Nos. 17-20333

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MARANDA LYNN ODONNELL,
Plaintiff-Appellee,

v.

HARRIS COUNTY, TEXAS; ERIC STEWART HAGSTETTE; JOSEPH LICATA, III; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ; JILL WALLACE; PAULA GOODHART; BILL HARMON; NATALIE C. FLEMING; JOHN CLINTON; MARGARET HARRIS; LARRY STANDLEY; PAM DERBYSHIRE; JAY KARAHAN; JUDGE ANALIA WILKERSON; DAN SPJUT; JUDGE DIANE BULL; JUDGE ROBIN BROWN; DONALD SMYTH; JUDGE MIKE FIELDS; JEAN HUGHES,
Defendants-Appellants.

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD,
Plaintiffs-Appellees,

v.

HARRIS COUNTY, TEXAS; JILL WALLACE; ERIC STEWART HAGSTETTE; JOSEPH LICATA III; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Case Nos. 4:16-CV-1414, -1436

BRIEF OF *AMICI CURIAE* TEXAS PUBLIC POLICY FOUNDATION AND R STREET INSTITUTE

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 28.2.1 of this Court's Rules, undersigned counsel of record certifies that the Texas Public Policy Foundation ("TPPF") is a not-for-profit institution that has no parent corporation and does not issue publicly held stock, and that Right on Crime is a not-for-profit project of the TPPF in cooperation with the American Conservative Union Foundation and the Prison Fellowship. Counsel further certifies that the R Street Institute is a Section 501(c)(3) nonprofit, nonpartisan, public-policy research organization.

Further, undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

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STATEMENT OF INTEREST

The Texas Public Policy Foundation ("TPPF") is a 501(c)(3) non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating policymakers and shaping the Texas public policy debate with sound research and outreach.

Right on Crime is the trademarked name of TPPF's national criminal justice reform project. Right on Crime believes a well-functioning criminal justice system enforces order and respect for every person's right to property and ensures that liberty does not lead to license, and also that criminal justice spending should be tied to performance metrics that hold it accountable for results in protecting the public.

This case concerns TPPF because Harris County's indiscriminate reliance on secured-money bail violates core constitutional values of individual liberty and imposes massive and unnecessary costs on taxpayers without providing any countervailing benefit to public safety. It also imposes serious human costs on individuals and communities that run counter to basic principles of personal responsibility while increasing crime.

The R Street Institute is a Section 501(c)(3) nonprofit, nonpartisan, public-policy research organization ("think tank"). R Street's mission is to engage in policy research and outreach to promote free markets and limited, effective government. Recognizing that solutions to current public-policy challenges require practical responses, R Street takes a pragmatic approach to issues, offering research, analysis and expert recommendations that advance the goals of a more market-oriented society and more effective, efficient governments.

The R Street Institute believes firmly that evidence-based methods to reform current problems within the criminal justice system are essential to achieve a just and impactful system. More than 60 percent of those detained in jail have not been convicted of a crime. The combination of lost economic opportunities and negative influences prevalent in a jail environment often can serve to drive poor and deprived individuals back to crime once they re-enter society. In order to avoid time in jail and mitigate losses, many individuals forfeit any valid defense and instead plead guilty to their charges. This system undermines the American understanding of law and justice. R Street advocates for individualized risk-based pretrial assessments that make use of objective and locally

validated assessment tools as a way to replace pre-determined bail schedules. Hearing officers and judges should have all the necessary options available to ensure an individual's right to due process and, ultimately, to reduce crime.

No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting this brief.

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

"Innocent until proven guilty" is the foundation of the American criminal justice system. This principle has existed for millennia and is woven into the fabric of our Constitution. An essential corollary to this principle is the rule that an individual has a fundamental right to liberty before trial. A pending criminal charge does not give the State a license to deprive a person of freedom. This right to pretrial liberty has long been protected through bail, which historically would be determined

based on an individualized assessment of the person's ability to pay, potential flight risk, and threat to public safety.

Having learned from the long English experience with bail and its abuses, the Founders sought to secure these rights through several provisions of the Constitution. The Fifth Amendment provides that no person shall be deprived of liberty without due process, while the Fourteenth Amendment imposes the same requirement on the States and provides that everyone, be they rich or poor, shall receive the equal protection of the laws. Further underscoring the importance of pretrial liberty—and the risk that a bail requirement can be abused—the Eighth Amendment expressly prohibits excessive bail. Article 1 the Texas Constitution offers the same protection.

Importantly, when these fundamental constitutional protections were adopted, commercial surety bail did not exist. Thus, reasonable, non-excessive bail necessarily meant bail that an individual defendant could plausibly afford with his or her own resources—not an amount of which the average person could, at best, pay a fraction.

Harris County's bail system defies these core principles. At cattle-call hearings lasting little more than a minute, during which they typically are prevented from speaking in their own defense, individuals arrested on nonviolent misdemeanor charges almost invariably find themselves detained until trial because they cannot pay a predetermined bail amount that has been set without regard to their individual circumstances, risk to public safety, or ability to pay. And those predetermined bail amounts are set on the assumption that a commercial bail bondsman will guarantee the full amount, placing them well beyond the typical defendant's means.

A system that deprives individuals of liberty without a meaningful hearing and without regard to their personal circumstances is the very definition of a due process violation. A system that predicates a person's continued liberty on the ability to pay a fixed amount of money, regardless of ability to pay, contravenes the requirements of equal protection and non-excessive bail. The State may not jail a person solely because he has been arrested, and it may not jail him solely because he is poor. That he is both poor and arrested does not enhance the State's claim on his liberty. Worse, the upshot of this regime is that punishment—indeed,

often the only jail time that will be inflicted—occurs *before* trial and conviction, perverting the principle of presumed innocence that is the bedrock of our justice system.

Further, pretrial detention has distorting, coercive effects on the ultimate resolution of criminal charges. Many detainees will waive valid defenses and plead guilty because doing so is the only way to get *out* of jail. Even those pretrial detainees who make it to trial are more likely to be convicted and to receive longer sentences.

This system is not merely unconstitutional, but also hugely expensive. The taxpayers of Harris County are forced to spend $472,663.48 to house pretrial detainees every single day. Nationwide, the cost is staggering—$38 million per day. Studies suggest that even a modest change in the bail system, by which the people with the lowest bonds were released without bail instead of detained, would have saved Harris County $20 million over a five-year period. Reinvesting just some of these savings elsewhere in the criminal justice system—in indigent defense, in prosecutor's resources, in the courts themselves—would make it fairer and faster.

These deprivations of liberty, and the accompanying vast expenditures, have not made Harris County any safer. Studies show no correlation between releasing someone on a money bond and better pretrial performance. In fact, individuals released on personal bond were more likely to appear at subsequent court dates and less likely to commit additional crimes pending trial.

In addition to the monetary costs to taxpayers, the Harris County bail system imposes great human costs on the people in the Harris County community. Pretrial detention destabilizes and upends lives, stripping many otherwise-productive citizens of their jobs and connections to family and community. This effect is all the more insidious given that the vast majority of misdemeanor defendants will not be sentenced to imprisonment even *after* they are convicted. By that time, the damage has been done, with long-lasting effects. Studies show that the amount of time an individual is held pretrial correlates to a higher likelihood of committing crimes even years later.

There is a better way. Modest changes to Harris County's system, relying on risk-assessment tools already in place and based on evidence-

based and validated metrics—rather than rote application of a predetermined bail amount—would provide a constitutional and reliable way to guide who should be released and who should be detained.

ARGUMENT

I. Harris County's Bail System Violates Basic Constitutional Principles.

A. Drawing On Ancient Principles Of Individual Liberty, The Constitution Fundamentally Protects The Right To Pretrial Freedom.

The "presumption of innocence" is a "bedrock … principle whose enforcement lies at the foundation of" our American criminal justice system. *In re Winship*, 397 U.S. 358, 363 (1970) (citation omitted). The presumption stretches at least as far back as Ancient Roman times, and "is to be found in every code of law which has reason and religion and humanity for a foundation." *Coffin v. United States*, 156 U.S. 432, 465 (1895) (quoting *McKinley's Case* (1817) 33 State Tr. 275, 506).

This presumption dovetails with the principle that an individual has the right to pretrial liberty through a bail system governed by due process and administered evenhandedly. *See* TEX. CONST. art. I, § 11, Interpretive Commentary (2007) ("Bail functions as a complement to the Anglo-American presumption of innocence by permitting a person

charged with a criminal offense to regain his liberty with some assurance of his presence at the trial ….”). This idea likewise has deep roots in the common law. The Magna Carta provided for the fundamental right to pretrial liberty: “No free man shall be seized or imprisoned … except by the lawful judgment of his equals or by the law of the land.” Magna Carta c. 39 (1215). Thereafter, the 1275 Statute of Westminster listed the crimes for which bail must be made available. Statute of Westminster I 1275, 3 Edw. 3, c. 3, 15.

Following a period of abuses and controversial court decisions, the English strengthened the right to bail. *See* Petition of Right 1628, 3 Car. I, c. 1; Habeas Corpus Act of 1679, 31 Car. 2., c. 2. In particular, Parliament’s 1689 Declaration of Rights prohibited excessive bail. Bill of Rights 1689, 1 W. & M., c. 2. Whether bail was excessive turned on an individualized assessment of the defendant’s circumstances: “[I]t depends upon the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances.” *R. v. Bowes* (1787) 99 Eng. Rep. 1327, 1329 (K.B.).

These concepts—and the evils they were intended to thwart—were at the forefront of the Founders’ minds when drafting the Constitution

and the Bill of Rights soon after. Protections for pre-trial liberty therefore exist throughout our Nation's charter. The Fifth Amendment provides that no person shall be deprived of liberty "without due process of law." U.S. CONST. amend. V. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). That is no less true after a person has been arrested: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 750, 755 (1987) (holding that the Due Process Clause provides a fundamental right to pretrial liberty).

The Fourteenth Amendment applies these same protections against the States, and mandates the "equal protection of the laws" for rich and poor alike. U.S. CONST. amend. XIV, § 1. "[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (citation omitted). So too when a person's liberty depends on his ability to pay a state-mandated exaction. *E.g.*, *Tate v. Short,* 401 U.S. 395, 398 (1971) (State cannot convert a fine imposed under a fine-only statute into a jail

term solely because the defendant cannot immediately pay the fine in full); *Williams v. Illinois,* 399 U.S. 235, 240–41 (1970) (State cannot subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because they are too poor to pay a fine). Thus, "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc).

Further, just as Parliament prohibited "excessive" bail in 1689, the Founders prohibited it a century later via the Eighth Amendment, *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required."), and mandated in the Judiciary Act of 1789 that a person arrested for a non-capital offense shall be admitted to bail. *Stack v. Boyle*, 342 U.S. 1, 4–5 (1951). "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.*; *see Salerno*, 481 U.S. at 752–55. And the Texas Constitution similarly guarantees a right to bail and prohibits "[e]xcessive bail." TEX. CONST. art. 1, §§ 11, 13. The goal of

these overlapping guarantees is to ensure that "the power to require bail is not to be so used as to make it an instrument of oppression." *Id.* § 13 Interpretive Commentary (2007).

Importantly, when the People ratified these constitutional protections in 1791, 1868, and (in Texas) 1876, "bail" did not mean what it means today. Although the bail bondsman is an ever-present feature of the current criminal justice system—and was when Harris County drafted its bail schedules—he was utterly unknown to the Founding and Civil War generations. It was not until 1898 that the commercial bail bond business first took root in this country. *See* Lydia D. Johnson, *The Politics of the Bail System: What's the Price of Freedom?*, 17 ST. MARY'S L. REV. & SOC. JUST. 171, 178–79 (2015). Thus, for the first century of the Nation's existence, the constitutional right to non-"excessive" bail necessarily referred to a form of release that a defendant could obtain using his or her *own* resources. The idea of a predetermined bail schedule that demands sums of money be posted, of which a typical defendant could realistically pay no more than a small fraction, would be anathema to those who demanded and ratified these constitutional guarantees.

B. Harris County's Bail System Violates These Principles By Depriving People Of Liberty Without A Meaningful Hearing And Without Any Regard To Individual Circumstance.

Harris County's misdemeanor bail regime, as it has been administered and applied to the plaintiffs in this case and many others, violates these bedrock constitutional principles. That system is typified by a lack of process and driven almost solely by an individual's ability to buy his freedom.

1. The district court's extensive findings put on full display Harris County's desultory process at the probable cause/bail-setting hearing. An arrestee does not appear in person, instead viewing the hearing officer and the assistant district attorney via videolink. Up to 45 arrestees may be processed in a single, cattle-call "hearing." The hearings typically last just one to two minutes per person, during which time the assistant district attorney reads the charge and the hearing officer determines probable cause and sets bail. *ODonnell v. Harris Cty.,* No. 16-1414, 2017 WL 1735456, at *30 (S.D. Tex. Apr. 28, 2017). Arrestees almost never have counsel. *Id.* Should arrestees try to make cases for release on personal bond in that brief time, the hearing officer typically prevents them from doing so: "You're not going to be able to talk to me because I'm not letting

you talk, because I'm going by what I feel is best for the community." *Id.* at *34–35.

Videos show hearing officers stating summarily that they will deny personal bond "based on your priors," while infrequently making notes on the pretrial service form stating things such as "Criminal History," "Safety of Community," or just "Safety." *Id.* at *30. There is no real evidence that these processes—which cannot fairly be called hearings—involve any substantive determination of an individual's flight risk, risk to public safety, or ability to pay any particular bail amount. *See id.* at *30–44. That is hardly surprising, given the extraordinary brevity of the interactions. In short, "Hearing Officers and County Judges do not make individualized determinations of bail based on each defendant's circumstances, but instead consistently adhere to the predetermined bail schedule," based on a cursory look at an individual's criminal history. *See Id.* at *41.

Indeed, the district court's findings show that the hearing officers typically disregard risk assessments in favor of the predetermined schedules. *Id.* at *31–32. When pretrial services recommended a personal

bond based on an individualized risk assessment, hearing officers rejected those recommendations 66.3% of the time. *Id.* at *31. When pretrial services made no recommendation, hearing officers rejected personal bond 96.9% of the time. *Id.*

The upshot is that, in just a minute or two, a hearing officer will determine whether an arrestee will remain in jail for weeks or months pending trial—which may well cause a loss of employment and other personally catastrophic consequences, *see infra* Part III—without hearing from the arrestee and without considering his individual circumstances, including his ability to pay the predetermined bail amount.

2. As currently operated, this system violates individuals' pretrial right to liberty secured by due process. There is no substantive, individualized assessment of an arrestee's flight risk, potential danger to the community, or ability to pay. Instead, there is only a cursory hearing and the near-automatic application of predetermined schedules.

Under any due process rubric, either procedural or substantive, what Harris County does is not sufficient. There can be no doubt that the individual interest at stake—personal liberty—is paramount; that the risk of an erroneous deprivation under these cursory procedures is

extremely high; and that the governmental interests (costs and ease of administration) in the vast majority of cases pale in comparison. *See ODonnell*, 2017 WL 1735456, at *71; *see also Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *cf. Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (invalidating state law requiring proof of innocence to obtain refund of fines and costs paid pursuant to vacated conviction "because defendants' interest in regaining their funds is high, the risk of erroneous deprivation of those funds … is unacceptable, and the State has shown no countervailing interests in retaining the amounts in question"). Likewise, for all the reasons explained above, the right to a reasonable bail amount, based on the arrestee's individual circumstances and ability to pay, is as fundamental as any other right in our constitutional system. *See Salerno*, 481 U.S. at 751 (citation omitted) (the Due Process Clause bars states from adopting criminal-justice rules that offend a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *supra* pp. 8–13.

More basic still, by depriving people of liberty for reasons unrelated to flight risk or dangerousness, the Harris County system effectively imposes punishment before trial or conviction, turning the presumption of

innocence into a farce. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995) (citation omitted) ("a [pretrial] detainee 'may not be punished prior to an adjudication of guilt in accordance with due process of law'"); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979) ("arbitrary" restrictions on liberty constitute "punishment that may not constitutionally be inflicted upon [pretrial] detainees *qua* detainees"). This effect is all the more pernicious given that many defendants will ultimately be sentenced to time served or probation, meaning that the time they spend in jail *before* trial may well be the only imprisonment they experience—all because they cannot afford a predetermined bail charge. This "'sentence first, conviction after' system," *ODonnell*, 2017 WL 1735456, at *39, represents a complete abandonment of the constitutional principles discussed above, which are the cornerstone of our Democracy.

Further, pretrial detention distorts case outcomes by coercing defendants to plead guilty and impeding the preparation of a defense. As the district court explained, the "evidence shows that many [people] abandon valid defenses and plead guilty in order to be released from detention by accepting a sentence of time served before trial." *Id.* at *61. Even those arrestees who make it to trial fare worse: "Those detained

seven days following a bail-setting hearing are 25 percent more likely to be convicted, 43 percent more likely to be sentenced to jail, and, on average, have sentences twice as long as those released before trial." *Id.* Thus, the imposition of detention based solely on a defendant's financial situation—which has nothing to do with his guilt or innocence—can actually influence whether he will be convicted and what sentence he will serve.

By the same token, Harris County's misdemeanor bail system violates the Equal Protection Clause's mandate that criminal punishment not be inflicted based solely on wealth or indigency. *See supr*a p. 10. Given the unattainable amounts in the predetermined bail schedules, only those with money can afford to secure their freedom—even if they pose a higher risk to the community. Yet those who pose little-to-no risk remain in prison simply because they cannot afford the predetermined bail amount. *See ODonnell*, 2017 WL 1735456, at *41–44 (hearing officers use "secured bail" to "effectively order[ ] pretrial preventive detention … when, and because, the defendant is too poor to pay the amount of bail imposed"). That is precisely the sort of "imprisonment solely because of

indigent status" that this Court, sitting *en banc*, has condemned as "not constitutionally permissible." *Pugh*, 572 F.2d at 1056.

Finally, and for much the same reasons, the Harris County regime violates the right to a bail amount that is proportionate to the individual's circumstances and ability to pay. As explained above, that right predates and cannot be altered by the current system of secured bail. *See supra* p. 12. Yet "Harris County has a consistent and systematic policy and practice of imposing secured money bail as de facto orders of pretrial detention in misdemeanor cases." *ODonnell*, 2017 WL 1735456, at *3. That practice cannot be squared with the historical understanding of non-excessive bail as reflecting an amount the arrestee can realistically pay himself.

II. Setting Bail Without Regard To Indigency Imposes Significant Costs On Taxpayers Without Offering Any Societal Benefits.

Harris County's inflexible reliance on fixed bail amounts is not merely unconstitutional, but hugely expensive, and without offering any countervailing benefit to the taxpayers.

In a 2015 study, Harris County jails had an average daily population of 9,041. Vera Inst. of Just., *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration* 28 (2015), https://goo.gl/1JApvj. The cost to house that population was $472,663.48 *per day*, or $52.28 per day for every single inmate. *Id.* at 29. A separate study estimated that, if Harris County had released just those held on the lowest bond, $500, from 2008 to 2013, it would have saved the county $20 million dollars. *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 787 (2017).

The numbers nationwide are even more staggering. Arrestees held while awaiting trial amounted to 95% of the growth of the jail population from 2000 to 2014. *See* U.S. Senators Kamala Harris and Rand Paul, *To Shrink Jails, Let's Reform Bail*, N.Y. TIMES (July 20, 2017), https://goo.gl/AXUncy. It now costs Americans approximately $38 million every day to jail defendants awaiting trial, totaling $14 billion per year. *Id.*

These significant taxpayer-funded outlays carry real opportunity costs. Even as Harris County has poured money into housing pretrial detainees, the District Attorney's office laid off 37 prosecutors at the end

of 2016. Brian Rogers, *Shake-Up at the Courthouse: Incoming DA Ogg Hands Pink Slips to 37 Top Prosecutors*, HOUS. CHRON. (Dec. 16, 2016), https://goo.gl/hzsfcQ. Meanwhile, a recent state audit found that Harris County's system for providing indigent defense continues to be "creaky and overburdened," in which "private attorneys have little incentive to provide a vigorous defense, since accepting a plea deal is the fastest way to clear a case and collect a fee." Lydia DePillis, *Harris County's System for Defending the Poor is Still Woefully Inadequate, State Audit Finds*, HOUS. CHRON. (Oct. 16, 2016), https://goo.gl/XosQBv. Diverting just some of the potential savings from pretrial detention to other areas of the criminal justice system would make the entire system work more quickly and more fairly, including by eliminating the backlogs in processing cases, which would shorten the period necessary to monitor an arrestee prior to trial (further reducing costs).

Even as it imposes these costs on the taxpayers, however, Harris County's devotion to predetermined secured-money bail offers scant benefits to the public. Under Texas law (which echoes federal law in this respect), bail should be set at a sufficient level to, inter alia, "give reason-

able assurance that the undertaking will be complied with" and considering "[t]he future safety of a victim of the alleged offense and the community." TEX. CODE CRIM. PROC. ANN. art. 17.15; *see also Salerno*, 481 U.S. at 742 (under the Bail Reform Act of 1984, bail should be denied only when no "combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community"). Harris County's system, by setting bail only by reference to criminal history and a predetermined amount on a bail schedule, serves neither of these ends.

On its face, a fixed, predetermined dollar amount is untethered from either individual flight risk or dangerousness to the community. Nor is there any empirical basis to believe that secured money bail, for those on misdemeanor offenses, has any positive effect on pretrial behavior. Instead, empirical evidence has suggested quite the opposite. The Pretrial Justice Institute conducted a study of 1,970 defendants in Colorado to determine the extent to which secured bonds correlate with better pretrial outcomes than unsecured bonds. Michael R. Jones, Pretrial Just. Inst., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 6 (2013), https://goo.gl/JTYU5m. When adjusted for risk

level (as determined by a risk-assessment tool), the study showed no higher likelihood of court appearance from those on secured bonds versus those on unsecured bonds. *Id.* at 11. Indeed, those on unsecured bonds returned to court at a slightly higher rate.

Likewise, the Colorado study showed no difference in future criminal activity between those released on unsecured bonds versus those released on secured bonds. *Id.* at 10. Again, the criminal activity rate of those on unsecured bond was slightly lower.

A better system, one that would actually keep the community safe, would rely on risk assessment tools rather than bank accounts and arbitrary schedules to determine who secures pretrial release. Harris County already has proposed such reforms. The Arnold Tool is a nationally validated risk assessment methodology that relies on nine risk indicators. *See ODonnell*, 2017 WL 1735456, at *55–56. Nearly all concern past failure to return, past criminal history, and the severity of the current charge. The Arnold Tool does not rely on poverty indicators in making risk assessments, because those variables do not significantly correlate with failure to appear rates or new criminal activity. *Id.*

These tools are meaningless, however, if hearing officers continue to disregard pretrial service recommendations in favor of the predetermined bail schedules. The existing system favors those least deserving of release but who are able to pay, while forcing those who pose virtually no risk to the community to languish in jail simply because they lack the resources to pay the bondsman.

III. Harris County's Bail Scheme Strips People Of Jobs And Connections To Family And Community, Making Them More Likely To Commit Crimes In The Future.

Finally, Harris County's bail system creates dire consequences for individuals caught in its grasp and for the employers, families, and communities that depend on those people. These costs are harder to quantify than the costs to taxpayers, but they are in many ways more detrimental to the community.

Plaintiff Maranda Lynn ODonnell is a case in point. A 22-year-old single mother, she had just started a new job seven days before being arrested for driving with an invalid license. *Id.* at *5. Any unexpected time away from a job, particularly a new job, puts her employment in jeopardy. Yet she could not afford the $2500 bond to secure her release, and was therefore detained. A loss of gainful employment would deprive

her of the ability to support herself and her child—all because she could not afford the bail amount in the first place.

Likewise, D.M. was the sole earner in a household in which his fiancée was pregnant. *Id.* at *33–34. D.M. was arrested for marijuana possession and, after the hearing officer wrongly calculated his prior felonies, set D.M.'s bond at $5000. The hearing officer was unmoved by D.M.'s explanation of his personal situation, or the fact that D.M. had never missed a court date. Again, pretrial detention prevents D.M. from working productively to support himself and his family.

A.G. was due to finish his exams to become a medical professional when he was arrested for improperly wielding a knife. *Id.* at *34. Although the hearing officer repeatedly refused to let A.G. speak, A.G. finally was able to explain his situation and that his only prior offense was a 25-year-old matter in Florida. The hearing officer nonetheless set A.G.'s bond at $2500 and told the assistant district attorney that it "makes me feel better" that A.G. would remain in detention.

Likewise, Bryan Sweeney was an accounting major at Texas Southern University when he was arrested on two misdemeanor charges, including driving with a suspended license. Juan A. Lozano, *Bail Practices*

in Texas' Biggest County Under Scrutiny, SEATTLE TIMES (Oct. 9, 2016), https://goo.gl/Pcuu8T. He served several days in Harris County jail because he could not afford the $10,000 bail. As a result, he missed his class registration and could not graduate that summer. Thus, for both A.G. and Mr. Sweeney, pretrial detention derailed their educations. As the district court pointed out, these are not exceptions to the rule, but rather examples of how the rule operates to destroy lives with no corresponding benefits to the County and in complete derogation of fundamental Constitutional principles.

All of these people were, despite challenging personal circumstances and in some cases prior run-ins with the law, pursuing gainful employment or attempting to better themselves through education. A sensible criminal justice system should encourage people to take personal responsibility, as these individuals were trying to do. It should not upend their lives because they cannot afford to pay the bail bondsman.

Sometimes, the consequences of time unnecessarily spent in jail are even more serious. Fifty-five people died while awaiting trial in Harris County between 2009 and 2015. James Pinkerton & Lauren Caruba, *Tough Bail Policies Punish the Poor and the Sick, Critics Say*, HOUS.

CHRON. (Dec. 26, 2015) https://goo.gl/nyiJWw. Sandra Oliver, a 39-year-old who died from a pulmonary embolism, had been arrested for trespassing but could not afford the $5000 bond.

These are not just statistics. They are parents, siblings, children, friends. Their families and livelihoods were upset because of an unconstitutional system that favored money over even-handed justice. And these consequences affect the larger community as well. Harris County's bail scheme deprives the local economy of many individuals who would otherwise be productive members of society. Detaining even nonviolent misdemeanor arrestees simply because they cannot afford bail deprives small business owners of their Sunday delivery driver, their opening-shift manager, or their mechanic.

There are longer-term consequences for the community as well. Holding low-risk people in jail for more than 24 hours before trial makes them more likely to commit crimes in the future, even years later. A 2013 study of 66,014 cases showed that even small increases in the amount of detention time correlated significantly to worse pretrial outcomes. Laura & John Arnold Foundation, *Pretrial Criminal Justice Research Brief* 4 (2013), https://goo.gl/YXjhNj. Low-risk defendants held for two to three

days were 40 percent more likely to commit new crimes before trial than those with no more than 24 hours. *Id.* For low-risk defendants detained for 31 days or more, they were 74 percent more likely to commit new crimes before trial. *Id.*

The detentions had effects years later. Low-risk defendants held for two to three days were 17 percent more likely to commit a crime within two years than those released within 24 hours. *Id.* at 5. If held for four to seven days, the number jumps to 35 percent. *Id.* And for defendants held eight to 14 days, they are 51 percent more likely to commit crimes within two years than those released within 24 hours. *Id.*

Harris County's bail system makes the community weaker by depriving its individual citizens of community ties and the means to support themselves and by increasing the likelihood of future criminal activity. Targeted modifications to the existing system, by properly accounting for individual circumstances, would offer dramatic improvements without increasing either cost or risk. Without such changes, a profoundly unconstitutional and inefficient system will continue to violate core principles of liberty, at great cost to Harris County's residents. This should not be tolerated.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Dated: August 9, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because it contains 5,505 words, excluding the material exempted by Fed. R. App. P. 32(a)(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2017, I caused the foregoing brief to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. Additionally, copies of the foregoing brief were sent via U.S. mail to the following counsel:

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