No. 22-835

IN THE

Supreme Court of the United States

BRADLEY HESTER,

Petitioner,

v.

MATTHEW GENTRY,

Respondent.

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

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS OF BAIL

KELLEN R. FUNK
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

SANDRA G. MAYSON
U. PENNSYLVANIA CAREY LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19103

JAMES F. BOGAN III
Counsel of Record
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street NE, Suite 2800
Atlanta, GA 30309
(404) 815-30309
jbogan@kilpatricktownsend.com

April 3, 2023

QUESTION PRESENTED

Whether the Due Process Clause protects a fundamental right to pretrial liberty that prevents states from depriving a presumptively innocent person of physical liberty pending a criminal trial unless a court finds that the deprivation is necessary to protect public safety and/or reasonably assure the person's appearance at future court proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(Continued)

Page

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE* [1]

Sandra G. Mayson and Kellen R. Funk are professors at the University of Pennsylvania Carey Law School and Columbia Law School, respectively. They teach and write about the law of American bail from constitutional, procedural, and historical perspectives and have an interest in the sound development of these fields.

SUMMARY OF ARGUMENT

As scholars of the history and practice of bail, we urge the Court to clarify what was abundantly clear to the founding generation: that when the government proposes to incarcerate a person before trial, it must provide thorough justification and process, whether the mechanism of detention is a detention order or its functional equivalent, the imposition of unaffordable money bail. This principle follows from the respect for liberty the Constitution enshrines. The protections of the criminal process—including the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the institution of bail itself—are meant to deny the state the power to imprison people on a mere accusation. These protections are

---

[1] *Amici curiae* notified the parties at least 10 days prior to the filing of this brief of their intent to file it. *See* Sup. Ct. R. 37.2. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

illusory if a court can detain a person by casually imposing a monetary bail amount that he cannot pay.

In this case, the Eleventh Circuit misconstrued both precedent and American legal tradition when it declared that there is "no fundamental right to pretrial release," such that accused persons may be detained indefinitely with minimal process. *Schultz v. Alabama*, 42 F.4th 1298, 1332 (11th Cir. 2022). The Eleventh Circuit reached that conclusion by relying on the premise that cash bail is a longstanding American tradition. This premise is demonstrably false. In the founding era and, indeed, until the latter half of the nineteenth century, "bail" referred to a process of release on the unsecured pledge of a defendant or his sureties.

On the other hand, there *is* a longstanding American tradition of strict protection for pretrial liberty, one that arises out of the Founders' commitment to religious liberty. Well before the founding era, the signal acts of English constitution-making aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. Religious settlers in America, including William Penn and the New England Puritans, went even further, protecting a right to pretrial liberty in all non-capital cases, an expansion of pretrial protections that was on its way to becoming the universal American rule by the 1780s. As the religious dissenters understood better than most, pretrial liberty was a fundamental right in the sense that it safeguarded all others, including rights to speak, believe, and transact free from government persecution. This Court's substantive due process jurisprudence has recognized and affirmed the

importance of pretrial liberty and the principle that detention must be limited by robust substantive and procedural safeguards.

The Eleventh Circuit ignored both precedent and legal tradition in rejecting the petitioners' substantive due process claim out of hand. The panel's errors reflect growing dissensus among the lower courts about the constitutional limits on detention before trial. This Court should grant the petition for a writ of certiorari in order to clarify those limits. In so doing, the Court would correct a significant departure from centuries of solicitude for the liberty rights of accused persons and from the guidance of the Court's precedent.

ARGUMENT

I. CASH BAIL IS A RECENT DEVELOPMENT, NOT A TIMELESS TRADITION

The Eleventh Circuit's rejection of the petitioners' claims followed in part from the erroneous premise that secured money bail is a timeless American tradition. Quoting *Stack v. Boyle*, 342 U.S. 1, 5 (1951), and citing an amicus brief filed by bail bondsmen associations, the panel wrote:

> Bail is a liberty preserving device—it balances the community's interest in security and the defendant's interest in liberty by allowing that defendant to "deposit ... a sum of money subject to forfeiture," which serves as "assurance of the presence of an accused' at trial. Since before the days of the Magna Carta,

> society has used the posting of surety as a mechanism for the accused to secure their pretrial release.

Schultz v. Alabama, 42 F.4th 1298, 1330 (11th Cir. 2022) (citations omitted). This passage conflates "bail" with an upfront cash deposit, takes language from *Stack* out of context, and suggests that money bail dates to before the Magna Carta. In fact, however, money bail is a "modern practice", as *Stack* itself recognized. 342 U.S. at 5. The Founders would have been unfamiliar with—and thus did not explicitly or implicitly condone—policies that made a defendant's pretrial liberty dependent on his ability to proffer cash or secured collateral.

The meaning of "bail" in the criminal context at the time of the founding was merely "delivery" of a person to his "sureties" in exchange for some pledge—not an actual deposit. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769) (describing system); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (distinguishing the "modern practice" of deposit bail from "the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused"). In a comprehensive review of thousands of bail determinations in Philadelphia from 1790 to 1802, and in thousands of other archival bail records from the same period in New York, Massachusetts, and South Carolina, we can establish that bail consisted of *pledges* to forfeit property in the *future* upon the absconding of a defendant, never a *present payment* of the bail amount in cash or any other tangible property. Indeed, in all the archives public and private, state and federal, the most glaring absence in the early "money bail system" is the money.

Funk & Mayson, *Bail at the Founding*, HARV. L. REV. (forthcoming 2023). Scholars have yet to find a single instance of a pretrial defendant detained for failure to pay a cash bail deposit at the time of the Founding, nor any offer or acceptance of bail collateral with a justice of the peace or a court of record from the period. *See id.*; Timothy R. Schnacke, *A Brief History of Bail*, 57 Judges' J. 4, 6–7 (2018) (recognizing that early bail practice consisted entirely of "unsecured" pledges).

Founding-era treatise literature uniformly confirms that property was not attached, transferred, or secured in advance of trial. Because attachment occurred—if at all—only after the default of the defendant the Government's successful prosecution of the resulting obligation, judging a surety's sufficiency was no easy task for local magistrates. Since property was merely pledged in a recognizance and not posted upfront, a magistrate or justice of the peace could only guess what property might be available to collect if a forfeiture ever came due. To aid his guess, he could put sureties under oath and examine them about their holdings. *See* OLIVER LORENZO BARBOUR, THE MAGISTRATE'S CRIMINAL LAW 502–03 (1841) (collecting authorities); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 100–02 (1st Am. ed. 1819 [1816]). Still, at no time during these proceedings was the property itself attached or offered to the magistrate.

The treason trial of Aaron Burr provides a clear example of the unmonetized surety system in operation. Burr's counsel took it for granted that "[i]n this country the only mode of establishing . . . the amount of bail to be taken from any individual is by looking at the state of his property. A man of no

property ought not to be required to give bail in a large sum of money. . . . [T]he court always inquires what the accused is worth, and makes him give security accordingly." 2 BURR TR. 458. Chief Justice John Marshall agreed, adjusting Burr's bail amount from $10,000 to $5,000 as the trial progressed and Burr's financial condition worsened. *Id*. at 487, 503. Still, in requiring bail of $10,000, $5,000, or later $3,000 of Burr and his sureties, the court at no point demanded or accepted a monetary payment. All of the bail "taken" consisted of pledges from Burr or Richmond merchants that they would forfeit the specified sums if Burr violated the conditions of his release in the future—what is today regarded as "unsecured" bail. Funk & Mayson, *Bail at the Founding*; Schnacke, *Brief History of Bail*, 6–7.

Only in the last century has the term "bail" commonly incorporated upfront transfers intended to secure an appearance. Schnacke, *Brief History of Bail*, 6–7. Modern bail policies that require upfront payment are therefore substantially different from the bail systems reflected in early English and American case law, with different effects on those who lack ready access to cash. *See Holland v. Rosen*, 895 F.3d 272, 293–95 (3d Cir. 2018) (discussing the transition from a surety system to secured cash bonds in the "mid-to-late Nineteenth Century," and subsequent efforts by "federal and state governments to reform their bail laws to deprioritize monetary bail" in light of, *inter alia*, concerns about discrimination against the poor). The Founders would not have recognized the bail system as it exists today—and never condoned bail policies that condition liberty on a defendant's ability to pay.

II. THERE IS AN AMERICAN TRADITION OF PROTECTION FOR PRETRIAL LIBERTY

While the form of bail has changed recently and dramatically, the Anglo-American tradition of imposing strict procedural protections against arbitrary pretrial detention is longstanding. Indeed, the tradition was well-established long before the drafting of the U.S. Constitution.

The tradition finds its clearest early expression in Magna Carta, which enshrined the principle that imprisonment was only to follow conviction by one's peers. Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land."); *accord* Magna Carta ch. 39 (1215). From that principle, English legislators and jurists over time derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, a defendant's right to bodily liberty on adequate assurance that he or she would reappear to stand trial. *See, e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (speedy trial "has its roots at the very foundation of our English law heritage" dating to Magna Carta and earlier); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (Magna Carta and trial right); *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981) ("Bail was a central theme in the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions.").

As the English Parliament gained power through the 1500s and 1600s, its signal acts of constitution-

making[2] aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. For example, "the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689" all "grew out of cases which alleged abusive denial of freedom on bail pending trial." Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959, 966 (1965). *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); ELSA DE HAAS, ANTIQUITIES OF BAIL (1940); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

Each such act sought to limit arbitrariness and increase fairness in that process. In 1554, for instance, Parliament required that the decision to admit a defendant to bail be made in open session, that two justices be present, and that the evidence weighed be recorded in writing. *See* TIMOTHY R. SCHNACKE *ET AL.*, PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010). In 1628, responding to perceived abuses by the Stuart kings and their justices and sheriffs, who detained defendants for months without bail or charge, Parliament passed the Petition of Right prohibiting imprisonment without a timely charge. *See* JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 126 (1997). In the Habeas Corpus Act of 1679, Parliament "established procedures to prevent long delays before a bail bond

---

[2] "The English Constitution is sought, not in any single written documents, as in the United States, but from acts of Parliament, [and] quasi-acts of Parliament, such as the Magna Charta [*sic*], the Petition of Rights (1627) . . . ." William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England,* 21 Yale L.J. 639, 641 (1912).

hearing was held," responding to a case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., BAIL AND PRETRIAL RELEASE, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges that no surety could responsibly pledge, leading to defendants' pretrial detention. Parliament responded again in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a protection later incorporated into the Eighth Amendment to the U.S. Constitution. Carbone, *New Clothes*, at 528–29.

In sum, by the time of the United States' founding, pretrial release on bail (an unsecured pledge) was a fundamental part of English constitutionalism, with procedural protections enshrined in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner. They ensured that accused defendants were not detained without charge or without a court's consideration of release on bail. All of these constraints were designed to ensure a fair, prompt consideration of each defendant's case for release.

Spurred by religious dissenters, American practice dramatically expanded the right to bail. Even before the English Bill of Rights, in 1641 Puritan Massachusetts made all non-capital cases bailable (and significantly reduced the number of capital offenses). Foote, *Constitutional Crisis in Bail*, at 968. William Penn's 1682 constitution likewise provided that "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is

evident or the presumption great." *See* Carbone, *New Clothes*, at 531 (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). The vast majority of American states copied Pennsylvania's provision in one form or another; many state constitutions still contain that language. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). The Judiciary Act of 1789 adopted the dissenters' bail framework, 1 Stat. 91, as did the Northwest Ordinance, 1 Stat. 52.

By "bailable," these early statutes meant that magistrates had no discretion to deny bail or detain defendants outright. William Penn—who had been denied bail many times when detained for preaching without a license in England—explained to fellow Quakers that his constitution aimed to achieve "that which is extraordinary, and to leave myself and successors no power of doing mischief." William Penn to Robert Turner, Anthony Sharp, and Roger Roberts, 12 April 1681, in 2 PAPERS OF WILLIAM PENN 89. In all, Penn aimed to prevent the government from jailing one of its citizens upon a mere accusation. Convinced that the fundamental law of Magna Carta required no less, Penn drastically curtailed the government's ability to detain prior to a jury verdict. Arrestees had a right to bail—that is, release on an unsecured pledge—in all but a narrow category of capital cases, and even then magistrates had discretion to admit to bail.

Thus, while adopting the English procedural protections regulating pretrial detention, early American constitutions also provided additional guarantees of pretrial liberty. English practice often required a full hearing to determine whether the

defendant was to be admitted to bail; by contrast, Americans *categorically* established—in their state constitutions and in the statute founding the federal judiciary and territorial courts—that defendants facing non-capital charges would be eligible for bail. The only determination left to judicial discretion was the sufficiency of the sureties, that is, *how* to bail, not *whether* to bail. *See* TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014).

Though the federal government and some states later granted the discretion or authority to allow "preventive" pretrial detention in some cases, *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966), that authority was accompanied by explicit protections long identified with due process in the English constitutional tradition, and ordinarily has been limited to circumstances where a strong government interest requires such detention. The federal Bail Reform Act of 1984, for instance, permits detention only in serious felony cases and only upon a judicial finding by clear and convincing evidence, after a full adversary hearing, that the accused presented an unmanageable flight risk or risk to public safety. Pub. L. No. 98–473, § 202, 98 Stat. 1837, 1976 (1984) (codified at 18 U.S.C. §§ 3141–50 (2012)). States that have expanded courts' authority to order pretrial detention have generally also included such constraints. *See, e.g.*, N.M. CONST., art. II, § 13; VT. CONST., art. II, § 40; WIS. CONST. art. I, § 8.

As this brief history illustrates, bail policies have for centuries been constrained by procedural protections that go well beyond a prohibition on excessiveness. Laws protecting a defendant's right to

bail "have consistently remained part of our legal tradition." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting). They safeguard "the individual's strong interest in liberty," and this Court has refused to "minimize the importance and fundamental nature" of that interest. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

III. SUBSTANTIVE DUE PROCESS PROTECTS THE RIGHT TO LIBERTY BEFORE TRIAL

This Court's due process jurisprudence reflects the American tradition of strict protection for liberty before conviction. In general, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause [the Due Process Clause] protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). In the pretrial context,

> [the] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 4 (1951) (citation omitted). The last time this Court addressed the "traditional right to freedom before conviction," in *United States v. Salerno*, 481 U.S. 739 (1987), it recognized "the

importance and fundamental nature of this right." *Id.* at 750-51.

Governmental infringements of fundamental rights must be "narrowly tailored to serve a compelling state interest." *E.g. Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). *Salerno* did not announce that pretrial detention triggers strict scrutiny, but it applied the narrow tailoring requirement in only slightly different terms. Having acknowledged the "fundamental nature" of the right to pretrial liberty, *Salerno* upheld the detention scheme implemented by the 1984 Bail Reform Act on the basis that it was "a carefully limited exception" to the "norm" of pretrial liberty. 481 U.S. at 755, 746–52. It "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming" by limiting detention eligibility and requiring courts to comply with strict substantive and procedural requirements before detention could be imposed. *Id.* at 749–52.

"If there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc). In *Foucha v. Louisiana*, for instance, the Court held that the challenged detention regime violated substantive due process because, "unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." 504 U.S. 71, 81 (1992); *see also Flores*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of

an adult by the government triggers heightened, substantive due process scrutiny.").

Some detention regimes survive heightened scrutiny. *Salerno* upheld the detention provisions of the Bail Reform Act because they limited detention eligibility to those charged with "extremely serious offenses" that Congress had "specifically found" to indicate danger. 481 U.S. at 750. The Act permitted detention only after a court had found, by clear and convincing evidence in an adversarial hearing, that the defendant posed "an identified and articulable threat" that no condition of release could manage. *Id.* at 751. The Act also provided for immediate appellate review of any detention order and imposed a speedy trial limit for cases in which defendants were detained. *Id.* at 752 (citing 18 U.S.C. § 3145(c)). These protections reflected Congress's understanding of what the Constitution requires when the government proposes to incarcerate a person before trial. *See* S. Rep. No. 98–225, at 8 (1983) (recognizing that "a pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect.").

In the case at bar, the Eleventh Circuit ignored the precedent protecting the fundamental right to liberty before conviction. *Schultz v. Alabama*, 42 F.4th 1298, 1332 (11th Cir. 2022). The panel cited Eleventh Circuit precedent bizarrely concluding that *Salerno* is "not a substantive due process case," *id.*, despite *Salerno*'s explicit and extensive substantive due process analysis. 481 U.S. at 746-51. Because it held that there was no fundamental right at issue, the

Circuit court blessed a system that permits local magistrates to casually impose detention, with no requirement that the accused be represented or other procedural check.

And make no mistake, the record shows that the imposition of detention in Cullman County, Alabama, is indeed casual, a far cry from the heightened procedures sustained in *Salerno*. Detention is imposed in brief, perfunctory hearings conducted (even before the pandemic) over videolink with uncounseled defendants who often do not understand the scant paperwork they have been provided. Defendants are encouraged not to speak or ask questions. Even prosecutors themselves are absent from the hearings, along with any formal request from the state for bail. Nevertheless, these non-adversarial, largely evidence-free proceedings form the basis for detention orders that will confine defendants for the duration of their proceedings. *See Shultz v. Alabama*, 330 F.Supp.3d 1344, 1353–54 (N.D. Ala. 2018) (district court findings of fact in the case at bar).

The fact that the detention here results from unaffordable money bail should not affect the analysis. As a matter of both logic and law, an order imposing unaffordable bail constitutes an order of detention. It has the same result: the defendant remains in jail. *See ODonnell v. Harris Cnty.*, 892 F.3d 147, 158 (5th Cir. 2018), overruled in part by *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) ("[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order."); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). Because an order imposing unaffordable bail is a *de facto* detention order, it infringes the fundamental

right to pretrial liberty to exactly the same extent and requires the same safeguards. *Accord*, *e.g.*, *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *see also* S. Rep. No. 98-225, at 16 (1984) (in the context of the Bail Reform Act, explaining that an order imposing unaffordable bail triggers detention process); *United States v. McConnell*, 842 F.2d 105, 108–10 & n.5 (5th Cir. 1988) (same); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order.").

In sum, this Court's precedent holds that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit regulatory detention—including detention before trial—absent careful substantive limits and procedural safeguards. The Eleventh Circuit ignored that precedent, as well as the history and tradition that it reflects. This Court should correct the Eleventh Circuit's departure from centuries of Anglo-American tradition protecting defendants from arbitrary pretrial detention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, April 3, 2023.

KELLEN R. FUNK
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

SANDRA G. MAYSON
U. PENNSYLVANIA CAREY
LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19103

JAMES F. BOGAN III
Counsel of Record
KILPATRICK TOWNSEND &
STOCKTON LLP
1100 Peachtree Street
NE, Suite 2800
Atlanta, GA 30309
(404) 815-30309
jbogan@kilpatricktown-
send.com

Counsel for Amici Curiae