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 Supreme Court of Alabama

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Question Presented is not properly before this Court. As discussed herein, Hester's Petition for Writ of Certiorari fundamentally mischaracterizes the nature of the claims and proceedings before the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the Eleventh Circuit. Since its inception – even before Hester intervened and subsequently became the lead plaintiff – the focus of this case has always been *indigent* criminal defendants. Both the parties' arguments and the courts' analyses have consistently been directed at the question of whether the bail procedures used by the Cullman County courts impermissibly violate the rights of indigent defendants when compared to those who were able to secure release under the bail schedule. Having lost this battle, Hester's Petition now improperly seeks to start a new war that would seemingly challenge Alabama's entire system of pretrial detention. This attempt to change tack at this juncture is due to be denied.

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STATEMENT OF THE CASE

Starting with the "Introduction," Hester's Petition is rife with misstatements regarding the procedural history of this case, the evidence presented, and the courts' holdings. The overarching problem is that the Petition first mischaracterizes the district court as having held that the bail procedures violate a fundamental substantive due-process right to pretrial liberty, and then mischaracterizes the panel as reversing because there is no fundamental right to pretrial release. The district court never addressed the kind of stand-alone substantive due process claim that Hester is now asking this Court to consider. Indeed, the point of the panel's brief comments regarding such a claim was merely to note that it was not before it. App. 55a.

The bulk of the district court's opinion is dedicated to Hester's equal protection claims, on which it found he was likely to prevail. App.154a. The panel reversed this finding; Hester is not challenging this decision. The district court then held that Hester was likely to prevail on his due process claims – but it conflated the concepts of substantive and procedural due process, citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), as support for the statement that "[t]he substantive right to pretrial liberty may not be infringed without 'constitutionally adequate procedures.'" App.163a. The district court never characterized any right at issue as "fundamental," let alone undertake an independent substantive due process analysis.

The panel's brief discussion of substantive due process occurred in context of defining the nature of the claims before it, as follows:

> Despite nominally resting on the doctrines of both procedural due process and substantive due process, the district court did not significantly rely on the latter for any of its findings. Indeed, it discussed few substantive due process cases in its analysis, did not identify any fundamental right at issue, and did not seek to provide a remedy for any substantive due process violation.
>
> This is unsurprising, as our precedent makes clear that the substantive due process claim is a nonstarter. . . .In *Walker* [*v. City of Calhoun, Ga.*, 901 F.3d 1245 (11th Cir. 2018)], this court analyzed [*United States v.*] *Salerno*, 481 U.S. 739 (1987)] and concluded that it was a procedural due process case, not a substantive due process case. 901 F.3d at 1262–65. Pretrial detainees have no fundamental right to pretrial release. If they did, bail itself would be unconstitutional. But, of course, it is not—*Salerno* said as much. And Hester cannot "avoid the Supreme Court's holding in *Salerno* by smuggling a substantive due process claim into the Equal Protection Clause."
>
> Each of the district court's findings do, however, fit squarely within the rubric of procedural due process…

App.55a.

The panel's comments regarding the availability of a pure substantive due process claim based on a deprivation of pre-trial liberty for a criminal defendant who has been properly arrested are thus mere *dictum* because such a claim was not before it. To be

clear, the issue is not that the district court somehow ignored or itself misconstrued this claim. Hester never put forth an independent substantive due process claim. Notably, he did not argue that *Walker v. City of Calhoun, Ga.*, 901 F.3d 1245 (11th Cir. 2018), *cert denied* 139 S.Ct. 1446 (April 1, 2019), on which the panel based its characterization of the case was wrongly decided; instead, he argued that *Walker* supported his intertwined equal protection/procedural due process analysis. (Corrected Appellee Br. 44)

It follows that quite literally everything of substance that Hester says in the Petition regarding the record in this case, the district court's decision, and the panel's decision is a misstatement of fact and/or law to some degree. It has all been distorted by Hester's attempt to fit the square peg of his equal protection and procedural due process claims into the round hole of a specific type of substantive due process claim that was not presented to the district court or the panel. This Opposition therefore sets forth the worst of these misstatements, in addition to addressing the Question Presented.

A. Procedural History

Hester misstates the procedural history of this case in the course of his attempt to assign error to the Panel's decision on mootness and its interrelated decision to confine its decision to the facial constitutionality of the Standing Bail Order. For example, without reference to the record, he criticizes the Cullman County judicial defendants for adopting the new Standing Bail Order "just sixteen days before the long-scheduled preliminary-injunction hearing," implying that the timing of this decision was suspicious. Pet.26. But the preliminary-injunction hearing was not long-scheduled; to the contrary, the hearing was

first set *before Hester had even filed his preliminary-injunction motion*, with less than two weeks' notice to the parties. The parties were eventually afforded another few weeks to prepare only after filing a joint motion for an extension and pleading with the court in a status conference. A brief review of the complicated and frankly rather chaotic proceedings leading up to the preliminary injunction hearing provides important background for the panel's ruling on mootness and its decision to approach this case as a facial challenge.

This case was originally filed by Plaintiffs Ray Charles Schultz, Davon Treshawn Beebe, James Hugo Sterling, and Tyrone Daishawn Beebe on February 21, 2017, against the "State of Alabama" as a challenge arguing that cash bail is inherently excessive for indigent defendants under the Eighth Amendment of the United States Constitution. D.Ct. Dkt. 1. Sheriff Gentry was added as a defendant in the first Amended Complaint on April 18, 2017 (D.Ct. Dkt. 14) but did not receive any kind of notice of the suit until June 6, 2017, when a law clerk emailed the county attorney to inform him that the district court planned to hold a hearing on a motion for temporary restraining order that had been filed on June 5 (D.Ct. Dkt. 23). Another inmate, Randall Parris, then filed a motion to intervene in the case on June 7, the day before the June 8 TRO hearing. D.Ct. Dkt. 31).[1] Between the original Complaint on February 21 and Hester's motion to intervene on August 1, both the Schultz and Parris plaintiffs filed, or attempted to file, multiple amended

[1] The motion for temporary restraining order sought immediate release of certain named plaintiffs. It was denied for a lack of exhaustion. D.Ct.Dkt. 35.

complaints with a revolving door of both plaintiffs and defendants.

Hester sought leave to intervene in this action on August 1, 2017. D.Ct. Dkt. 76. On August 16, 2017, Sheriff Gentry and the Judicial Defendants both notified the court that, while they did oppose the latest improper filings by the other would-be plaintiffs, they did not oppose intervention by Hester. D.Ct. Dkt.Docs. 83, 84. Hester's motion (and the other various pleadings and motions) then remained pending for almost seven months, until Hester filed an unopposed motion on March 6, 2018, asking that the district court set a status conference in order to address intervention and the timing of further proceedings. D.Ct. Dkt. 93.

On March 8, 2018, in a text order, the district court granted Hester's Motion to Intervene and ordered him to file a complaint; motion for preliminary injunction; and a motion to certify class by March 12, 2018. D.Ct. Dkt. 94. It also set a hearing on the *not-yet-filed* motion for preliminary injunction on March 21.

On March 9, 2018, the parties filed a ***joint*** motion for an extension of time on the briefing schedule. D.Ct. Dkt. 97. The Judicial Defendants specifically stated in that Motion that:

> "they have not been idle during the pendency of Hester's motion to intervene. Counsel for Intervenor [Judicial] Defendants have met with the relevant judicial officials to discuss reducing bail procedures to a formal, written procedure that would allow an orderly presentation of the constitutional issues to the Court. As a precursor to the adoption of a written order on bail procedures, Defendants have found it expedient to make certain

> upgrades to allow for the more efficient processing of pretrial detainees. This includes the installation of an electronic warrant system for the use of both court and law enforcement officials in Cullman County, as well as training on this system, that occurred on March 1, 2018. Intervenor [Judicial] Defendants believe that they will be able to issue a formal, standing order on bail procedures within the next two weeks, and that these bail procedures will significantly clarify the nature of the constitutional issues before the Court on Hester's motion for a preliminary injunction. As a result, Intervenor Judicial Defendants would request an extension of time to formally adopt written bail procedures in order to better respond to Hester's motion for a preliminary injunction." D.Ct. Dkt. 97, ¶¶ 5-6.

For his part, Hester also requested an extension of time to file both his motion for a preliminary injunction and to file a reply to any written opposition "to reflect new developments in case law since the time he filed his motion to intervene" and "to allow him time to sufficiently analyze their written bail procedures and respond accordingly." D.Ct. Dkt. 97, ¶ 6.

The district court set a telephone status conference for March 13, 2018, to discuss the case. D.Ct.Dkt. 99, 100. In the meantime, Hester filed his motion for preliminary injunction on March 12, 2018. D.Ct.Dkt. 102.

On March 14, 2018, the district court ordered that oppositions be filed on or before March 28; that a reply by Hester be filed on or before April 9, 2018; and that the hearing would be held on April 12, 2018. D.Ct. Dkt. 111.

On March 22, 2018, the Parties submitted a joint status report agreeing that, *inter alia*, Hester's Complaint would be the operative complaint in this action. D.Ct. Dkt. 115. All other complaints and plaintiffs were dismissed as of March 27, 2018. D.Ct. Dkt. 119. The preliminary injunction hearing would eventually be held over the course of three days in April 2017.

B. Relevant Facts regarding Alabama's Bail System

As the panel and district court discuss, the procedures used by Cullman County's judges to set the terms and conditions of pretrial release do not arise out of a vacuum, but are instead governed by Ala. Const. Art. I, § 16, as amended by Ala. Const. Amend. No. 981, Ala. Code §§ 15-13-1 *et seq.*, and Alabama Rule of Criminal Procedure 7. App.3a-5a, 131a, 139a. Instead of discussing these provisions of law, however, the Petition opts to engage in a generalized overview of "Historical and Modern Bail Practice" that does not speak to the facts of this case.

Prior to January 1, 2023, all offenses except capital murder were bailable as a matter of right in Alabama.[2] After the ratification of Ala. Const. Amend. No. 981, also known as "Aniah's Law" in the memory of a college student who was kidnapped and murdered by a man who was out on bond despite being charged with multiple violent crimes, bail may be denied for a

[2] It is worth noting that certain persons are not eligible for immediate release even on a bailable offense under Alabama law, including, but not limited to, persons who are intoxicated when arrested, who are arrested for domestic violence, or who are subject to holds from other jurisdictions, i.e., for outstanding warrants. These persons were excluded from the preliminary injunction, which exclusion was not appealed by Hester. App.189a.

person charged with several other violent crimes, including kidnapping, rape, domestic violence in the first degree, aggravated child abuse, etc. Ala. Code § 15-13-3 (1975). The statute sets out a procedure for a pretrial detention hearing in such cases. This Petition does not appear to be directed at the procedures laid out in Aniah's Law, which would presumably moot portions of this suit and/or at least narrow the proposed class.

The presiding judge of the Cullman County Circuit Court issued the Standing Bail Order ("SBO") on March 26, 2018 (App. 195a-202a), which implements the requirements of Alabama law as to those persons who have been charged with bailable offenses. Hester states throughout the Petition that detainees are "typically" held for weeks both before and after the implementation of the SBO without any meaningful opportunity for the reconsideration of the terms and conditions of their release. This claim is a major misstatement of fact. The record established that the vast majority of persons arrested in Cullman County were in fact able to make bond based on the specific amounts set by the Cullman County judges and were released almost immediately, even before the implementation of the SBO, and many of the persons who were held for over forty-eight hours were ineligible for release. App.6a-7a; 161a; Appellants' 11th Cir. Appendix, Vol. III, pg. 18. The number of people who actually stayed in jail until trial was a "minute amount." 11th Cir. App. Vol. III, 47.

The SBO requires that, pursuant to Alabama law, a criminal defendant who is unable to post the bond set in the bond schedule (for warrantless arrests) or the arrest warrant, or for whom a Bail Request Form has been submitted, "shall be entitled to a judicial deter-

mination of the conditions of their release promptly after arrest, but in any even no later than 72 hours after arrest." App.198a. It requires that the judge impose "the least onerous conditions contained in Rule 7.3(b) of the Alabama Rules of Criminal Procedure that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large," taking into account the fourteen factors set forth in the Alabama Rules of Criminal Procedure. App.199a-201a. It prohibits a judge from requiring a secured appearance bond "if there is a less onerous condition that would assure the defendant's appearance or minimize risk to the public" and "requires a written finding as to why the posting of a bond is reasonably necessary to assure the defendant's presence at trial in such a case." App. 201a-202a. A criminal defendant who is still in custody seventy-two hours after arrest, who has not been given this hearing, must be released on an unsecured appearance bond in the minimum scheduled amount. App.202a.

Alabama law imbues the courts, not Sheriff Gentry, with the power to determine the terms and conditions of pretrial release and to conduct hearings regarding these terms. *See, e.g.*, *Gaines v. Smith*, —So. 3d—, No. 1210304, 2022 WL 17073033 (Ala. Nov. 18, 2022) (rejecting § 1983 challenge against sheriff and deputy to duration of detention on separation of powers grounds). Sheriff Gentry's only real power is to determine in the first instance whether certain property is sufficient security to meet the terms and conditions of the bond, and his policy is to be as generous as possible in making such decisions, accepting property as security for a bond up to an amount equal to 100% of the tax assessed value of property, without requiring any surrender of the property or the production of underlying documenta-

tion beyond publicly available records. 11th Cir. Appendix, Vol. III, pgs. 28-29. He testified that property bonds are a very effective method of involving the community and a detainee's support system, both for the purposes of assuring the detainee's appearance and for public safety purposes, and that executions against bonds are virtually nonexistent. *Id.*, pgs. 30-32, 49-50, 52-55.

REASONS FOR DENYING THE WRIT

I. The federal courts lack subject matter jurisdiction because Sheriff Gentry lacks authority to either cause or redress Petitioner's alleged injury.

As an initial matter, this Response should not be considered consent to the jurisdiction of this Court or any other court in this matter; Respondent Sheriff Gentry does not waive his arguments regarding the lack of subject matter jurisdiction over the claims alleged against him, but fully reserves the right to re-assert all such arguments if certiorari is granted.

Both standing and sovereign immunity deprive this Court of subject-matter jurisdiction over Hester's claims. Issues of subject-matter jurisdiction may be raised at any point in the litigation, and may even be considered *sua sponte*. *See Fort Bend County, Tex. v. Davis*, 139 S. Ct. 1843, 1849 (2019). The "irreducible constitutional minimum" of standing imposes a burden on a plaintiff to show three elements: (1) that he has "suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The traceability element requires "a causal connection between the injury and the conduct

complained of—the injury must be 'fairly traceable to the challenged action of the *defendant*, and not some third party not before the court.'" *Id.* at 560 (emphasis added) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). As to the redressability element, the relief requested must actually remedy the complained-of injury. *Id.* at 568.

Sovereign immunity, as memorialized in the Eleventh Amendment, similarly limits subject-matter jurisdiction by barring suits against nonconsenting States. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). This immunity from suit extends to State officials also, except to the limited extent permitted under the *Ex parte Young* exception. *See id.* That exception allows suit "against a state official when that suit seeks prospective injunctive relief in order to 'end a continuing violation of federal law.'" *Id.* (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). And, somewhat similar to standing's traceability element, *Ex parte Young* itself confirmed that the State official must have "some connection" to the action challenged "or otherwise it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." 208 U.S. 123, 157 (1908).

An intervening decision of the Supreme Court of Alabama confirms that Sheriff Gentry lacks the State-law authority required to establish subject-matter jurisdiction over him. *See Gaines v. Smith*, —So. 3d—, No. 1210304, 2022 WL 17073033 (Ala. Nov. 18, 2022). In *Gaines*—issued about four months after the panel's decision below—the Supreme Court of Alabama held that a sheriff and his deputy were not proper defendants in a § 1983 suit challenging plaintiff's alleged detention for about a month following his

arrest without a hearing. 2022 WL 17073033, at *4-5. Relying on the express separation of powers contained in the Alabama Constitution, *Gaines* reaffirmed that an Alabama sheriff and his deputies "are part of the State's executive branch," and thus "the Alabama Constitution forbids them from exercising the legislative or judicial power." *Gaines*, 2022 WL 17073033, at *5; *see also McMillian v. Monroe County, Ala.*, 520 U.S. 781 (1997). The "power to decide whether a defendant is entitled to remain at large on bail is a *judicial* power." *Id.* (emphasis added) (internal quotations omitted). Accordingly, sheriffs lack such power.

The panel's holding that Hester has standing to bring his claims against Sheriff Gentry is thus in direct contradiction with the authority granted to him by Alabama law. The panel's standing decision rested on its conclusion that Hester's injury was "traceable to the Sheriff's *decision* not to promptly release him from jail." App. 23a (emphasis added). But *Gaines* rejects this conclusion and confirms that Sheriff Gentry does not have the authority to make any such decision. Because Sheriff Gentry could not *decide* the conditions under which pretrial detainees would be released (even more so going forward post-*Gaines*), Hester's claims are neither traceable to Sheriff Gentry nor sufficiently connected to him to satisfy *Ex parte Young*. And because Sheriff Gentry could not *decide* to release pretrial detainees in contradiction of the judicially issued (and facially valid) Standing Bail Order, Hester's claims are likewise not redressable by Sheriff Gentry either. Accordingly, Hester's claims against Sheriff Gentry lack subject-matter jurisdiction on both standing and sovereign immunity grounds.

The shifting nature of Hester's claims to focus purely on his alleged substantive due process rights

only accentuates the fact that what he is really challenging is the underlying correctness of the State's judicial officials' decisions regarding pre-trial detention.[3] Among the many problems with this strategy, Hester's attempts to collaterally litigate those decisions runs afoul of *Younger* abstention, as the en banc Fifth Circuit recently held (relying heavily on this Court's decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974)). *See Daves v. Dallas County, Tex.*, 64 F.4th 616 (5th Cir. 2023) (en banc). *Younger* abstention is likewise warranted here because pretrial release hearings are part of criminal proceedings that (1) were ongoing as to Hester (and, by definition, the class members) at the time this litigation began; (2) implicated important state interests in pre-trial detention; and (3) Hester and the class members had an adequate opportunity to raise constitutional challenges in those proceedings (despite the panel's contrary one-sentence conclusion unsupported by any citation, App.16a). *See Sprint Comm'cns, Inc. v. Jacobs*, 571 U.S. 69 (2013) (explaining the preconditions for *Younger* abstention).[4]

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[3] Hester does not name any of the judicial defendants below as respondents here, *see* Pet. at ii, or otherwise seek review of the panel's dismissal of judicial defendants on the grounds that they were not enjoined by the district court and thus were themselves improper parties below, *see* App.27a. But even if he had, such claims would appear to be barred by judicial immunity, as those defendants argued below. *See* App.27a.

[4] The panel below incorrectly rejected *Younger* abstention on the grounds that "Hester is not asking us to enjoin any prosecution." App.15a. But even if it were true that the bond hearing were not part of a criminal proceeding itself—indeed one of the very first judicial steps in those proceedings—it certainly "involv[es] certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions," which is

Hester has the wrong parties and the wrong vehicle for his claims. Hisattempt to avoid the restrictions on his claims challenging inherently judicial acts through the convenient expedient of seeking an injunction against Sheriff Gentry is due to be denied. But if the Writ were to issue, Sheriff Gentry would request that the Parties be required to address the issue of whether subject matter jurisdiction exists in this case, both as to the question of Eleventh Amendment immunity and as to Hester's standing, and the issue of whether *Younger* abstention bars Hester's attempts to circumvent the State judicial process.

II. The Eleventh Circuit properly confined its review to a facial challenge to the constitutionality of the Standing Bail Order.

First, Hester's objection to the panel's mootness ruling is without merit. As to his argument that the panel should not have considered only the post-SBO procedures: the district court also confined its analysis only to the "new criminal pretrial procedures," without objection by Hester. App.146a-147a. He has accordingly waived his arguments as to whether the pre-SBO procedures should have any bearing on this case. Further, his argument on this point conflates voluntary cessation doctrine with the mootness exception for cases capable of repetition but evading review.

Likewise, Hester's attempt to assign error to the panel's decision to consider his challenge only as a facial one is also without merit. As stated by the panel, it is not entirely clear from the district court opinion whether or to what extent that court even

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another type of proceeding that justifies abstaining under *Younger*. *Sprint*, 571 U.S. at 78 (internal quotation omitted).

attempted a true as-applied analysis under the SBO. App.28a. In addition to the jurisdictional considerations cited by the panel, it correctly held that the minimal "findings of fact" made by the district court were not sufficient to maintain an as-applied challenge. Hester's arguments on this point significantly overstate the district court's conclusions. The district court did not find that the post-SBO procedures "largely mirrored the county's pre-SBO practices." Pet., 24. Instead, it merely noted that the "limited evidence that the defendants did offer indicates that officials in Cullman County do not always comply with the written requirements in the new Standing Order," citing a single example. App.144a. There are three problems with Hester's attempt to expand this statement into a "finding of fact" that must be respected under Fed. R. Civ. Pro. 52. First, an "indication" based on "limited evidence" does not meet the Rule's standards. Second, defendants did not have the evidentiary burden. And, third, the SBO provides that a review of bail conditions must occur within seventy-two hours, not forty-eight hours, as suggested by the district court.

Finally, Hester's attempt to place the blame for the paltry record concerning post-SBO practices at the hearing on Sheriff Gentry is without merit. Setting aside the fact that Sheriff Gentry had no control over when the Standing Bail Order would be promulgated by the Judicial Defendants, the procedural history reviewed *supra* makes it clear that the SBO was not implemented in a last-minute attempt to manipulate a "long-scheduled" hearing, because the hearing was not long-scheduled, but rather was sprung on the parties with little notice in a chaotic flurry of proceedings occurring in approximately a month.

III. The Question Presented is not properly before this Court.

It is well-established that this Court is "one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718, n. 7 (2005)). This Court therefore does not ordinarily decide issues that are not presented or decided below. *Id.*; *see also, e.g., Byrd v. U.S.*, 138 S.Ct. 1518, 1526-27 (2018). As discussed *supra*, Hester did not bring an independent substantive due process claim, and neither the district court nor the Eleventh Circuit ever considered such a claim. The Petition is accordingly due to be denied because the Question Presented is not properly before this Court.

Even before this Court, Hester's arguments still do not fit into the rubric of substantive due process. Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 202, 301-302 (1993) (*emphasis in the original*). This "analysis must begin with a careful description of the asserted right. . ." *Id.* In defining the right at issue, it is helpful to note what is <u>not</u> at stake in this case. This case does not involve pre-trial detention without a sufficient judicial determination of probable cause to support an arrest. *Cf. Gerstein v. Pugh*, 420 U.S. 103 (1975). Nor does it involve explicit detention orders, *c.f. United States v. Salerno*, 481 U.S. 739 (1987), nor limitless non-criminal incarceration, *c.f. Foucha v. Louisiana*, 504 U.S. 71 (1992). It is instead concerned with the conditions of release for pretrial detainees who have been validly arrested – even more specifically, it is

concerned with when a pretrial detainee can be held because they cannot provide the collateral required to secure their release on bail.

Petitioner Hester claims that he seeks only "modest" relief: "that government have a good reason to keep people in jail cells pretrial." Pet. 29. A proper independent substantive due process claim would challenge the validity of the underlying "good reason" to impose the challenged conditions, while a procedural due process claim looks to the fairness of the procedures.[5] These are "two separate inquiries." *Schall v. Martin*, 467 U.S. 253, 263-64 (1984). The *Schall* Court accordingly first held that "preventative detention" of juveniles accused of a crime during the pretrial process served a legitimate state objective, 467 U.S. at 264-65, and then examined "whether the procedures afforded juveniles detained prior to fact-finding provide sufficient protection against erroneous and unnecessary deprivations of liberty," ultimately finding that the state's "flexible procedures" met the requirements of procedural due process. *Id.* at 274.[6] In contrast, in *Foucha v. Louisiana*, this Court held that a state may not indefinitely confine a person who has not been con-

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[5] An equal protection claim goes a step farther, examining the relative fairness of the treatment of indigent and non-indigent criminal defendants. As this Court recognized, this inquiry is "substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary" for a State to take action because of a failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 665-666 (1983). Again, however, Hester is not seeking certiorari on the Eleventh Circuit's reversal of the district court's favorable finding on his equal protection claim.

[6] *Schall* also considered the question of whether the pretrial detention amounted to an improper imposition of punishment. 467 U.S. 269-74. Hester has not made a similar argument at any point in this litigation.

victed of a criminal offense, is not currently accused of a criminal offense, and is not both mentally ill and dangerous merely because it believes that he might pose a danger to others, "regardless of the fairness of the procedures used to implement" the law. 504 U.S. 71, 80-81 (1992) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Similarly, to the extent that *Salerno* dealt with substantive due process, it did so in the context of examining whether the federal government's interest in preventing future criminal activity by a pretrial detainee was compelling enough to ever justify unconditional pretrial detention, regardless of the procedures used. 481 U.S. at 744-750. The *Salerno* Court held that the "government's interest in preventing crime by arrestees is both legitimate and compelling." *Id.* at 750.

The Standing Bail Order requires that a judge impose "the least onerous condition or conditions contained in Rule 7.3(b) of the Alabama Rules of Criminal Procedure that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large." App.199a. Hester has never and does not now challenge whether these interests may be compelling enough to justify imposing secured bail in some cases, even if doing so may result in some criminal defendants remaining in pretrial detention. He instead argues that the Standing Bail Order is unconstitutional not because of the standard for setting conditions of release per se, but because its *procedural* requirements are not robust enough to ensure that the Cullman County judges will make good decisions as to the amount of bail required in individual cases, given the importance of the liberty interest at stake. Of course, individual challenges to unaffordable bail are also not substantive due process challenges, but rather Eighth

Amendment excessive bail challenges. *See County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (holding that challenges to enumerated rights cannot be brought under substantive due process clause).

Several of Hester's *amici curiae* say the quiet part out loud, unabashedly arguing that bail schedules should be entirely eliminated, and that secured bail should never be based on concerns of public safety. *See* ABA Brief, 9-10. These arguments are not properly before this Court, as they have never been raised by Hester and were not considered by the lower court. *See F.T.C. v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226, n.4 (2013). Such claims would have to be brought as challenges to the various provisions of Alabama law itself, specifically including the Alabama Rules of Criminal Procedure. It is wholly inappropriate to attempt to saddle a single sheriff with the task of defending the entirety of Alabama's system of pretrial release, when he has no authority to enforce a different system, and could even conceivably be subject to impeachment for countermanding facially valid judicial orders. This case is simply not the correct vehicle for such arguments.

The Eleventh Circuit panel correctly characterized Hester's arguments as presenting only a question of procedural due process under the United States Constitution, this Court's precedents, and its own unchallenged precedent. The panel's "nonstarter" comment was plainly directed at the attempt to conflate substantive and procedural due process analyses that should remain separate. App.55a. But instead of fairly confronting the Eleventh Circuit's published opinion on its own terms, Hester takes a few brief lines in the majority's lengthy opinion out of context. The Petition is accordingly due to be denied

because the pure substantive due process issue in the Question Presented is not properly before this Court.

IV. There is no real conflict amongst appellate courts on the substantive due process issue.

Hester's claim that the Eleventh Circuit's ruling conflicts with those of other appellate courts is again based on a mischaracterization of the opinion as holding that the right to pretrial liberty is never protected by the substantive due process clause, as opposed to merely finding that Hester's claims in this case do not sound under the substantive due process clause. He first cites *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc), as an example of a circuit split. *Lopez-Valenzuela* is a useful example of a pure substantive due process case involving a challenge to a state's reason for imposing pretrial detention. There was no question of the validity of any procedures in that case; the provision at issue was instead a categorical denial of bail to undocumented immigrants without any individualized determination whatsoever. 770 F.3d at 782.

There are also no real conflicts as to the questions of federal law between the Eleventh Circuit's decision in this case and the state appellate court decisions cited by Hester. For example, in *In re Humphrey*, the Supreme Court of California held that equal protection and substantive due process required some sort of individualized determination be made whenever a pretrial detainee could not meet the requirements of his secured bail, citing *Walker* as an example of a consistent opinion on the issue. 482 P.3d 1008, 1018 (Cal. 2021). Again, the Standing Bail Order is not a categorical denial of bail or even of unsecured bail, but instead provides for an individualized determination

for each criminal defendant who cannot make bond under the schedule. Admittedly, there are some differences in the procedures that the Eleventh Circuit upheld in this case and *Walker* and those discussed in *In re Humphrey*; however, the *Humphrey* court's holdings as to the separate question of what procedures are due to a pretrial detainee were largely explicitly based on California law. *Id.* at 1019-1020.

Finally, Hester's attempt to claim that this case conflicts with *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc) is completely without merit. *Pugh* specifically *upheld* Florida's implementation of a rule incorporating a master bond schedule against a challenge that it was facially unconstitutional merely because it failed to embody a presumption against money bail. 572 F.2d at 1057-59. As recognized by *Pugh*, a pure substantive due process challenge must consider a broad range of criminal defendants: "Money bail, however, may not be the most burdensome requirement in all cases. A moneyed visitor in a city far removed from his home might find certain of the alternative forms of release infinitely more onerous. Utilization of a master bond schedule provides speedy and convenient release for those who have no difficult in meeting its requirements." 572 F.3d at 1057. Far from creating a circuit split, the panel decision below repeatedly relied on *Pugh* as "binding precedent" that is "nearly indistinguishable" from this case. App. 29a.

CONCLUSION

The panel for the Eleventh Circuit Court of Appeals correctly premised its reversal on two issues: equal protection and procedural due process. Petitioner Hester is not seeking certiorari of the actual decision below, but is instead belatedly attempting to reshape his arguments into an independent substantive due process claim that has never been part of this case. This strategy appears to be an attempt to justify a grant of certiorari by manufacturing a conflict amongst appellate courts. Despite his abandonment of his equal protection and procedural due process claims, however, his arguments against the Standing Bail Order are still fundamentally procedural in nature. Hester's Petition for Writ of Certiorari does not meet the standards set forth in Sup. Ct. R. 10 and is accordingly due to be denied.

Respectfully submitted,

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