

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

No. 21 EM 2019

THE PHILADELPHIA COMMUNITY BAIL FUND, *et. al.*,

Petitioners,

v.

**ARRAIGNMENT COURT MAGISTRATES of the FIRST
JUDICIAL DISTRICT of the COMMONWEALTH OF
PENNSYLVANIA,**

Respondents,

**BRIEF OF *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF PETITIONERS
THE PHILADELPHIA COMMUNITY BAIL FUND, *ET AL.***

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF believes that liberty should be the norm for unconvicted defendants, with pretrial detention as the exception. The Eighth Amendment’s proscription against excessive bail, and its state constitutional analogues, must be rigorously enforced and scrupulously honored. Unwarranted pretrial detention based on a defendant’s inability to pay exorbitant cash bail is unjust to those merely accused of crimes, wrongly punishing poverty and harming communities and families.

AFPF has an interest in this case because it believes cash bail should only be used as a last resort, based on particularized findings supported by clear and convincing (non-hearsay) evidence that no other set of conditions of release would assure the defendant’s appearance at trial. Wrongful and unnecessary pretrial detention has severe real-world consequences, including loss of childcare, loss of housing caused by missed rent payments, and lost jobs and wages. It also makes it

¹ Pursuant to Pa. R.A.P. 531(b)(1)(iii), this Court has granted leave for any *amicus curiae* to file a brief in this Court regarding the Special Master’s Report and Recommendation. *See* Order Regarding Application for Extraordinary Relief Other Disposition at 4 (July 8, 2019). On January 3, 2020, this Court granted Petitioner’s request to extend the filing deadline to January 30, 2020. Under Pa. R.A.P. 531(b)(2), *amicus curiae* states that no person, other than *amicus curiae* and its counsel, paid for or authored this brief, in whole or in part.

unduly difficult for those charged with crimes to assist in their own defense and increases the likelihood that poor (and actually innocent) defendants will abandon meritorious defenses and plead guilty just to get out of jail—and all at taxpayer expense. Indeed, empirical research suggests that use of high cash bail as a de facto detention order undermines public safety by increasing recidivism rates.

Allowing abuse of the cash-bail system to continue in our justice system not only wrongly encourages and enables unnecessary pretrial detention effectively gutting the presumption of innocence, but also is antithetical to the concept of a free society and the rule of law. It is simply wrong and unjust to use a person’s income and financial resources as a proxy for protecting the community. AFPF believes the pretrial system should instead focus on objective factors such as past convictions, previous absconsion, and alleged behaviors that have been proven to be more effective indicators of flight risk or danger to the community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Judicial District’s bail system reminds of Alexis De Tocqueville’s “observation in 1835 that our bail system ‘is hostile to the poor. . . . The poor man has not always a security to produce . . . ; and if he is obliged to wait for justice in prison, he is speedily reduced to distress.’” *In re Humphrey*, 19 Cal. App. 5th 1006, 1049 n.29 (Cal. 2018) (quoting De Tocqueville, *Democracy in America*, at 56 (Dover Thrift ed. 2017)). So too here.

It's an old cliché that a prosecutor can indict a ham sandwich, an adage that is not too far from the truth. Historically, however, those charged with crimes based on the low “probable cause” standard would, as a general rule, at the least be allowed to remain free pending a trial, where the government would be held to the far more rigorous proof beyond a reasonable doubt standard. To be sure, bail or other nonmonetary conditions of release may be required to secure the defendant's appearance at trial. Bail may also be denied in order to protect the public and community from a truly dangerous defendant. And in certain instances, on an individualized case-by-case basis, a defendant who is a flight risk may be detained so long as the requirements for issuance of a valid detention order are met. But the purpose of the bail system has never been to broadly and systematically authorize the pretrial detention of those of limited means. But that is what the First Judicial District has done, at least until this litigation.

The First Judicial District's systematic use of high cash bail as an illusory condition of release—in truth functioning as a de facto detention order. In doing so, it has wrongly flipped the strong presumption in favor of pretrial release and the presumption of innocence on its head, effectively rendering the traditional right to freedom before conviction the exception for many impoverished defendants. The First Judicial District's policies and practices also fly in the face of the federal

constitutional proscription against excessive bail, in addition to rendering hollow additional procedural safeguards prescribed by Pennsylvania law.

The First Judicial District’s punishment of poverty through systematic abuse of the cash-bail system specifically to ensure that defendants remain incarcerated pending resolution of the case must end. This Court can, and should, build on the parties’ and Special Master’s commendable efforts to right these wrongs. It should clarify the rigorous evidentiary and procedural requirements that must be met before those who are merely accused of a crime may be detained pending trial.

ARGUMENT

I. The Strong Presumption in Favor of Pretrial Release Is Deeply Rooted in Our History and Safeguards Fundamental Freedoms and Rights Vital to Liberty.

The Eighth Amendment to the federal Constitution provides that “excessive bail shall not be required[.]” U.S. Const. amend. VIII.² And under the Equal Protection and Due Process Clauses, individuals may not be “subjected to imprisonment solely because of [their] indigency.” *Tate v. Short*, 401 U.S. 395, 398

² “The Eighth Amendment is made applicable to the states through the Fourteenth Amendment.” *Commonwealth v. 5444 Spruce St.*, 574 Pa. 423, 427 (2003).

(1971). The Pennsylvania Constitution, likewise, prohibits excessive bail.³ Pa. Const. Art. I, § 13.

The constitutionally enshrined presumption against pretrial detention safeguards important values and rights, which are deeply rooted in our history and tradition. *See generally* Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. Crim. L. & Criminology 701, 710–11 (2018); June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 530–31 (1983); *see also* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 920 (2013) (describing right to bail, as framed at the end of the seventeenth century, as “absolute and unequivocal.”). Pennsylvania has a long tradition of protecting the right to pretrial release:

In the colonial era, bail was generally synonymous with release. . . . In 1682, Pennsylvania adopted a colonial charter providing that “all Prisoners shall beailable by Sufficient Sureties unless for capital Offenses, where proof is evident or the presumption great.” The Pennsylvania Frame Government further liberalized the bail decision by limiting capital crimes to “willful murder,” which had the effect of expanding the right to bail beyond that ever recognized in Massachusetts or England.

³ This Court may interpret the Pennsylvania Constitution to provide broader protection against excessive bail than the federal Constitution. *See Commonwealth v. Baker*, 621 Pa. 401, 416–18 (2013) (Castille, C.J., concurring).

Brunt & Bowman, 108 J. Crim. L. & Criminology at 710–11.

“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.” *United States v. Salerno*, 481 U.S. 739, 755 (1987). We have a “deep-rooted commitment to freedom before conviction.” *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981). “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.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). As the Supreme Court explained long ago:

It is true that the taking of recognizance or bail for appearance is primarily for the benefit of the defendant But in criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time; 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.* Presumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail[.]

United States v. Barber, 140 U.S. 164, 167 (1891) (emphasis added).

II. Unnecessarily High Pretrial Detention Rates Punish Poverty and Harm Society.

In the First Judicial District, the exact opposite is true: *pretrial incarceration* through the use of high cash bail as a de facto detention order has become the norm, with liberty the limited exception.⁴ That is wrong and nonsensical.

Indeed, empirical research regarding earlier efforts to reduce reliance on cash bail to secure defendants' appearance at trial has found "no detectable evidence that the decreased use of monetary bail, unsecured bond, and release on conditions had adverse effects on appearance rates or recidivism." Aurelie Ouss & Megan T. Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail*, George Mason Legal Studies Research Paper No. LS 19-08, at 13 (Feb. 17, 2019), available at <https://ssrn.com/abstract=3335138>. The authors of an empirical study of Pennsylvania's bail system also concluded: "Money bail imposes many costs on society—including those stemming from pretrial detention, convictions, and recidivism—yet we find no evidence that money bail results in positive outcomes, such as an increase in defendants' rate of appearance at court." Arpit

⁴ More broadly, as one commentator has put it: "Today, the 'norm' is pretrial detention for nearly 450,000 people across the country, many of whom are destitute but eligible for immediate release if they pay the money bail imposed by the court. Throughout the history of America, money bail has been, and continues to be, the most significant barrier to pretrial freedom for those who are arrested but presumed innocent of criminal conduct." Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 Alb. L. Rev. 1063, 1063–1064 (2019).

Gupta *et al.*, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 473 (2016); *see also* Glenn A. Grant, 2018 Criminal Justice Reform Report to the Governor and the Legislature, at 13 (April 2019) (finding that crime rates did not meaningfully increase after New Jersey drastically curtailed use of cash bail), *available at* <http://bit.ly/2sPoyEu>.

Conversely, “[r]esearch indicates that alternatives to cash bail and secured bonds, such as unsecured bonds, pretrial supervision, and court notification systems, may be just as effective in assuring that a defendant appears at future court proceedings.” *Brangan v. Commonwealth*, 477 Mass. 691, 709 n.23, 80 N.E.3d 949, 966 (Mass. 2017). Put different, the available evidence suggests indiscriminate use of high cash bail to incarcerate poor defendants serves no legitimate purpose.

Balanced against this, systematic abuse of the cash bail system can have serious real-world consequences for the most vulnerable among us. “Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationships.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). “There are also practical reasons why it is sensible to avoid detaining a defendant on unaffordable bail unless it is truly necessary. Pretrial detention disrupts a defendant’s employment and family relationships, with often tragic consequences.” *Brangan*, 477 Mass. at 709 n.23. As one commentator noted:

It is significant that money bail is imposed routinely in cases involving *minor traffic infractions or petty regulatory offenses for which the*

maximum penalty upon conviction is a fine of a few hundred dollars, but no period of incarceration. Likewise, pretrial defendants can be held in pretrial detention on nonviolent misdemeanor charges which are punishable by up to a year in jail, but will likely result in either dismissal of the charges or, if convicted, a probationary sentence. Moreover, the impact of weeks and months in pretrial detention is profound. Pretrial detainees are at risk of losing any stability they had prior to detention. Even two or three days of pretrial detention causes indigent defendants who are already experiencing socioeconomic disadvantages (*i.e.*, homelessness, mental health disorders, substance abuse) to suffer greater set-backs, including the loss of employment, public benefits, child custody. Also, detainees are exposed to dangers of physical and sexual violence as well as disease and poor medical treatment in jail.

Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 Alb. L. Rev. 1063, 1064–65 (2019).

Further, abuse of the bail system coerces many defendants (including those who are innocent) to abandon meritorious defenses and plead guilty just to get out of jail. “Many defendants who are detained on money bail before trial may . . . choose to plead guilty to avoid or minimize further detention.” Arpit Gupta *et al.*, 45 J. Legal Stud. at 473. As one court put it, there is “overwhelming[] pro[of] that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention. This Hobson’s choice is . . . the predictable effect of imposing secured money bail on indigent misdemeanor defendants.” *O’Donnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1104–05 (S.D. Tex. 2017), *aff’d in part and rev’d and vacated in part*, 892 F.3d 147 (5th Cir. 2018).

Empirical research has further shown that “[p]retrial detention has a significant impact on downstream criminal justice outcomes—both in the immediate case and through the future criminal activity of detained defendants. Detention increases the rate of guilty pleas and leads detained individuals to commit more crime in the future.” Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711, 786–87 (2017). “[T]he current pretrial system produces false convictions in addition to training real criminals.” Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 *Yale L.J.* 1344, 1355 (2014). “Money bail may also directly influence recidivism through the harms of pretrial incarceration imposed on those unable to make bail, posttrial incarceration following conviction, or the stigma of conviction[.]” Arpit Gupta *et al.*, 45 *J. Legal Stud.* at 473-74.

Finally, high pretrial detention rates not only harm individual defendants and their families but also the general public by imposing a substantial tax burden on society at large. *See* Wiseman, 123 *Yale L.J.* at 1357–58.

III. Unnecessary Pretrial Detention Essentially Reverses the Burden of Proof Against the Defendant.

Unnecessary pretrial detention flips the presumption of innocence on its head, allowing for the incarceration of defendants upon a bare showing of probable cause. The principle that people cannot be convicted of a crime except upon proof beyond a reasonable doubt is not merely some transient and provincial notion, but an

elementary precept of our system of jurisprudence. It is “the ‘golden thread’ that runs throughout the criminal law, heralded as the ‘cornerstone of Anglo-Saxon justice,’ and identified as the ‘focal point of any concept of due process.’” Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *Hastings L.J.* 457, 457 (1989) (citation omitted). Indeed, the fundamental notion of procedural due process enshrined in the Constitution subsumes within it a guarantee, as a condition precedent to the imposition of criminal punishment on an individual, the State must affirmatively “pro[ve] beyond a reasonable doubt . . . every fact necessary to constitute the crime charged.” *In re Winship*, 397 U.S. 358, 364 (1970).

The constitutionalization of this standard represents an effort to “give concrete substance to the presumption of innocence,” *id.* at 363—the notion that, as Sir William Blackstone put it, “it is better that ten guilty persons escape than that one innocent suffer.” 4 William Blackstone, *Commentaries* 352 (1769). “The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error.” *In re Winship*, 397 U.S. at 363.

Conversely, the probable-cause standard for *charging* someone with a crime is far, far lower, and is designed to serve a different function. “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt. And this means less than evidence which would justify condemnation or conviction[.]”

Brinegar v. United States, 338 U.S. 160, 175 (1949) The probable-cause determination “does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.” *Gerstein*, 420 U.S. at 121. As a result, the risk of false positives is far higher at the charging stage. The reality is that many people are charged with crimes they did not commit; they should not be forced to languish in jail while they wait for the Commonwealth to drop the charges, a judge to dismiss them, or for acquittal at trial, except in the rare circumstances in which the requirements for a valid detention order have been met.

Against this backdrop, “[j]ailing people who have not yet been convicted of any crime solely because they cannot afford to pay money bail flips this fundamental presumption [of innocence] on its head. Pretrial detention devastates individuals, destroys families, and profoundly harms communities.” ACLU Pennsylvania, *Punishing Poverty: Cash Bail in Allegheny County*, at 3 (Oct. 2019), *available at* <http://bit.ly/2svpGNm>. Indigent defendants (particularly those who are actually innocent) should not be forced to spend months in jail awaiting trial based on a “probable cause” to believe they committed a crime, absent a strong showing that they are a genuine flight risk or a threat to the community and no other conditions,

financial or non-financial, could reasonably assure the defendant's appearance or the safety of the community.

IV. This Court Should Take this Rare Opportunity to Clarify the Rigorous Evidentiary and Substantive Requirements for Denying Pretrial Release.

As the Special Master noted in his Report: “The law is not clear whether the constitutional standard that ‘proof is evident and presumption great’ equates to a clear and convincing evidence standard. It is also unclear whether or not hearsay evidence is permitted in the various bail review hearings.” Special Master Report at 23. As the Special Master explained, “guidance from the Supreme Court in some manner on those issues would be useful.” *Id. Amicus curiae* AFPF strongly agrees with the Petitioners and the Special Master that this Court should take this rare opportunity to clarify the law on these important issues. Furthermore, this Court should make clear that Arraignment Court Magistrates (“ACMs”) *must* apply the *least restrictive* condition necessary to ensure a defendant's appearance, the safety of all persons and the community, or compliance with the bail bond moving forward. And this Court should also clarify that prior to imposing monetary bail conditions, the ACMs should conduct a robust ability-to-pay hearing carefully considering a defendant's financial picture, including income, expenses, and life circumstances.

This case provides an ideal vehicle and all-too-rare opportunity for this Court to reaffirm Pennsylvania's historical commitment to pretrial release. Clarity in the

law would be particularly appropriate given the magnitude of what is at stake here: the liberty of those unconvicted of any crime and the attendant collateral consequences of pretrial incarceration to not just the individual defendants but also their families and communities and society as a whole. As a practical matter, it is highly unlikely that the important issues raised by this litigation will not otherwise percolate up to this Court in the foreseeable future. This Court should not hesitate to reach the merits of these important issues.

A. Clear-and-Convincing Evidence Requirement for Detention Orders

Given the stakes involved in bail determinations, accuracy is of paramount importance. Yet, at present, the First Judicial District's pretrial bail system is anything but that. At least on detention orders, the Pennsylvania Constitution demands far more: its plain language requires the Commonwealth to *prove* by clear and convincing evidence the requirements for issuing a detention order.

The Pennsylvania Constitution enshrines the longstanding presumption in favor of pretrial release, providing in pertinent part: "All prisoners shall be bailable by sufficient sureties, . . . unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is *evident* or presumption great[.]" Pa. Const. art. I, §14 (emphasis added). "[T]he plain language of the evident proof standard in Article I, § 14 suggests a 'clear and convincing' standard." *Commonwealth v. O'Shea-*

Woomer, 8 Pa. D. & C.5th 178, 223 (C.P. 2009). By definition, for proof to be “evident,” it must be supported by clear and convincing evidence. *See id.* at 222–23 (“The word ‘evident’ is defined by the Oxford English Dictionary (1989) as ‘[c]lear to the understanding or judgement; obvious, plain’ and ‘[i]ndubitable, certain, conclusive.’ Webster’s New Universal Unabridged Dictionary (2nd ed. 1983) defines ‘evident’ as ‘visible, clear, out and plain; easy to see or perceive; apparent.’ Synonyms for ‘evident’ are ‘plain, visible, conspicuous, manifest, obvious, clear, palpable, apparent, discernable.’); *see also* 1 Pa. Cons. Stat. Ann. § 1903 (“Words and phrases shall be construed according to rules of grammar and according to their common and approved usage[.]”).

The choice of a burden of proof reflects a societal value judgment as to which party should bear the risk of fact-finding errors. Writing for a unanimous Court, then-Chief Justice Burger observed in *Addington v. Texas*:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of fact finding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

441 U.S. 418, 423 (1979) (cleaned up). Given the magnitude and stakes to individual criminal defendants, at the least the risk of error should be placed in favor of the defendant, requiring proof by clear and convincing evidence. The clear-and-

convincing standard of proof serves as a procedural safeguard that shifts the risk of error to the party bearing this heightened burden of proof: here, the Commonwealth.

The Pennsylvania Constitution properly places the risk of factfinding errors in the bail process squarely on the party best equipped to bear it—the government—by requiring proof by clear and convincing evidence that a defendant presents a substantial threat to an individual and the community and that no conditions of release can reasonably assure their safety before a bail authority may order pretrial detention. This Court should clarify this important point of Pennsylvania law.

B. Unconvicted Defendants Should Not Be Deprived of Their Liberty Before Trial Based on Hearsay Without A Full and Fair Adversarial Hearing.

As suggested by the Special Master, this Court should also clarify that untested, uncross-examined hearsay evidence may not be used to support the pretrial detention of a defendant, at least subsequent to the pretrial arraignment.

Hearsay evidence, not admissible by an exception to the hearsay rule, can seldom, if ever, be clear and convincing. And unconvicted defendants should not be incarcerated for months at a time based on the Commonwealth’s *ipse dixit* alone. At the least, in cases where the Commonwealth or the magistrate determines that the defendant should be detained pretrial because “no other condition or conditions can reasonably assure safety of any person and the community,” Pa. Const. Art. 1 § 14, the defendant should have an opportunity after the preliminary arraignment for a full

and fair adversarial hearing with appropriate procedural safeguards: the right to counsel, the right to testify and present witnesses on his or her behalf, the right to proffer evidence, and, perhaps most importantly, the right of cross-examination—which ““is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”” *Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (quoting 5 J. Wigmore, *Evidence* § 1367 (J. Chadbourn rev. 1974)). Where the government seeks to deny *any* pretrial release, due process requires a full adversarial hearing.

C. ACMs Should Apply the *Least Restrictive Conditions Necessary to Ensure a Defendant’s Appearance, the Safety of the Community, or Compliance with the Bail Bond.*

The primary function of bail is limited: assuring the presence of the accused. *See Boyle*, 342 U.S. at 5. Because those who are merely accused of crimes are presumed innocent, the conditions of pretrial release must be no more onerous than necessary to serve those limited functions. Consistent with the limited permissible purpose of bail, this Court should clarify that ACMs should apply the least restrictive condition, or combination of conditions, necessary to ensure a defendant’s appearance and protect the public.

D. ACMs Must State Orally or In Writing the Specific Reasons Why the Condition, or Combination of Conditions, is the Least Restrictive Reasonably Necessary.

Relatedly, to avoid arbitrary and capricious pretrial determinations, and to promote reasoned decisionmaking, ACMs should be required to set forth on the

record the specific reasons why they believe the conditions of pretrial release to be the least restrictive reasonably necessary to ensure a defendant's appearance, the safety of all persons and the community, or compliance with the bail bond moving forward. This would also facilitate efficient and effective review of those determinations. *See also* Hon. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 9 (1972) (“[T]he giving of reasons helps the decision-maker himself in the effort to be fair and rational, and makes it possible for others to judge whether he has succeeded.”).

E. ACMs Should Conduct a Robust Ability-to-Pay Hearing Before Imposing Monetary Conditions of Bail.

For too many defendants of limited means, the imposition of any monetary conditions of pretrial release will effectively function as a detention order. “[M]agistrates may not impose a secured bail solely for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order.” *O’Donnell v. Harris County*, 892 F.3d 147, 158 (5th Cir. 2018). At the least, then, ACMs should seek to understand, and take into consideration, defendants’ ability to pay before determining whether to impose a cash bail requirement and, if so, in what amount. Monetary conditions of release should never be imposed for the sole purpose of detaining the accused.

CONCLUSION

This Court should use this rare opportunity to make pellucidly clear that the historical presumption in favor of pretrial release remains the law in Pennsylvania.

Respectfully submitted,

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**STATEMENT PURSUANT TO
PENNSYLVANIA RULE OF APPELLATE PROCEDURE 531(B)(2)**

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), I certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing AMICUS CURIAE BRIEF OF AMERICANS FOR PROSPERITY FOUNDATION complies with Pennsylvania Rule of Appellate Procedure 2135 because it contains 4,515 words, excluding the parts of the brief exempted.

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CERTIFICATE OF COMPLIANCE UNDER PA. R.A.P. 127

I certify that the foregoing AMICUS CURIAE BRIEF OF AMERICANS FOR PROSPERITY FOUNDATION complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents. *See* Pa. R.A.P. 127(a)

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CERTIFICATE OF SERVICE

I, Shawn M. Rodgers, hereby certify that on this 30th day of January, 2020, I caused a copy of the foregoing Brief of *Amicus Curiae* Americans for Prosperity Foundation to be served via the Court's electronic PAC filing system and Federal Express upon the following counsel of record noted below in a manner that satisfies the requirements of Pa. R. App. P. 121:

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