No. 24-330

In the Supreme Court of the United States

CID C. FRANKLIN,

PETITIONER

v.

NEW YORK,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF OF ROBERT F. KENNEDY HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Robert F. Kennedy Human Rights ("RFK Human Rights") is a nonpartisan, not-for-profit organization that has worked to realize Robert F. Kennedy's dream of a more just and peaceful world since 1968. Months after Senator Robert F. Kennedy's death, his widow Ethel Kennedy founded the organization as a living memorial to carry forth his unfinished work as a civil rights activist and human rights defender. In partnership with local activists, RFK Human Rights advocates for key human rights issues, championing change makers and pursuing strategic litigation at home and around the world. To ensure change that lasts, we foster a social-good approach to business and investment and educate millions of students about human rights and social justice. The U.S. Advocacy and Litigation Program at RFK Human Rights partners with grassroots community organizations to seek accountability for human rights abuses in the U.S. criminal legal and immigration systems and to promote fairness, equity, and dignity for all people whose lives are touched by those systems.

RFK Human Rights is deeply committed to Robert F. Kennedy's enduring vision of the effective use of pretrial release tools to protect the fairness of the criminal legal system. Starting in 2018, RFK Human Rights and numerous advocates fought for

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[1] All parties received notice 10 days in advance of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus or his counsel made a monetary contribution intended to fund the brief's preparation or submission.

release of people trapped in pretrial detention across New York City jails simply because they could not afford to pay bail. Honoring Robert F. Kennedy's commitment to ending unfair bail practices, RFK Human Rights posted $1.2 million in bail for people from Rikers Island and other NYC jails.[2] In 2020, as the threat of COVID-19 rose behind bars, RFK Human Rights and Colin Kaepernick's Know Your Rights Camp committed $1 million to support community bail funds across 10 cities in their work to free indigent people from poverty-based pretrial detention. The mass bailout action was part of a national campaign to demonstrate the effectiveness of non-carceral tools to secure a person's appearance in court and the harm that cash bail disproportionately inflicts on Black and Brown communities and those experiencing poverty.

SUMMARY OF ARGUMENT

A defendant has a Sixth Amendment right to confront and cross-examine the author of a post-arrest report prepared to determine eligibility for bail because bail reports are "testimonial" out-of-court statements. To find otherwise greatly undermines the accuracy and fairness of the bail system. Without the safeguard of confrontation, participants in bail interviews risk their statements or the information gleaned from them being misrecorded or misinterpreted and then used unfairly at trial. This risk disincentivizes good-faith, candid participation in

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[2] Jeffery C. Mays, *105 New York City Inmates Freed in Bail Reform Experiment*, N.Y. Times (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/nyregion/bail-reform-rikers-rfk-nyc.html.

a bail interview, leading to inaccurate and unfair bail determinations, decreased credibility of the criminal legal system, and increased public costs spent on unnecessary pretrial detention.

But in evaluating whether an out-of-court statement was "testimonial" under the Sixth Amendment, the New York Court of Appeals diverged from other courts by ruling that a post-arrest report prepared to determine Petitioner's eligibility for bail was not subject to the Confrontation Clause. *People v. Franklin*, 42 N.Y.3d 157, 242 N.E.3d 652 (2024). The bail report, introduced via the author's *supervisor* (who had no knowledge about the report's accuracy), "was central to the People's case at trial" and the sole piece of evidence presented to establish an essential element of the case against Petitioner. *Id*. at 160. As explained below, the lower courts' conflicting tests on whether an out-of-court statement is "testimonial" is a question of profound consequence for bail systems across the country and for the accuracy and fairness of the criminal legal system by extension. The Court should therefore grant Petitioner's writ of certiorari to resolve this critically important question.

ARGUMENT

I. The Lower Court's Decision Threatens the Accuracy, Fairness, and Efficiency of the Criminal Legal System.

Meaningful access to bail is fundamental to the integrity of our criminal legal system. It brings greater fairness and efficiency, protecting against undue coercion of people to plead guilty and reducing costly and unnecessary pretrial incarceration. Fair

and accurate bail determinations, in turn, rely on open and honest interviews with defendants and people with whom they share personal and professional relationships. By depriving a defendant of the right to confront and cross-examine the author of a pretrial bail report, the Court of Appeals' decision disincentivizes candor in interviews underlying bail reports and threatens the gains in fairness and efficiency to the criminal legal system made possible by accurate bail determinations.

a. Fact-intensive, accurate bail reports reduce the use of arbitrary pretrial detention.

The Founders viewed access to bail so central to the rule of law that they enshrined it in the Constitution, writing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Prior to the ratification of the Bill of Rights, the First Congress had already enacted a near-absolute right to bail with the Judiciary Act of 1789, mandating that "upon all arrests in criminal cases, bail shall be admitted . . . ."[3] This Honorable Court has acknowledged how imperative the right to bail is for the fairness and efficiency of criminal legal proceedings, stating that the "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

[3] 1 Stat. 73, 91 (1789). The Act made bail in capital cases discretionary, depending on the nature and circumstances of the offense.

presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

Yet by the 1960s, then-U.S. Attorney General Robert F. Kennedy testified before the Senate Judiciary Committee that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail."[4] The Attorney General criticized federal, state, and local jurisdictions for maintaining bail setting processes that were "unrealistic and often arbitrary."[5] He argued that courts across the country routinely set bail "without regard to a defendant's character, family ties, community roots or financial condition."[6]

Attorney General Kennedy's remarks to the Senate followed the year after he had organized a national conference on bail, where the Committee on Poverty and the Administration of Federal Criminal Justice authored a comprehensive report on the subject.[7] Setting the stage for the modern bail system's reliance on accurate and thorough fact-finding in pretrial bail reports, the Committee report concluded that pretrial release should be tailored specifically to each individual, that courts should

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[4] Robert F. Kennedy, U.S. Att'y Gen., Testimony on Bail Legislation Before the Subcommittees on Constitutional Rights and Improvement in Judicial Machinery of the Senate Judiciary Committee 1 (Aug. 4, 1964) (transcript available at https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf) [hereinafter Kennedy].

[5] *Id.* at 2.

[6] *Id.*

[7] Nat'l Task Force on Fines, Fees, and Bail Practices, Bail Reform: A Practical Guide Based on Research and Experience 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0026/42587/Bail-reform-guide-3-12-19.pdf.

favor nonfinancial conditions of release, and that heavy reliance on commercial bail bondsmen threatened the fairness of the criminal legal system.[8] The key findings of the report were shared in a series of Senate hearings, which ultimately led to the passage of the Federal Bail Reform Act of 1966.[9] The Act reinforced that the purpose of bail was not to harass or punish people, but "simply to guarantee appearance in court."[10] In the years following this Court's decision in *Stack v. Boyle* and the passage of the Federal Bail Reform Act of 1966, many states followed suit and reformed their own pretrial release systems.[11]

Echoing the 1960s reforms to federal and local bail laws, recent reforms seek to ensure that individuals do not languish needlessly in pretrial detention. On any given day in the United States, more than 460,000 people are detained pretrial.[12] The majority are placed into detention because they

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[8] *Id.*

[9] *Id.*

[10] Kennedy, *supra* note 4, at 1.

[11] Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. Legis. & Pub. Pol'y 919, 927 (2013) [hereinafter Jones]; Nat'l Task Force on Fines, Fees, and Bail Practices, *Bail Reform: A Practical Guide Based on Research and Experience* 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0026/42587/Bail-reform-guide-3-12-19.pdf.

[12] Emily Widra, *New Data and Visualizations Spotlight States' Reliance on Excessive Jailing*, Prison Policy Initiative (Apr. 15, 2024), https://www.prisonpolicy.org/blog/2024/04/15/jails_update/#:~:text=Pretrial%20policies%20have%20a%20warehousing%20effect&text=In%20particular%2C%20our%20national%20reliance,legally%20innocent%20and%20awaiting%20trial.

cannot afford to pay bail.[13] Those held in pretrial detention are far more likely to "plead guilty, be convicted, be sentenced to jail, have longer sentences if incarcerated, and be arrested again" in comparison to those who can afford to pay bail.[14] It is not that pretrial detainees have weaker legal defenses than their monied counterparts, but rather that the perilous consequences of incarceration drive people, even the innocent, to plead guilty. Today, "state bail laws generally authorize some combination of financial and non-financial release conditions."[15] Many states statutorily require a presumption of nonmonetary release.[16] Decades of research shows that arbitrary incarceration at the pretrial stage leads to poor outcomes individually and for society writ large.[17]

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[13] *Id.*

[14] *Id.*

[15] Jones, *supra* note 11, at 930.

[16] *Id.*

[17] Alison Siegler et al., *Freedom Denied: How the Culture of Detention Created a Federal Jailing Crisis*, Univ. Chi. L. Sch. Fed. Crim. Just. Clinic 1, 23 (Oct. 2022), https://freedomdenied.law.uchicago.edu/report (noting that the cost of pretrial for a year is more than 8 times higher than supervision on bond in the community and estimating that taxpayers pay more than one billion dollars a year for federal pretrial detention); Bernadette Rabuy, *Pretrial Detention Costs $13.6 Billion Each Year*, Prison Policy Initiative (Feb. 17, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/ (calculating expense of pre-trial detention to local governments nationwide); Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* 39-43 (U.S. Dep't of Just. & Vera Found. Inc., 1964) (criticizing costs of pretrial detention in the United States as "staggering" in terms of time, money, human suffering, and justice).

Pretrial services agencies are one of the primary tools to counter overreliance on unnecessary, arbitrary pretrial detention, making candid interviewing in support of accurate factfinding in bail reports more important than ever. Organizations that provide pretrial services are crucial in ensuring that an individual's criminal case is administrated fairly and that the expenses of needless incarceration are not borne by the public. Courts rely on bail reports from pretrial services in deciding whether to release an individual back into the community for the duration of that person's criminal case. The accused depend on bail reports from pretrial services for the opportunity to demonstrate to the court that they can and will appear for their case. And for bail reports to be accurate and fair, the interviewed individual must be as honest and forthcoming as possible, confident that any inaccurate or unfair use of their statements by a bail report author can be tested by confrontation and cross-examination.

b. Accurate bail determinations save money, reduce recidivism, and improve outcomes in the criminal legal system.

Being held in pretrial detention for days, weeks, months, and even years has the potential to destabilize a person's life—or even cost a person their life. However, robust access to pretrial services such as the New York City Criminal Justice Agency (CJA) provides a lifeline for individuals awaiting to have their case heard before the court, allowing judges to make determinations based on individualized flight-risk assessments. For over 50 years, the CJA has

helped New Yorkers navigate the criminal legal system by paying bail and notifying individuals of their court dates.

New York, a pioneer of pretrial services agencies, is a useful case study in how accurate and fair bail reports enhance fairness in the criminal legal system and reduce waste of public funds on unnecessary incarceration. In the early 1960s, the Manhattan Bail Project became the country's first pretrial program, demonstrating that individuals accused of crimes need not be forced to pay bail or held in custody to appear successfully in court.[18] Jurisdictions throughout the country modeled their pretrial services agencies after the Manhattan Bail Project. After a successful pilot in Brooklyn, the CJA was authorized to provide pretrial services in all the city's boroughs.[19]

In April 2019, the New York legislature reformed bail laws to abolish cash bail and require release or nonmonetary conditions for most misdemeanors and low-level felonies.[20] As a result, the statewide jail population hit record lows in 2020.[21] Because of the new law, thousands of New Yorkers who otherwise would have been held in jail were allowed to reunite with their families and keep their

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[18] Kennedy, *supra* note 4, at 4.

[19] *50 Years of CJA*, New York City Criminal Justice Agency, https://www.nycja.org/fifty-years ("The new system was so successful that PTSA [the Pretrial Services Agency] (and by 1977, the newly created Criminal Justice Agency) was given citywide responsibility to provide pretrial services.").

[20] Envision Freedom Fund, *The Problem With Bail & Pretrial Detention* 1 (Sept. 2022), https://envisionfreedom.org/wp-content/uploads/2022/11/Bail-Reform-Fact-Sheet-3.pdf.

[21] *Id.* at 2.

jobs, housing, and custody of their children.[22] Court appearance rates increased from 85% to 91%.[23] Bail reform also led to fewer re-arrests for those released on their own recognizance.[24] Overall, the reform "saved New Yorkers $104 million in bail money, returned more than 24,000 people to their homes before their day in court, and prevented 1.9 million nights in jail."[25]

With recent reforms, the CJA continues to play a major role in safeguarding fair, accurate bail determinations. Prior to arraignment, the agency interviews and collects key information from nearly *every* arrested person to prepare the bail report for the court.[26] If the court is to set nonmonetary conditions for release under section 530.40 of New York's criminal code, it must rely on the bail report prepared by the CJA to determine the appropriate conditions for release. These reforms safeguard the right to freedom before trial and save time, money, and lives.

c. The lower court's decision undercuts the reliability and accuracy of bail reports.

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] Nicholas Turner & Sam McCann, *New Yorkers Have Known Bail Doesn't Work for 60 Years. Why Are We Still Debating It?*, Vera Inst. of Just. (May 4, 2023), https://www.vera.org/news/new-yorkers-have-known-bail-doesnt-work-for-60-years-why-are-we-still-debating-it#:~:text=All%20told%2C%20the%20laws%20have,1.9%20million%20nights%20in%20jail.
[26] *Court Services,* New York City Criminal Justice Agency, https://www.nycja.org/court-services#pretrialinterview.

The Court of Appeals' decision in *Franklin* threatens to erode the community's long-held trust in pretrial services agencies. By removing the safeguard of confrontation and cross-examination of a bail report author, the decision heightens the risk that one's participation in a bail report interview will be unfairly used to penalize an accused person. This dilemma will dissuade people from disclosing important information to pretrial services agencies, such as a home address, crucial to a court's ability to reliably and accurately assess bail.

To help a court determine flight risk, pretrial services collect personal information from the accused at arraignment, such as access to stable housing, a working phone number, employment, and family members who can take them to and from court if the individual lacks their own means of transportation. The freer an accused person feels to divulge this information to pretrial services, the greater a court's ability to reliably and accurately determine bail.

Additionally, pretrial services often verify an accused person's information in a bail report via interviews with a family member, co-worker, or friend or loved one, enhancing the report's reliability and accuracy. Without assurance that unfair or inaccurate use of information given to a bail report author can be challenged by confrontation and cross-examination at trial, these people will be less inclined to speak to pretrial services.

The Court of Appeals' decision in *Franklin* will chill the candor required for fair, reliable, and accurate bail determinations. It endangers the court's ability to efficiently assess and determine bail conditions, as required under the Eighth Amendment,

and thwarts decades' worth of meaningful bail reform and the improvements in fairness and efficiency it has brought to the criminal legal system.

II. The Lower Court's Decision Stifles Innovative Specialty Courts and Related Programs.

Beyond bail reports like those prepared by the CJA in the instant matter, the lower court's decision could allow for unfair use at trial of a breadth of documents and reports created under innovative pretrial or pre-sentencing programs that states use to reduce costs and enhance efficiency of their criminal legal systems. This Court should preserve states' ability to experiment with those programs by granting certiorari to clarify the meaning of a "testimonial" statement.

Numerous documents prepared in specialty courts that offer alternatives to criminal proceedings do not fit the lower court's narrow definition of "testimonial" and therefore could be utilized at trial without confrontation and cross-examination. At arraignment, in addition to bail determinations, a person may be screened for entry into a specialty court to address the underlying circumstances that led to the crime. Many jurisdictions have specialty, problem-solving courts, including domestic violence courts, drug courts, mental health court, DWI courts, and veteran courts.[27] Rather than focusing on punishment, these courts connect offenders to resources, social services, and treatments. In exchange for successful completion of programming

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[27] *Problem Solving Courts,* Nat'l Inst. of Just. (Feb. 20, 2020), https://nij.ojp.gov/topics/articles/problem-solving-courts.

assigned by a problem-solving court, a person can have their sentence reduced or dismissed entirely.[28] According to one review of drug courts, recidivism dropped on average by 38% to 50% among adult drug court participants.[29]

However, to be accepted into specialty court programs, individuals must volunteer sensitive information vulnerable to misrecording or misinterpretation in a report or other document. Under the Court of Appeals' decision, these inaccuracies cannot be corrected by confrontation and cross-examination at a subsequent criminal proceeding, disincentivizing an accused person from freely disclosing information essential to successful administration of a specialty court. Thus, a person loses access to essential resources, and courts and society at large lose the opportunity to reduce recidivism by addressing the underlying issue that led to the offense.

During negotiations or the plea stage of a criminal proceeding, a defense attorney may request that the client undergo a psychosocial assessment, known as a 390 exam in New York. N.Y. Crim. Proc. § 390.30. The report summarizes and details a person's mental health history, current mental state, any treatment they require, educational history, and family circumstances. The report may also speak to the charges at hand. The greater the accuracy and reliability of the information in the report, the greater

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[28] *Treatment Courts*, Office of Just. Programs, https://www.ojp.gov/feature/treatment-courts/overview.

[29] Stanford Network on Addiction Pol'y, *Drug Courts as an Alternative to Incarceration*, Stanford University, https://addictionpolicy.stanford.edu/drug-courts-alternative-incarceration.

a court's ability to individually tailor sentencing, enhancing the criminal legal system's efficiency and effectiveness.

The life of a criminal case is long. To produce accurate reports, an accused individual must feel confident that the choice to divulge sensitive information, at every stage of the proceeding, will not unfairly penalize him or her in the future. Without assurance that rights under the Sixth Amendment's Confrontation Clause can later be asserted, a person is less likely to volunteer information essential to a case's efficient and fair resolution. The lower court's ruling in *Franklin* thus jeopardizes a court's ability to resolve a criminal case.

CONCLUSION

Robert F. Kennedy once described the nation's bail system as a "vehicle for systematic injustice."[30] Pretrial services agencies emerged as one of the primary tools to combat that injustice. Narrowing the Sixth Amendment's Confrontation Clause protections to exclude authors of bail reports threatens to turn New York's criminal legal system on its head. Where communities could once trust pretrial services agencies and other problem-solving court specialists to help them navigate the criminal legal system, they will now look at these agencies with suspicion. Pretrial services agencies reduce the rate of arbitrary pretrial detention, save courts money, and promote efficiency and fairness during criminal proceedings. The broad rule endorsed by the Court of Appeals would upend participation with these services and erase the gains in cost-efficiency and fairness they

[30] Kennedy, *supra* note 4, at 1.

have brought. Prohibiting cross-examination of employees that prepare these bail reports erodes public trust of the courts and does little to enact justice. For these reasons, we ask this Court to grant certiorari.

Respectfully submitted,

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