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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Nothing in respondent Matthew Gentry's opposition changes the facts that warrant certiorari: The Eleventh Circuit held that jailing presumptively innocent people pretrial for days, weeks, or months does not violate substantive due process even if the detention is not necessary to serve any government interest. Pet.App.55a. That holding conflicts with *United States* v. *Salerno*, 481 U.S. 739 (1987), and *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), which hold that—as Gentry never disputes—substantive due process protects a fundamental right to pretrial liberty, Pet.18-20. The holding also conflicts with other lower-court decisions, which hold that the right to pretrial liberty cannot be infringed unless

detention is found necessary to protect public safety or reasonably assure appearance at trial. Pet.30-31. And the question presented is—as, again, Gentry never disputes—exceedingly important. Pet.32-35.

Gentry's responses lack merit. Many are simply untrue, such as his assertion that the substantive-due-process claim here was not litigated below, while others are irrelevant, such as his extended recitation of the banal details of the procedural history. None provides a valid reason for this Court—which last addressed these issues over three decades ago—not to resolve the clear lower-court division over a question that involves one of our most basic rights (physical liberty) and that affects hundreds of thousands of people each year.

ARGUMENT

I. THE QUESTION PRESENTED IS PROPERLY BEFORE THIS COURT

Gentry's leading claim (e.g., Opp. i, 16) is that the question presented is not properly before this Court because no substantive-due-process claim was raised or addressed below. Even a cursory review of the record belies that claim.

Far from saying that the substantive-due-process claim here was not raised below or otherwise "not before it" (Opp.1), the Eleventh Circuit recognized that petitioner Bradley Hester "brought … a substantive due process claim." Pet.App.12. And it rejected that claim *on the merits*, labeling the claim a "nonstarter" because "[p]retrial detainees have no fundamental right to pretrial release." Pet.App.55a.

Gentry argues (Opp.19) that the "'nonstarter' comment was plainly directed at the attempt to conflate substantive and procedural due process." Even if that is

correct it does not help Gentry, because under that reading, the "comment" would still be a ruling *on the merits*, not a ruling that no substantive-due-process claim was before the court. Put differently, a court's conclusion that a particular claim involves procedural rather than substantive due process is a conclusion that the claim fails on the merits if framed as a substantive-due-process claim, i.e., a conclusion that the challenged conduct does not violate substantive due process. That, as explained, is the (merits) ruling the panel made.[1]

No more is needed to dismiss Gentry's argument, as a question that is pressed *or* passed upon below is properly presented. *Williams* v. *United States*, 504 U.S. 36, 41 (1992). Regardless, the substantive-due-process right to pretrial liberty was also raised throughout the proceedings below, starting with Hester's complaint, *see* D.Ct. Dkt. 95, ¶83. (As noted, the Eleventh Circuit recognized this. *See* Pet.App.10a.) The claim was also raised in Hester's preliminary-injunction brief, D.Ct. Dkt. 108, at 1, and his Eleventh Circuit brief (e.g., at 37). Like the panel, moreover, the district court addressed the claim, ruling that "[c]riminal defendants have a constitutional right to pretrial liberty" that this "Court held in … *Salerno* … is 'fundamental.'" Pet.App.148a. *Contra* Opp.1 ("The district court never characterized any right at issue as 'fundamental.'"). Gentry's non-preservation argument is utter fiction.

Gentry contends, however, that Hester never brought an "independent" or "pure" substantive-due-process claim. *E.g.*, Opp.2, 16. To the extent Gentry

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[1] Gentry alternatively argues (Opp.2) that the panel's substantive-due-process analysis was "dictum." But the premise of that argument (*id.*) is that a substantive-due-process claim "was not before" the panel. As explained, that is wrong.

means that the complaint raised substantive and procedural due process violations in a single claim for relief, it is unclear why he thinks that matters. It does not matter. What matters is that—again as the Eleventh Circuit recognized, Pet.App.10a—the complaint asserted that Cullman County's bail practices violate three distinct Fourteenth Amendment rights: the substantive-due-process right to pretrial liberty, the equal-protection/substantive-due-process right against detention based solely on access to money, and the procedural-due-process right not to be deprived of liberty without adequate procedural safeguards. Pet.App.10a. The right at issue here—the first of these—*is* a "pure" substantive-due-process right. For example, *Salerno* recognized (mentioning no other constitutional underpinning) a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749. That the *conduct* challenged here was also alleged to violate two other Fourteenth Amendment rights does not make the right to pretrial liberty any less a "pure" substantive-due-process right (or affect this Court's ability to address only that right, to the extent that is Gentry's point).[2]

Gentry relatedly asserts (Opp. i) that "this case has always been [about] *indigent* criminal defendants." It is true that Hester represents arrestees deprived of physical liberty (by Gentry) because of their inability to pay a sum of money. But that does not change the fact that

[2] Citing nothing, Gentry contends (Opp.17) that a "proper" substantive-due-process claim "would challenge the validity of the underlying 'good reason' to" detain. But the substantive-due-process violation alleged here is detention without *any* "good reason" (i.e., any necessity finding). Indeed, the absence of that reason is why the detention is unconstitutional.

throughout the case, Hester asserted three different rights, including a substantive-due-process right to pretrial liberty distinct from the right against detention based on access to money.

Finally, Gentry asserts (Opp.18) that Hester's claim must be grounded in procedural due process because he acknowledges that the government's interests in public safety and preventing flight can justify pretrial detention. That is nonsensical. Hester's recognition that the substantive-due-process right to pretrial liberty is not *absolute* does not either mean the right is non-existent or transform its constitutional basis—any more than admitting that the government can limit certain speech or types of firearms possession would transform a challenge to a particular speech or gun restriction into something other than a First or Second Amendment claim (or defeat that claim).

Hester's substantive-due-process claim was litigated from the day Hester sued to the end of the proceedings below. The Court should reject Gentry's attempt to avoid this Court's review of that claim by baselessly asserting that it was neither raised nor addressed below.[3]

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[3] Gentry also wrongly accuses *Hester* of making misstatements. For example, Gentry challenges Hester's assertion (Pet.34) that certain arrestees are detained for weeks, saying (Opp.8) that most arrestees could afford the bail imposed. But the passage Gentry attacks was about arrestees "who cannot afford" their bail amount. Pet.34. Hester's argument about them was correct. Pet.App.139a-143a.

II. GENTRY'S ARGUMENT THAT FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION IS MERITLESS

Gentry argues (Opp. 10) that "federal courts lack subject matter jurisdiction" here because (1) Hester lacks standing to maintain his substantive-due-process claim against Gentry; (2) Gentry has sovereign immunity; and (3) *Younger* v. *Harris*, 401 U.S. 37 (1971), requires abstention. Gentry further promises (Opp.10) "to re-assert [these] arguments"—all of which the Eleventh Circuit rejected—"if certiorari is granted." None of this provides a basis to deny review.

To begin with, as to arguments not implicating subject-matter jurisdiction, a respondent who "seeks to alter a lower court's judgment … must file … a cross-petition." *Houston Community College System* v. *Wilson*, 142 S.Ct. 1253, 1258 (2022). As Gentry recognizes (Opp.14), *Younger* does not implicate subject-matter jurisdiction, *see Tenet* v. *Doe*, 544 U.S. 1, 6 n.4 (2005) ("*Younger* … may be resolved before addressing jurisdiction."). Yet Gentry did not cross-petition, even though his *Younger* argument would alter the Eleventh Circuit's judgment, by requiring outright dismissal. As a result, *Younger* is not a basis to deny review, nor may Gentry raise it if certiorari is granted.

Subject-matter jurisdiction, by contrast, may be challenged anytime "prior to final judgment." *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 571 (2004). Gentry thus could re-raise his standing and sovereign-immunity arguments at the merits stage. But that is not a basis to deny review, partly because (as explained herein) both arguments lack merit, and partly because allowing respondents to evade certiorari by threatening to challenge subject-matter jurisdiction at

the merits stage would improperly curtail this Court's ability to reach important issues.

In any event, Gentry's standing and sovereign-immunity arguments fail. Both arguments boil down to one claim (*see* Pet.App.18a): Because Gentry did not write the challenged bail policies, he is not a proper defendant under *Ex Parte Young*, 209 U.S. 123 (1908), and Hester's injury is not traceable to him. Opp.12. The Eleventh Circuit correctly rejected that claim under this Court's precedent.

As an initial matter, sovereign immunity does not bar injunctive relief against county officials (like Gentry) enforcing county policies. Pet.App.19a. Nor does it bar injunctive relief against a state official who "by virtue of his office, has some connection" to the challenged conduct. *Young*, 209 U.S. at 157. Gentry—as the person who enforces the challenged policies—meets that standard. *See* Pet.App.20a; *accord McNeil* v. *Community Probation Services LLC*, 945 F.3d 991, 995 (6th Cir. 2019) (Sutton, J.). Likewise, Hester has standing because his (and other putative class members') pretrial detention is both traceable to Gentry—Gentry literally holds the jailhouse keys—and redressable by an injunction prohibiting Gentry from detaining arrestees whose detention has not been found necessary to serve a government interest. *See* Pet.App.22a-23a.

Gentry asserts, however (Opp.11-12), that *Gaines* v. *Smith*, 2022 WL 17073033 (Ala. Nov. 18, 2022), supports his two jurisdictional arguments. That is incorrect. *Gaines* held that plaintiffs cannot obtain *monetary* relief against law-enforcement officers for delaying bail hearings because officers lacked authority to schedule hearings, *id.* at *5. But the court recognized that "claims for equitable relief" against a county sheriff—like

Hester's—"are permitted under certain circumstances." *Id.* at *3. And nothing in *Gaines* affects the Eleventh Circuit's holding that Gentry is a proper defendant under *Young* (a case *Gaines* never mentions) because he has some connection to the challenged practices; again, he is the one who enforces them. *See* Pet.App.20a.

More generally, a sheriff does not have "immunity from injunction" because the "conduct he participated in … was protected by the order of [a] state court." *Due* v. *Tallahassee Theatres, Inc.*, 333 F.2d 630, 632 (5th Cir. 1964). To the contrary, the fact that state "statutes … place the sheriff in charge of keeping detainees in the county jail" pursuant to judicial bail orders is *why* his "actions come within *Ex parte Young*[]." *McNeil*, 945 F.3d at 995. Other courts agree, noting (in considering claims like Hester's) that "*Young* assumes that the state actor has done nothing more than enforce the law." *Edwards* v. *Cofield*, 265 F.Supp.3d 1344, 1346 (M.D. Ala. 2017); *accord Buffin* v. *City & County of San Francisco*, 2016 WL 6025486, at *8-9 (N.D. Cal. Oct. 14, 2016). In fact, lawsuits commonly name as defendants officials who are duty-bound to enforce a challenged statute or order. *E.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); *Moore* v. *Urquhart*, 899 F.3d 1094, 1103 (9th Cir. 2018).

Finally, it bears noting that under Gentry's position, *no one* could be sued for any constitutional violations a jurisdiction committed regarding bail: Judges would have judicial immunity and sheriffs would have sovereign immunity and/or would not satisfy the traceability requirement. Any jurisdiction could thus, for example, say that *all* people (rich and poor) will be detained pretrial, or that all Blacks, Catholics, or women (and only them) will be. Under Gentry's position, there would be no redress for any of that in federal (and quite possibly

state) court. That has never been and never should be the law.[4]

III. GENTRY OFFERS NO PERSUASIVE DEFENSE OF THE ELEVENTH CIRCUIT'S REFUSAL TO CONSIDER THE CHALLENGE HESTER BROUGHT TO CULLMAN COUNTY'S ACTUAL BAIL PRACTICES

Hester argued (Pet.23-26) that the Eleventh Circuit impermissibly refused to address his challenge to Cullman County's actual bail practices, instead considering only whether the Standing Bail Order ("SBO") issued mid-litigation is facially unconstitutional. Gentry's responses are meritless.

First, Gentry asserts (Opp.14) that Hester "waived" this argument because he did not object when the district court supposedly conducted the same analysis the panel later did. In reality, the district court did what Hester contends the panel should have: It evaluated Cullman County's *actual* bail practices after the SBO issued, and determined that they were essentially unchanged from the county's pre-SBO practices, i.e., were different from the SBO. Pet.App.144a. There was thus no objection for Hester to make.

Second, Gentry asserts (Opp.14) that Hester "conflates voluntary cessation doctrine with the … capable of repetition but evading review" mootness exception. That too is incorrect; the petition discussed the two doctrines separately. It first explained that issuance of the SBO was not a voluntary cessation of the challenged practices—and therefore did not moot Hester's claim—

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[4] Gentry's *Younger* argument is likewise meritless. *See Gerstein* v. *Pugh*, 420 U.S. 103, 108 n.9 (1975); *Arevalo* v. *Hennessey*, 882 F.3d 763, 765-767 (9th Cir. 2018). But again, because Gentry did not cross-petition, he cannot raise *Younger* if certiorari is granted.

because, as the district court found, those practices never ceased. Pet.24-25. Rather, Gentry continues to detain presumptively innocent people pretrial without finding that detention is necessary to serve a government interest. Pet.25. The petition then separately explained that Hester's release prior to the SBO's issuance did not moot his claims because pretrial detention "is by nature temporary"—and therefore falls within the "capable of repetition" mootness exception. *Id.* Gentry offers almost no response (certainly nothing persuasive) to either argument, each of which rests on this Court's established precedent.

Third, Gentry asserts (Opp.14-15) that the district court's findings about the county's actual post-SBO practices were insufficient to evaluate Hester's as-applied claim. That too is wrong. As the petition recounted (at 13-14, 21-23), the court considered ample testimony and other evidence, including a county judge's testimony that he had conducted over forty initial appearances of putative class members *after* the SBO's issuance. Pet.App.146a-147a. While more evidence can almost always be adduced, that provides no basis not to adjudicate the as-applied claim Hester brought. Pet.App.70a (dissent). Indeed, as the petition argued (at 26), Gentry never objected below (nor does he object now) that the evidence the court relied on fails to accurately depict Cullman County's post-SBO bail practices. Nor could he; the injunction was based on his testimony as well as the county judge's—two witnesses ideally situated "to testify to the County's actual practices under the" SBO. Pet.App.68.

Finally, Gentry spills substantial ink explaining why "the SBO was not implemented in a last-minute attempt to manipulate a 'long-scheduled' hearing." Opp.15; *see also* Opp.3-7. That is irrelevant. Regardless of who is to

"blame" (Opp.15) for available evidence concerning post-SBO practices, what matters is that the district court was able to make factual findings based on that evidence about those practices—findings that were *not even challenged* on appeal, let alone held clearly erroneous. The Eleventh Circuit could not disregard those findings, or otherwise fail to address Hester's as-applied challenge on which they directly bore. Pet.25.

IV. GENTRY'S ATTEMPT TO ERASE THE LOWER-COURT DIVISION FAILS

As to the conflict between the decision below and other appellate courts that recognize a substantive-due-process right to pretrial liberty, Gentry first argues (Opp.20) that the Eleventh Circuit did *not* hold "that the right to pretrial liberty is never protected by … substantive due process," but only that "Hester's claims … do not sound under the substantive due process clause." As explained in Part I, that is false; the panel rejected Hester's substantive-due-process claim on the *merits*, labeling it a "nonstarter" because "pretrial detainees have no fundamental right to pretrial release." Pet.App.55a.

Gentry also comes up short in disputing that other courts have held the opposite. As to *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc), he says only (Opp.20) that it was "a pure substantive due process case involving a challenge to a state's reason for imposing pretrial detention." That misses the point: The Ninth Circuit recognized a substantive-due-process right to pretrial liberty that bars unnecessary pretrial detention, 770 F.3d at 780, 785—which is directly contrary to the Eleventh Circuit's rejection of any such right, Pet.App.55a.

Likewise infirm is Gentry's contention (Opp.20) that there is "no real conflict[] … between the Eleventh

Circuit's decision … and the state appellate court decisions cited by Hester." For starters, Gentry says *nothing* about three of the four state supreme court decisions Hester cited. He addresses only *In re Humphrey*, 482 P.3d 1008 (Cal. 2021), arguing that it held merely that substantive due process requires an "individualized" bail determination, Opp.20-21. That is wrong; *Humphrey* recognized a "fundamental right to pretrial liberty," 482 P.3d 1013, 1021, that makes pretrial detention "impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests," *id.* at 1019. That conflicts with the decision below—as do the other state-court decisions Hester cited, which Gentry ignores.

Finally, Gentry notes that *Pugh* v. *Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), upheld Florida's use of a bail schedule. That is irrelevant because Hester does not contend that use of a schedule is always unconstitutional; that is a separate issue. What matters is that *Pugh* addressed the question here, holding that "unnecessary … pretrial detention" is "constitutionally interdicted," *id.* at 1058. That too conflicts with the decision below, which blesses unnecessary—yet enormously harmful, *see* Pet.3, 32-35—pretrial detention.

In short, Gentry cannot brush aside the lower-court division over the question presented. Nor can he change the indisputable fact that throughout this litigation, he detained people pretrial absent any finding that doing so was necessary to serve a government interest. Certiorari is warranted to resolve the division of authority and reaffirm this Court's precedent establishing that substantive due process requires such a finding to justify deprivations of physical liberty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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