No. 17-20333

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARANDA LYNN ODONNELL; ROBERT RYAN FORD; LOETHA SHANTA MCGRUDER,
Plaintiffs-Appellees,

v.

HARRIS COUNTY, TEXAS, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas,
Case No. 4:16-cv-001414

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The following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that members of the Court may evaluate possible recusal.

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August 2, 2017

STATEMENT REGARDING ORAL ARGUMENT

On June 27, 2017, this Court granted the parties' joint motion to schedule oral argument at the next available sitting. On August 1, this Court tentatively scheduled argument for the week of October 2, 2017.

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INTRODUCTION

"In our society, liberty is the norm and detention prior to trial … is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Harris County, Texas, however, detains over 40% of all misdemeanor arrestees before trial for the entire duration of their cases. ROA.5555, 5651. Forty percent cannot be regarded as an "exception," let alone a "carefully limited" one.

Harris County detains so many misdemeanor arrestees because pretrial liberty there depends on access to money. As the district court found after reviewing massive amounts of evidence and conducting an eight-day evidentiary hearing, the county imprisons misdemeanor arrestees before trial if they cannot pay secured bail amounts, without any individualized consideration of ability to pay or whether alternative conditions of release would serve the government's purposes. ROA.5679-5682. This factual finding is essentially undisputed and, in any event, unassailable.

Applying established due process and equal protection precedent to the facts it found, the district court held that the county's wealth-based bail practices are unconstitutional. It concluded that, if the government conditions release from jail on an amount of money that an individual cannot pay, then it has imposed a de facto order of pretrial detention. Denying liberty in this way to those who are presumed innocent, the court ruled correctly, is permissible only if the government

(1) shows that non-financial conditions could not serve its purposes, and (2) provides procedures adequate to protect against the erroneous deprivation of arrestees' liberty.

Nothing in this ruling creates a "right to affordable bail," as appellants assert, or requires that anyone be released from jail as a matter of federal constitutional law. Requiring secured money bail that a person cannot pay may be constitutional—but the government must demonstrate good reasons for doing so, and it must follow appropriate procedures. Harris County does neither.

Having found the county was committing 20,000 constitutional violations each year, ROA.5555-5556, 5714 n.99, the district court exercised its broad equitable power to craft an injunction that would remedy these violations and prevent future ones. In so doing, the court recognized and considered the county's interests, its existing legal obligations, and its proposed improvements. And it also recognized and considered the grave costs caused by the county's bail practices—lost jobs, housing, medical care, family relationships, and educational opportunities, as well as the coerced guilty pleas by those unable to shoulder those burdens. *See, e.g.*, ROA.5666. The court additionally found that the county's bail practices result in thousands of additional crimes. ROA.5665. All of these findings are, again, largely unchallenged and manifestly correct.

The district court's judgment and injunction should be affirmed.

ISSUES PRESENTED

1. Whether any of the district court's challenged legal rulings is erroneous.

2. Whether there was any threshold barrier to the district court reaching the merits of plaintiffs' claims.

3. Whether the district court abused its discretion in crafting its injunction.

STATEMENT

A. The Named Plaintiffs

Maranda ODonnell, Loetha McGruder, and Robert Ryan Ford were arrested in Harris County for misdemeanor offenses. Shortly after arrest, they were each informed by law enforcement that they were eligible for immediate release, but that they would be released only if they paid a predetermined amount of money required by local rules.

Each plaintiff subsequently had a hearing, broadcast by video from the jail to the courthouse, that lasted about one minute. A hearing officer made findings of probable cause for each and confirmed the predetermined monetary amounts affixed at arrest. ROA.5563-5565. (The three bail-hearing videos are part of Exhibits 8(c)(i)-(iii), which were filed under seal and are available on a hard drive filed with the district court clerk.) There was no inquiry into their ability to pay

and no consideration of alternative release conditions. Because they could not afford to purchase release, they were kept in jail. *Id.*

The morning after her video hearing, and three days after her arrest, Ms. ODonnell was brought to court. She was found indigent, appointed an attorney, told that her secured money bail had been posted by a stranger, and released that afternoon. She later learned that it was an insurance underwriter for the bail industry who—shortly after this action was filed on the day following her arrest—paid her bail in an apparent attempt to moot her claim. ROA.5563-5564.

Ms. McGruder, who was pregnant at the time, spent 3½ days in custody before being brought to court. While in the holding cell she was appointed a lawyer and agreed to plead guilty to get out of jail. Before finalizing the plea, however, she met a pro bono attorney who obtained her release on unsecured bond, i.e., without any upfront payment. Ms. McGruder abandoned her intention to plead guilty and left jail that night. ROA.5565-5566.

Mr. Ford was brought to court after more than four days in custody. He pled guilty and was sentenced to five days in jail with credit for time served since arrest. He was released shortly after midnight that night. ROA.5564-5565.

B. Harris County's Post-Arrest Process

Harris County's sixteen Criminal Court at Law Judges promulgate rules governing the post-arrest process ("the Rules"). ROA.6545-6546, 5605. The

Rules establish a predetermined money-bail schedule that applies to all misdemeanor arrests in the county. ROA.5604, 5607-5608. By custom and practice, that schedule is interpreted to require secured bail. ROA.5731-5732. Secured bail means that an arrestee must pay upfront—using her own money, money from friends or family, or money posted by a private bail company for a 10% non-refundable fee—in order to be released.

1. Arrest. When a person is arrested by warrant, the predetermined secured bail amount is written on the warrant. ROA.5614, 7717. For a warrantless arrest, the scheduled amount is typically imposed within hours of arrest. ROA.5608. Arrestees with access to money can pay and be released more or less immediately; those who cannot pay are booked into jail. ROA.5614.

During the booking process, Pretrial Services interviews most misdemeanor arrestees, ROA.5612, and recommends pretrial detention or release. ROA.5610-5612. Pretrial Services has an "unwritten custom" of never recommending release without payment for people who are homeless. ROA.5714, 5642 n.56.

2. Appearance Before A Hearing Officer. Texas law and local rules require that warrantless-misdemeanor arrestees appear before a hearing officer within 24 hours of arrest. ROA.5611. In about one-fifth of cases, however—thousands every year—arrestees wait longer than that. ROA.5647-5648. The hearing officers determine the existence of probable cause and set bail. ROA.5606.

The district court found that Harris County hearing officers do not give individualized consideration to release conditions (including the possibility of non-financial ones), but instead confirm the predetermined amount in 90% of cases. ROA.5640. Indeed, when amounts are adjusted, it is often to ensure that prehearing amounts imposed by the district attorney conform to the schedule. ROA.5680. Although hearing officers occasionally permit release on "personal bonds," i.e., unsecured bonds—meaning the arrestee is released without paying anything but owes the full amount if she fails to appear, ROA.5602-5603—those determinations are based on considerations other than ability to pay, as the hearing officers make no inquiry into that issue. ROA.5621-5623, 5680; Exhibits 2(c) & 3(a) (also available on the hard drive). (Pretrial Services' website includes a "Frequently Asked Question" asking why more arrestees are not released without requiring upfront payment—to which the agency's answer is, "Good question!" ROA.5620.) And even when personal bonds are granted, the arrestee will remain in jail, pursuant to county policy, unless Pretrial Services verifies her references or she pays the secured bail amount. (For years the county required two independent references. Three months after this lawsuit was filed, the judges changed that requirement to one reference. ROA.5609, 11195.) In 2015 and 2016, nearly 1,500 people were detained throughout their case under these circumstances, i.e., despite being granted an unsecured bond by a hearing officer. ROA.5619 n.35.

The record evidence establishing these factual findings included hundreds of thousands of Harris County case records, two years of data, expert analysis of county bail settings, and thousands of video-recorded bail hearings. The videos (also available on the hard drive) show hearing officers:

1) Not articulating any legal standards or findings or permitting any evidence or argument—including from the arrestee—on the issue of release versus detention, ROA.4713, 5616-5617, 5719-5721;

2) Refusing unsecured release "based on the judges' bail schedule," ROA.4719;

3) Requiring secured financial conditions when arrestees state that they cannot pay, or are charged with crimes of poverty, such as "begging for money" or sleeping at a car wash, ROA.4714-4715;

4) Refusing to release homeless people on non-financial conditions, ROA.4715-4716 (e.g., Kaitlin H.: "You indicated to pretrial that you were living in a car, so I'm not gonna be able to consider you for a personal bond."; Laura P.: "A personal bond is where you have a place to stay.");

5) Stating (incorrectly under Texas law) that certain categories of arrestees "do not qualify" for release on unsecured conditions, ROA.4716, 4720-4723; and

6) Requiring secured financial conditions punitively, including raising secured bail amounts because an arrestee said "yeah" instead of "yes," ROA.4724-4725.

3. Arraignment. After the initial hearing, "[t]he next step in the process is … arraignment, referred to as the 'first appearance setting[.]'" ROA.5606. Arraignment usually occurs the next business day after the video hearing. ROA.5649-5650, 7121. Thus, even when the process works as planned, people

arrested mid-to-late week stay in jail for 72-96 hours after arrest before being arraigned. Indeed, that occurs frequently: Between January 1, 2015, and January 31, 2017, over half of the 52,000-plus people who were continuously detained between arrest and arraignment spent more than 48 hours in jail before arraignment. About half of those (13,000 people) waited 72 hours or longer, and about half of this latter group (7,000 people) waited over 96 hours. ROA.5649-5650, 9792, 9070.

The district court found that the predetermined secured bail amounts are typically not reviewed at arraignment, ROA.5629-5630, 5634-5635, rejecting appellants' contention that arraignment provides arrestees an opportunity to make legal or factual arguments about matters including bail, ROA.5616-5617. This is due largely to an unwritten custom of not bringing arrestees into the courtroom from the holding cell unless they agree to plead guilty. ROA.5629. Six months after this lawsuit was filed, the judges voted to require a bail review at arraignment. ROA.5629, 4009-4010. But some judges refuse to comply, ROA.5630, and the district court found "no basis" to conclude that the rule change "has altered or will alter these practices." ROA.5635. Overall, judges changed the predetermined secured bail amount, or approved unsecured bonds at some point in a case, in fewer than 1% of misdemeanor cases. ROA.5681.

C. Procedural History

Plaintiffs filed this action in May 2016 and filed an amended complaint several months later. After largely denying defendants' motions to dismiss, the district court held an eight-day evidentiary hearing on plaintiffs' motion for a preliminary injunction. As part of that hearing, the parties submitted thousands of documents—including public records, expert statistical analysis, academic studies, and government reports—along with thousands of hours of video evidence and live testimony from thirteen witnesses, including four experts.

Having received all this evidence, the court issued a 193-page decision setting forth findings of fact and conclusions of law. It found that Harris County hearing officers and judges do not "make individualized adjustments to the scheduled bail amount [or] assess nonfinancial conditions of release based on each defendant's circumstances, including inability to pay." ROA.5680; *see also* ROA.5622-5623, 5626-5627, 5634, 5640. They deny release on unsecured bond even "in a high majority of cases in which … Pretrial Services recommends [such] release … based on a validated risk-assessment tool." ROA.5680; *accord* ROA.5618-5619. The officers and judges do this, the court found, "despite their knowledge of, or deliberate indifference to, a misdemeanor defendant's inability to pay [secured] bail … and the fact that secured money bail functions as a pretrial detention order." ROA.5680.

Putting these and other facts together, the district court found "that Harris County has a custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases." ROA.5682. Those who can pay "are promptly released," while those "who cannot afford to do so are detained." *Id.* This custom and practice results in the pretrial detention of 40% of all misdemeanor arrestees in Harris County for the entire duration of their cases. ROA.5651.

The court further found that these practices harm arrestees not only in the short term—by depriving them of liberty before trial, which often costs them employment, housing and shelter, medical care, personal and familial relationships, and so on—but also in the longer term, because the likelihood of being convicted in Harris County depends significantly on whether the arrestee is free or detained at disposition. ROA.5636-5637. In 2015 and 2016, 84% of misdemeanor arrestees detained at disposition in Harris County pled guilty. By contrast, a majority of those not detained at disposition avoided conviction altogether. *Id.*

This variation in likelihood of conviction, the court found, is based only partly on the defendant's ability to mount a better trial defense from outside prison. Additionally, the court found that indigent misdemeanor arrestees who are detained frequently give up before trial. Facing "intense pressure to accept a guilty plea to end their pretrial detentions," ROA.5669, they often "abandon valid defenses and

plead guilty … accepting a sentence of time served," ROA.5681; *accord* ROA.5726. Arrestees unable to secure pretrial release in misdemeanor cases plead guilty a median of 3.2 days after arrest, ROA.5636, while the median duration from arrest to resolution for those who obtain release is 112 days, ROA.9794, 5636. Perhaps unsurprisingly, the court also found that Harris County leads the nation in exonerations, due in large part to erroneous guilty pleas to misdemeanor drug charges by individuals seeking to end their pretrial detention and unwilling or unable to wait for lab tests that would prove their innocence. ROA.5636.

This automatic use of secured bail, the court further found, "does not meaningfully add to assuring misdemeanor defendants' appearance at hearings or absence of new criminal activity during pretrial release." ROA.5661-5662. (Nonappearance and commission of new crime are together referred to as the "pretrial failure rate.") Indeed, the court stated, "the credible, reliable evidence in the present record" established that (1) Harris County has not shown any basis to conclude that secured bail conditions are superior to unsecured ones, and (2) "those released on personal bond have substantially similar—or even somewhat better—pretrial failure rates as those released on surety bonds." *Id.* Appellants' contrary assumption—that "imposing secured money bail at the scheduled amount will

induce better pretrial behavior"—has, the court found, "no basis in evidence or experience." ROA.5645.[1]

Based on these and other factual findings, the court ruled that a preliminary injunction was warranted because plaintiffs were likely to succeed on their claims that Harris County's pretrial, wealth-based release and detention practices for misdemeanor arrestees violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court also granted plaintiffs' motion for class certification and denied defendants' motion for partial summary judgment.

More specifically, the court ruled that, under the Equal Protection Clause, "pretrial detention of indigent defendants who cannot pay a financial condition of release is permissible only if … no less restrictive alternative can reasonably meet the government's compelling interest" in reasonably assuring arrestees' appearance at trial. ROA.5696. The county's practices violate this mandate, the court held; rather than inquiring into individuals' ability to pay and assessing the feasibility of alternative release conditions, hearing officers (with the judges' blessing) "almost automatically set secured money bail at unpayable amounts," and thus "use secured money bail as de facto pretrial detention orders," ROA.5713-5714. Under the Due Process Clause, the court ruled that adequate procedural safeguards were

[1] Based on expert and other evidence in the record, the court concluded that its factual findings were "consistent with recent empirical work in other jurisdictions." ROA.5662.

required to ensure that indigent misdemeanor arrestees were not erroneously deprived of their pretrial liberty, and further concluded that the county did not provide most of those safeguards. ROA.5705-5706, 5718-5719.

Having made these findings and conclusions, the court crafted a preliminary injunction to cure the tens of thousands of constitutional violations, while minimizing the intrusion into local government. ROA.5739-5740. The injunction was informed by the extensive post-hearing briefing the court had sought, including argument concerning the proper scope of any relief. ROA.8935-8936, 5038-5047, 4390-4391, 4793-4800. As part of ensuring compliance with the equal protection and due process mandates articulated above, the injunction requires Pretrial Services to inquire into a misdemeanor arrestee's ability to pay any financial condition of release. It also requires the sheriff to offer release to an arrestee on an equivalent amount of unsecured bail if the predetermined bail schedule or hearing officer requires a secured bail condition beyond her ability to pay. ROA.5763.

SUMMARY OF ARGUMENT

1. The district court's central conclusion—that Harris County's wealth-based bail practices cause 20,000 constitutional violations each year—is compelled by precedent and its unimpeachable factual findings. These violations are both substantive and procedural.

a. Substantively, this Court, sitting en banc, has held that the government may not require secured financial bail conditions that detain solely due to indigence, unless it demonstrates that non-financial conditions would not reasonably assure the accused's appearance at trial. *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). The Supreme Court has similarly applied heightened scrutiny to pretrial detention orders because of the "fundamental" interest in pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 749, 750 (1987). The district court's conclusion that these cases apply here rested on its undisputed factual finding that Harris County's bail practices are not individualized. The county has a custom of requiring predetermined secured bail amounts without inquiring into ability to pay or assessing whether non-financial conditions would serve the government's purposes. In other words, even when a secured bail order exceeds the accused's ability to pay—thus triggering constitutional scrutiny as a de facto pretrial detention order—judges and hearing officers do not consider (let alone answer) the questions the Constitution requires.

Most of appellants' responses are foreclosed by Supreme Court and Fifth Circuit precedent. This includes their lead contention that plaintiffs' constitutional theories could only be raised under the Eighth Amendment. Moreover, appellants present many arguments that would not warrant reversal even if correct. For example, appellants attack at length plaintiffs' theory that wealth-based detention

triggers heightened scrutiny. But even if all of their arguments had merit, heightened scrutiny would still be warranted under plaintiffs' independent theory that de facto pretrial detention orders are subject to strict scrutiny. Similarly, by failing to challenge the district court's dispositive factual finding—the lack of individualized inquiry and findings prior to wealth-based pretrial detention—appellants render irrelevant their passing attacks on other findings.

b. Procedurally, the Constitution requires certain protections to guard against the erroneous deprivation of substantive rights. Applying the Supreme Court's traditional balancing framework here, those protections include adequate notice to misdemeanor arrestees that their financial information will be a critical issue in determining release conditions, and a meaningful hearing before an impartial decisionmaker who makes written findings pursuant to applicable legal standards, if the government decides to impose a condition of release that will result in detention because of indigence. Appellants fail to show why the district court erred in holding that these minimal protections are required before departing from the "norm" of liberty before trial. *Salerno*, 481 U.S. at 755.

2. Appellants also raise a series of threshold procedural objections. None has merit.

Younger abstention is not warranted in light of the Supreme Court's holding that challenges to post-arrest detention practices cannot be vindicated through the

ordinary criminal process. That is especially true here, where appellants concede that the initial hearing is not an adequate opportunity to raise a challenge to post-arrest, wealth-based detention. Later hearings or trial could not provide an adequate opportunity to challenge constitutional violations already suffered, especially when misdemeanor arrestees face overwhelming pressure to plead guilty to end their unlawful jail terms.

Appellants' next contention—that plaintiffs were required to bring a habeas action and not one under 42 U.S.C. §1983—fundamentally misunderstands plaintiffs' claim. Habeas is required only when the relief sought would *necessarily* result in release from confinement. That is not true here. Under the district court's ruling, unaffordable bail conditions are permissible so long as they satisfy heightened scrutiny and are accompanied by basic procedural protections. Notwithstanding appellants' mantra-like repetition of the phrase, plaintiffs' claim is simply not a "right to affordable bail."

Finally, Harris County is liable under section 1983 on two independent grounds. The county judges are county policymakers who have acquiesced in the unconstitutional bail practices challenged here. And the sheriff's choice as final county policymaker to enforce secured bail orders he knows are unconstitutional is attributable to the county. Appellants' contrary arguments rest on misconceptions of Texas law and practice.

3. Regarding the preliminary injunction, appellants do not meaningfully engage with the critical question: whether the district court abused its discretion in issuing a preliminary injunction given plaintiffs' likelihood of success on the merits, their undisputed irreparable injury, the public interest in remedying 20,000 constitutional violations each year, and the district court's close consideration of the county's alleged harms based on detailed factual findings. There is no serious argument that, under these circumstances, the issuance of a preliminary injunction was an abuse of the court's broad equitable discretion.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT HARRIS COUNTY'S WEALTH-BASED BAIL PRACTICES VIOLATE BOTH SUBSTANTIVE AND PROCEDURAL CONSTITUTIONAL RIGHTS

Plaintiffs' constitutional claims have "both substantive and procedural aspects." *Washington v. Harper*, 494 U.S. 210, 220 (1990). Substantively, there are two rights at issue: one against wealth-based incarceration, arising under both equal protection and due process, and one against the deprivation of pretrial liberty, arising under due process alone. These substantive rights cannot be overcome unless the government satisfies heightened scrutiny—here, by showing that no alternative to secured money bail would serve the government's interest in reasonably assuring the accused's appearance at trial. And procedurally, due process guarantees "protections … necessary to ensure that" any deprivation of a

substantive right is "neither arbitrary nor erroneous under the [aforementioned] standards." *Id.* at 228.

The district court's exhaustive factual findings lead inexorably to its conclusion that Harris County's wealth-based bail practices violate both the substantive and procedural rights of misdemeanor arrestees. Appellants' contrary arguments are meritless.

A. Harris County's Wealth-Based Bail Practices Violate Plaintiffs' Substantive Constitutional Rights

1. The substantive right against wealth-based detention is well-established

The constitutional principle at issue here is straightforward: A person may not be "subjected to imprisonment solely because of his indigency." *Tate v. Short*, 401 U.S. 395, 397-398 (1971). This principle has thrice led the Supreme Court to strike down state and local practices imprisoning indigent individuals solely due to their inability to pay a fine—in *Tate*, *Williams v. Illinois*, 399 U.S. 235 (1970), and *Bearden v. Georgia*, 461 U.S. 660 (1983). In the last of these cases, the Court reiterated the core principle on which this substantive right rests, namely the "impermissibility of imprisoning a defendant solely because of his lack of financial resources." *Id.* at 661.

The Court has explained that these cases are exceptional because they "reflect both equal protection and due process concerns." *M.L.B. v. S.L.J.*, 519

U.S. 102, 120 (1996). As a result, the Court has cautioned against attempts to resolve similar cases "by resort to easy slogans or pigeonhole analysis." *Bearden*, 461 U.S. at 666. For example, such cases are not limited by the ordinary equal protection rule excluding disparate-impact liability. *See M.L.B.*, 519 U.S. at 125-127 (distinguishing *Washington v. Davis*, 426 U.S. 229 (1976), on the ground that "[s]anctions of the *Williams* genre … are wholly contingent on one's ability to pay and thus … apply to all indigents and do not reach anyone outside that class"); *see also Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (striking down a scheme in which "[t]hose with means avoid imprisonment [while] the indigent cannot escape imprisonment"). Similarly, when the Supreme Court held that poverty is not a suspect class, it exempted this line of cases because they involved an "absolute deprivation" of a benefit due solely to indigence. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20-21 (1973); *accord Barnett v. Hopper*, 548 F.2d 550, 553 (5th Cir. 1977) (when "the sole distinction is one of wealth," "the procedure is invalid"), *vacated on other grounds*, 439 U.S. 1041 (1978).

This Court, sitting en banc, has applied the Supreme Court's ban on wealth-based detention to the bail context. In resolving a challenge brought by indigent arrestees to Florida's bail system, this Court cited *Tate* and *Williams* in affirming "the principle that 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). Although the Court ultimately rejected plaintiffs' *facial* attack, because "[m]oney bail … may not be the most burdensome requirement in all cases," *id.* at 1057, it had "no doubt" about the propriety of applying the *Williams-Tate-Bearden* principle "in the case of an indigent [suffering] pretrial confinement for inability to post money bail," *id.* at 1058. In fact, the Court observed that the principle has "broader effects and constitutional implications" in the pretrial context than with post-conviction fines because it implicates a "deprivation of liberty" of those "accused but not convicted." *Id.* at 1056.

As the district court recognized, *Pugh* and the Supreme Court's cases do not mean that secured bail that exceeds the accused's ability to pay—and thus incarcerates her—is invariably unconstitutional. But such a bail order *is* subject to heightened scrutiny. The Court in *Bearden*, for example, in examining the constitutionality of revoking probation due to inability to pay a fine, made "careful inquiry" into the state's professed "interests" and "the existence of alternative means for effectuating" those interests. 461 U.S. at 666-667. That is not the language of rational-basis review.

Pugh, in fact, explained what heightened scrutiny entails in the context of a bail challenge like this one: an individualized finding that secured money bail "is necessary to reasonably assure defendant's presence at trial." 572 F.2d at 1057.

Accordingly, if the government's interest in "appearance at trial could reasonably be assured by … alternate [conditions] of release, pretrial confinement for inability to post money bail" is unconstitutional. *Id.* at 1058. Put another way, the Constitution demands "meaningful consideration of … alternatives" to "incarceration of those who cannot" pay a financial condition of release. *Id.*[2]

2. The Supreme Court in *Salerno* recognized the substantive due process right against restrictions on pretrial liberty

In addition to the substantive constitutional right not to be automatically detained due to indigence, this case implicates (as plaintiffs argued below, ROA.9367, 3439, 67 n.9) the substantive right to pretrial liberty.

Because the "interest in liberty" is "fundamental," it is a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *United States v. Salerno*, 481 U.S. 739, 749, 750 (1987). The Supreme Court accordingly applied the Due Process Clause to the 1984 Bail Reform Act's provisions permitting pretrial detention under certain circumstances. *Id.* at 746-751. The same analysis is required here, as "the setting

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[2] *Pugh* does not address whether strict or intermediate scrutiny applies in this context. But *Frazier*, which remains binding, explicitly applied strict scrutiny, 457 F.2d at 728, consistent with *Bearden*'s later rejection of a challenged practice because the government's interest could "often be served by alternative means," 461 U.S. at 671-672. In any event, this Court need not resolve what scrutiny applies if it agrees with the district court that the challenged practices flunk intermediate scrutiny, or if it affirms on substantive due process grounds, where strict scrutiny unquestionably applies. *See infra* p.22.

of bond unreachable because of its amount would be tantamount to setting no conditions at all." *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969); *accord United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam).

Like all rights, of course, the right to pretrial liberty can yield to compelling interests if the government makes the requisite showing—as in *Salerno*, which upheld the 1984 Bail Reform Act against a facial challenge. 481 U.S. at 746-751. But the government must satisfy strict scrutiny. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-781 (9th Cir. 2014) (en banc) (compiling "Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest," and applying strict scrutiny); *see also Salerno*, 481 U.S. at 749, 751 (describing the governmental interest in preventing serious pretrial crime as "compelling" and the statute as "careful[ly] delineat[ing] … the circumstances under which detention will be permitted"). That is, the government must demonstrate that its "infringement [of pretrial liberty] is narrowly tailored to serve a compelling state interest." *Lopez-Valenzuela*, 770 F.3d at 780.[3]

[3] The judges, while largely ignoring this substantive due process theory, indirectly attack it by suggesting (Br. 28-29, 32, 46-47) that the "fundamental right to pretrial release" is conditioned on "giving adequate assurance" of appearance at trial through sufficient sureties. This confuses a condition precedent to a right—e.g., state action under the Fourteenth Amendment—with a circumstance in which a state interest may outweigh that right—here, reasonably assuring appearance at trial. None of the judges' cited authority adopts the condition-precedent position.

3. The district court correctly concluded that Harris County's wealth-based bail practices are unconstitutional

The two substantive rights just discussed both require that the government justify any financial condition of release that operates as a pretrial detention order. And both rights are implicated by Harris County's "practice of using secured money bail … as de facto orders of detention in misdemeanor cases." ROA.5682. That practice subjects an "indigent [to] pretrial confinement for inability to post bail." *Pugh*, 572 F.2d at 1058. And it regularly deprives arrestees of their fundamental right to pretrial liberty. *Salerno*, 481 U.S. at 749; *Leathers*, 412 F.2d at 171; *Mantecon-Zayas*, 949 F.2d at 550.

Indeed, in Harris County secured bail orders are frequently de facto orders of pretrial detention not only in effect but also in intent. The district court found that "[j]udicial officers in Harris County follow a custom and practice … of setting bail on a secured basis" *for the purpose* of obtaining "pretrial preventive detention." ROA.5646-5647. Appellants conceded this, stating that county officials intentionally use secured bail to detain because they "have to consider a risk of future violence," ROA.6929, and "to ensure that [arrestees] are not going to go out and commit a new crime against the victim or against the community," ROA.8464. For example, Pretrial Services recommended "Detain" rather than release for Mr.

And *Salerno* and *Lopez-Valenzuela* reject it. *See* 481 U.S. at 748-749; 770 F.3d at 780-783.

Ford (arrested for shoplifting), on the ground that there were unspecified "[s]afety issues that conditions can't mitigate." ROA.5564. Nor is this example isolated, as Pretrial Services recommended "Detain" for 15% of misdemeanor arrestees in 2015. ROA.5619. Notwithstanding appellants' implausible suggestion below that "'detain' is used colloquially, not legally," ROA.3741, 5574, this practice further confirms that Harris County intentionally uses secured bail orders as de facto orders of pretrial detention.

Given the impact of secured bail orders on plaintiffs' constitutional rights, the district court correctly considered (a) the government's interests, and (b) whether Harris County's wealth-based deprivation of pretrial liberty is sufficiently tailored to that interest. ROA.5686-5694.

a. Plaintiffs have never disputed that Harris County has a valid interest in reasonably assuring arrestees' appearance at trial. This Court found such an interest in *Pugh*, 572 F.2d at 1056, and the district court (not surprisingly) did likewise here, ROA.5692.

The judges now attempt (*e.g.*, Br. 1, 53) to offer public safety as an alternative adequate interest. But appellants "did not brief public safety as a governmental interest" below. ROA.5692. In any event, this argument—also repeated as part of appellants' challenge to the district court's weighing of the equities, *see infra* pp.80-83—fails for multiple reasons.

First, the Texas Constitution forecloses the validity of that interest with respect to misdemeanor arrestees. It specifies the offenses for which pretrial release can be denied altogether, i.e., when public safety makes pretrial detention permissible. Tex. Const. art. 1 §§11a-11c. Save for one category of offenses involving a history of family violence, misdemeanors are not included.

Second, this public-safety justification rings hollow because Harris County would release *every one* of the people alleged to be a "grave" risk—if only they could pay several hundred dollars. As the district court observed, "[a]n arrestee with access to money but with similar present charges, similar prior failures to appear, and similar criminal history could pay the secured bond and be released, despite the risks to public safety." ROA.5644; *see also* ROA.5564, 5573, 6378, 5742. The notion that these arrestees are any threat to public safety is further belied by the fact that the vast majority are sentenced to time served for minor crimes and released into the community in a matter of days. As the district court noted, 84% of people detained throughout their cases plead guilty, in a median of 3.2 days, ROA.5636, and 67% are then released within a day, ROA.5652. *See supra* pp.10-11.

Nor is it an answer to assert that secured money bail deters pretrial crime. *See* Judges Br. 53; ROA.8485-8486. Appellants conceded below that, under Texas law, committing a crime while out on bail cannot justify forfeiture of the bail

amount. Tex. Code Crim. P. art. 22.01-22.02; 22.13(5); ROA.5643. Money bail thus *cannot* create a financial deterrence against new crimes.

Third, the record shows—and the district court found—that far from promoting public safety, secured bail in fact *increases* crime. ROA.5683. Low-risk arrestees kept in jail for two or three days are almost 40% more likely to commit new crimes before trial than similar arrestees held no more than 24 hours. ROA.5665, 16727. This is likely due to the destabilizing effects of even a few days in jail, which can result in lost income, jobs, medical and mental health care, and housing. *See* ROA.5666, 16796-16797.

Accordingly, as a matter of law, appellants' only valid interest in secured money bail is reasonably assuring appearance at trial.

b. Although Harris County's wealth-based practices fail the tailoring prong for several reasons, one is dispositive: Its imposition of financial conditions is not individualized. As explained above, the district court found after extensive proceedings that the county has a policy of requiring secured money bail according to a predetermined schedule. It simply does not consider whether non-financial or unsecured conditions of release would reasonably assure appearance at trial. The de facto detention orders that result from this practice whenever the preset bail exceeds ability to pay are unconstitutional under *Pugh*. The en banc Court there had "no doubt that in the case of an indigent, whose appearance at trial could

reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." 572 F.2d at 1058.

The district court also made factual findings foreclosing any argument that individual assessments are unnecessary because, as a categorical matter, alternatives to secured money bail do not reasonably assure appearance at trial. (To be clear, that argument also fails as a matter of law, because *Bearden* requires individual consideration of non-monetary alternatives to jailing. *See* 461 U.S. at 672 ("Only if the sentencing court determines that alternatives to imprisonment are not adequate *in a particular situation* … may the State imprison a probationer who has made sufficient bona fide efforts to pay." (emphasis added)).) In particular, the court found that Harris County lacked any evidence to support this argument—adding that "to the extent [relevant] information is available, it shows that those released on personal bond have substantially similar—or even somewhat better—pretrial failure rates as those released on surety bonds." ROA.5661.

In short, appellants cannot satisfy the tailoring requirement because Harris County follows a predetermined schedule to require secured money bail without any individualized consideration of whether alternatives would meet the government's interest. The district court thus correctly held that the county's wealth-based practices violate both substantive constitutional rights.

4. Appellants' challenges to the district court's holding lack merit

The judges argue that plaintiffs' due process and equal protection claims are foreclosed by the Eighth Amendment and inconsistent with the history of bail. They also assert that the equal protection claim has additional flaws. These arguments are mistaken.

a. The judges' lead argument (Br. 27-30) is that because the Eighth Amendment protects against "excessive bail," plaintiffs' substantive constitutional claim must be brought under that provision. That argument, which rests largely on *Graham v. Connor*, 490 U.S. 386 (1989), is foreclosed by circuit precedent, depends on an incorrect premise, and would have little practical significance even if it were correct.

Most importantly, the judges' argument is precluded by *Pugh*. In that case—which involved, as explained, a similar challenge to bail in Florida—the en banc Court accepted the validity of a wealth-based challenge under both equal protection and due process. *See* 572 F.2d at 1057 ("The incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."). *Pugh* is of course binding precedent.

The judges' crucial premise, moreover—that a topic addressed in one constitutional provision can never implicate another—is incorrect. There are many

examples when multiple constitutional provisions extend the same substantive protection, such as the right against discrimination based on religion, which is recognized under the Equal Protection Clause, the Free Exercise Clause, and the Establishment Clause. *See, e.g.*, *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) ("[S]tatutes involving discrimination on the basis of religion … are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (citations omitted)).

Indeed, *Salerno* presents another example: the right to pretrial liberty. The Court there analyzed the deprivation of that "fundamental" right under *both* substantive due process, 481 U.S. at 746-751, and the Eighth Amendment, *id.* at 752-755—without even hinting that only one constitutional theory was colorable. Similarly, in *Pugh* this Court relied on equal protection and due process precedents along with Eighth Amendment ones. 572 F.2d at 1056-1057.

Appellants' cited authorities do not help them. For example, the Supreme Court has made clear that *Graham v. Connor* reflects only a "'reluctan[ce] to expand the concept of substantive due process.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Plaintiffs' theory involves no such expansion; it relies on a "converge[nce]" of equal protection and due process principles, *Bearden*, 461 U.S. at 665, as well as the established principle that substantive due process

encompasses the "vital … interest" in pretrial liberty. *United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

The judges also cite *Gerstein v. Pugh*, 420 U.S. 103 (1975), which stated in a footnote that a procedural challenge to probable cause determinations was more appropriately analyzed under the Fourth Amendment than under procedural due process, *see id.* at 125 n.27. But *Salerno* makes clear that even if that footnote constitutes a holding, it does not extend to this context. Citing *Gerstein*, the *Salerno* Court analyzed the procedural challenge to bail determinations under procedural due process, not the Eighth Amendment. *See* 481 U.S. at 746, 751-752.

Finally, there is little practical significance to the judges' argument. Given that *Pugh* relies on both Fourteenth and Eighth Amendment cases, plaintiffs could have made a materially identical argument under the Eighth Amendment, specifically that because that provision prohibits bail "higher than an amount reasonably calculated to fulfill [its] purpose," *Stack v. Boyle*, 342 U.S. 1, 5 (1951), the government must demonstrate that less restrictive conditions could not reasonably ensure appearance at trial. The judges' argument is thus an academic

distraction at best. *See* Cato Institute Amicus Br., *Walker v. City of Calhoun*, 2016 WL 4364152, at *16-17 (11th Cir. Aug. 12, 2016).[4]

The judges relatedly argue that plaintiffs chose the Fourteenth Amendment to evade circuit precedent holding that there is no freestanding right to "affordable bail" under the Eighth Amendment. Br. 29-30 (citing *United States v. McConnell*, 842 F.3d 105, 107 (5th Cir. 1988)). But plaintiffs do not contend that the Fourteenth Amendment creates such a right, and the district court did not hold that it does. The court held instead that a secured bail order must satisfy heightened scrutiny if it results in detention. Appellants thus appear to fundamentally misunderstand this case when they assert that the district court created a right to "affordable bail."[5]

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[4] The for-profit bail industry argues that in addition to proscribing excessive bail, the Eighth Amendment guarantees an affirmative "right to [money] bail." This is also the argument underlying the industry's recent class-action lawsuit challenging New Jersey's bail scheme as effectively eliminating secured financial conditions of release. *Holland v. Rosen*, No. 17-4317 (D.N.J. June 14, 2017). Whatever the merits of that novel theory, the argument is irrelevant here. Plaintiffs' claims here do not depend on (or even call for) the categorical elimination of secured-money bail.

[5] This case does not concern what additional state-law constraints may apply in an individual case if a court were to require a secured bail condition exceeding an arrestee's ability to pay on the ground that non-financial conditions could not serve the government's purposes, in a circumstance in which state law guarantees a right to bail. *See State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014) ("Intentionally setting bail so high as to be unattainable is simply a less honest method of unlawfully denying bail altogether."). Nor does it concern (because plaintiffs did

b. The judges make various additional arguments (Br. 30-44) focused on plaintiffs' right against automatic, wealth-based detention. Aside from being wrong for the reasons explained below, these arguments are also effectively irrelevant because the judges ignore plaintiffs' separate substantive due process right to pretrial liberty. Even if plaintiffs had never advanced the wealth-based detention theory (or if this Court were to reject it), the district court's constitutional ruling would be fully warranted by the undisputed violation of plaintiffs' substantive due process right.

That aside, the judges' equal protection arguments are foreclosed by Supreme Court or circuit precedent. Their lead argument (echoed by the state amici) is that plaintiffs' claim rests on "disparate-impact theory" unavailable under *Washington v. Davis*. But as noted *supra* p.19, the Supreme Court rejected this very contention in *M.L.B.* *See* 519 U.S. at 126-127.

The judges also deny (Br. 36-38) that heightened scrutiny applies, dismissing the *Williams-Tate-Bearden* trilogy as merely "penal fine cases" prohibiting punishment due to indigence. The judges' reading not only gets these cases wrong—ignoring the Supreme Court's condemnation of *incarceration* based solely on indigence—but also contradicts *Pugh*, which applied the trilogy to a

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not argue) an independent due process theory that *Salerno* only permits pretrial detention for "extremely serious offenses." 481 U.S. at 751.

wealth-based bail challenge, *see supra* pp.19-20. *Pugh* likewise forecloses the judges' unexplained assertion (Br. 36) that the *Williams-Tate-Bearden* trilogy does not "purport to apply heightened scrutiny." *See supra* pp.20-21. Because *Pugh* is binding precedent, the judges' extended discussion (Br. 32-38) of case law purportedly applying rational-basis review is simply not relevant.

That case law does not help appellants anyway. *McGinnis v. Royster*, 410 U.S. 263 (1973), for example, is distinguishable in two key respects. First, the parties agreed that rational-basis review applied, and thus the Court had no occasion to decide the proper level of scrutiny. *Id.* at 270. Second, while the plaintiffs there alleged that a statute discriminated against those who did not obtain release on bail, they did not allege that this was due *solely* to indigence or in violation of the principles at issue here (there being reasons other than indigence why a person may be detained pretrial). *Id.* at 265, 268. The right against wealth-based incarceration was simply not implicated, as the Ninth Circuit has recognized. *See MacFarlane v. Walter*, 179 F.3d 1131, 1140 n.11 (9th Cir. 1999), *vacated on other grounds sub nom. Lehman v. MacFarlane*, 529 U.S. 1106 (2000). This latter point also applies to *Smith v. U.S. Parole Commission*, 752 F.2d 1056 (5th Cir. 1985), and *Spina v. Department of Homeland Security*, 470 F.3d 116 (2d Cir. 2006), which the judges cite. Each case held that the harm alleged was not *solely* a consequence of indigence. *See* 752 F.2d at 1058; 470 F.3d at 131.

Nor can appellants draw help from *Schilb v. Kuebel*, 404 U.S. 357 (1971), *Jackson v. Alabama*, 530 F.2d 1231 (5th Cir. 1976), or *Doyle v. Elsea*, 658 F.2d 512 (7th Cir. 1981) (per curiam). *Schilb* does not even implicate the right against wealth-based detention, as the plaintiffs' only alleged harm there was payment of an extra fee. 404 U.S. at 358-359. *Jackson*, meanwhile, involved a claim that individuals detained before trial because they could not afford bail are entitled to a credit for that time against their eventual sentence. *See* 530 F.2d at 1232. This Court did not reach that claim because it applied a presumption that pretrial-detention time had been taken into account when the sentence was imposed. *See id.* at 1236. (*Jackson* acknowledged, of course, that if the sentence exceeded the statutory maximum, then it would be unconstitutional because it would necessarily mean that the inmate served a longer sentence solely due to indigence. *Id.*) *Jackson*, therefore, has no bearing here. Because *Jackson*, like *Royster*, did not presume any additional detention due to inability to pay, it did not cite or apply binding circuit precedent applying strict scrutiny to even a few days of detention due solely to indigence. *See, e.g.*, *Frazier*, 457 F.2d at 728. And even if *Jackson* were somehow inconsistent with plaintiffs' claim, it would no longer be good law after *Bearden* and *Pugh*. The same is true of *Doyle*, which also relied on a distinction—that *Williams* and *Tate* apply only if the detention exceeds the statutory maximum, 658 F.2d at 518—rejected by *Bearden*. *See* 461 U.S. at 661

(noting the "impermissibility of imprisoning a defendant solely because of his lack of financial resources").

Perhaps recognizing the irrelevance of these authorities, especially in light of *Pugh*, the judges attempt to distinguish that decision. They argue (Br. 38) that because *Pugh* rejected a facial challenge to a presumption in favor of money bail, the Court must also have rejected a "flat rule prohibiting money bail." But as explained, plaintiffs do not seek, and the district court did not establish, any such flat rule. *Pugh* directly supports the theory that plaintiffs do advance and that the district court did adopt. *See supra* pp.19-21, 23-24, 26-27.

The judges next contend (Br. 38-44) that the district court erred in concluding that the county had failed to satisfy intermediate scrutiny. They first assert (Br. 38-39) that "discriminatory purpose" must be shown as to each arrestee; they then infer that the court improperly relied on "jurisdiction-wide proof" to conclude, as they put it, that "reasonable alternatives to continued detention exist for every single misdemeanor arrestee."

Putting aside the irony of this demand for individualized consideration of appellants' conduct, the argument misunderstands the district court's conclusion. The court's key finding was that appellants have a county-wide custom and practice of automatically imposing secured financial conditions without individualized consideration of alternative conditions of release. The district

court's holding that this practice is unconstitutional invalidated that practice county-wide. It did not imply that money bail can never be an appropriate condition of release in a given case, following a proper, individualized inquiry. By analogy, a police force that adopted a policy allowing standardless searches could not plausibly assert a defense that in some cases there might be probable cause for a search. The *policy* would be invalid because it violates the particularity requirement of the Fourth Amendment. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (a statute authorizing warrantless searches is facially unconstitutional).

The judges also assert (Br. 39) that *McCleskey v. Kemp*, 481 U.S. 279 (1987), requires case-by-case proof of discriminatory intent. As explained, however, discriminatory intent is not required in this context. *See supra* pp.18-19. *McCleskey* is thus inapposite.

The remainder of the judges' argument regarding intermediate scrutiny (Br. 40-44) attempts to show that alternatives to secured money bail are categorically less effective at reasonably assuring appearance at trial. But again, categorical evidence is not sufficient; the Constitution demands an individualized inquiry into non-monetary options. *See supra* pp.20-21, 27. For the sake of comprehensiveness, the district court considered the comparative efficacy of secured versus unsecured conditions of release. But since that comparison was not

crucial to its holding, this Court need not wade into the surrounding battle of live witnesses, credibility determinations, expert views, and empirical studies.

Rather than engage with this evidence, the judges offer conclusory assertions and overheated rhetoric—asserting, for example, that the district court's findings are "untenable" or contradicted by "the entire history of human experience" (Br. 41). They then present (Br. 41-44) a version of the facts that the district court rejected after considering the voluminous evidence submitted—notwithstanding the fact that the clearly erroneous standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). To reverse, this Court would have to be left "with the definite and firm conviction that a mistake has been committed." *Id.* (quotation marks omitted). Nothing in the judges' presentation could instill such a conviction. The materials that they relied on below and cite again here are deeply flawed. To take just one example, none of the judges' cited articles compares the effectiveness of secured money bail to a system employing adequate non-financial alternatives, supervision, or unsecured bonds. The district court's refusal to credit such fundamentally deficient materials is in no way clearly erroneous. ROA.5663-5664.

c. Finally, the judges argue (Br. 1, 4, 31) that the district court's substantive constitutional holding is erroneous because Harris County's wealth-

based bail practices are longstanding. As an initial matter, the judges (and the bail industry, which makes similar arguments) misrepresent the history by conflating "bail"—the general conditions of a person's release, monetary or otherwise—with "commercially secured money bail." The latter was (and is) unlawful in England, and did not even exist in America until 1898. Department of Justice, National Institute of Corrections, Fundamentals of Bail (2014) at ROA.17329. For nearly 1,500 years before that, "bail" conditions were largely "unsecured." ROA.17400-17401; *see also* Center for Legal and Evidence-Based Practices Amicus Br., *Walker v. City of Calhoun*, 2016 WL 4376539, at *7-8 (11th Cir. Aug. 15, 2016) (citing Blackstone, *Commentaries on the Laws of England*, at 291, 295-297 (Chitty ed., 1857)). This same conflation pervades appellants' and amici's historical arguments.

In any event, "longstanding" is not a defense to plaintiffs' claim; even if the claim merely "expose[s] old infirmities which apathy or absence of challenge has permitted to stand," "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams*, 399 U.S. at 245. Moreover, despite appellants' suggestion, there is nothing novel or unprecedented about plaintiffs' claim. Most federal courts presented with the claim have found it meritorious. *See, e.g.*, *Walker v. City of Calhoun*, 2017 WL 2794064, at *4 (N.D. Ga. June 26, 2017), *appeal pending*, No. 17-13139 (11th

Cir.); *Rodriguez v. Providence Community Corr., Inc.*, 191 F. Supp. 3d 758, 779 (M.D. Tenn. 2016), *appeal pending*, No. 16-6127 (6th Cir.); *Cooper v. City of Dothan*, 2015 WL 10013003, at *1 (M.D. Ala. June 18, 2015); *Jones v. City of Clanton*, 2015 WL 5387219, at *2 (M.D. Ala. Sept. 14, 2015). The same is true of state courts. Nearly forty years ago, for example, Mississippi's highest court stated that "the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional." *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979). The Alabama Supreme Court took a similar position a quarter-century ago, stating that a law under which "an indigent defendant charged with a relatively minor misdemeanor who cannot obtain release by [money bail] must remain incarcerated for a minimum of three days … violates … equal protection rights guaranteed by the United States Constitution." *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994).

B. Harris County's Wealth-Based Bail Practices Fail To Provide Constitutionally Required Procedural Protections Against The Erroneous Deprivation Of Pretrial Liberty

Plaintiffs' procedural due process claim is analyzed in two steps: first, "whether there exists a liberty or property interest which has been interfered with by the State," and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, ___ F.3d ___, 2017 WL 2805637, at *21 n.14 (5th Cir. June 29, 2017); *see also*

Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam). The district court's conclusion is correct at both steps.

1. The existence and deprivation of plaintiffs' liberty interest are essentially undisputed

As explained above, plaintiffs assert two liberty interests, both of which "arise from the Constitution itself," *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The first, under the Equal Protection and Due Process Clauses, is the right against wealth-based detention. The second is the "fundamental" "interest in [pretrial] liberty." *Salerno*, 481 U.S. at 750.

The judges deny (Br. 46-47) that there is any interest in pretrial liberty because it is not absolute. This argument is foreclosed by *Salerno*, where the Court assessed the sufficiency of procedures attending the deprivation of the right to pretrial liberty. 481 U.S. at 751-752. Moreover, the judges' argument proves too much. Few if any constitutional rights are absolute; there are almost always "conditions under which competing state interests might outweigh" the individual interest. *Harper*, 494 U.S. at 220. What procedural due process guarantees are "the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." *Id.* (citation omitted).

Regardless, the judges ignore entirely the substantive constitutional right against detention based solely on indigence. That right suffices on its own to trigger an assessment of the county's procedures.

2. The district court correctly ruled that Harris County fails to provide minimum due process protections

The second step of procedural due process analysis—here, determining what procedures are required for a valid pretrial detention order—is guided by the three-part balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). In particular, courts consider (1) "the private interest" at issue, (2) "the risk of an erroneous deprivation" absent the sought-after procedural protection, and (3) the state's interest in not providing the additional procedure. *Id.* at 334-335. Here, the district court ruled that four procedural protections are required:

> (1) notice that the financial and other resource information … collect[ed] is for the purpose of determining the misdemeanor arrestee's eligibility for release or detention; (2) a hearing at which the arrestee has an opportunity to be heard and to present evidence; (3) an impartial decisionmaker; and (4) a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial.

ROA.5705.

As explained below, each of these four protections satisfies *Eldridge* balancing. That is unsurprising because, as the district court held, the secured bail orders ubiquitous in Harris County are de facto detention orders, and hence require

the same process that is due upon the imposition of express detention orders. *See Mantecon-Zayas*, 949 F.2d at 550 ("[O]nce a court … insist[s] on terms in a 'release' order that will cause the defendant to be detained pending trial[,] it must satisfy the procedural requirements for a valid *detention* order."). That process, it is well-accepted, includes each of the four protections. *See, e.g.*, *McConnell*, 842 F.2d at 110 ("When no attainable conditions of release can be put into place, the defendant must be detained pending trial. In such an instance, the court must explain its reasons for concluding that the particular financial requirement is a necessary part of the conditions for release."). Indeed, *Salerno* went further, upholding the federal statute under procedural due process because it provided a full and robust adversarial hearing with counsel, the right to present and contest evidence, specific heightened legal standards governing the decision, and findings on the record explaining why no other condition or combination of less restrictive conditions of release is sufficient. 481 U.S. at 742.[6]

[6] *Salerno* approved pretrial detention orders in proceedings at which the arrestee is afforded counsel and with a "clear and convincing" evidentiary standard for detention based on asserted dangerousness. The district court did not address either of these additional safeguards—the former likely because the county committed to providing counsel and preliminary equitable relief on that issue was neither necessary nor specifically requested in this posture, and the latter likely because Texas law does not permit public-safety based detention for most misdemeanors. Those issues are therefore not before this Court.

If this Court nonetheless finds it necessary to conduct the *Eldridge* balancing, each of the four protections required by the district court is well supported.

a. Notice regarding the purpose of information collected is essential for misdemeanor arrestees, because it ensures accuracy regarding ability to pay secured bail. Without accurate information, the county may require financial conditions without realizing that they will result in incarceration. Accordingly, the risk of erroneous deprivation without such notice is high. Moreover, the private interest is significant—the loss of fundamental pretrial liberty and the very real possibility of pleading guilty simply to end the incarceration. The government's interest, meanwhile, is minimal, as the costs of providing such notice are negligible. The need for notice is confirmed by *Turner v. Rogers*, 564 U.S. 431 (2011), which held that a person cannot be jailed for lack of a financial payment absent very similar protections, specifically:

> (1) notice to the defendant that his "ability to pay" is a critical issue in the … proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status[] (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Id. at 447-448. All this likely explains why appellants' briefs make no specific objection to this protection.

b. The second, third, and fourth protections (opportunity to be heard at a hearing, impartial decisionmaker, and written findings) are best considered together, as they generally presume that the county has imposed secured money bail notwithstanding the misdemeanor-arrestee's indigence, thereby triggering the accused's substantive right to a finding that no alternative condition would reasonably assure appearance at trial. The Supreme Court has held that, with any right implicating a person's liberty, the opportunity to be heard before an impartial decision maker is the bare minimum due process protection. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("Parties whose rights are to be affected are entitled to be heard."); *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) ("[D]ue process requires a 'neutral and detached judge in the first instance.'"). Indeed, a plurality of the Court concluded that these minimal protections were required even in the national security context. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (requiring "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). And a written statement has been required for nearly half a century, even for convicted parole violators. *See United States v. Kindred*, 918 F.2d 485, 488 (5th Cir. 1990). Put simply, none of these protections is exceptional, particularly when it comes to the deprivation of pretrial liberty.

The judges' responses (Br. 48-49) lack merit. First, the fact that the county claims to move arrestees quickly from arrest to verdict does not obviate the need for the protections. Even a brief denial of pretrial liberty is significant—as is shown by the fact that, in a median of 3.2 days, the county secures guilty pleas in 84% of the cases in which arrestees cannot afford to buy their prompt release. *See supra* pp.10-11.

Second, an "adversarial evidentiary hearing" (Judges Br. 48) is not required in all cases, but only when the county requires a financial condition of someone who will be detained because of it. No such hearing is required, therefore, for arrestees who can pay money bail within 24 hours, or anytime the county concludes that secured money bail is unnecessary. Only when the county restricts an indigent person's constitutional rights does due process require minimum procedures to safeguard those rights.

Finally, the judges challenge (Br. 49-50) the district court's ruling that hearings—when required—must occur within 24 hours of arrest. But all three factors under the *Eldridge* balancing test favor this conclusion. Certainly the private interests at stake are weighty. As the district court found, "[i]n the context of misdemeanor arrests, pretrial detention of even three or four days can significantly increase the rates of nonappearance, recidivism, and the cumulative disadvantages of lost employment, leases, and family custody rights." ROA.5706.

On the other side of the balance, the government's interest is not significant; the county conceded below that it is already required to provide bail hearings "within 24 hours of arrest" under current law. ROA.3926. And without a prompt hearing, there will almost always be at least several days of deprivation for arrestees with no procedure to ensure that the deprivation is not erroneous, i.e., no procedure for examining whether detention in a particular case is unwarranted because reasonable alternatives "are readily available." ROA.5718.

The cases on which the judges rely are not to the contrary. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), was a Fourth Amendment case concerning the timing of probable cause hearings. It did not apply *Eldridge* balancing, nor did its ancillary reference to bail reflect any consideration of the issues here, i.e., the procedural requirements at bail hearings, including when a jurisdiction chooses to conduct those hearings within 24 hours. And in *Collins v. Ainsworth*, 382 F.3d 529 (5th Cir. 2004), this Court did not even reach the second step of the procedural-due-process analysis, instead terminating the inquiry at the first step because it rejected the validity of plaintiffs' asserted state-law liberty interest. Here, by contrast, there is no dispute that the first step is satisfied, as appellants concede one of plaintiffs' two constitutional liberty interests. *See supra* pp.40-41. *Collins* is thus inapposite. Most importantly, neither of these cases

involved equal protection claims or the application of heightened scrutiny to a period of wealth-based pretrial detention.

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' THRESHOLD PROCEDURAL ARGUMENTS

Appellants assert that various procedural hurdles should have prevented the district court from reaching the merits of plaintiffs' constitutional claims. That is incorrect.

A. *Younger* Abstention Does Not Apply

The judges first contend (Br. 18-22) that federal courts should decline jurisdiction to remedy the constitutional violations in this case, based on the principles announced in *Younger v. Harris*, 401 U.S. 37 (1971). But, as an initial matter, "a federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). Abstention is thus the exception and applies narrowly. It is not warranted here.

Younger abstention has three prerequisites: (1) the potential for undue interference with an ongoing state-court proceeding, (2) an important state interest implicated by that proceeding, and (3) an adequate opportunity to raise the relevant claim in that proceeding. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 433 n.12 (1982); *Louisiana Debating & Literary Ass'n v. New Orleans*, 42 F.3d 1483, 1490 (5th Cir. 1995). The third requirement is not met here.

Both the Supreme Court's decision in *Gerstein* and this Court's still-binding panel decision in that case (then known as *Pugh*) make this clear. The plaintiffs there (as here) challenged a pretrial practice, specifically their detention without a prompt probable cause determination. 420 U.S. at 106-107. The Supreme Court held that *Younger* did not apply to a claim that a prompt hearing into the validity of their detention was required, because the claim "was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n.9. Precisely the same is true here. Moreover, as the panel in *Pugh* elaborated, "no remedy would exist" if arrestees had to wait until a later hearing, because the challenged incarceration "would have ended as of [that] time." *Pugh v. Rainwater*, 483 F.2d 778, 782 (5th Cir. 1973), *aff'd in part and rev'd in part sub nom. Gerstein*, 420 U.S. 103 (1975). Again, that is true here too: Even if misdemeanor arrestees could later demonstrate that their days or weeks of post-arrest wealth-based detention had been unconstitutional, the state court could not remedy those harms. This analysis is so straightforward that appellants' *Younger* argument has consistently been rejected in similar cases. *See, e.g.*, *Walker*, 2017 WL 2794064, at *2; *Rodriguez v. Providence Community Corr., Inc.*, 155 F. Supp. 3d 758, 765-766 (M.D. Tenn. 2015), *appeal pending*, No. 16-6127 (6th Cir.); *Welchin v. City of Sacramento*, 2016 WL 5930563, at *6-9 (E.D. Cal. Oct. 10,

2016); *Buffin v. City & County of San Francisco*, 2016 WL 374230, at *2-5 (N.D. Cal. Feb. 1, 2016).

The judges suggest nonetheless that Harris County arrestees *do* have an "adequate opportunity" to raise plaintiffs' claim. The judges do not assert that the initial hearing provides such an opportunity—a manifestly correct concession given that the hearings last only minutes (with scant seconds typically spent on bail), ROA.5615l; that arrestees are directed not to speak, ROA.5627 & n.48; ROA.5629, 5616-5617, 5725; and that hearing officers lack authority to "examine witnesses, hear evidence, or make findings of fact," ROA.1957. The judges instead argue (Br. 21) that an adequate opportunity exists at arraignment. But arraignments routinely take place only after three or four days of wealth-based pretrial detention and, in any event, the district court found that, for years, the judges have not allowed deputies to bring misdemeanor arrestees into the courtroom during arraignment unless the arrestee agrees to plead guilty. ROA.5629, 5721 n.117. Thus, even when arrestees might in theory raise these claims, they are forbidden in practice from doing so.[7]

[7] Although the judges changed the Rules after this lawsuit was filed so as to require a bail review at arraignment, the district court found that the new rule had not had a significant effect, because some judges refuse to follow the new policy and continue to keep arrestees in holding cells unless they agree to plead guilty. ROA.5634-5635. In any event, defendants' after-the-fact voluntary cessation of

Nor can later stages of the misdemeanor proceeding provide an adequate opportunity. The district court found that, when faced with the choice of pleading guilty and being released with "time served" or fighting their cases and remaining in custody for weeks, detained arrestees plead guilty in a median of 3.2 days, before reaching any later stages. ROA.5636-5639. Hence, even if those later stages might theoretically provide an opportunity to challenge their wealth-based detention—an argument appellants notably do not make—arrestees must remain in jail to avail themselves of that opportunity. *Younger* does not require people who stand innocent of any charges to continue giving up their freedom in order to challenge a past deprivation of it.

The judges also relatedly suggest (Br. 21) that plaintiffs should have brought their claims in state habeas proceedings. (This is separate from their argument, addressed below, that plaintiffs' claim had to be brought in *federal* habeas.) State habeas proceedings, however, frequently cannot be completed before the misdemeanor charges are resolved and the arrestee released anyway, and certainly not in time to challenge the wealth-based, post-arrest detention of 72-96 hours that thousands of arrestees suffer before arraignment. State habeas proceedings are thus not an adequate alternative. And even if they were, *Younger* asks whether the

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their unconstitutional conduct could not require the district court to abstain. *See K.P. v. LeBlanc*, 627 F.3d 115, 121 (5th Cir. 2010).

plaintiff's claim could be raised *in the pending proceeding*, not in a separate one. The Supreme Court has never required initiation of separate civil proceedings to avoid *Younger* abstention. *See Fernandez v. Trias Monge*, 586 F.2d 848, 852-853 (1st Cir. 1978) (even if state habeas relief is available, it is not a bar to federal court relief under *Younger*); *Coleman v. Stanziani*, 570 F. Supp. 679, 687 (E.D. Pa. 1983) ("Requiring the plaintiffs to institute a separate action in state court … would go well beyond the *Younger* doctrine."). Such a requirement would create an exhaustion mandate for section 1983 cases, contrary to the Supreme Court's clear holding that no such requirement exists. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961).

At a minimum, because appellants concede that there is no adequate opportunity until arraignment to challenge post-arrest detention, *Younger* cannot bar this Court's resolution of plaintiffs' constitutional theory. Even if there were some unarticulated basis for rejecting the district court's factual finding that arrestees are not brought into the courtroom at arraignment unless they plead guilty, this Court would nonetheless be required to at least resolve the merits of plaintiffs' theory as applied to the pre-arraignment period of wealth-based detention.

The judges also assert (Br. 18-20) that *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981), demonstrate the need

for *Younger* abstention here. In those cases, however, pro se plaintiffs sought federal review of virtually an entire local criminal-justice system, including individualized pretrial bail imposed in proceedings the plaintiffs did not challenge as inadequate. The Supreme Court understandably labeled such a comprehensive federal intrusion "unworkable." *O'Shea*, 414 U.S. at 500. This Court, meanwhile, concluded that the plaintiff's "injunction … no matter how carefully limited, would require a federal court to reevaluate de novo each challenged bail decision." 646 F.2d at 1013. *Tarter* thus recognized a distinction between suits seeking federal "case-by-case evaluations of discretionary decisions" and those "add[ing] a simple, nondiscretionary procedural safeguard to the criminal justice system," the latter being permissible. *Id.* In other words, *Tarter* reflects the proposition that, if a person does not like the result of an individualized (but adequate) bail hearing, the proper avenue is to seek direct review of that hearing, not to file a federal lawsuit (just as when a person has a *Gerstein* hearing and objects to the probable cause finding as unsupported by the evidence). But this case does not challenge individual bail determinations; rather plaintiffs' claims target the system-wide absence of adequate procedures and standards. The concerns in *O'Shea* and *Tarter* are thus not implicated.

More fundamentally, neither *O'Shea* nor (of course) *Tarter* overruled *Gerstein*, or in any way undermined *Middlesex*'s subsequent three-factor *Younger*

test, which appellants neither cite nor apply. As explained, *Gerstein* and *Middlesex* make clear that abstention is not required here. Put simply, nothing in *O'Shea* or *Tarter* forecloses a challenge to systematic failures—as here and in *Gerstein*—that result in no adequate hearing at all.

B. This Case Is Properly Brought Under Section 1983

The judges next argue (Br. 22-25) that *Preiser v. Rodriguez*, 411 U.S. 475 (1973), prohibits the relief plaintiffs seek under section 1983. This issue was forfeited below and thus this Court should not reach it. ROA.6367. Disputing this, the judges contend (Br. 26) that, although they did not cite *Preiser* until their stay motion, they implicitly raised the issue below by mentioning "exhaustion" when making other arguments. Even if true, that is insufficient to preserve an argument in this circuit, where a party must "press and not merely intimate the argument … before the district court." *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005). As plaintiffs explained in their response to appellants' emergency stay motion, these references to "exhaustion" do not begin to present, much less press, the argument they now advance.[8]

[8] The judges alternatively argue (Br. 26-27) that the Court should excuse their forfeiture because (among other reasons) forfeiture rules are relaxed in the context of state sovereignty. Their only authority for that proposition is a nonprecedential unpublished decision. *See* Circuit Rule 47.5.4. But even if the proposition were valid, it would not apply here because no appellant has state sovereignty.

Waiver aside, appellants' *Preiser* argument fails because plaintiffs' claims do not necessarily require their release from custody.

The Supreme Court has explained that, under *Preiser*, a "§1983 action is barred … *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). The touchstone of the inquiry is "necessarily." If a claim would not "necessarily spell speedier release," it is cognizable under section 1983. *Skinner v. Switzer*, 562 U.S. 521, 525 (2011). In other words, even where plaintiffs advance a section 1983 claim "because they *believe* that victory … will lead to speedier release from prison," that does not bar their claim. *Dotson*, 544 U.S. at 78 (emphasis added); *see also id.* ("hope" of "earlier release" is insufficient).

Plaintiffs here seek nothing that requires or hastens any person's release, i.e., nothing that *necessarily* "demonstrate[s] the invalidity of [anyone's] confinement or its duration." *Dotson*, 544 U.S. at 82. They do challenge the automatic, wealth-based practices that defendants use to determine who is jailed and who is released after arrest, and they seek an injunction requiring constitutionally adequate practices to determine post-arrest release or detention going forward. Those are not habeas claims. *Cf. id.* at 81 (holding that "the prisoner's claim for an injunction barring future unconstitutional procedures did not fall within habeas' exclusive domain"). And plaintiffs have never argued that the Constitution

requires any (let alone every) arrestee to be released from custody—nor do regimes in other jurisdictions that have rejected automatic wealth-based procedures require every arrestee to be released. Plaintiffs claim only that the *way* in which the government determines whom to release and whom to detain must honor substantive rights and adhere to procedural requirements. Plaintiffs understand that success on their claims would not guarantee that any particular arrestee be released from custody.

Case law confirms *Preiser*'s inapplicability here. In *Gerstein*, for example, pretrial detainees sought "a judicial hearing on … probable cause," 420 U.S. at 107, claiming that their detention violated the Fourth Amendment because they had not been afforded prompt probable cause determinations, *id.* at 105-106. Texas argued that the claim belonged in a habeas proceeding because no "purpose could be served by a determination of probable cause" other than to release improperly held detainees. Texas Amicus Br., *Gerstein v. Pugh*, 1974 WL 186448, at *9 (U.S. Aug. 19, 1974). The Supreme Court rejected this argument, declining to inquire into the plaintiffs' subjective expectations about release and focusing instead on whether the injunction would *necessarily* produce that result. 420 U.S. at 107 n.6. Concluding that the injunction would not do so, because it merely provided a hearing at which the validity of detention would be determined under appropriate legal standards, the Court held that "the lawsuit did not come

within the class of cases for which habeas corpus is the exclusive remedy." *Id.* Likewise here, the injunction plaintiffs seek "relates to" but does not provide "'core' habeas corpus relief." *Dotson*, 544 U.S. at 81. The sought-after injunction addresses unconstitutional practices used to *determine* post-arrest release or detention, rather than addressing custody as such. Therefore the *Preiser* exception does not apply. *See, e.g.*, *Walker v. City of Calhoun*, 2016 WL 361612, at *13 (N.D. Ga. Jan. 28, 2016) (finding *Preiser* inapplicable in a similar challenge to wealth-based release-and-detention practices), *vacated on other grounds*, 2017 WL 929750 (11th Cir. Mar. 3, 2017).

Finally, even were this Court to conclude that plaintiffs' claims should have been brought via habeas, federal courts have broad authority to treat them as if they had been. *See, e.g.*, *Castro v. United States*, 540 U.S. 375, 382-383 (2003) (a district court may recharacterize a filing as a habeas petition if it provides notice to the litigant of its intent to do so and explains the effects of recharacterization). And in a habeas proceeding, plaintiffs would be able to make the same claims, because the same lack of an "adequate opportunity" to bring the claims in state criminal proceedings that renders *Younger* abstention inapplicable would also satisfy the habeas exhaustion requirement. *See Preiser*, 411 U.S. at 493 ("Requiring exhaustion … means, of course, that a prisoner's state remedy must be adequate and available."); *Beharry v. Ashcroft*, 329 F.3d 51, 62 (2d Cir. 2003)

(exhaustion is satisfied if "'available remedies provide no genuine opportunity for adequate relief'" or if "'irreparable injury may occur without immediate judicial relief'").[9]

C. The County Was Properly Enjoined

The county argues that it cannot be enjoined because the post-arrest procedures and practices challenged here are not county policy. This challenge—which is quite narrow and concedes most of the municipal liability issues resolved by the district court—is meritless.

Municipal liability requires three elements: "(1) an official policy (2) promulgated by the municipal policymaker (3) [that] was the moving force behind the violation of a constitutional right." *Groden v. City of Dallas*, 826 F.3d 280, 283 (5th Cir. 2016). The first element can be established through any of three methods: (1) an express policy, *Monell v. Department of Social Services City of*

[9] Other circuits have uniformly held either that Federal Rule of Civil Procedure 23 authorizes class action habeas petitions or that "representative" habeas petitions are available. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1117 (9th Cir. 2009); *Williams v. Richardson*, 481 F.2d 358, 361 (8th Cir. 1973); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974); *Bijeol v. Benson*, 513 F.2d 965, 967 (7th Cir. 1975). And this Court has repeatedly countenanced habeas class actions. *See, e.g.*, *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 421 (5th Cir. 1992) (affirming denial of attorney fees in a successful habeas class action); *Stewart v. Murphy*, 42 F.3d 641 (5th Cir. 1994) (noting that because "[t]he district court has not determined … whether to classify the pending class action … as a habeas or a §1983 matter," the prisoner should have a chance to amend his pending habeas action).

New York, 436 U.S. 658, 694 (1978); (2) a widespread custom or practice, *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992); or (3) an action by an official with final policymaking authority, *Jones v. Lowndes County*, 678 F.3d 344, 349 (5th Cir. 2012).

Applying this framework, the district court identified two independently sufficient bases for county liability. First, the county judges, as final policymakers with the power to promulgate post-arrest policy for misdemeanors, have acquiesced in customs and practices underlying the challenged bail practices. ROA.5712-5716. Second, the sheriff is the final county policymaker regarding the jail, and he controls detention based on financial conditions of release. ROA.5721-5723.

The county's challenges rest largely on the premise that state law prevents the county judges and sheriff from correcting the unconstitutional bail practices (and therefore the challenged practices are not county policy). *See Crane v. Texas*, 759 F.2d 412, 430 n.19 (municipal liability exists when state law allows municipal discretion to act lawfully), *amended*, 766 F.2d 193 (5th Cir. 1985) (per curiam). This is mistaken with respect to both the county judges and the sheriff. And even accepting the county's arguments, the district court's injunction is undoubtedly valid against the sheriff.

1. Because the county judges can correct the unconstitutional bail practices, those practices are county policy

The district court's threshold conclusion regarding county liability was that the judges are "[c]ounty policymakers when they promulgate written and unwritten [misdemeanor] bail procedures for all of the Harris County criminal courts." ROA.3276-3277. The county responds (Br. 38-42) that, even if the county judges are county policymakers, state law prohibits them from interfering with the challenged bail practices, and the county cannot be responsible for the judges simply following state law. The county further contends (Br. 42-50) that it cannot be liable for policies that the county judges make in their judicial capacity. Both arguments are mistaken.[10]

i. The rules and related bail practices are county policy

As explained, the crux of the constitutional violations here is the fact that Harris County imposes secured bail without individualized inquiry into alternative conditions. This practice arises from a combination of two others: first, the Rules

[10] To be sure, the county offers a one-paragraph argument (Br. 50) that the judges are state, not county, policymakers. But in making this argument, the county does not even attempt to respond to the district court's thorough analysis, *see* ROA.3276-3277, 4444-4451, including its application of the governing Supreme Court precedent, *McMillian v. Monroe County*, 520 U.S. 781 (1997), or its explanation of why the county's leading authority, *Woods v. City of Michigan City*, 940 F.2d 275 (7th Cir. 1991), is inapposite. This Court need not even consider such underdeveloped arguments, *see Trevino v. Johnson*, 168 F.3d 173, 161 n.3 (5th Cir. 1999), but if it does then it should reject the argument for the reasons given by the district court.

dictate how all misdemeanor arrestees will be released or detained prior to appearance before a magistrate, through a predetermined bail schedule; and second, the county judges have a custom and practice of not deviating from that schedule, even when financial conditions operate to detain. Both aspects are county policy.

The first is undisputed. The Rules, which the county judges promulgated by at least a two-thirds majority vote, require the district attorney and the sheriff to use a predetermined bail schedule. ROA.5605. The judges have also knowingly acquiesced to local custom interpreting the Rules as requiring *secured* bail. ROA.5731-5732. Because the county does not argue that state law requires the predetermined schedule, this aspect of the challenged bail practices concededly gives rise to county liability.

As to non-deviation from the schedule, the county claims (Br. 37) that state law forbids the judges from "issu[ing] rules or directives controlling how [h]earing [o]fficers set bond." On this view, the judges are powerless to stop the violations plaintiffs challenge. That is incorrect.

Texas law grants local jurisdictions discretion to promulgate and implement post-arrest policies that are consistent with its broad provisions regarding pretrial release and detention. *See* Tex. Gov't Code §75.403(f). County judges thus have significant power under state law to adopt policies governing post-misdemeanor-

arrest practices, as the district court explained. ROA.3273. In particular, nothing in state law prohibits the judges from promulgating rules that require hearing officers to exercise their discretion in ways that are consistent with the Constitution, as the court also explained. *See* ROA.5714-5716, 5677-5678. For example, in addition to promulgating a bail schedule that does not rely automatically on secured bail, the county judges could promulgate a rule requiring: (1) inquiry into and findings about ability to pay, and (2) consideration of non-financial alternatives. Or they could require that a financial condition be imposed only in an amount that does not operate to detain the arrestee absent findings justifying detention. Or they could require that unsecured bail and non-financial conditions of release be employed for certain arrestees after certain findings. Such rules would both cure the constitutional violations found by the district court and be consistent with Texas law.

The county's argument that it could not promulgate any such rules rests on article 17.03(a) of the Texas Code of Criminal Procedure, which states: "Except as provided by Subsection (b) of this article, a magistrate may, in the magistrate's discretion, release the defendant on his personal bond without sureties or other security." From this provision *allowing* magistrates to *release* arrestees on *unsecured* money bail, the county argues that any local rules *constraining* authority to *detain* arrestees using *secured* money bail would violate the statute.

That claim cannot be reconciled with the plain text of the statute. It is nonsensical to interpret a provision permitting unsecured release for all misdemeanor arrestees as barring the county judges from placing any constraint on the use of secured conditions. To state that a person "may" do something (such as impose unsecured bail as a condition of release in every case) is not to say that the person cannot be proscribed from doing the opposite (to impose secured money bail in every case). Rather, to say that something is always permissible is fully consistent with the possibility that it may be required in some circumstances. The county's reading is even more bizarre when considered alongside the next subsection, article 17.03(b), as it must be. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) (under Texas law, statutes are read "as a whole"). Subsection (b), tellingly ignored by the county, prohibits magistrates from using unsecured bail for certain arrestees, such as dangerous felony arrestees, who may only be released on unsecured bond by (non-magistrate) judges. The point of article 17.03 overall, then, is that magistrates may use unsecured bond for misdemeanor arrestees but may not do so for certain other arrestees.

The county's only supporting case law—*Combs v. State*, 652 S.W.2d 804 (Tex. Ct. App. 1983)—provides it no help. *Combs* merely rejected the claim that article 17.03(b) required release on personal bond in a murder case, and held that the decision to grant a personal bond is within the discretion of the "court before

whom the case is pending," given deferential standards of appellate review. *Id.* at 806. The "court" referred to in article 17.03(b) is a felony court judge, not a hearing officer, and *Combs* said nothing about the authority of the county judges to require release on unsecured bond in certain circumstances for arrestees in their jurisdiction.

Furthermore, as the district court pointed out, ROA.5626-5629, the county's interpretation flies in the face of Texas practice—a relevant consideration under *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), which directs that in determining municipal liability, courts look to "state and local positive law, as well as 'custom or usage' having the force of law," *id.* at 737. Texas practice has consistently understood that the county judges have the authority to limit hearing officers' discretion. To begin with, the judges issue "Rules," the plain meaning of which is to proscribe or prescribe conduct. As the district court observed, "[t]he County Judges testified that they could change these customs and practices legislatively … but that they choose not to." ROA.5715. The judges' actions confirm this concession: Between the filing of this case and the district court's ruling, the judges voted collectively to legislate presumptions for video hearings, for example, choosing offenses for which hearing officers must "favor" release on unsecured bond and choosing other offenses for which officers must "disfavor" unsecured bail. ROA.5606 & n.24; *see also*, *e.g.*, ROA.11194-11197 (judges'

August 2016 letter to hearing officers); ROA.11259-11261 (judges' November 2016 letter requiring bail hearings at first setting).

The hearing officers, moreover, view themselves as bound by the judges' Rules. ROA.7995-7996. The record shows them repeatedly stating, in thousands of video-recorded jailhouse hearings, that they lack discretion to deviate from the schedule's secured bail amounts, *see, e.g.*, ROA.5626 & n.46 (hearing officers treat deviations from the bail schedule as "incorrect"), ROA.5624; that they lack authority to inquire into and make findings concerning ability to pay or alternative conditions, ROA.1956-1957 ("Hearing Officers are not a court of record, and have not been delegated the authority to examine witnesses, hear evidence, or make findings of fact at hearings."), ROA.5616, 8009; and that only the judges have the authority to consider deviations from the schedule, ROA.5626-5627. These facts confirm that the custom in Texas is that county judges, consistent with the text of the article 17.03(b), have authority to limit hearing officers' conduct. *Jett*, 491 U.S. at 737.

ii. The challenged practices are not judicial acts

The county next argues (Br. 42-50) that the challenged practices cannot support municipal liability under section 1983 because they are "judicial acts." That too is mistaken.

This Court has "consistently" distinguished "between a judge's judicial and administrative duties." *Johnson*, 958 F.2d at 94. "Only with respect to actions taken pursuant to his or her administrative role can a judge be said to institute municipal policy." *Id.* The district court accordingly separated (1) the county judges' conduct in promulgating the post-arrest bail Rules and in effectively amending them by acquiescing in the hearing officers' implementation, from (2) the judges' (and hearing officers') adjudication of individual cases. It correctly ruled that the former was legislative or administrative, while the latter was judicial. ROA.3301-3302.

The former conclusion—the only one the county disputes—is strongly supported by the record. This Court has described criteria for whether an act is judicial as:

> (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity.

Davis v. Tarrant County, 565 F.3d 214, 222 (5th Cir. 2009). All of these factors support the conclusion that the challenged bail practices are not a judicial act.

As to the first, the precise acts complained of here—the promulgation and maintenance of unconstitutional bail practices—are not a traditional judicial function. "The touchstone [of a judicial act] has been performance of the function

of resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (quotation marks omitted). The judges' bail practices, by contrast, proscribe and prescribe conduct in "all the courts across one of the largest and most populous counties in the United States." ROA.3279. They are no different than a statute creating a presumption of release for certain categories of substantive offenses or imposing a set of standards by which to make a preventive detention decision. The fact that these practices incorporate conduct "embodied only in judicial decisions" does not undermine the conclusion that they are nevertheless "legislative rule[s]." *Gerstein*, 420 U.S. at 109 n.10.

The fact that the rules embody multiple policy judgments is further evidence that they are legislative. *See State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 89 (2d Cir. 2007). For example, they reflect a judgment that different standards are appropriate for different offenses. They also include judgments about which offenses warrant certain presumptions, such as prostitution and public intoxication. ROA.5605-5606. And they embody a judgment that different bail conditions (financial and otherwise) are appropriate based on certain characteristics of arrestees and that different presumptions of unsecured release should apply to different categories of arrestees based on policy assessments about the differences between those substantive offenses. All of these are classic legislative judgments.

This conclusion is confirmed by *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980). The Supreme Court held there that the Supreme Court of Virginia's issuance of a code of conduct for members of its bar "was not an act of adjudication but one of [legislative] rulemaking." *Id.* at 731. It separately concluded, however, that resolving individual disciplinary cases was a judicial act. *Id.* at 734-735. This forecloses the county's argument (Br. 47) that if an individualized action is judicial in nature, any policies or practices relating to that action (or establishing the standards and procedures to be applied in taking it) must also be judicial in nature.

According to the second and fourth *Davis* factors, the practices at issue do not arise out of an adversarial process in a courtroom or chambers, or an official visit to a judge. "[The Rules] are not promulgated by a single judge's signed order. [They] are promulgated by the County Judges sitting en banc as a board, voting by two-thirds majority." ROA.3279. If a city council or state legislature had promulgated these Rules, there could be no argument that creating them was a judicial act. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (voting on ordinance was "quintessentially legislative"); *Rowland*, 494 F.3d at 89-90 (acts "passed by means of established legislative procedures" are "procedurally legislative" (quotation marks omitted)). It is irrelevant that the people who vote on

them are called "judges," because the inquiry turns not on job title but on the nature of the function. *Davis*, 565 F.3d at 222.

Thus the county is not helped by *Harris v. City of Austin*, 2016 WL 1070863 (W.D. Tex. Mar. 16, 2016), which does not cite or apply the *Davis* factors. The relevant act here is a group vote to govern other officials' conduct through substantive rules having the force of law; it is not, as in *Harris*, a judicial order from a single judge setting forth procedural guidelines without "mandat[ing] … any particular action with respect to any defendant." *Id.* at *7; *accord* ROA.3279.

As to the third *Davis* factor, the promulgation of bail rules of "general application" is divorced from any particular "controversy which must be adjudicated." *Supreme Ct. of Va.*, 446 U.S. at 731 (quotation marks omitted). For example, the Rules and other unwritten customs and practices prescribe that no homeless person be released without paying secured bond, a mandate that ensures pretrial detention of all homeless misdemeanor arrestees in Harris County. ROA.5642 & n.56. Further, these practices require that no arrestee "be released on unsecured personal bonds until [two] references are verified." ROA.5712. These are categorical rules, not individualized controversies. That distinguishes this case from *Johnson*, where the plaintiff did not challenge the general policy or practices but rather his individual adjudication. 958 F.2d at 94.

The result in *Davis* is also readily distinguishable. The court there concluded that (1) a procedural scheme creating a list of lawyers from which trial courts must draw in making appointments, and (2) the judicial act of appointing counsel in a given case, were "inextricably linked." 565 F.3d at 223, 226. That conclusion was closely tied to the facts of the case and to the application of those facts to the four factors. In particular, this Court held that the "nature of the decision" was "identical" between the two categories, because when an attorney is placed on a rotating list for appointment, the court is effectively making the decision about appointment in *particular* cases. That is not true here. The challenged bail practices govern the conduct of county actors prior to any judicial hearing and include different substantive presumptions for different categories of arrestees depending, for example, on the type of charge or homelessness. Like other local and state laws, they create a framework in which the detention or release decision is made—first by law enforcement and then by hearing officers—based on particular standards and policy judgments. This is far from "identical" to the bail decision in a particular case.

In sum, the unconstitutional bail practices are attributable to the county judges and thus Harris County as a municipal entity.

2. The sheriff's enforcement is an act by an official with final policymaking authority

The county was also properly enjoined under an independent theory of municipal liability, namely the sheriff's enforcement of wealth-based bail practices that he knows to be unconstitutional. The county offers two responses: first, the sheriff is a state, not county actor (Br. 30-35); second, even if a nominally county actor, the sheriff is required by state law to enforce secured bail conditions (Br. 25-30). Each argument fails.

i. A phalanx of this Court's precedent forecloses the county's argument that the sheriff is a state rather than county actor with respect to law enforcement. "It has long been recognized that, in Texas, the county sheriff is the *county's* final policymaker in the area of law enforcement[.]" *Turner v. Upton County*, 915 F.2d 133, 136 (5th Cir. 1990) (emphasis added); *accord James v. Harris County*, 577 F.3d 612, 617 (5th Cir. 2009); *Williams v. Kaufman County*, 352 F.3d 994, 1013 (5th Cir. 2003); *Bennett v. Pippin*, 74 F.3d 578, 586 (5th Cir. 1996); *Colle v. Brazos County*, 981 F.2d 237, 244 (5th Cir. 1993). This is because the sheriff "holds virtually absolute sway over the particular tasks or areas of responsibility entrusted to him by state statute and is accountable to no one other than the [county's] voters." *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980). Among those areas of responsibility is the "execut[ion of] all lawful process issued to the officer by any magistrate or court." Texas Code Crim. P. art. 2.13(b)(2).

Texas law also provides that "[t]he sheriff of each county is the keeper of the county jail. The sheriff shall safely keep all prisoners committed to the jail by a lawful authority, subject to an order of the proper court." Tex. Gov't Code §351.041(a); *see Brown v. Callahan*, 623 F.3d 249, 254 (5th Cir. 2010) (recognizing that "the Sheriff is legally responsible for operating the county jail"). All this leaves no doubt that the sheriff is the final county policymaker in this arena.

ii. The county's contention that the sheriff is required by state law to enforce secured bail conditions misunderstands Texas law. Under Texas law, a sheriff is not required to enforce an order he *knows* to be unlawful. The district court's unchallenged factual findings make clear that that is the situation here.

Texas law recognizes a sheriff's "duty" to "ensure that only those persons are incarcerated for whom the sheriff … has a good faith belief based upon objective circumstances that he possesses valid legal authority to imprison." *Douthit v. Jones*, 641 F.2d 345, 346-347 (5th Cir. 1981) (per curiam). While this principle has received slightly different formulations in different contexts, it has been applied consistently by both this Court and Texas courts. *See, e.g.*, *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989) ("[T]he duty imposed by [state law] is a duty to investigate…. *Douthit* clarifies this duty by indicating that the investigation must yield 'objective circumstances' justifying a good faith belief that there exists

lawful authority to incarcerate the prisoner."); *Soto v. Ortiz*, 526 F. App'x 370, 376 (5th Cir. 2013) (reaffirming that Texas law commands the sheriff "to incarcerate only those persons whom he has lawful authority to imprison" (citing Tex. Gov't Code §351.041(a))); *McBeath v. Campbell*, 12 S.W.2d 118, 123 (Tex. Comm'n App. 1929) (holding that "when the sheriff finds out that a prisoner is confined in his jail … it is his duty to know by what authority he is confined therein"). It necessarily follows that "the sheriff is also endowed with the authority" to not enforce orders he knows to be illegal. *Doe v. Angelina County*, 733 F. Supp. 245, 257 (E.D. Tex. 1990).[11]

The county does not dispute the district court's factual finding that the sheriff knows that, in Harris County, secured bail is required without an individualized inquiry into ability to pay or consideration of alternatives to incarceration. ROA.5722-5724. Sheriff Gonzalez, echoing the public concerns of his predecessor, testified that in his view, "this practice violates the U.S. Constitution." ROA.5723. The court's finding is corroborated by its separate finding that sheriff's deputies have a custom and practice of participating in certain

[11] On this point, Texas law comports with the longstanding federal rule that law-enforcement officers must not enforce court orders in which they do not have a "good faith" belief of validity. *See Franks v. Delaware*, 438 U.S. 154, 155-156 (1978); *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

aspects of the constitutional violations by instructing all arrestees not to speak at hearings (which is not required by state law). ROA.5563, 5616.

The county nevertheless protests (Br. 26-30) that the sheriff does not have authority under Texas law to release arrestees on unsecured bail amounts. That is doubly flawed. First, it attacks a detail of the injunction—namely the requirement that the sheriff convert into unsecured bail conditions any secured bail conditions that exceed an accused's ability to pay—but is irrelevant to county liability. So long as the sheriff has discretion to not enforce an unconstitutional secured bail condition, a point the county does not appear to dispute, then his enforcement of Harris County's unconstitutional bail practices is discretionary and attributable to the county. Any objections to the contours of the district court's injunction are addressed below. *See infra* pp.84-86.

Second, the county misunderstands Texas law. The sheriff is authorized to "take … a bail bond." Texas Code Crim. P. art. 17.20. This provision is clarified by article 17.15, which states that "[t]he amount of bail to be required in any case is to be regulated by the court, judge, magistrate or officer taking the bail." The Texas Attorney General has interpreted the conjunction of these provisions to "compel[] the conclusion" that, in addition to "tak[ing]" bail in misdemeanor cases, "the sheriff or other peace officer … is also to regulate the *amount* of bail in such cases." Texas Attorney General Opinion No. H-856 (1976) (emphasis

added). Furthermore, Texas law defines the term "bail" to include *both* secured and unsecured bail, Tex. Code Crim. P. art. 17.01; ROA.5645, and it permits the sheriff to consider "ability to make bail," Tex. Code Crim. P. art. 17.15. Accordingly, state law permits the sheriff to require unsecured bail conditions when secured bail would constitute an order of detention due to indigence.

The county's only response (Br. 29) is that the sheriff can set the "amount" but not convert secured bail into unsecured bail. By that logic, the sheriff could set secured bail of $0 or $0.50 but could not set unsecured bail of $500. Merely articulating this reasoning reveals its incoherence. Moreover, as noted, Texas law defines "bail" to include unsecured conditions.

In sum, the sheriff is a final county policymaker with the discretion to not enforce illegal secured bail conditions. His decision to enforce county bail practices he knew to be unconstitutional creates county liability.

3. The county's arguments have little practical importance because the sheriff could be enjoined even if he were a state actor rather than a county policymaker

Finally, the injunction would be valid against the sheriff even if the county were correct (Br. 25) that he is a "state actor" for purposes of enforcing detention orders. State actors can be enjoined under section 1983 and a century of Supreme Court precedent, dating back to *Ex parte Young*, 209 U.S. 123, 155-156 (1908). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("An allegation

of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient" to seek injunctive relief). Indeed, this point is conceded on appeal, as appellants do not challenge the district court's earlier ruling that even if "the sheriff was not a municipal policymaker," "he was still subject to prospective relief as a state actor sued in an official capacity under *Ex parte Young*." ROA.3291-3292.

Accepting the county's arguments regarding *its* liability under section 1983 therefore would not affect the district court's preliminary injunction as applied to the sheriff. The injunction's central requirement—that the sheriff offer arrestees release on unsecured bail if the predetermined schedule or hearing officers impose a secured financial condition that results in de facto detention—would remain valid.

The county also invokes (Br. 52-54) the 1996 amendment to section 1983 eliminating injunctive relief "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity … unless a declaratory decree was violated or declaratory relief was unavailable." Pub. L. No. 104-317, §309(c), 110 Stat. 3817, 3853 (1996). Citing no authority, the county argues that this amendment deprives federal courts of power to enjoin local officials from violating the Constitution so long as the officials are following a state-court directive. This argument misunderstands the 1996 amendment.

After the Supreme Court held that state judges could be enjoined from violating the Constitution, *see Pulliam v. Allen*, 466 U.S. 522 (1984), Congress enacted a limited exception to "restore[]" protections for judges from "frivolous" lawsuits and "burdensome litigation." S. Rep. No. 104-366, at 36-37 (1996); *see also* 141 Cong. Rec. 21,836 (1995) (statement of Sen. Thurmond). The amendments thus ensure that federal and state judges can make decisions in their judicial capacity without being "subject to cost and fee awards in cases alleging Federal constitutional torts." S. Rep. No. 104-366 at 37. This limitation on injunctive relief, in other words, was meant to reinstitute previously existing protections for *judges*, not introduce new protections for unconstitutional judicial pronouncements.

It is thus unsurprising that, in cases both before *Pulliam* and after the 1996 amendments, courts have done exactly what appellants claim they may not do: enjoin the enforcement of unlawful court orders. In *Due v. Tallahassee Theatres, Inc.*, for example, this Court explained:

> If … the Sheriff, either through misunderstanding as to the scope of the order, or in excessive zeal in enforcing it, or because the order … violat[ed] the constitutional rights of the appellants, invaded appellants' constitutional rights, this could be tested out in a suit seeking to enjoin such conduct by the public officials.

333 F.2d 630, 632 (5th Cir. 1964). More recently, when the Alabama Supreme Court ordered the enforcement of a state law barring same-sex marriage, contrary

to the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the federal courts did not regard the state judicial order as a barrier to a preliminary injunction under section 1983. *See Strawser v. Strange*, 105 F. Supp. 3d 1323, 1329-1330 (S.D. Ala. 2015), *aff'd sub nom. Stawser v. Alabama*, 2015 U.S. App. Lexis 23018 (11th Cir. Oct. 20, 2015).

Rather than cite a single counterexample, the county invokes (Br. 53) "the Anti-Injunction Act's analogous bar on enjoining state judicial proceedings." But that statute has a different and broader purpose: to prevent undue interference with state court proceedings. *See, e.g.*, *Mitchum v. Foster*, 407 U.S. 225, 232-233 (1972). Indeed, section 1983 actions are exempt from the Anti-Injunction Act precisely because they "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 242.

III. THE INJUNCTION IS VALID

Finally, the judges attempt to show that this case meets the high standard for reversing a district court's discretionary judgment in crafting an injunction to remedy constitutional violations. They challenge both the court's consideration of the preliminary-injunction factors and the scope of its injunction. Both arguments fail.

An important point regarding both arguments is that a district court's equity power is sweeping. "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971); *accord Brown v. Plata*, 563 U.S. 493, 538 (2011). Indeed, "[t]he *essence* of equity jurisdiction has been the power of the Chancellor to … mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (emphasis added). For this reason, "the trial court is allowed wide discretion." *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974). And "appellate review is correspondingly narrow." *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001).

A. The District Court's Weighing Of The Equities Was Not An Abuse Of Discretion

The four-part test for a preliminary injunction is familiar: (1) likelihood of success on the merits, (2) irreparable harm to the moving party, (3) the balance of the equities, and (4) the public interest. *E.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2736 (2015). The Supreme Court has explained in the analogous context of a stay pending appeal that "[t]he first two factors of the traditional standard are the most critical." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see also id.* (noting the "substantial overlap between" stays and preliminary injunctions). The preceding arguments demonstrate that plaintiffs are likely to succeed on the merits of their

claim, and appellants say *nothing* to dispute the fact that these constitutional violations produce irreparable harm. The district court was thus confronted with a jurisdiction that causes 20,000 irreparably harmful constitutional violations each year.

As for the third and fourth (i.e., less "critical") factors, the judges do not even attempt to challenge the district court's discretionary weighing of the equities. They merely assert a variety of alleged harms to the "public interest" and "the enforcement of state law." Setting aside the infirmity of these allegations—discussed below—the district court did not ignore these points. It sought and received extensive briefing and considered closely how to balance the county's interests against 20,000 irreparable constitutional violations each year. *See supra* p.13. That the court ultimately concluded an injunction was necessary is fully consistent with this Court's precedent, which holds that "the public interest weighs in favor of preliminarily enforcing the [i]ndividual [p]laintiffs' rights." *Gee*, 2017 WL 2805637, at *19. That is especially so for constitutional violations. *See, e.g.*, *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997); *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). It cannot be an abuse of discretion for a district court to issue an injunction to remedy tens of thousands of constitutional violations when both of the "most critical" factors support an injunction, *Nken*, 556 U.S. at 434, when the

court has considered the state's alleged harms, and when the appellant fails to challenge the court's weighing of the equities. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 394 (1992) (O'Connor, J., concurring) ("[A]n appellate court should examine primarily the method in which the District Court exercises its discretion, not the substantive outcome the District Court reaches.").

In any event, the alleged harms are insubstantial. While the judges argue (Br. 53-55) that the injunction presents a "grave risk to public safety," Harris County would, as discussed, release *every one* of the people alleged to pose a public-safety risk—if they could pay to do so. *See supra* pp.24-26. It is untenable for appellants to try to frighten this Court into reversing by claiming that the injunction releases supposedly dangerous individuals, when appellants would be perfectly willing to throw these individuals' cells open if not for their inability to pay. That may explain why the elected district attorney has supported the relief sought in this case, ROA.4575, ROA.5822, and why the elected sheriff has strongly expressed the public-safety benefits of the relief ordered, ROA.5665 ("Sheriff Gonzalez credibly testified that the research showing the 'criminogenic' effects of even a short period of pretrial detention and the high public costs of extended detention is consistent with his own experience as a Harris County law-enforcement officer.").

Despite their public-safety rhetoric, the judges actually rest their "grave risk" argument on a factual assertion (Br. 53-54) that the injunction will increase failure-to-appear rates. But the district court found that those rates *decrease* when simple strategies are used, including (1) phone and text message reminders of court dates (a dramatically less expensive practice than the pretrial detention of 20,000 indigent misdemeanor arrestees every year), ROA.5662, 15731-15733, 8622, 8633; (2) targeted non-financial conditions, like those used in other cities; and (3) varying levels of supervision based on risk, *see* ROA.5703. The county has consistently declined to adopt such alternatives, and indeed has failed to adequately fund Pretrial Services so that it may provide proper reminders and supervision. ROA.7818-7819, 7811-7814. Regardless, even in evaluating the status quo (in which the county is neither properly funding alternatives nor following "best practices" for supervision, ROA.7928, 7811-7814), appellants' own expert witness found no meaningful difference in pretrial failure rates between arrestees on secured and unsecured release in Harris County. ROA.5660-5661.

The judges next argue (Br. 54) that the injunction will "overwhelm" Pretrial Services, which—they claim without citation (Br. 55)—would cause "irreparable harm to the public fisc." But as the district court explained, "[t]he issue is not added costs, but … shifted costs." ROA.5704. Based on the sheriff's testimony and other evidence, the court found that supervising arrestees in the community is

less expensive than keeping them in jail. ROA.5703-5704, 6375. Indeed, under the injunction, the county will actually save millions of dollars annually, by conservative estimates. ROA.5665. That some of these savings would need to be allocated to Pretrial Services (which the county concedes is inadequately funded, ROA.7818-7819, 7811-7814) rather than to jail expenditures does not pose any risk, much less a "grave" one, to public safety or the public fisc.

The judges further posit (Br. 54) that the injunction hinders the county's ability to impose non-financial conditions of release. That claim is facially implausible, given that a key reason for the district court's restriction on financial release conditions was the ready availability of equally effective non-financial ones, and given that the provision of the injunction authorizing release on unsecured bail by its terms applies only when secured *financial* conditions are imposed in excess of a misdemeanor arrestee's ability to pay. Nothing limits a hearing officer's authority to impose non-financial conditions or the sheriff's ability to enforce such conditions. ROA.6373. To the extent the injunction requires release after 24 hours without imposition of non-financial conditions, that is a function not of the injunction but of Texas law, which requires misdemeanor arrestees to be released after 24 hours absent a probable-cause determination. ROA.5706-5707, 5736. State and county law similarly require the probable-cause and bail-setting hearings to take place (together) within 24 hours in misdemeanor

cases. ROA.5580-5581, 5605-5606. But again, the injunction itself creates no restrictions on non-financial conditions of release.[12]

Finally, this Court need not dwell on the judges' cursory arguments (Br. 51-53) that the injunction will prohibit the enforcement of state law. *Every* injunction against illegal government action prohibits the enforcement of state or local law, to the extent it is subsumed by higher authority (here, the Constitution). Furthermore, appellants greatly overstate the extent to which the injunction affects state law. For example, it does not deem any state law facially invalid, because the county judges and sheriff have discretion in how to apply and enforce secured bail conditions, as explained above. Compelling these county actors to exercise their discretion consistent with the Constitution does not provide any basis to disturb the injunction. And the judges' concerns about family-violence cases (Br. 52) are unfounded because the district court excepted from the injunction family-violence arrestees who are subject to preventive detention. ROA.5763, 5735. The court also specifically crafted its relief to not interfere with "formal holds," ROA.5763-5764, and made clear that its relief only applies to misdemeanor arrestees "who have been deemed eligible for release." ROA.5763, 5733.

[12] Nor does it prevent appellants from imposing conditions automatically on certain arrestees (subject to prompt individualized review if the conditions would result in detention) or ensuring that certain arrestees appear before a hearing officer within 24 hours for the imposition of appropriate non-financial conditions (such as a restraining order). ROA.5762-5765.

In short, based on witness testimony and other record evidence, the district court made factual findings that appellants' "public safety" and related concerns are misguided. Those findings are not remotely clearly erroneous, and they gave the court ample grounds—in exercising its broad equitable power—to issue the injunction so as to remedy the 20,000 irreparably harmful constitutional violations per year that the county's bail practices cause. The district court did not abuse its wide discretion in doing so.

B. Appellants' Remaining Attacks On The Scope Of The Injunction Are Meritless

Finally, the judges hint in various places (*e.g.*, Br. 14, 24, 27, 58) that the injunction is improper because it provides relief exceeding the precise bounds of plaintiffs' constitutional theory. That suggestion is meritless.

Even if it were true that the injunction exceeds the scope of the constitutional violation, that would not be a basis to disturb the injunction. As the Supreme Court has explained, "those caught violating the [law] must expect some fencing in." *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957). The Court has also explained that "[t]he judicial remedy for a proven violation of law *will often include commands that the law does not impose on the community at large*." *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 n.22 (1986) (emphasis added). These cases explain why both this Court and the Supreme Court have approved injunctions that went beyond prohibiting repetition of the exact same

conduct. *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (FTC "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" and "cannot be required to confine its road block to the narrow lane the transgressor has traveled," lest its order "be by-passed with impunity"); *United States v. Campbell*, 897 F.2d 1317, 1323 (5th Cir. 1990) (upholding injunction that required the defendant "to notify the IRS of the intent to participate in the organization or sale of any tax shelter" and "wait 30 days thereafter").

Appellants also level meritless attacks on particular provisions of the injunction. For example, appellants now object (Br. 14) that the injunction does not provide them an opportunity to demonstrate that non-financial conditions could not serve the government's interests. But they contended below as a factual matter that they *could not* provide the procedures, consideration of evidence, or findings required by the Constitution for a valid order of detention at their video hearings. ROA.5725, 1956-1957, 5627 & n.48, 5629, 5616-5617. The court took that contention into account. Similarly, by incorporating the county's existing obligations to provide hearings within 24 hours, the district court ensured that its order provided reasonably complete guidance to county actors. *See Komyatti v. Bayh*, 96 F.3d 955, 960 (7th Cir. 1996) (noting benefits of a federal consent decree informed by state law requirements, including "minimizing the intrusiveness … into state affairs" and "harmonization … with the legitimate policy choices of the

state government"). The fact that the court—exercising the "[f]lexibility" that is the "essence of equity jurisdiction," *Swann*, 402 U.S. at 15—crafted an injunction that would be practically administrable by the Harris County criminal system is not a basis to set it aside. Put another way, the district court—by not ordering the county to do that which it could not do, and by accounting for what the county was already required to do—ensured "the right administration of justice." *Seymour v. Freer*, 75 U.S. 202, 218 (1869). This Court should defer to the experienced district court's considered judgment in this regard.

CONCLUSION

The district court's judgment and injunction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's June 27, 2017 order permitting appellees to file a brief no longer than 22,400 words. According to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the petition contains 19,936 words, excluding the portions exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Alec Karakatsanis
ALEC KARAKATSANIS

August 2, 2017

CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on August 2, 2017 by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Alec Karakatsanis
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