No. 17-20333

In the United States Court of Appeals for the Fifth Circuit

MARANDA LYNN O'DONNELL,

PLAINTIFF – APPELLEE,

v.

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

DEFENDANTS – APPELLANTS.

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD,

PLAINTIFFS - APPELLEES

v.

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

DEFENDANTS - APPELLANTS

On Appeal from the United States District Court for the Southern District of Texas

Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiff-Appellee

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August 9, 2017

Supplemental Certificate of Interested Persons

Case 17-20392, *Maranda O'Donnell v. Harris County, Texas, et al.*

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

Person or Entity	Connection to Case
Ilya Shapiro	Counsel to *amicus*
Devin Watkins	Counsel to *amicus*
Cato Institute	*Amicus curiae*

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/s/ Ilya Shapiro

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INTEREST AND INDEPENDENCE OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. This case concerns *amicus* because holding prisoners through non-individualized bail schemes undermines due process and the Eighth Amendment.

SUMMARY OF ARGUMENT

The right to affordable bail is supported by nearly a *millennium* of Anglo-American constitutional and common law. The Eighth Amendment protects the specific right to non-excessive pre-trial bail that takes into account defendants' indigency. That right specifically incorporates a more general right to pre-trial liberty protected by the Fifth and Fourteenth Amendments' Due Process Clauses. A predetermined, scheduled bail scheme that does not take into account individual indigency factors—like Harris County's—violates those rights. Accordingly, this Court should affirm the court below and uphold the preliminary injunction.

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[1] No one other than *amicus* and its counsel wrote any part of this brief or paid for its preparation. The parties have consented to this filing.

ARGUMENT

I. THE RIGHT TO BAIL EXISTED AT COMMON LAW AND WAS INCORPORATED INTO THE U.S. CONSTITUTION

Anglo-American law from the Saxon tribes to the Rehnquist Court support the existence of a procedural right to bail for bailable offenses attendant to the fundamental right to pre-trial liberty.

A. English Authorities from Before the Magna Carta to the Revolution Confirm the Right to Bail

Since time immemorial, concomitant to the general right to pre-trial liberty, bail has been a procedural right for all offenses against the Crown, except for those specifically excluded at law. *See*, *e.g.*, 4 William Blackstone, Commentaries *295 ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)); *accord generally* 2 William Hawkins, A Treatise on the Pleas of the Crown, bk. 2, ch. 15, at 138 (8th ed., 1716, reprinted 1824); 2 Co. Inst. 191; Sir Edward Coke, A Little Treatise of Baile and Maineprize (1635) (listing the offenses for which a person had a right to bail and no right to bail at common law); 2 Henri de Bracton, De Legibus et Consuetudinibus Angliae 295 (c. 1235,

reprinted 1990). This tradition of bail rights continued through the Magna Carta, the English Revolution, the English Restoration, the Colonial Era, and into American jurisprudence.

"[T]he root idea of the modern right to bail" originates from "tribal customs on the continent of Europe," developing far earlier than parchment barrier guarantees of freedom like the Magna Carta or the Constitution. Elsa De Haas, Antiquities of Bail: Origin and Development in Criminal Cases to the Year 1275, at 128 (1966); *accord* 2 Sir Frederick William Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 458-60 (2d ed. 1898, reprinted 1984). Those customs used a financial bond "as a device to free untried prisoners." Daniel J. Freed & Patricia M. Wald, Bail in the United States: 1964, at 1 (1964). Pre-Normal England was largely governed by the Germanic tribal custom of *wergild*[2] carried over by the Saxons—*wergild* payment is the ancient root of surety bail. De Haas, *supra*, at 3-15. *Wergild* was the payment due to a family for the slaying or assault of a relative. *Id.* at 11-13. By providing sufficient surety that the *wergild* would be paid, the blood feud between the families subsided and the perpetrator was given

[2] Also known as *wirgeld* or *wergeld*.

safe conduct. *Id.* at 12-13. The surety of the *wergild* evolved into the concept of bail thereafter. This system pervaded until William the Conqueror imported Frankish law.

As the Germanic law evolved into the classic common law of post-Norman Conquest England, the *wergeld* surety became the crown pleas of replevy and mainprize, secured by bail pledges circa 1275. *See* 2 Pollock & Maitland, *supra*, at 584; De Haas, *supra*, at 32-33, 64-65, 68, 85 (noting that the pleas are listed in the Statute of Westminster I). The writs were aimed at the "release of the alleged criminal," as "bail as a right of free men assumed greater proportions of importance." De Haas, *supra*, at 85, 129. Near the end of the Danish and Wessex Kings' rule over the British Isles in the 1000s, King Canute II (the Great) instituted the frankpledge system which subdivided the people of the realm by household into groups of ten—a tithing—that were bound for the surety of each-other to appear in criminal offenses. Timothy R. Schacke, Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform 25 (2014); 4 William Blackstone, Commentaries, *249. The frankpledge system complimented a robust private surety system. De Haas, *supra* at 49-50.

In 1215, the Magna Carta codified the fundamental right to pretrial liberty: "No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta ch. 32 (1216); *accord* Magna Carta ch. 39 (1215); Magna Carta ch. 29 (1225); 2 Co. Inst. 190, 191 ("To deny a man replevin that is replisable, and thereby to detain him in prison, is a great offense."); *see also Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 186 (1963) (noting the same). Thus, men were to be left at liberty until there is a verdict in their cases. Indeed, "the King's courts at Westminster" were greatly concerned with "'the liberty of the subject'" in bail cases. *Cf.* 2 Pollock & Maitland, *supra*, at 586. The 1275 Statute of Westminster laid out which crimes were bailable and those where the right to bail may be abrogated by the risk of disturbance of the peace of the community, as well as creating severe punishments for corrupt sheriffs. Statute of Westminster I, 3 Edw. III, c. 3, 15; De Haas, *supra*, at 95.

Following the Norman Conquest, it became apparent that the sheriffs (shire-reeves) responsible for groups of frankpledged tithings were corrupt in their administration of bail through writs of bail, replevy, and mainprize. *United States v. Edwards*, 430 A.2d 1321, 1326 (D.C. Cir.

1981) (en banc) (noting that sheriffs' bail "power was widely abused by sheriffs who extorted money from individuals entitled to release without charge" and "accepted bribes from those who were not otherwise entitled to bail"); De Haas, *supra* at 90-95. In 1166, bail, mainprize, and replevy for crimes of royal "concern" were thus committed to judicial discretion as crown pleas that must be heard by a crown court. De Haas, *supra*, at 60-61. The Normans also incorporated grand juries into the justice system, and established a system of circuit-riding judges. Schacke, *supra*, at 25; De Haas, *supra* at 58-63 (discussing the 1166 Assize of Clarendon); *see also Smith v. Boucher*, 10 Geo. 2 136, 136, 27 Eng. Rep. 782, 783 (Hardwicke, J.) (K.B. 1736) ("[T]o settle the quantum of that bail . . . is still subject to the power of the Judge.").

Statutes between 1150 and the 1400s curtailed the powers of the sheriffs in bail in response to malpractice and heaped on penalties for abuses. De Haas, *supra* at 95-96 & n.277 (collecting statutes). Abuse of the right to bail by the Stuart King Charles I lead to the adoption of the Petition of Right in 1628, overruling the King's judges in *Darnel's Case* who interpreted the Magna Carta as not applying to pre-trial liberty. Petition of Right, 3 Car. I, c.1 (1628); *Darnel's Case*, 3 How. St. Tr. 1, 25

(1627) (opening request to the judges was "that he may be bailed from his imprisonment . . . for it being before trial and conviction had by law, it is but an accusation, and he that is only accused ought by law to be let to bail."); 3 Sir Edward Coke, The Selected Writings and Speeches of Sir Edward Coke 1270 (Steve Sheppard, ed., 1st ed. 2003) (MP Sir Edward Coke's report on the framing of the Petition of Right to the Committee of the Whole Commons). In 1679, in response to further abuses of the Stuart kings and their sheriffs, Parliament passed the Habeas Corpus Act, securing judicial review of detention, including whether a person was entitled to bail release. Habeas Corpus Act of 1679, 31 Cha. II, c. 2.

In 1689, Parliament underscored the importance of the right to pre-trial liberty by expressly including a right against excessive bail in the Bill of Rights, thereby legislating against a chief form of attack on the fundamental right to bail employed by the Stuart Kings—the unlawful holding of prisoners through unaffordable bail. Bill of Rights, 1 W. & M., c. 2 (1689). The common law of the right to pre-trial liberty through bail continued through to the Revolution and was carried into the U.S. Constitution, state constitutions, and federal law. *E.g.*, 4 William Blackstone, Commentaries *295.

B. American Constitutional and Common Law Incorporates and Upholds a Right to Bail

"In crossing the Atlantic, American colonists carried concepts embedded in these documents [the Magna Carta, 1275 Statute of Westminster I, Habeas Corpus Act of 1679, and the 1689 Bill of Rights] that became the foundation for our current system of bail." *New Mexico v. Brown*, 338 P.3d 1276, 1284 (N.M. 2014).

Both the colonies that became states and later states incorporated the right to bail into their own law. "One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail 'by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.'" *Id.* (quoting Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013)). Pennsylvania, New York, Massachusetts, North Carolina, and Virginia all adopted right to bail clauses either before or immediately after the founding. *Caleb Foote, The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 974-77 (1965); *see also generally* N.Y. Charter of Liberties and Privileges (1683); Mass. Body of Liberties (1641); N.C. Const. Declaration of Rights § x (Dec. 18, 1776).

On the federal level, this right to bail has been woven into the Constitution, federal statutory law, and federal court decisions. The general right to pre-trial liberty from the time of the Magna Carta was preserved on a constitutional level in the Constitution's Due Process Clauses. *Compare* U.S. Const. amend. V ("nor shall any person . . . be deprived of . . . liberty . . . without due process of law") *and* amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law") *with* Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land.").

In the Judiciary Act of 1789, Congress codified bail as the procedural mechanism for preserving the right to pre-trial liberty by enacting an absolute right to bail in non-capital cases and a limited right to bail in capital cases. 1 Stat. 73, § 33, at 91 ("Upon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein."). The Articles of Confederation Congress also recognized the right to pre-trial liberty through bail—the

Northwest Ordinance of 1787 enacted that "[a]ll persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, art. 2.

It is worth examining an example of how the right to bail applied even for the most serious non-capital crimes during the Founding Era by considering *United States v. Lawrence*, 4 Cranch C. C. 518 (1835). In this case, Richard Lawrence attempted to assassinate President Andrew Jackson, failing only because two properly loaded pistols both misfired. Because no physical harm occurred, the laws of the time considered this act to be the common law crime of assault with intent to murder (which did not carry the death penalty). Any crime that was not a capital crime—even one as serious as this—was bailable and the Constitution was understood to prohibit bail more than the defendant could provide. *Id.* ("The chief judge then said . . . that the constitution forbade him to require excessive bail; and that to require larger bail than the prisoner could give

would be to require excessive bail, and to deny bail in a case clearly bailable by law."). The judge initially suggested a bail of $1000. The government recognized the right to bail here, but suggested that the amount be increased to $1500 on the possibility that the defendant had friends who could assist in posting bail—a request to which the judge agreed. *Id.*

The understanding in *Lawrence,* that bail cannot be required of indigent defendants beyond what they could reasonably acquire, was broadly accepted for over 100 years. Joseph Chitty, A Practical Treatise on the Criminal Law 130-31 (1832) ("The rule is, where the offense is prima facie great, to require good bail; moderation, nevertheless, is to be observed, and such bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge."); *United States v. Brawner*, 7 F. 86, 89 (W.D. Tenn. 1881) (citing *Lawrence* for the proposition that "to require larger bail than the prisoner could give would be to require excessive bail, and to deny bail in a case clearly bailable by law"); William Smithers Church, A Treatise of the Writ of Habeas Corpus 532, § 397 (1886) ("To require larger bail than the prisoner can give is to require excessive bail,

and to deny bail in a case clearly bailable by law."); George Arthur Malcolm, The Constitutional Law of the Philippine Islands Together with Studies in the Field of Comparative Constitutional Law 497 (1920) ("It is substantially a denial of bail, and a violation of constitutional guaranties against excessive bail, to require a larger sum than, from the circumstances, the prisoner can be expected to give.").

Modern Supreme Court precedent has reaffirmed these ancient principles of bail: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Supreme Court in *Stack v. Boyle* made clear that a "right to bail" is a component of pre-trial liberty as understo bod in American law "[f]rom the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure":

> [F]ederal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. *See Hudson v. Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 4 (1951) (Vinson, C.J.).

Since *Stack v. Boyle*, the Supreme Court has backed away from the idea that the Eighth Amendment's Excessive Bail Clause incorporates a general right to bail. *United States v. Salerno*, 481 U.S. 739, 752-54 (1987) ("The above-quoted dictum in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail"). Yet *Salerno* still incorporated a fundamental right to pre-trial liberty under the Due Process Clauses. *Id.* at 746-53.

The *Salerno* Court is correct that certain crimes are not and have not been bailable at common law; "the right to bail they have discovered in the Eighth Amendment is not absolute." *Id.* at 753. That has been clear since Bracton and Coke, 2 Co. Inst. 191; Sir Edward Coke, A Little Treatise of Baile and Maineprize (1635) (listing the offenses for which a person had a right to bail and no right to bail at common law); 2 Bracton, *supra* at 295, and as the Statute of Westminster I and the 1628 Petition of Right shows, the legislature clearly has the power to make policy decisions about who is and is not bailable—at least within the bounds of reason. *See supra* Part I.A; *cf. Salerno*, 481 U.S. at 755 (upholding the Bail Reform Act of 1984).

The confusion of the *Salerno* Court as to the Eighth Amendment is understandable and easily corrected. This amendment is not the textual anchor for the general right to bail and pre-trial liberty—though it clearly provides support in that it presumes such a right. As the *Salerno* Court found, the general right to pre-trial liberty is preserved in the Due Process Clauses—and bail is the due process mechanism for achieving pre-trial liberty—but the Eighth Amendment affirms a different yet related right against *excessive* bail. That right is conceptually separate from the general right to pre-trial liberty via bail, but it evolved out of the same common law. *Compare* Magna Carta ch. 32 (1216) (protecting pre-trial liberty in general with the predecessor to the Due Process Clauses), *with* Bill of Rights, 1 W. & M., c. 2 (1689) (incorporating a right against excessive bail); *see infra* Part II.A (discussing the common law considerations for setting "sufficient" bail and the codification of that right in 1689).

The heavy lifting of the general right to bail and pre-trial liberty is more properly done by the Due Process Clauses, while *excessive* bail challenges arise under the Eighth Amendment. Excessive bail claims give

rise to claims of denial of bail altogether, however, so the Eighth Amendment can protect against a specific type of encroachment on rights generally guaranteed by the Due Process Clauses.

In sum, American law incorporates over 950 years of English constitutional and common law in establishing a fundamental right to the process of bail in order to secure pretrial liberty.

II. THE RIGHT TO BAIL GUARANTEES NON-EXCESSIVE, INDIVIDUALIZED ASSESSMENTS NOT FIXED BY A PRE-DETERMINED SCHEME

Amici American Bail Coalition, Professional Bondsmen of Texas, and Professional Bondsmen of Harris County are absolutely correct that "[s]ince before the Founding, American communities have relied on bail systems to give criminal defendants an option to secure their liberty before trial" and that "[t]he American colonies developed bail procedures based on English practices, and they retained those practices at independence." Am. Bail Coal. Br. at 7. But they are incorrect that those English and colonial practices—and modern practice—would countenance non-individualized, pre-determined "bail systems like Harris County's." *Id.* at 10. Since Norman England, bail has been supposed to be set with respect to the individual wealth circumstances of the criminal defendant.

A. Pre- and Post-Revolutionary Constitutional and Common Law Commits Bail to Judicial Discretion to Avoid Excessive Bail for Indigents and to Ensure Sufficient Sureties

After the Norman Conquest of England and during the changes to pre-trial liberty and bail laws contemplated in the Magna Carta and the 1275 Statute of Westminster I, it became clear that bail is to be set with respect to the individual wealth circumstances of the defendant.

Defendants are required to put up "sufficient sureties," but what is "sufficient" depended on the individual wealth circumstances of the defendant. *See, e.g.*, *King v. Bowes*, 1 T.R. 696, 700, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (per curiam) (noting that "[e]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances"), (Archbald, J.) (allowing for a "lessening" of bail as there may be "difficulty" in procuring the sums); 2 Hawkins, at ch. 15, at 138-39 (discussing "[w]hat is said to be sufficient bail" and noting that judges ought to "take care that every one of the bail be of ability sufficient to answer the sum in which they are bound . . . upon consideration of the ability and quality of the prisoners, and the nature of the offence."). The rule Hawkins discusses extends back to early Norman common law. *See* De Haas, *supra*,

at 84 ("It is noteworthy that no fixed amount seems to have been charged for the privilege of bail release . . . . It is our conclusion that they allowed themselves considerable leeway in writing out the order for release, and that they failed generally to abide by any set formula."); 2 Pollock & Maitland, *supra*, at 514 (noting that in applying amercements to the sureties of those who fled on bail bond, "[a]ccount can now be taken of the offender's wealth or poverty . . . . there also seem to be maximum amercements depending on the wrong-doer's rank; the baron will not have to pay more than a hundred pounds, nor the routier more than five shillings").

These common-law roots were expanded and became more solidified with the abuses of the Stuart Kings before and after the English Civil War. In *Darnel's Case* in 1627, judges of the King's Bench "proved their subservience to the King [Charles I] by denying [habeas] release" to five knights committed to prison by special royal command for unnamed offenses. Foote, *supra*, at 966; *Darnel's Case*, 3 How. St. Tr. 1 (1627). That court found that, on due process grounds, the Magna Carta did not secure pre-trial liberty. Foote, *supra*, at 966; *Darnel's Case*, 3 How. St. Tr. 1 (1627). The House of Commons, under the leadership of Sir Edward Coke, took up the case and responded with the 1628 Petition of Right, asserting

the right to pre-trial liberty under the Magna Carta and overruling *Darnel's Case*—"no freeman in any such manner as is before mentioned, be imprisoned or detained." Petition of Right, 3 Car. I, c.1 (1628); 3 How. St. Tr. 1, at 224 ¶ x; 3 Coke, Selected Writings and Speeches, at 1270; Foote, *supra*, at 967.

Further abuses of loopholes by Stuart King Charles II lead to the adoption of the Habeas Corpus Act of 1679, which noted that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable." 31 Cha. II, c. 2 (1679). Having exhausted all of those loopholes, Charles II turned to "setting impossibly high bail" in order to "erect[] another obstacle to thwart the purpose of the law on pretrial detention." Foote, *supra*, at 967.

After William and Mary assumed the throne, Parliament responded to the Stuart high bail policy with the 1689 Bill of Rights. Bill of Rights, 1 W. & M., c. 2 (1689). Clause 10 of the Bill of Rights expressly provided that "excessive bail ought not be required." *Id.* The courts of the King's Bench bent to parliamentary supremacy after the destruction of Stuart absolutism and examined actions for excessive bail, respecting the rank and ability of the individual to post bond. *E.g.*, *Daw v. Swaine*, 1 Sid. 424,

21 Car. 2 424, 88 Eng. Rep. 1195, 1195 (C.P. 1670) (action for excessive bail); *Neal v. Spencer*, 10 Will. 3 257, 257-58, 88 Eng. Rep. 1305, 1305-06 & n.a (K.B. 1698) (collecting cases that note the diversity of bails given for the same offense in an action for excessive bail); *Parker v. Langley*, 11 Anne 145, 145-46, 88 Eng. Rep. 667, 667 (Q.B. 1712) (action for excessive bail); *Smith v. Boucher*, 10 Geo. 2 136, 136 27 Eng. Rep. 782, 783 (Hardwicke, J.) (K.B. 1736) ("[T]o settle the quantum of that bail . . . . is still subject to the power of the Judge."); *King v. Bowes*, 1 T.R. 696, 700, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (Archbald, J.) (allowing for a "lessening" of bail as their may be "difficulty" in procuring the sums."); *Bates v. Pilling*, 149 Eng. Rep. 805, 805 (K.B. 1834) ("[A] defendant might be subjected to as much inconvenience by being compelled to put in bail to an excessive amount, as if he had been actually arrested."); *accord* 2 Hawkins, at ch. 15, at 138-39.

In the *King v. Bowes*, the per curiam King's Bench noted that "[e]xcessive bail is a relative term; it depends on the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances." 1 T.R. at 700, 99 Eng. Rep. at 1329. Hawkins in his *Pleas of the Crown* repeated the rule that "sufficient" bond

must take into account the wealth status of the defendant. 2 Hawkins, at ch. 15, at 138-39. Thus, "excessive" bail was not determined by examining a pre-determined, fixed amount, but rather by asking whether the amount was appropriate given the wealth of the defendant, for "a defendant might be subjected to as much inconvenience by being compelled to put in bail to an excessive amount, as if he had been actually arrested." *Bates*, 149 Eng. Rep. at 805; *accord* 1 J. Chitty, A Practical Treatise on the Criminal Law *131, at 88-89 (William Brown, Philadelphia 1819) ("[S]uch bail is only to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.")

After the Revolution, the United States affirmed the specific right against excessive bail from the English Bill of Rights but with stronger language. *Compare* U.S. Const. amend. VIII ("Excessive bail *shall* not be required"), *with* 1 W. & M., c. 2, cl. 10 (1689) ("excessive bail *ought* not be required") (emphases added). Early American common law adopted the English understanding that setting bail includes particularization to a defendant's wealth, lest it be unconstitutionally "excessive" considering individual circumstances. "'[T]o require larger bail than the prisoner

could give would be to require excessive bail, and to deny bail in a case clearly bailable by law.'" *United States v. Brawner*, 7 Fed. 86 (W.D. Tenn. 1881) (quoting *United States v. Lawrence*, 26 Fed. Cas. 887, 888 (No. 15,557) (D.C. Cir. 1835)); *United States v. Radford*, 361 F.2d 777, 780 (4th Cir. 1966) ("[I]n a case clearly bailable by law, to require larger bail than the prisoner could give, would be to require excessive bail."); *see also, e.g.*, *Jones v. Kelly*, 17 Mass. 116, 116-17 (1821) (finding bail to be excessive when a man could not secure sufficient sureties and reducing it from $3000 to $1000); *Whiting v. Putnam*, 17 Mass. 175, 175-78 (1821); *Ex Parte Hutchings*, 11 Tex. App. 28, 29 (Tex. 1881) (whether bail is "excessive and oppressive" depends "upon the pecuniary condition of the party. If wealthy the amount would be quite insignificant compared to a term in the penitentiary; if poor, very oppressive, if not a denial of the bail."). The Supreme Court has often reaffirmed "the Eighth Amendment's proscription against excessive bail." *Salerno*, 481 U.S. at 746.

Accordingly, the established common law of the sufficiency of bail from the Norman Conquest of England through to the modern American law requires that magistrates and judges take into account the individual wealth circumstances of the defendant in setting bail.

B. Pre-Determined, Non-Individualized Bail Schemes Violate the Right to Pre-Trial Liberty, the Right to Bail, and the Right Against Excessive Bail

A pre-determined, scheduled bail scheme as applied by Harris County's, by its very nature, does not give individualized determinations that the Fifth, Eighth and Fourteenth Amendments demand. U.S. Const. amend. V (granting a general right to pre-trial liberty and bail, see *supra* Part I); U.S. Const. amend. VIII (requires bail determinations with individualized wealth determination per common law, see *supra* Part II.A); U.S. Const. amend. XIV, § 1 (requiring the law not to abridge the fundamental right to pretrial liberty). The facts of this case demonstrate, as the district court found, that Harris County's "Hearing Officers treat the bail schedule, if not as binding, then as a nearly irrebuttable presumption in favor of applying secured money bail at the prescheduled amount," ROA.5626, thus failing to set bonds respecting the individual defendant's wealth circumstances. Like the impetus behind the Excessive Bail Clause when King Charles II's "setting impossibly high bail" that defendants could not possibly pay, Foote, *supra*, at 967, Harris County's practically fixed bail system sets bail beyond the ability of some defendants to pay.

Nor did Harris County even provide "timely hearings at which misdemeanor defendants can be heard, can present evidence of their inability to pay, or can receive reasoned opinions with written findings on why a secured financial condition of release, and not a less restrictive condition, is the only reasonable means to assure their appearance at trial or lawabiding conduct before trial." ROA.5725.

Accordingly, the district court properly concluded that Harris County's policies violated Due Process Clause. That decision is supported by nearly a *millennium* of Anglo-American common law on bail. This Court should not deviate from that long common law tradition.

CONCLUSION

For the foregoing reasons, *amicus* Cato Institute urges the court to uphold the preliminary injunction and establish clearly that bail must take into account the wealth of indigent defendants.

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August 9, 2017

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

/s/ Ilya Shapiro

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On August 9, 2017, I filed this *Brief of the Cato Institute as Amicus Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

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