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required…nor cruel and unusual punishments inflicted."

The pertinent provision of the U.S. Code governing the release or detention of defendants pending trial is reproduced in the appendix to this petition in full, App. 37a, and excerpted here:

(c) **Release on conditions**. (1) If the judicial officer determines that [release on personal recognizance or unsecured appearance bond]…will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person…(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure…the safety of any other person and the community…. In any case that involves a minor victim…any release order shall contain, at a minimum, a condition of electronic monitoring and [five other specified conditions].

(e) **Detention**. (1) If, after a hearing…the judicial officer finds that no condition or combination of conditions will reasonably assure…the safety of any other person and the community, such judicial officer shall order the detention of the person before trial….(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure…the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed…(E) an offense involving a minor victim….

(f) **Detention hearing**. (2) …The facts the judicial officer uses to support a finding…that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence….

(g) **Factors to be considered**. The judicial officer shall, in determining whether there are conditions of release that will reasonably assure…the safety of any other person and the community, take into account the available information concerning (1) the nature and circumstances of the offense charged…(2) the weight of the evidence against the person; [and] (3) the history and characteristics of the persons….

18 U.S.C. § 3142.

STATEMENT OF THE CASE

In *United States v. Salerno*, this Court held that the Bail Reform Act, which allows the federal government to jail individuals accused of crimes while awaiting the adjudication of their guilt or innocence, includes procedural "safeguards" sufficient to satisfy the Fifth Amendment's fundamental due process requirement and the Eighth Amendment's specific promise that "[e]xcessive bail shall not be required." 481 U.S. 739, 755 (1987). By the plain language of the Act, a magistrate cannot order pretrial detention unless she evaluates "the nature and circumstances of the offense" and "the history and characteristics of the person" and then finds that "no condition or combination of conditions will *reasonably assure*" community safety. 18 U.S.C. § 1342(g), (e) (emphasis added). *Accord Salerno*, 481 U.S. at 742. The Court's opinion rested on the "legislative intent" of the Act and Congress' "considered response" to the specific problem of crimes committed by persons on release. *Id.* at 747, 742.[2] This case presents the questions of (1) whether a magistrate may order detention to guarantee community safety, contrary to the plain language of the Act, and disregard the statutory directive to consider case-specific circumstances, (2) whether the lower courts' reliance on an amendment to the Act unsupported by congressional findings brings the Act into conflict with the Fifth and Eighth Amendments, and (3) whether the Act empowers courts to consider systemic conditions such that

[2] *See also id.* at 747, 750, 755.

government's interest in pretrial detention is weakened during a global pandemic.

At the time of his arrest in November 2019, Michael Foster had no criminal record.[3] He was over fifty years old,[4] and he had been married for decades, living in the same community for decades, and employed by the same company for decades.[5] As a child, he was involved in sports, became an eagle scout, and worked to help provide for his mother and sister after his adoptive father died.[6] As an adult, he has a "very close" relationship with his two grown children and "strong ties" to the community.[7] Those who know Mr. Foster have attested to his character.[8] At the time of his arrest, Mr. Foster also had several health conditions, including precancerous colon polyps, gastroesophageal reflux disease, and Ménière's disease, which is understood as an auto-immune disorder.[9]

Since his arrest, Mr. Foster has been kept in a county jail in Virginia where new inmates arrive daily and where, well into the pandemic, no COVID-19

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[3] App. 17a.

[4] R.6-1 (Appellant's Motion to Take Judicial Notice); App. 1a–2a.

[5] App. 17a–18a.

[6] R.12 at Page 15 (Appellant's Brief).

[7] App. 31a.

[8] App. 15a.

[9] App. 18a. *Cf. Doucett v. Strominger*, 112 A.D.3d 1030, 1030-31 (N.Y. App. Div. 2013) (referring to Ménière's disease as "autoimmune inner ear disease").

tests were conducted.[10] During this period, he has not received appropriate medical treatment for his ill health.[11] (The quick moving nature of the COVID-19 pandemic and the expedited review granted to pretrial release determinations suggest that additional, updated facts are worthy of this Court's notice.)[12]

The courts below determined that Mr. Foster must be jailed before his trial, even during the pandemic, because no conditions of release would protect the community. The detention orders from which he appeals are premised on the lower courts' interpretation of the Act, according to which (1) because Mr. Foster's alleged offenses involved a smartphone application, he may not be released because it is not possible to prevent all access to the internet, and (2) his admirable reputation in the community *supports* rather than undermines the

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[10] App. 1a–2a (taking judicial notice of COVID-19 restrictions and testing at Mr. Foster's facility, as well as his physician's interpretation of recent prison medical tests); R.6-1 (Appellant's Motion to Take Judicial Notice).

[11] *Id.*

[12] *See, e.g.*, *Merrill v. People First of Ala.*, 2020 U.S. LEXIS 5183, at *2 (Oct. 21, 2020) (Sotomayor, J., dissenting) ("The severity of the COVID-19 pandemic should, by now, need no elaboration.") (describing changed circumstances during month between findings of fact and court's ruling); *In re Von Staich*, 56 Cal. App. 5th 53 (2020) (finding deliberate indifference, in violation of Eighth Amendment, for state to disregard experts' conclusion that, because of COVID-19, it was essential to reduce prison population since pandemic has taken greatest toll among older individuals and in congregate living situations).

need for detention because he must have deceived those who knew him.

1. In March 2020, as awareness grew about the novel coronavirus and heightened risks of COVID-19 for certain populations,[13] Mr. Foster moved for pretrial release.[14] In support of his release, two witnesses testified, and he provided a written proffer that included multiple sworn declarations from family members; declarations from those in the local community supporting his release; medical records and letters from his primary care provider and gastrointestinal specialist documenting his medical conditions; medical and other information concerning the local jail where he is detained; and a report from a technology expert regarding computer and internet software and hardware restrictions that could be placed on Mr. Foster and his household.[15] He also offered a plan for his conditional release: his company said they would try to re-employ him,[16] his wife and adult daughter agreed to be third-party custodians,[17] and he agreed to remove the internet and internet-connected devices from his home, including his wife's and daughter's smartphones.[18]

The prosecution opposed his release, relying only on the criminal complaint and indictment in which

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[13] *Cf.* App. 30a.

[14] App. 11a, 18a.

[15] R.12, Page 13 (Appellant's Brief); App. 14a, 20a.

[16] App. 18a.

[17] App. 28a.

[18] App. 15a.

the government alleged that Mr. Foster enticed another to send him sexually explicit photographs and videos via the cell phone application Snapchat, in violation of 18 U.S.C. §§ 2251(a), 2252A, and 2422(b).[19] According to the government, when investigators traced the IP address of the Snapchat accounts, "they found it registered to Defendant, Michael Foster, identifying his home address and phone number."[20]

Although the magistrate judge heard testimony about Mr. Foster's "positive and commendable behavior…through the years" and received evidence that he is a "husband of many years; loving father; coach; well-respected member of his community; and very talented and loyal employee,"[21] Mr. Foster's request for release pending trial was rejected. The magistrate judge agreed that Mr. Foster is not a flight risk but concluded that he "has not introduced sufficient evidence to rebut the presumption" of detention regarding his dangerousness.[22]

The magistrate judge rested her conclusion that no condition or combination of conditions of release would reasonably assure the public's safety on two primary bases.

First, the court determined that, "If [Mr. Foster] did commit the crimes of which he is accused, he used

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[19] App. 11a; R.12, Page 13 (Appellant's Brief).

[20] App. 10a.

[21] App. 29a, 28a.

[22] App. 26a.

the internet as the mechanism for committing these crimes."[23] Consequently, "the Court would have to be convinced that [Mr. Foster] would not have access to the Internet," but "[w]hile the Court believes that [his family] would sincerely attempt to prevent Defendant from accessing the Internet," that was not possible "given the widespread availability of the Internet,"[24] which is "an essential part of how almost every aspect of the world operates today…."[25]

Second, the magistrate judge analyzed the pre-offense factors enumerated in 18 U.S.C. § 3142(g)—such as Mr. Foster's strong family and community ties, stable employment, stable addresses, and lack of criminal history—through the lens of the allegations: the magistrate concluded that Mr. Foster must be "a very dangerous master of deception," because the allegations are inconsistent with "the side [of him] that most of the world knew."[26]

In addition, the magistrate did not find that Mr. Foster "demonstrated himself to be in the population particularly vulnerable to Coronavirus."[27]

2. Mr. Foster then sought review by the district court pursuant to 18 U.S.C. § 3145(b).[28] The district

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[23] App. 32a.

[24] App. 33a.

[25] App. 32a. The magistrate judge's order does not state that she found the proposed third-party custodians "utterly incredible," but expressed a "lack of faith." App. 33a.

[26] App. 32a, 28a.

[27] App. 32a.

[28] App. 11a.

court affirmed the magistrate's pretrial detention order and concluded that Mr. Foster did not overcome the presumption of detention.[29] The court's evaluation of the § 3142(g) factors was thus "out of an abundance of caution and in the interest of thoroughness."[30]

Regarding potential conditions of release, the court stated that "simply removing internet access from the home does not adequately address the danger Defendant poses to the community."[31] Regarding the pre-offense factors, the district court stated that Mr. Foster's exemplary history and characteristics were "of limited value" because "[s]eldom does a defendant broadcast to the family and friends his intentions to" commit crimes.[32]

In addition, the district court concluded that Mr. Foster's risk of contracting COVID-19 is not a justification for release.[33]

3. Mr. Foster appealed to the Sixth Circuit pursuant to 18 U.S.C. § 3145(c) and 28 U.S.C. §

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[29] App. 21a–22a.

[30] App 16a.

[31] App. 21a.

[32] App. 19a. *Accord* App. 20a.

[33] App. 18a (reasoning that whereas § 3142(g)(3) factor regarding defendant's personal characteristics may include defendant's health, § 3142(g)(4) "focuses on 'the nature and seriousness of the danger to any person or the community that would be posed by the person's release,' not the danger to the defendant upon his detention").

1291.[34] A panel affirmed the pretrial detention order.[35]

Regarding potential conditions of release, the panel concluded that the district court's ruling (*i.e.*, that no set of pretrial release conditions would protect the public) was not "clearly erroneous," because the charges against Mr. Foster were "serious in nature" and "extremely dangerous to the community."[36] The panel described the harm caused by the type of offense alleged, [37] remaining silent on whether those accused of this type of offense tend to commit dangerous acts in the community after arrest.

Instead, the panel endorsed the view taken by district courts within the Sixth Circuit that such offenses are "particularly dangerous" because "'[T]here is simply no failsafe way to prevent any and all exposure,' even if a defendant forfeits all electronic devices and is denied access to the Internet."[38] And, "'The myriad of Internet-capable devices available,

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[34] *See In re Stone*, 940 F.3d 1332, 1339 n.2 (D.C. Cir. 2019) ("Whether a criminal defendant's appeal of his detention or release order is reviewable as a 'final order' under 28 U.S.C. § 1291 or as a 'collateral order,' the end result is the same: an appealable order.") (citations omitted).

[35] App. 3a–4a.

[36] App. 6a (quoting *United States v. Tang*, No. 3:19-cr-00014, 2019 U.S. Dist. LEXIS 98602, 2019 WL 2453655, at *4 (E.D. Ky. June 12, 2019)).

[37] App. 4a (explaining legislative history of 18 U.S.C. § 2251(a)).

[38] App. 6a (quoting *United States v. Cornish*, No. 3:20-CR-00003, 2020 U.S. Dist. LEXIS 54398, 2020 WL 1498841, at *4 (E.D. [Ky.] Mar. 30, 2020), and *Tang*, at *4).

including those that work with data plans rather than wifi access, render policing [defendant's] Internet use almost impossible.'"[39]

Regarding the pre-offense factors, the panel reasoned that Mr. Foster's positive history and characteristics favor release, but his "deceptive conduct…does not speak to his strength of character."[40]

In addition, the panel took judicial notice of Mr. Foster's medical records and the jail conditions but rejected the argument that special consideration should be given to medically vulnerable individuals during the global COVID-19 pandemic because the statutorily required factors are sufficient,[41] and, in any event, Mr. Foster's conditions "do not render him uniquely vulnerable."[42]

Finally, the panel rejected Mr. Foster's constitutional arguments. Finding no Fifth or Eighth Amendment violations, the panel declared that Mr. Foster received "full due process"; the Bail Reform Act "carefully limits the circumstances under which detention may be sought to the most serious of crimes" such that the "regulatory" pretrial detention order does not constitute punishment; and Mr. Foster

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[39] App. 6a (quoting *Cornish*, at *4).

[40] App. 5a.

[41] App. 3a.

[42] App. 5a–6a.

can pursue claims regarding his health and medical needs in a civil rights action under 42 U.S.C. § 1983.[43]

A petition for re-hearing was timely filed and subsequently denied.[44]

REASONS FOR GRANTING THE PETITION

Certiorari is warranted for three reasons. First, the decision below ignored the plain language of the Bail Reform Act and its requirement to set the "least restrictive" conditions that will "reasonably assure" community safety.[45] Instead, the Sixth Circuit ordered Mr. Foster jailed before his trial because it reasoned that "no condition" of release can guarantee community safety given that he is charged with internet-related offenses and there is "no failsafe way to prevent any and all" internet access.[46] In finding that pretrial detention is required unless community safety can be guaranteed and that no guarantee is possible when the allegations involve the internet, the Sixth Circuit's decision sanctioned lower courts' departures from the Act, turning the Act's rebuttable presumption of detention for certain offenses into a categorical detention requirement. In addition, federal appellate courts have been applying the Bail Reform Act's standards inconsistently, and therefore review by this Court is warranted to bring uniformity to the application of the Bail Reform Act when

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[43] App. 7a (quoting *Salerno*, 481 U.S. at 747).

[44] App. 36a.

[45] 18 U.S.C. § 3142(c).

[46] App. 6a (quoting *Tang*, at *4).

individuals are charged with offenses committed using the internet. *See* Sup. Ct. R. 10(a), (c).

Second, the Sixth Circuit's decision conflicts with *United States v. Salerno*, 481 U.S. 739, 750 (1987). *See* Sup. Ct. R. 10(c). In *Salerno*, this Court held that the Bail Reform Act retains the traditional presumption that bail shall be granted in all but the most serious cases and is constitutional because its terms are predicated on specific congressional findings. Namely, Congress justified a statutory, rebuttable presumption of detention on findings that individuals charged with certain "extremely serious offenses" are "far more likely" to be responsible for dangerous acts in the community after their arrest. *Salerno*, 481 U.S. at 747, 750 (citing Senate record). The post-*Salerno* expansion of presumptively detainable offenses is at issue in this case. For these new offenses, the Bail Reform Act's congressional record is marked by a "complete absence of legislative findings,"[47] such that there is no basis to believe individuals charged with the new offenses are more likely to commit dangerous acts in the community after arrest.[48] Yet, the Sixth Circuit rested its conclusion that Mr. Foster should be held in jail before his trial on the "serious" and "dangerous" nature of the offenses alleged in his case, despite no congressional findings to support that conclusion for purposes of pretrial detention. Review

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[47] 149 Cong. Rec. S5145 (daily ed. Apr. 10, 2003) (statement of Sen. Leahy).

[48] *See* Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub. L. 108-21, § 101, 117 Stat. 650, 651 (2003).

is therefore warranted to establish that the Bail Reform Act violates the Fifth and Eighth Amendments to the U.S. Constitution for the post-*Salerno* offenses.

Finally, the Bail Reform Act instructs courts to consider the accused's health when determining whether pretrial release is appropriate. 18 U.S.C. § 3142(g)(3)(A) (providing that court "shall" take into account "the history and characteristics" of person "including" the person's "physical…condition"). The Sixth Circuit concluded that the global COVID-19 pandemic need not be addressed outside the defendant-specific considerations enumerated in § 3142(f) and (g).[49] Lower courts have issued conflicting decisions concerning whether and, if so, how to account for the COVID-19 pandemic in Section 3142 determinations. Review by this Court is necessary to provide lower courts guidance because the nature of the novel coronavirus makes incarcerated people more vulnerable and the Bail Reform Act must remain a "carefully limit[ed]" exception to this country's norm of liberty. One should not be subjected to life-threatening conditions while waiting for trial.[50] *See* Sup. C. R. 10(c).

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[49] App. 2a–3a.

[50] *Cf. Foster v. Florida*, 537 U.S. 990, 992 (2002) (Breyer, J., dissenting) ("[T]he combination of uncertainty of execution and long delay is arguably 'cruel.' This Court has recognized that such a combination can inflict 'horrible feelings' and 'an immense mental anxiety amounting to a great increase of the offender's punishment.' ") (citations omitted).

The petition should be granted.

I. The Sixth Circuit's effective *per se* detention determination for offenses involving the internet is inconsistent with the plain language of the Bail Reform Act and conflicts with *United States v. Salerno*.

A. The Bail Reform Act reinforces that pretrial detention is the "carefully limited" exception to the right to bail.

For centuries, this Court has recognized that "a person arrested for a non-capital offense *shall* be admitted to bail." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citing Judiciary Act of 1789) (emphasis original). Indeed, this country's tradition of "freedom before conviction," *id.*, is reflected in or related to several constitutional rights. Namely, in conjunction with the fundamental right to due process protected by the Fifth Amendment, the Eighth Amendment's specific promise that "[e]xcessive bail shall not be required" also "permits the unhampered preparation of a defense[ ] and serves to prevent the infliction of punishment prior to conviction." *Id.* at 4. *Accord Jennings v. Rodriguez*, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) (summarizing history of the right to bail and noting that, under this Court's precedent, "both the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Bail Clause apply in cases challenging bail procedures").

In federal cases, the right to bail is governed by the Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156,

which retains the traditional presumption that bail shall be granted in all but the most serious cases. Given the fundamental nature of the right at stake, appeals of bail decisions must be decided "promptly." *See In re Stone*, 940 F.3d 1332, 1339 (D.C. Cir. 2019) (quoting 18 U.S.C. § 3145(c), denying petition for mandamus to review pretrial release conditions regarding public communications).

This Court has held that the Bail Reform Act offsets concerns about limitations on individuals' liberty with procedural due process provisions. *United States v. Salerno*, 481 U.S. 739, 750, 752 (1987) (upholding Act's constitutionality in response to facial challenge based on congressional findings and procedural "safeguards"). According to the Act, a court must order the release of an individual accused of a crime, either on his own recognizance or subject to the "least restrictive" conditions that will "reasonably assure" the "safety of any other person and the community." 18 U.S.C. § 3142(c). However, a court may order an individual detained pretrial if the person's release would endanger others and no condition or combination of conditions will "reasonably assure" others' safety. 18 U.S.C. § 3142(e). Dangerousness must "be supported by clear and convincing evidence." 18 U.S.C. § 3142(f). *Cf. Reno v. Flores*, 507 U.S. 292, 341–42 (1993) (Stevens, J., dissenting) (summarizing government's burden to prove detention as "not easily met" when government action infringes on fundamental rights, scrutinizing "legitimate and compelling" interests implemented in a manner that is "carefully limited" and "narrowly

focused"); *United States v. Montalvo-Murillo*, 495 U.S. 711, 713 (1990) (examining failure to comply with Bail Reform Act's prompt hearing provision).

i. The Bail Reform Act includes a rebuttable presumption of detention for a growing list of enumerated offenses.

The Bail Reform Act was enacted in response to "the alarming problem of crimes committed by persons on release." *Solerno*, 481 U.S. at 742 (quoting Senate report). Therefore, in certain serious cases Congress has established a rebuttable presumption of detention. *See* 18 U.S.C. § 3142(e). In these cases, the accused bears a limited burden of production (not persuasion) to rebut the presumption by presenting evidence that he is not a danger to the community. *United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010); *United States v. Taylor*, 289 F. Supp. 3d 55, 62–63 (D.D.C. 2018) (burden to offer "some credible evidence" contrary to presumption).

Initially, Congress "carefully limit[ed] the circumstances under which detention may be sought" to "individuals who have been arrested for a specific category of extremely serious offenses"—*i.e.*, if a case involves "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders"[51]—because "Congress specifically found that these individuals are far more likely to be responsible for dangerous

[51] *Salerno*, 481 U.S. at 747.

acts in the community after arrest." *Salerno*, 481 U.S. at 747, 750 (citing Senate report).[52]

After this Court analyzed the Bail Reform Act in *Salerno*, Congress broadened the types of offenses for which detention may be presumed. In 2003, Congress passed the "unlikely title[d]" Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003. Although the PROTECT Act was the legislative response to *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which this Court held that provisions of the Child Pornography Prevention Act of 1996 violate the First Amendment,[53] the PROTECT Act also became the vehicle to amend the Bail Reform Act.

The PROTECT Act nominally amended the Bail Reform Act to presumptively deny pretrial release "for those who rape or kidnap children"[54]—this is also how the amendment is referenced throughout the limited Congressional record[55]—though the amendment actually added twenty offenses.

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[52] *See id.* at 746–48 (stating Congress "carefully limits the circumstances under which detention may be sought to the most serious of crimes" such as "if case involves crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders"); 18 U.S.C. § 3142(e) (2002).

[53] *See United States v. Williams*, 553 U.S. 285, 289 (2008); *see also* PROTECT Act, Pub. L. 108-21.

[54] PROTECT Act, Pub. L. 108-21, § 203.

[55] H. Rep. No. 108-66, at 54 (2003) ("rebuttable presumption that child rapists and kidnappers should not get pre-trial release"); H. Rep. No. 108-47, at 18 (2003); *see also* 149 Cong. Rec. S5144–45 (daily ed. Apr. 10, 2003) (Statement of Sen.

Unlike the original list of offenses carrying a rebuttable presumption of detention,[56] the PROTECT Act did not include any findings about why the new offenses were included or a basis to believe that individuals charged with these offenses are more likely to be responsible for dangerous acts in the community after arrest. In fact, according to the lead Senate co-sponsor, the section amending the Bail Reform Act was "never…considered by the Senate, and received only the most cursory consideration by the House."[57] He further stated, "I am concerned that the complete absence of legislative findings supporting the new presumption could imperil its constitutionality under the Excessive Bail Clause. At a minimum, it could give defendants a good argument that the presumption should be overcome more easily than the authors of this provision perhaps intended.

Leahy) ("[At] Tuesday's conference...Republicans sprung a lengthy and complex amendment on the Democrats.…The sponsors denied a request to break briefly in order to give conferees a moment to analyze the document.…Then, to add insult to injury, the sponsors of the amendment misrepresented its contents in the conference meeting and quickly forced a vote before the conferees had a chance to review or debate the amendment."); 149 Cong. Rec. S5147 (daily ed. Apr. 9, 2003) (describing Section 203).

[56] *Cf.* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 Cardozo L. Rev. 1679, 1687 (Apr. 2012) (noting that, in addition to "child pornography offenses," "[o]ther crimes [of violence] on the list for limited pretrial release include sexual trafficking of children, terroristic offenses, drug trafficking, and other capital offenses").

[57] 149 Cong. Rec. S5147 (daily ed. Apr. 10, 2003) (Statement of Sen. Leahy).

That is what happens when we do not take the time to do things the right way." [58]

ii. Even in cases where pretrial detention is presumed, courts must consider whether any conditions of release will "reasonably assure" the safety of the community.

When a court orders a person to be detained pretrial, according to the Bail Reform Act, it is because the court has concluded that "no condition or combination of conditions will reasonably assure…the safety of the community." 18 U.S.C. § 3142(e), (f)(2). In addition, courts must fashion bail packages with the "least restrictive" condition or combination of conditions. 18 U.S.C. § 3142(c)(1)(B). The purpose of the condition or combination of conditions is, in relevant part, to "assure…the safety of any other person and the community." 18 U.S.C. § 3142(f), (g).

To determine whether conditions of release may reasonably assure safety, the Bail Reform Act specifies that courts must "take into account" certain factors including "the nature and circumstances of the offense charged," "the weight of the evidence against the person," and "the history and characteristics of the person," including the person's physical condition, family ties, employment, length of residence in the community, community ties, and criminal history. 18 U.S.C. § 3142(g). The same analysis applies in rebuttable presumption cases. *See*, *e.g.*, *United States*

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[58] *Id.*

v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986); *United States v. Enix*, 209 F. Supp. 3d 557, 574–75 (W.D.N.Y. 2016).

In *United States v. Karper*, a defendant charged with child pornography offenses was released pretrial with the condition not to use a computer or employ any internet capabilities, without first informing pretrial services. 847 F. Supp. 2d 350, 363–64 (N.D.N.Y. 2011). The court concluded that this condition by itself "eliminate[d] the possibility of potential on-going harm to children…." *Id.* at 363. However, the court noted that an even less restrictive condition would have served the government's compelling interest as it relates to future dangerousness and met the statute's objectives without being oppressive: a condition simply "not to commit any crime, nor re-offend, during the pendency of this prosecution." *Id.* (finding conditions excessive as applied). *Accord United States v. Djoko*, No. CR19-0146-JCC, 2019 U.S. Dist. LEXIS 170496, at *17–18 (W.D. Wash. Oct. 1, 2019) (concluding that condition prohibiting defendant from accessing internet without pretrial services' prior approval "should be especially effective at reducing the risk of further" offenses); *United States v. Heckley*, No. 15-mj-3075-KAR, 2016 U.S. Dist. LEXIS 42470, at *6–7 (D. Mass. Mar. 30, 2016) (conditions included no electronic device with internet capability or internet access); *United States v. Pullen*, No. CR 12-0829 MAG, 2012 U.S. Dist. LEXIS 179593, at *15–16 (N.D. Cal. Dec. 18, 2012) (conditions to "mitigate any danger Defendant poses" included home confinement without

internet access);[59] *United States v. Merritt*, 612 F. Supp. 2d 1074, 1075–76 (D. Neb. 2009) (conditions included no computer access without prior approval, no internet, e-mail, or online inter-computer communications, and unannounced examinations of computer hardware and software). *Contra United States v. Dhavale*, No. 19-mj-00092, 2020 U.S. Dist. LEXIS 69800, at *11 (D.D.C. Apr. 21, 2020) ("Given the ubiquity of internet-capable devices and defendant's skill in usage, the danger presented by his release to the community is obvious….").

Conditions prohibiting defendants from committing additional offenses—or accessing the internet—are sufficient to ensure community safety, courts have held, because Congress has made offenses committed while on release subject to heightened punishments. *See, e.g.*, *United States v. Reulet*, 658 Fed. Appx. 910 (10th Cir. 2016) (citing 18 U.S.C. § 3148); *United States v. Kentz*, 251 F.3d 835 (9th Cir. 2001), *cert. denied*, 535 U.S. 933 (2002) (citing 18 U.S.C. § 3147).

iii. Congress has established conditions when the allegations involve minors.

Congress has specified appropriate conditions of release when some defendants have been charged with an offense involving a minor. *Id.* § 3142(c)(1). In

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[59] *Compare United States v. Marigny*, No. 20-mj-70755-MAG-1, 2020 U.S. Dist. LEXIS 132653, at *7 (N.D. Cal. July 24, 2020) ("While phones and computers may be placed out of reach to limit Defendant's Internet access, they are overwhelmingly available in the community….").

2006, Congress passed the Adam Walsh Child Protection and Safety Act, which amended the Bail Reform Act to require that, for a person charged with listed offenses involving minors, any pretrial release order must prescribe certain conditions. Pub. L. 109-248, § 216, 120 Stat. 587, 617 (2006). Specifically, the order must provide for, at minimum, (1) electronic monitoring; (2) restrictions on personal associations, place of abode, or travel; (3) no contact with an alleged victim or potential witnesses; (4) regular contact with law enforcement; (5) a curfew; and (6) a prohibition on dangerous weapons. 18 U.S.C. § 3142(c)(1).[60] The listed offenses include those where use of the internet is an express or implied element. *E.g.*, 18 U.S.C. § 2252(a)(1) ("knowingly transports or ships using any means…including by computer"). The Bail Reform Act therefore countenances the release of persons charged with offenses involving minors, even when the allegations include use of the internet.

iv. Pretrial bail determinations equate to post-conviction sentencing determinations.

When trial courts sentence defendants who have been convicted of offenses involving minors, they must undertake a similar analysis to that required by Section 3142. *See* 18 U.S.S.G., Appx. § 1B1.13; *United States v. Pennington*, 606 F. App'x 216, 221 (5th Cir.

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[60] Defendants have successfully challenged the constitutionality of these automatic provisions. *E.g.*, *United States v. Polouizzi*, 697 F. Supp. 2d 381, 386–87 (E.D.N.Y. 2010) (collecting cases).

2015) (noting that supervised release conditions must be related to nature and circumstances of offense and defendant's history and characteristics but "cannot impose any 'greater deprivation of liberty than is reasonably necessary' to advance deterrence, protect the public from the defendant, and advance the defendant's correctional needs") (citations omitted). Despite the confirmation at the sentencing stage of the proceedings that the person committed the offense, courts regularly order conditions of supervised release concerning computer and internet access; some conditions fall short of a total ban on internet use.

In fact, courts that disallow blanket prohibitions on internet access while on release do so because technology plays an increasingly indispensable role in modern life. As explained by the Second Circuit, "Although Internet access through smart phones and other devices undeniably offers the potential for wrongdoing, to consign an individual to a life virtually without access to the Internet is to exile that individual from society." *United States v. Eaglin*, 913 F.3d 88, 91 (2d Cir. 2019) (rejecting broad ban on internet access and possession of legal adult pornography). "As the Supreme Court recently reiterated, 'cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society.'" *Id.* (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2210 (2018) (quoting *Riley v. California*, 573 U.S. 373 (2014))). Indeed, the Tenth Circuit also recently concluded that a special

condition of supervised release banning a defendant's use of computers and internet devices in the absence of permission from his parole officer was overbroad because it involved a greater deprivation of liberty than reasonably necessary. *United States v. Blair*, 933 F.3d 1271, 1272 (10th Cir. 2019). In *Blair*, the defendant pleaded guilty after he was found in possession of more than 700,000 images of child pornography. *Id.* However, the court recognized the internet as "one of the central means of information-gathering and communication in our culture today" and "a means of communication that has become a necessary component of modern life."[61] "[T]he role that computers and the Internet play in our everyday lives has become even more pronounced, and we expect that trend to continue.…We must read our prior cases in light of the evolution of the Internet and the public's dependency on it." *Id.* at 1277.

B. The Sixth Circuit's order endorses a non-rebuttable presumption of detention for cases involving the internet, contrary to the plain language of the Bail Reform Act.

This Court's precedent confirms that, contrary to the Sixth Circuit's ruling, most individuals accused of crimes should not be detained before trial. *Salerno*, 481 U.S. at 750. Accordingly, for even the most serious offenses, courts must identify conditions that will assure the safety of the community; such

[61] *Id.* at 1276, 1277 (citations omitted).

conditions should be the least restrictive to achieve those goals. 18 U.S.C. § 3142(c)(1)(B).

The Sixth Circuit's order, by contrast, amounts to a *per se* denial of bail for offenses involving the internet, in contravention of fundamental rights. *See United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006) ("Neither *Salerno* nor any other case authorizes detaining someone in jail while awaiting trial, or the imposition of special bail conditions, based merely on the fact of arrest for a particular crime. To the contrary, *Salerno* . . . upheld the constitutionality of a bail system where pretrial defendants could be detained only if the need to detain them was demonstrated on an individualized basis."); *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014) ("Lawmakers may rely on 'reasonable presumptions and generic rules,' when a regulation 'involves no deprivation of a "fundamental" right'….") (citations omitted).

This Court upheld the constitutionality of the Bail Reform Act under the Due Process Clause of the Fifth Amendment and the Excessive Bail Clause of the Eighth Amendment because it concluded that its provisions for pretrial detention "fall within th[e] carefully limited exception" to our society's norm of liberty. *Salerno*, 481 U.S. at 755. The Act, as this Court analyzed it in the 1980s, only authorized the detention of individuals found "to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *Id.* To be constitutional, restrictions on pretrial release of adult

arrestees must be carefully limited to serve a compelling governmental interest. *Id.* at 748–51.

Therefore, except in outlier cases, courts are instructed to craft the "least intrusive" condition or conditions to "reasonably assure" public safety in order to justify pretrial detention for individuals not yet convicted of crimes. These terms are not defined by the Act,[62] but Congress knows how to draft statutes that require certain outcomes, and Congress did not require magistrates to establish conditions that "guarantee" safety and did not do so here.[63]

In this case, the Sixth Circuit concluded that *no* conditions of release could reasonably protect others because the alleged offenses "are particularly dangerous" and there is "no failsafe way" to prevent Mr. Foster from accessing the internet.[64] The Sixth Circuit's position regarding conditions of release amounts to a *per se* rule that persons charged with offenses involving technology cannot be released and home detention with conditions governing access to

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[62] *See* 18 U.S.C. § 3156 (Definitions).

[63] *See United States v. Fortna*, 769 F.2d 243, 250 (5th Cir. 1985) ("[T]he standard is reasonably assure appearance, not 'guarantee' appearance, and that detention can be ordered on this ground only if 'no condition or combination of conditions will reasonably assure the appearance.' "). *Accord United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990); *United States v. Portes*, 786 F.2d 758, 764 n.7 (7th Cir. 1985); *United States v. Orta*, 760 F.2d 887, 890–92 (8th Cir. 1985); *United States v. Hir*, 517 F.3d 1081, 1092 n.9 (9th Cir. 2008); *United States v. Xulam*, 84 F.3d 441, 444 (D.C. Cir. 1996); *see also United States v. Thornton*, 787 F.2d 594, *5 (6th Cir. 1986).

[64] App. 6a (quoting *Cornish*, at *4; *Tang*, at *4).

the internet can never reasonably assure community safety (either before trial or after conviction). If accepted, the Sixth Circuit's logic—that a person cannot be released if he could potentially access the instrumentality of the alleged offense—suggests that virtually all defendants should be kept in the government's custody both before and after trial. *Cf.* 18 U.S.C. § 3583 (authorizing conditions of supervised release after imprisonment). Drugs, money, and weapons are, after all, ubiquitous, too.

The Sixth Circuit opinion establishes an effective blanket prohibition on the release of defendants charged with offenses involving the internet such that it is in direct conflict with this Court's holding that the Bail Reform Act is constitutional insofar as it provides for an individualized judicial assessment. *Cf. United States v. Patriarca*, 948 F.2d 789, 792 (1st Cir. 1991) (summarizing that, "although *in theory* a Mafia Boss was an intimidating and highly dangerous character, the government had not demonstrated that *this Boss* posed a significant danger, or at least not a danger that could not be overcome given appropriate conditions") (emphasis original); *United States v. Manafort*, 897 F.3d 340, 348 (D.C. Cir. 2018) (ruling based on defendant's course of conduct).

The Sixth Circuit's ruling that Mr. Foster may be detained in order to effectuate a total prohibition on internet access resembles the state statute that this Court examined and found unconstitutional in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017). In *Packingham*, the Court struck down a

North Carolina criminal statute that made it a felony for sex offenders to access certain social media websites. 137 S. Ct. at 1738. The Court reasoned that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights." *Id.* at 1737. By enforcing this restriction, "North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Id.*

The Second Circuit has similarly concluded that a condition of supervised release prohibiting internet access does not survive constitutional scrutiny. *See Eaglin*, 913 F.3d at 95–96. In *Eaglin*, the court found that the defendant "has a First Amendment right to be able to email, blog, and discuss the issues of the day on the Internet while he is on supervised release. Moreover, one of the conditions of supervised release is that he remain employed: to search for a job in 2019, the Internet is nearly essential…." *Id.* at 95–96. Here, even recognizing that certain restrictions may be permissible as conditions of release when they would not as similarly applicable statutes, *id.* at 96, the Sixth Circuit's order effectuates a broad restriction prohibiting internet access in the most extreme way: by requiring Mr. Foster to be imprisoned before he has even been found guilty, rather than in the least restrictive manner required by the Bail Reform Act.

This Court recognizes that "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people" and that legislation may seek to protect against this conduct, "But the assertion of a valid governmental interest 'cannot, in every context, be insulated from all constitutional protections.' " *Packingham*, 137 S. Ct. at 1736 (internal citations omitted). Therefore, the right to due process and to be free from excessive bail and pre-conviction punishment must mean that the Sixth Circuit's interpretation of the Bail Reform Act cannot stand. The Bail Reform Act cannot justify detention to avoid *all* risk of future dangerousness. *Cf. Parretti v. United States*, 122 F.3d 758, 780 (9th Cir. 1997).

C. The Courts of Appeals disagree regarding whether persons charged with offenses involving minors via the internet may be released pending trial.

The Sixth Circuit took the position that seems to mean a defendant charged with an offense involving a smartphone application cannot be released because it would be impossible to prevent all access to the internet, given the internet's ubiquity in society. The Sixth Circuit's decision in *Foster* therefore conflicts with other appellate courts' positions regarding whether a defendant charged with an offense against a minor may be released pretrial when the allegations involve use of the internet.

In *United States v. Deutsch*, the Second Circuit addressed the propriety of a defendant's release

pending trial on multiple counts of attempted and actual production of child pornography. No. 20-1745-cr, 2020 U.S. App. LEXIS 30481, at *1 (2d Cir. Sep. 22, 2020).[65] The allegations against the defendant unquestionably subjected the defendant to a rebuttable presumption of pretrial detention, *id.* at *1–2, and the government sought a permanent order of detention pending trial. *Id.* at *2. In *Deutsch*, "all of Defendant's alleged criminal conduct took place online."[66] However, contrary to the Sixth Circuit's conclusion that no conditions of release would be possible for defendants charged with committing crimes involving minors via the internet, the Second Circuit upheld a trial court's decision to authorize conditions of release which included a prohibition on the use of "any internet capable devices,"[67] and pretrial services being able to remotely monitor electronic devices, including a router, possessing "complete control of the internet in" the defendant's home.[68] The appellate court reviewed the trial court's findings as to potential danger to the community for clear error and concluded that no mistake had been

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[65] According to the Second Circuit's local rules, summary orders do not have precedential effect. 2d Cir. IOP 32.1.1. However, the rule also provides that citation is permitted and governed by the federal appellate procedure rules, according to which courts may not restrict citations to judicial dispositions designated "non-precedential" or "not precedent." Fed. R. App. P. 32.1(a).

[66] *United States v. Deutsch*, No. 18-cr-502 (FB), 2020 U.S. Dist. LEXIS 115466, at *11–12 (E.D.N.Y. July 1, 2020).

[67] *United States v. Deutsch*, No. 18-cr-502 (FB), 2020 U.S. Dist. LEXIS 104547, at *2 (E.D.N.Y. June 4, 2020).

[68] *Deutsch*, 2020 U.S. Dist. LEXIS 115466, at *12.

made such that the government's arguments were "without merit." *Id.* at *2, *3. The District Court authorized the release "only after reasonably concluding" that "the conditions of release (including extensive electronic and physical monitoring by the Government) reasonably assured the safety of the community…." *Id.* at *2–3. *See also United States v. Deppish*, 554 F. App'x 753, 754 (10th Cir. 2014) (concluding that because defendant's conduct "went beyond passively accessing child pornography to actively posting sexually suggestive photographs of a minor family member on the internet," government's position was "strong enough to justify imposing the challenged conditions of release," including no contact with minors without adult supervision and electronic monitoring).

In cases where the alleged offense involved use of a computer, courts within the Second,[69] Eighth,[70] and Ninth[71] Circuits have also concluded that conditions requiring a defendant not to use a computer or to do so only after informing pretrial services are sufficient to ensure community safety. Mr. Foster proffered expert testimony that his house could be monitored and his access to the internet foreclosed.[72] Therefore, this Court should grant this petition to resolve the conflict between the Second and Sixth Circuits on this important question.

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[69] *Karper*, 847 F. Supp. 2d at 363–64.

[70] *Merritt*, 612 F. Supp. 2d at 1075–76.

[71] *Djoko*, at *17–18.

[72] R.12, Page 12 (Appellant's Brief).

D. Applying a presumption of detention for cases involving minors violates the Fifth and Eighth Amendments, according to *Salerno*, because Congress made no findings justifying pretrial detention in such cases.

There is no evidence that cases in which an individual is charged with an offense involving a minor correlate with greater pretrial danger to another person and the community. *Accord Lopez-Valenzuela*, 770 F.3d at 785–87 (concluding no evidence undocumented status correlates closely with unmanageable flight risk). The question is not whether the offense, if proven, constituted harm to the victim[73] but whether the individual alleged to have committed the offense would be a danger while awaiting trial. As described *supra*, there are no findings in the Congressional record to support the statutory presumption that individuals charged with offenses against minors are more likely to re-offend while on release awaiting trial.

In *Salerno*, this Court explained a restriction on liberty constitutes either an "impermissible punishment" or a "permissible regulation" based on legislative intent. *Salerno*, 481 U.S. at 747. Even if Congress did not "expressly intend[ ] to impose

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[73] For example, the Sixth Circuit cited the legislative history for § 2251 in which Congress found that the use of "children in the production of sexually explicit materials…is a form of sexual abuse." App. 4a (quoting *United States v. Champion*, 248 F.3d 502, 506 (6th Cir. 2001)). *Champion* examined § 2251 for purposes of a Sentencing Guidelines determination.

punitive restrictions," a restriction may constitute impermissible punishment, depending on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* (citation omitted). Using this framework, this Court concluded that the Bail Reform Act was regulatory—not punitive—because "Congress specifically found that these individuals are far more likely to be responsible for dangerous acts in the community after arrest," *id.* at 750. As such, the legislative history "clearly indicates" that pretrial detention was crafted to address "a pressing societal problem" related to "dangerous individuals," and the Act "carefully limit[ed] the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 747. *See also id.* at 750 ("narrowly focuses on particularly acute problem" and "operates only on individuals who have been arrested for a specific category of extremely serious offenses"); *id.* at 754–55.

The Sixth Circuit relied on the Bail Reform Act's presumption of detention for offenses involving minors to support its unconstitutionally generalized conclusion that individuals charged with offenses involving minors cannot be released pending trial, if the offense was committed via internet-connected devices, regardless of the person's history and characteristics or conditions of release. The lower court's reasoning cannot be reconciled with *Salerno*. Given that this Court's holding in *Salerno* relied on

the Congressional findings to support the government's interest in detention, this Court should grant the Petition to evaluate the constitutionality of the PROTECT Act amendments to the Bail Reform Act of 1984.

II. The Courts of Appeals need this Court's guidance regarding whether the global COVID-19 pandemic is an appropriate basis for pretrial release.

The Sixth Circuit concluded, contrary to the Second Circuit and lower courts across the country, that the Bail Reform Act does not anticipate conditions beyond the case when determining whether to grant pretrial release.[74] The Sixth Circuit suggested that the COVID-19 pandemic does not materially affect the release calculation. However, incarcerated people have a "greater risk of transmission" than the general population because of "the highly congregational environment, the limited ability of incarcerated persons to exercise effective disease prevention measures (*e.g.*, social distancing and frequent handwashing), and potentially limited

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[74] App. 3a ("We need not add the *Clark* factors to the statutorily-required review of the § 3142(f) and (g) factors…."). In *Clark*, the district court was "mindful of the unprecedented magnitude of the COVID-19 pandemic and the extremely serious health risks it presents" but concluded that it must still make individualized determinations, including but not limited to "the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant" and "the likelihood that the defendant's proposed release would increase COVID-19 risks to others." *United States v. Clark*, 448 F. Supp. 3d 1152, 1156–57 (D. Kan. 2020).

onsite healthcare services." *United States v. Haun*, No. 3:20-CR-024-PLR-DCP, 2020 U.S. Dist. LEXIS 63904, at *9–10 (E.D. Tenn. Apr. 10, 2020).

In *United States v. Deutsch*, the Second Circuit rejected the government's challenge to the trial court's determination that "the changing circumstances caused by the COVID-19 pandemic justified reversing its prior denial of bail." 2020 U.S. App. LEXIS 30481, at *1. The trial court had "recognize[d] that the government remains steadfast in its position that bail should not be granted under any circumstances. But changing circumstances have tipped the balance into now allowing bail under those strict conditions."[75]

In *Salerno*, this Court affirmed that, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 745. "The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, '[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.' " *Jennings*, 138 S. Ct. at 861–62 (Breyer, J., dissenting) (collecting cases). Unfortunately, today, in addition to individuals held pretrial by states, there are an estimated 55,000 federal pretrial detainees.[76]

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[75] *Deutsch*, 2020 U.S. Dist. LEXIS 104547, at *3.

[76] *See* U.S. Marshals Service, Duties, Prisoner Operations, https://www.usmarshals.gov/careers/duties.html.

Some lower courts have concluded that COVID-19 rebuts the presumption of dangerousness. For example, in *United States v. McLean*, the court concluded that "COVID-19 tips the scales in Defendant's favor on [two of the § 3142(g) factors], it also provides a 'basis to conclude that the case falls "outside the congressional paradigm" giving rise to the presumption' that Defendant poses a danger to the community." No. 19-cr-380, 2020 U.S. Dist. LEXIS 90691, at *1–2 (D.D.C. Mar. 28, 2020) (quoting *Taylor*, 289 F. Supp. 3d at 63 (quoting *Stone*, 608 F.3d at 945–46)). Specifically, the defendant was especially at risk due to his diabetes and age (55 years old): "When combined with increased mortality rates for those over 50 and the fact that Defendant also suffers from sleep apnea, Defendant is undeniably at risk." *Id. Cf. United States v. Kennedy*, 449 F. Supp. 3d 713, 715 (E.D. Mich. 2020) (releasing defendant because COVID-19 constitutes "an independent compelling reason" for temporary release and "is necessary for Defendant to prepare his pre-sentence defense").

The global COVID-19 pandemic is relevant to the pretrial release or detention determination because this Court recognizes constitutional limits on pretrial detention: "[I]f the offence be not bailable, or the party cannot find bail, he is to be committed to the county [jail] ... [b]ut ... only for safe custody, and not for punishment." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015). Persons held in pretrial detention cannot, consistent with the Fifth and Eighth Amendment, be held in conditions that "amount to punishment." *Id.* at 2477 (Scalia, J., dissenting)

(discussing *Bell v. Wolfish*, 441 U.S. 520 (1979), which held that Due Process Clause forbids holding pretrial detainees in conditions that "amount to punishment"). However, the infection and death rates from COVID-19 for incarcerated populations are higher than average. *See Ahlman v. Barnes*, 445 F. Supp. 3d 671, 689 (C.D. Cal. 2020) (referencing "astronomical" infection rate in jail compared to general population); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 403 (E.D. Pa. 2020) (noting, as early as April 2020, that "[s]ome jails and prisons have already become COVID-19 hotspots" with rates in jail outpacing adjoining city, and a federal facility that recently " 'exploded with coronavirus' cases"). For those like Mr. Foster who have underlying health conditions and are over 50 years old, pretrial detention during the global COVID-19 pandemic where the conditions of confinement are known to encourage transmission amounts to punishment. The Sixth Circuit refused to consider COVID-19 as an independent basis for pretrial release and therefore raises an issue of importance this Court should address.

Even before the pandemic, pretrial detainees have died in custody, without ever having been convicted.[77] *Cf. Barnes v. Ahlman*, 140 S. Ct. 2620, 2624 (2020) (Sotomayor, J., dissenting) ("It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where

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[77] *See* Peter Eisler *et al.*, *Dying Inside: The Hidden Crisis in America's Jails*, Reuters (Oct. 16, 2020).

inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm[.]") (citation omitted). This Court should grant the petition to ensure that lower courts take the global COVID-19 pandemic into consideration when evaluating pretrial detention determinations.

CONCLUSION

The petition for a writ of certiorari should be granted. This Court's guidance is necessary to correct the inconsistent application by lower courts of the plain language of the Bail Reform Act, which requires courts to set the least restrictive conditions that reasonably assure community safety, consistent with individuals' liberty interests and the Constitutional protections against excessive bail. In addition, when lower courts transform the Act's required individualized detention determinations into categorical ones based on the offense alleged, this Court must intervene to correct the course whereby detention is the default determination, especially when the offense is one for which no congressional findings have been made regarding pretrial dangerousness. Lastly, this Court's guidance is needed to resolve the courts of appeals' differences on whether the Bail Reform Act is flexible enough to factor the global COVID-19 pandemic into detention decisions for individuals not convicted of any charged crime, presumed innocent.

Respectfully submitted,

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