No. 129248

IN THE
SUPREME COURT OF ILLINOIS

JAMES R. ROWE, in his official capacity as Kankakee County State's Attorney, and MICHAEL DOWNEY, in his official capacity as Kankakee County Sheriff, Plaintiffs-Appellees, v. KWAME RAOUL, in his official capacity as Illinois Attorney General; JAY ROBERT PRITZKER, in his official capacity as Governor of the State of Illinois; EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives; and DON HARMON, in his official capacity as Illinois Senate President, Defendants-Appellants.	)	On Appeal from the Circuit Court of the Twenty-First Judicial Circuit, Kankakee County, Illinois No. 2022CH16 The Honorable THOMAS W. CUNNINGTON, Chief Judge Presiding.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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ARGUMENT

Plaintiffs' response brief identifies no persuasive reason to affirm the circuit court's sweeping decision striking down the pretrial release provisions.[1] The court reasoned that three separate provisions of the Illinois Constitution independently require the State to maintain a system of monetary bail, and that only courts—not the Illinois General Assembly—can regulate the conditions under which criminal defendants may be detained pending trial. Those unprecedented holdings are incorrect, and would effectively bar the General Assembly from ever reforming pretrial procedures in the State. The circuit court's decision should be reversed.

I. The Elimination of Monetary Bail Is Constitutional.

Plaintiffs renew their argument that the Illinois Constitution requires the State to maintain a system of monetary bail, because (they contend) that system is mandated by (a) the bail clause, (b) the crime victims' rights clause, and (c) the separation-of-powers clause. AE Br. 15-28, 31-33, 38-41. Plaintiffs' grab-bag of constitutional theories should be rejected: None of these

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[1] Although plaintiffs repeatedly chastise the General Assembly for its "haste" in passing the SAFE-T Act, *e.g.*, AE Br. 6, 14, 19-20, they have abandoned on appeal their claims that the General Assembly violated the Constitution's single-subject and three-readings rules in doing so, as well as their claim that various provisions are unconstitutionally vague, *id.* at 5. (The appendix is cited as "A__"; the common-law record as "C__"; defendants' opening brief as "AT Br."; and plaintiffs' response brief as "AE Br."). Although plaintiffs' amici attempt to litigate the single-subject claim, FOP Amicus Br. 9-10, amici curiae cannot resuscitate a claim that the parties have abandoned. *See Bruns v. City of Centralia*, 2014 IL 116998, ¶ 15 n.1. The only claims before the Court are thus those targeting the pretrial release provisions.

constitutional provisions—much less all three—locks in place the institution of monetary bail.

A. The elimination of monetary bail does not violate the bail clause.

As defendants explained, AT Br. 14-28, the elimination of monetary bail does not violate the bail clause for two independent reasons: The clause guarantees a right to criminal defendants that the legislature is free to exceed (and that plaintiffs, who are not criminal defendants, cannot invoke), and it does not in any event require the State to maintain a system of monetary bail.

1. The bail clause guarantees an individual right to criminal defendants.

Plaintiffs devote the bulk of their response brief to disputing the *content* of the bail clause—that is, the exact nature of the right that the clause establishes. AE Br. 15-28. As defendants explained, however, the elimination of monetary bail is constitutional no matter how the clause is read, because it confers a right only on criminal defendants, which the General Assembly is free to exceed—and which plaintiffs, who are prosecutors, cannot invoke. AT Br. 25-28. The Court need go no farther to reject plaintiffs' bail-clause claim.

Plaintiffs barely address this argument. They reprise the circuit court's holding that they have standing to challenge the pretrial release provisions, AE Br. 9-14, but they miss the point: The question is not whether the provisions "impose . . . obligations on the plaintiffs," AE Br. 12, such that they have suffered injury in fact, but whether plaintiffs are asserting their "own rights" under the bail clause, *State v. Funches*, 212 Ill. 2d 334, 346 (2004).

Because the clause protects criminal defendants, not law enforcement officers, the answer to that question is no. Plaintiffs' response is that, as state's attorneys, they are "unique[ly]" positioned "to challenge unconstitutional legislation." AT Br. 10-11. But plaintiffs cite no authority permitting state's attorneys to invoke third parties' rights across the board (much less in cases where they advance positions *adverse* to those parties), and no good reason to establish such a rule here. Plaintiffs' argument fails on that basis alone.

Even if plaintiffs could invoke the bail clause, though, it would not matter, because the clause simply sets a floor that the General Assembly is free to exceed, as it has done here. That is, even if the clause did confer on criminal defendants the right to release *upon* furnishing monetary bail, the General Assembly could still grant criminal defendants the right to release *without* furnishing monetary bail—just as the legislature has granted defendants speedy-trial rights that exceed the constitutional floor, 725 ILCS 5/103-5(a); *see* AT Br. 27. There is nothing unconstitutional—or even unusual—about that.

Plaintiffs' only response is that bail serves multiple purposes, in that it also "assur[es] the defendant's presence at trial." AE Br. 10; *accord id.* at 27 (similar). But that is a non sequitur: Most individual rights are limited, and those limitations, too, serve a "broader" purpose. *Id.* at 10. The Constitution protects us from only "unreasonable" searches and seizures, not *all* searches and seizures, Ill. Const. art. I, § 6, but that limitation does not mean the

General Assembly cannot confer additional privacy rights on individuals, as indeed it has in multiple contexts, *e.g.*, 720 ILCS 5/11-23.5 (private images); *id.* 5/14-2 (private conversations); 740 ILCS 14/15 (biometric information). These laws do not conflict with article I, section 6, by conferring additional rights on individuals any more than the elimination of monetary bail conflicts with the bail clause. Defendants made this point in their opening brief, AT Br. 28, but plaintiffs have no response.

2. The bail clause does not require the State to maintain a system of monetary bail.

In any event, plaintiffs are wrong about the meaning of the bail clause. Whether viewed through the lens of 1818 or 1970, the clause does not require the State to maintain a system of monetary bail; rather, it grants criminal defendants a qualified right to seek pretrial release. AT Br. 15-25. Plaintiffs' counterarguments lack merit.

To start, although plaintiffs invoke the bail clause's "plain language," AE Br. 15, they present no affirmative explanation of that language or why it is best interpreted to require the State to maintain a system of monetary bail. Indeed, plaintiffs cite no cases or dictionaries supporting their reading of the clause. Instead, the centerpiece of plaintiffs' "plain language" argument is an extended discussion of bail reforms enacted by New Jersey and New Mexico. *See* AE Br. 17-19 (explaining why plaintiffs "would strongly support a system[] like those in New Jersey and New Mexico"). But neither plaintiffs' policy preferences nor the experiences of other States with different constitutional

frameworks have any bearing on the issues before the Court, and certainly not on the "plain language" of the Illinois Constitution's bail clause, as plaintiffs admit. *Id.* at 7 (agreeing that "public policy" considerations are irrelevant to "the issues before this Court").

Plaintiffs appear to invoke other States' experiences in an attempt to distinguish *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018) (discussed at AT Br. 17-20), which considered the constitutionality of New Jersey's bail reform statute. But defendants relied on *Holland* not for its holding on "[w]hether the Eighth Amendment contains an implied right to monetary bail," AE Br. 17, but for its discussion of the public understanding of the term "bail" in the early 1800s, when the bail clause was first added to the Illinois Constitution, AT Br. 17-19, 22-23. As defendants explained, at that time, the term "bail" did not mean monetary bail, because today's system of monetary bail did not exist. As a result, the clause's reference to "bail" cannot be read to lock in place the institution of monetary bail, as plaintiffs contend, but rather to allow criminal defendants "a means of achieving pretrial release from custody conditioned on adequate assurances." *Holland*, 895 F.3d at 291.

Plaintiffs cannot—and do not—dispute this historical account. They argue that this account "does not advance" defendants' argument, AE Br. 25, but they do not explain why not, nor do they genuinely dispute it. *See id.* (agreeing that, at common law, "the surety was a person," not a requirement to furnish a financial payment, and that this system reigned until "the early

20th Century"). They argue merely that defendants are attempting to "create ambiguity" where it does not exist, *id.* at 16, but, again, it is defendants who offer an account of the bail clause rooted in the "common understanding of the persons who adopted it," *Walker v. McGuire*, 2015 IL 117138, ¶ 16, and it is plaintiffs who are resorting to policy arguments. That is dispositive.

Plaintiffs suggest, in the alternative, that the bail clause should be read in light of the records of the 1970 constitutional convention, AE Br. 22-28, but those records do not support plaintiffs' reading of the clause. Plaintiffs' primary point appears to be that the delegates chose not to abolish the monetary bail system at that time. *See id.* at 24-25 ("[E]ven the rejected minority position did not abolish monetary bail . . . ."); *accord id.* at 23. But defendants have never suggested otherwise; rather, defendants explained that the delegates made no substantive changes to the clause in part *because* they understood that, in its current form, it "permitted the legislature to delve into the problems" presented by monetary bail "and do something about them," if the legislature concluded that was needed. 3 *Record of Proceedings*, Sixth Illinois Constitutional Convention ("Proceedings") 1674; AT Br. 20-21. That is just what the General Assembly has now done.

Plaintiffs also point to a floor exchange that they argue shows that the convention delegates viewed "money bail [as] a component" of the "sufficient sureties" described in the clause. AE Br. 23-24 (citing 3 Proceedings 1657). Again, though, defendants have never argued that the "sureties" described in

the clause *exclude* monetary bail; to the contrary, defendants explained that those "sureties" include any conditions imposed by a court as an "assurance" that the defendant will return to face trial, monetary or not. AT Br. 23; *see Stack v. Boyle*, 342 U.S. 1, 4 (1951) (bail secures "[t]he right to release before trial . . . conditioned on the accused's giving adequate assurance that he will stand trial and submit to sentence"). It is plaintiffs' burden to show that the bail clause carries a more specific, and restrictive, definition—i.e., that "bail mean[s] exclusively monetary bail," *Holland*, 895 F.3d at 291, and sureties mean exclusively financial conditions. Nothing in the 1970 records reflect such a restrictive reading of the clause; indeed, that reading is incompatible with the statements made by multiple delegates regarding the legislature's authority—including its authority to "abolish[]" "the money bail system," 3 Proceedings 1664, if it chose to.

Plaintiffs have little else to add. Plaintiffs argue that the legislature violated the Constitution by changing the *statutory* definition of "sufficient sureties" to include only sureties that are "nonmonetary" in nature. AE Br. 15-16, 21-22, 26; *see* 725 ILCS 5/102-6, 5/110-1(b). But the General Assembly did not attempt to "change[] the meaning" of the bail clause in doing so, nor try to "amend[] [the clause] by mere legislation," AE Br. 16, as plaintiffs suggest. The General Assembly simply amended the statutory definitions to reflect the elimination of monetary bail. Put another way, as discussed, *supra* pp. 4-5, the bail clause's reference to "sureties" *permits* the imposition of a

range of conditions on criminal defendants who are released pretrial—both monetary and nonmonetary alike—but that does not mean that the clause *requires* specific conditions to be available to courts in making pretrial release decisions. As a result, the General Assembly is free to limit the conditions that courts can permissibly impose in making those decisions, just as it has done by amending plaintiffs' cited statutes.

Indeed, this Court's decision in *Gendron* holds just that, albeit in the context of a different kind of "sureties"—the bail bonds issued by professional surety companies. *See People v. Gendron v. Ingram*, 34 Ill. 2d 623 (1966). As defendants explained, AT Br. 21-22, the General Assembly in the 1960s passed a set of statutory reforms designed to "destroy[] the odious" industry of professional "bail bond[s]m[en]," 3 Proceedings 1656 (statement of Delegate Pechous), by permitting a defendant to obtain release by furnishing 10% of the amount of any monetary bail imposed but requiring surety companies to furnish the full amount, *Gendron*, 34 Ill. 2d at 624-25. This Court rejected the argument that this legislation was invalid because the unsecured bonds offered by those companies constituted "sufficient sureties" under the bail clause, explaining that the "legislature" was free to "determine[]" that such bonds did not serve the clause's purpose, as it had done in legislating. *Id.* at 626. So too here: The General Assembly has decided that monetary bail does not serve the clause's purpose, and has removed it as a condition that courts may impose. The bail clause does not prohibit that decision.

Plaintiffs try to distinguish *Gendron*, AE Br. 20-21, 26-27, but their arguments boil down to a policy disagreement with the General Assembly over whether monetary bail does, in fact, serve the "purpose" of the clause. *See id.* at 21 (the Act has "eliminated a tool under which a court can 'accomplish the purpose of bail'" (quoting *Gendron*, 34 Ill. 2d at 626)).[2] But nothing in *Gendron* authorizes courts to override the legislature's decision as to which conditions of pretrial release are appropriate and which are not, or requires the State to maintain any surety system that could be viewed as consistent, in the abstract, with the purposes of bail. In the end, plaintiffs' understanding of the bail clause—in which the clause protects not criminal defendants but the specific institution of monetary bail—cannot be squared with text, history, or precedent.

B. The elimination of monetary bail does not violate the crime victims' rights clause.

Plaintiffs are also wrong that the elimination of monetary bail violates the crime victims' rights clause. As defendants explained, AT Br. 28-33, that claim fails multiple times over: The clause by its plain language guarantees rights only to crime victims; it cannot reasonably be read to require a system of monetary bail; and it is easily squared with the pretrial release provisions,

[2] Plaintiffs' amici likewise do no more than identify policy concerns with the pretrial release provisions, *see* Kennedy Amicus Br. 4-24; FOP Amicus Br. 3-9, which are irrelevant to the questions before the Court.

which at multiple stages require courts to consider crime victims in making release decisions.

Plaintiffs have little to say in response. They argue that the statute implementing the crime victims' rights clause permits prosecutors to "'assert [a] victim's rights.'" AE Br. 13 (quoting 725 ILCS 120/4.5(c-5)(3)). But that statute applies only in an individual "criminal case," 725 ILCS 120/4.5(c-5)(3), which this is not. And a statute cannot trump the constitutional text, in any event, which expressly states that the crime victims' rights clause does not "alter the powers, duties, [or] responsibilities of the prosecuting attorney." Ill. Const. art. I, § 8.1(b), thus foreclosing plaintiffs' attempt to expand their own authority at criminal defendants' expense. And plaintiffs have no response at all to defendants' argument that the pretrial release provisions comply with the clause by requiring the court to consider victims at every stage. AT Br. 31.

In the end, moreover, plaintiffs essentially abandon this claim: They concede that Illinois voters did *not* amend the Constitution in 2014 to require the existence of monetary bail, but rather that the addition of the relevant language to the crime victims' rights clause that year merely shows that the public believed that "the constitution *already* authorized judges to set monetary bail" at that time. AE Br. 32 (emphasis added). That argument is incorrect. *Supra* pp. 4-9. But at minimum, it amounts to a concession that the crime victims' rights clause has no separate legal effect; it merely serves as

evidence (in plaintiffs' view) of the meaning of *other* constitutional provisions. This claim can be rejected based on that concession alone.

C. The elimination of monetary bail does not violate separation-of-powers principles.

Finally, plaintiffs renew their suggestion that separation-of-powers principles somehow require courts to be able to set monetary bail. AE Br. 40. As defendants explained, however, this Court has never held that courts have the inherent authority to set monetary bail. AT Br. 46-47. Rather, the Court held in *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74 (1975), that courts have a narrow inherent authority to *detain a criminal defendant*—that is, to "deny or revoke bail," *id.* at 79—pending trial on specific grounds. *Infra* pp. 13-14. That holding cannot be read to require the State to maintain a system of monetary bail.

Plaintiffs appear to concede that *Hemingway* did not rest on any such holding, AE Br. 40-41, instead tracing their preferred rule to dicta in *People ex rel. Davis v. Vazquez*, 92 Ill. 2d 132 (1982). But defendants explained why *Davis* cannot reasonably be read that way, AT Br. 46-47: *Davis* concerns the bail clause, not separation-of-powers principles, and no court has ever read it to recognize an inherent judicial power to set monetary bail. Rather, *Davis*'s reference to a court's "authority," 92 Ill. 2d at 148, refers to courts' *statutory* authority under the Code of Criminal Procedure. Plaintiffs offer no response to this basic—and dispositive—point. In the end, *Davis* is simply too slender a

reed to support plaintiffs' position that the Illinois Constitution requires the State to retain the institution of monetary bail.

II. The Detention Provisions Are Constitutional.

Plaintiffs also defend the circuit court's sweeping holding setting aside the Act's detention provisions, which establish new procedures governing who can be detained pending trial, on separation-of-powers grounds. AE Br. 33-48. But the circuit court's decision amounts to an extraordinary repudiation of the General Assembly's "concurrent . . . authority" to regulate in areas in which courts possess inherent power. *People v. Walker*, 119 Ill. 2d 465, 475 (1988). Under the circuit court's reasoning—and plaintiffs'—the General Assembly is categorically prohibited from regulating who may be detained pending trial. That expansive holding cannot be squared with history or precedent.

A. The detention provisions do not violate separation-of-powers principles.

The circuit court's separation-of-powers holding is badly flawed. The court misapplied this Court's precedent, stating that the General Assembly is "prohibited" from legislating in areas in which courts have inherent authority. A17. And its reasoning would essentially bar the legislature from playing the role that it has played in regulating pretrial procedure in the State for 60 years. AT Br. 5-6, 37-38. That is not the law.

Plaintiffs concede that the circuit court articulated the wrong standard. AE Br. 34 (agreeing that "the circuit court did not expressly" state the correct standard). But they attempt to resuscitate its holding, primarily by advancing

an expansive reading of this Court's decision in *Hemingway* and analogizing this case to others in which the Court has found separation-of-powers violations. Both efforts fail.

To start, plaintiffs' sweeping reading of *Hemingway* cannot be squared with the Court's reasoning in that case. Plaintiffs insist that *Hemingway* held that courts have the inherent authority to "set or deny bond," including "*all* possible conditions of bond," in all cases and for any reason. AE Br. 38-41. But plaintiffs offer no explanation at all for the Court's statement that it was *not* recognizing an inherent authority to detain "one charged with a criminal offense for the protection of the public," 60 Ill. 2d at 80—an aspect of pretrial decisionmaking that plaintiffs repeatedly insist is integral to courts' authority in this area. *See* AE Br. 29 (bail helps "protect[] society against dangerous persons"); *id.* at 6 (similar). The explanation for that statement is simple: The Court did not embrace the broad understanding of judicial power that plaintiffs now press, but instead identified only a narrow authority to detain persons accused of serious felonies for three specific purposes. AT Br. 35-37. The Court should decline plaintiffs' invitation to expand *Hemingway* beyond its text.

In any event, even if plaintiffs' broader reading of courts' inherent authority were correct, that would not matter. *Hemingway* does not hold that the legislature is barred from regulating pretrial procedures; to the contrary, the General Assembly has legislated in this area for six decades without

incident. AT Br. 5-6, 37-38.[3] That makes sense: As this Court has held, the legislature "has, as the branch of government charged with the determination of public policy, the concurrent constitutional authority to enact complementary statutes" even in areas in which courts have inherent power. *Walker*, 119 Ill. 2d at 475. The circuit court's view would read that authority out of existence, calling into question a half-century of legislative reform in this area. Plaintiffs protest that consequence, suggesting that the detention provisions "go much further" than prior measures, AE Br. 43, but this is a distinction without a difference: Under prior law, too, courts were prohibited from ordering pretrial detention except under certain circumstances, AT Br. 37-38; *e.g.*, 725 ILCS 5/110-6.1(a) (2020), making the circuit court's reasoning equally applicable to those provisions. In the end, plaintiffs' view appears to be that the legislature simply has no serious role to play in regulating pretrial criminal procedure. But that position cannot be reconciled with *Hemingway* or history.

Plaintiffs turn to other separation-of-powers opinions to salvage their claim, AE Br. 36-38, but those cases are distinguishable. Plaintiffs' main point appears to be that in those cases—*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217 (2010); *Ardt v. Illinois Department of Professional Regulation*, 154

[3] Indeed, the statute at issue in *Hemingway* was held invalid because it conflicted with the bail clause, not because it violated separation-of-powers principles. The Court invoked separation-of-powers principles to *preserve* the General Assembly's goals (i.e., to permit detention), not to contravene them.

Ill. 2d 138 (1992); *People v. Joseph*, 113 Ill. 2d 36 (1986), and others—the Court held unconstitutional statutes in other contexts that limited courts' discretion. But none of these cases concern pretrial detention (or even, in most cases, criminal procedure), and there are a wide range of other cases in which the Court has upheld statutes limiting judicial discretion in the criminal procedure context as consistent with the General Assembly's power. *E.g.*, *In re S.G.*, 175 Ill. 2d 471, 492 (1997) (statute requiring courts to dismiss certain cases if hearings are not completed within 90 days); *People v. Williams*, 124 Ill. 2d 300, 307 (1988) (statute permitting automatic substitution of judge); *In re T.W.*, 101 Ill. 2d 438, 441 (1984) (statute prohibiting courts from entering continuances in juvenile cases absent State's consent). Plaintiffs identify no reason the Court should follow their cherrypicked cases over these.

Indeed, plaintiffs have little to say at all about the cases in which this Court has expressly approved of legislation "limit[ing] the discretion of courts" to impose sentences, notwithstanding courts' "exclusive[]" authority to do so. *E.g.*, *People v. Taylor*, 102 Ill. 2d 201, 208 (1984); AT Br. 39. Plaintiffs suggest these cases are irrelevant because the General Assembly exercises "concurrent authority over criminal sentencing," AE Br. 44 (emphasis omitted), but this Court has used that exact phrase to describe the legislative authority underpinning the Code of Criminal Procedure, *see Walker*, 119 Ill. 2d at 475 (General Assembly has "concurrent constitutional authority to enact complementary statutes" in areas characterized by judicial power, like "the

Code of Criminal Procedure"). As long as the legislature does not enact a statute that facially conflicts with a rule of this Court in that area, or "unduly infringe" upon judicial authority in regulating, its enactments will be upheld. *Id.* at 474-75. The legislature has not done so here, so the detention provisions should stand.

B. At the very least, the detention provisions do not facially violate separation-of-powers principles.

At minimum, the detention provisions are not *facially* unconstitutional. This Court has repeatedly explained that a law is "facially invalid only if *no* set of circumstances exist under which it would be valid." *Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 306 (2008) (emphasis added). But the detention provisions are consistent with even plaintiffs' broader reading of *Hemingway* in *most* circumstances: They parallel the judicial authority recognized in that case, permitting a court to detain criminal defendants in a wide range of cases, including virtually all serious felony cases, on either flight-risk or public-safety grounds. *See* 725 ILCS 5/110-6.1(a); AT Br. 8-9. There is no serious argument that "no set of circumstances exists," *Napleton*, 299 Ill. 2d at 306, in which the detention provisions are consistent with *Hemingway*.

Plaintiffs do not genuinely argue otherwise. Instead, they largely resist the premise, embracing the circuit court's holding that the distinction between facial and as-applied challenges does not apply in separation-of-powers cases.

AE Br. 46-48.[4] Plaintiffs concede that this Court has repeatedly acknowledged that distinction in such cases, *see In re Derrico G.*, 2014 IL 114463, ¶ 57; *Davis v. Brown*, 221 Ill. 2d 435, 442-43 (2006); *People v. Greco*, 204 Ill. 2d 400, 406-07 (2003), but nonetheless insist that they are entitled to a ruling setting aside the detention provisions in *all* cases if they can show that the provisions clash with *Hemingway* in *some* cases. The Court should decline plaintiffs' invitation to create such an exception to the ordinary standard for facial challenges.

Plaintiffs point to a handful of cases in which they say this Court *has* applied such an exception, AT Br. 46, but plaintiffs are wrong. The Court in *Lebron* stated that it *would* apply the very rule that plaintiffs are seeking to evade, 237 Ill. 2d at 228 ("A statute is facially invalid only if no circumstances exist under which the statute would be valid."), so it is an unusual citation for the proposition that that rule should *not* apply. And *Ardt* and *Joseph* are inapposite because those cases involved as-applied challenges: Each was brought by a party who was subject to the statute in question, not as a pre-enforcement challenge seeking relief as to all parties. *See Ardt*, 154 Ill. 2d at 142 (plaintiff sought administrative review of order suspending his license to practice dentistry); *Joseph*, 113 Ill. 2d at 39-41 (defendant filed postconviction petition and sought substitution of judge). The challengers in these cases, in

[4] Plaintiffs also briefly reiterate their view that the detention provisions categorically violate separation-of-powers principles because those principles require courts to be able to set monetary bail, not merely to detain criminal defendants. AE Br. 45-46. As explained, however, AT Br. 46-47; *supra* p. 11, this Court has never recognized an inherent authority to set monetary bail.

other words, sought relief only as to themselves, not the world, and so they were not obligated to satisfy the demanding standards for facial challenges.[5]

Plaintiffs, by contrast, concededly seek to set aside the pretrial release provisions categorically, in all cases, and before they even take effect. AE Br. 45. In such a case, the standard for facial challenges applies, and plaintiffs cannot meet it.

C. Plaintiffs' remaining arguments fail.

Plaintiffs raise two final arguments about the detention provisions, contending that (a) section 6.1(a) violates the bail clause by allowing the State to seek pretrial detention for "bailable" offenses, and (b) section 6.1(i) violates separation-of-powers principles by requiring the State to bring detained defendants to trial within 90 days. AE Br. 28-31, 42-43. Both claims fail.

Defendants have explained why plaintiffs' arguments with respect to section 6.1(a) lack merit. AT Br. 51-54. Section 6.1(a) identifies a range of offenses for which the State may seek pretrial detention. *See* 725 ILCS 5/110-6.1(a). Plaintiffs object that, in some circumstances, an individual charged with one of these offenses might be eligible for a sentence of probation only, and thus be "bailable" under the bail clause. AE Br. 28-31. As defendants

[5] In any event, no party in these cases argued that the ordinary standard for adjudicating facial claims *should* have applied, so any ambiguity on that issue cannot be regarded as a holding of the Court. *See Heaney v. Ne. Park Dist. of Evanston*, 360 Ill. 254, 260 (1935) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents . . . .").

have explained, however, this argument is not properly before the Court: It is an argument properly brought by criminal defendants, not prosecutors, and in individual cases, not in a facial pre-enforcement challenge like this. AT Br. 51-54.

Defendants made all these points in their opening brief, but plaintiffs fail to respond to *any* of them. They simply reiterate their position that the General Assembly should have put section 6.1(a) to Illinois voters, just as it did in the 1980s in proposing other amendments to the bail clause. AE Br. 28-30. That argument is nonresponsive: Plaintiffs do not explain how the Court could facially adjudicate this claim, given that whether a defendant is "bailable" under the clause will turn on the facts and circumstances of their individual criminal case. Nor do they explain why it would be appropriate to do so, given that they are trying to use an argument that properly belongs to criminal defendants to strike down legislation protecting those defendants. Plaintiffs' silence on these issues is telling.

Plaintiffs are also wrong on the merits, in any event: The General Assembly was not required to put section 6.1(a) to the voters, because it does not facially "conflict[] with the provisions of the [C]onstitution." AE Br. 30. Instead, section 6.1(a) guides courts in determining which defendants may be detained consistent with the bail clause and with the separation-of-powers principles identified in *Hemingway*. *See People v. Bailey*, 167 Ill. 2d 210, 237-40 (1995). To the extent there are defendants who cannot be detained under

section 6.1(a) consistent with those principles, that is not a reason that the section is facially unconstitutional; it is simply a reason that such defendants cannot be detained pending trial. Plaintiffs are not entitled to a windfall—the Act's facial invalidation—simply because in some cases defendants charged with offenses identified under section 6.1(a) cannot be detained. Courts can "consider" those cases "when they arise." *Oswald v. Hamer*, 2018 IL 122203, ¶ 43.

Plaintiffs' section 6.1(i) argument also fails. That subsection provides that any defendant detained pending trial "shall be brought to trial . . . within 90 days," setting aside any periods of time resulting either from a continuance requested by the defendant or one requested by the State "with good cause shown." 725 ILCS 5/110-6.1(i). A defendant not brought to trial within that time must be released pending trial. *Id.* Plaintiffs complain that this provision unduly infringes on judicial authority, primarily because "most felony cases involving forensic evidence cannot be tried in 90 days given the time-lags in [DNA] testing." AE Br. 42.

This argument fails on multiple levels. For one, section 6.1(i) was not added by the SAFE-T Act; as defendants explained below, C1138, it was added to the Code of Criminal Procedure over 45 years ago, in substantially the same form as today. *See* Pub. Act No. 85-892, § 1 (1987) (enacting 725 ILCS 5/110-6.1(f) (1988)) (requiring a defendant held pretrial to "be brought to trial . . . within 90 days" or released). Indeed, the SAFE-T Act gave courts *more*

authority, not less: The pre-Act version of section 6.1(i) did not toll the 90-day period for a State-requested continuance, whereas the Act expressly requires such tolling, *see* 725 ILCS 5/110-6.1(i). Plaintiffs are thus wrong to chalk any objections they have to this provision up to the Act.

In any event, section 6.1(i) does not "unduly infringe" upon judicial authority. Speedy-trial requirements like section 6.1(i) are commonplace, *see* 725 ILCS 5/103-5, and courts routinely reject arguments that they infringe upon separation-of-powers principles. *See, e.g.*, *United States v. Brainer*, 691 F.2d 691, 698-99 (4th Cir. 1982) (rejecting such a claim). And to the extent plaintiffs' policy complaints are relevant to the merits of their constitutional claims, plaintiffs identify no reason section 6.1(i)'s tolling provisions would not encompass the testing-based delays they identify (or any other good causes for delay, for that matter); indeed, plaintiffs do not mention the tolling provisions at all. But those provisions are fatal to this claim, given that they preserve judicial authority to detain a defendant pending trial in most cases.

D. The detention provisions are severable.

Finally, even if there were a constitutional defect associated with the detention provisions (i.e., those that govern pretrial detention, as opposed to those eliminating monetary bail), the circuit court's overbroad remedy—the invalidation of *all* the pretrial release provisions, including the elimination of monetary bail—cannot be squared with the Court's severability jurisprudence or the General Assembly's intent in passing the Act. The Court has explained

that, in a case involving a statute with a severability clause (like this one), a court should presumptively sever any individual "statutory provision," issuing a broader remedy only if the legislature "would not have passed the statute with the invalid portion eliminated." *People v. Mosley*, 2015 IL 115872, ¶ 56. The appropriate remedy here is thus the invalidation of any provision deemed unconstitutional, and not the pretrial release provisions as a whole. AT Br. 55-57.

Plaintiffs protest that this "subsection-by-subsection" approach is not "workable," AE Br. 51, but it is simply the approach dictated by this Court's cases. *See Mosley*, 2015 IL 115872, ¶¶ 27-28 (asking whether "the remaining four subsections . . . are severable from [the unconstitutional] subsections"); *People ex rel. Chi. Bar Ass'n v. State Bd. of Elections*, 136 Ill. 2d 513, 537-38 (1990) (finding some provisions severable from invalid provision and others inseverable).

In any event, plaintiffs are wrong. It would be easy to sever any of the detention provisions that plaintiffs identify as defective from the remainder of the Act. For instance, if the Court were to agree with plaintiffs that section 6.1(i) violates separation-of-powers principles by requiring a court to release a detained defendant who is not brought to trial within 90 days, *supra* pp. 20-21, there is no reason to find the pretrial release provisions unconstitutional as a whole based on that single defect. The remainder of the provisions enacted by the legislature are clearly "complete in and of [themselves], and [are] capable

of being executed wholly independently" of amended section 6.1(i). *Mosley*, 2015 IL 115872, ¶ 30. The same is true of plaintiffs' arguments about section 6.1(a), *supra* pp. 18-20: If the General Assembly had known it could not add specific offenses to section 6.1(a), there is no reason to believe that any single offense's inclusion was so integral to the passage or operation of the Act that its invalidation should bring down the pretrial release provisions as a whole.

The same is true of plaintiffs' broader argument about the interaction between the detention provisions and *Hemingway*. Plaintiffs' view appears to be that the General Assembly would not have eliminated monetary bail had it understood that courts possessed the inherent authority to detain defendants (even defendants convicted of low-level felonies and misdemeanors) pending trial. AE Br. 50-51. But plaintiffs identify no reason that would be the case. After all, the December 2022 amendments to the Act made *more* defendants eligible for detention, not fewer. *See* Pub. Act No. 102-1104, § 70 (2022). Plaintiffs' assertion that the elimination of monetary bail is "inherently tied" to the provisions identifying detention-eligible offenses, AE Br. 51, is thus hard to understand: If plaintiffs are right that *Hemingway* recognizes an inherent authority to detain defendants in *all* cases (one that cannot be regulated by the General Assembly), it is hard to see why the elimination of monetary bail would depend on whether section 6.1(a)'s limitations are in force or not. So if the Court were to conclude that section 6.1(a) facially conflicts with *Hemingway* by limiting detention to those charged with certain offenses, the

appropriate course would be to hold that that courts may detain defendants under the circumstances set out in *Hemingway* regardless of the charged offense, but that the elimination of monetary bail stands.

CONCLUSION

For these reasons, the Court should reverse the judgment below.

Respectfully submitted,

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February 27, 2023

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,984 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 27, 2023, I electronically filed the foregoing **Reply Brief of Defendants-Appellants** with the Clerk of the Court for the Illinois Supreme Court using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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