No. 23-4057

In the United States Court of Appeals for the Tenth Circuit

DAWN H. MEDINA, et al.,
Plaintiffs – Appellants,

v.

THE HON. ANN MARIE MCIFF ALLEN, et al.,
Defendants – Appellees.

Appeal from the U.S. District Court, D. Utah (Hon. David Nuffer)
No. 4:21-cv-00102-DN-PK

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF UTAH AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae American Civil Liberties Union (ACLU) and ACLU of Utah state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

/s/ *John Mejia*
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INTERESTS OF AMICI CURIAE

The American Civil Liberties Union ("ACLU") is a nonpartisan organization of over 1.6 million members dedicated to protecting constitutional rights, including those of people facing criminal charges. The ACLU has litigated against numerous jurisdictions for promulgating unconstitutional and unnecessary wealth-based pretrial detention and denying criminal defendants the right to a prompt, individualized bail hearing with counsel. The ACLU also files amicus curiae briefs in courts across the country, weighs in as subject matter experts on pretrial policy, and seeks to educate the public and contribute to the important jurisprudence addressed in this case. The ACLU of Utah also regularly advocates to protect the rights of pretrial detainees in Utah's county jails.

Amici submit this brief because the Court's opinion in this case will affect the constitutional rights of thousands of people who will be arrested in the hundreds of local jail systems in this Circuit and the over two dozen jails in Utah. The lower court's decision wrongly decided several issues that, if upheld, threaten the individual liberties of thousands of presumptively innocent Utahns.

DISCLOSURE STATEMENT

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, I hereby certify that the enclosed brief is the work of undersigned counsel and not authored by counsel for either party. No party or party's counsel contributed money intended to fund the preparation of this brief, and no person contributed money to fund the preparation or submission of this brief.

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INTRODUCTION

The district court below made a range of legal errors in its treatment of Plaintiffs' due process, equal protection, and right to counsel claims. The stakes are inarguably high: these foundational rights exist to ensure all individuals receive fair and equal treatment when they are arrested, and that presumptively innocent people do not languish unnecessarily in jails.

Central to the lower court's mistake was applying rational basis to all of Plaintiffs' Fourteenth Amendment claims, often ignoring the allegations in the complaint to do so. But each of the Fourteenth Amendment rights advanced by Plaintiffs—to Equal Protection and Due Process; to Procedural Due Process; and to Substantive Due Process—trigger higher standards of review than rational basis. A "converge[nce]" of Equal Protection and Due Process prohibit wealth-based detention unless the court finds that "alternatives to imprisonment are not adequate." *Bearden v. Georgia*, 461 U.S. 660, 665, 672 (1983). Substantive Due Process requires an individualized determination that detention is necessary, and narrowly tailored, before it is imposed. *See, e.g., United States v. Salerno*, 481 U.S. 739, 750 (1987). And procedural due process requires adequate procedures to ensure "the accuracy of [this] determination," including notice and the opportunity to be heard. Probable cause alone is not enough to justify days or weeks of detention. *Id.* at 751; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiffs challenge practices that require arrestees to post an upfront sum of money bail or remain incarcerated. Bail is set by a judicial officer behind closed doors, without notice or any opportunity for the arrestee to participate in the proceedings. App. 414. Judicial officers do not inquire into, nor make findings with respect to, how much money an individual could afford to pay. *Id.* For arrestees like Plaintiffs, who cannot afford the required amount, these perfunctory determinations serve as orders of detention. App. 415. Detention can last for several days to weeks, with no guarantee that bail orders will ever be revisited unless the individual's attorney later brings a motion for review. App. 428. Plaintiffs challenge these detention practices in four Utah counties. App. 413–14. The parties have not had an opportunity to conduct any discovery into actual practices in any of these counties.[1]

In a sweeping ruling, the district court concluded that Plaintiffs failed to adequately state a claim. But Plaintiffs sufficiently pled several constitutional

[1] Significantly, rather than accepting the facts alleged by Plaintiffs as true, which the posture required, the court presumed that challenged practices adhered perfectly onto the applicable provisions of the Utah Code. App. 554 (treating the procedures outlined in statute as if they were the procedures alleged in the complaint). It is not safe to assume, as the lower court did, that practices on the ground in each jurisdiction perfectly track state law. *See, e.g.,* Andrea Woods, et al., *Boots and Bail on the Ground: Assessing the Implementation of Misdemeanor Bail Reforms in Georgia,* 54 Ga. L. Rev. 1235, 1256 (2020) (surveying 55 Georgia counties and finding only two adhered to statutory requirement that judges consider income, debts, and dependents before setting bail).

violations that have been recognized by numerous courts. This Court should reverse the district court's opinion and remand the case for further proceedings.

ARGUMENT

Plaintiffs were deprived of a prompt, counseled bail hearing, in violation of three constitutional rights. First, the government may not incarcerate someone solely due to their inability to pay a sum of money, under *Bearden*, 461 U.S. at 665 , and related cases. *See Williams v. Illinois*, 399 U.S. 235 (1970) (defendants may not be incarcerated beyond statutory maximum due to inability to pay a fine); and *Tate v. Short*, 401 U.S. 395 (1971) (government may not convert a fine into a jail term solely because fine is unaffordable). Second, because pretrial liberty is a fundamental right, a person may not be detained prior to trial—whether via an unattainable bail condition or otherwise—unless the court determines that detention is necessary. The court must make this finding pursuant to robust enough procedures to guard against erroneous incarceration. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *Salerno*, 481 U.S. 739; and *Reno v. Flores*, 507 U.S. 292, 316 (1993). Third, the Sixth Amendment protects a right to counsel at the initial bail determination, because it is a critical stage of prosecution that risks "substantial prejudice" to case outcomes. *United States v. Wade*, 388 U.S. 218, 225 (1967). *Amici* address each in turn below, followed by *Younger* abstention.

I. *Bearden* Prohibits the Government from Detaining an Individual Because She Cannot Afford a Sum of Money

Courts have "long been sensitive to the treatment of indigents in our criminal justice system." *Bearden*, 461 U.S. at 665 . This sensitivity has manifested in several criminal contexts, including the right to access case transcripts, *Griffin v. Illinois*, 351 U.S. 12, 19 (1956); *Roberts v. LaVallee*, 389 U.S. 40 (1967); the right to appeal, *Douglas v. California*, 372 U.S. 353 (1963); and the right not to be detained for inability to pay a fine or fee, *Williams,* 399 U.S. at 242 *Tatet*, 401 U.S. at 397; *Bearden*, 461 U.S. at 674. These precedents require the government to satisfy heightened scrutiny when it imposes an absolute deprivation of a right based on wealth. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973).

Bearden specifically requires three procedural protections before imposing wealth-based detention: First, the court "must inquire into" the arrestee's ability to pay. 461 U.S. at 672. Where an arrestee cannot pay, "the court must consider alternat[ives] … to imprisonment." *Id.* Finally, courts may only detain upon "evidence and findings" that the arrestee is *able* to pay, or that alternatives to jail are inadequate. *Id.* at 665. Detaining someone without these procedures is detaining him "simply because, through no fault of his own, he cannot pay" which violates the Fourteenth Amendment." *Id.* at 661.

Courts have virtually unanimously applied this protection against wealth-based pretrial detention on unaffordable bail. *See, e.g., ODonnell v. Harris Cnty.*,

892 F.3d 147, 162 (5th Cir. 2018); *overruled on other grounds*, *Daves v. Dallas Cnty.*, 22 F.4th 522 (5th Cir. 2022) (en banc); *Brangan v. Commonwealth*, 477 Mass. 691, 700 (Mass. 2017) ("[A] judge must address... in writing or orally [that she considered the arrestee's finances] on the record in every case where bail is set in an amount that is likely to result in a defendant's long-term pretrial detention because he or she cannot afford it."); *Pugh v. Rainwater,* 572 F.2d 1053, 1057 (5th Cir. 1978) ("The incarceration of those who cannot [afford bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements"); *In re Humphrey*, 482 P.3d 1008, 1019 (Cal. 2021); *Valdez-Jimenez v. Eighth Judicial Dist. Court of Nevada*, 460 P.3d 976, 984 (Nev. 2020); *Buffin v. City and Cnty. of San Francisco*, 2018 WL 424362 at 8 (N.D. Cal. Jan. 16, 2018) (applying strict scrutiny to pretrial arrestee's equal protection and due process claim under *Bearden-Tate-Williams*).

Notwithstanding this well-established precedent, the district court held that strict scrutiny would apply to the equal protection claim pled here "*only* if Plaintiffs show that their attested right is fundamental or if they demonstrate that they are a suspect class." App. 558 (emphasis added). As discussed below, the right to pretrial liberty *is* fundamental. Regardless, this analysis missed the mark: the *Bearden* line of cases stems from a unique "convergence" of due process and equal protection, and requires an inquiry into ability to pay, consideration of alternatives to

unaffordable bail, and findings that alternatives are inadequate. 461 U.S. at 672. *Bearden* instructs that it is "fundamentally unfair" to detain someone because, "through no fault of his own," he cannot afford a sum of money despite reasonable efforts to pay. 461 U.S. at 669.

So too here. As Plaintiffs pled, they were "totally unable to pay the demanded sum" of bail and thus detained. *San Antonio ISD*, 411 U.S. at 22; App. 418–26. Further, Plaintiffs were detained despite readily available alternatives to promote the government's interests. In many instances, alternate "conditions alone might satisfy the government's interests." App. 427.

Unlike the petitioner in *Vasquez v. Cooper*, 862 F.2d 250 (10th Cir. 1988), who retroactively challenged his pretrial detention on bail after being sentenced, the state's penological interests are not implicated by Plaintiffs' claims. Plaintiffs filed suit as pretrial detainees on behalf of a putative class of similarly situated persons: their *Bearden*-type claim is thus not disposed of by *Vasquez* which hinged on the fact that "the denial of the benefit of bail does not necessarily extend to the sentencing phase." *Id.* at 253.

II. Plaintiffs Have Pleaded Deprivation of Their Fundamental Right to Pretrial Liberty in Violation of Substantive and Procedural Due Process

A. Pretrial Detention is Deprivation of a Fundamental Right Triggering Strict Scrutiny

Pretrial liberty is a fundamental right. "In Salerno, the Court recognized that a person who is detained pending trial has a fundamental liberty interest in freedom from restraint." *Hoang v. Comfort*, 282 F.3d 1247, 1257 (10th Cir. 2002), vacated on other grounds sub nom. *Weber v. Phu Chan Hoang*, 538 U.S. 1010 (2003). As the Supreme Court has stated plainly, "[t]he institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." *Flores*, 507 U.S. at 316 (O'Connor, J., concurring).

As a matter of substantive due process, then, the government must satisfy heightened scrutiny before depriving a defendant of liberty. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc); *Humphrey,* 482 P.3d at 1018 ("The accused retains a fundamental constitutional right to liberty."); *Valdez-Jimenez,* 136 Nev. at 162 (applying heightened scrutiny unaffordable bail-setting procedures); *Burroughs v. State*, 2023 WL 5603971 at 12 (Del. Aug. 30, 2023) (where cash bail results in pretrial detention, judge's decision must be evaluated under strict scrutiny); *Torres v. Collins*, 2020 WL 7706883 (E.D. Tenn. Nov. 30, 2020) (granting preliminary injunction based on due process claim arising out of similar bail procedures); *Buffin,* 2018 WL 424362 at 6 (applying strict scrutiny to challenge to pretrial detention on unaffordable bail).

As the district court acknowledged, the right of a presumptively innocent individual to their bodily liberty is "strong," "importan[t]," and "fundamental," App.

552. But the court nonetheless applied rational basis review because, in its view, Plaintiffs "fail[ed] to show that their right is 'objectively, deeply rooted in this Nation's history and tradition.'" App. 555. This was an error. The "deeply rooted" test applies only to unenumerated rights. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The district court's ruling thus added a hitherto unknown requirement where Plaintiffs assert a fundamental right enumerated *in the Constitution*. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

In any event—though Plaintiffs should not have been required to make such a showing—the right to pretrial liberty *is* decidedly rooted in this Nation's history and tradition. This right predates the founding of this country. Bail[4] originated in England as "a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, *Bail in the United States: 1964* (National Conference on Bail and Criminal Justice, Working Paper, 1964). As the Supreme Judicial Court of Massachusetts recently noted, "[t]he practice of releasing a defendant on bail prior to trial has been part of Massachusetts law since its beginnings as a colony." *Brangan,* 477 Mass. at 692 (citing The Body of Liberties (1641)). The drafters of American colonial law, and the Bill of Rights, imported the concept of "bail" expecting it to protect a strong right to pretrial release. *See* Timothy Schnacke, *The History of Bail and Pretrial Release,*

Pretrial Justice Institute (Sept. 23, 2010); Caleb Foote, *The Coming Constitutional Crisis in Bail,* 113 U. Penn. L. R. 959 (1965).

The leading case to examine how pretrial detention can comport with substantive and procedural due process is *Salerno*, 481 U.S. 739 . Salerno challenged the constitutionality of his detention under the federal Bail Reform Act of 1984. The Court found that preventive pretrial detention was constitutional in the federal system for two main reasons. First, as a matter of substantive due process, it was "narrowly focuse[d] on a particularly acute problem," i.e. cases in which a person has "been arrested for a specific category of extremely serious offenses," *id.* at 740. Second, detention was constitutional as a procedural matter because it was accompanied by robust safeguards, discussed *infra.*

In *Salerno* and subsequent decisions, the U.S. Supreme Court has described arrestee's right to pretrial liberty as "fundamental," such that heightened scrutiny is applied to detention practices. 481 U.S. at 750; *Flores*, 507 U.S. at 301; *Foucha*, 504 U.S. at 80–83 (Kennedy, J., dissenting). As this Court has held: "Our analysis… entails a determination of whether the government's interest is compelling and whether the [action] is narrowly tailored." *Hoang*, 282 F.3d at 1255. The governmental action "must be narrowly tailored to serve a compelling government interest… [W]e apply strict scrutiny." *Maehr v. United States Dep't of State*, 5 F.4th 1100, 1117 (cleaned up). *Accord Lopez-Valenzuela*, 770 F.3d at 780 (citing *Flores*

and *Foucha*: "[S]ubsequent Supreme Court decisions [] have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny."; *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990) ("[W]e recognize that a vital liberty interest is at stake.").

B. Procedural Due Process Requires Strong Procedures Ensuring the Accuracy of Pretrial Detention Determinations

Under *Salerno*, and as a matter of straightforward procedural due process, individuals should not be detained pretrial without adequate procedural safeguards. *See, e.g., Caliste v.* Cantrell, 329 F.Supp.3d 296, 312–315 (E.D. La. 2018) (finding that procedural due process requires arrestees to be given: (1) an inquiry into their ability to pay bail, (2) consideration of less-restrictive alternatives, and (3) representative counsel). Plaintiffs allege that they are detained without any notice or opportunity to be heard whatsoever. App. 426.

One of the primary reasons that *Salerno* upheld federal pretrial detention as constitutional is that detention follows "a full-blown adversary hearing," during which the government bears the burden of establishing by clear and convincing evidence "that no conditions of release can reasonably assure the safety of the community or any person," *id.,* and in which "[d]etainees have a right to counsel," a "right to testify in their own behalf," to "present information by proffer or otherwise," and to "cross-examine witnesses who appear at the hearing," *id.* at 751.

Federal pretrial detention orders must include written findings of fact and "a written statement of reasons for a decision to detain." *Id.* at 752.

The complaint alleges that putative class members are detained with *no* notice, opportunity to be heard, inquiry into their ability to pay, counsel, or examination of less-restrictive alternatives. App. 414–15, 428. Plaintiffs have thus alleged the three elements of a procedural due process violation: "(1) the deprivation of (2) a constitutionally cognizable liberty . . . interest, (3) without adequate due process procedures." *Abdi v. Wray*, 942 F.3d 1019, 1031 (10th Cir. 2019). Dismissal of this claim was in error.

C. Accepting the Pled Facts as True, Practices in Challenged Counties Fail Under Both Procedural and Substantive Due Process

The Complaint clearly alleges that the practices on the ground in Iron, Beaver, Carbon, and Utah counties violate the due process tests outlined above. Plaintiffs were detained despite being charged with low-level crimes such as shoplifting and criminal mischief, App. 418, 421, not a narrow category of "extremely serious offenses." Plaintiffs were detained after closed-door proceedings during which they were given no opportunity to participate *whatsoever*; a far cry from a "full-blown adversary hearing" with counsel. App. 414. And the orders leading to Plaintiffs' incarceration did not evaluate less restrictive ways to serve the government's interests, nor find Plaintiffs' detention necessary by clear and convincing evidence. App. 427. Plaintiffs' ability to pay bail was not assessed in any manner. App. 427–

29. Only if their attorneys agree to request a later bail review can detainees potentially receive a "meaningful mechanism for challenging pretrial detention." App. 428.

D. The District Court Incorrectly Relied on Caselaw Concerning Punishment

Amici briefly address two additional cases. First, as Plaintiffs note, the district court misread *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Supreme Court's holding in *Gerstein* deals with probable cause determinations governed by the Fourth, not Fourteenth, Amendment. *Id.* at 111. Plaintiffs' raise distinct Fourteenth Amendment questions which require independent, careful balancing of the individual liberty interests and the government's interest in future court appearance. *Gerstein* does not dispose of Plaintiffs' claims.

Bell v. Wolfish, 441 U.S. 520 (1979) involved a due process challenge to pretrial detainees' jail *conditions*, like double-bunking, as punitive. But Plaintiffs do not challenge jail conditions or otherwise claim that their detention is punitive. *Salerno* discussed *Bell* because the *Salerno* petitioner argued that pretrial detention amounted to unconstitutional pretrial punishment, full-stop. 481 U.S. at 746. After concluding that the Bail Reform Act's detention scheme was regulatory, the Court moved into its detailed due process analyses. *Id.* at 749–52.

Plaintiffs' claims are not governed by *Bell* or *Gaylor v. Does*, 105 F.3d 572 (10th Cir. 1997), a pro se case challenging an inefficient jail policy as punitive. *Id.*

at 578 (holding the jail's "policy not to inform detainees of their bail status until they asked" would be punitive). Plaintiffs challenge the initial decision whether they should be detained *at all*, and subject to what procedural protections. *Bell* was "not concerned with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails," and so it is inapplicable. 441 U.S. at 533–34.

III. Plaintiffs Stated a Claim for Violation of their Sixth Amendment Right to Counsel

Plaintiffs were each charged with a crime and denied representation at their initial bail determinations in violation of the Sixth Amendment right to counsel. The right to counsel analysis has two steps: first, any "criminal prosecution" causes the right to "attach"; and second, counsel must be provided at any "critical stage" of that prosecution. *United States v. Calhoun*, 796 F.3d 1251, 1254 (10th Cir. 2015). The district court held that the right to counsel had not attached at the time of the initial bail determination. It then opined, in dicta, that the initial bail determination is not a critical stage of prosecution. The court applied the incorrect legal standard on both issues.

A. The Right to Counsel Attached Because Charges Were Pending Against the Plaintiffs

The right to counsel attached at Plaintiffs' initial bail determinations because they were charged with a crime. The district court incorrectly held that attachment

requires an initial appearance in court: but initial appearance was held to be sufficient, not necessary, in *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008). The correct standard asks only whether the government has shifted "from investigation to accusation." *Calhoun*, 796 F.3d at 1254 (quoting *Moran v. Burbine*, 475 U.S. 412, 430 (1986)). Under *Rothgery*'s reasoning, once the government files a formal accusation prompting a judicial officer to act, "a prosecution is commenced" and the right has attached. *Rothgery*, 554 U.S. at 198–99 & n.9, 207. In any case, as discussed above, Plaintiffs have a right to a prompt bail hearing—which, if offered, would plainly trigger attachment under *Rothgery*. Defendants cannot rely on violation of the right to a prompt bail hearing as a defense for their further violation of the right to counsel.

The Sixth Amendment grants a right to counsel in defense of "all criminal prosecutions." U.S. Const. Amend. VI. The Sixth Amendment "attaches" when "a prosecution is commenced." *Rothgery*, 554 U.S. at 198. The standard for commencement is often stated as "the initiation of adversary judicial criminal proceedings . . . by formal charge." *Id.* at 198 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984) and *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). While *Rothgery* concerned an initial appearance, its reasoning relied on decades-old precedent pinning the commencement of a prosecution to a list of events with or without the defendant's presence, including "formal charge." *Id.* at 198;

Texas v. Cobb, 532 U.S. 162, 167 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *Gouveia*, 467 U.S. at 188; *Moore v. Illinois*, 434 U.S. 220, 226 (1977); *Kirby*, 406 U.S. at 689 (plurality opinion). *Rothgery* explained the meaning of a "formal charge" triggering attachment: "What counts is that the complaint filed with the magistrate accused [the defendant] of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set the terms of bail and order the defendant locked up)." *Id.* at 199 n.9. *Accord Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("[T]he right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him.").

This Court has faithfully applied this rule, repeatedly characterizing attachment as requiring no more than pending charges. *E.g.*, *United States v. Ross*, 837 F. App'x 617, 628 (10th Cir. 2020) ("Mr. Ross had not been charged with any federal offense . . . ."); *Calhoun*, 796 F.3d at 1255 (holding attachment occurred when "he was formally charged"); *United States v. Mullins*, 613 F.3d 1273, 1286 (10th Cir. 2010) (holding the right to counsel attaches to "charged offenses"); *Blythe v. Fatkin*, 64 F. App'x 141, 144 (10th Cir. 2003) (holding attachment depends on whether petitioner was "charged with a crime"); *United States v. Mitcheltree*, 940 F.2d 1329, 1339 (10th Cir. 1991) (repeatedly referring to "pending charges": "once

charges have been filed, the defendant is in a different position because the right to counsel has attached on those charges").

The Plaintiffs' right to counsel had attached at the time of their initial bail determinations. Each Plaintiff was "accused [] of committing a particular crime" in a probable cause affidavit filed by the police. *Rothgery*, 554 U.S. at 199 n.9; App. 0017–23. For example, the probable cause affidavit for Mr. Horton includes three offense descriptions with statutory citations for each offense, and the arresting officer's argument supporting "probable cause to charge the defendant with these charges." App. 0187. Utah law explicitly labels these accusations as "criminal charges" upon the magistrate's finding of probable cause. Utah Code § 77-20-205(1)(a) (requiring the magistrate to issue a temporary pretrial status order pending "resolution of criminal charges"). Those facts are all that were required for attachment.

The district court relied on *Rothgery* for the proposition that attachment occurs "at the initial appearance before a judicial officer." App. 0559–60. While this quote is accurate, the district court erred by treating initial appearance as necessary, rather than sufficient, for attachment to occur. *Id.* Requiring an initial appearance for attachment is flatly inconsistent with *Rothgery* and other precedent.[2] As *Rothgery*

[2] This rule would also contravene *Rothgery*'s reasoning that attachment should not depend on such "absurd distinctions as the day of the month an arrest is made." 554 U.S. at 207.

approvingly quoted: "It would defy common sense to say that a criminal prosecution has not commenced against a defendant who, [] incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by . . . the police, and approved by a court of law." *Id.* at 208.[3] The oft-quoted formulation of the attachment standard lists initial appearance among other ways prosecutions may commence, including by "formal charge," "indictment," and "information"—none of which requires an initial appearance. *Rothgery*, 554 U.S. at 198 (quoting *Gouveia*, 467 U.S. at 188 and *Kirby*, 406 U.S. at 689 (plurality opinion)). This Court has repeatedly held that attachment occurs upon indictment, which can occur prior to initial appearance. *E.g.*, *Calhoun*, 796 F.3d at 1255 (holding attachment occurred "the date he was formally charged by way of indictment"); *United States v. Rogers*, 124 F.3d 218 (10th Cir. 1997) (holding right to counsel attached upon "formal charge by indictment," even though Mr. Rogers fled the country). Even without an indictment, in a case where charges were filed upon arrest but no preliminary hearing occurred, this Court had no trouble concluding that the "Sixth Amendment right to counsel had attached." *United States v. Baez-Acuna*, 54 F.3d 634, 635, 637 (10th Cir. 1995).

[3] Quoting Joseph D. Grano, Rhode Island v. Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1, 31 (1979).

Applying the proper standard, Plaintiffs were subject to a formal accusation that "prompted the judicial officer to . . . set the terms of bail and order the defendant locked up." *Rothgery*, 554 U.S. at 199 n.9. The Sixth Amendment right to counsel attached.

B. Plaintiffs' Initial Bail Determinations Are a Critical Stage of Prosecution Because They Risk Prejudicing Case Outcomes

Initial bail determinations for the putative class can substantially prejudice the outcome of a criminal case. The Sixth Amendment entitles a defendant to counsel at every "critical stage" of a criminal prosecution, which is "any proceeding where an attorney's assistance may avoid the substantial prejudice that could otherwise result." *United States v. Bergman*, 599 F.3d 1142, 1147 (10th Cir. 2010). Here, as initial bail determinations are currently conducted,[4] an attorney's assistance at the initial bail determination can help avoid pretrial detention that increases the likelihood of conviction and the severity of sentences. More importantly, compliance with the Constitution requires producing Plaintiffs for a prompt bail hearing—additional risks "inheres in the particular confrontation," which deepens the need for counsel's presence. *Wade*, 388 U.S. at 227.

The initial bail determination risks substantial prejudice through the coercive effect of pretrial detention. The "substantial prejudice" standard implicates "pretrial

[4] Where *amici* use the present tense, it is because the facts "relate back" to the moment that Plaintiffs filed their complaint.

proceedings where the results might well settle the accused's fate." *Wade*, 388 U.S. at 224, 227. Substantial prejudice concerns the fairness of "the whole course of a criminal proceeding." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). Thus, the right to counsel also protects the fairness of plea bargaining, which "is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (observing that 94% of state criminal prosecutions are the result of guilty pleas); *Williams v. Jones*, 571 F.3d 1086, 1091–92 (10th Cir. 2009) ("Surely, the plea process is part of the defense.").

The amended complaint specifies how initial bail determinations affect the fairness of plea bargaining and trials for the putative class. Bail amounts set at the initial bail determination determine whether a person will be detained for several days at minimum. App. 0026. As Plaintiffs explicitly allege, this period of pretrial detention notably increases the likelihood of conviction by decreasing plea bargaining power through the coercive effect of pretrial detention. App. 0028. Plaintiffs also rightly allege that pretrial detention undermines the detainee's ability to consult with their attorney, search for evidence, or help find and meet witnesses who are otherwise reluctant to speak with counsel. *Id.*

In *amici's* experience litigating and advocating for the right to counsel at bail determinations, career defenders detailed consistent themes explaining why bail

setting is a critical stage.[5] Prosecutors may leverage detention to coerce people into accepting guilty pleas, rather than enduring more pretrial detention and risking a less favorable plea offer. The coercive effect of pretrial detention can also operate on people facing prison time, forcing them to choose a transfer to state prison over enduring the often-inferior living conditions in the local jail. And detained people have fewer opportunities to aid in their investigation and defense. These limitations prejudice the fairness of trial preparation, and as a result, many detainees plead to less favorable plea deals. These realities of the trial and plea-bargaining system mean the initial bail determination for putative class members "might well settle the accused's fate," *Wade*, 388 U.S. at 224, precluding a more favorable outcome "by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147.

Courts across the country have recognized these realities. Most notably, the court in *Booth v. Galveston County* issued a preliminary injunction requiring representation at the initial bail determination, in part based on the argument Plaintiffs make here: uncounseled bail determinations "lead[] to unwarranted pretrial detention," which leads to "increased likelihood of conviction and harsher

[5] *See, e.g.*, Pls.' Mot. for Sum. J. at 23–29 & Exs. 12, 13, 23, 24, *Guill v. Allen*, No. 19-cv-1126 (M.D.N.C. filed Aug. 1, 2022), ECF No. 107; First Am. Compl. ¶¶ 34–42, *White v. Hesse*, No. 19-cv-1145 (W.D. Ok. filed Nov. 23, 2021), ECF No. 64; Mot. for Prelim. Inj. at 3–7 & Exs. QQQ–SSS, *Booth v. Galveston Cnty.*, No. 18-cv-0104 (S.D. Tex. granted Aug. 7, 2019), ECF No. 3-1.

sentences." *Booth v. Galveston Cnty.*, 2019 WL 3714455 at 17–18 (S.D. Tex. Aug. 7, 2019); This holding follows the reasoning of other appellate courts that have acknowledged the major significance of bail hearings in a criminal case. *Higazy v. Templeton*, 505 F.3d 161, 172–73 (2d Cir. 2007) (discussing significance of the initial bail determination); *Ditch v. Grace*, 479 F.3d 249, 253 (3d Cir. 2007) (holding preliminary hearing is a critical stage because the prosecutor may seek pretrial detention, and "a principal function of the hearing . . . is to protect the accused's right against [] unlawful . . . detention."); *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2nd Cir. 2004) ("Bail hearings fit comfortably within the sphere of adversarial proceedings closely related to trial. . . . [They] require a court's careful consideration of a host of facts about the defendant and the crimes charged . . . [to] determine whether a defendant will be allowed to retain, or forced to surrender, his liberty . . . ."); *Smith v. Lockhart*, 923 F.2d 1314, 1319–20 (8th Cir. 1991) (holding omnibus hearing including bail reduction motion is a critical stage, especially when opposed by the prosecution and "a competent attorney could have provided meaningful assistance"); *Gonzalez v. Comm'r of Corr.*, 68 A.3d 624, 637 (Conn. 2013) (bail hearing is a critical stage where bail determination results in detention: "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail."); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223–24 (N.Y. 2010) (holding initial bail hearings are a critical stage because they

"encompass matters affecting a defendant's liberty and ability to defend against the charges").

The district court did not identify the correct legal standard, nor did it engage Plaintiffs' allegations of substantial prejudice. Instead, the district court tersely observed: "Because there is no confrontation, counsel is unnecessary." App. 0560. Respectfully, this dictum misapprehends precedent describing critical stages of prosecution as "trial-like confrontations." *United States v. Ash*, 413 U.S. 300, 312 (1973). Critical stages do not require confrontation with an adversary or legal formalities resembling a trial: law enforcement's recording of a defendant's conversation with an informant, witness identification at a lineup, and a formal plea offer are all critical stages of prosecution. *Frye*, 566 U.S. at 143–44 (formal plea offer); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (informant recording a conversation); *Wade*, 388 U.S. at 231 (in-person lineup). These are "trial-like confrontations," not because they look like a mini trial, but because denying counsel at this stage can have permanent consequences for the defendant by irreparably prejudicing the defense. *Ash*, 413 U.S. at 311–12 (describing historical expansion of right to counsel "when new contexts appear presenting the same dangers that gave birth initially to the right itself.").

Setting that aside, one constitutional violation does not excuse another. Due process and equal protection require a prompt, meaningful hearing on pretrial

release. That hearing necessarily involves a "confrontation" with contemporary "law enforcement machinery": a bail determination made based on accusations by the police, with the potential to "settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 310. Plaintiffs have stated a claim that they are entitled to counsel at this hearing.

Applying the correct standard, Plaintiffs have alleged that initial bail determinations risk substantial prejudice to the outcome of a criminal case. And counsel's assistance is necessary to avoid substantial prejudice at the initial bail determination. *See Wade*, 388 U.S. at 227–28 (considering the "ability of counsel to help avoid that prejudice"). Neither Defendants nor the district court contended otherwise.

IV. *Younger* Abstention is Unwarranted

The district court's *Younger* analysis is unclear to *amici*,[6] but to the extent it held that abstention was improper in this case, that ruling should be upheld.

[6] In granting the motion to dismiss, the district court concluded that "the first and second prongs" of the *Younger* test were "not met," (though in discussion the Court seemed to suggest the second prong *was* met) and indicated: "[W]e abstain because Plaintiffs' claims are not wholly embedded in state law and because state court process provides an adequate forum." App. 0548–49. The order never explicitly stated that *Younger* barred adjudication of this entire case in federal court, and the district court proceeded to consider remaining arguments including the merits. App.551 ("We now address Plaintiffs' two substantive claims.") And, because the court did not find that all three prongs of *Younger* were met, it necessarily did *not* abstain (because all three prongs are a necessary precondition

Younger held that federal courts must sometimes abstain from hearing claims that would interfere with pending state criminal proceedings. 401 U.S. 37 (1971). But as the Supreme Court explained in its most recent in-depth discussion of *Younger*—*Sprint Communications, Inc.* v. *Jacobs*, 571 U.S. 69 (2013)—"abstention … is the 'exception, not the rule.'" *Id.* at 82; *accord New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 368 (1989). More specifically, *Younger* abstention is not required unless: (1) federal adjudication would unduly interfere with an ongoing state-court proceeding, (2) the proceeding implicates an important state interest, and (3) the plaintiff has an adequate opportunity to raise the federal claim in that [state court] proceeding. *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432-433 (1982).

Numerous courts have found *Younger* inapplicable where pretrial arrestees seek to vindicate their federal constitutional rights in federal court. Notably, many of these rulings have found *Younger* abstention unwarranted even where plaintiffs sought class-wide injunctive relief, and plaintiffs here seek declaratory relief.[7]

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to abstention). At oral argument, the Court indicated that "I'm really not inclined to apply *Younger* abstention." App. 0521.

[7] App. 0485 (Court: "[I]t seems like I'm in the position of, if I were to impose some kind of remedy, prescribing a process for the state that's eminently involved with their criminal procedures, and I am not very comfortable with that," Counsel: "[A]ll we need is a declaration… prospective declaratory relief.").

First and foremost, in *Gerstein v. Pugh,* the U.S. Supreme Court held that abstention was not required with claims challenging the constitutionality of pretrial detention without adequate and prompt findings. 420 U.S. 103, 108 n.9 (1975). The *Gerstein* plaintiffs were subject to weeks of pretrial detention before they could challenge the probable cause underlying their arrests. *Id.* at 105-106. The district court invalidated this practice, ordering prompt probable-cause hearings under the Fourth Amendment. *Id.* at 107-108. On appeal, the Supreme Court explained that the lawsuit would not unduly interfere with pending prosecutions because it "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n.9. "The order to hold [prompt] hearings," *Gerstein* elaborated, "could not prejudice the conduct of the trial on the merits." *Id.* Abstention was therefore not appropriate.

Circuits to rightly apply *Gerstein* have similarly refused to abstain under *Younger* in cases challenging pretrial detention practices. In *Walker* v. *City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), the plaintiff challenged the practice of "jailing the poor [pretrial] because they cannot pay," *id.* at 1252 (quotation marks omitted). The court held that "*Younger* d[id] not readily apply … because Walker is not asking to enjoin any prosecution. *Id.* at 1254. Rather, "[a]s in *Gerstein*, Walker

merely asks for a prompt pretrial determination of a distinct issue, which will not interfere with subsequent prosecution." *Id.* at 1255.

The Ninth Circuit reached the same conclusion in *Arevalo* v. *Hennessy*, 882 F.3d 763 (9th Cir. 2018). There too, a criminal defendant being detained pretrial solely because he could not pay bail brought a federal action, "argu[ing] that financial release conditions are unconstitutional absent both specific procedural protections and a finding that non-financial conditions could not reasonably serve the State's interest." *Id.* at 764. Relying on *Gerstein*, the court held that "the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it." *Id.* at 766. "Regardless of how the bail issue is resolved," the court elaborated, "the prosecution will move forward unimpeded." *Id.*

At minimum, if this Court interprets the ruling below as one in which the court abstained, that ruling should be reversed to allow discovery into the availability and adequacy of alternate state court proceedings in which to raise these important substantive claims.

CONCLUSION

The lower court's dismissal of this case on 12(b) grounds was wrong as a matter of both law and procedure. This decision is not only an affront to the rights of low-income people facing criminal prosecution, but risks perpetuating needless

and harmful practices of overreliance on wealth-based detention. *Amici* respectfully request this Court reverse and remand for further proceedings.

Dated this September 18, 2023.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Due to the number of significant, overlapping, and related constitutional issues presented on appeal, and *amici*'s expertise with those various rights, *amici curiae* respectfully request permission to participate in oral argument if argument is set. *Amici* will so move if their brief is accepted.

/s/ John Mejia
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the cover page, tables of contents and authorities, certificates of counsel, and oral argument statement, but including footnotes) contains 6,492 words as determined by the word counting feature of Microsoft Word 2019. This brief thus complies with the type-volume limitation contained in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font, in compliance with Fed. R. App. P. 32(a)(5)–(6).

The files have been scanned for viruses and are virus-free.

Dated this September 18, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Through the Court's CM/ECF system, this brief has been served on counsel for all parties.

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