No. 17-20333

In the United States Court of Appeals for the Fifth Circuit

MARANDA LYNN ODONNELL,
Plaintiff-Appellee,

v.

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

Defendants-Appellants.

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

v.

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

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

BRIEF *AMICUS CURIAE* OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: August 9, 2017

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for equality and liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Harris County, Texas has a policy and practice of using secured money bail to impose pretrial detention on misdemeanor defendants too poor to pay. This practice cannot be squared with the text and history of the Fourteenth Amendment, which guarantees equal justice under the law to rich and poor alike. Indeed, the County's policy denies the most

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

basic form of liberty to those unable to pay, exerts coercive pressure on defendants charged with misdemeanors to plead guilty in order to be released, and makes it harder for others to prepare a defense. Using the bail system in this way perverts the historic use of bail as a mechanism for ensuring pretrial liberty for persons charged with a crime. Moreover, this policy is completely unnecessary in light of numerous alternative approaches that serve the governmental interests in a defendant's appearance at trial and in community safety while respecting the constitutional guarantees of equal protection and due process enshrined in the Fourteenth Amendment.

Nearly 150 years ago, in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment fundamentally altered our Constitution's protection of individual, personal rights, adding to our nation's charter sweeping guarantees of liberty and equality in order to secure "the civil rights and privileges of all citizens in all parts of the republic," *see* Joint Comm. on Reconstruction, *Report of the Joint Committee on Reconstruction*, No. 39-30, at xxi (1st Sess. 1866), and to keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country."

Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Crafted against the backdrop of the suppression of rights in the South, the Fourteenth Amendment was designed to protect the full scope of liberty and to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. Together with its guarantee of equal protection, which "secur[ed] an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502, the Fourteenth Amendment gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766.

The Fourteenth Amendment's guarantees of liberty and equality, which "are connected in a profound way," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015), together ensure equal justice under the law for all persons, rich and poor. As the Supreme Court has explained, the "constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—

all people charged with crime must, as far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). It is "a basic premise of our criminal justice system" that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

In a long line of cases rooted both in equal protection and due process principles, the Supreme Court has faithfully applied this constitutional commitment to equal justice for rich and poor alike, striking down deprivations of liberty that affect people based on how much money they possess. *See Griffin*, 351 U.S. at 17; *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Indeed, the Supreme Court has recognized that even when fair on their face, state rules that "grossly discriminat[e] in [their] operation," *Griffin*, 351 U.S. at 17 n.11, cannot be squared with the constitutional command of due process and equal protection for all persons. Under these cases, "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).

Harris County's bail system, which detains before trial 40% of all persons arrested only on misdemeanor charges, runs afoul of these principles. Quite simply, pricing those too poor to pay out of the "traditional right to freedom before conviction," *Stack v. Boyle*, 342 U.S. 1, 4 (1951), cannot be squared with the Fourteenth Amendment's mandate that all persons enjoy equal justice under the law. Nor can it be squared with the historic use of bail as a due process mechanism for preserving pretrial liberty, which ensures "the unhampered preparation of a defense," and "prevent[s] the infliction of punishment prior to conviction." *Id.* "The practice of admission to bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, . . . [it] enables[s] them to stay out of jail until a trial has found them guilty." *Id.* at 7-8 (Jackson, J., concurring); *see United States v. Salerno*, 481 U.S. 739, 755 (1987) (fundamental constitutional principles make "liberty . . . the norm" and "detention prior to trial or without trial . . . the carefully limited exception"). The County's use of bail as a mechanism for imposing

pretrial detention on those too poor to pay turns bail, a fundamental aspect of our heritage of liberty, into an engine of oppression.

Harris County and its *amici* insist that the County's discriminatory bail policy is necessary to ensure the attendance of misdemeanor defendants at trial and protect the public, but there is no conflict between ensuring pretrial liberty for all persons regardless of income and the plainly important interests in ensuring the presence of defendants at trial and in community safety. As the experiences of states across the country demonstrate, states have many alternative means available to them—alternatives that not only ensure the appearance of defendants at trial and preserve public safety, but also comport with the fundamental fairness that the Fourteenth Amendment guarantees to all persons. As these examples demonstrate, Harris County's bail system unnecessarily denies pretrial liberty to indigent defendants and prevents the equal administration of justice. Such practices are not only unconstitutional, they also conflict with sound public policy. The judgment of the district court should be affirmed.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT GUARANTEE EQUAL JUSTICE UNDER THE LAW FOR ALL PERSONS.

The Fourteenth Amendment commands that "[n]o State" "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. These overlapping guarantees—which "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused," *id.* at 807 (Thomas, J., concurring)—"call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Griffin*, 351 U.S. at 17. The Fourteenth Amendment enshrined in the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty." Cong. Globe, 39th Cong., 1st Sess. 1255 (1866). The Amendment gives to "the humblest, the poorest, the most despised . . . the same rights and the same protection of the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766.

As the Supreme Court has recognized, "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection . . . may be instructive as to the meaning and reach of the other." *Obergefell*, 135 S. Ct. at 2603. "Each concept—liberty and equal protection—leads to a stronger understanding of the other." *Id.*

This principle is particularly true in the context of discrimination in the court system. "Due process and equal protection principles converge," *Bearden*, 466 U.S. at 665, to ensure that the state may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring); *see M.L.B.*, 519 U.S. at 120 ("The equal protection concern relates to the legitimacy of fencing out [litigants] based solely on their inability to pay . . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."); *cf. Pugh*, 572 F.2d at 1057 ("Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent . . . .").

Ensuring equal justice in the courts for all persons was of particular concern to the drafters of the Fourteenth Amendment. In the wake of the Civil War, widespread maladministration of justice in the South meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 602, 783, 1065, 1090-91, 1093-94, 1263 (1866). The Framers understood that the lack of basic free trial rights was instrumental in the subordination of African-Americans and their Unionist allies. Sadly, it was all too "easy to show how impossible it is for the freedmen . . . to receive anything like justice, protection, equity . . . . Judges, juries, lawyers, officers . . . carry with them such a hatred and contempt for the freedmen as to utterly preclude the idea that they can do him full justice." *Id.* at 1838; *id.* at 653 ("Where is your court of justice in any southern State where the black man can secure protection? Again there is no response."); Cong. Globe, 39th Cong., 2nd Sess. 160 (1866) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty, or property").

These abuses—together with the injustices wrought in the North by the federal Fugitive Slave Act of 1850, *see* Akhil Reed Amar, *America's Constitution: A Biography* 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850")—convinced the Framers that it was necessary to add to the Constitution new limits on state governments in order to secure liberty and equality for all persons.

The Fourteenth Amendment guarantees to all persons—"no matter how poor, no matter how friendless, no matter how ignorant"—"due process of law . . . which is impartial, equal, exact justice," Cong. Globe, 39th Cong., 1st Sess. 1094 (1866), establishing "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." *Id.* at app. 256; Cong. Globe, 42nd Cong., 1st Sess. app. 153 (1871) (arguing that the due process guarantee "realizes the full force and effect of the clause in Magna Carta, from which it was borrowed" and provides that "there is no power . . . to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty, and

property, except by due process of law; that is by an *impartial trial* according to the laws of the land" (emphasis added)).

Under these principles, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755; *see Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). An "indigent defendant's loss of personal liberty . . . lies 'at the core of the liberty protected by the Due Process Clause'" and its "threatened loss through legal proceedings demands 'due process protection.'" *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011) (citations omitted); *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, . . . freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution."). Detaining an individual prior to trial requires careful factual findings supporting the denial of this most basic form of liberty; it cannot be imposed on the basis of indigency alone.

The Fourteenth Amendment not only guarantees due process of law—forbidding deprivations of liberty not accompanied by fair procedures—but also guarantees equal protection of the law to all

persons, establishing "a shield and protection over the head of the lowliest and poorest citizen in the remotest region of the nation[.]" Cong. Globe, 39th Cong., 1st Sess. 586 (1866). The constitutional guarantee of equal protection "establishes equality before the law," *id.* at 2766, ensuring that, in the administration of justice, all persons—regardless of their race, their gender, or the amount of money they possess—are entitled to equal rights under the law. The constitutional guarantee of equal protection also "abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* at 2766*; see id.* at 2459 ("Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."); *id.* at 2766 ("It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."). This serves to ensure that that "the Constitution, in the administration of justice, in the organization of tribunals for the

administration of justice, is no respecter of persons." Cong. Globe, 36th Cong., 2nd Sess. app. 83 (1861).

While the Fourteenth Amendment's guarantee of equality was written in the aftermath of the Civil War and the end of slavery, it protects all persons. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring), secures equal rights and "equal dignity in the eyes of the law," *Obergefell*, 135 S. Ct. at 2608, for all men and women of any race, whether young or old, citizen or alien, rich or poor. *See* Cong. Globe, 39th Cong., 1st Sess. 343 (1866) ("[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest

man in the land[.]"); *id.* at 1159 ("A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.").

Together, the Fourteenth Amendment's overlapping guarantees of due process and equal protection prevent the states from "bolt[ing] the door to equal justice," for rich and poor alike, *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring), a principle with deep roots in our constitutional heritage. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (quoting oath requiring Article III judges to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich"); Magna Carta, chs. 39-40 (1215), http://avalon.law.yale.edu/medieval/magframe.asp ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice."); John Locke, *Second Treatise of Government* § 142, at 75 (C.B. Macpherson ed., 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court,

and the country man at plough."). Under these principles, imprisonment before trial may not be based on indigency alone.

II. SUPREME COURT PRECEDENT PROHIBITS CRIMINAL DEFENDANTS FROM BEING IMPRISONED SOLELY AS A RESULT OF INDIGENCY.

Consistent with the Fourteenth Amendment's text and history, the Supreme Court has long held that, under both due process and equal protection principles, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. As that Court has explained, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. Applying *Griffin*'s teachings, the Supreme Court has repeatedly held that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh*, 572 F.3d at 1056. As the Court has recognized, use of a blanket policy of incarcerating indigent defendants based on their inability to pay—particularly when there are alternative means of achieving the government's interests—cannot be squared with the Fourteenth Amendment's overlapping guarantees of liberty and equality for all persons. These protections apply both before and after trial.

In *Williams v. Illinois*, the Supreme Court held that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment . . . since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." *Williams*, 399 U.S. at 243; *id.* at 264-65 (Harlan, J., concurring) (concurring on due process grounds). It did not matter that "the Illinois statutory scheme [did] not distinguish between defendants on the basis of ability to pay fines," because, as in *Griffin*, "'a law nondiscriminatory on its face may be grossly discriminatory in its operation.' Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine." *Id.* at 242 (quoting *Griffin*, 351 U.S. at 17 n.11). As the Supreme Court has since explained, "[s]anctions of the *Williams* genre . . . are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons,'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127 (quoting *Williams*, 399 U.S. at 242) (emphasis in

original) (internal citation omitted); s*ee Tate*, 401 U.S. at 397-98 (holding that "petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency").

The *Williams* Court recognized that its holding "may place a further burden on States in administering criminal justice," but held that "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. The Fourteenth Amendment requires states to "canvass the numerous alternatives" rather than simply apply a blanket policy of imprisoning indigent defendants for "involuntary nonpayment of a fine or court costs." *Id.* at 244; *Tate*, 401 U.S. at 399 (requiring states to use nondiscriminatory "alternatives . . . to serve its concededly valid interest in enforcing payment of fines").

In *Bearden v. Georgia*, the Supreme Court held that "*Griffin*'s principle of equal justice," *Bearden*, 461 U.S. at 664, did not permit a state court to revoke automatically an indigent's probation for failure to pay a fine. Under due process and equal protection principles, "the State cannot justify incarcerating a probationer who has demonstrated

sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty." *Id.* at 671. "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73.

The principles laid out in *Williams*, *Tate*, and *Bearden*—all cases involving defendants convicted after a fair trial—apply with even greater force to imprisonment *before* trial, when the presumption of innocence still attaches and the individual accused of a crime is entitled to the full scope of the Constitution's protections. "Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack*, 342 U.S. at 4. Without this basic right, "the presumption of innocence, secured only after centuries of struggle, would

lose its meaning." *Id.* Virtually all of the Constitution's safeguards that "ensur[e] against the risk of convicting an innocent person" and "make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant," *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993), are harder to exercise and meaningfully enjoy when the defendant is denied his liberty and incarcerated before trial. "If a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (recognizing that defendants denied their pretrial liberty "are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense").

Even more troubling, in misdemeanor cases of the sort at issue here—crimes that generally carry short sentences or only fines—"the pretrial detention can approach and even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the

length of time already served." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492-93 (2004). Our system of "criminal justice . . . is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), and "pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial." Bibas, *supra*, at 2493. Indeed, "research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period." Pretrial Justice Inst., *Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process* 2 (2012), http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

The Supreme Court has upheld the constitutionality of federal statutes providing for pretrial detention only in sharply circumscribed instances, holding that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and

articulable threat to an individual or the community, . . . a court may disable the arrestee from executing that threat." *Salerno*, 481 U.S. at 751. Despite "the individual's strong interest in liberty" and the "fundamental nature of this right," *id.* at 750, the Court approved the use of pretrial detention because of "Congress' careful delineation of the circumstances under which detention will be permitted." *Id.* at 751; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."); *Foucha*, 504 U.S. at 81-82 (holding that "*Salerno* does not save" a system of detention where the "scheme of confinement is not carefully limited" and the "State need prove nothing to justify continued detention").

Harris County's bail policy imposes pretrial detention on indigent misdemeanor defendants too poor to pay and thereby denies the "'core of the liberty protected by the Due Process Clause,'" *Turner*, 131 S. Ct. at 2518 (quoting *Foucha*, 504 U.S. at 80), without any "careful delineation of the circumstances," *Salerno*, 481 U.S. at 751, and without any findings at all. This subjects indigent defendants—simply because they are

poor—to "one of the most feared instruments of state oppression and state indifference," *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting), makes it more difficult for them to "gather evidence, contact witnesses, or otherwise prepare [a] defense," *Barker*, 407 U.S. at 533, and pressures them to plead guilty simply to get out of jail. ROA.5637 (district court opinion) ("[F]or misdemeanor defendants unable to pay secured money bail, Harris County maintains a 'sentence first, conviction after' system that pressures misdemeanor defendants to plead guilty at or near their first appearances because that is the only way to secure timely release from detention."). This "lump[s] [plaintiffs] together with other poor persons," effectively "punishing [them] for [their] poverty." *Bearden*, 461 U.S. at 671. That practice cannot be squared with the Fourteenth Amendment's guarantee of liberty and equality for all persons.

III. EXPERIENCE SHOWS THAT GOVERNMENTS HAVE AMPLE MEANS TO ENSURE PRETRIAL LIBERTY FOR ALL PERSONS WHILE SECURING A DEFENDANT'S ATTENDANCE AT TRIAL AND PROTECTING PUBLIC SAFETY.

The use of secured money bail to impose pretrial detention on indigent defendants is not necessary to serve the fair administration of justice. In fact, governments have a host of alternative means at their

disposal to ensure pretrial liberty for all persons—regardless of the amount of money in their bank account—while also ensuring the presence of defendants at trial and protecting public safety. The experiences of state governments, as well as the federal government, refute any suggestion that Harris County's discriminatory bail system is necessary to further important state interests. The goals Harris County purports to advance can be "served fully by alternative means," *Bearden*, 461 U.S. at 672, consistent with our nation's constitutional commitment to equal justice for rich and poor alike.

Half a century ago, Congress recognized that it was unjust to maintain a bail system in which the "defendant with means can afford to pay bail," while the "poorer defendant . . . languishes in jail weeks, months, and perhaps even years before trial." *See* President Lyndon B. Johnson, Remarks on the Signing of the Bail Reform Act of 1966 (June 22, 1966), http://www.presidency.ucsb.edu/ws/?pid=27666. To effectuate this promise of equal justice for rich and poor alike, federal law currently provides that "[a] judicial officer may not impose a financial condition that results in the pretrial detention of [a] person," 18 U.S.C. § 3142(c)(2), and requires courts to consider non-financial conditions on pretrial

liberty in order to ensure that defendants appear for trial and do not pose a threat to public safety. *Id.* § 3142(c)(1), (g); *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (noting the congressional decision "proscribing the setting of a high bail as a *de facto* automatic detention practice"). The Bail Reform Act of 1966, which sought to ensure pretrial liberty for "all persons, regardless of their financial status," 80 Stat. 214, § 2, together with the Bail Reform Act of 1984, 18 U.S.C. §§ 3141-50, which gave courts the power to detain defendants shown to pose a danger to public safety, create a bail system based on the risk of flight or danger a defendant poses, not on the amount of money he or she possesses.

In recent years, many states, too, have reexamined their bail systems, concluding that persons charged with a crime should be treated according to the risks they pose, not according to the amount of money they can pay. Bail systems that rely on secured money bail, these jurisdictions have concluded, do not serve the fair administration of justice or public security. They result in indigent defendants—even those who pose a low risk of fleeing or endangering public safety—being deprived of their pretrial liberty, while wealthier defendants who may, in fact, pose a risk to public safety are released. As these jurisdictions

have concluded, ensuring that bail determinations respect the principle of equal justice for rich and poor alike enhances, rather than detracts from, public safety.

States across the country have reached the conclusion that the use of individualized pretrial risk assessment and non-monetary conditions of release—rather than secured money bail—can ensure pretrial liberty for rich and poor alike while ensuring attendance at trial and promoting public safety. *See* Md. R. 4-216.1(c)(1) (requiring "release on personal recognizance or unsecured bond" absent finding "that no permissible non-financial condition" will "reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community"); N.J. Stat. Ann. § 2A:162-15 (West 2017) ("primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required" and "the protection of the safety of any other person or the community" and providing that "[m]onetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required"); 725 Ill. Comp. Stat. § 5/110-5(a)(5) (establishing "presumption that any

conditions of release imposed shall be non-monetary in nature" and requiring use of "the least restrictive conditions or combination of conditions necessary to reasonably assure the appearance of the defendant" and "protect the integrity of the judicial proceedings from a specific threat to a witness or participant"); Ariz. R. Crim. Pro. 7.3(b)(2) (requiring court, in deciding whether to impose a monetary condition to "make an individualized determination of the person's risk of nonappearance, risk to the community, and financial circumstances rather than rely on a schedule of charge-based bond amounts"); Colo. Rev. Stat. Ann. § 16-4-103 (West 2014) (requiring courts, where "practicable and available" to use "an empirically developed risk assessment instrument designed to improve pretrial release decisions" and to "[c]onsider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration"); Ky. Rev. Stat. Ann. § 431.066 (West 2012) (providing for use of a "pretrial risk assessment" and requiring release "on unsecured bond or on the defendant's own recognizance" of "low risk" defendants and release with non-financial conditions, including "ordering the defendant to participate in global positioning system monitoring, controlled substance testing, increased supervision,

or other such conditions," for "moderate risk" defendants); Ky. Sup. Ct. Am. Order 2016-10 (court rule designed to "expedite pretrial release of low to moderate risk defendants charged with non-violent, non-sexual misdemeanors"); Ark. R. Crim. Pro. 9.2(a) (permitting setting of "money bail only" if "no other conditions will reasonably ensure the appearance of the defendant in court").

A number of jurisdictions have made explicit that bail cannot be used to impose preventive detention on those too poor to pay. *See* Md. R. 4-216.1(e)(1)(A) (prohibiting the imposition of a "special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition"); Ariz. R. Crim. Pro. 7.3(b)(2) ("The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond."); N.M. Const. art. II, § 13 (amended 2016) ("A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond."); D.C. Code § 23-1321(c)(3) (authorizing use of a "financial condition to

reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in" preventive detention statute).

States, too, have enacted measures specifically designed to ensure pretrial liberty for persons charged with misdemeanors, crimes that do not usually justify imposing pretrial detention. *See* Conn. Gen. Stat. Ann. § 54-64a(a)(2) (West 2017) (establishing presumption that, for misdemeanors not involving family violence, "the court shall not impose financial conditions of release"); Ky. Rev. Stat. Ann. § 431.525(4) (West 2011) (in misdemeanor cases, limiting amount of bail to the "amount of the fine and court costs"); Colo. Rev. Stat. Ann. § 16-4-113(1) (West 2013) (requiring, subject to narrow exceptions, "release . . . upon personal recognizance if the charge is a class 3 misdemeanor or a petty offense").

The new rules reflect concerns that using secured money bail to detain those too poor to pay neither promotes the fair administration of justice nor advances public safety. In Maryland, Attorney General Brian Frosh found that "bail was set higher for low risk defendants than for their moderate and high risk counterparts. Lower risk defendants are detained because they cannot afford the bail, while higher risk

defendants who have access to financial resources are able to make bail . . . ." Letter from Attorney Gen. Brian Frosh to Hon. Alan M. Wilner at 3 (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf. The change from a resource-based to a risk-based system reflected that "evidence-based pretrial risk assessments experience a reduction in their pretrial detention populations and an increase in defendants' appearance at trial without incurring a greater risk to public safety." *Id.* at 4.

In New Jersey, a 2014 report authored by the Joint Committee on Criminal Justice, which was chaired by the Chief Justice of the New Jersey Supreme Court and included the Acting Attorney General, prosecutors, defense attorneys, judges, and others, spurred bipartisan state efforts to limit the use of money bail. A "resource-based system" dependent on the use of secured money bail, the Committee found, resulted in a "dual system error": "the detention of poor defendants who present manageable risks of pretrial misconduct and the release of more affluent defendants who present more severe and frequently less manageable risks of pretrial misconduct." *Report of the Joint Committee*

on Criminal Justice 67 (2014), https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf. The report unanimously recommended a shift to a risk-based system, explaining that such a system "promotes both defendant's liberty interests and community safety," as well as "public confidence in the integrity of the judicial process." *Id.* "In a risk-based system, those defendants who present an unmanageable risk of pretrial misconduct may be detained. Every other defendant is conditionally released, subject to the least restrictive conditions crafted to address their individualized risks of flight and danger." *Id.* at 65. This avoids the "incentive, inherent in any resource-based system, to address the unmanageable risks of such pretrial misconduct through the *sub rosa* consideration of danger in setting an unaffordably high money bail." *Id.* at 62.

Evidence from the states shows that these alternatives to secured money bail can help secure pretrial liberty, attendance at trial, and community safety. For example, in Kentucky, after converting to a risk-based system, the state increased the percentage of defendants who are released before trial and who appear for their court dates, while significantly reducing the numbers arrested for other crimes. *See*

Pretrial Servs., *Pretrial Reform in Kentucky* 16-17 (2013), https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf; Laura and John Arnold Found., *Results from the First Six Months of the Public Safety Assessment—Court in Kentucky* 1 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf ("Kentucky's courts have achieved a truly remarkable result: They have been able to reduce crime by close to 15% among defendants on pretrial release, while at the same time increasing the percentage of defendants who are released before trial."). Likewise, "[i]n D.C. approximately 85% of pretrial defendants are released with conditions that correlate to risk level. About 90% of the released defendants appear in court as required and remain crime-free during the pretrial period." *Governor's Commission to Reform Maryland's Pretrial System* 24 (2014) http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf.

This spate of state legislation demonstrates that there are "numerous alternatives" that both ensure pretrial liberty for rich and

poor alike—as the Fourteenth Amendment requires—and serve the governmental interests in ensuring a defendant's appearance at trial and public safety. *Williams*, 399 U.S. at 244. Harris County "is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." *Id.* at 244-45. But given the host of nondiscriminatory alternatives available to satisfy all the governmental interests related to the fair functioning of its bail system, Harris County may not deny the "traditional right to freedom before conviction," *Stack*, 342 U.S at 4, to indigent defendants simply because they are poor. In doing so, Harris County does "little more than punish[] [them] for [their] poverty." *Bearden*, 461 U.S. at 671. The "comfortable convenience of the status quo," *Williams*, 399 U.S. at 245, must give way to our Constitution's commitment to equal justice for rich and poor alike.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,425 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook font.

Executed this 9th day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 9, 2017.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 9th day of August, 2017.

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