No. 18-396

IN THE

Supreme Court of the United States

BRITTAN HOLLAND, *et al.*,

Petitioners,

v.

KELLY ROSEN, *et al.*,

Respondents.

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

BRIEF OF BAIL AGENTS ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae Golden State Bail Agents Association, Bail Association of Connecticut, Professional Bail Agents of Idaho, Kansas Bail Agents Association, Mississippi Bail Agents Association, North Carolina Bail Agents Association, Ohio Professional Bail Association, Oklahoma Bondsman Association, Professional Bondsmen of Tarrant County, Professional Bondsmen of Texas, the Virginia Bail Association, and the Washington State Bail Agents Association are associations of bail agents. *Amici* are dedicated to promoting professionalism among bondsmen, providing educational opportunities for their members, and promoting cooperation between bail bonding professionals and the criminal justice system. *Amici* and their members closely follow developments in the industry and are constantly working with local communities, law enforcement, legislators, and other stakeholders to improve the industry and provide the best possible service to their clients and the criminal justice system. *Amici* have a powerful interest in this case because they are committed to ensuring that criminal defendants have the option of obtaining pretrial release through monetary bail.

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1. Pursuant to this Court's Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amici*'s intent to file and have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners ably explain why certiorari is warranted in light of the serious errors of law in the Third Circuit's reasoning and the conflict between the decision below and the decisions of several other circuits. *Amici* will not repeat those arguments here but instead submit this brief to offer additional context about both the history and efficacy of monetary bail.

For centuries both before and after the Founding of the United States, the right to bail was seen as a fundamental and absolute right of the accused in all non-capital cases. That right was enshrined in the foundational documents of English law, in state and federal constitutions, and in statutes dating back to the Judiciary Act of 1789 and the Northwest Ordinance. And, as long as bail has existed, so has *monetary* bail, in which a third-party surety posts a bond on behalf of the defendant to secure his appearance. The Anglo-American legal system has long recognized that the bail mechanism strikes the proper balance between preventing pre-trial deprivations of liberty for defendants who are presumed innocent while also creating powerful incentives to secure the defendants' appearance for trial.

Monetary bail has been an integral part of the criminal justice system for centuries for a simple reason: it works. Overburdened and understaffed police departments are already stretched thin responding to crimes and conducting investigations; they rarely view it as a priority to locate defendants who fail to appear for a court hearing. Monetary bail, however, gives the right

incentives to all involved. The defendant and/or his co-signer on the bond risk being held liable for a large sum of money if he fails to appear. Meanwhile, the bond agent—who must produce the defendant for his trial to avoid forfeiting the bond amount—has a powerful incentive to keep tabs on the defendant, remind him of the relevant deadlines, and ensure that he meets all requirements of his release. Academic research has consistently shown that monetary bail far outperforms other measures in protecting defendants' right to liberty while also giving all parties involved the proper incentives to ensure that the defendant appears for trial.

Critics of monetary bail also tend to disregard the downsides of their own preferred approaches. Eliminating or reducing monetary bail may lead judges to over-incarcerate defendants who otherwise would have been candidates for release. And some jurisdictions may err too far in the other direction by releasing defendants with minimal or no conditions; studies have shown that those individuals are vastly less likely to appear for their court hearings than defendants whose appearance is secured by a bond. Still other types of "reform" proposals seek to ensure defendants' appearance through measures such as GPS monitoring, drug testing, or periodic check-ins with a pretrial services agency. But those programs require large and expensive government bureaucracies to administer, and often predict flight risk using computer algorithms that may be plagued by racial disparities. Critics of monetary bail have yet to identify any other method for ensuring the appearance of defendants that is as efficient and effective as the commercial bail system.

In sum, if efforts like New Jersey's are allowed to succeed, it will only open the door to more States seeking to disregard historic, long-accepted, and highly effective practices for ensuring defendants' appearance in court while protecting the presumption of innocence. This petition raises questions of significant and increasing importance about the scope of a fundamental right of the accused, and this Court's intervention is plainly warranted.

BACKGROUND

Bail is the means through which the criminal justice system permits the release of an accused from custody pending trial, while ensuring his or her appearance at all required court proceedings. *See Cohen v. United States*, 82 S. Ct. 526, 528 (1962) ("The purpose of a bail bond is to insure that the accused will reappear at a given time by requiring another to assume personal responsibility for him, on penalty of forfeiture of property."). A defendant's right to be free on bail before having been convicted of a crime is an essential safeguard of the presumption of innocence and is also necessary to allow the defendant to prepare an effective defense.

After an individual has been arrested and charged with a crime, bail is then set and conditions are established under which the defendant may be released from custody. Some jurisdictions use a "bail schedule" with a specified bail amount for different types of crimes, while other jurisdictions give the judicial officer discretion to set an appropriate amount. *See generally* L. Jay Labe & Jerry Watson, *Commercial Bail Bonds,* at 4 ("*Commercial Bail Bonds*"), *available at* https://bit.ly/2CIzrLo.

Once the bail amount is set, the defendant can either post the amount himself or contact a local bail bonding agent. If the defendant or his family chooses to hire a bondsman, the agent will post an appearance bond with the court in exchange for payment of a premium (generally around 10% of the face value of the bond). Depending on the defendant's flight risk, the bondsman may also require the defendant or his family to post collateral before issuing the bond.

After the bond is posted with the court, the defendant is released from custody. If the defendant fails to appear in court for his trial or other proceeding, the bond is forfeited and a warrant is issued for the defendant's arrest. The bondsman is then given a set period of time in which to locate and produce the defendant; if he is unable to do so, the forfeiture of the bond becomes a judgment that must be paid by the bondsman. Under common law, contract, and statute, bondsmen have the authority to take a defendant into custody if needed to secure his appearance, or to apprehend a defendant who has fled the jurisdiction. *See, e.g.*, *Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72 (1872) (bounty hunter may pursue a defendant into another state, arrest him on the Sabbath, or apprehend him in his home with the same authority as a sheriff pursuing an escaped prisoner).

This system of monetary bail effectively shifts the risk of non-appearance from the state to the bondsman: if the defendant does not appear for trial, the bondsman loses the entire amount of the bond unless he is able to locate the defendant and present him to the court. The bondsman thus has a powerful incentive to take proactive steps to ensure the defendant's appearance, such as

reminding the defendant of court dates or staying in regular communication with the defendant and his family throughout the process.

ARGUMENT

I. Monetary Bail Is Deeply Rooted In The History And Traditions Of Our Legal System.

The history of bail in the United States before, during, and, after the Founding era makes clear that the right to bail was unequivocal in non-capital cases, and was seen as extremely important to preserving other important values such as the right to a fair trial, the right to due process, and the right not to be deprived of liberty before conviction by a jury of one's peers. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("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.").

A. The right to bail in the United States "arose primarily out of the inherited statutes and common law of England," and was "protected, refined, and strengthened by some of the most fundamental constitutional documents in Anglo-American history: the Magna Carta, issued in 1215; the Statute of Westminster I in 1275; the Petition of Right in 1628; the Habeas Corpus Act of 1679; and the English Bill of Rights of 1689." Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916-17 (2013) ("*Right to Bail*"). In 1275, the Statute of Westminster I declared a list of particularly

serious offenses—such as arson, treason, and breaking prison—that would not be bailable, leaving "the vast quantity of felonious, as well as nonfelonious, offenses as bailable." *Id.* at 917. In short, "for all of English history, from before the Conquest until the time of American independence, only the most serious of felonies were not bailable, and bail was available *not as a matter of judicial discretion but as a matter of right*." *Id.* (emphasis added).

Unsurprisingly, that English tradition influenced the colonies' approach to bail. In the Massachusetts Body of Liberties of 1641, the *very first sentence* in the provision regarding "Rites Rules and Liberties" in judicial proceedings stated: "No mans person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance and good behavior in the meane time, unlesse it be in Crimes Capitall…." Mass. Body of Liberties of 1641, § 18. The Pennsylvania Frame of Government of 1682 similarly provided that "all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption [of guilt] great." Frame of the Government of Pennsylvania of 1682, Laws Agreed Upon in England, &c., art. XI.

Given this long tradition, it is unsurprising that, for the first two centuries after independence, bail "was one of the best-protected constitutional rights in America." *Right to Bail* at 916. The "pervasive guarantee of the right to bail on the state level demonstrates that the right evolved in the decades after 1789 into a fundamental principle of American criminal jurisprudence." Donald B. Verrilli, Jr., *The Eighth Amendment and the Right*

to Bail: Historical Perspectives, 82 Colum. L. Rev. 328, 351 (1982) ("*Historical Perspectives*"). At some point in their history, 42 of the 50 States have had a "right to bail" clause in their state constitution, and 48 of 50 States have protected the right to bail by statute or constitution. *See Right to Bail* at 921, 927. The wording of those protections varied slightly across States, but most draw upon the same basic formulation: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." *See id.* at 921-927 (summarizing state constitutional provisions).

The right to bail is also deeply engrained in our legal system as a matter of federal law. The Northwest Ordinance was enacted under the Articles of Confederation in the summer of 1787, at the same time the Constitution was being drafted. The Ordinance contains a declaration of those rights common to the original 13 States, and its express purpose was to "extend[] the fundamental principles of civil and religious liberty, which form the basis whereon [the original States], their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory." Northwest Ordinance of 1787, § 13. The Ordinance provided in no uncertain terms that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." *Id.* art. II. Through the Northwest Ordinance, the right to bail was extended to the areas that later became Ohio, Indiana, Illinois, Wisconsin, Michigan, and Minnesota; Congress also subsequently included that right in the organic legislation for the Philippines, the U.S. Virgin Islands, and Puerto Rico. *See Right to Bail* at 937 (collecting sources).

Two years after the Northwest Ordinance was enacted, the Judiciary Act of 1789 broadly defined the right to bail for federal crimes: "Upon all arrests in criminal cases, bail *shall be admitted*, except where the punishment may be death…" Judiciary Act of 1789, ch. 20, § 33 (emphasis added). Put differently, judges had *no* discretion to deny bail to a defendant accused of a non-capital crime. Even in capital cases, moreover, the Judiciary Act did not foreclose the possibility of bail altogether but instead committed it to "a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law." *Id.*

Finally, in addition to these early statutes, the Eighth Amendment—which was passed by Congress in 1789 and ratified in 1791—further protects defendants' ability to post bail by providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Recognizing that excessive bail could be tantamount to no bail at all, the Eighth Amendment ensures that defendants will have *meaningful* and *effective* access to bail.[2]

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2. One scholar has argued based on a careful analysis of the Eighth Amendment's drafting history that "to construe the [E]ighth [A]mendment as not providing a constitutional right to bail secure against legislative abridgment flies in the face of everything we know about the purpose of the Bill of Rights as a whole." Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 988 (1965). He contends that the right to bail was so well-established and so uncontroversial at the time of the Founding that it was likely mere inadvertence that led such a right to be omitted from the text of the Bill of Rights. *See id.* at 984-89.

B. Historic practice also confirms the *breadth* of the right to bail. As noted, the bail protections in many state constitutions provided that "[*a*]*ll persons* shall be bailable" with only limited exceptions. Writing in 1849, Chief Justice Field of the California Supreme Court (who later served on this Court) emphasized that "the admission to bail is a right which the accused can claim, *and which no Judge or Court can properly refuse*." *People v. Tinder*, 19 Cal. 539, 542 (1862) (emphasis added). The right to bail was not seen as merely discretionary or a matter of judicial grace; it was instead available as a matter of right to *all* defendants other than those accused of the most heinous crimes.

The relevant state and federal laws also generally provided for bail "by sufficient sureties." A surety is a "person who binds himself for the payment of a sum of money or for the performance of something else, for another." 2 Bouvier's Law Dictionary 1073 (Bos. Book Co. 1897). The early protections for bail thus contemplated that bail would be posted by "a third party, that is, a person of sufficient means that would guarantee the appearance of the prisoner at trial, on penalty of forfeiture of the surety's property." *Right to Bail* at 939.

From the earliest days of the system, "[p]rofessional bondsmen would act as sureties who would simply promise to pay a given amount of money if the accused failed to appear at court." *Id.*; *see also* 4 William Blackstone, *Commentaries* *294 (bail involved the defendant being entrusted "to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol."). Not just the right to bail but the existence of *monetary* bail is deeply engrained in our justice system.

Bail was also widely available for nearly all categories of *offenses*. The general statement of the right excluded only "capital offenses when the proof is evident or the presumption great." Murder is the only offense that was punishable by death throughout all States in the early republic. *See Right to Bail* at 943-45 & n.131. There was thus a near-universal consensus that bail must be available for all less serious offenses (including felonies) unless "the proof is evident or the presumption great." Courts applied that language strictly: given the presumption of innocence and the strong presumption in favor of bail, courts would refuse to grant bail only in the most obvious cases of guilt. And, as noted above, the federal government was even more generous than the States in making bail available even in some capital cases based on the judge's discretion.

* * *

In sum, "[t]he development of a pervasive right to bail reflects a profound historical judgment that pretrial liberty, at least for defendants who pose no risk of flight, is a requisite of fair criminal procedure." *Historical Perspectives* at 356-57. Recent attempts by state and federal governments—such as New Jersey—to reduce or eliminate access to monetary bail "contravene this traditional right, whether the changes are sought to be justified by a finding that there is no right to bail at all or that the right does not extend to dangerous defendants." *Id.* at 360. The relevant "[h]istorical evidence does not support either justification for denial of bail." *Id.*

II. Monetary Bail Is An Efficient And Effective Means Of Ensuring That Defendants Appear For Trial.

A. There is a good reason why monetary bail has been such an integral part of the criminal justice system since before the Founding era: because it works. Monetary bail is an efficient and effective means of ensuring that defendants appear for their court dates without excessively burdening taxpayers, courts, or government agencies. The modern commercial bail industry strikes an appropriate balance between the competing interests at stake by facilitating pretrial release without liberty-infringing conditions while still assuming responsibility for the defendant's appearance at trial.

Most importantly, monetary bail is highly *effective*. The relevant data "consistently indicate that defendants released via surety bond have lower [failure to appear] rates than defendants released under other methods." Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 96 (2004) ("*The Fugitive*").

One major study found that felony defendants "released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time." *Id.* at 188. The U.S. Department of Justice has similarly found that "[c]ompared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances." Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, Pretrial Release of Felony Defendants in State Courts

1 (2007), *available at* http://bit.ly/2kG9rV3. Another study of 22,000 defendants in Dallas County found that felony defendants who were released on commercial bond were 39% to 56% less likely to miss a court appearance than those released through other means. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* 2 (Jan. 2013), *available at* https://bit.ly/2ygjZCn ("Dallas Report").

Monetary bail is extremely effective at ensuring the appearance of defendants because "bond dealers, just like other lenders, have numerous ways of creating appropriate incentives for borrowers." *The Fugitive* at 97. In particular, the bondsman may "ask defendants for collateral and family cosigners to the bond." *Id.* Moreover, "[i]n order to make flight less likely, bond dealers will also sometimes monitor their charges and require them to check in periodically," or will "remind defendants of their court dates and, perhaps more important, remind the defendant's mother of the son's court date when the mother is a cosigner on the bond." *Id.*

If a defendant does fail to appear, the bond dealer is granted a specified period of time, typically 90 to 180 days, to locate him and secure his appearance before the bond is forfeited. Bondsmen have reported that 95% of their clients must show up in court just to break even; needless to say, bondsmen thus have a powerful incentive to pursue and re-arrest any defendant who flees. *The Fugitive* at 97. Bondsmen and their agents have powerful statutory, contractual, and common law rights over any defendant who fails to appear. Bail enforcement agents, for example, have the right to enter a defendant's home, make arrests,

temporarily imprison defendants, and pursue and return a defendant across state lines without using the formal extradition process. *Id.*; *see also Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 371-72 (1872).

But that is all just a last resort. The *most* efficient course is for the bondsman to ensure that the defendant appears in court without needing to track him down. And that is a task at which bondsmen excel. As noted, the bondsman will stay in regular contact with the defendant and will often require the defendant to "check in" at the office at specified dates and times. Moreover, the bond application will typically require extensive information about the defendant's residence, employer, former employers, spouse, children (names and schools), spouse's employer, mother, father, automobile (description, tags, financing), previous arrests, and so on. *See The Fugitive* at 97-98.

If the bond is co-signed by a third party—such as a parent or sibling of the defendant—this adds yet *another* layer of protection to ensure the defendant will appear. Anyone who would co-sign a bond for a person potentially facing jail time is likely someone who the defendant is *least* likely to want to disappoint or harm. A defendant may not hesitate to skip bail if it is just the bondsman's money at stake, but would certainly think twice if his mother had pledged her house or car as collateral. And if the defendant does skip town despite the bond being co-signed by a friend or relative, this arrangement ensures that the co-signer—as well as the bondsman—has a powerful incentive to locate the defendant and secure his appearance in court. When a defendant fails to appear, any co-signers "tend to become the surety's best and most

reliable source of information leading to his apprehension." *Commercial Bail Bonds* at 6.

Monetary bail also provides an invaluable service to the criminal justice system *at no cost to taxpayers*. Courts and police departments are perpetually strained for resources, and re-arresting defendants who fail to show up for a court hearing is typically treated as a low priority; indeed, many states such as Texas, Florida, Massachusetts, and California have hundreds of thousands of unserved arrest warrants, many of which will never be served due to a lack of manpower. *See* ABC News, *Thousands Run Free Despite Warrants* (Aug. 7, 2009), *available at* https://abcn.ws/2PBgWLN.

Bondsmen, however, have an immediate and direct incentive to ensure that defendants appear for their hearings (or can be easily located if they miss a court date). One study found that every missed court appearance results in a public cost of $1775, and that the use of commercial bonds saved Dallas County more than $11 million in such costs in 2008 alone. *See* Dallas Report at 3. Private sector bondsmen and their agents also apprehend more than 30,000 fugitives per year at no cost to taxpayers. *See Commercial Bail Bonds* at 24 & n.83; *The Fugitive*, at 118 ("These finding[s] indicate that bond dealers and bail enforcement agents (bounty hunters) are effective at discouraging flight and at recapturing defendants. Bounty hunters, not public police, appear to be the true long arms of the law.").

B. Critics of monetary bail often fail to grapple with the problems and unintended consequences of their own preferred approaches. *See, e.g.*, Alex Tabarrok,

We Cannot Avoid the Ugly Tradeoffs of Bail Reform, Marginal Revolution (Oct. 12, 2018), *available at* https://bit.ly/2yhd2Bi (arguing that "[e]liminating money bail ... is a crude and dangerous approach" to the problem of poor defendants being detained before trial). At the outset, some judges may respond to the elimination of money bail by finding more defendants ineligible for pretrial release altogether. Thus, "the unintended consequence of bail reform may be that more people are held until trial with no possibility of release." *Id.* And even for defendants who are released, they may be subject to liberty-restricting measures such as GPS monitoring or house arrest.

At the other extreme, some jurisdictions may simply release defendants with minimal (or minimally enforced) conditions. Philadelphia, for example, had long prohibited commercial bail and instead released a large share of criminal defendants on personal recognizance. Unsurprisingly, that city faced extremely high failure-to-appear rates. As of November 2009, there were nearly 50,000 fugitives who had been missing for at least a year, and 19,000 defendants *per year* (nearly one in three) were failing to appear for their hearings. *See* Pa. Joint State Gov't Comm'n, Report of the Advisory Committee on the Criminal Justice System in Philadelphia 19 (Jan. 2013), *available at* http://bit.ly/25Y8c8s.[3] An overburdened and understaffed police department is not remotely equipped to track down and re-arrest all of those individuals at the

3. A study of failure-to-appear rates in Maryland similarly found that defendants released on personal recognizance were 25.7% more likely to fail to appear compared to defendants released on commercial surety bonds. *See, e.g.*, Byron L. Warnken, *Warnken Report on Pretrial Release* 16-17 (Feb. 2002), http://bit.ly/2s0N6XT.

expense of neglecting more immediate law enforcement concerns such as responding to emergencies and conducting investigations.

Another oft-cited alternative to monetary bail—which has been used in the District of Columbia—is to have a large pretrial services program that evaluates each defendant and makes recommendations to the courts about which defendants should be eligible for release, remain incarcerated, or be released with conditions such as house arrest or GPS monitoring. The pretrial services agency is also tasked with supervising defendants and overseeing the terms of their release.

The most obvious drawback to such a system is its cost. In Washington, D.C. alone, the pretrial services agency has more than 350 employees and is seeking an annual budget of $74 million for FY2019. *See* Pretrial Services Agency for the District of Columbia, Congressional Budget Request for Fiscal Year 2019, at 6 (Feb. 12, 2018), *available at* https://bit.ly/2CM8tma. And New Jersey's system—which has 270 employees and a budget of $67 million—is going broke less than two years after it was created. A recent report found that once the program is fully implemented, expenses will exceed revenue by "at least $13 million annually." Criminal Justice Reform Report to the Governor and Legislature for Calendar Year 2017, at 9-10, *available at* https://bit.ly/2PxUIdB. The report found that New Jersey's program faced a "structural deficit" for the foreseeable future, even as administrators of the program sought additional funds to *expand* its services. *Id.* at 8, 25.

Finally, due their large caseloads, pretrial services agencies often use computer algorithms to predict whether the defendant poses a danger to the community or is likely to fail to appear for his trial. Such algorithms often lack transparency and have been criticized for being biased against certain racial groups. *See, e.g.*, Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), *available at* https://bit.ly/1XMKh5R ("There's software used across the country to predict future criminals. And it's biased against blacks."). As then-Attorney General Eric Holder stated in 2014, "[a]lthough these measures were crafted with the best of intentions, I am concerned that they inadvertently undermine our efforts to ensure individualized and equal justice," and "may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society." *Id.*

III. Certiorari Is Warranted For This Court To Provide Much-Needed Guidance About The Constitutionality Of State Bail "Reform" Efforts.

As Petitioners ably explain, the Court should grant certiorari—and Petitioners should prevail—even under the framework set forth in *United States v. Salerno*, 481 U.S. 739 (1987). But the Court could also use this case as a vehicle to provide greater clarity about its approach to bail issues more generally.

In *Salerno*, the Court rejected a facial challenge to the federal Bail Reform Act of 1984, which significantly expanded the use of pretrial detention without bail in federal court. In its discussion of the Excessive Bail Clause, however, the Court did not even mention the long

history of bail at the time of the Founding or the near-consensus among States in the early years of the republic about the importance of bail in protecting the rights of the accused. Instead, the Court applied an interest-balancing functional test that compares "the Government's proposed conditions of release or detention" to "the interest the Government seeks to protect by means of that response." *Id.* at 754.

Amici respectfully submit that the Court's approach to the Eighth Amendment should be grounded in the text and history of that provision rather than an ad hoc balancing of interests. In interpreting the Bill of Rights, the Court must "begin by reading the [Eighth] Amendment as ratified in 1791," must "understand the history" of that amendment "as the Founders then knew it," and must "carry those lessons onward." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for certiorari and reverse the judgment of the Third Circuit.

Respectfully submitted,

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