No. 18-814

In the Supreme Court of the United States

MAURICE WALKER,
on behalf of himself and others similarly situated,
Petitioner,

v.

CITY OF CALHOUN, GEORGIA,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The Cato Institute has a strong interest in this case because the City of Calhoun's practice of detaining indigent misdemeanor defendants based solely on their inability to pay a predetermined money bail amount offends the right to pretrial liberty and is inconsistent with the historical purposes of bail.

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

On September 3, 2015, petitioner Maurice Walker was arrested by the Calhoun Police Department ("CPD") and charged with being a pedestrian under the influence, a misdemeanor offense that carries a fine, but no jail time. O.C.G.A. § 40-6-95. CPD officers brought Walker to the local jail, booked him, and detained him in a holding cell.

The City of Calhoun uses a money bail schedule to determine how much individuals—like Walker—arrested and charged with misdemeanor offenses must pay for pretrial release. The schedule provides a predetermined bond amount for each offense. Walker had two options: either he could be released immediately by paying the standard $160 bond set for his charge pursuant to the predetermined money bail schedule *or* he could remain in jail and request—at his first appearance—that the court set his bond amount by taking into account his individual circumstances, including his indigence. Neither Walker nor his family could pay the standard $160 bond, so he remained in jail pending his first appearance scheduled for September 14th, eleven days after his arrest.

On September 8th, while still incarcerated, Walker filed this lawsuit challenging his detention as unconstitutional wealth-based detention. Walker alleged, on behalf of himself and a class of similarly situated indigent arrestees, that the City's money bail scheme violated the Fourteenth Amendment by "jailing the poor because they cannot pay a small amount of money." The next day, Walker was

released on a personal recognizance bond by agreement of counsel for the City of Calhoun.

The district court granted Walker's motion for a preliminary injunction. *Walker v. City of Calhoun*, No. 4:15-CV-0170, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016). Upon remand, the district court imposed a revised preliminary injunction requiring Calhoun to determine arrestees' ability to pay bail within 24 hours of arrest, and to immediately release those who established indigence. A divided Eleventh Circuit panel vacated the revised preliminary injunction and remanded, characterizing Walker's claim of unconstitutional pretrial detention as "merely wait[ing] some appropriate amount of time to receive the same benefit as the more affluent." *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018).

The Eleventh Circuit majority decision is at odds with the longstanding history of bail and pretrial release in common law countries from medieval England to the early American Republic. It also fails to adequately protect the fundamental right to pretrial release under contemporary case law, and implicates doctrines arising under the Due Process Clauses, the Eighth Amendment's prohibition on excessive bail, and the Equal Protection Clause.

More generally, bail schemes like that employed by the City of Calhoun erode the Sixth Amendment right to a jury trial by systemically incentivizing indigent arrestees to plead guilty or else face the harsh consequences of pretrial detention. Indigent arrestees should not be forced, simply on account of their financial status, to choose between a guilty plea

and the multiplying consequences of continued pretrial detention.

ARGUMENT

I. The Historical Development of Bail Confirms the Right to Pretrial Liberty Through Bail for Misdemeanants.

The Founders shaped their understanding of bail from the statutes and common law of England, which stemmed from some of the most fundamental documents in Western democracy—Magna Carta, the Statute of Westminster I, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. The right to pretrial release in the United States, therefore, has roots that extend back to medieval England, where bail originated "as a device to free untried prisoners." *See* Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964,* 1 (1964).

A. English Authorities Confirm the Right to Pretrial Liberty Through Bail for Misdemeanants.

Something like our modern notion of bail and pretrial release has been present throughout the entire history of the Anglo-American legal tradition.

During the Anglo-Saxon period—before the Norman Conquest of England in 1066—the tribes moved away from blood feuds to a system of justice based on the wergild (meaning "man price" or "man payment") as payment for offenses. Elsa De Haas, *Antiquities of Bail: Origin and Development in Criminal Cases to the Year 1275*, 3-15 (1940). The wergild assigned a monetary value to persons and

their property according to social rank, and the convicted paid monetary compensation to his victim to resolve an offense. *Id.* at 10-13.

Crucially, under this system, an accused was not "detained," but rather was required to secure a third party, commonly known as a surety, to pledge a guarantee of the appearance of the accused for trial and the payment of the monetary judgment upon conviction. *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. Rev. 517, 519-520 (1983). The accused did not exchange money to obtain pretrial release, either to the accuser or to the surety. Timothy R. Schnake*, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, at 25 (Sept. 2014). This system lowered the risk of pretrial flight as the surety had an incentive to make certain the accused appeared for trial or else the surety would bear the financial responsibility. Carbone, *supra*, at 520-21.

Following the Norman Conquest, capital and corporal punishment gradually replaced the wergild as the penalty for most offenses, and the justice system transitioned from a private process to a public process. Schnake, *supra*, at 25. The writs of replevin and mainprize replaced the wergild to secure the "release of the alleged criminal," as "bail as a right of free men assumed greater proportions of importance." *Id.* at 85, 129.

In 1215, Magna Carta codified the fundamental right to pretrial liberty, proclaiming that "no freeman shall be taken or imprisoned, or be dissesised of his Freehold, or Liberties, or Free Custom or be

outlawed, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." Magna Carta, ch. 39, in A. Howard, *Magna Carta: Text and Commentary* 43 (1964).

This right to pretrial liberty codified by Magna Carta was hobbled, however, by the abuses of the local sheriffs, acting as the Crown's representatives, in exercising their discretionary powers to release or hold a defendant. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 45-46 (1977); *see also United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. 1981) (en banc) (explaining that sheriffs "exercised a broad and ill-defined discretionary power to bail" prisoners and that this "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and who "accepted bribes from those who were not otherwise entitled to bail"). The English Parliament responded to abuses and circumvention of the right to pretrial liberty by enacting additional protections, which were later incorporated into American law.

First, to curb abuses, the English Parliament enacted the Statute of Westminster I in 1275 to eliminate the discretionary power of the local sheriffs by defining bailable and non-bailable offenses, and establishing criteria to govern bail. *See* Carbone, *supra*, at 523-26. The sheriffs, and later the justices of the peace, were required to grant or deny bail according to the terms of the Statute of Westminster I, which also provided sanctions for noncompliance. Accordingly, for all bailable offenses, bail meant

release as a matter of right, not discretion.[2] Moreover, the Statute of Westminster I required an inquiry into the charge, including whether the evidence was reliable, in determining whether the offense was bailable. Thus, an accused could be bailed if the evidence consisted only of light suspicion.

Second, the English Parliament passed the Petition of Right in 1628 in direct response to the Crown's detention of defendants without a charge. By way of background, King Charles I had received no funds from the Parliament for the Thirty Years' War. Duker, *supra*, at 58. He responded by requiring certain noblemen to loan him funds and he imprisoned without bail or trial anyone who refused. *Id.* at 58-60. In *Darnel's Case*, 3 How. St. Tr. 1 (1627), five incarcerated knights filed a habeas corpus petition arguing that their indefinite incarceration on an unstated charge without bail or trial was unlawful. The attorney general argued that they were held "by the special command of his majesty," *id.* at 3, and that Magna Carta did not apply to pretrial imprisonment. The court denied them release.

The English Parliament responded by setting forth arbitrary imprisonment as a specific grievance when it passed the Petition of Right in 1628. Petition of Right, 3 Car. 1, Ch. 1 (1628) (stating "your subjects

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[2] *See* Statute of Westminster I, 3 Edw. 1, c. 15 (1275) (stating that persons accused of bailable offenses "shall from henceforth be let out by sufficient Surety, whereof the Sheriff will be answerable and that without giving ought of their Goods.").

have of late been imprisoned without any cause showed").[3] By accepting the Petition of Right, King Charles I brought the force of Magna Carta to bear upon pretrial imprisonment. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 967 (1965). A specific charge, rather than a recitation that the prisoner was detained at the King's command, would enable a justice to determine whether the cause was a bailable offense such that the defendant could enjoy their right to pretrial liberty through bail. *Id.* at 966-67.

Third, procedural delays frustrated the right to pretrial liberty for those accused of bailable offenses, so the Parliament passed the Habeas Corpus Act to provide a mechanism for an accused to challenge his detention without bail. Habeas Corpus Act of 1679, 31 Car. 2, Ch. 2 (1679) (acknowledging that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable."). The Act strengthened the protections of the right to pretrial liberty by requiring early judicial review of a defendant's detention, including a determination of whether the defendant was entitled to bail upon a surety's pledge, and penalties for judges if they "deny any writ of Habeas Corpus by this act required to be granted." *Id.* at § 9.

Finally, the Parliament underscored the importance of pretrial liberty again by including a prohibition on excessive bail in the English Bill of

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[3] *See Proceedings in Parliament Relating to the Liberty of the Subject*, 3 How. St. Tr. 59, 154 (1628) ("[T]he constant practice hath been anciently and modernly to bail men . . . .").

Rights. The protections of the Habeas Corpus Act had been circumvented by the practice of setting prohibitively high bail. Thus, Parliament corrected this injustice against pretrial liberty by prohibiting excessive bail. Bill of Rights, 1 W. & M., s.2, c. 2 (1689). It recognized that "excessive bail" was used "to elude the benefit of the laws made for the liberty of the subjects" and declared "that excessive bail ought not to be required." *Id.*

English common law further required an individualized assessment of what a defendant or surety could pledge to assure appearance at trial. If a defendant failed to appear for trial, the surety was "amerced" with a fine, but there were "maximum amercements depending on the wrong-doer's rank; the baron [did] not have to pay more than a hundred pounds, nor the routier more than five shillings."2 Frederick William Pollock & Frederic William Maitland, 1 *The History of English Law Before the Time of Edward I,* 514 (2d ed. 1895 [1898]).[4]

Most crucially, English courts firmly rejected the equivalent of fixed bail schemes, acknowledging that requiring an amount beyond a specific defendant's reach was equivalent to offering no bail at all. "A defendant might be subjected to as much inconvenience by being compelled to put in bail to an

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[4] *See also* 1 J. Chitty, *A Practical Treatise on the Criminal Law* 88-89 (Philadelphia ed. 1819) ("The rule is, where the offence is prima facie great, to require good bail; moderation nevertheless is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.").

excessive amount, as if he had actually been arrested." *Bates v. Pilling*, 149 Eng. Rep. 805, 805 (K.B. 1834) (Richards). Thus, courts inquired into the individual's circumstances to determine the appropriate amount of bail. "[E]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances." *King v. Bowes*, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (per curiam) (allowing for a "lessening" of bail as there may be "difficulty" in procuring the sums); *Neal v. Spencer*, 88 Eng. Rep. 1305, 1305-06 (K.B. 1698) (collecting cases showing a diversity of bail amounts for the same offense and allowing a cause of action for excessive bail).[5]

B. Constitutional and Common Law in the United States Confirm the Right to Pretrial Liberty through Individualized Bail.

The English system of bail, and its emphasis on protecting the right to pretrial liberty, including through individualized determinations of a defendant's bail, served as a model for bail in America. In colonial America, the bail system was unsurprisingly patterned after English law. *See* Duker, *supra*, at 80-81. And shortly after independence, the Confederation Congress adopted

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[5] *See also* De Haas, *supra*, at 84 ("It is noteworthy that no fixed amount seems to have been charged for the privilege of bail release . . . . It is our conclusion that they allowed themselves considerable leeway in writing out the order for release, and that they failed generally to abide by any set formula.").

the Northwest Ordinance to govern the rights of the Northwest Territory, which also recognized the right to pre-trial liberty. Northwest Ordinance of 1787, Art. 2 ("All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land.").

At the state level, nearly every state constitution followed the model of the Pennsylvania Frame of Government of 1682, which provided that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where the proof is evident or the presumption is great." Frame of Government of Pennsylvania of 1682, art. XI.[6] A number of states limited the number of capital offenses, thereby extending the right to pretrial liberty to a greater number of defendants. Foote, *supra*, at 977 (finding that the "American experience had gone far beyond contemporaneous English law in the scope given the right to bail").[7]

At the federal level, the first Congress passed the Judiciary Act of 1789, which was unequivocal that there was an absolute right to bail for any non-capital offense. "'[U]pon *all* arrests in criminal cases, bail

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[6] *See* Carbone, *supra*, at 532 ("[T]he Pennsylvania provision became the model for almost every state constitution adopted after 1776.").

[7] *See also* Carbone, *supra*, at 535 ("The byproduct of the liberalization of penalties was a far-reaching extension of the right to bail.").

shall be admitted, except where the punishment may be death[.]" Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (emphasis added). And of course, in 1791, the Eighth Amendment was adopted to officially command that "[e]xcessive bail shall not be required, nor excessive fines imposed." U.S. CONST. amend. VIII.

C. Bail Schemes Like the City of Calhoun's Are Inconsistent with the History and Doctrine Recognizing the Right to Pretrial Liberty.

Much like the English model, the United States adopted constitutional protections to curb government abuses of the right to pretrial liberty. In *Stack v. Boyle*, 342 U.S. 1 (1951), the Supreme Court made clear that there is a "right to bail" that has continued unabated in American law "[f]rom the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure." *Id.* at 4. It continued:

> This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if

> found guilty. *Id.* (internal citations omitted).

The Supreme Court confirmed the right to pretrial liberty is "fundamental" in *United States v. Salerno*, 481 U.S. 739 (1987), holding that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 750, 755. The Supreme Court has acknowledged that "in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time." *United States v. Barber*, 140 U.S. 164, 167 (1891).

Nevertheless, while all misdemeanant defendants in the City of Calhoun are presumptively subject to immediate release by paying the predetermined money bond, immediate pretrial release is practically available only for those with access to financial resources. This bail scheme clashes with the historical understanding of the right to pretrial liberty in the United States, and it implicates several different constitutional provisions and contemporary doctrines.

First, the Due Process Clauses of the Fifth and Fourteenth Amendment provide—much like Magna Carta itself—that no person should be deprived of liberty without due process of law.[8] Under the

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[8] *Compare* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of . . . liberty . . . without due process of law"), *and* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law"), *with* Magna Carta, ch. 39

framework of the Due Process Clause, the *Salerno* Court addressed the procedural protections required for pretrial detention of defendants charged with serious felony offenses, as it is only in such cases that the balance of interests might permit the deprivation of an individual's "fundamental" right to pretrial liberty. 481 U.S. at 750. The Court upheld the authorization of pretrial detention under the Bail Reform Act because of "the numerous procedural safeguards," including a "full-blown adversary hearing," *id.* at 750, "findings of fact" by "clear and convincing evidence," and a "statement of reasons for a decision to detain," *id.* at 752.[9]

Indigent misdemeanant defendants in the City of Calhoun, however, are subject to pretrial detention without receiving any procedural safeguards. Instead, indigent misdemeanant defendants fail to have an adversarial bail setting hearing until their first appearance, which may not occur for up to 48 hours after arrest under the revised Standing Bail Order. This 48-hour pretrial detention occurs notwithstanding that the misdemeanants are alleged to have committed bailable offenses that presumptively would result in their immediate release if they had available resources.

("No freeman shall be taken or imprisoned, or be dissesised of his Freehold, or Liberties . . . but by lawful Judgment of his Peers, or by the Law of the Land.").

[9] *See also* 18 U.S.C. § 1343(f) (requiring that the adversarial hearing "be held immediately upon the person's first appearance before the judicial officer" except in limited circumstances); *Stack*, 342 U.S. at 4 ("Relief in this type of case must be speedy if it is to be effective.").

Second, the Excessive Bail Clause of the Eighth Amendment provides—much like the English model—protections against the setting of excessive bail.[10] In *Stack*, the Court explained that bail is unconstitutionally excessive where it is "set at a figure higher than an amount reasonably calculated" to assure the accused's presence at trial. 342 U.S. at 3; *see also United States v. Motlow*, 10 F.2d 657, 659 (7th Cir. 1926) (opinion by Butler, J. as Circuit Justice of the Seventh Circuit) ("[The Eighth Amendment] implies, and therefore safeguards, the right to give bail at least before trial. The purpose is to prevent the practical denial of bail by fixing the amount so unreasonably high that it cannot be given."). Courts have historically protected the right to pretrial liberty through individualized bail determinations, lest the bail amount serve as a practical denial of bail. *E.g.*, *United States v. Brawner*, 7 F. 86, 89 (W.D. Tenn. 1881) (stating that "to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in

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[10] *Compare* U.S. CONST. amend. VIII ("Excessive bail shall not be required . . ."), *with* English Bill of Rights of 1689, 1 W. & M., c.2, s.2 ("That excessive bail ought not to be required"); *see Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 294 (1989) (O'Connor, J., concurring in part and dissenting in part) (explaining that the first Congress based the Eighth Amendment "on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English Bill of Rights").

a case clearly bailable by law") (citation and internal quotation marks omitted).[11]

The City of Calhoun, however, routinely incarcerates indigent misdemeanants based on a bail schedule that predetermines money bond amounts for each alleged offense without any individualized consideration. For indigent misdemeanants, the predetermined money bond amounts are prohibitively high, and therefore serves as a practical denial of bail for those accused of bailable offenses.

Third, as detailed extensively in the petition, the Equal Protection Clause of the Fourteenth Amendment protects indigent criminal defendants from receiving unequal justice. "[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that the failure to provide an indigent defendant a trial transcript at public expense in order to prosecute an appeal was a violation of the Equal Protection Clause); *Tate v. Short*, 401 U.S. 395 (1971) (holding statute violated the Equal Protection Clause where it converted a fine imposed under a fine-only statute

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[11] *See also Jones v. Kelly*, 17 Mass. 116, 116-17 (Mass. 1821) (finding bail to be excessive when a man could not secure sufficient sureties and reducing it from $3000 to $1000); *Ex Parte Hutchings*, 11 Tex. App. 28, 29 (Tex. 1881) (whether bail is "excessive and oppressive" depends "upon the pecuniary condition of the party. If wealthy the amount would be quite insignificant compared to a term in the penitentiary; if poor, very oppressive, if not a denial of the bail.").

into a jail term solely because the defendant is indigent and cannot immediately pay the fine).

As this Court recognized in *Williams v. Illinois*, 399 U.S. 235 (1970), a statute may appear to extend to all defendants the chance to limit their confinement by paying a fine, yet this presents an "illusory choice" for any indigent who is without funds. *Id.* at 242 (holding that a statute violated the Equal Protection Clause where it subjected defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay a fine). "By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons," because incarceration applies "only to those without the requisite resources." *Id.* Likewise, in *Bearden v. Georgia*, 461 U.S. 660 (1983), this Court held that a lower court's revocation of an indigent defendant's probation for failure to pay the imposed fine and restitution violated the Equal Protection Clause. In its decision, this Court explained that the sentencing court's initial decision to place the defendant on probation reflected a determination that "the State's penological interests do not require imprisonment," and that the scheme to revoke his probation and incarcerate him for failure to pay amounted to "little more than punishing a person for his poverty." *Id.* at 670-671.

Walker claims that misdemeanor defendants who can pay secured money bail are able to purchase their pretrial liberty, whereas the indigent are absolutely denied pretrial liberty because they cannot pay for it. The misdemeanant defendants would receive pretrial release if they have the available resources. This

two-tiered system of justice denies a fundamental right of pretrial liberty to the indigent. This type of unequal justice is squarely the type of harm this Court has addressed under the Equal Protection Clause.

As this Court previously acknowledged, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Predetermined money bail schedules—like the City of Calhoun's—that fail to provide for a timely, individualized determination of bail and results in jailing people for being poor are inconsistent with that longstanding history and violate the fundamental right to pretrial liberty.

II. Protecting Pretrial Liberty Is All the More Important Given the Major Role that Money Bail Schemes Play in Facilitating Coercive Plea Bargaining.

Money bail schemes, like those employed by the City of Calhoun, do not simply deny the fundamental right to pretrial liberty. At a structural level, they also erode the Sixth Amendment right to a jury trial itself, by giving prosecutors enormous leverage to extra guilty pleas from defendants, regardless of factual guilt.

Despite their intended centrality as the bedrock of our criminal justice system, jury trials today are being pushed to the brink of extinction. The proliferation of plea bargaining, which was completely unknown to the Founders, has transformed the country's robust "system of trials" into a "system of pleas." *Lafler v. Cooper*, 566 U.S.

156, 170 (2012).[12] The Framers understood that "the jury right [may] be lost not only by gross denial, but by erosion." *Jones v. United States*, 526 U.S. 227, 248 (1999). That erosion is nearly complete, as plea bargains now comprise all but a tiny fraction of convictions. *See Lafler*, 566 U.S. at 170 (in 2012, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions").

Most troubling, there is ample reason to believe that many criminal defendants are effectively *coerced* into taking pleas, regardless of the merits of their case. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS, Nov. 20, 2014. For example, in a recent report, the National Association of Criminal Defense Lawyers extensively documented the "trial penalty"—that is, the "discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial." NAT'L ASS'N OF CRIM. DEF. LAYWERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION, AND HOW TO SAVE IT 6 (2018).

Although coercive plea bargaining has many complex causes, one of the most significant is the extraordinary coercive pressure that results from pretrial detention. As discussed extensively in Judge

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[12] *See also* John M. Beattie, *Crime and the Courts in England: 1660-1800*, at 336-337 (1986) ("Virtually every prisoner charged with a felony insisted on taking his trial, with the obvious support and encouragement of the court. There was no plea bargaining in felony cases in the eighteenth century.").

Martin's dissenting opinion below, even relatively brief periods of pretrial detention can have extreme consequences, especially for indigent defendants. *See Walker*, 901 F.3d at 1275-76 (Martin, J., dissenting) ("[Indigent defendants] can lose their jobs. They can lose their homes and transportation. Their family connections can be disrupted. And all this is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members.").[13] And pretrial detention also makes it far more difficult for a defendant to prepare for trial, as "he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

Unsurprisingly then, the extreme pressure of pretrial detention makes defendants far more likely to enter guilty pleas. *See* Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (July 24, 2016), https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/. For example, the Bail Project, a non-profit that pays bail for indigent defendants, notes that in 50% of the cases where they pay bail, criminal charges are dismissed; yet among those held on bail, a staggering *90%* enter a guilty plea. *See* The Bail

[13] *See also* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html ("Our clients work in service-level positions where if you're gone for a day, you lose your job. People in need of caretaking—the elderly, the young—are left without caretakers. People who live in shelters, where if they miss their curfews, they lose their housing.").

Project, *Why Bail?*, https://bailproject.org/why-bail/ (last visited Jan. 28, 2019). *See also* Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 771 (2017) ("In this dataset, detention increases the likelihood of pleading guilty by 25% for no reason relevant to guilt.").

That the resolution of criminal cases turns so heavily on the happenstance of whether a defendant can afford bail is a sobering indictment of our modern system of criminal adjudication. There is no panacea to the problem of coercive plea bargaining, but ensuring meaningful protection of the right to pretrial liberty—especially for indigent defendants—would be a major step toward restoring the vitality of the Sixth Amendment right to a jury trial.

CONCLUSION

For the foregoing reasons, and those stated by the petitioner, the Court should grant the petition.

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