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 ESTELLA 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 ESTELLA VILLAGOMEZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:15-cv-1414 and 4:16-cv-1436

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PRETRIAL JUSTICE INSTITUTE, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NEW YORK ASSOCIATION OF PRETRIAL SERVICE AGENCIES, MINNESOTA ASSOCIATION OF PRETRIAL SERVICE AGENCIES, PRISON POLICY INITIATIVE, INC. AND DRUG POLICY ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Maranda ODonnell, et al. v. Harris County, Texas, et al., No. 17-20333.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Fifth Circuit Rules 26.1.1 and 29.2, the National Association of Pretrial Services Agencies (NAPSA) declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

The Pretrial Justice Institute (PJI) declares that it is a not-for-profit institute that has no parent corporation and does not issue publicly held stock.

The National Association for Public Defense (NAPD) declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

New York Association of Pretrial Services Agencies (NYAPSA) declares that it is a nonprofit corporation that has no parent corporation and does not issue publically held stock.

The Minnesota Association of Pretrial Services Agencies (MAPSA) declares that it is a nonprofit corporation that has no parent corporation and does not issue publicly held stock. Additionally, MAPSA declares that it is a not-for-profit membership association that has no parent corporation and does not issue publicly held stock.

The Prison Policy Initiative, Inc. (PPI) declares that it is a nonprofit corporation that has no parent corporation and does not issue publicly held stock.

The Drug Policy Alliance (DPA) declares that it is a nonprofit organization that has no parent corporation and does not issue publicly held stock.

Further, pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that, in addition to the list of interested person certified in the Appellants' Brief and supplemented by the certificates in the subsequent briefs filed with this Court, the following entities and persons may have an interest in the outcome of this case:

Amici
Association of Pretrial Professionals of Florida, Affiliate of NAPSA
California Association of Pretrial Services, Affiliate of NAPSA
Colorado Association of Pretrial Services, Affiliate of NAPSA
Connecticut Pretrial Services, Affiliate of NAPSA
Drug Policy Alliance
Minnesota Association of Pretrial Services
National Association for Public Defense
National Association of Pretrial Services Agencies
New York Association of Pretrial Services Agencies
Ohio Association of Pretrial Services Agencies, Affiliate of NAPSA
Pennsylvania Pretrial Services Association, Affiliate of NAPSA
Pretrial Justice Institute
Prison Policy Initiative, Inc.
Shelby County Tennessee Pretrial Services, Affiliate of NAPSA
South Carolina Association of Pretrial Intervention Programs, Affiliate of NAPSA
Virginia Community Criminal Justice Association, Affiliate of NAPSA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTEREST OF THE *AMICI CURIAE*[*]

Founded in 1973, NAPSA is a membership association that maintains the Standards of Practice for the pretrial services profession. NAPSA's membership consists of national and international pretrial practitioners, judges, attorneys, prosecutors, and criminal justice researchers. Its board contains elected representatives from federal, state and local pretrial services agencies. NAPSA's mission is to promote pretrial justice and public safety through rational pretrial decision-making and practices informed by evidence. NAPSA aims to promote the establishment of pretrial agencies nationwide, further research and development on pretrial issues, establish mechanisms for exchange of information, and increase the pretrial field's professional competence through professional standards and education. NAPSA has exclusively hosted the premier annual pretrial services training conference for the last 44 years. In 1978, NAPSA published its first set of Standards on Pretrial Release. NAPSA revised these standards in 1995, 2004, and 2008 in light of emerging issues facing pretrial decision-makers and changes in practices, technology, case law, and program capabilities. The revised standards to be released in 2017 call for the elimination of secured financial conditions of release.

[*] Pursuant to Federal Rule of Appellate Procedure 29, all parties, through their respective counsel, have consented to the filing of this brief. *Amici* certify that no counsel for any party authored this brief in whole or in part and that no counsel or party made any monetary contribution toward the brief's preparation and submission.

PJI's mission is to advance safe, fair and effective pretrial justice. Its staff are among the nation's foremost pretrial justice experts. PJI's Board includes representatives from the judiciary, law enforcement, prosecutors, victim advocates, pretrial services, county commissioners, and academia. Founded in 1977, PJI is supported by grants from the U.S. Department of Justice (DOJ) and private foundations. PJI is at the forefront of building stakeholder support for legal and evidence-based pretrial justice practices. For example, PJI staff served on the taskforce that drafted the most recent American Bar Association (ABA) Criminal Justice Standards on Pretrial Release. In 2011, PJI partnered with the DOJ to hold a National Symposium on Pretrial Justice. That symposium issued dozens of recommendations for concrete reforms addressing serious deficiencies in the money-based bail system. *See* PJI, *Summary Report of Proceedings of the National Symposium on Pretrial Justice* (May 31, 2011), *available at* http://www.pretrial.org/download/infostop/NSPJ%20Report%202011.pdf. Since then, DOJ's Bureau of Justice Assistance assigned PJI to lead a Pretrial Justice Working Group, comprised of over 90 justice-system-related organizations and associations, which is responsible for overseeing the implementation of the Symposium's recommendations.

Over the past four decades, PJI and NAPSA have released dozens of publications, conducted hundreds of training sessions and provided technical assistance to thousands of jurisdictions on enhancing pretrial justice.

NAPD is an association of more than 14,000 professionals who deliver the right to counsel throughout all states and territories in the United States. NAPD's members include attorneys, investigators, social workers, administrators, and other support staff responsible for executing the constitutional right to effective assistance of counsel. NAPD's members are the defense advocates in jails, courtrooms, and communities. They are experts in both theoretical best practices and practical, day-to-day delivery of indigent defense services. With respect to the constitutional right to bail, NAPD's members constitute the front-line defenders of the right to be released from custody pending trial, and they observe the collateral damage that occurs in the lives of indigent defendants who remain incarcerated while they are presumed to be innocent. NAPD has an interest in preserving its clients' constitutional right to release pending trial and reforming the bail system in the United States.

NYAPSA—a state and national leader in the pretrial field—is an organization of professionals who are dedicated to the advancement of pretrial-release services and community-based, non-incarcerative alternatives for the disposition of criminal cases. NYAPSA's Board of Directors is comprised of individuals from each of the

four major geographic regions of New York State, representing a diverse group of active members.

Founded in 1996, MAPSA is devoted to promoting pretrial justice reform through evidence-based practices. MAPSA's mission is to create a safer and just criminal justice system by providing quality training to its members, promoting information to improve pretrial programs and emphasizing the importance of pretrial services in Minnesota.

PPI challenges over-criminalization and mass incarceration through research, advocacy, and organizing. PPI's work includes research and analysis of the impact of bail on individuals, communities, and the nation's mass incarceration problem.

DPA is a national nonprofit advocacy organization that works to advance policies that are grounded in science, compassion, health and human rights. DPA has a strong interest in protecting the rights of all accused individuals and maintaining a fair and safe criminal justice system. DPA also has a significant interest in pretrial justice reform and led a coalition of civil rights and faith-based advocates to pass pretrial justice reform in New Jersey in 2014. The organization is currently working to safeguard the reform in New Jersey and ensure its fair implementation. DPA has an interest in supporting other jurisdictions' efforts to eliminate wealth-based and discriminatory systems of pretrial justice.

ISSUE ADDRESSED BY *AMICI CURIAE*

The amici offer this brief to provide further explanation and context to the Court regarding the empirical evidence demonstrating how money bail and non-money alternatives impact legitimate state interests like appearance rates and public safety and to support the District Court's findings following its careful engagement with this empirical evidence.

SUMMARY OF THE ARGUMENT

Independent, appropriately controlled scholarship reinforces each of the District Court's core conclusions. Effective, constitutionally sound alternatives to the money-based bail system successfully achieve the three goals of constitutional bail: maximizing appearance at trial, minimizing harm to the community from the small percentage of high-risk defendants who cannot be safely released, and maximizing pretrial release of those not proven guilty. Pretrial release systems based on secured bonds perform no better than other systems with regard to appearance at trial and community safety. But critically, secured bonds delay or completely prevent the release of individuals who are bailable under the law, increasing pretrial costs and consequences for the innocent, the guilty, and the State. Other states have been able to effectively manage pretrial release and meet the three goals of constitutional bail by utilizing pretrial supervision programs and evidence-based risk screening tools.

The secured bond system, monopolized by the profit-driven commercial surety industry, runs counter to evidence from credible studies and core constitutional values. This industry props up a flawed system so that it can profit by selling a "service"—guaranteeing, for a non-refundable fee, the appearance of defendants who are statistically as likely (or more likely) to return on their own. This practice enriches the industry without doing anything to advance the legitimate goals related to bail. Only this rent-seeking industry's advocacy and flawed studies find any virtue in requiring low- and moderate-risk bailable defendants to pay for release from pretrial detention. The benefits flow entirely to the bail-bond industry, making the costs of this system—whether measured in dollars or days in pretrial custody—excessive and unconstitutional.

ARGUMENT

I. The bail process is intended to achieve three legitimate state interests.

Our system has long recognized legitimate state interests that impose pretrial burdens on people who have been accused—but not convicted—of a crime. These legitimate state interests resulted in the traditional concept of bail. Because our constitution specifically forbids excessive bail, however, "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). Under the constitutional view, "[t]he 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, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty." *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring). The District Court correctly found that Harris County's bail procedures do not serve these interests and correctly granted Appellees' request for injunctive relief.

A. Legitimate bail systems must promote return for trial, public safety, and pretrial release.

Our judicial system recognizes that the bail process is meant to effectuate pretrial release while ensuring later appearance and preserving public safety; a constitutional bail system does not necessarily ensure the collection of fines or generate profits for governments or the bail-bond industry. *See id.* These three legitimate objectives also establish the relevant factors courts weigh when

considering bail: the risk that (1) a defendant will fail to return or (2) will endanger the public before returning for trial, balanced against (3) the right to pretrial release. While these three state interests—return, safety and release—were historically the focus of the bail process, the shift away to a profit-focused commercial bail system resulted in higher detention rates for pretrial defendants.

Money bail has its root in the Anglo-Saxon criminal justice system which was comprised mainly of monetary penalties for criminal acts. Timothy R. Schnacke, DOJ, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 23 (2014). England and America eventually adopted a personal surety system in which a reputable person would take responsibility for the accused and promise to pay the required financial condition if the defendant failed to return. *Id.* at 25.

A key component of the personal surety system was that the surety took on this responsibility without any initial remuneration or promise of any future payment. *Id.* But as America grew and communities became larger, the personal surety system gave way to one that allowed "impersonal" sureties to demand re-payment upon a defendant's default. *Id.* at 26. An "impersonal and wholly pecuniary," for-profit industry emerged, *Leary v. United States*, 224 U.S. 567, 575 (1912), which requires bailable defendants to pay before being released. This shift resulted in an increase in detention of defendants who were traditionally eligible for

bail. Schnacke, *supra*, at 26. This phenomenon is clearly demonstrated here. Statistics presented in the District Court showed that over 40 percent of those arrested for misdemeanor offenses in Harris County were detained from the time of their arrest until case disposition. ROA.5651.

B. Other conflicting interests distract from the legitimate purposes of bail.

The secured bail industry has stymied the return to a more rational, constitutional system—even with respect to low-risk, misdemeanor defendants. This industry actively opposes evidence-based reforms, such as the use of unsecured or personal recognizance bonds that permit bailable defendants to post bond without a pre-release payment and only require forfeiture if the defendant fails to appear. These proven systems produce better, more constitutional results but fail to offer the same commercial opportunities.

The industry's opposition to reform is fierce and well-funded, and its use of flawed, misleading studies to advance its interests is well-documented. *See, e.g.*, DOJ, Bureau of Justice Statistics, *Data Advisory* (March 2010) (cautioning against misuse of certain statistics collected by the Bureau), *available at* www.bjs.gov/content/pub/pdf/scpsdl_da.pdf; Kristin Bechtel, et al., PJI, *Dispelling the Myths: What Policy Makers Need to Know about Pretrial Research* 1, 3–10 (2012) (analyzing secured-bail industry studies that misuse Bureau statistics). Consider, for example, a logically flawed 2004 article popular with the industry. *See*

Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & Econ. 93 (2004). Helland and Tabarrok's article has been discredited for misusing data from the Bureau of Justice Statistics by alleging causation in ways that the bureau itself has rejected. *See* Bechtel, *supra*, at 7–8. Industry advocates and others continue to cite this discredited article for its conclusions—including to this Court—without acknowledging that they cannot be inferred from the underlying data. *See, e.g.*, Br. American Bail Coalition vii, 12, 13, 15, 16 (citing Helland & Tabarrok "passim"); Br. Appellants Fourteen Judges 41, 42, 44, 54 (same).

The money-based bail system at issue in this case does not reasonably advance any discernable state interest. Instead, it solely advances the interests of the rent-seeking bail-bond industry.

II. Secured-money bonds do not serve the three legitimate state interests.

As the District Court found, secured-money bonds prejudicially prevent or delay release without reliably advancing the legitimate state interests that bail is intended to address:

- Secured money bonds do not correlate with higher rates of appearance; and
- They do not improve public safety; but
- Secured financial bonds hinder pretrial release.

Secured bonds thus fail to meaningfully achieve any of the legitimate goals related to bail and succeed only in supporting the bail industry.

A. Secured-money bonds do not correlate with higher rates of appearance for trial.

The District Court properly concluded that "[s]ecured money bail in Harris County does not meaningfully add to misdemeanor defendants' appearance at hearings." ROA.5661–62. Rigorous studies from Colorado, Kentucky, and elsewhere support this conclusion and stand in stark contrast to the flawed studies promoted by the bail-bond industry.

1. A first-of-its-kind study in Colorado found unsecured bonds offer the same likelihood of court appearance as secured bonds.

In a first-of-its-kind study, researchers collected hundreds of case-processing and outcome variables on 1,970 defendants booked into ten Colorado county jails over a 16-month period and analyzed whether secured bonds were associated with better pretrial outcomes than unsecured bonds. Michael R. Jones, PJI, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 6 (2013), *available at:* http://www.pretrial.org/download/research/Unsecured+Bonds,+The+As+Effective+and+Most+Efficient+Pretrial+Release+Option+-+Jones+2013.pdf. Over 80 percent of the state's population resides in the ten participating counties. *Id.* Each local jurisdiction collected data on a pre-determined, systematic random sampling to

minimize bias in selecting defendants. *Id.* Defendants' pretrial risks were assessed and assigned to one of four risk categories. Nearly 70 percent scored in the lower two risk categories. *Id.* This study—unlike the industry's—analyzes pretrial outcomes by risk level to ensure valid comparisons.

The study tracked defendants who received unsecured or secured bonds. *Id.* at 7. Unsecured bonds in Colorado are authorized by statute as "personal recognizance bonds" and do not require defendants to post any money with the court prior to pretrial release. If defendants fail to appear, the court can hold those defendants liable for the full amount of the bond. The Court can also require co-signors on unsecured bonds (like the personal sureties of yesteryear). In contrast, secured bonds require money to be posted with the court on a defendant's behalf prior to pretrial release. *Id*.

The study showed that unsecured bonds offer the same likelihood of court appearance as secured bonds. Fully 97 percent of defendants who were assigned to the lowest risk level and given a personal recognizance bond attended all future court appearances. *Id.* at 11. Only 93 percent of defendants in the same risk level with a secured bond attended all future court appearances. *Id.* Similarly, in the second risk category, 87 percent of defendants with unsecured bonds attended all future court appearances. *Id.* Only 85 percent of defendants in the same risk category with a secured bond attended all future court appearances. *Id.* Thus, defendants released on

unsecured bonds returned for trial *more* consistently than similar defendants with secured bonds.

2. Recent data from Kentucky also demonstrates that unsecured bonds are as effective as secured bonds in ensuring court appearance.

Research beyond Colorado also shows that secured bonds are not necessary to ensure future court appearances. Court appearance rates in Kentucky recently increased when Kentucky reformed its bail process. In 2011, Kentucky passed HB 463, which required the state pretrial services division to use an empirically valid risk assessment instrument to assess defendants' likelihood of returning for trial without threatening public safety. Low-risk defendants were released on their own recognizance unless the court made a finding that such a release was not appropriate. In the first two years after the law passed, the number of defendants released on unsecured bonds increased from 50 percent to 66 percent while the court appearance rate rose from 89 percent to 91 percent. Administrative Office of the Courts, Kentucky Court of Justice, *Pretrial Reform in Kentucky* 16–17 (2013), *available at* www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf. Both the Kentucky and Colorado data sets demonstrate that secured bonds are statistically no better than unsecured bonds (and may actually be worse) at ensuring that defendants return to court as promised. The foundation of the money-bail system is statistically invalid.

3. Studies that claim secured bonds are more effective do not adequately control for risk.

Supporters of secured bail often tout studies—usually funded by the for-profit bail industry—that claim secured bonds are more effective than other types of bonds. *See* Bechtel, *supra*, at 6–15 (critiquing flawed studies commonly cited by the for-profit bonding industry). Here, Appellants cite to an unpublished 2013 study conducted by Professor Robert Morris comparing failure to appear and recidivism outcomes of pretrial defendants who were released pending trial by various mechanisms in Dallas County, Texas. Appellants' Br. 56. Morris concluded that defendants released on commercial bonds were less likely to fail to appear than those released on all other bond types, and that commercial bonds were the most cost-effective release type in Dallas County. As explained in the Declaration of John Clark, that study was limited to one county with idiosyncratic pretrial release practices and, by its own terms, is "not necessarily generalizable" to counties with different practices, making it irrelevant to other jurisdictions, including Harris County. ROA.15745–47. Further, as explained by the District Court, Dallas County policies permitting release of defendants posting commercial surety bonds within the first 24 hours after arrest created "significant dissimilarities between the two populations" studied. ROA.5664. Morris withheld data needed to determine how well (or if) Morris adequately addressed those "significant dissimilarities."

In contrast, the Colorado study sorted each defendant using a pretrial risk assessment. This made it possible to accurately compare the failure-to-appear rate of low-risk defendants with that of other low-risk defendants and make a valid comparison between two similarly situated populations. Ignoring the differences between high-risk, moderate-risk, and low-risk defendants makes it impossible to credibly evaluate the effectiveness of secured bond. High-risk defendants—those who are least likely to return for trial and most likely to threaten public safety if released—are a small percentage of bailable defendants. Generally, statistics on bail outcomes for these defendants "should be interpreted with caution" because high-risk defendants are often only a small and statistically challenging portion of any study. *See, e.g.*, Jones, *supra*, at 10, tbl.3, n.*.

Both the bail industry's preferred studies and the Dallas County study fail to adequately account for risk. The federal agency responsible for collecting the data the bail industry uses in its studies has specifically warned that this data cannot be used to advocate for one type of pretrial release over another. That agency warned in a March 2010 that "the data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one form of pretrial release over another." DOJ, Bureau of Justice Statistics, *Data Advisory*, *supra*. The agency explained that in order to determine the most effective type of pretrial release, "it would be necessary to collect information relevant to the pretrial decision and factors

associated with individual misconduct." *Id.* Unlike the typical study supporting the money-bail system, both the Colorado and Kentucky studies collected and analyzed such information, validating their conclusions.

B. Secured-money bonds do not correlate with lower rates of pretrial criminal conduct.

The District Court also correctly found that secured-money bonds do not meaningfully affect the rate of new criminal activity committed by misdemeanor defendants. ROA5661–62. Secured-money bonds are not intended to and cannot deter criminal activity during the defendant's pretrial release because bond forfeiture is predicated on failing to appear in court, not on arrests. Defendants do not lose their money bond if they are arrested again. Indeed, the ABA recognizes that financial conditions on release are not appropriate tools for preventing pretrial criminal conduct. ABA Standards for Criminal Justice, *Pretrial Release* § 10-5.3 (3rd ed. 2007). Logic suggests that secured bonds, therefore, are not more effective than other types of release conditions at preventing new pretrial criminal activity, except perhaps as a blunt tool for detaining indigent defendants without regard to actual risk.

The Colorado study confirms this point. It shows no statistical difference between unsecured and secured bonds in preventing criminal activity during the pretrial period. Jones, *supra*, at 10. Only seven percent of defendants in that study's lowest risk group who received an unsecured bond were rearrested for new pretrial

crimes compared with ten percent of defendants with a secured bond—a consistent finding across all risk groups. *Id.*

The Kentucky case study likewise shows no positive correlation between secured bonds and public safety. After HB 463 passed, the public safety rate—a rate measuring how often defendants complete pretrial release without being charged with a new crime—actually improved slightly. *Pretrial Reform in Kentucky*, *supra*, at 17; *see* Kentucky Justice & Public Safety Cabinet, *Sourcebook of Criminal Justice Statistics*, tbl.5.9 (2012) (defining public safety rate), *available at* https://justice.ky.gov/Documents/Sourcebook/Sourcebook2012ChapterFive.pdf. In 2013, as part of the reform started by HB 463, the pretrial services program began using an improved pretrial risk assessment tool. Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 3–5 (2014). A study conducted six months after the improved tool was introduced showed the pretrial release rate rose to 70 percent of all defendants and the rate of new criminal activity for defendants on pretrial release declined by 15 percent. *Id.* Thus, secured bonds are neither a necessary means of promoting public safety nor more effective at reducing incidents of new criminal activity.

C. Secured-money bonds excessively and arbitrarily delay or prevent release for indigent defendants, increasing costs for both the State and bailable defendants.

Beyond simply failing to promote court appearance or protect public safety, secured-money bonds and fixed bail schedules directly undermine the primary purpose of bail by delaying or preventing the release of defendants—particularly the indigent. Resource-blind bail schedules, like those used in Harris County, inevitably lead to the detention of people who would be low risk for release but are simply too poor to post the amount required by the schedule. Failing to release bailable defendants not only harms them, it also increases the financial cost to the State through higher pretrial detention rates. Unsecured bonds produce significantly higher release rates, do less harm to bailable defendants and impose fewer costs on the State.

1. Pretrial detention destabilizes defendants economically and socially.

As the District Court found, "[b]ail exacerbates and perpetuates poverty." ROA.5666. The costs of secured bonds go beyond direct financial payments. Predictably, the Colorado study found defendants with secured bonds were detained significantly longer than those with unsecured bonds. Five days of pretrial incarceration passed before defendants with secured bonds achieved the same threshold of 80-percent release that defendants with unsecured bonds achieved on

the first day. Jones, *supra*, at 15. This imposes a pre-trial punishment on defendants who—though presumed innocent—are too poor to secure their freedom.

Multi-day pretrial detention poses obvious threats to employment and family stability. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L.J. 1334, 1356–57 (2014) ("Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release. Without income, the defendant and his family may fall behind on payments and lose housing, transportation, and other basic necessities.") (internal footnotes omitted). This is particularly true for indigent defendants, who frequently live paycheck to paycheck, and for parents, who risk losing contact with and custody of their children when they are incarcerated awaiting trial. ROA.5666. The impact on defendants of these unnecessary destabilizing events greatly exceeds the value to the County of the fines and bonds collected from misdemeanor defendants. Secured bonds add cost without benefit. The personal costs to defendants may persist past the conclusion of the case, even if the charges are dismissed.

2. Pretrial detention correlates with higher failure to appear rates.

Even brief periods of pretrial incarceration associated with secured bonds negatively impact rates of appearance and re-offense. Another study using Kentucky's historical data determined that even a short delay in release of bailable individuals correlated with a significant increase in failure to appear. *See* Christopher

T. Lowenkamp, et al., Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 17–18 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

After controlling for relevant factors including risk level, the researchers found statistically significant decreases in appearance rate for low-risk defendants and moderate-risk defendants related to delayed pretrial release. *Id.* at 4, 13. When compared with those released within a day, bailable low-risk defendants detained for as few as two to three days were 22 percent more likely to miss future proceedings. *Id.* at 15.

3. Pretrial detention correlates with higher rates of pretrial criminal activity.

The same study found that "the longer low-risk defendants were detained, the more likely they were to have new criminal activity pretrial." *Id.* at 17. When compared with those released within a day, bailable low-risk defendants detained for as few as two to three days were 39 percent more likely to engage in criminal activity while awaiting trial. *Id.* Moderate-risk bailable defendants showed a smaller, but still significant, increase in reported pretrial criminal activity. *Id.* These results may follow from the loss of jobs, transportation, and even housing that can occur when pretrial detention prevents a defendant from showing up for work or meeting other commitments. *See* Wiseman, *supra*, at 1356–57. In sum, evidence correlates

secured bail with measurably poorer outcomes in the metrics that should be driving bail decisions.

4. Pretrial detention results in higher costs to the State.

The extended pretrial detention associated with secured bonds also increases financial costs to the State. *See generally* Criminal Justice Section, *State Policy Implementation Project*, ABA 2, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_pretrialrelease.authcheckdam.pdf (last accessed Aug. 8, 2017) (comparing costs of pretrial detention with noncustodial supervision). While bail is designed to move bailable defendants out of expensive pretrial detention, defendants who cannot afford secured bail remain in custody, increasing costs to the State.

A recent study by the DOJ's Office of the Federal Detention Trustee quantified the State costs associated with pretrial detention. Like the Colorado study, this study sorted defendants into risk levels, utilizing five risk levels rather than four. It then analyzed the costs associated with pretrial detention and the Alternatives to Detention Program (ATD). ATD includes options such as computer monitoring, third-party custody, and mental health treatment.[1] The study found the average cost

[1] NAPD does not take a position as to whether these or other pretrial detention alternatives are constitutional or valid in any particular case. Its members reserve the right to challenge the appropriateness of specific detention alternatives in individual cases. Nonetheless, NAPD does agree that, on a systemic level, there are less

of pretrial *detention* for all five risk levels was between $18,768 and $19,912 per defendant based on an average daily cost of $67.27 and average pretrial detentions ranging from 279 to 296 days. In contrast, the average cost of the ATD program was $3,860 per defendant including the costs of supervising the pretrial defendant, the alternatives to detention, and fugitive recovery. Marie VanNostrand, DOJ, Office of the Fed. Detention Trustee, *Pretrial Risk Assessment in Federal Court* 34–36 (2009). On average, detention is between *four and six times more expensive* than the alternatives, even after factoring in costs related to recovering defendants who do not return on their own. *See id.* Reducing pretrial detention rates therefore significantly decreases the cost to the State by decreasing the number of expensive pretrial detainees.

III. The experience of professionals who do not have a vested financial interest in secured-money bonds confirms the conclusions of these empirical studies.

Judges, other neutrals, and advocates on both sides of the criminal justice system who engage the empirical data presented in this brief consistently find that it conforms to their experience with the pretrial system. The American Judges Association agrees that pretrial detention decisions "have a significant, and sometimes determinative, impact on thousands of defendants and communities

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invasive, less burdensome, and more efficacious alternatives to imposing money bail on pretrial defendants.

every day" and that defendants who are detained "solely because they cannot afford to pay for their release" bear an increased risk of adverse outcomes. American Judges Association, Resolution 2 (2017), *available at http://www.amjudges.org/pdfs/AJA-Pretrial-Resolution.pdf*. Accordingly, the American Judges Association calls for "the adoption of evidence-based risk assessment and management," the elimination of "practices that cause defendants to remain incarcerated solely because they cannot afford to pay for their release," and "the elimination of commercially secured bonds at any time during the pretrial phase." *Id.*

The Judges are not alone in recognizing the results of this empirical data in their professional practice; instead they are in "some very good and credible company." Conference of State Court Administrators, *2012-2013 Policy Paper Evidence-Based Pretrial Release* 10 (2013), *available at: http://www.pretrial.org/download/policy-statements/Evidence%20Based%20Pre-Trial%20Release%20-%20COSCA%202012.pdf* (listing major adopters of empirically supported pretrial practices). The National Association of Counties also recognizes the utility of evidence-based risk assessment and the need to "eliminate practices that cause defendants to remain incarcerated even for a few days solely because they cannot afford to pay for their release." National Association of Counties, *Resolution on Improving Pretrial Justice Process* (2017), *available at:*

http://www.naco.org/sites/default/files/attachments/Final%20Adopted%20Interim%20Resolutions%20-%202017%20Legislative%20Conference.pdf.

Law enforcement organizations also recognize that this empirical data quantifies and offers solutions to problems that are borne out in their members' experiences. Sheriffs are troubled by a system in which most pretrial inmates are detained "not because of their risk to public safety or of not appearing in court, but because of their inability to afford the amount of their bail bond." National Sheriffs' Association, Resolution 2012-6 (June 18, 2012), *available at: http://www.pretrial.org/download/policy-statements/NSA%20Pretrial%20Resolution.pdf*. Chiefs of Police agree that "length of time until pretrial release has a direct impact on public safety" and advocate basing release decisions on empirically validated measures, not on bail schedules and wealth. International Association of Chiefs of Police, *Resolution on Pretrial Release and Detention Process* 16 (2014), *available at: http://www.pretrial.org/download/policy-statements/Pretrial%20Release%20and%20Detention%20Process%20-IACP%202014.pdf*.

IV. Legitimate state interests are better served by approaches proven successful elsewhere.

Other successful approaches to pretrial release without financial conditions put the secured-money-bond system into context, revealing it as a failed deviation from traditional bail systems. Those approaches eliminate the damage done by

secured-money-bond systems and restore constitutional values in which "liberty is the norm[] and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Evidence shows that personal recognizance bonds are an effective tool for most bailable defendants, and objective risk assessment tests provide a clear guide for reliably limiting pretrial detention to the few defendants whose release poses a serious risk.

A. Pretrial supervision has been shown to be effective with bailable individuals in all risk levels.

Community-based support is effective for managing low-risk and moderate-risk defendants without imposing financial conditions of release. While secured bonds delay or prevent release, they do not fundamentally alter the consequences of violating the conditions of release. New charges under either type of bond will result in revocation and detention. Whether bonds are secured or unsecured, defendants who fail to appear may be required to forfeit money. Jones, *supra*, at 10–11. The relevant question for a judge, therefore, is what conditions on bail might improve the outcomes for defendants at what risk profiles?

A 2013 study drawing from historical data in two states identified statistically significant correlations between pretrial supervision—a common condition of release in which defendants meet and communicate regularly with a supervising officer—and improvements in court appearance rates of defendants released on bail. Christopher T. Lowenkamp & Mary VanNostrand, Laura & John Arnold Found.,

Exploring the Impact of Supervision on Pretrial Outcomes 10, 14–17 (2013). The study indicates that "the effect of pretrial supervision [on appearance rates] appears to matter even more as risk level increases," especially for moderate- and higher-risk defendants who were 38 percent and 33 percent less likely to fail to appear when supervised during their release. *Id.* at 15.

B. Risk assessment tools are available and effective.

Risk assessment tools are valuable for distinguishing low-risk defendants from higher-risk defendants so that a judge may determine appropriate, individually tailored release conditions for each defendant.[2] Evidenced-based risk assessment has recently advanced dramatically such that courts may now reliably assess risk and minimize conflict with the constitutional rights related to pretrial release. PJI, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 4–5 (2015), *available at* http://www.pretrial.org/solutions/risk-assessment/. Screening tools developed in multiple jurisdictions—including Virginia, Ohio, Kentucky, and Colorado—and validated through rigorous study have discredited prior assumptions about the factors that predict a defendant's risk to the community and risk of non-

[2] While NAPD agrees that risk assessment tools can be effective, depending on how they are designed and applied to an individual defendant, it does not endorse any particular risk assessment tool and has not taken a position on whether such tools are a constitutionally adequate remedy for flawed state court bail systems. Accordingly, NAPD does not join this section of the brief.

appearance in court. *Id.*; *see, e.g.*, PJI, *The Colorado Pretrial Assessment Tool (CPAT) Revised Report* 19–20 (2012).

1. National data sets allow reliable, nondiscriminatory risk assessment with minimal expense.

The data in this area is vast, and it provides state and local governments of any size with reliable tools for determining a defendant's risk level. One such tool, the forthcoming Public Safety Assessment (PSA), provides a validated risk assessment based on "a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions." Laura & John Arnold Found., *PSA*, www.arnoldfoundation.org/initiative/criminal-justice/crime-prevention/public-safety-assessment/ (last accessed Aug. 8, 2017). The data-driven process used to create the PSA identified nine administrative factors based on current charges and criminal history that reliably predict risk of new crime, new violence, and failure to appear. After accounting for those administrative factors, the authors determined that none of the interview-dependent factors—including "employment, drug use, and residence"—improved predictions. Laura & John Arnold Found., *Developing a National Model for Pretrial Risk Assessment* 4 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf.

As compared with unsubstantiated or discriminatory heuristics for estimating risk associated with pretrial release, the PSA is "more objective, far less expensive,

and requires fewer resources to administer." *PSA*, *supra*. Courts using the PSA can make reliable predictions by focusing on criteria already available from charging documents and prior criminal records. Eliminating extraneous information—including race, gender, level of education, and socioeconomic status—the tool both reduces the need for intensive and expensive pre-bail interviews and presents courts with a cleaner distillation of the factors relevant to legitimate state interests. *Id.*

2. Individual states have been able to tailor risk assessment to statutory requirements.

Several states, including Virginia and Ohio, employ objective tools tailored to statutory criteria governing pretrial release. Virginia developed and validated a pretrial risk assessment instrument tailored to its statutory requirements. Marie VanNostrand & Kenneth J. Rose, *Pretrial Risk Assessment in Virginia* 1 (May 1, 2009). The Virginia validation study analyzed a year's worth of records from five representative counties and identified a set of statistically significant predictors of negative outcomes including failure to appear, new arrests, and criminal allegations prior to trial. *Id.* at 2.

Ohio followed a similar process in developing several tools for pretrial assessment and other risk inquiries related to recidivism. *See* Edward Latsessa, et al., *Creation and Validation of the Ohio Risk Assessment System Final Report* ii, 13 (2009). The Ohio initiative demonstrated the value of these assessment tools not only for managing pretrial release, but also for addressing community supervision,

institutional intake for convicted defendants, and community re-entry following incarceration.

State and local governments thus have abundant options for effectively and efficiently managing pretrial release without imposing a burden that adds cost to the accused and the State itself.

3. Pretrial risk assessments are more effective than bail schedules.

The rise of objective, evidence-based assessment tools is precisely why bail schedules should be rejected. Recognizing the importance of individual risk assessment, the ABA "flatly rejects the practice of setting amounts according to a fix bail schedule based on charge." Commentary to ABA Pretrial Release Standard 10-5.3(e), p. 113. Such schedules exclude consideration of factors that may be far more relevant than the charge. *Id.*

In addition, the use of such schedules inevitably leads to the detention of persons who pose little threat to public safety but are too poor to afford release while releasing others that pose a higher safety risk but can afford to post bond. For this reason and others, the International Association of Chiefs of Police adopted a resolution criticizing the use of bail schedules and calling for the use of pretrial risk assessments to increase public safety and reduce release of individuals that may pose a threat. International Association of Chiefs of Police, *supra*. In sum, evidence-

based, objective pretrial risk assessments are more effective than bail schedules at serving legitimate state interests.

CONCLUSION

Any disinterested review of the relevant data—like the one conducted by the District Court in this case—shows secured-money bail to be ineffective and counter-productive at achieving the legitimate goals of maximizing release, maximizing court appearance, and minimizing public risk. The practice hinders release of bailable defendants and shows no statistically significant positive impact on any other valid metric. Its only reliable function is to provide the bail-bond industry with a literally captive market. The Court should affirm the District Court's well-reasoned findings and refuse to allow Harris County to impose bail requirements that keep bailable indigent defendants in custody while providing security only for a rent-seeking industry.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6282 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that this brief complies with the typeface and style requirements of Rules 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman, 14-point font.

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Dated: August 9, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I filed the foregoing brief with this Court, by causing a copy to be electronically uploaded and by causing the original and six paper copies to be delivered by FedEx next business day delivery. I further certify that I caused this brief to be served on all participants through the CM/ECF system.

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