No. 22-

IN THE

Supreme Court of the United States

BRADLEY HESTER,
on behalf of himself and others similarly situated,
Petitioner,

v.

MATTHEW GENTRY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause protects a fundamental right to pretrial liberty that prevents states from depriving a presumptively innocent person of physical liberty pending a criminal trial unless a court finds that the deprivation is necessary to protect public safety and/or reasonably assure the person's appearance at future court proceedings.

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellee below, is Bradley Hester, on behalf of himself and others similarly situated.

Respondent, defendant-appellant below, is Matthew Gentry, Sheriff of Cullman County, Alabama, in his official and individual capacity.

Other defendants-appellants below were Amy Black, in her official capacity as a magistrate; Lisa McSwain, in her official capacity as a magistrate; Judge J. Chad Floyd; and Judge Rusty Turner. The court of appeals dismissed these defendants' appeal for lack of appellate jurisdiction.

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PETITION FOR A WRIT OF CERTIORARI

Bradley Hester respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

Over the last fifteen or so years, lawsuits have been filed around the country challenging bail practices in various jurisdictions (here, Cullman County, Alabama). More specifically, these lawsuits have challenged the constitutionality of using "secured-money bail"—meaning an upfront payment is required for release—to detain people in jail while they await trial on charges of which they are presumed innocent. The bail systems at

issue in these cases deprive people of pretrial liberty without any court finding that alternatives to detention could not reasonably ensure public safety and prevent flight, such that detention is necessary to serve a government interest. Indeed, in Cullman County, anyone arrested who cannot make an upfront cash payment—typically at least several hundred dollars, and often several thousand—is detained in jail for *weeks* before having an adversarial hearing, i.e., before having any opportunity to be heard on whether pretrial detention is in fact necessary.

Federal and state appellate courts hearing these lawsuits have divided over the constitutionality of the challenged systems. *See infra* pp.30-31. Some courts have held that due process protects a fundamental right to pretrial liberty that prohibits states from detaining people pretrial unless a court finds—after providing adequate procedural protections, such as an adversarial hearing at which a person has a meaningful right to be heard—that the detention is necessary to serve a government interest. A divided panel of the Eleventh Circuit, by contrast, held here that it does *not* violate due process for states to lock presumptively innocent people in cells for days, weeks, months, or years even if doing so is not necessary to protect public safety or to prevent flight, and even if procedures to protect against erroneous deprivations of pretrial liberty have not been provided. In fact, the Eleventh Circuit flatly held that "[p]retrial detainees have no fundamental right to pretrial release." App.55a.

Certiorari is warranted to resolve this entrenched division of authority. The question presented arises frequently, and the question is extremely important. That is both because the right to physical freedom is one of

our most precious liberties and because pretrial detention inflicts grievous harms, including:

- prolonged separation from spouses, parents, children, and other family;
- loss of employment, housing, and medical care;
- exposure to violence and disease in jail;
- interference with religious practices;
- guilty pleas coerced—even from the innocent—because pleading often means immediate release whereas requiring the government to prove its charges at trial means spending weeks, months, or years in jail; and
- higher conviction rates for those who go to trial (because pretrial detention hampers individuals' ability to prepare their defense), as well as longer sentences for those convicted.

Society overall is likewise harmed by pretrial detention, both because of the monetary costs of incarceration and because pretrial detention—controlling for other factors—*increases* future crime and *lowers* rates of future court appearance.

Answering the question presented would not require this Court to break new ground. To the contrary, although the Court has not addressed these bail-related issues for over three decades, its decisions make clear that the lower-court cases rejecting a right to pretrial liberty and allowing pretrial detention that serves no legitimate government interest are wrong. For example, the Court—speaking through Chief Justice Rehnquist—recognized in *United States* v. *Salerno*, 481 U.S. 739 (1987), that there is a "'general rule' of substantive due process that the government may not detain a person

prior to" conviction, and that this right to pretrial liberty is "fundamental," *id.* at 749-750. Indeed, *Salerno* explained that "[i]n our society liberty is the norm, and detention prior to trial … the carefully limited exception." *Id.* at 755. And *Foucha* v. *Louisiana*, 504 U.S. 71 (1992), invoked *Salerno* in striking down under the Due Process Clause a state law that permitted deprivations of physical liberty precisely because the law did not require a showing that such deprivations were necessary, *see id.* at 80-83.

That holding is entirely unsurprising. As a matter of first principles, there is no reason why states *should* be able to detain people pretrial if alternatives to detention could adequately serve their interests. Again, physical liberty is among the most basic of rights. If that liberty means anything, it must mean that the state cannot just keep someone in jail before conviction (often for prolonged periods) when alternatives to preventive detention would adequately serve its interests.

Recognizing all this, the district court here preliminarily enjoined Cullman County's bail practices, holding that they violate the substantive-due-process right to pretrial liberty. But over a dissent, the Eleventh Circuit reversed, seeing no constitutional violation because it improperly (1) limited itself to a facial challenge rather than addressing the as-applied claims Hester actually brought and (2) disregarded the district court's factual findings about how the county's bail system actually functions—findings that were based on the live testimony and other evidence the court heard, and that were not set aside (or even challenged) on appeal.

If the panel's decision were correct, then each state would be free to declare that every person arrested—rich or poor—will be kept in jail for the entire pretrial

period, without the opportunity for an adversarial hearing on the question. But again, that holding is wrong under *Salerno*, *Foucha*, and other decisions of this Court; it conflicts with decisions of other lower courts; and it involves issues that arise frequently and are enormously important. Certiorari should therefore be granted and the decision below reversed.

OPINIONS BELOW

The Eleventh Circuit's opinion (App 1a-126a) is published at 42 F.4th 1298. The district court's preliminary-injunction opinion (App.127a-186a) is published at 330 F.Supp.3d 134. The injunction itself (App.187a-191a) is unpublished, as is the Eleventh Circuit's order denying rehearing (App.193a-194a).

JURISDICTION

The Eleventh Circuit entered judgment on July 29, 2022, and denied a timely rehearing petition on November 18, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part that "[n]o State shall … deprive any person of … liberty … without due process of law."

STATEMENT

A. Historical And Modern Bail Practice

Historically, "bail" has referred to a means of securing release from custody—i.e., a mechanism for vindicating the right to freedom during the pretrial period—ra-

ther than a way of facilitating pretrial detention. In particular, for centuries "bail" in England and here typically meant release with just a promise (often from a third person) that an arrested individual would appear for trial. Only in recent decades has "bail" come to commonly mean secured-money bail, that is, the requirement of an upfront cash payment, and hence mass pretrial detention of those unable to make such payments.

1. Anglo-American law has long recognized that a meaningful right to pretrial liberty is a central protection against arbitrary government detention. The Magna Carta itself established that imprisonment was permissible only upon conviction. Magna Carta, ch. 30 (1216); *accord id.*, ch. 39 (1215). And over the following centuries, legislators and jurists developed additional protections to implement that principle, including the right to release on "bail," historically defined as pretrial release conditioned on a promise to appear for trial. Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. Pa. L. Rev. 959, 966-967 (1965); *see also State* v. *Brown*, 338 P.3d 1276, 1283-1284 (N.M. 2014).

By the time of our nation's founding, the right to pretrial liberty—including the right to bail and other limits on the government's authority to arbitrarily impose detention absent conviction—was firmly established. As Blackstone wrote not long before America declared independence, "to refuse or delay to bail any person bailable[] is an offense against the liberty of the subject." 4 Blackstone, *Commentaries* *294 (1770). And the first Congress mandated that bail be available for all non-capital offenses. *See* Judiciary Act of 1789, 1 Stat. 73, 91. States likewise protected pretrial liberty, with most state constitutions guaranteeing a right to release on bail by the time the Fourteenth Amendment was rati-

fied. *See* Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 913 (2013). From the republic's earliest days, moreover, American law recognized—as it does today, *see infra* pp.19-20—that imposing an unattainable bail condition (such as unaffordable secured-money bail) is "mere colour for" denying bail entirely. 1 Chitty, *A Practical Treatise on The Criminal Law* 107-108 (1819).

In sum, "[b]ail was a carefully guarded right in colonial America, and early legislation significantly expanded upon English bail law by replacing remnants of magistral discretion with a positive right to bail, except in capital cases." *Sistrunk* v. *Lyons*, 646 F.2d 64, 68 (3d Cir. 1981). These and other developments reflected "a deep-rooted commitment to freedom before conviction. *Id.*; *see also Brown*, 338 P.3d at 1284-1288. They also underscore that bail has traditionally been "a mechanism for pretrial release and not for continued pretrial preventive detention." *ODonnell* v. *Harris County*, 251 F.Supp.3d 1052, 1070 (S.D. Tex. 2017) (subsequent history omitted).

2. Throughout the twentieth century, the interest in pretrial liberty—implemented, again, partly via the right to bail—continued in importance. For example, this Court explained that the "right to bail before trial" is crucial because unless it "is preserved, the presumption of innocence … lose[s] its meaning." *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951). That is both because arrested persons are deprived of physical liberty despite being presumed innocent and because "freedom before conviction permits the unhampered preparation of a defense." *Id.*

Also during the twentieth century, however (specifically late in the century), there was an acceleration of a change regarding how pretrial release is effected. For

centuries, it was almost exclusively through "unsecured" personal sureties, i.e., a third person's promise to assure the defendant's appearance. But after adoption of the Fourteenth Amendment, a new practice emerged of requiring upfront cash payments to secure release. Schnacke, *A Brief History of Bail*, 57 Judges' J. 4, 6-7 (2018). The first known commercial bail company began operating in San Francisco in 1896. Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* 165 (2018). But in recent decades, the practice has become much more common. Whereas courts in 1990 demanded secured-money bail (also known as "cash bail") in only about one-third of felony cases, they did so nearly twice as often by 2009. *See* National Institute of Corrections, *Fundamentals of Bail* 10 (2014); *ODonnell*, 251 F.Supp.3d at 1068-1070.

This modern development, however, occurred only at the state and local level, because for years the use of secured-money bail in federal courts has been restricted by the 1984 Bail Reform Act ("BRA"). That law forbids courts from imposing secured-money bail if doing so "results in … pretrial detention." 18 U.S.C. §3142(c)(2). It also requires courts to release individuals pretrial "subject to the least restrictive … conditions" that will serve the government's interests in "reasonably assur[ing] the appearance of the person … and [public] safety," *id.* §3142(c)(1)(B). Pretrial detention is thus permissible in federal cases only if a court—after an adversarial hearing at which the accused has the rights to counsel, to present evidence, and to challenge the government's evidence—finds that the government has satisfied its burden to establish that no conditions of release could reasonably prevent flight and assure community safety. *Id.* §3142(e)-(f).

Even as localities have increased the use of secured-money bail, moreover, many state laws continue to reflect the broader meaning of "bail." Alabama is one example: Its law defines "bail" as "the release of a person who has been arrested," Ala. Code §15-13-102, and specifies four different types of "bail," one of which is "the release of any defendant without any condition of an undertaking relating to, or a deposit of, security," *id.* §15-13-111.

B. Hester's Arrest And Detention

1. In 2017, petitioner Bradley Hester was arrested in Cullman County and charged with one count of misdemeanor drug-paraphernalia possession. App.10a. Although an otherwise-identical person with money could have bought her freedom in under 90 minutes by paying $1,000 cash bail, Hester could not pay that amount. *Id.*; D.Ct. Dkt. 95, ¶45. He was therefore locked in jail. App.10a.

The $1,000 figure came from a schedule (i.e., a chart) that Cullman County used to set cash bail for warrantless arrests. App.5a. For every charge, the chart specified a range of required cash amounts. App.6a. Arrestees who could not pay the scheduled amount stayed behind bars until a magistrate (who generally is not a lawyer) conducted an initial appearance. *Id.*; App.82a & n.3. Hester was detained for two days before his initial appearance. App.10a.

2. In Alabama, initial appearances are not adversarial hearings where individuals are entitled to be heard on the need for detention. They are instead brief ministerial proceedings at which individuals are informed of the charges, their right to counsel at later stages of the case, and the conditions of release. Ala. R. Crim. P. 4.4. Initial appearances in Cullman County are

typically conducted by video—with the arrested individual appearing from jail—and neither prosecutors nor defense counsel are present. App.139a.

At Hester's initial appearance (which lasted under two minutes), the magistrate recited the $1,000 price of liberty but did not inquire whether Hester could pay that amount. D.Ct. Dkt. 95, ¶44. Nor did she assess whether preventive pretrial detention was necessary to protect public safety or prevent flight. *Id.* Hester was not given counsel at the initial appearance, nor an opportunity to either confront the evidence on which his detention was based or otherwise be heard on whether detaining him was necessary to protect public safety or prevent flight. *Id.* Because Hester could not pay $1,000, he remained in jail. App.10a.

This experience was typical: At the time of Hester's arrest, magistrates in Cullman County could not adjust bail amounts at initial appearances, App.6a, so anyone who could not buy release right after arrest likewise would not be able to do so after the initial appearance. Those people, i.e., individuals unable to afford the amount required by the bail chart, usually spent weeks in jail before having any opportunity to challenge the need for their detention. D.Ct. Dkt. 132, ¶¶8-9.

C. District Court Proceedings

1. Days after his arrest (and while still incarcerated), Hester intervened in this lawsuit, which challenges the constitutionality of Cullman County's bail practices. App.81a; D.Ct. Dkt. 76-1. On behalf of himself and an inherently transitory class, Hester asserted that those practices violate the substantive-due-process right to pretrial liberty by jailing presumptively inno-

cent people without any finding that detention is necessary to serve a government interest and without providing basic procedural protections, such as an adversarial hearing at which people have a meaningful opportunity to be heard on the need for their detention. App.10a; D.Ct. Dkt. 76-1, at 19.[1]

After intervening, Hester moved for a classwide preliminary injunction. App.2a. Two weeks before the evidentiary hearing on that motion (and over nine months after he intervened), Cullman County issued a new "Standing Bail Order" (SBO). App.11a, 195a-202a. The order made formal changes to Cullman County's bail policies, but as elaborated below, the district court found that the county's actual practices after this mid-litigation change were largely if not entirely the same as before it. *See* App.144a.

Like the practices in effect when Hester was arrested, the SBO uses a chart to condition pretrial freedom on upfront cash-bail payments, based on the charge or charges. App.7a, 195a-196a. It also provides that a person who cannot pay must have an initial appearance within 72 hours of arrest. App.8a, 198a. If that does not occur, the county sheriff must release the person on unsecured bail (meaning no actual cash payment is required unless a mandatory court appearance is later missed). App.22a, 202a.

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[1] Hester also claimed violations of (1) the separate Fourteenth Amendment right against detention based solely on inability to pay a sum of money, and (2) procedural due process, because Cullman County detains people pretrial without providing even the most basic procedural protections, such as a meaningful opportunity to be heard and to challenge the evidence against them. This petition does not address those claims.

Under the SBO, a law-enforcement officer who believes an arrestee presents an unreasonable public-safety or flight risk can ask a magistrate to deny release until the initial appearance. App.7a-8a, 197a-198a. The district court found, however, that in practice such requests are virtually never made. App.144a.

The SBO formally requires judges, in evaluating at initial appearances whether to adjust a pre-scheduled cash-bail amount, to consider both a person's ability to pay—as gleaned from forms arrestees can submit and any questions a judge asks—as well as the fourteen factors in Alabama Rule of Criminal Procedure 7.2(a). App.199a-201a. A judge may release a person on recognizance. App.201a. If the judge instead re-imposes secured-money bail, the SBO formally requires "a written finding as to why [doing so] is reasonably necessary to assure the defendant's presence at trial." App.202a. The SBO also formally prohibits imposing unaffordable secured-money bail "if there is a less onerous condition that would assure the defendant's appearance or minimize risk to the public." App.201a.

Like defendants' practices at the time this case was filed, the SBO allows weeks of detention before arrested people have the right to counsel, to present evidence, to challenge the state's evidence, or even a meaningful opportunity to be heard. App.139a. Under the SBO (as before), an initial appearance is only a brief, ministerial, and non-adversarial proceeding. App.139a, 198a-199a.

2. Two-plus weeks after the SBO was implemented, the district court conducted an evidentiary hearing on Hester's preliminary-injunction motion. App.11a. Four witnesses testified and nearly sixty exhibits were filed. App.81a-82a. Because no factual dispute existed about the pre-modification practices, "[t]he

parties conformed their evidence … to Cullman County's new pretrial procedures," i.e., its practices since the mid-litigation issuance of the SBO. App.128a n.1. Based on that evidence, the court made factual findings about those practices. *Id.*

The court first found that county officials do not follow the SBO. App.144a. For example, despite the SBO's requirement that unaffordable secured-money bail not be imposed if less onerous conditions would reasonably assure public safety and appearance at trial, the district court found that—after the SBO's issuance (as before)—judges often detain people by requiring unaffordable secured-money bail, App.143a, without "ask[ing] too many questions," App.175a, i.e., without inquiring into flight risk or dangerousness, and without giving individuals an opportunity to speak. The court also found that although the SBO requires judges who impose unaffordable secured-money bail to "make 'a written finding'" on two forms regarding "why the posting of a bond is reasonably necessary," App.202a, that does not happen in practice because neither form provides space to do so. App.145a. Instead, one form merely requires a judge to check boxes identifying which of fifteen factors he "consider[ed]," while the other form simply requires the judge to check a box if secured-money bail is imposed. *Id.* And the court found that requests by law-enforcement officials to deny bail until the initial appearance are almost never made. App.144a. Finally, the court found that Cullman County's automatic imposition of secured money bail does not advance the county's stated interests of minimizing flight and public-safety risks. App.154a. For example, "the evidence demonstrate[d] that secured bail is no more effective than other conditions" (such as unsecured bail) in ensuring "a criminal defendant's appearance." App.159a.

After making these findings (and others), the district court rejected, for two reasons, defendants' argument that the SBO's issuance mooted Hester's claims. App.146a-147a. First, defendants "do not fully comply with the new written procedures." App.146a. Second, those procedures are themselves "constitutionally deficient." App.147a.

Turning to the preliminary-injunction factors, the court first considered whether Hester "demonstrated a substantial likelihood of success on [his] constitutional claims." App.128a n.1. Based on the facts found, the court ruled that Hester was likely to prove (as relevant here) that the county's post-SBO bail practices violate substantive due process. App.163a-164a. Specifically, the court held that by detaining people without any finding that doing so is necessary to further a government interest, Cullman County likely violated the right to pretrial liberty recognized in *Salerno* and other cases. *Id.*[2]

The district court then concluded that the remaining preliminary-injunction factors each favored an injunction—including because of the irreparable harm that pretrial detention imposes. App.181a-185a; *see infra* pp.33-35. It thus entered a preliminary injunction—after inviting defendants to provide input on the appropriate contours of the injunction, an invitation defendants declined. App.187a-191a.

The injunction requires the sheriff to either release bail-eligible individuals on unsecured bail or else submit

[2] The court also held that Hester was likely to succeed on his other claims. App.154a-180a. For example, it held that Cullman County's initial appearances—where individuals are neither provided counsel nor have a right to speak or present evidence about the need for detention—likely violate procedural due process. App.173a-180a.

a bail-request form. App.188a-189a. It further mandates that any individual for whom a bail-request form is submitted receive an initial appearance within 48 hours or be released on unsecured bail. App.189a. Before initial appearances, moreover, the sheriff must notify arrestees that they are entitled to release on unsecured bail unless a judge finds by clear and convincing evidence that they pose "a significant risk of flight or danger to the community." *Id.* The sheriff was also required to adopt other specified procedural safeguards. App.189a-190a.

D. Decision Below

1. The Eleventh Circuit reversed the entry of the preliminary injunction. App.62a.

The panel first unanimously rejected defendants' arguments that *Younger* v. *Harris*, 401 U.S. 37 (1971), required abstention and that the district court should have dismissed the sheriff based on lack of standing, sovereign immunity, or failure to state a claim. App.14a-23a. The panel also unanimously granted Hester's motion to dismiss the judicial defendants from the appeal for lack of appellate jurisdiction because the injunction bound only the sheriff. App.23a-27a.

The panel majority then ruled that even though Hester's complaint challenged Cullman County's *actual* bail practices, his claims had to be analyzed as a "facial[]" challenge to the policy revisions the county issued mid-litigation (i.e., the SBO). App.29a. The majority reasoned that "Hester cannot trace his injury to the current operative bail system" because he was released before it was issued, and "the bail scheme at issue here had only been in place for sixteen days before the district court

held its preliminary injunction hearing," App.28a (emphasis omitted).

Having refused to analyze the claims Hester actually brought (despite concluding that it had jurisdiction over those claims), the panel majority held that the SBO facially complies with substantive due process, App.54a-55a, summarily dismissing Hester's substantive-due-process challenge on the ground that "[p]retrial detainees have no fundamental right to pretrial release," App.55a. *Contra Salerno*, 481 U.S. at 749-750, *quoted supra* p.4.[3]

2. Judge Rosenbaum dissented in relevant part. She would have held that Cullman County's actual bail practices "violate[] indigent arrestees' … due-process rights." App.65a.

The panel reached a contrary conclusion, Judge Rosenbaum explained, only by (1) limiting itself to a facial challenge, and (2) ignoring the district court's unchallenged factual findings about how Cullman County's bail system actually operates, including after issuance of the SBO. App.67a-68a. But the panel, she stated, was not free to disregard those binding facts—none of which were even challenged on appeal, let alone held to be clearly erroneous—nor was it free to refuse to evaluate Hester's challenge to Cullman County's actual bail practices. App.66a-73a. Applying the law to those claims,

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[3] The panel likewise rejected Hester's other claims. For example, it held that Cullman County's initial appearances comport with procedural due process because they are supposedly similar to the detention hearings at issue in *Salerno*, even though—unlike those hearings—initial appearances are not adversarial and do not afford people a right to be heard or put the burden on the government to justify pretrial detention by clear and convincing evidence. App.55a-61a.

and to the facts as found, Judge Rosenbaum concluded "that Cullman County's current bail practices violate the Fourteenth Amendment." App.78a.[4]

All this matters, Judge Rosenbaum explained, because pretrial detention inflicts tremendous harm—including on society, because pretrial detention not only costs taxpayers money but also increases the risk of future crime. App.90a-96a; *see supra* p.3, *infra* pp.33-35. And, she noted, that harm is inflicted for no countervailing benefit, as the district court found that Cullman County's practices "do[] nothing to secure public safety," App.160a, and that secured bail is no better than unsecured bail at ensuring appearance, App.158a-159a.

3. The Eleventh Circuit denied panel rehearing and rehearing en banc. App.193a-194a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG

Keeping presumptively innocent people in jail prior to trial without finding that detention is necessary violates their fundamental right to pretrial liberty. Cullman County's actual bail practices, as described in the district court's unchallenged factual findings, do exactly

[4] Judge Rosenbaum also disagreed with the majority's rejection of Hester's other claims. As to procedural due process, she explained that Cullman County locks people in jail for weeks after providing only a non-adversarial initial appearance that lasts minutes (if that) and at which pretrial detention is imposed "almost automatically," App.105a, without any written findings being made to support the detention and without individuals having any right to counsel or even to speak, much less to challenge the basis for detention or otherwise be heard on why detention is unnecessary to protect public safety or prevent flight, App.105a-108a.

that. The Eleventh Circuit's reasons for concluding otherwise are deeply flawed.

A. Cullman County's Bail Practices Violate The Substantive Due Process Right To Pretrial Liberty

1. Salerno *and* Foucha *Establish That Substantive Due Process Bars Pretrial Detention Absent A Finding That No Alternative To Detention Will Serve The Government's Interest*

This Court has repeatedly recognized that substantive due process protects a right to pretrial liberty. "Freedom from bodily restraint," the Court has explained, "has always been at the core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80; *accord Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001). The "fundamental nature of this right," *Salerno*, 481 U.S. at 750, is indisputable: Incarceration implicates the "most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality).

Salerno applied these principles to a facial challenge to the Bail Reform Act, which as noted governs decisions in federal court regarding pretrial detention and release. In resolving that challenge, *Salerno* recognized a "'general rule' of substantive due process that the government may not detain a person prior to" conviction—a rule reflecting a "fundamental" right. 481 U.S. at 749-750. And given "the individual's strong interest in liberty," *Salerno* emphasized, that right may be overcome only "where the government's interest is sufficiently weighty." *Id.* at 750. The BRA satisfied this standard, *Salerno* held, because it permits pretrial detention only

if, "[i]n a full-blown adversary hearing, the Government … convince[s] a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* This Court has since described *Salerno* as applying strict scrutiny. *See Reno* v. *Flores*, 507 U.S. 292, 301-302 (1993).

Foucha confirms that the BRA's requirement of a finding that detention is necessary was critical to *Salerno*'s upholding of the law: *Foucha* struck down a Louisiana law permitting the confinement of individuals precisely because that law did *not* require such a finding. *See* 504 U.S. at 80-83. In fact, *Foucha* invoked *Salerno*'s recognition that, because physical freedom is at the "core of the liberty protected by the Due Process Clause," it may be outweighed only in "narrow circumstances," such as when "persons … pose a danger." *Id.* at 80. And it contrasted *Salerno*'s "sharply focused scheme," *id.* at 81, with the detention regime before it—noting, for example, that whereas in *Salerno*, the government had to prove dangerousness, under Louisiana's law, "the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous," *id.* at 81-82. In short, *Foucha* held, Louisiana's law violated substantive due process by permitting confinement that was not necessary to serve Louisiana's interests. *Id.* at 81.

That *Salerno* and *Foucha* involved express detention orders rather than (as here) detention via the imposition of unaffordable secured-money bail does not affect those cases' applicability here (nor did the panel suggest otherwise). As numerous courts have recognized, an order imposing unaffordable financial conditions is a "de facto pretrial detention order[]." *ODonnell*, 251 F.Supp.3d at 1150; *accord United States* v. *Mantecon-*

Zayas, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *United States* v. *Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam). Indeed, one state high court has opined that "[i]ntentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether." *Brown*, 338 P.3d at 1292. Regardless, because both types of orders result in the same restriction of pretrial liberty, both must satisfy the same constitutional rule: Detention is permissible only if it is necessary because no alternative could serve the government's interests.

To be sure, the right to pretrial liberty is not absolute. (No right is.) As *Salerno* recognized, *see* 481 U.S. at 751, that right can be overcome when the state's interests outweigh the individual's. But the fact that substantive due process permits pretrial detention that *is* necessary to serve the government's interests does not mean detention is permissible *absent* such necessity, any more than acknowledging the government's ability to restrict expression if it satisfies strict scrutiny means such restrictions are permissible when the government cannot do so.

2. Cullman County's Actual Bail Practices (Pre- And Post-SBO) Violate The Right To Pretrial Liberty

The district court's unchallenged factual findings—amply supported by the evidence yet disregarded by the Eleventh Circuit in clear conflict with this Court's precedent, *see infra* pp.23-26—establish that Cullman County routinely detains arrested individuals absent any finding that detention is necessary to serve a government interest. That practice, which has continued since issuance of the SBO, violates those individuals' interest in pretrial liberty.

To be sure, the SBO formally requires judges who impose unaffordable secured-money bail to "make a written finding" on two forms regarding "why the posting of bond is reasonably necessary." App.202a. But as the district court explained, neither form provides space to do so. App.145a. And the court expressly found that "Cullman County judges do not actually make 'findings,'" App.177a, including any finding that detention is necessary to protect public safety or reasonably assure future court appearance. Instead, judges (even after issuance of the SBO) merely check boxes identifying which listed factors were "considered." *Id.* The district court explained, however, that each "check communicates no individualized reason for the judge's decision"; indeed, "a checked box does not [even] indicate whether a factor worked in the defendant's favor or … against." App.178. Judges thus detain people without finding that no less-restrictive alternative to detention—such as unsecured bail, mandatory check-ins, GPS monitoring, text message or email reminders about court dates, stay-away orders, drug testing, requiring surrender of firearms, or others—would serve the state's interests in protecting public safety and preventing flight. Under *Salerno* and *Foucha*, that is unconstitutional.

While no more is needed, it bears noting that a finding of necessity must be supported by sufficient evidence; a judge cannot just aver with no basis that depriving a person of physical liberty is necessary. *See Salerno*, 481 U.S. at 750. And the record shows that Cullman County's procedures do not result in a sufficient evidentiary basis to detain. As noted, initial appearances are extremely brief, pro forma proceedings at which neither prosecutors nor defense counsel are present, and at which individuals have no right to speak, much less present evidence or challenge any evidence against them.

Moreover, one of the two county judges who handle initial appearances testified below that he "does not inquire 'much past the defendant's income or indigency status.'" App.87a. A court cannot find that detention is necessary to address public-safety or flight risks if the only information available is about "income or indigency status."

The post-litigation forms that arrestees can submit before their initial appearances do not fill this gap. "[T]he district court found that many defendants cannot effectively complete the forms" because "most people arrested in Cullman County do not have a high-school education, many have learning disabilities, and [many] struggle with reading comprehension." App.85a; *see also* App.138a-139a, 174a. Nor does either form provide adequate notice; neither, for example, informs individuals that "a judge may enter a *de facto* detention order by setting unaffordable secured money bail even after considering information provided by the defendant." App.106a. The forms thus provide little or no information regarding public-safety and non-appearance risks. That, together with the lack of an adversarial hearing, evidentiary standard, findings on the record, and meaningful judicial inquiry on those topics, leaves no doubt that detention occurs without a supportable finding that detention is necessary to serve a government interest.

Needless pretrial detention is in fact *commonplace* in Cullman County. The same judge just mentioned "testified that under the Standing Bail Order system, he sets secured bonds for indigent defendants at their initial appearances about half the time." App.116a-117a; *see also* D.Ct. Dkt. No. 143, at 393:2-4. That is wholly inconsistent with *Salerno*'s explanation that the right to pretrial liberty ensures that "[i]n our society liberty is

the norm, and detention prior to trial … the carefully limited exception." 481 U.S. at 755.

Indeed, Cullman County's bail practices stand in stark contrast to the regime *Salerno* upheld. As explained, the BRA prohibits pretrial detention unless a court finds, after a "full-blown adversary hearing," that the government has proven by clear and convincing evidence that detention is necessary because no alternatives would protect public safety. 481 U.S. at 750. Cullman County has instead adopted practices similar to those invalidated in *Foucha*: It allows detention without a finding of necessity, puts the burden on individuals to prove the *absence* of any basis to detain, and provides utterly ministerial proceedings that are devoid of the most basic procedural protections. *See, e.g.*, App.2a; *compare Foucha*, 504 U.S. at 81-82. This Court's precedent forecloses such a regime.

B. The Eleventh Circuit's Grounds For Reversing The Preliminary Injunction Are Infirm

The panel's rationales for rejecting Hester's pretrial-liberty claim lack merit.

1. Facial Challenge

As a threshold matter, the panel stated that Hester could succeed on his claims only if the SBO issued mid-litigation is "facially unconstitutional." App.29a. But while the SBO *is* facially unconstitutional—for example, it allows detention without providing even the most basic procedural protections, such as a meaningful opportunity to be heard—Hester's complaint challenged Cullman County's *actual* bail practices. D.Ct. Dkt. 95, ¶¶13-40. Hester continued to challenge those actual practices after the mid-litigation issuance of the SBO, al-

leging that those practices differed from the newly written policy. D.Ct. Dkt. 131, at 29-31; *see* App.146a-147a. And the district court found, after hearing live testimony and receiving other evidence, that the county's practices after issuing the SBO did differ from the written policy—and largely mirrored the county's pre-SBO practices. App.144a. The panel had no authority to refuse to adjudicate or refashion the claims Hester actually brought: "[T]he plaintiff is 'the master of the complaint,'" *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 831 (2002) (quoting *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 398-399 (1987)), and so long as jurisdiction exists (as here), a "federal court's 'obligation' to … decide a case is 'virtually unflagging,'" *Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69, 77 (2013).

The panel's two reasons for refusing to adjudicate the claims Hester brought are misguided.

a. The panel asserted that, for two reasons, it could consider only a facial challenge by Hester to the SBO. First, the panel stated that because Cullman County issued the SBO mid-litigation, "Hester's challenge to Cullman County's former bail procedures is now moot." App.32a. Second, the panel stated that because Hester was released from jail before the SBO's issuance, he "cannot trace his injury to the current operative bail system," and thus could not challenge it as applied. App.28a. Both points are manifestly wrong under this Court's precedent.

A voluntary mid-litigation cessation of challenged practices moots a claim attacking those practices only if the defendant "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*,

LLC v. *Nike, Inc.*, 568 U.S. 85, 95 (2013)). The Eleventh Circuit did not conclude that that burden had been met. Nor did defendants ever claim to have satisfied that burden. That is not surprising, because the district court found (based on ample supporting evidence) that the issuance of the SBO did not meaningfully change the actual practices that Hester challenged: The county continues to detain presumptively innocent people pretrial without providing basic procedural protections (such as an adversarial hearing) and without finding that detention is necessary to serve a government interest. *E.g.*, App.144a-146a. Defendants thus could not possibly show that the challenged practices would not *recur*; those practices *never ceased*. The panel accordingly had no basis to deem Hester's challenge to the pre-SBO conduct moot—other than disregarding the district court's factual finding about the post-SBO practices. But the panel could not disregard those findings, because this Court has held that the federal rules impose a categorical "obligation o[n] a court of appeals to accept a district court's findings unless clearly erroneous." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). The panel here did not deem any finding clearly erroneous.

The panel's reliance on Hester having been released before the SBO issued is likewise infirm. Hester's claims are brought on behalf of a class of people detained by Cullman County. App.2a. And this Court—applying the mootness exception for conduct "capable of repetition, but evading review"—has held that because "[p]retrial detention is by nature temporary," the fact that the named plaintiff's pretrial detention has ended "does not moot the claims of the unnamed [class] members." *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *accord County of Riverside* v. *McLaughlin*, 500 U.S. 44, 51-52

(1991). Here too, then, the panel's mootness holding directly conflicts with this Court's precedent.

b. The panel stated that because defendants chose to issue the SBO just sixteen days before the long-scheduled preliminary-injunction hearing, the record was insufficient to evaluate Cullman County's post-SBO practices. App.28a-29a. But the fact "[t]hat a longer period of operation might have allowed for … evidence about more facets of how Cullman County executes the [SBO]" is not a "reason to dismiss the … factual findings about the aspects of Cullman County's bail practices that the evidence did illuminate." App.70a. No party asked to postpone the preliminary-injunction hearing, nor has anyone ever suggested (1) that the evidence adduced at the hearing—including a Cullman County judge's testimony that he had conducted "40 to 45" initial appearances of putative class members since the SBO became effective, D.Ct. Dkt. 143, at 84:21-84:24—is insufficient to evaluate the post-SBO practices, or (2) that "the evidence on which the district court relied does not provide an accurate picture of what Cullman County's bail practices are," App.69a-70a.

Put simply, the district court made undisputed factual findings about Cullman County's actual post-SBO bail practices based on defendants' own evidence and testimony, findings the panel did not set aside and hence was bound by. Hester's challenge to those practices was therefore properly before the panel (as it is now properly before this Court), and the panel had no basis not to address it.

2. Right To Pretrial Liberty

The panel said little about Hester's claim that Cullman County's bail practices violate the substantive-due-

process right to pretrial liberty. The few points it did make are wrong.

For starters, the panel flouted this Court's precedent in stating that "[p]retrial detainees have no fundamental right to pretrial release." App.55a. Again, *Salerno* stated the opposite, recognizing arrestees' "strong interest in liberty" and acknowledging "the importance and fundamental nature of this right." 481 U.S. at 750.

The panel sought to excuse its departure from *Salerno* in two ways. *First*, it cited circuit precedent stating that *Salerno* is "a procedural due process case, not a substantive due process case." App.55a. But while a case can be about both (this case is), *Salerno* unquestionably is a substantive-due-process case. It referred repeatedly to substantive due process, both in describing the decision below and in its own analysis. *See* 481 U.S. at 741, 746, 749. If any doubt remained, *Foucha* and *Reno* would dispel it, as each characterized *Salerno* as a substantive-due-process case. *See Foucha*, 504 U.S. at 80 (citing *Salerno* in stating that "the Due Process Clause contains a substantive component"); *Reno*, 507 U.S. at 301-302 (same).

Second, the panel noted that *Salerno* makes clear that the right to pretrial liberty is not absolute. App.55a. But "absolute" and "fundamental" are not the same thing. As noted, no constitutional right is absolute. Some, however, are fundamental. The same point answers the panel's reasoning that if there were a "fundamental right to pretrial release …, bail itself would be unconstitutional." *Id.* That is wrong even putting aside that the court said "bail" when it must have meant pretrial detention. (As noted earlier, "bail is a mechanism for pretrial release and not for continued pretrial preventive detention," *ODonnell*, 251 F.Supp.3d at 1070; *see*

also Ala. Code §15-13-102, *quoted supra* p.9.) It is wrong because, again, the right to pretrial liberty—though fundamental—is not absolute.

Finally, the panel asserted that the bail practices challenged here—including using secured-money bail to deprive people of pretrial liberty without an adversarial hearing or any finding that detention is necessary to serve a government interest—are "ubiquitous." App.2a. To the extent it was suggesting that such practices are constitutional because they are commonplace, that is both factually and legally incorrect. Factually, the use of secured-money bail is (as explained, *see supra* pp.5-9), a recent phenomenon (becoming markedly more prevalent after 1990). For centuries, including both at the Founding and when the Fourteenth Amendment was ratified, "bail" was instead almost always *un*secured. And as a legal matter, even longstanding practices involving deprivation of physical liberty—what this Court has called "old infirmities which apathy or absence of challenge has permitted to stand"—enjoy no immunity to constitutional challenge. *Williams* v. *Illinois*, 399 U.S. 235, 245 (1970). Rather, "constitutional imperatives … must have priority over the comfortable convenience of the status quo." *Id.*

Similarly, to the extent the panel meant to imply that Hester's pretrial-liberty claim is novel or radical, that is demonstrably incorrect. The regime that Hester says the Constitution requires—under which pretrial detention *is* permissible, so long as it is demonstrated to be necessary to protect public safety or prevent flight—has largely been in place by statute (the Bail Reform Act) in federal courts for decades. And many other jurisdictions likewise do not jail presumptively innocent individuals without finding that detention is necessary

to serve a government purpose. The regime Hester espouses is thus not remotely novel. Nor is there any evidence—despite the decades of experience the federal government and other jurisdictions have had with largely the regime Hester espouses—that that regime is unworkable or would have deleterious consequences. In sum, what Hester seeks is modest (that government have a good reason to keep people in jail cells pretrial), workable (as years of experience in other jurisdictions show), and, most importantly, required by the Constitution.

Indeed, this Court has adopted the same constitutional requirement Hester espouses—that detention be supported by a finding of necessity—in cases involving the separate Fourteenth Amendment right not to be detained based solely on inability to pay a sum of money. Even people already convicted of crimes, the Court has held, can constitutionally be imprisoned via the imposition of an unaffordable sum of money "[o]nly if" doing so is necessary because "alternatives to imprisonment are not adequate in a particular situation to meet the State's interest[s]." *Bearden* v. *Georgia*, 461 U.S. 660, 672 (1983).

In short, the panel said nothing supporting its conclusion that Cullman County's bail practices do not infringe the right to pretrial liberty recognized in *Salerno* and in *Foucha* (a case the panel never even cited). And that conclusion—specifically that there is no such right—led the panel to endorse a regime in which uncounseled people are (1) locked in jail (based on an utterly pro forma proceeding, and with no finding of necessity) and (2) kept there for *weeks* before having a meaningful opportunity to be heard, including to speak or confront evidence on whether they are a flight risk or a danger to the community. That cannot be the law.

II. THE DECISION BELOW CONFLICTS WITH OTHER COURTS' CASES

The Eleventh Circuit's rejection of Hester's substantive-due-process claim, on the ground that "pretrial detainees have no fundamental right to pretrial release," App.55a, conflicts with decisions of other appellate courts. Those courts recognize a fundamental interest in pretrial liberty and hold that due process prohibits states from detaining people pretrial unless doing so is necessary to serve a government interest.

For example, in *Lopez-Valenzuela* v. *Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc), the en banc Ninth Circuit recognized, contrary to the Eleventh Circuit's holding here, that certain Arizona laws restricting pretrial liberty "infringe[d] a 'fundamental' right," *id.* at 780 (quoting *Salerno*, 481 U.S. at 750). And it held those laws unconstitutional because (among other defects) they allowed—in fact required—detention "needlessly," i.e., when persons arrested "d[id] not pose a flight risk." *Id.* at 785.

Similarly, in *In re Humphrey*, 482 P.3d 1008 (Cal. 2021), the California Supreme Court recognized—again in conflict with the decision below—that the U.S. Constitution confers a "fundamental right to pretrial liberty," *id.* at 1013. And it held needless pretrial detention unconstitutional, stating that "federal constitutional constraints" make pretrial detention "impermissible unless no less restrictive conditions of release can adequately vindicate the state's compelling interests," *id.* at 1019.

Decisions of other state high courts—likewise applying federal law—are to the same effect. The Nevada Supreme Court, for example, held that its "conclusion that bail may be imposed only when necessary to ensure the

defendant's appearance or to protect the community is … mandated by substantive due process principles." *Valdez-Jimenez* v. *Eighth Judicial District Court*, 460 P.3d 976, 984 (Nev. 2020). Pretrial detention, the court expounded, "infringes on the individual's liberty interest. And given the fundamental nature of this interest, substantive due process requires that any infringement be necessary to further a legitimate compelling government interest." *Id.*; *accord Brangan* v. *Commonwealth*, 80 N.E.3d 949, 964-965 (Mass. 2017) ("[W]here … bail … will likely result in … pretrial detention, the judge must" explain "why … the defendant's risk of flight is so great that no alternative … will … assure … her presence at future" proceedings); *State* v. *Wein*, 417 P.3d 787, 791 (Ariz. 2018) (due process "prohibits the government from … jailing [people] before trial" except in "exceptional circumstances" where "the government's interest … outweigh[s] an individual's 'strong interest in liberty,' an important, fundamental right").

Finally, the en banc Fifth Circuit has explained that "[r]ules under which personal liberty is to be deprived [pretrial] are limited by … constitutional guarantees," and that "[t]he ultimate inquiry in each instance is what is necessary to reasonably assure [a] defendant's presence at trial." *Pugh* v. *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). Accordingly, the court elaborated, "unnecessary … pretrial detention" is "constitutionally interdicted." *Id.* at 1058.

Had Hester's case come before any of the courts just cited, the district court's grant of Hester's preliminary-injunction motion would have been affirmed rather than reversed. And this division of authority is unlikely to resolve itself. Here, for example, the Eleventh Circuit declined Hester's request to rehear the appeal en banc.

III. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT

Certiorari is warranted to resolve the lower-court division over the question presented and to correct the Eleventh Circuit's departure from this Court's precedent because the question is both recurring and surpassingly important.

As the cases cited herein show, whether states can lock up presumptively innocent individuals pretrial for extended periods, without showing that doing so is necessary to serve their interests, is a question that arises frequently. *Millions* of people are jailed in America each year. *See* Zeng, *Jail Inmates in 2021*, at 3, Bureau of Justice Statistics (Dec. 2022). The constitutional limits on states' power to deprive arrested people of one of our most fundamental freedoms is thus a matter that affects huge numbers of Americans. Yet this Court has not addressed those limits for decades, and as explained, *see supra* pp.30-31, lower courts have reached divergent conclusions in recent years.

The question presented is also of paramount importance, both because physical liberty is among the oldest and most precious of rights and because pretrial detention inflicts severe harms. *See* App.90a-96a; *supra* p.3.

For example, this Court has explained that pretrial detention can mean "loss of a job" and "disrupt[ion to] family life" for detainees. *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972); *accord Gerstein*, 420 U.S. at 114. Other courts have made the same point. *See ODonnell* v. *Harris County*, 892 F.3d 149, 154-155 (5th Cir. 2018) (opinion on rehearing), *Curry* v. *Yachera*, 835 F.3d 373, 376-377 (3d Cir. 2016); *Lopez-Valenzuela*, 770 F.3d at 781.

Empirical research documents these harms (and others). For instance, according to one study of several hundred thousand cases, an arrestee "detained for even a few days may lose her job, housing, or custody of her children." Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 713 (2017). The Justice Department has found, meanwhile, that jailed individuals suffer every major type of chronic condition and infectious disease at higher rates than others. Maruschak et al., *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12*, at 2-3, Bureau of Justice Statistics (rev. Oct. 4, 2016). Empirical research also indicates that those convicted following pretrial detention receive longer sentences than those convicted after being free pretrial. *See* Heaton et al., *supra*, at 747, 748 tbl. 3; Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. Law Econ & Org. 511, 527-528 & tbl. 2 (2018). After they are freed, moreover, those who were jailed pretrial earn less on average than arrestees who avoided pretrial detention—a 40% decrease in earnings, one study found, *see Collateral Costs: Incarceration's Effect on Economic Mobility* 11, The Pew Charitable Trusts (2010).

Because of these and other dire consequences, pretrial detainees are more likely to plead guilty—regardless of whether they *are* guilty—to gain speedy release. *See ODonnell*, 251 F.Supp.3d at 1157-1158. For those who don't plead, pretrial detention increases the likelihood of conviction, by hindering access to counsel, witnesses, and exculpatory evidence. *See Barker*, 407 U.S. at 533. One study found that, controlling for other factors, pretrial detention is associated with a 25% increase in the likelihood of conviction, and leads to more crime in

the future. Heaton et al., *supra*, at 744; *accord* D'Abruzzo, *The Harmful Ripples of Pretrial Detention*.

Nor are the harms from pretrial detention limited to those detained (and their loved ones). Detention also burdens "society[,] which bears the direct and indirect costs of incarceration." *Rosales-Mireles* v. *United States*, 138 S.Ct. 1897, 1907 (2018). These costs—including the money needed to pay for mass jailing and the fact that those detained will more likely commit crimes in the future—also come with little or no benefit, as experts agree that there is no "link between financial conditions of release and appearance at trial or law-abiding behavior before trial." *ODonnell*, 892 F.3d at 162; *see also ODonnell*, 251 F.Supp.3d at 1121-1122, 1152.

The Eleventh Circuit tried to minimize these myriad harms, stating that people arrested in Cullman County who cannot afford to buy their pretrial freedom are locked up for only "a short time period," App.2a, or "a brief time period," App.53a, before an initial appearance. But pretrial detention in Cullman County is assuredly not "short" or "brief"; the record shows that although arrestees were typically given a pro forma initial appearance within 72 hours, they were then typically detained for *weeks* before having any opportunity to actually be heard on why they should not be detained pretrial. In any event, this Court has repeatedly recognized that "'*[a]ny* amount of actual jail time'" imposes "exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles*, 138 S.Ct. at 1907.

That is simply common sense. Research demonstrates that even having to spend "only" 48 to 72 hours in jail so destabilizes people's lives that they become significantly more likely to commit crime for years in the future. *See* Heaton et al., *supra*, at 717-718. Moreover,

an inability to care for young children is obviously a huge problem even if it is "only" for a few days. Equally commonsensical is the notion that "[m]any detainees lose their jobs even if jailed for a short time." Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356-1357 (2014). And such a loss of employment has cascading effects: "While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 543 (1985). In the meantime, "[w]ithout income, the defendant and his family … may … lose housing, transportation, and other basic necessities." Wiseman, *supra*, at 1356-1357. Put simply, the panel's seeming dismissiveness of the harms of pretrial detention was unwarranted, and does nothing to undermine the critical importance of the issues here—or to excuse the panel's departure from decisions of this Court and others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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