No. ______

In the

Supreme Court of the United States

BRITTAN HOLLAND, individually and on behalf of all others similarly situated; LEXINGTON NATIONAL INSURANCE CORPORATION,

Petitioners,

v.

KELLY ROSEN, Pretrial Services Team Leader; MARY COLALILLO, Camden County Prosecutor; GURBIR GREWAL, Attorney General of New Jersey; CHRISTOPHER S. PORRINO,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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September 21, 2018

QUESTION PRESENTED

Since before the Framing, monetary bail has been the primary mechanism for securing the presumptively innocent's "right to freedom before conviction" while assuring "that he will stand trial." *Stack v. Boyle*, 342 U.S. 1, 4 (1951). "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Id.* at 5. Because of that key protection, "liberty is the norm, and detention prior to trial … is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

In 2017, New Jersey made monetary bail unavailable to virtually all accused. The new law prohibits courts from even considering the possibility of monetary bail unless no combination of non-monetary conditions—up to and including house arrest and 24-hour electronic monitoring—will reasonably assure the accused's appearance. Thus, New Jersey precludes a court from offering monetary bail even when it (either alone or in combination with non-monetary conditions) is an equally effective but less intrusive means of ensuring appearance relative to a draconian non-monetary condition, like house arrest. In so doing, the law forces courts to needlessly restrict the pretrial liberty of the accused.

The question presented is:

Whether New Jersey, which authorizes monetary bail, but affirmatively requires courts to exhaust more restrictive non-monetary conditions before even considering monetary bail, unnecessarily restricts pretrial liberty in violation of the Eighth Amendment, Due Process Clause, or Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Brittan Holland and Lexington National Insurance Corporation. They were plaintiffs in the District Court and plaintiffs-appellants in the Court of Appeals.

Respondents are Kelly Rosen, who is sued individually and in her official capacity as Team Leader for Pretrial Services in the Criminal Division of the Superior Court of New Jersey, Camden Vicinage; Mary Colalillo, who is sued individually and in her official capacity as Camden County Prosecutor; by operation of Rule 35.3, Gurbir Grewal, who is sued in his official capacity as Attorney General of New Jersey; and Christopher Porrino, who is sued individually for actions he took while Attorney General of New Jersey. Rosen, Colalillo, and Porrino were defendants in the District Court and defendants-appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Lexington National Insurance Corporation has no parent corporation and has issued no stock to any publicly held corporation.

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FBI, *Uniform Crime Report*, FBI: UCR (2015), https://bit.ly/2hTjfN4 35

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PETITION FOR WRIT OF CERTIORARI

Since at least the Middle Ages, monetary bail has been a cornerstone of the Anglo-American criminal justice system. Upon arrest, either the accused or a responsible third party makes a financial pledge that the accused will appear in court, and the accused then regains the "traditional right to freedom before conviction" enjoyed by other presumptively innocent individuals. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). That conditional freedom protects the presumption of innocence by ensuring that someone accused but not convicted of a crime has an unfettered opportunity to mount a defense. Although the government may require bail in an amount that mitigates the risk of non-appearance, "bail set at a figure higher than an amount reasonably calculated to fulfill this purpose" is unconstitutional. *Id.* at 5.

In 2017, New Jersey instituted a new law—the Criminal Justice Reform Act (CJRA)—that made monetary bail categorically unavailable whenever non-monetary conditions, up to and including house arrest with 24-hour electronic monitoring, reasonably addressed the risk of non-appearance. The law is structurally excessive: Even if monetary bail (either by itself or in combination with other conditions) provides a less intrusive means of mitigating flight risk—and even if the accused is willing and able to post bail—a court must impose more liberty-restrictive non-monetary conditions instead. While other jurisdictions have tried to de-emphasize reliance on monetary bail, New Jersey has gone further and essentially guarantees the unnecessary and excessive

restriction of the pretrial liberty of presumptively innocent individuals.

Petitioner Brittan Holland's case is illustrative of this novel and unconstitutional system: Since his arrest for an alleged bar fight nearly 18 months ago, Holland has been subjected to, *inter alia*, home detention and nonstop electronic monitoring, even though a court has never considered—and under New Jersey law cannot consider—whether monetary bail could adequately assure his appearance or obviate the need for some of the most restrictive non-monetary conditions. Until the decisions below, no court had ever countenanced such a needless and excessive deprivation of pretrial liberty.

The Third Circuit nevertheless held that New Jersey's novel approach did not offend the Eighth Amendment, the Due Process Clause, or the Fourth Amendment. The Court of Appeals recognized that, under New Jersey law, presumptively innocent individuals willing and able to post monetary bonds would be subject to more significant restrictions, like house arrest and 24-hour electronic monitoring, even "when monetary bail would suffice" to address flight risk. Pet.App.30. But it found that unnecessary restriction of liberty neither excessive under the Eighth Amendment nor unreasonable under the Fourth Amendment nor inconsistent with due process.

The Third Circuit's anomalous decision conflicts with decisions of this Court and other circuits and cannot stand. This Court has repeatedly admonished that when the state seeks to ensure the appearance of the accused, "bail must be set by a court at a sum designed to ensure that goal, and no more." *United*

States v. Salerno, 481 U.S. 739, 755 (1987); *accord Stack*, 342 U.S. at 5. Other courts of appeals have similarly held that the government may not unnecessarily restrict the pretrial liberty of the presumptively innocent, but must pursue the least restrictive mechanism to achieve its legitimate interests. *See, e.g.*, *Walker v. City of Calhoun*, No. 17-13139, 2018 WL 4000252 (11th Cir. Aug. 22, 2018); *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017); *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). And the Ninth Circuit has held that unnecessary searches and seizures imposed as a condition of pretrial release are unreasonable under the Fourth Amendment. *See United States v. Scott*, 450 F.3d 863 (9th Cir. 2006).

The Third Circuit's contrary conclusion readily warrants certiorari. New Jersey's law is structurally excessive and *guarantees* unnecessary deprivations of pretrial liberty by making monetary bail categorically unavailable even when it is fully adequate and far less intrusive than draconian non-monetary measures. Worse still, New Jersey imposes those draconian conditions without demanding any heightened showing. Thus, presumptively innocent individuals are confined to their homes and monitored around the clock even when the traditional mechanism for ensuring pretrial liberty enshrined in the Constitution—monetary bail—would ensure their appearance. That result is simply not compatible with multiple constitutional guarantees that protect the presumption of innocence and forbid unnecessary deprivations of liberty. The Court should grant review to reaffirm the "right to bail" and ensure that "the

presumption of innocence" does not "lose its meaning." *Stack*, 342 U.S. at 4.

OPINIONS BELOW

The Third Circuit's opinion is reported at 895 F.3d 272. Pet.App.1-55. The District Court's opinion is reported at 277 F. Supp. 3d 707. Pet.App.56-138.

JURISDICTION

The Third Circuit's opinion issued on July 9, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth, Eighth, and Fourteenth Amendments, and the CJRA are reproduced at Pet.App.141-72.

STATEMENT OF THE CASE

A. History of Bail

Few aspects of criminal law have deeper roots than bail. It receives mention in the New Testament, *Acts* 17:9, and the defining documents of English liberty—the Magna Carta of 1215, the Statute of Westminster of 1275, the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1689—all recognize the accused's right to pretrial liberty through bail. *See* Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 965-66 (1965). For centuries, bail has supplied "the answer of the Anglo-American system of criminal justice to a vexing question: what is to be done with the accused, whose guilt has not been proven, in the 'dubious interval' ... between arrest and final adjudication." Donald B. Verrilli, Jr., *The Eighth*

Amendment and the Right to Bail: Historical Perspectives, 82 Colum. L. Rev. 328, 329 (1982) (quoting 4 W. Blackstone, Commentaries *300).

"American history makes clear that the settlers brought this practice with them to America." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting). Colonial constitutions, the Northwest Ordinance of 1787, the Judiciary Act of 1789, and the vast majority of state constitutions throughout history have protected a right to bail by sufficient sureties. *See id.* at 863-64; Verrilli 351. And the Eighth Amendment outlaws "[e]xcessive bail"—a formulation that presumes the availability of bail in the first place. *See Hunt v. Roth,* 648 F.2d 1148, 1157 (8th Cir. 1981), *vacated on other grounds*, 455 U.S. 478 (1982).

Like the right to bail, the right to be free from excessive bail predates the Framing. *See Carlson v. Landon*, 342 U.S. 524, 545 (1952) ("The bail clause was lifted with slight changes from the English Bill of Rights Act."). The Eighth Amendment recognizes both the obvious liberty interest of one accused, but not yet convicted, of a crime and the government's legitimate interest in ensuring the accused's appearance at trial. It does so by ensuring that "the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Stack,* 342 U.S. at 5. Hence, the amount of bail cannot be "excessive"—*i.e.*, "higher than ... reasonably calculated to" ensure the accused's appearance. *Id.*

The same principle applies when the government seeks to address interests beyond flight risk or impose

non-monetary conditions on pretrial release. Bail "limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public, *see Salerno*, 481 U.S. at 750-51, or to assure his appearance," *Jennings*, 138 S. Ct. at 862 (Breyer, J., dissenting). And whether monetary or otherwise, "the Government's proposed conditions of release" must "not be 'excessive' in light of the perceived evil." *Salerno*, 481 U.S. at 754.

Like other constitutional rights, the right to bail is not absolute. Courts may deny bail if no amount of money will ensure the accused's appearance at trial, and some may not be able to afford even non-excessive bail. Similarly, legislatures may define categories of non-bailable offenses or other "special circumstances" in which detention without bail may be permitted based on a sufficient showing that the accused is especially likely to flee or endanger the community. *Id.* at 749. In the Bail Reform Act, for example, Congress authorized—and this Court approved—pretrial detention for those shown by clear and convincing evidence to pose a danger to the community. *Id.* at 741. But as the Court took care to explain, "liberty is the norm, and detention … is the carefully limited exception." *Id.* at 755.

B. New Jersey's Law

Until 2017, "New Jersey had long guaranteed … the right to bail," with presumptively innocent individuals entitled to "post cash or arrange for a bond to secure their release." *State v. Robinson*, 160 A.3d 1, 5 (N.J. 2017). Indeed, since the 1682 Laws of East Jersey and through two state constitutions, New Jersey recognized bail as "a fundamental right." *State*

v. Johnson, 294 A.2d 245, 247-48, 250 (N.J. 1972); *see also* N.J. Const. of 1844, art. I, §10; N.J. Const. of 1947, art. I, §11. But after centuries of protecting the bail right, New Jersey took an about face, amending its constitution to repeal the right to bail by sufficient sureties, *see* N.J. Const., art. I, §11, and enacting the CJRA.

The CJRA requires New Jersey courts to follow a five-stage hierarchical process in making pretrial custody determinations for individuals charged with offenses through a complaint-warrant.[1] N.J.S.A. §2A:162-16(d)(1).

First, the court "shall order" the pretrial release of the accused on personal recognizance or an unsecured appearance bond (*i.e.*, an unconditioned promise to appear) when the court finds that such a release would "reasonably assure the eligible defendant's appearance in court when required, the protection of the safety of any other person or the community, and that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process."[2] N.J.S.A. §2A:162-17(a).

Second, if the court finds that release on personal recognizance or an unsecured appearance bond will

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[1] The CJRA does not apply to individuals charged through a complaint-summons, N.J.S.A. §2A:162-16(d)(1), which is used only for minor offenses and when there is no "reason to believe" an arrest warrant is needed to reasonably assure the accused's appearance or to protect public safety or the criminal justice process, N.J. Ct. Rule 3:3-1(d).

[2] The CJRA presumes the accused will not obstruct or attempt to obstruct the criminal justice process unless the state suggests otherwise. N.J.S.A. §2A;162-17(e).

not provide the requisite assurances, the court "may order" pretrial release subject to the conditions that the accused "not commit any offense during the period of release," "avoid all contact with an alleged victim of the crime," and "avoid all contact with" witnesses who may testify concerning the offense. N.J.S.A. §2A:162-17(b)(1).

The court may then add "the least restrictive" *non-monetary* "condition, or combination of conditions, that the court determines" are needed to provide the requisite assurances. N.J.S.A. §2A:162-17(b)(2). These conditions range from relatively minimal inconveniences to extreme restrictions on liberty. On one end of the spectrum, a court may order the accused to call pretrial services once a week. On the other end, the court may order physical detention (including house arrest), remaining "in the custody of a designated person," or even returning "to custody [in jail] for specified hours." *Id.* The court can additionally order that all of the accused's movements (even within the home) be monitored through a GPS device worn around the ankle 24 hours a day. *Id.*

The court may impose any combination of these restrictions, including the most restrictive combination of these conditions, without the state making any heightened showing of their need. In other words, although the court is directed to "the least restrictive" combination of non-monetary conditions needed to address the government's interests, the CJRA requires no greater showing and provides no greater procedural protections before the state imposes house arrest with 24-hour monitoring than when it requires weekly check-in calls. The one

condition the court may not consider at this second stage is the imposition of monetary bail in combination with or in lieu of non-monetary conditions.

Third, if the court finds that release subject to *any combination* of the onerous non-monetary measures outlined above will not "reasonably assure the eligible defendant's appearance in court when required," the court then, *and only then*, "may order the pretrial release of the eligible defendant on monetary bail." N.J.S.A. §2A:162-17(c)(1). In addition, the court "may only impose monetary bail ... to reasonably assure the eligible defendant's appearance," not to address the accused's perceived dangerousness. N.J.S.A. §2A:162-17(c)(1). Thus, under New Jersey law, monetary bail may be considered only to address flight risk and only after the Court has already concluded that house arrest with 24-hour monitoring is insufficient to address flight risk.

Fourth, if the court "does not find" that either non-monetary conditions alone or monetary bail alone will provide the requisite assurances, the court may order pretrial release subject to a combination of non-monetary conditions and monetary bail, again without any heightened evidentiary showing. N.J.S.A. §2A:162-17(d)(1).

Finally, if the prosecutor seeks pretrial detention, the accused shall be "detained in jail" until the pretrial detention hearing. N.J.S.A. §2A:162-19(d)(2). After the hearing, the court may order pretrial detention if it finds by "clear and convincing evidence that no amount of monetary bail, non-monetary conditions of pretrial release[,] or combination of monetary bail and

conditions would reasonably assure" the state's interests in appearance, public safety, and an unobstructed criminal justice process. N.J.S.A. §2A:162-18(a)(1).

Once a court imposes non-monetary conditions, the accused has no avenue to challenge them before a court unless "there has been a material change in circumstance that justifies a change in conditions." N.J. Ct. Rule 3:26-2(c)(2).

Notably, although the CJRA bars judges from considering monetary bail in most cases, the CJRA still recognizes bail as a useful tool for ensuring appearance. As noted, monetary bail can be considered at the third and fourth steps of the process for individuals charged with a complaint-warrant. And if the accused is "charged on a complaint-summons"—typically used for comparatively minor crimes—and released and then arrested for failure to appear, he is "not … subject" to the restrictive non-monetary conditions described above, but a court can impose monetary bail as a condition of the accused's subsequent release. N.J.S.A. §2A:162-16(d).

Since the CJRA took effect in 2017, the numbers confirm that while monetary bail remains theoretically available, "the CJRA has all but eliminated the use of money bail and bail bonds to secure pretrial release." Pet.App.79. In 2017, 44,319 presumptively innocent individuals were issued a complaint-warrant, and courts allowed "only 44" of them to post monetary bail. Pet.App.13-14.

C. Petitioner Brittan Holland's Arrest and Home Detention with 24-Hour Monitoring

Petitioner Brittan Holland was arrested in April 2017 for his alleged participation in a bar fight and charged with second-degree aggravated assault. Pet.App.14. Holland is a New Jersey resident with a job, a supportive family, and part-time custody of his son. Although Holland almost certainly would have been eligible to regain his pretrial liberty by paying non-excessive bail under the system that had prevailed in New Jersey for nearly its entire history, his case unfolded very differently under the CJRA.

New Jersey courts could not consider releasing Holland on monetary bail without first finding that no combination of non-monetary conditions—including home detention and electronic monitoring—would reasonably assure his appearance at trial. Because such draconian restraints would obviously ensure his appearance, Holland could not secure a hearing where bail would even be considered. The Camden County Prosecutor moved for Holland's pretrial detention, but offered to withdraw the motion if Holland agreed to home detention and an ankle bracelet. Pet.App.14-15. Having already been detained five days, and with no prospect of having the New Jersey courts even consider the role monetary bail could play in preserving his liberty, Holland agreed. Pet.App.15. Pursuant to the order of proceeding prescribed by the CJRA, the Superior Court found that own recognizance release or "an unsecured appearance bond would not reasonably assure" the state's interests. Pet.App.139. Then, without considering

whether monetary bail could advance the state's interests, the court ordered Holland subject to home detention (except for trips to work), 24-hour GPS monitoring, and regular reporting in person and by telephone to the pretrial services office. Pet.App.139-140; Pet.App.15.

D. District Court Proceedings

In June 2017, Holland and Lexington National Insurance Corporation, a bail surety company, sued various New Jersey officials, alleging the CJRA violates the Eighth Amendment, the Due Process Clause, and the Fourth Amendment. Petitioners sought a preliminary injunction that would prevent respondents from "impos[ing] severe restrictions on the pre-trial liberty of" Holland and other presumptively innocent individuals when some form "of non-excessive monetary bail" could "reasonably assure their appearance at trial …." JA147. The District Court rejected a host of preliminary obstacles raised by the state to reach the merits of Holland's claims, but denied petitioners' motion on the merits.

On the Eighth Amendment claim, the District Court acknowledged that courts had previously recognized bail as "elemental to the American system of jurisprudence," Pet.App.118 n.22, and that petitioners requested only "that some monetary condition … be part of a state court judge's analysis and determination of appropriate conditions of pretrial release," Pet.App.119 n.23. The court rejected their claim, however, on the ground that "bail" has not "traditionally" been understood exclusively in monetary terms. Pet.App.117. The court likewise rejected petitioners' due process claims because there

are no "post-*Salerno* bail cases … describing *monetary* bail as a 'fundamental' right," Pet.App.128, and the state's procedures were sufficient, Pet.App.124-126. The court then found the 24-hour monitoring and house arrest reasonable under the Fourth Amendment because Holland had been arrested, he could have faced pretrial detention instead, and a judge had approved the conditions. Pet.App.132-33.

E. Third Circuit Decision

The Third Circuit affirmed. Pet.App.19-20. Like the District Court, the Third Circuit rejected various procedural objections raised by the state and reached the merits of Holland's claims.[3] On the Eighth Amendment claim, the Third Circuit (unlike the District Court) acknowledged that "a form of monetary bail" prevailed during the Founding Era, because a "surety agreed to pay a sum of money if the defendant failed to appear." Pet.App.27. It similarly recognized that colonial laws, early federal laws, and numerous state constitutions codified a right to bail. Pet.App.26-27. But the Third Circuit (unlike the District Court) narrowly construed petitioners' claim as seeking only two particular forms of monetary bail. Pet.App.24 n.4. In the Third Circuit's view, Holland did not argue for a general right to monetary bail; rather, he sought a particular "right to pretrial release secured by cash bail or corporate surety bond." Pet.App.27. The court

[3] The Third Circuit joined the District Court in holding that Lexington did not have third-party standing to challenge the CJRA, reasoning that "criminal defendants under home detention and electronic monitoring" did not "face obstacles to pursuing" litigation against the officials prosecuting them because Holland brought suit. Pet.App.23.

held that because these modern forms of monetary bail were not "in practice" at the Framing, "[u]nder an original meaning, even assuming there is a 'right to bail,'" it would not encompass "cash bail" or "corporate surety bond." Pet.App.28, 30.

The court then rejected the argument that "the Eighth Amendment's prohibition of excessive bail is violated when there is a less restrictive alternative to the conditions of release." Pet.App.30. The court declared that "the existence of a purportedly less restrictive means does not bear on whether the conditions" imposed "are excessive." Pet.App.30. Thus, the court concluded, the state is free to impose "home detention and electronic monitoring" to ensure the accused's appearance at trial even when less restrictive "monetary bail would suffice." Pet.App.30.

Turning to due process, the court acknowledged the historical record demonstrating the prevalence of "a form of monetary bail" during the Founding Era and the numerous federal and state legal authorities recognizing a right to bail throughout history. Pet.App.27. But echoing its Eighth Amendment analysis, the court concluded that while "bail constitutes a fundament of liberty underpinning our criminal proceedings, … we cannot say the same of Holland's requested forms of monetary bail." Pet.App.40.

The Third Circuit likewise saw no procedural deficiency. The court "assum[ed]" that "home detention and/or electronic monitoring restrict criminal defendants' pretrial liberty," but it concluded that the CJRA is unlikely to erroneously deprive the accused of their liberty because the law includes

"extensive" procedural safeguards that require courts to "impose[] only the least restrictive non-monetary condition[s]." Pet.App.43, 45. Thus, there was a "low" "probable value" in requiring consideration of "monetary bail in line with home detention and electronic monitoring." Pet.App.47.

Finally, the Third Circuit rejected petitioners' Fourth Amendment argument on the ground that Holland had a "reduced privacy interest" as a result of his arrest, and the state had a "substantial interest" in ensuring Holland's availability for trial. Pet.App.52-53. Moreover, the court underscored, "[t]he existence of a less intrusive means does not itself render a search or seizure unreasonable." Pet.App.53.

REASONS FOR GRANTING THE PETITION

In its novel effort at "bail reform," New Jersey has effectively guaranteed that presumptively innocent individuals will not receive the least restrictive conditions of pre-trial release. Indeed, New Jersey has taken the one form of pretrial release the Framers expressly protected and dictated that monetary bail will not even be considered unless and until a court determines that no combination of non-monetary conditions, up to and including house arrest and 24-hour monitoring, will be sufficient to secure the appearance of the accused. Remarkably, the decision below recognized that the CJRA necessarily leads to wholly unnecessary pretrial deprivations of liberty, such as imposing house arrest when a monetary bond would suffice, and nonetheless found no constitutional problem.

That extraordinary holding is antithetical to the presumption of innocence and finds no support in the Constitution, this Court's cases, decisions of other courts of appeals, or historical precedent. This Court has repeatedly described bail as a constitutional right that is integral to preserving the presumption of innocence and the bedrock guarantee that individuals do not lose their right to liberty simply because they are accused of committing a crime. Thus, this Court held in *Stack* and reiterated in *Salerno* that it is unconstitutional to set bail at a figure higher than necessary to address the state's interest in ensuring appearance at trial. The Fifth, Ninth, and Eleventh Circuits all agree with the heretofore-uncontroversial notion that the government may not unnecessarily deprive the liberty of presumptively innocent individuals but must strive for the least restrictive conditions necessary to achieve the government's interests.

While these conflicts alone warrant certiorari, the Third Circuit's bottom-line conclusion—that New Jersey's law poses no serious issue under the Eighth, Fourteenth, and Fourth Amendments—is deeply flawed and profoundly important. New Jersey has concluded that the presumptively innocent should be released on the least restrictive set of conditions necessary to advance state interests *unless* those conditions include monetary bail, in which case courts *must* deprive more liberty than necessary. That is neither an exaggeration nor an anomaly limited to petitioner Holland. The CJRA is structurally excessive. Through its "rigid order of battle," *Pearson v. Callahan*, 555 U.S. 223, 234 (2009), the CJRA categorically precludes the consideration of monetary

bail unless and until all non-monetary conditions have been exhausted. Because the non-monetary conditions include house arrest and 24-hour monitoring and monetary bail can only redress flight risk, monetary bail is only available for the *rara avis* whose appearance can be guaranteed by a monetary bond but not house arrest and 24-hour monitoring. As for the far more common creature whose appearance could be guaranteed by either and would vastly prefer the option of posting a bond, monetary bail is categorically unavailable. That policy is not constitutionally permissible—indeed, it is not even rational—in a society that puts a value on liberty. This Court should grant review to make clear that the CJRA's discrimination against monetary bail is antithetical to the Constitution and the presumption of innocence before New Jersey's novel and misguided "reform" spreads to other States.

I. The Third Circuit's Decision Conflicts With Decisions From This Court And Other Courts of Appeals.

A. There is no more basic constitutional protection than the right of ordinary, law-abiding citizens to be free of "government custody, detention, or other forms of physical restraint." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). And it is equally "axiomatic and elementary" that a person accused but not convicted of a crime is presumed to be innocent. *Coffin v. United States*, 156 U.S. 432, 453 (1895). Merely being accused of a crime is not a sufficient basis for severe restrictions on liberty. Any other rule would needlessly interfere with "the unhampered preparation of a defense…. Unless th[e] right to bail

before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack*, 342 U.S. at 4.

To be sure, the government has distinct interests vis-à-vis individuals accused of criminal conduct, including an obvious interest in ensuring that those individuals appear to defend against the government's charges. But for over two centuries, monetary bail has been the principal mechanism through which our constitutional system reconciles "the administration of criminal justice with the convenience of a person accused, but not proved to be guilty." *United States v. Feely,* 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813) (No. 15,082) (Marshall, C.J.). And while states have latitude to address those competing interests in ways that are *more* protective of pretrial liberty, they are not free to impose excessive deprivations of pretrial liberty. To the contrary, this Court has repeatedly reaffirmed that bail "is basic to our system of law" and has repeatedly assumed that the Eighth Amendment's bail clause "appl[ies] to the States through the Fourteenth Amendment." *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

The Eighth Amendment speaks directly to bail, mandating that it not be "[e]xcessive." The Court has repeatedly explained that this excessiveness prohibition limits the government's ability to place needless restrictions on an individual's pretrial liberty. *Stack* made clear that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill" the government's interests "is 'excessive' under the Eighth Amendment." 342 U.S. at 5. And *Salerno* reaffirmed that if the government's "interest is in

preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more." 481 U.S. at 754.

The New Jersey law is structurally excessive; it essentially guarantees a violation of the constitutional right to non-excessive conditions of release. Under New Jersey's first-of-its-kind law, "[m]onetary bail may be set for an eligible defendant *only when* it is determined that *no other* conditions of release will reasonably assure the eligible defendant's appearance in court when required." N.J.S.A. §2A:162-15 (emphasis added). Those non-monetary conditions run the gamut from a simple requirement that the accused call pretrial services to severe restrictions on liberty that are barely distinguishable from full-scale pretrial detention and all but guarantee the appearance of the accused. Monetary bail cannot even be considered until all these non-monetary conditions are exhausted and deemed insufficient to secure the appearance of the accused. Accordingly, even in a case where a monetary bond would be wholly adequate to secure the appearance of the accused, the New Jersey courts are powerless to consider offering the accused a bond unless they first find that non-monetary conditions, up to and including home confinement and 24-hour monitoring, are insufficient. Thus, New Jersey essentially guarantees that it will impose unnecessary deprivations of pretrial liberty in direct violation of the teaching of *Stack* and *Salerno*.

Although the Third Circuit purported to apply this Court's precedents, the conflict between the decision below and *Stack* and *Salerno* is evident on the face of the Third Circuit's opinion. The Third Circuit

recognized that the CJRA "subject[s] defendants to home detention and electronic monitoring when monetary bail would suffice." Pet.App.30. Since house arrest with 24-hour monitoring is a far greater imposition on pre-trial liberty than merely posting a monetary bond in an amount the accused can afford, this observation should have sufficed to condemn the CJRA as plainly inconsistent with *Stack* and *Salerno*. But the court nonetheless held that "the existence of … less restrictive means" to satisfy the state's interest "does not bear on whether the conditions" imposed on the accused "are excessive." Pet.App.30.

That observation defies language, logic, and precedent. The entire concept of "excess" is whether something is "[m]ore than enough." 1 Samuel Johnson, *A Dictionary of the English Language* 724 (1755 ed.). And the existence of less restrictive alternatives is the best evidence that the state's favored form of pretrial definition is "more than enough." Indeed, *Salerno* makes clear that when the "perceived evil" is flight risk, bail must be set at an amount that satisfies that goal "and no more." 481 U.S. at 754. The reasoning of the Third Circuit simply cannot be reconciled with *Stack* and *Salerno*.

B. The Third Circuit's decision also conflicts with decisions of other circuits. In *Pugh v. Rainwater*, the en banc Fifth Circuit addressed a challenge to Florida's bail system, which enumerated six possible forms of release, including "the posting of a bail bond with sureties or the deposit of cash in lieu thereof." 572 F.2d 1053, 1055 (5th Cir. 1978). Concerned that monetary bail needlessly subjected indigent individuals accused of crimes to pretrial detention, the

plaintiffs argued the "new rule [was] constitutionally defective by reason of its failure to express … a presumption" against monetary bail. *Id.* at 1056. The Fifth Circuit recognized that restriction of pretrial liberty "necessary to provide reasonable assurance of the accused's presence at trial is constitutionally permissible," but that "[a]ny requirement in excess of that amount would be inherently punitive and run afoul of due process requirements." *Id.* at 1057.

Applying those principles, the Fifth Circuit rejected plaintiffs' challenge, which it characterized as "favoring a specified priority sequence" for considering the conditions of release such that there would be a presumption against monetary conditions. *Id*. As the Court explained, in some cases "[m]oney bail … may not be the most burdensome requirement"; for example, "[a] moneyed visitor in a city far removed from his home might find certain of the alternative forms of release infinitely more onerous." *Id*.

Fifth Circuit decisions like *Rainwater* that predate the formation of the Eleventh Circuit are binding precedent in both the Fifth and the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). That reality was underscored by a recent Eleventh Circuit decision that applied *Rainwater* in rejecting a challenge to a municipal bail schedule. *See Walker v. City of Calhoun*, No. 17-13139, 2018 WL 4000252, at *7 (11th Cir. Aug. 22, 2018) (O'Scannlain, J.). In *Walker*, the Eleventh Circuit viewed *Rainwater* as "the decisive case" and applied its constitutional holding that "'[t]he demands of equal protection of the laws and of due process prohibit de[nying] pre-trial detainees of the

rights of other citizens to a greater extent than necessary to assure appearance at trial and security of the jail.'" *Id.* (quoting *Rainwater*, 572 F.2d at 1057).

The Ninth Circuit's decision in *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), embraces the same no-greater-than-necessary requirement and conflicts with the Third Circuit's holding that New Jersey may blind its judges to monetary bail when they determine appropriate conditions of release. Indeed, *Hernandez* is the perfect corollary of this case. The *Hernandez* plaintiffs challenged a policy by which the government imposed monetary bail without considering, *inter alia*, "whether non-monetary … conditions of release would suffice to ensure … future appearance." *Id.* at 983, 988. In reviewing that policy, the Ninth Circuit concluded that, as a matter of due process, "[d]etention of an indigent 'for inability to post money bail' is impermissible if the individual's 'appearance at trial could reasonably be assured by one of the alternate forms of release.'" *Id.* at 990. As the court explained, failure to consider "alternative release conditions is unlikely to result in a bond amount that is reasonably related to the government's legitimate interests." *Id.* at 991. When the government "fails to consider" alternative conditions, "[t]here is simply no way for the government to know whether … [the] alternative condition would adequately serve [its] purposes." *Id.*

The CJRA suffers the same kind of structural defect as the law invalidated in *Hernandez.* New Jersey's refusal to consider monetary alternatives is no more rational or constitutional than federal law's refusal to consider non-monetary alternatives in

Hernandez. Indeed, given the historical pedigree of monetary bail, the unconstitutionality of the CJRA follows *a fortiori* from *Hernandez.*

The decision below also conflicts with the Ninth Circuit's Fourth Amendment holding in *United States v. Scott*, 450 F.3d 863, 871 (9th Cir. 2006). There, the court addressed whether the government, without probable cause, could constitutionally search the home of a presumptively innocent individual who had consented to the search as a condition of his pretrial release. *Id.* at 865-66. The court rejected the notion that individuals accused but not convicted of crimes have substantially reduced privacy expectations. *Id.* at 872-74. The Court then found the search at issue unreasonable because it was not "necessary to ensure [the accused's] appearance at trial." *Id.* at 871. The Third Circuit, by contrast, held (at Pet.App.52-53) that accused individuals have substantially reduced privacy interests and approved ongoing searches and seizures on the express assumption that they were not "necessary to ensure [the accused's] appearance at trial." *Scott*, 450 F.3d at 871.

In sum, the Fifth, Ninth, and Eleventh Circuits have all recognized that governments may not impose unnecessary restrictions on a presumptively innocent individual's pretrial liberty when less onerous measures suffice to ensure appearance in court. The Fifth and Eleventh Circuit both apply a test that forbids greater-than-necessary pretrial restrictions, and the Ninth Circuit has applied the same test to invalidate a policy that guarantees excessive restrictions by artificially constraining what conditions courts can consider. That clear split—in

addition to the clear conflict with *Stack* and *Salerno*—readily warrants this Court's review.

II. The Third Circuit's Decision Is Profoundly Wrong.

The decision below not only conflicts with this Court's precedents and the decisions of other circuits; it is profoundly wrong. Whether this case is analyzed under the Eighth Amendment, the Due Process Clause, or the Fourth Amendment, the bottom line is the same: The CJRA violates the Constitution by *guaranteeing* unnecessary restrictions on pretrial liberty. By placing the one protection of pretrial liberty enshrined in the Constitution behind emergency glass and "subjecting defendants to home detention and electronic monitoring when monetary bail would suffice," Pet.App.30, New Jersey has violated the Constitution three times over.

A. New Jersey's Law Violates the Eighth Amendment.

For centuries, Anglo-American law has recognized bail as the preferred mechanism for preserving the "traditional right to freedom before conviction." *Stack*, 342 U.S. at 4. This Court has accordingly described bail as both a "right" and a "constitutional privilege" that safeguards the pretrial liberty of presumptively innocent individuals who can deposit sufficient security to assure their appearance and do not endanger the community. *Id.*

By its terms, the Eighth Amendment protects against "[e]xcessive bail," without specifying that bail must be offered for bailable offenses. The far better view is that the Eighth Amendment both presupposes and protects the right to bail in some non-excessive

amount for bailable offenses, just as the right to a speedy trial implies the right to a *trial*. Otherwise, a state could eliminate bail entirely without implicating, much less violating, the Eighth Amendment.

But the Court need not even definitively recognize a right to bail to find New Jersey's novel law incompatible with the Eighth Amendment. The Eighth Amendment undeniably protects against excessive bail, and the CJRA is structurally excessive. The law's basic structure guarantees that excessive restrictions on pretrial liberty will be commonplace. When the government imposes conditions of pretrial release directed at reducing flight risk, this Court has made clear that "bail must be set by a court at a sum" that addresses that interest "and no more." *Salerno*, 481 U.S. at 754; *accord Stack*, 342 U.S. at 5. New Jersey has made explicit that monetary bail is permissible only to address flight risk, N.J.S.A. §2A:162-17(c)(1), and yet New Jersey has made equally explicit that courts may not even consider monetary bail until it has already exhausted more restrictive options for addressing flight risk, like home detention and 24-hour monitoring. That rigid order of battle guarantees excessive restrictions on pretrial liberty in violation of the Eighth Amendment.

The Third Circuit's contrary conclusion is deeply flawed. The court first concluded that, "even if the Eighth Amendment provides a 'right to bail,'" it does not "include a right to make a cash deposit or to obtain a corporate surety bond to secure pretrial release," because those forms of bail were not "in practice" during the Founding Era. Pet.App.28. That analysis

rests on a caricature of originalism that would leave video games unprotected by the First Amendment because James Madison did not play Fortnite. *But see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011). In reality, the Constitution's protections extend to "modern" forms of Founding Era rights, even if those modern practices "were not in existence at the time of the founding." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). And "the modern practice" of bail, which is fully protected by the Constitution, involves "requiring a bail bond or the deposit of a sum of money subject to forfeiture." *Stack,* 342 U.S. at 5.[4] Surely if New Jersey required corporate surety bonds in excessive amounts for petty crimes, everyone, including the Third Circuit, would recognize the Eighth Amendment violation. The basic guarantee of the Eighth Amendment is not eliminated by the (debatable) observation that the precise form of monetary bail prevalent today differs in some respects from the form of bail known to the Framers.

The Third Circuit asserted that this "Court's use of 'bail' since" *Stack* has suggested that bail means any "process by which a person is released from custody." Pet.App.28. That conclusion is hard to square with this Court's references to "bail bond[s] or the deposit of a sum of money" or mentions of setting bail at a "figure" (*Stack*, 342 U.S. at 5) or "sum," *Salerno*, 481

[4] States are free to replace the precise form of monetary bail in practice at the Framing with a more modern equivalent. But no rational mode of interpreting the Constitution would allow a state to do what New Jersey has done here—namely, disfavor all forms of monetary bail in favor of non-monetary conditions that guarantee severe and unnecessary pretrial deprivations of liberty.

U.S. at 754. But even assuming bail refers to all conditions of release—both monetary and non-monetary—that only highlights the structural excessiveness of New Jersey's regime. By putting one form of bail—a form that has both a deep historical pedigree and is plainly less restrictive of pretrial liberty than house arrest and 24-hour monitoring—behind emergency glass, not to be offered unless more onerous conditions are inadequate, New Jersey guarantees excessive restrictions on pretrial liberty in contravention of *Stack*, *Salerno*, and the Eighth Amendment.

B. New Jersey's Law Violates Due Process.

The CJRA violates the Due Process Clause in multiple respects.

1. The CJRA—which, *inter alia*, imposes house arrest and 24-hour electronic monitoring on presumptively innocent individuals—plainly works a deprivation of liberty. *See Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("liberty" has "always ... been thought to encompass freedom from bodily restraint"). And the procedures New Jersey employs are inadequate whether judged based on the historical approach of *Medina v. California*, 505 U.S. 437, 446 (1992) or the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

Under *Medina*, New Jersey's decision to disfavor the historically rooted option of monetary bail and make it unavailable in all but the rarest of cases is impermissible. *See* Pet.App.14 (noting that New Jersey courts offered monetary bail in less than 0.1% of cases). That is particularly true when New Jersey employs a process that forces judges to employ more-

restrictive and more-novel options like house arrest and 24-hour monitoring before they can even consider the historically rooted means for protecting the liberty interest of the accused while assuring his appearance at trial.

The result is the same under the familiar balancing test of *Mathews*. The CJRA authorizes severe deprivations of liberty on presumptively innocent individuals without any heightened showing by the state, without any meaningful procedural protections for the accused, and virtually always without consideration of the historically rooted option of monetary bail, even when it would suffice to ensure appearance and be less restrictive than non-monetary conditions. Thus, the "risk of an erroneous deprivation" is not just substantial; it is guaranteed. *Mathews*, 424 U.S. at 335. And the state's countervailing interest is minimal. New Jersey has never argued that monetary bail is ineffective in securing appearance. To the contrary, it continues to authorize monetary bail and recognize its role in securing appearance. *See* N.J.S.A. §§2A:162-16(d)(1), 2A:162-17(c)(1). Moreover, New Jersey affirmatively requires judges to use the "least restrictive" combination of *non*-monetary conditions in conditioning release. Asking them to use the least restrictive combination of conditions—monetary or non-monetary—hardly imposes a meaningful "fiscal or administrative burden."

The Third Circuit nevertheless rejected petitioners' challenge because it concluded that the CJRA provides "extensive" procedural "safeguards" that render the risk of erroneous liberty deprivations

"low," and that the "probable value" of considering monetary bail is "also low." Pet.App.46, 47. But that analysis is flawed at multiple levels. First, almost all the procedural protections provided by the CJRA apply only when the state seeks full-blown pretrial detention. Indeed, the chasm between the procedures and standards used to detain someone in a public jail and to order house arrest and 24-hour monitoring is telling. While New Jersey provides substantial protections and a heightened showing for the former (as *Salerno* requires), it imposes nearly as dramatic restrictions of pretrial liberty based only on a showing that the state need not impose an even greater non-monetary imposition on liberty. More fundamentally, the procedures the state employs categorically forbid the consideration of monetary bail as a less restrictive alternative. The CJRA thus not only creates a risk of needless and erroneous deprivations of liberty—its structure *guarantees* them.

The Third Circuit suggested that considering monetary bail would cut against the state's interest in "pretrial liberty" because some arrestees cannot post bail. Pet.App.48. But that observation not only conflates the state's interests with the liberty interests of indigent arrestees, but also ignores that the proper analysis should give the judge the tools to impose the least liberty-restrictive option for the individual before the court. *See*, *e.g.*, *Rainwater*, 572 F.2d at 1057. Imposing monetary bail on an indigent individual who truly cannot afford to post a bond when there are non-monetary alternatives to achieve the state's interest is constitutionally problematic, but imposing house arrest when an affordable monetary bond would fully achieve the government's interest is at least as

problematic. *Id.* Nothing allows New Jersey to protect the liberty interests of the indigent by sacrificing the liberty interests of individuals like petitioner Holland, especially when the simple expedient of making monetary bail available as an option for the court to consider before exhausting the possibility of house arrest is such an obvious solution.

2. Following *Salerno*, numerous courts have analyzed pretrial restrictions on liberty under the rubric of substantive due process. *See, e.g.*, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014) (en banc). Moreover, where the procedures in place foreclose the consideration of obviously more liberty-preserving options, the procedural and substantive due process analyses tend to merge. *See Foucha v. Louisiana*, 504 U.S. 71, 78-82 (1992). Thus, the CJRA violates substantive due process for reasons that mirror its procedural failings.

A right is protected by due process if it is "fundamental to [our] scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Although a right need only meet one of those standards to merit constitutional protection, the right asserted here satisfies both.

First, an accused's right to post bail before being subjected to severe deprivations of pretrial liberty is "fundamental to [our] scheme of ordered liberty." *Id.* This Court has expressly recognized the fundamental place of bail, describing it as "basic to our system of law," *Schilb*, 404 U.S. at 365, and a "constitutional privilege" to which the presumptively innocent are "entitled," *United States v. Barber*, 140 U.S. 164, 167

(1891). Moreover, this Court has directly connected bail to preserving the presumption of innocence that all agree is fundamental to our scheme of ordered liberty. *See Stack*, 342 U.S. at 4.

Second, bail is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 767. Indeed, few aspects of our criminal justice system have deeper roots. The right to bail was recognized in the Massachusetts Body of Liberties in 1641 and other fundamental documents of the Founding Era—including in New Jersey. *See State v. Mairs*, 1 N.J.L. 335, 336 (1795). The right was "unequivocally" protected by federal law after the Northwest Ordinance of 1787 and the Judiciary Act of 1789. And the overwhelming consensus of states—including all but two to join the Union after the Founding—is that the accused have a right to bail. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 920-27 (2013).

The court below acknowledged that "bail constitutes a fundament of liberty underpinning our criminal proceedings," but suggested that "cash bail or corporate surety bonds" could not be "fundamental to our scheme of ordered liberty" because there was no "evidence" of those forms of monetary bail "in early bail practice in the United States." Pet.App.35. But this misguided approach to originalism is just as flawed when it comes to due process as the Eighth Amendment. In 2017, only 44 people arrested in New Jersey on complaint-warrants (less than 0.1%) were offered monetary bail, while thousands were shackled with ankle bracelets or confined to their homes. Pet.App.14. The state has thus effectively eliminated

the modern equivalent of the historical mechanism for protecting pretrial liberty and replaced it with alternatives that are substantially more restrictive of liberty. That plainly violates this Court's precedents.

The Third Circuit revealed its hostility to monetary bail by remarking that monetary bail "cannot be fundamental to preserving ordered liberty" because it "often deprived presumptively innocent defendants of their liberty." Pet.App.40-41. That gets matters backwards. The *option* of some "form of monetary bail" has been available since the Framing because it *preserves*, not limits, pretrial liberty. Pet.App.27. It has always been the case that some of those accused of crimes have been unable to take advantage of that option, but that has never been a reason for ignoring the liberty-preserving character of the option for those who can take advantage of it. *See, e.g.*, *Stack*, 342 U.S. at 10 (Jackson, J., concurring) (rejecting notion that "every defendant is entitled to such bail as he can provide").

The government no doubt has ample authority to supplement monetary bail with other options that judges may consider for the indigent and the well-heeled alike. But it has no license to replace the historically approved and liberty-preserving option of monetary bail with something like house arrest. In doing so, it has trampled on the "fundamental" and "strong interest in liberty." *Salerno*, 481 U.S. at 750.

C. New Jersey's Law Violates the Fourth Amendment.

Finally, New Jersey's law violates the Fourth Amendment by subjecting presumptively innocent individuals to "unreasonable searches and seizures."

An accused "does not lose his or her Fourth Amendment right to be free of unreasonable" searches and seizures. *Scott*, 450 F.3d at 868. And nonstop electronic monitoring clearly constitutes a search, just as house arrest clearly constitutes a seizure. *See Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018); *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984). The only question is whether such searches and seizures are reasonable, and the answer is provided "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

That balancing is not close here. The degree to which the CJRA's searches and seizures intrude on the privacy interests of individuals like Holland is severe. GPS monitoring, for example, "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217. House arrest—which this Court has likened to "imprisonment," *Wallace v. Kato*, 549 U.S. 384, 388-89 (2007)—is equally problematic, as it too involves "permeating police surveillance" that converts one's own home into a detention facility. *Carpenter*, 138 S. Ct. at 2214. On the other side of the ledger, New Jersey has a "legitimate governmental interest[]" in securing Holland's appearance at trial. *Houghton*, 526 U.S. at 300. But the state cannot possibly show that its intrusive electronic monitoring or restrictive home detention are "*needed* for the promotion of" that interest when the state prohibits courts from even

considering the less-restrictive and readily available mechanism of bail. *Id.* (emphasis added).

The Third Circuit rejected this challenge largely on the theory that "reasonableness under the Fourth Amendment does not require employing the least intrusive means." Pet.App.53. But in other Fourth Amendment contexts, this Court has deemed intrusions greater than necessary to serve the government's interest to be unreasonable. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) ("Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate th[at] purpose.'"). And making plainly less intrusive means categorically unavailable is a hallmark of unreasonableness. *See Wilson v. Arkansas*, 514 U.S. 927 (1995).

III. This Case Is A Uniquely Well-Suited Vehicle For Addressing This Vital Issue.

This case presents an exceptionally important issue, as New Jersey has struck at the heart of the "traditional right to freedom before conviction." *Stack*, 342 U.S. at 4. Last year, over 44,000 individuals were issued a complaint-warrant in New Jersey, and only 44 were permitted to post monetary bail. Pet.App.13-14. Although tens of thousands of presumptively innocent individuals will be affected by the decision below, this Court is unlikely to hear from them, especially in light of the decision below. After all, pretrial liberty is crucial not only for "the unhampered preparation of a defense," *Stack*, 342 U.S. at 4, but also for the unhampered preparation of a challenge to restrictions on that right. Thus, a presumptively innocent individual under house arrest is

"handicapped in consulting counsel, searching for evidence and witnesses, and preparing" his affirmative case. *Id.* at 8 (Jackson, J., concurring). Such an individual is unlikely to direct her limited and fettered resources away from her defense and towards an affirmative challenge to pretrial restrictions when circuit precedent now forecloses it and "there is an opportunity for prosecutorial vindictiveness in the pretrial stage," for example, by "adding or substituting charges." *State v. Gomez*, 775 A.2d 645, 653 (N.J. App. Div. 2001). Thus, the instant petition provides a unique opportunity to address a critical issue affecting the rights of tens of thousands presumptively innocent individuals.

The Court should act now because states are beginning to follow New Jersey's misguided lead, threatening the liberty of numerous other presumptively innocent individuals. *See* FBI, *Uniform Crime Report*, FBI: UCR (2015), https://bit.ly/2hTjfN4 (estimating 10,797,088 arrests nationwide in 2015). On July 1, 2017, the New Mexico Supreme Court implemented rules that make monetary bail available only when house arrest and 24-hour monitoring cannot ensure appearance (which is to say, almost never). *See* N.M. Ct. Rule 5-401(D)-(E). The Maryland Court of Appeals likewise promulgated rules last year designed to deprioritize monetary bail. *See* Md. Ct. Rule 4-216.1. Though Maryland's efforts may have been well-intentioned, the results are troubling: Maryland is now seeing "more defendants being detained without the option of pretrial release." Lynh Bui, *Reforms Intended to End Excessive Cash Bail in Md. Are Keeping More in Jail Longer, Report Says*, Wash. Post (July 2, 2018),

https://wapo.st/2vL9S7v; Jayne Miller, *Numbers Raise Questions About Move to Reform Bail in Maryland*, WBALTV (May 29, 2018), https://bit.ly/2xki9QD (reporting 26% increase in individuals held without bail in Baltimore under new bail rule).

California too has recently hopped on the anti-bail bandwagon, passing a law that will eliminate monetary bail. *See* S.B. 10 (Cal. 2018). For many cases, courts will replace a judge's assessment of the accused and the appropriate bail with a "[v]alidated risk assessment tool" based on "scientific research" to "assess[] the risk of a person failing to appear in court." Cal. Penal Code §1320.7(k). In short, New Jersey's novel approach has already been replicated and, given its obvious constitutional flaws and conflict with precedents of this Court and other circuits, the Court should intervene now before the unconstitutional "reform" spreads any further.

* * *

To be clear, states remain free to offer more options for pre-trial release, including options that are more protective of pre-trial liberty. But what states may not do—and until now, had never tried—is what New Jersey has done here: make monetary bail an option of last resort, theoretically available but impossible for courts to even consider unless and until they have determined that draconian restrictions of pretrial liberty such as house arrest are insufficient to secure the accused's appearance. The undeniable result is that individuals whose appearance could be secured by a monetary bond are needlessly subjected to house arrest and 24-hour monitoring. That is not a

result the Constitution should tolerate. This Court thus should grant review, before the "right to bail" and "the presumption of innocence" "lose [their] meaning." *Stack*, 342 U.S. at 4.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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