

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 25-2762

**GREGORY HARTMANN, JOHN HAYS; DEWAYNE BAILEY; ISHAQ
BRYANT; HOWARD CHAPMAN; CHRISTO BELONY; and ROBERT
EDWARDS, on behalf of themselves and all others similarly situated,**

Plaintiffs-Appellants

v.

**HON. BRIAN CHUDZIK; HON. EDWIN TOBIN;
HON. MILES BIXLER; HON. ANDREW LEFEVER,
in their official capacities as Magisterial District Judges; LANCASTER
COUNTY; and WARDEN OF THE LANCASTER COUNTY PRISON,**

Defendants-Appellees

*On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 5:22-cv-1588)
District Judge: Honorable John M. Gallagher*

***AMICUS CURIAE* BRIEF OF CATO INSTITUTE IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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INTEREST OF *AMICUS*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato’s Project on Criminal Justice was founded in 1999, and focuses on 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.

This case interests Cato because pretrial detention—especially that imposed without proper consideration of detainees’ financial means—creates very real hardships for accused individuals, including potentially recidivism and coerced guilty pleas.

INTRODUCTION

This case is remarkable for the questions that it does not involve. It does not question the adequacy or propriety of the controlling Pennsylvania law regarding bail decisions, which all parties agree provides for adequate consideration of detainees’ financial means. Nor does it involve whether the Plaintiffs-Appellants

¹ No counsel for any party authored this brief in whole or in part. No one other than *amicus* and its counsel made monetary contributions to its preparation or submission. All parties have consented to the filing of this *amicus* brief.

have adequately pled that the Defendants-Appellees violated their constitutional rights—the district court determined that they have.

Rather, the questions before the Court include (1) whether the district court can negate the Defendants-Appellees’ waiver of *Younger* abstention arguments after multiple unsuccessful motions to dismiss litigated over the course of 20-plus months, and (2) whether criminal defendants have a meaningful opportunity to challenge Lancaster County’s improper refusal to consider their financial means when setting bail at preliminary arraignments. After addressing the important role that pretrial bail holds in the criminal legal process historically, Cato will address those two issues.

SUMMARY OF ARGUMENT

The right to pretrial bail has its origins in pre-Norman law, and it was stated expressly in Magna Carta in 1215. Pre-conviction release principles were refined by, and ultimately codified into, later English law. The American colonists carried these English bail standards with them to the United States, where William Penn—who was personally subjected to wrongful pretrial detention due to his Quaker beliefs—articulated his theories regarding the general availability of pre-conviction release. The same principles that Penn expressed continue to exist in Pennsylvania.

Even short periods of pre-conviction detention can have harsh consequences for an accused individual. Academic studies and Supreme Court precedent concur that criminal defendants who are detained before trial face harsh economic and familial circumstances and suffer reduced access to counsel. The consequences of pretrial detention can include job loss, loss of housing, and increased recidivism.

The Defendants-Appellees in this case made several unsuccessful attempts to dismiss the Plaintiffs-Appellants' claims. It was only after their motions to dismiss were denied after more than 20 months of litigation that the district court directed the parties to address *Younger* abstention. At that point, the Defendants-Appellees had waived their ability to assert abstention arguments, and the district court's *sua sponte* efforts to revive those arguments on their behalf conflicts with its "virtually unflagging obligation" to exercise jurisdiction at this advanced stage of the proceedings.

Finally, to satisfy an element of the *Younger* abstention test, the district court concluded that indigent criminal defendants in Lancaster County have adequate opportunities to challenge the court's failure to consider their financial means when making the initial bail determination. But this conclusion is not supported by the facts. In Lancaster County, a criminal defendant is not represented by court-appointed counsel at the preliminary arraignment stage, there is no prosecuting attorney present, and the judicial officer presiding over the preliminary

arraignment is not required to be an attorney. Thereafter, once the criminal defendant is incarcerated, his access to counsel is substantially diminished. There is no indication that Lancaster County criminal defendants have any meaningful opportunity to challenge the initial bail determinations until at least two weeks later, when they reach the preliminary hearing stage and counsel is appointed for them.

I. The right to pretrial bail is fundamental to both Pennsylvania and American jurisprudence.

The pretrial bail rights on which the Plaintiffs-Appellants' claims are based are fundamental to the American system of justice. The concept of bail originated with the pre-Norman system of "amercements", which were payments made to settle blood feuds. Kellen R. Funk & Sandra G. Mayson, *Bail at the Founding*, 137 Harv. L. Rev. 1816, 1827 (2024). As the pre-Norman law evolved into the common law of post-conquest England, those payments evolved into the crown pleas of replevy and mainprize, secured by bail pledges. *See* ELSA DE HAAS, *ANTIQUITIES OF BAIL: ORIGIN AND DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275* at 128 (1966).

In 1215, Magna Carta provided that "[n]o free man shall be arrested or imprisoned . . . except by the lawful judgment of his peers or by the law of the land." Funk & Mayson, *supra*, at 1827 (quoting Magna Carta ch. 39 (1215)).

Magna Carta’s right to bail—i.e., to freedom prior to a criminal conviction—was ultimately codified by Parliament in 1628 in the Petition of Right, 3 Car. I, c.1 (1628), which tracked John Selden’s interpretation of Magna Carta in *Darnel’s Case*, 3 How. St. Tr. 1 (1627). Funk & Mayson, *supra*, at 1828 (citing J. A. Guy, *The Origins of the Petition of Right Reconsidered*, 25 Hist. J. 289 (1982)).

Once the foundations were laid, Parliament continued to limit the scope of judicial discretion over pretrial detention decisions. The Statute of Westminster I, 3 Edw. III, c. 3, 15 (1275), laid out which crimes were bailable and which were not. DE HAAS, *supra*, at 95. Thereafter, Parliament approved the Habeas Corpus Act in 1679, which “established procedures to prevent long delays before a bail hearing was held,” and the English Bill of Rights, 1 W. & M., c. 2 (1689), which prohibited “excessive bail.” Funk & Mayson, *supra*, at 1828.

At the time of the American Founding, the right to pre-conviction bail was well-grounded in English law. *Id.* The general practice followed by the American colonists consisted of the accused appearing before a magistrate at the time of arrest. *Id.* at 1829 (citing 2 JAMES WILSON, THE WORK OF JAMES WILSON 446–47 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)). At that time, the magistrate would decide whether to discharge the defendant, set bail, or commit the defendant to prison. *Id.* Unfortunately for criminal defendants lacking wealth or social connections, this system permitted broad judicial discretion in the great

majority of cases. *Id.* at 1826 (citing J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW (1832)).

Discretion made the English-based system ripe for abuse. *Id.* at 1835. That prospect gave rise to reform efforts in the colonies that were led by Pennsylvania’s founder, William Penn. *Id.* Although Penn was raised in a wealthy family with substantial social status, his Quaker religious convictions caused him to be subjected to arbitrary arrest and detention in England for offenses such as illicit preaching and refusing to doff his hat to the court. *Id.* at 1837–38. Lessons he drew from these experiences played a role in shaping Pennsylvania law and, eventually, federal law on the proper role of judicial discretion in the bail process. *Id.*

Penn viewed Magna Carta and its guarantee that “[n]o free man shall be taken or imprisoned” unless “by the lawful judgment of his peers” as the primary source of guidance on pretrial detention. *Id.* at 1840 (citing William Penn & William Head, *The People’s Ancient and Just Liberties*, in THE SELECT WORKS OF WILLIAM PENN 79 (London, James Phillips, 3d ed. 1782)). This view led Penn to conclude that pretrial detention without conviction was generally proscribed in all but a few capital cases—in which the magistrate could still set bail as a matter of discretion. *Id.* at 1842. This so-called “dissenter’s view” was ultimately codified

in Pennsylvania and elsewhere, although its application has remained inconsistent over time. *Id.*

These concepts are preserved today in the Due Process Clauses of the Fifth and Fourteenth Amendments, as well as the “excessive bail” provision of the Eighth Amendment. U.S. Const. amends. V, VIII, & XIV, § 1. Pennsylvania law remains consistent with Penn’s views, too. Article I, Section 14 of the Pennsylvania Constitution provides:

All prisoners shall beailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or 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. 1, §14. The precise considerations that factor into bail decisions are set forth in Pennsylvania Rule of Criminal Procedure 523(A). Once the court determines that cash bail may be appropriate, Rule 528(A) expressly requires it to consider “[t]he financial ability of the defendant” before imposing monetary bail, while Rule 528(B) requires that the amount of the monetary condition “shall be reasonable” in the light of the defendant’s “financial ability”.

Put simply, Pennsylvania’s pretrial bail system historically presumed that no one should be held in pre-conviction detention unless there is a threat to some person or the community in general. The rules codifying these principles make it clear that courts must consider the defendant’s financial condition prior to setting

monetary bail. Here, it is undisputed that the Plaintiffs-Appellants were not afforded that fundamental consideration at the preliminary arraignment stage.

II. Even short periods of pretrial detention pose serious consequences for a criminal defendant.

The district court made two observations downplaying shortcomings in Lancaster County’s bail-setting process at the preliminary arraignment stage. First, it observed that the preliminary hearings are “[n]ormally . . . scheduled two weeks after the preliminary arraignment”. Doc. 80 at 4. Second, it stated that “other options remain available” through alternative bail-modification provisions provided under the Pennsylvania Rules of Criminal Procedure and Rules of Appellate Procedure. *Id.* Neither of these suppositions changes the reality that even a short period of pretrial detention can have dire consequences for a criminal defendant.

Fifty years ago, the Supreme Court observed that “pre-trial 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). Recent studies illustrate just how soon after initial detention adverse consequences can arise. In 2022, the New York Criminal Justice Agency published an analysis of 2016 data relating to criminal defendants’ first appearances in New York City Criminal Courts. Stephen Koppel et al., *Examining the Causal Effect of Pretrial Detention on Case Outcomes: A Judge Fixed Effect Instrumental Variable Approach*, 20 J.

Experimental Criminology 439 (2024). It found that *any* period of pretrial detention increases the likelihood of a guilty plea by 23 percent and the prospect of a conviction by 24 percent. *Id.* at 447. Citing earlier research, the authors observed that pretrial detention may disproportionately threaten defendants facing lesser charges, such as retail theft, as these people may be more vulnerable to losing employment or housing and so be likelier to plead guilty to win their release. *Id.* at 440, 452.

In 2022, the authors of a 2013 study regarding the effect of pretrial detention in Kentucky revisited their original findings with refined data and reaffirmed that “getting people out of jail sooner rather than later is better.” Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention Revisited* at 6, Arnold Ventures (Jan. 21, 2022). The new data showed that detaining low-risk defendants for just two or three days made them nearly 1.4 times likelier to commit a crime upon release. Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention* at 17, Arnold Found. (Nov. 2013).

A 2023 systematic review and meta-analysis examined the average impact of pretrial detention. Stacie St. Louis, *The Pretrial Detention Penalty: A Systematic Review of Meta-Analysis of Pretrial Detention and Case Outcomes*, 41 Just. Q. 347 (2023). It observed the difficulties that detained defendants face when attempting to access counsel, as well as the difficulties that criminal defense

attorneys face when representing detained defendants. *Id.* at 349. This study verified the Supreme Court’s recognition 50 years ago that a detained individual is “hindered by his ability to gather evidence, contact witnesses, or otherwise prepare his defense.” *Barker v. Wingo*, 407 U.S. 519, 533 (1972).

These scholarly findings support two important conclusions. First, periods of pretrial detention of even two or three days can create substantial economic and familial hardships for individuals charged with crimes, and those hardships can be particularly harsh for defendants charged with less-severe crimes. The pressures created by the inability to work or be with one’s family can incentivize defendants to plead guilty to obtain earlier release. Those same hardships can also lead to increased recidivism occasioned by the loss of a job or housing. Second, incarcerated individuals have less access to counsel, either to defend them or to secure bail. The district court’s assurance that incarcerated indigent detainees can meaningfully challenge bail decisions before their preliminary hearings is dubious.

III. The district court’s *sua sponte* raising of abstention after over 20 months of litigation fails to negate the Defendants-Appellees’ waiver.

Federal courts have a “virtually unflagging obligation” to exercise their congressionally authorized jurisdiction. *Malhan v. Sec’y U.S. Dep’t of State*, 938 F.3d 453, 462 (3d Cir. 2019) (citing *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))). Abstention under *Younger v. Harris*, 401 U.S. 37 (1971),

is an exception that exists as a matter of comity between state and federal courts—it does not shrink federal subject matter jurisdiction. *Id.* at 465. Accordingly, a defendant can waive abstention. *Ohio Civ. Rts. Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626 (1986). That is what happened in this case.

For more than 20 months, the Defendants-Appellees elected to challenge the Plaintiffs-Appellants’ constitutional claims in federal court. “Defendants tried several times to dismiss the claims against them.” Doc. 80 at 5. It was only after the Plaintiffs-Appellants prevailed as to these efforts and the case was ready to proceed on the merits that the Defendants-Appellees argued that the district court should abstain in this matter—after the district court *sua sponte* directed the parties to address abstention issues. *Id.*

This request conflicted with the district court’s “virtually unflagging obligation” to exercise the jurisdiction conferred upon it. *Malhan*, 938 F.3d at 462. Further, the delay between the filing of this action and the introduction of the abstention issue is particularly problematic because the Plaintiffs-Appellants’ claims arise from delayed access to appropriate bail determinations. The district court exacerbated the very issue of delay that is the entire reason for this lawsuit.

The district court misapplied *Ohio Bureau of Emp. Servs. v. Hodory*, 431 U.S. 471 (1977), and *Dayton Christian Schools* in holding that a defendant cannot waive *Younger* abstention arguments by silence. Doc. 80 at 7–9. Neither case

states such a rule. This issue was addressed persuasively by *Cradle of Liberty Council, Inc. v. City of Phila.*, No. 08-2429, 2010 WL 68874 (E.D. Pa. Jan. 7, 2010), which held that the defendant waived *Younger* abstention arguments by choosing to litigate the dispute in federal court. *Id.* at *3–4 (distinguishing *Hodory, supra*, and *O’Neill v. Coughlan*, 511 F.3d 638 (6th Cir. 2008)). The court summarized the balance between comity and judicial inefficiency in a manner that is highly relevant to this case:

Lastly, the Court recognizes the deference it owes to state courts in accord with the notions of comity the *Younger* doctrine embodies. Allowing the City to at once fully litigate their case in federal court, but then, at the drop of the *Younger* abstention argument, to abandon the federal forum for a state court favors not the worthy principles of comity, but the principles of forum-shopping and judicial inefficiency.

Id. at *4 (citation omitted).

In this case, the district court decided “several” motions to dismiss, over the course of nearly two years, before directing the Plaintiffs-Appellants to go litigate in state court. Doc. 80 at 5. This belated consideration of comity does not promote judicial efficiency. The parties litigated at length—with the Plaintiffs-Appellants defeating multiple motions to dismiss their putative class action—before the district court gratuitously gave the Defendants-Appellees an easy way out.

The authorities that the district court cited to support doing so can be distinguished. Notwithstanding decades of Supreme Court and Third Circuit precedents providing that federal courts have a “virtually unflagging obligation” to

exercise the jurisdiction conferred upon them, the district court relied upon an unreported 2023 district court decision that appears to have merged the different concepts of subject matter jurisdiction and abstention. Doc. 80 at 6 (citing *Coyle v. Pennsylvania*, No. 23-1618, 2023 WL 3594146 (E.D. Pa. May 22, 2023)). The logic of that decision does not carry over to this case, where two sophisticated parties have actively litigated for nearly two years. In *Coyle*, the district court raised *Younger* abstention shortly after the case was filed by a *pro se* plaintiff and before any defendant even appeared. *Id.* at *3, n. 2. Like the district court in this case, the *Coyle* court wrongly equated *Younger* abstention with federal subject matter jurisdiction and concluded that both issues may be raised by the court *sua sponte*.² *Id.* at *3.

In contrast with the district court’s analysis, it is undisputed that a defendant may waive a *Younger* abstention argument and choose to take its chances in federal court. *Hodory*, 431 U.S. at 480–81. Conversely, it is “well-settled” that subject matter jurisdiction is not waivable. *Brown v. Phila. Hous. Auth.*, 350 F.3d 338, 346 (3d Cir. 2003). It is difficult to reconcile the possibility of a party waiving abstention with the district court *sua sponte* injecting that issue into a case after almost two years of active litigation. *See Cradle of Liberty*, 2010 WL 68874, at

² It appears that the *pro se* plaintiff in *Coyle* attempted to appeal the abstention decision, but that the appeal was dismissed.

*4. The district court’s belated conjuring of *Younger* arrived too late to save the Defendants-Appellees from their own waiver of it.

IV. Lancaster County criminal defendants do not have meaningful access to bail determination changes until the preliminary hearing stage.

The district court’s decision to abstain under *Younger* came down to “whether Plaintiffs have an adequate opportunity to raise their constitutional challenges in state proceedings.” Doc. 80 at 21. Without repeating the challenges to other aspects of the district court’s *Younger* analysis set forth in the Plaintiffs-Appellants’ brief (see Third Circuit Local Rule 29.1(a)), Cato disagrees with the district court’s resolution of that question for three reasons.

First, there is no meaningful opportunity to raise legal objections to means-blind bail determinations made at the preliminary arraignment stage. Even presuming that an unrepresented indigent defendant has the wherewithal to object, the Government is not represented by counsel at the preliminary arraignment and the presiding officer need not be a lawyer. Hearing Transcript (Nov. 16, 2022), Doc. 45 at 12, 20, 26–27.

Second, the studies cited above in Section II confirm that incarcerated individuals have less access to counsel than those who are released on bail. The district court’s imagined post-arraignment motions practices (*see* Doc. 80 at 21–22) are simply not realistic for indigent detainees, who are unable to post bail but would nevertheless need to immediately contact and retain private counsel.

Finally, the district court’s reliance on the relatively short time in which the defendant may be held wrongfully without bail fails to appreciate the potentially catastrophic effects of even brief periods of incarceration. Doc. 80 at 22. The Supreme Court has recognized that pretrial incarceration can subject a defendant to severe economic and familial harm. *Gerstein*, 420 U.S. at 114. Scholarly analyses have concluded that these harms may be realized within just two to three days following the start of detention. *See*, Section II, *supra*. Unwarranted deprivations of liberty—even for relatively brief periods, as judged from the perspective of those of us blessedly free from subjection to them—represent something far more odious than the mere abstract lack of an “ideal legal system” (*see* Doc. 80 at 22–23). *Cf. Burdine v. Johnson*, 87 F. Supp. 2d 711, 717 (S.D. Tex. 2000) (“ . . . [The plaintiff] suffers irreparable harm each day that he is imprisoned in violation of the United States Constitution. Remedying such harm is the very essence of the writ of habeas corpus.”), *cited approvingly by Vonville v. Kerestes*, No. 3:14-CV-1582, 2019 WL 2184769 (M.D. Pa. May 21, 2019). Lancaster County’s detainees deserve an “adequate opportunity” to challenge such oppression, *Younger* notwithstanding.

CONCLUSION

After more than 20 months of litigation, the district court concluded that the Plaintiffs-Appellants had validly claimed that Lancaster County’s bail-setting

practices at the preliminary arraignment stage violate their constitutional rights. The district court's late order requesting *Younger* arguments does not negate the Defendants-Appellees' decision to waive abstention. Accordingly, the district court's order abstaining from hearing this case should be reversed and the Plaintiffs-Appellants should be permitted to proceed in district court.

Respectfully submitted,

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COMBINED CERTIFICATIONS

1. Nicholas P. Vari, Patrick Maley, and Matthew Cavedon are members of this Court's bar.
2. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,436 words.
3. On December 15, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United State Court of Appeals of the Third Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.
4. The text of the electronic version of this document is identical to the text of the hard copies that will be provided.
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