No. 22-835

IN THE
Supreme Court of the United States

BRADLEY HESTER,
on behalf of himself and others similarly situated,
Petitioner,
v.
MATTHEW GENTRY,
Respondent.

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

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the largest voluntary professional membership organization in the world and is the leading organization of legal professionals in the United States, with members in all fifty states, the District of Columbia, and the United States territories. The ABA's members, and the consensus support for its policies, come from all aspects of the legal profession: prosecutors, public defenders, private defense counsel, attorneys practicing in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and non-lawyer associates in related fields.[2]

For more than half a century, the ABA has promulgated comprehensive recommendations related to the practice of criminal law, known as the ABA Standards for Criminal Justice ("Criminal Justice

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for the parties have received timely notice of *amicus curiae*'s intent to file.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the ABA's Judicial Division. No member of the Judicial Division participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division before filing.

Standards").[3] Then-ABA President Lewis F. Powell Jr. initiated this work,[4] and Chief Justice Warren E. Burger endorsed it as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251 (1974). The Criminal Justice Standards have been developed and revised by broadly representative task forces comprised of prosecutors, defense lawyers, judges, academics, and members of the public, and then approved by the ABA House of Delegates, the ABA's national policymaking body.[5] They have been relied upon or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 state supreme court opinions, and 2,100 law journal articles.

In 1968, the ABA adopted standards specifically focusing on rights and procedures surrounding whether arrestees should be detained while awaiting trial ("Pretrial Release Standards"). The ABA revised the Pretrial Release Standards in 1979, and again in 1985, primarily to establish criteria for preventive detention in limited circumstances. The current edition of the Pretrial Release Standards was approved in

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[3] Available at https://www.americanbar.org/groups/criminal_justice/standards/.

[4] Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future*, 59 Denv. L.J. 3, 8 n.14 (1981).

[5] *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Justice 10 (2009).

2002.[6] The ABA has participated as *amicus curiae* in cases implicating the Pretrial Release Standards, including *United States v. Salerno*, 481 U.S. 739 (1987).

INTRODUCTION AND SUMMARY OF ARGUMENT

The ABA supports granting the Petition because the use of fixed money bail schedules resulting in *de facto* detention, which the Eleventh Circuit described as "ubiquitous," App.2a, is contrary to longstanding and deeply considered ABA policy, violates core constitutional guarantees, and raises a recurring question long overdue for this Court's resolution.

Cullman County, Alabama's bail system relies principally on an offense-based "Master Bail Schedule." App.5a. Initially, bail is imposed with *no* inquiry into whether the arrestee presents a risk of danger or flight.[7] Defendants who can afford bail are released typically within 90 minutes of arrest—no matter how likely they are to flee or pose a danger. Arrestees who cannot afford the fixed-schedule bail amounts are jailed for at least three days and often much longer, pending an initial appearance. While defendants with means walk free immediately, poor arrestees remain

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[6] The *ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) (hereinafter, "*Pretrial Release*") are available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf.

[7] The facts set forth herein were found by the district court following a two-day evidentiary hearing at which four witnesses testified and nearly sixty exhibits were filed. Pet. 12; App.81a-82a. The court of appeals did not disturb or reject those findings as clearly erroneous.

detained until and unless they prove—without counsel or any opportunity to present evidence or cross-examine witnesses—that they are neither a flight risk nor a danger to others. App.3a-10a.

That system flouts half a century of ABA policies and standards on pretrial detention and bail. Every edition of the Pretrial Release Standards has urged restricting the use of money bail, especially when tied to a fixed schedule by the offense charged, to determine whether to detain a defendant pretrial. *See infra* Section A. The ABA reiterated that position in 2017, opposing financial conditions of pretrial release that result in detention solely due to defendants' inability to pay, as well as the use of "bail schedules" that consider only the charged offense.[8] The Criminal Justice Standards for the Prosecution Function also instruct that pretrial detention decisions should not be made "categorically" (including using bail schedules) but instead should be "based on the facts and circumstances of the defendant and the offense."[9]

The ABA's policies align with this Court's decisions. The ABA's *amicus* brief in *Salerno* generally supported the federal Bail Reform Act's pretrial detention regime, including detention based on risk of harm (not just to ensure appearance). That was because the Act conditioned pretrial detention on proof by the

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[8] ABA Resolution 112C (2017), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf.

[9] ABA, *Criminal Justice Standards: Prosecution Function*, Std. 3-5.2(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.

prosecution, and a finding by the court, that the defendant posed a risk of danger or flight that no release conditions would sufficiently mitigate, along with other procedural protections. Brief for the ABA as *Amicus Curiae* 3-6, 10-13, *Salerno*, 481 U.S. 739. This Court likewise relied on the individualized demonstration of a compelling interest to justify detention—and "extensive safeguards"—rather than, as the Eleventh Circuit did here, relying on the absence of any protected liberty interest. *Salerno*, 481 U.S. at 752; *see also infra* Section B.2 (describing protections).

Guidance from the Court on this critical constitutional issue is long overdue. Absence of physical restraint has always been a core liberty interest protected by the Due Process Clause. Being arrested, prior to any determination of guilt, does not extinguish that interest. *Salerno*, 481 U.S. at 755. "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)). The limited exception to pretrial liberty this Court recognized in *Salerno* is meaningless if a local government can—without any showing that no release conditions could ensure the defendant's appearance or protect the community—detain arrestees simply by setting bail at amounts they cannot afford.

ARGUMENT

THE USE OF UNAFFORDABLE MONEY BAIL TO DETAIN WITHOUT SHOWING A COMPELLING INTEREST WARRANTS REVIEW

The practice of *de facto* detention through money bail, without an individualized showing that detention is necessary, warrants this Court's review, lest pretrial detention become the norm for indigent arrestees, and the substantive and procedural constraints this Court relied on in *Salerno* for "a carefully limited exception" to pretrial liberty become a dead letter. 481 U.S. at 755.

"In a system which grants pretrial liberty for money, those who can afford a bondsman go free; those who cannot stay in jail." *Pretrial Release*, Std. 10-5.3(a) cmt. 112 (quoting Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964*, 21 (1964)). The ABA has long opposed such a two-tier system. Detaining defendants only because they cannot afford bail and without an adversary hearing at which the prosecution bears the burden of proving a compelling interest in detention—*i.e.*, that no conditions of release would ensure appearance for trial and public safety—is contrary to this Court's due process precedents. Doing so while also releasing defendants who *can* afford the scheduled bail, without any inquiry into their risk of flight or danger, is inconsistent with this Court's due process and equal protection precedents.

The Eleventh Circuit concluded that Cullman County's bail system did not have to satisfy the same substantive and procedural standards as the Bail Reform Act provisions this Court upheld in *Salerno* because it determined that "[p]retrial detainees have

no fundamental right to pretrial release." App.55a. But as other courts have held, *see* Pet. 30-31, the "absence of physical restraint" is a core liberty interest protected by the Due Process Clause.[10] Being arrested, prior to conviction, does not extinguish that liberty interest. *Salerno*, 481 U.S. at 755. Review of the Eleventh Circuit's contrary holding is warranted because it erodes a core constitutional right and bears on every aspect of this case, including the level of scrutiny applied to the different treatment of those who can pay and those who cannot, and the adequacy of the procedures used to continue detention at the initial appearance.

A. The ABA Has Long Opposed Money Bail That Results In *De Facto* Detention For Those Unable To Pay, Consistent With This Court's Jurisprudence.

The ABA opposes using money bail to detain, rather than to secure the defendant's appearance as a condition of release.

First, indigency should play no part in whether a person is detained pretrial. "[F]inancial condition[s]" that "result[] in the pretrial detention" of defendants "solely due to an inability to pay" should not be imposed. *Pretrial Release*, Std. 10-5.3(a); *see also id.*, Std. 10-1.4(e). "Release on financial conditions should be used only when no other conditions will ensure appearance." *Id.*, Std. 10-1.4(c). "If unsecured bond is

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[10] *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *see also Turner v. Rogers*, 564 U.S. 431, 445 (2011); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to ensure the defendant's appearance and with regard to a defendant's financial ability to post bond." *Id.* Basing detention on the ability to afford bail results in the "detention of some persons who would be good risks but are simply too poor to post the amount of bail" and the "release of more affluent defendants who may present real risks of flight or dangerousness." *Id.*, Std. 10-5.3(e) cmt. 113.

The federal Bail Reform Act draws the same line, *see* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial detention of the person."), which is rooted in our constitutional tradition: "Bail set at a figure higher than an amount reasonably calculated to fulfill th[e] purpose [of assuring the presence of the accused for trial] is 'excessive' under the Eighth Amendment." *Stack*, 342 U.S. at 5 (1951); *see also id.* at 8 (opinion of Jackson, J.). Equal protection and due process likewise forbid "imprisoning a defendant solely because of his lack of financial resources." *Bearden v. Georgia*, 461 U.S. 660, 661 (1983). Just as a person may not be incarcerated post-conviction for an inability to pay fines or fees, *id.*, a person's pretrial confinement cannot hinge on the person's ability to afford bail.

Second, "[f]inancial conditions should not be employed to respond to concerns for public safety," as opposed to serving as a condition of release to secure a defendant's appearance for trial. *Pretrial Release*, Std. 10-1.4(d); *see also id.* Std. 10-5.3(b) ("Financial conditions of release should not be set to prevent future

criminal conduct during the pretrial period or to protect the safety of the community or any person."). Rather, "concerns about risks of pretrial crime should be addressed explicitly through non-financial release conditions or, if necessary, through pretrial detention ordered after a hearing—not covertly through the setting of bail so high that defendants cannot pay it." *Id.*, Std. 10-5.3(b) cmt. 112. That is the federal law's approach to detention based on concerns about dangerousness too. 18 U.S.C. §§ 3142(c)(1)(B)(i), (e)(1).

Third, regardless of wealth, individuals should not be detained pretrial without a court's individualized determination, after an adversary hearing, that no condition(s) of release will ensure the defendant's appearance. *Pretrial Release*, Std. 10-5.8. So too as a matter of federal law. *See* 18 U.S.C. § 3142(e). Imposing financial conditions of release should be "the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk." *Pretrial Release*, Std. 10-5.3(e); *see also* ABA, *Criminal Justice Standards: Prosecution Function*, Std. 3-5.2(b) (4th ed. 2017) ("The prosecutor's decision to recommend pretrial release or seek detention should be based on the facts and circumstances of the defendant and the offense, rather than made categorically."); ABA Resolution 112C (calling for "individualized, evidence-based assessments").

Pursuant to such individualized determinations, courts "should impose the least restrictive of release conditions necessary reasonably to ensure the defendant's appearance in court, protect the safety of

the community or any person, and to safeguard the integrity of the judicial process." *Pretrial Release*, Std. 10-5.2(a). "[T]he prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court and protect the safety of the community or any person." *Id.*, Std. 10-5.10(f); *see also* ABA, *Criminal Justice Standards: Prosecution Function*, Std. 3-5.2(a) (4th ed. 2017).

Fourth, financial conditions of release "should never be set by reference to a predetermined schedule of amounts fixed according to the nature of the charge." *Pretrial Release*, Std. 10-5.3(e). Such "bail schedule[s]" are "arbitrary and inflexible" because they "exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates." *Id.*, Std. 10-5.3(e) cmt. 113. Instead, "bail and release determinations" should be "based upon individualized, evidence-based assessments." ABA Resolution 112C.

These principles are not new. Since it first issued Pretrial Release Standards in 1968, the ABA has urged, for example, that money bail not be used to detain persons to prevent them from committing further crime. Setting bail for that purpose was "generally regarded as a distortion of the bail system." *ABA Project on Standards for Criminal Justice: Standards Relating to Pretrial Release – Approved Draft, 1968*, 6 (1st ed. 1968). Pretrial release decisions should openly consider the issue of dangerousness, rather than leave it "masked behind manipulations of bail amounts." *Id.* The introduction to the First Edition

likewise recognized money bail's serious harms, including that money bail "inevitably discriminates against the poor." *Id.* at 1.

Following a decade of further study, the ABA sharpened its criticism of money bail in the Second Edition of the Pretrial Release Standards, first issued in 1980 and revised in 1986. The ABA again noted serious constitutional concerns with systemically jailing people due to their inability to afford bail (and thus liberty), stressing that "[r]elease on monetary conditions should be reduced to minimal proportions." *ABA Standards for Criminal Justice*, Std. 10-1.3(c) (2d ed. 1980, rev. 1986); *see also id.*, Std. 10-5.4(a) cmt. 78-79 (citing, *inter alia*, *Griffin v. Illinois*, 351 U.S. 12 (1956); *Tate v. Short*, 401 U.S. 395 (1971)). The ABA approved money bail "only in cases in which *no other conditions* will reasonably ensure the defendant's appearance" and recommended that, when money bail is used, it should be set "with regard for the defendant's financial ability to post bond" and only "at the lowest level necessary to ensure the defendant's reappearance." *Id.*, Std. 10-1.3(c) (emphasis added).

Two decades of additional study and experience confirmed that money bail systems serve no legitimate public safety purpose, needlessly harm defendants, and impose unnecessary public costs. As set forth above, the Third Edition of the Pretrial Release Standards, adopted in 2002 and currently in force, counsels that jurisdictions should impose monetary release conditions only after considering defendants' individual circumstances and should ensure that defendants' finances never prevent their release.

B. Cullman County's *De Facto* Detention Of Indigent Persons Is Not Justifiable.

Cullman County's *de facto* detention of indigent persons is contrary to ABA standards and presents an important question worthy of this Court's review. Whether pretrial detention is based on an explicit detention order (as in the federal system addressed in *Salerno*) or an order simply setting bail in an amount the defendant cannot afford, it must be based on an individualized showing that detention serves a legitimate and compelling interest sufficient to overcome the right to freedom from bodily restraint.

1. No Legitimate And Compelling Government Interest Supports Detaining Only Those Who Cannot Afford Bail.

Because Cullman County's system deprives individuals of liberty pending trial, it can only be constitutional—and consistent with ABA standards—if a compelling interest justifies detention in each instance. But the structure of the County's bail-schedule system belies any such interest.

Cullman County operates a two-tier system: swift release for those who can pay bail in the amounts set by the County's schedule, and *de facto* detention for those who cannot pay, unless they can convince the court—after some period of detention—that they will not flee or pose a danger if released with conditions. That disparate treatment occurs without regard to "the nature of the crime charged, the arrestee's criminal history, or the arrestee's prior record of failures to appear." App.136a. And it extends beyond the initial

appearance, when individuals unable to pay the fixed bail amounts are ordered to remain in detention. Cullman County imposes on *only* indigent defendants the burden to prove—without counsel—that they deserve to be released, even if they cannot read or write, and even for the most minor alleged crimes. App.136a, 138a-139a, 174a.

Although Cullman County claims that it must detain defendants to assess dangerousness and flight risk, it requires that assessment only for indigent defendants. As the district court found, "[t]he system is discriminatory: not all criminal defendants who pose a real and present danger to the public are indigent, but Cullman County detains only indigent criminal defendants who pose a real and present danger to the public. Dangerous defendants with means enjoy pretrial liberty." App.161a.

Such overt discrimination, where those with means walk free (even if presenting a high likelihood to endanger others or to flee) while the poor are *de facto* detained *regardless* of their risk of harm or flight, is incompatible with the Pretrial Release Standards and serves no compelling interest. Nor is it consistent with the historic purpose of money bail: to "assur[e] the presence of that defendant." *Stack*, 342 U.S. at 5.

As the district court found, detention of those who cannot afford the fixed bail amounts serves neither the interest of ensuring appearance nor of preventing danger to the community. App.155a-162a. As for ensuring appearance, "the evidence demonstrate[d] that secured bail is no more effective than other conditions to assure a criminal defendant's

appearance." App.159a. Decades of research confirms that detaining defendants pretrial not only is generally unnecessary to promote appearance in court, but also may make them *less* likely to appear. App. 155a-159a.[11] Moreover, alternative systems to promote court appearances—including supervised release and reminders of upcoming court dates—are demonstrably more effective than (temporary) pretrial detention. App.155a-159a.[12]

Decades of research also confirm the district court's findings that detaining defendants pretrial rarely serves to protect public safety, App.159a-160a, 182a,[13] especially because most pretrial detainees are not

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[11] *See also, e.g.*, Alexander M. Holsinger, Crime & Justice Inst., *Exploring the Relationship Between Time in Pretrial Detention and Four Outcomes* 11 (2016); Christopher T. Lowenkamp et al., Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 10 (2013); James C. Neubaum & Anita S. West, Denver Research Inst., *Jail Overcrowding and Pretrial Detention: An Evaluation of Program Alternatives* 123, 130-31 (Table 21), 136 (1982); Wayne H. Thomas, Jr., *Bail Reform in America* 98 (1976); Paul B. Wice, *Freedom for Sale: A National Study of Pretrial Release* 67-68 (1974); Freed & Wald, *supra* p. 6, at 62.

[12] *See also, e.g.*, Brice Cooke et al., *Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court* 16-18 (2018); Jennifer Elek et al., Pretrial Justice Ctr. for Courts, *Use of Court Date Reminder Notices to Improve Court Appearance Rates* 2-4 (2017); Christopher T. Lowenkamp & Marie VanNostrand, Laura & John Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 17 (2013); Michael R. Jones, Pretrial Justice Inst., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (Oct. 2013).

[13] *See also, e.g.*, Wice, *supra* note 11, at 75-76.

charged with violent crimes.[14] In fact, detaining arrestees pretrial often *increases* risks to public safety.[15] Detaining low- and moderate-risk defendants makes them significantly more likely to commit a future crime than a similarly situated defendant who is released,[16] even years later.[17]

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[14] *See* John Mathews II & Felipe Curiel, ABA, *Criminal Justice Debt Problems* 6 (2019) (75 percent of pretrial detainees are accused of having committed drug or property crimes); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L., Econ., & Org. 511, 512 (2018) (for detainees held longer than three days, 60 percent were charged with non-violent crimes and 28 percent with only a misdemeanor).

[15] *See, e.g.*, Léon Digard & Elizabeth Swavola, Vera Inst. of Justice, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* 6 (2019).

[16] Christopher T. Lowenkamp, Arnold Ventures, *The Hidden Costs of Pretrial Detention Revisited* 4 (2022) (finding that "any time spent in pretrial detention beyond 23 hours is associated with a consistent and statistically significant increase in the likelihood of rearrest"); Lowenkamp et al., *supra* note 11, at 4, 11, 17-18 (for low-risk defendants, two- to three-day detention increased likelihood of arrest for new pretrial criminal activity by 39 percent; four- to seven-day detention increased the likelihood by 50 percent; and eight- to 14-day detention increased the likelihood by 56 percent).

[17] *See, e.g.*, Emily Leslie & Nolan Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & Econ. 529, 550 (2017) (pretrial detention increased likelihood of re-arrest within 2 years by 7.5 percent for defendants charged with felonies and 11.8 percent for those charged with misdemeanors); Lowenkamp et al., *supra* note 11, at 3, 28 (eight- to 14-day pretrial detention of low-risk defendants associated with 51 percent increase in likelihood of re-arrest within two years); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev.

In short, no compelling interest supports detaining defendants who cannot afford scheduled bail amounts—and imposing only on them the burden to prove they deserve to be released—while immediately releasing defendants able to pay bail. Such a system is incompatible with the ABA's standards, due process, and equal protection.

2. Cullman County Detains Indigent Defendants Without Requiring An Individualized Showing That Detention Is Warranted And Without Other Necessary Safeguards.

As explained above, the ABA's standards provide that individuals should not be detained pretrial unless the government, at an adversarial hearing (with evidence, counsel, and confrontation), makes an individualized showing "by clear and convincing evidence that no condition or combination of conditions of release will reasonably ensure the defendant's appearance in court or protect the safety of the community or any person." *Pretrial Release*, Std. 10-5.8(a); *see also supra* pp. 9-10.

Even if Cullman County could assert a compelling interest in preventing flight or danger to the community limited to those unable to post the scheduled bail, that interest would not permit detaining a person without an individualized showing after an adversary hearing that no combination of conditions of release would ensure appearance and

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711, 718 (2017) (pretrial detention on misdemeanor charges associated with 30 percent increase in new felony charges and 20 percent increase in new misdemeanor charges 18 months later).

protect the community. The ABA's brief in *Salerno* supported the federal Bail Reform Act provisions at issue but emphasized that pretrial detention must not be imposed without, among other procedural safeguards, such an individualized showing. Brief for the ABA as *Amicus Curiae* 4-5, 12-13, *Salerno*, 481 U.S. 739. Cullman County's pretrial detention system bears little resemblance to the federal system upheld in *Salerno*.

In Cullman County, detention is not limited to serious felonies, App.131a; there is no adversarial hearing before the decision to impose an unaffordable bail amount, nor even a right to present evidence, much less to confront evidence relied on as a basis for detention, App.124a-125a; there is no right to counsel when bail is set, App.139a; the burden is on the *defendant* seeking release to establish that he is not a flight risk or threat to the community, App.119a, 152a; defendants receive "vague and substantively inadequate" notice about the bail hearings, App.173a; some defendants cannot complete the forms the County uses to gather information because of illiteracy or disability, App.174a; Cullman County courts do not make individualized findings regarding flight risk or danger, App.177a-180a; and making factual findings requires merely checking a box, App.146a, 175a. And if the judge decides that the defendant is indigent but is also a danger or flight risk, the judge "may set bail at a level that the defendant cannot afford, creating a *de facto* detention order." App.152a.

The Eleventh Circuit erred in stating that the only "salient" differences between the County's detention system and the federal Bail Reform Act are "that

detainees in Cullman County are not entitled to counsel at their initial bail hearing and that judges in Cullman County are not required to meet the clear and convincing evidence standard before imposing bail." App.60a. In fact, under the Bail Reform Act, detention is limited to "the most serious of crimes"; defendants have a right to counsel at the detention hearing; defendants may testify on their own behalf, present evidence by proffer or otherwise, and cross-examine witnesses; the government generally has the burden of proof and must prove its case by clear and convincing evidence; and a judicial officer must determine the appropriateness of detention, guided by statutorily enumerated factors, and include written findings of fact and a written statement of reasons for a decision to detain. *Salerno*, 481 U.S. at 747, 751-52.

Similarly, the ABA's Pretrial Release Standards would entitle defendants at detention hearings to "(i) be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed; (ii) testify and present witnesses on his or her own behalf; (iii) confront and cross-examine prosecution witnesses; and, (iv) present information by proffer or otherwise." *Pretrial Release*, Std. 10-5.10(a). They also would require that a court state on the record or in written findings "the reasons for concluding that the safety of the community or of any person, the integrity of the judicial process, and the presence of the defendant cannot be reasonably ensured by setting any conditions of release or by accelerating the date of trial." *Id.*, Std. 10-5.10(g)(ii).

"In our society liberty is the norm," and detention, including while awaiting trial, is supposed to be "the

carefully limited exception." *Salerno*, 481 U.S. at 755. The ABA's standards agree. The absence of individualized findings and other safeguards present in *Salerno* counsels in favor of granting the writ of certiorari to review the Eleventh Circuit's judgment.

C. *De Facto* Detention Of Indigent Defendants Without Demonstrating A Compelling Interest, And Contrary To ABA Standards, Seriously Harms Detainees, Their Families, And The Legitimacy Of The Criminal Justice Process.

The district court's findings about the harmful effects of unjustified pretrial detention, App.153a-154a, coincide with the experience of the ABA's members involved in the prosecution, defense, and adjudication of criminal cases, as reflected in the Pretrial Release Standards, and with decades of empirical research.

Although the federal system has abolished detention through unaffordable money bail, at the state level it remains a serious problem, as the ABA's decades of research and promulgation of standards attest. Many presumptively innocent people are detained simply because they cannot afford bail.[18]

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[18] Almost half a million unconvicted persons are detained in state and local jails nationwide. Zhen Zeng, U.S Dep't of Justice, Bur. of Justice Stats., *Jail Inmates in 2021—Statistical Tables* 1 (2022). Of the individuals detained pretrial, more than 30 percent remain in jail merely because they cannot afford bail. Mathews & Curiel, *supra* note 14; *see also* Catherine S. Kimbrell & David B. Wilson, George Mason Univ., Dep't of Criminology, L. & Soc'y, *Money Bond Process Experiences and Perceptions* 6 (2016); George J.

Detention means losing jobs and the ability to care for family members, and it interferes with preparing a defense and leads to worse outcomes at trial and sentencing. Imposing those consequences only on defendants who are too poor to post bail, even if they are no more dangerous or likely to flee than wealthier defendants, undermines both the actual and perceived fairness of the criminal justice system.

Detention has immediate and long-lasting impacts on detainees, their families, and their communities. Research confirms the district court's findings that even a day or two in jail "negatively influences a person's employment, financial circumstances, housing, and the wellbeing of dependent family members" and that "[t]hese detrimental impacts are exacerbated when pretrial incarceration exceeds three days." App.141a.[19] In many jurisdictions, defendants,

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Alexander et al., *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 707-08 (1958).

[19] *See, e.g.*, E. Ann Carson, U.S. Dep't of Justice, Bur. of Justice Stats., *Mortality in Local Jails, 2000-2019 – Statistical Tables*, Table 6 (2021) (finding that between 2000 and 2019, 15,405 unconvicted detainees died while detained, accounting for 75.5 percent of deaths in local jails); Alexander M. Holsinger & Kristi Holsinger, *Analyzing Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, 82 Fed. Probation 39, 41-43 (2018); Kimbrell & Wilson, *supra* note 18, at 1, 19 (finding that 30 percent of defendants detained pretrial lost their jobs due to their incarceration, and that the majority of "those who did lose their jobs were incarcerated for between 1 and 3 days prior to release"); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1344, 1356-57 (2014).

including indigent defendants (or their families), are even forced to pay for their own pretrial detention.[20]

The adverse effects of pretrial detention can last for years. For example, pretrial detention decreases an individual's future employment prospects,[21] and increases in pretrial detention rates are associated with increases in county-level poverty rates.[22]

Bail systems resulting in *de facto* detention also undermine the fairness, efficacy, and legitimacy of the criminal justice system itself. *See Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to

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[20] Kimberly Kessler Ferzan, *The Trouble with Time Served*, Faculty Scholarship at Penn Law 2831, 25 & nn.160-61 (Jan. 31, 2022); Barbara Krauth & Karin Stayton, U.S. Dep't. of Justice, *Fees Paid by Jail Inmates: Fee Categories, Revenues, and Management Perspectives in a Sample of U.S. Jails*, 2-3, 29 (Dec. 18, 2005).

[21] Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 204, 227-29 (2018) (detention associated with 23 percent reduction in the probability of having any formal sector income, *i.e.*, income from employment that offers regular hours and wages, on which income tax is paid, and provides employment rights).

[22] Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Econ. Activity 253-54 (2021).

impose them on those persons who are ultimately found to be innocent.").[23]

Finally, pretrial detention distorts case outcomes, as the district court found, App.181a-182a, and 50 years of research confirm.[24] Compared to those released before trial—and controlling for such factors as charge seriousness, bail amount, prior record, representation by private or court-assigned counsel, family integration, employment stability, and demographics—individuals detained pretrial are more likely to be convicted, to receive sentences of incarceration, and to receive longer sentences.[25] This includes *innocent* detainees, many of whom plead guilty to secure release—in which case not only has the system led to an erroneous conviction, but the underlying crime may remain unsolved and the perpetrator may remain at large.[26] And although

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[23] These impacts are worsened by the fact that research also consistently shows that, controlling for other factors, Black and Latino defendants are detained pretrial at higher rates than white defendants and are more likely to have financial conditions imposed (and set at higher amounts). *See* Prison Pol'y Initiative, *Summary of research studies related to racial disparities in pretrial detention* (Oct. 9, 2019).

[24] *See, e.g.*, Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125, 1137-51 (1965); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641, 646, 655 (1964).

[25] For example, studies show that, controlling for other relevant factors, pretrial detention leads to at least a 13 percent increase in the likelihood of being convicted and an 18 percent increase in the likelihood of pleading guilty. Stevenson, *supra* note 14, at 532; Leslie & Pope, *supra* note 17, at 530.

[26] *See* Crim. Justice Pol'y Program at Harvard L. Sch., *Moving Beyond Money: A Primer on Bail Reform* 7 (2016); Robert C.

numerous other factors affect sentencing, "detention to disposition [is] the strongest *single* factor influencing a convicted defendant's likelihood of being sentenced to jail or prison for nonfelony and felony cases alike."[27]

Unlike the consequences of detention ordered after a rigorous, individualized, and non-discriminatory determination that no conditions of release can ensure the defendant's appearance and public safety, consistent with the ABA's Pretrial Release Standards, no compelling interest can justify the consequences of detaining those too poor to afford a scheduled bail amount.

Boruchowitz et al., Nat'l Ass'n of Crim. Def. Lawyers, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 32-33 (2009).

[27] Mary Phillips, N.Y.C. Crim. Justice Agency, Inc., *A Decade of Bail Research in New York City* 118 (2012).

CONCLUSION

The ABA urges the Court to grant the Petition.

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