No. 22-835

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

BRIEF OF THE CATO INSTITUTE, NATIONAL ASSOCIATION OF EVANGELICALS, THE RUTHERFORD INSTITUTE, GEORGIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE WOODS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF *AMICI CURIAE*[1]

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

The National Association of Evangelicals ("NAE") is a nonprofit association of evangelical Christian denominations, churches, ministries, institutes, and individuals founded in 1942 that includes more than 45,000 local churches from 40 denominations as well

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

The Emory Law School Supreme Court Advocacy Program (ELSSCAP) assisted the Cato Institute in preparing this amicus brief. ELSSCAP, established in 2010, is the only student-run Supreme Court litigation program in the United States, producing persuasive petitions for certiorari and amicus briefs in a broad range of practice areas, including administrative law, bankruptcy law, constitutional law, criminal law, and tort law. Students work under the guidance of experienced litigators as they handle all aspects of ELSSCAP's work, giving them a unique opportunity to choose cases, write briefs, and engage in significant issues that merit being heard by the U.S. Supreme Court

as evangelical charities, schools and networks. Together we serve a constituency of millions. The NAE believes that human life is an embodied, sacred gift from God, and that our God-given human rights extend to those accused of crimes. This includes the right not to be arbitrarily detained. We seek a criminal justice system that upholds the human dignity of every person.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

The Georgia Association of Criminal Defense Lawyers (GACDL) is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence

and procedure, and the preservation and fulfillment of our great constitutional heritage.

The Woods Foundation is a nonprofit organization in Birmingham, Alabama, that works with incarcerated individuals facing excessive sentences and unconstitutional conditions of confinement. We advocate for the principle that a person's financial position should not determine their access to freedom and fairness. The Woods Foundation urges this Court to end Cullman County's practice of denying due process, equal protection, and pre-trial liberty to indigent defendants.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The original public meaning of the right to bail and pretrial liberty, incorporated into the Due Process Clause of the Fourteenth Amendment, calls for this Court to grant certiorari and reverse the decision of the Eleventh Circuit.

The Anglo-American common law tradition is rooted in protecting the criminally accused against arbitrary and abusive detention and punishment. In the early days of the Republic, states codified the right to bail for non-capital offenses—which existed at common law—in their constitutions and the federal government did so in statute. The long-understood purpose of bail was to ensure the presence of the accused at trial. Prior to trial, the accused retained the ancient presumption of innocence and could not be punished or imprisoned without due process of law. For centuries under the Anglo-American tradition, the right to bail was synonymous with pretrial release. Restoring the original public meaning of bail and

pretrial liberty would entitle most defendants, especially those accused of misdemeanors, to release pending trial.

ARGUMENT

I. HISTORICAL DEVELOPMENTS IN THE ANGLO-AMERICAN COMMON LAW WERE DESIGNED TO MINIMIZE PRETRIAL DETENTION

The bail system was markedly different at common law than it is today and characterized by several key developments.

Pre-Norman kings in England, seemingly as a method of abolishing the vigilante "blood feud" justice of earlier eras, developed laws of "borh" (surety) which dictated that "wergeld" (a fixed fine) be levied against those accused of crimes. William F. Duker, *The Right to Bail: A Historic Inquiry*, 42 ALB. L. REV. 33, 35 (1977). If the action was settled against the person accused, compensation was then doled out to the victim. *See id.* These laws also allowed for pretrial release of both servants and foreign visitors who were accused of crimes, so long as they were placed under the care of hosts who were expected to guarantee their appearance before a tribunal. *See id.* "The general purpose of the early Anglo-Saxon code was to restrain private vengeance until resort could be had to a public tribunal." *See id.* at 36.

During the reign of King Edgar (959–975 A.D.), use of the system of pretrial release turned from a rare occasion into an almost-universal requirement. "Ordinances demanded that 'every man . . . [was to] have a 'borh.'" *Id.* at 37. The system was also extended beyond the interval between accusation and trial to

after the trial had ended, in effect becoming a system of probation. *See id.* at 36. Those who were unable to secure a "borh" and resided in an area where no prison existed were able to secure their pretrial release with an oath of future good behavior. *See id.* Releasing the accused before trial was likely seen as a method of reducing both overcrowding and disease that swept through unsanitary prisons (a concern with resonance to our own recent experience of a global pandemic). *See* Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961).

The Norman invaders built their own "frankpledge" system upon the foundations set by the borh laws. *See* Duker, *supra* at 39. The frankpledge was a collective bail and probation system, requiring members to become a surety or "free pledge" for the other members, from the age of twelve. *See id.* If one member stood accused of an offense, the others were collectively fined if they did not apprehend him and present him before court. *See id.* Whereas fines for offenses were fixed and proportionate before the Norman Conquest, these were replaced by discretionary amercements (e.g., fines), which were ripe for excessiveness and abuse. *See* Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 845 (1969).

After the Norman Conquest, the criminal process could be initiated by a presentment jury as well as the sworn statements of the aggrieved. Capital and other forms of corporal punishment replaced monetary fines for all but the least-serious offenses and the delays between accusation and trial were prolonged. *See* June Carbone, *Seeing Through the Emperor's New Clothes:*

Rediscovery of Basic Principles in the Administration of Bail, 34 SYRACUSE L. REV. 517, 521 (1983).

The American colonies carried over the English common law and, importantly, the three statutes which Professor Caleb Foote refers to as the "three-legged stool" of bail: the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Caleb Foote, *Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 968 (1965); *see also* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 918 (2013); Carbone, *supra* at 529.

These statutes developed because of "cases which alleged abusive denial of freedom on bail pending trial." Foote, *supra* at 966. *Darnel's Case* in 1627 concerned five knights imprisoned by King Charles I without cause. *See id.*; 3 How. St. Tr. 1 (K.B. 1627). The knights argued that they were denied their right to bail before trial and conviction. *See* Foote, *supra* at 966. The Attorney General argued that Magna Carta did not apply to pretrial detention and the judges denied the knights' release. *Id.* The Petition of Right was adopted a year later, asserting that "no freeman in any such manner as is before mentioned, be imprisoned or detained." *Id.* at 967. Thus, the decision in *Darnel's Case* was voided and Magna Carta was enforceable in the pretrial imprisonment context. *See* Foote, *supra* at 967.

The Petition of Right reconfirmed Magna Carta's provision that "no freeman shall be taken or imprisoned . . . without the judgment of his peers or by the law of the land." Magna Charta, 1225, c. 26 (Eng.), *in* 1 THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE REIGN OF KING HENRY THE SIXTH 7–8

(Owen Ruffhead, ed., London, Mark Basket 1763) (containing both an English translation and the original Latin). The Petition of Right deemed that bail was to obtain "the liberty of the subjects" from pretrial imprisonment. Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1324 (2012).

When Francis Jenkes was arrested and imprisoned for inciting a riot to call a new Parliament, English law required him to be released on bail, yet he was still held in prison. *See* Foote, *supra* at 967. Where the Petition of Right allowed for procedural delays, the Habeas Corpus Act of 1679, 3 How. St. Tr. at 69, closed that loophole by making judges subject to penalties for noncompliance. *See id.*; Duker, *supra* at 66.

Another procedural crack in the common law allowed for judges to set impossibly high bail "to thwart the purpose of the law on pretrial detention." Foote, *supra* at 967. Parliament, therefore, declared in the 1689 Bill of Rights "[t]hat excessive bail ought not to be required." 1 W. & M., st. 2, c.2; *see id.* These English statutes, the "three-legged stool" of bail, affirmed that "relief against abusive pretrial imprisonment was one of those fundamental aspects of liberty which was of most concern during the formative era of English law." Foote, *supra* at 968.

Blackstone, articulating the nature of the common law in the late 1760s, commented on pretrial liberty:

> [T]o refuse or delay to bail any person bailable, is an offense against the liberty of the subject . . . by the common law, as well as the Statute of Westminster and

> the Habeas Corpus Act. And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by [the Bill of Rights of 1689, *supra*] that excessive bail ought not to be required.

4 WILLIAM BLACKSTONE, COMMENTARIES *297 . Despite attempts at clarification, English law in this area was a disorganized arrangement well into the nineteenth century. *See* Foote, *supra* at 973.

The three cornerstone English statutes underpinned colonial conceptions of bail. *See* Hegreness, *supra* at 919; A. E. Dick Howard, *Rights in Passage: English Liberties in Early America*, in THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 3, 11–13 (Patrick T. Conley & John P. Kaminski eds., 1992). But colonial charters soon veered significantly. *See* Carbone, *supra* at 530. The colonies employed pretrial detention less frequently than England, and Massachusetts led the way in liberalizing its bail laws. *See id.* The 1641 Massachusetts Body of Liberties provided for an "unequivocal right to bail for non-capital offenses"[2] and simplified the Statute of

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[2] The statute provided:

> 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 behaviour in the meane time, unlesse it be Crimes Capital, and Contempts in open Court,

Westminster. *Id.* at 530. Massachusetts' list of capital offenses omitted burglary, robbery, and larceny. *See* Foote, *supra* at 981.

However, Massachusetts' liberalized version of English law still retained a wide array of capital crimes, including idolatry, witchcraft, blasphemy, bestiality, sodomy, adultery, rape, and cursing or smiting a parent. *See id.* Pennsylvania passed an even more liberal provision in its colonial charter and later state constitution, ensuring that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption [of guilt] great" (thereby presuming a right to bail even in capital cases). Carbone, *supra* at 531; 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909). Further, Pennsylvania limited the list of capital offenses to "willful murder" (although Black men could also be executed for rape, bestiality, and burglary). *See* Carbone, *supra* at 531; 531 n.69. It thus extended "the right to bail far beyond the provisions of the Massachusetts Body of Liberties and far beyond English law." *Id.* at 531–32.

Come 1789, only North Carolina and Pennsylvania included a specific right-to-bail clause in their state constitutions—but by the time of the ratification of the Fourteenth Amendment, 27 out of 37 states included

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> and in such cases where some expresse act of Court [legislature] doth allow it.

THE COLONIAL LAWS OF MASSACHUSETTS § 8, at 37 (W. Whitmore ed. 1889).

one closely resembling that of Pennsylvania.[3] *See* Hegreness, *supra* at 925; 969–96.

Each state that entered the Union after 1789, except West Virginia and Hawaii, guaranteed a right

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[3] Alabama (ALA. CONST. of 1867, art. I, §18 (provision adopted 1819)); Arkansas (ARK. CONST. of 1868, art. I, §9 (adopted 1836)); California (CAL. CONST. of 1849, art. I, §7); Connecticut (CONN. CONST. of 1818, art. I, §14); Delaware (DEL. CONST. of 1831, art. I, §12 (adopted 1792)); Florida (FLA. CONST. of 1868, Decl. of Rights, §7 (adopted 1839)); Illinois (ILL. CONST. of 1848, art. XIII, §13 (adopted 1818)); Indiana (IND. CONST. of 1816, art. I, §14); Iowa (IOWA CONST. of 1857, art. I, § 12 (adopted 1846)); Kansas (KAN. CONST. of 1859, Bill of Rights, § 9); Kentucky (KY. CONST. of 1850, art. XIII, §18 (adopted 1792)); Louisiana (LA. CONST. of 1868, tit. I, art. 7 (adopted 1812)); Maine (ME. CONST. of 1819, art. I, §10 (amended 1837)); Michigan (MICH. CONST. of 1850, art. VI, §29 (adopted 1835)); Mississippi (MISS. CONST. of 1868, art. I, §8 (adopted 1817))); Missouri (MO. CONST. of 1865, art. I, §20 (adopted 1820)); Nebraska (NEB. CONST. of 1866–1867, art. I, §§6, 8); New Jersey (N.J. CONST. of 1844, art. I, §10); Ohio (OHIO CONST. of 1851, art. I, §9 (amended 1997; adopted 1802)); Oregon (OR. CONST. of 1857, art. I, §14); Pennsylvania (PA. CONST. of 1839, art. IX, §14 (adopted 1776)); Rhode Island (R.I. CONST. of 1842, art. I, § 9); South Carolina (S.C. CONST. of 1868, art. I, §16); Tennessee (TENN. CONST. of 1834, art. I, §15 (adopted 1796)); Texas (TEX. CONST. of 1866, art. I, §9 (adopted 1845)); Vermont (VT. CONST. of 1793, ch. 2, §§ 33, 40 (adopted 1777)); and Wisconsin (WIS. CONST. of 1848, art. I, §8 (amended 1870)). North Carolina removed its right-to-bail clause in 1868. *See* N.C. CONST. art. I, § 27 (1868). But North Carolina's bail provision is almost identical to the Eighth Amendment, and it was North Carolina that recommended the adoption of the federal Excessive Bail Clause at the Philadelphia Convention. *See* Duker, *supra* at 83. There is no clear indication as to why North Carolina removed the right to bail from its constitution, except that under military occupation, the state constitutional convention may have chosen to apply the federal analogue. *See id.*; JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, AT ITS SESSION 1868 (Raleigh, Joseph W. Holden 1868).

to bail in its original state constitution. *See* Donald B. Verrilli Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 351 (1982). The right to bail survived the widespread practice of redrafting state constitutions during the Civil War era. *See id.* at 352. Most clauses on the subject were left unamended and all, except Maine's, expanded the availability of the right. *See id.* Many of the changes reduced the categories of capital crimes to only murder and treason, thereby expanding the list of bailable crimes. *See id.*

The federal government also respected the right to bail. The Northwest Territory Ordinance of 1787 provided for one, except for capital offenses, in language parallel to the Pennsylvania provision. *See* 1 Stat. 13, art. II. The right-to-bail provisions in the Pennsylvania constitution, other state constitutions, and the Northwest Ordinance found their way into the federal Judiciary Act of 1789, which extended an absolute right to bail in all noncapital federal criminal cases. *See* Judiciary Act of 1789, ch. 20 § 33, 1 Stat. 73, 91. Congress simultaneously considered the Judiciary Act and the Bill of Rights during the spring and summer of 1789. *See* Foote, *supra* at 971. The House worked on the Bill of Rights and the Senate worked on the Judiciary Act. *See id.* The legislative record indicates little debate on the merits of either proposal. *Id.* at 972 ("As to bail there is no record of any debate in either House or Senate on the right to bail provision of the Judiciary Act, and there are only a few lines in the House record and nothing in the Senate's as to the excessive bail amendment.").

Around the advent of the nineteenth century, the criminal justice system turned towards incarceration

and away from reliance on corporal punishment. *See* Carbone, *supra* at 535. Capital punishment was increasingly reserved for murder and rape. *See id.* Some states even abolished capital punishment altogether. *See id.* n.84.

The surety system in the colonial and early national period functioned without prepayment and the guarantee was only submitted to the court upon the defendant's default. *See id.* at 519–20. Even when historical language seems to suggest that courts demanded upfront payments from defendants, this was almost never the case: When a defendant was required to make an upfront payment, "this meant only finding sureties who would be obligated for some amount of money due upon default." Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES J. 4, 6 (2018). Personal sureties and promises virtually guaranteed the release of bailable defendants. *See id.* A criminal law treatise from 1819 stated, "such bail is only to be required as the party is able to procure, for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge." JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 88–89 (Phila., Edward Earle 1819). The historical tradition of bail in the American criminal justice system from its inception until the mid-twentieth century equated the "right to bail" with the rights to "release before trial" and "freedom before conviction." Schnacke, *supra* at 6.

As the nineteenth century progressed, the absolute right to bail, except in capital cases, coupled with the absence of close friends and neighbors in frontier America, made the task of finding acceptable personal sureties more difficult for many defendants. *See*

WAYNE H. THOMAS JR., BAIL REFORM IN AMERICA 11–12 (1977). Judges struggled with the problem and placed secured money conditions on defendants. *See* Schnacke, *supra* at 6. Courts then diverged from centuries of Anglo-American caselaw and concluded that an amount was not excessive simply because it was unattainable. *See id.* When states began allowing commercial sureties around 1900, they departed from the common law (and other common law countries) because they "gradually discard[ed] the longstanding rules against profit and indemnification at bail." *Id.* at 7. Then, a new generation of bail reform erupted in the 1960s and 1970s, focusing on public safety as a valid consideration at the bail stage. *See id.* But the historical purpose of bail was to ensure appearance at trial; the bail system was not tasked with limiting pretrial liberty for noncapital defendants on the basis of public safety. *See id.*

Nevertheless, this Court still reiterated the Anglo-American axiom, rooted in the presumption of innocence, that the "fundamental tradition in this country is that one charged with a crime is not, in ordinary circumstances, imprisoned until after a judgment of guilt." *Bandy v. United States*, 81 S. Ct. 197, 197 (1960). This doctrine, originally understood to be at the core of the common law tradition, merits revival. In recognition of the presumption of innocence, the historical justification for bail was to secure the presence of the accused at trial.

II. THE HISTORICAL PURPOSE OF BAIL WAS TO ENSURE APPEARANCE AT TRIAL

The function of bail was historically understood as to "insur[e] the presence of a defendant before the court." Duker, *supra* at 68–69. When the accused was

not bailable or did not post bail, "this imprisonment . . . [wa]s only for safe custody, and not for punishment." BLACKSTONE, *supra* *300. Describing the purpose of bail in *Ex parte Milburn*, Justice Story wrote:

> A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon. It is not designed as a satisfaction for the offence, when it is forfeited and paid; but as a means of compelling the party to submit to the trial and punishment, which the law ordains for his offence.

34 U.S. (9 Pet.) 704, 710 (1835). "Historically, defendants were punished only when convicted, according to principles of due process and the presumption of innocence, . . . [which] protected individuals from imprisonment unless there was confession in open court or proof of guilt beyond a reasonable doubt." Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 734 (2011); *see also* BLACKSTONE, *supra* *300. Indeed, this Court established early on that imprisonment or punishment is not allowed until trial. *See Hudson v. Parker*, 156 U.S. 277, 285 (1895); Baradaran, *supra* at 735. In 1891, this Court stated:

> [I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time; and, as these persons usually belong to the

> poorest class of people, to require them to pay the cost of their recognizances would generally result in their being detained in jail at the expense of the government, while their families would be deprived, in many instances, of their assistance and support.

United States v. Barber, 140 U.S. 164, 167 (1891). The Court later pronounced that "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (citing *Tot v. United States*, 319 U.S. 463, 466–47 (1943)).[4] The Court drew on our "cherished tradition" "[d]ating back to Magna Carta" commanding that "no freeman shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963); Magna Charta, *supra* at c. 26. It elaborated that the Constitution requires that "punishment cannot be imposed 'without due process of law.'" *Id.* And this Court has also explained that "[t]he purpose of bail is to insure the defendant's appearance and submission to the judgment of the

[4] A significant amount of federal jurisprudence on pretrial liberty and bail was written during the mid-twentieth century (and thereafter), owing to the increased incorporation of the Bill of Rights's criminal procedure guarantees through the Fourteenth Amendment. *See* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982) ("[I]n a single decade [this Court] expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's constitutional rulings over the previous 170 years.").

court. It is never denied for the purpose of punishment . . . ." *Reynolds v. United States*, 80 S. Ct. 30 (1959) (Justice William O. Douglas, sitting as circuit justice).

Because the purpose of bail is to ensure the defendant's appearance at trial, it should be denied only for those facing likely conviction of the most serious charges.

III. THE SEVERITY OF THE ALLEGATION AS A RELEVANT FACTOR IN BAILABILITY

In addition to ensuring the accused person's appearance at trial, the history of bail reveals the severity of the allegation as a relevant factor, because the greater the severity of the prospective penalty and likelihood of its imposition, the greater the incentive to flee. *See* Carbone, *supra* at 560 ("Under the Statute of Westminster, those accused of the most serious—and the most violent—crimes, those certain to be convicted, and those of ill fame were not to be released at all."). Blackstone commented, "[t]o allow bail to be taken commonly for such enormous crimes would greatly tend to elude the public justice." BLACKSTONE, *supra* *299. He further wrote that "in felonies, and other offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person." *Id.* *296.

It was understood at common law that flight risk increased when the accused was charged with a capital crime. *See* Note, *Bail: An Ancient Practice Reexamined*, *supra* at 970. When given the "choice between hazarding his life before a jury and forfeiting his or his sureties' property, the framers of the Constitution obviously reacted to man's undoubted

urge to prefer the latter." *State v. Konigsberg*, 33 N.J. 367, 373 (1960); *see id.* At common law, defendants charged with capital crimes were "instantly taken, and their bodies kept safely in prison." 2 FRANCIS MORGAN NICHOLS, BRITTON: THE FRENCH TEXT CAREFULLY REVISED WITH AN ENGLISH TRANSLATION INTRODUCTION AND NOTES 25 (Francis Morgan Nichols, trans., The Lawbook Exchange, Ltd. 2003). In America, those defendants charged with capital crimes were similarly ineligible for bail when "the proof [wa]s evident" or "the presumption [of guilt] great." Shima Baradarn Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 857 (2018).

By contrast, individuals charged with misdemeanors were generally guaranteed bail. *See* BLACKSTONE, *supra* at *296; Baughman, *supra* at 859. Indeed, misdemeanor bail was historically recognized as a constitutional right. *See id.* at 863. In this case, the lead petitioner, Hester, was charged with a misdemeanor, drug-paraphernalia possession. Cert. Pet. at 9. A bail schedule fixed Hester's release at $1,000, an amount he could not afford. *Id.* Hester was locked in jail for two days before his initial appearance. *Id.* A similar defendant with more money could have bought his liberty in under 90 minutes. *See id.* Under Cullman County's practice, the accused can be held in detention for weeks before enjoying fundamental pretrial rights: the right to counsel, to present evidence, to challenge the state's evidence, or even have a meaningful opportunity to be heard. App.139a. At common law, a defendant charged with a misdemeanor, such as Hester, would have been guaranteed the right to bail.

Hester and similarly situated defendants lose their pretrial liberties and presumption of innocence when they are detained prior to a determination of guilt. This practice conflicts with the Anglo-American legal tradition dating back to before Magna Carta. In a misdemeanor drug-paraphernalia possession case, where there exists little to no public safety concern, an original understanding of pretrial liberty requires bail to depend solely on ensuring the presence of the defendant at trial. Here, Cullman County ignored flight risk entirely in arbitrarily imprisoning Hester due to his inability to pay. That cannot comport with "fairness and the appearance of fairness," which are "fundamental values in the American criminal justice system." Brett Kavanaugh, *Defense Presence and Participation: A Procedural Minimum for* Batson v. Kentucky *Hearings*, 99 YALE L.J. 187, 207 (1989). Both, however, would be ensured by upholding the original public meaning of the right to bail.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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