No. 17-20333

In the United States Court of Appeals for the Fifth Circuit

MARANDA LYNN ODONNELL,
Plaintiff-Appellee,

v.

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

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court for the Southern District of Texas
No. 4:16-cv-01414

BRIEF OF LAW-ENFORCEMENT AND CORRECTIONS OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

BRADLEY S. PHILLIPS
Counsel of Record
KENNETH M. TRUJILLO-JAMISON
MUNGER, TOLLES & OLSON LLP
350 South Grand Ave., Fiftieth Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
brad.phillips@mto.com

LISA A. FOSTER
2422 Tracy Place, NW
Washington, DC 20008
lafoster@gmail.com

Counsel for Amici Curiae Other Than Harris County Sheriff Ed Gonzalez

Additional Counsel Listed on Inside Cover

MURRAY FOGLER
Counsel of Record
FOGLER, BRAR, FORD, O'NEIL & GRAY LLP
711 Louisiana Street, Suite 500
Houston, TX 77002
Telephone: (713) 481-1010
mfogler@fbfog.com

Counsel for Amicus Curiae Harris County Sheriff Ed Gonzalez

CERTIFICATE OF INTERESTED PERSONS

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

Plaintiffs-Appellees	**Counsel**
Maranda Lynn ODonnell Robert Ryan Ford Loetha Shanta McGruder	Alec Karakatsanis Elizabeth Rossi CIVIL RIGHTS CORPS Seth P. Waxman Daniel S. Volchok Arpit K. Garg WILMER CUTLER PICKERING HALE AND DORR LLP Neal S. Manne Lexie Giselle White Michael Gervais SUSMAN GODFREY LLP Rebecca Bernhardt Susanne Ashley Pringle TEXAS FAIR DEFENSE PROJECT

Defendants-Appellants	**Counsel**
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 Jean Hughes	Charles J. Cooper Michael W. Kirk Harold S. Reeves William C. Marra John D. Ohlendorf COOPER & KIRK, PLLC John Ellis O'Neill John R. Keville Sheryl Anne Falk Robert Lawrence Green, III Corinne Stone WINSTON AND STRAWN LLP
Judge Mike Fields	Bruce Powers HARRIS COUNTY ATTORNEY'S OFFICE
Harris County, Texas Eric Stewart Hagstette Joseph Licata, III Ronald Nicholas Blanca Estella Villagomez Jill Wallace	John Odam Melissa Spinks HARRIS COUNTY ATTORNEY'S OFFICE Michael Anthony Stafford Katharine D. David James G. Munisteri Stacy R. Obenhaus Philip J. Morgan Benjamin R. Stephens GARDERE WYNNE SEWELL LLP

Defendant	**Counsel**
Judge Darrell William Jordan	Laura Beckman Hedge HARRIS COUNTY ATTORNEY'S OFFICE

Defendant-Amicus Curiae	**Counsel**
Sheriff Ed Gonzalez	Murray Fogler FOGLER, BRAR, FORD, O'NEIL & GRAY, L.L.P.

Other Interested Parties	**Counsel**
American Bail Coalition Professional Bondsmen of Texas Professional Bondsmen of Harris County	Paul D. Clement Christopher G. Michel Andrew Lawrence KIRKLAND & ELLIS LLP
State of Texas State of Arizona State of Hawai'i State of Kansas State of Louisiana State of Nebraska	Ken Paxton Jeffrey C. Mateer Scott A. Keller Joseph D. Hughes TEXAS ATTORNEY GENERAL Mark Brnovich ARIZONA ATTORNEY GENERAL Douglas S. Chin HAWAI'I ATTORNEY GENERAL Derek Schmidt KANSAS ATTORNEY GENERAL Jeff Landry LOUISIANA ATTORNEY GENERAL Douglas J. Peterson NEBRASKA ATTORNEY GENERAL

Other Interested Parties	**Counsel**
Conference of the Chief Justices	Thomas Phillips Evan A. Young BAKER BOTTS, L.L.P.
Kim K. Ogg Roy L. Austin Thomas Berg A. Bates Butler Robert Butterworth Bonnie Campbell Kimberly Cheney John T. Chisholm Steve Clark Tim Cole Scott Colom Thomas Corbett J. Joseph Curran Frankie Sue Del Pappa Thomas J. Donovan, Jr. Richard Doran Mark A. Dupree, Sr. Mark Earley John Farmer Brian E. Frosh Douglas Gansler Gil Garcetti George Gascón Terry Goddard Mark Gonzalez Christian A. Gossett Scott Harshbarger Peter Harvey David J. Hickton Peter Holmes Robert Johnson Peter Keisler Miriam Aroni Krinsky Scott Lassar Peg Lautenschlager	Mary B. McCord Joshua A. Geltzer Robert Friedman INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION GEORGETOWN UNIVERSITY LAW CENTER

Other Interested Parties	**Counsel**
Rory K. Little Pamela Marsh Mary B. McCord Barbara McQuade Kenneth Mighell Jeff Modisett Marilyn J. Mosby, Esq. Carlos R. Moreno J. Tom Morgan Charles Oberly Jerome O'Neill James Petro Richard Pocker Earnest Preate Karl A. Racine Ira Reiner James H. Reynolds Stephen Rosenthal Donald Santarelli Carol A. Siemon Robert Spagnoletti Carter Stewart Robert Stephan James Tierney Mary Sue Terry Raúl Torrez Anthony M. Troy Cyrus R. Vance Jr. Lynneice O. Washington Francis Wikstrom William Wilmoth Grant Woods	
Clarence O'Neal Bradford Joseph E. Brann Lee Brown Ronald Davis Kathleen Dennehy Steve Downing	Bradley S. Phillips Kenneth M. Trujillo-Jamison MUNGER, TOLLES & OLSON LLP Lisa A. Foster

Other Interested Parties	**Counsel**
Neill Franklin Adrian Garcia Thomas Hoffman William Lansdowne James L. Manfre Charles H. Ramsey Norman H. Stamper Darrel W. Stephens James Trainum Roger Werholtz	

/s/ *Bradley S. Phillips*
Bradley S. Phillips

Counsel of Record for Amici Curiae Other Than Harris County Sheriff Ed Gonzalez

/s/ *Murray Fogler*
Murray Fogler

Counsel of Record for Amicus Curiae Harris County Sheriff Ed Gonzalez

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STATEMENT REGARDING AMICI CURIAE[1]

Amici curiae are current and former police chiefs, sheriffs, law-enforcement and corrections officials who are or have been responsible for law enforcement in their respective jurisdictions. Amici have a strong interest in this case because Harris County's practice of detaining indigent misdemeanor defendants pending trial solely because of their inability to pay money bail leads to increased crime, undermines community stability, wastes scarce public resources, is unnecessary to ensure defendants' appearance at trial, and erodes public confidence in the criminal justice system. Amici believe that the district court's injunction will foster the efficient administration of justice in Harris County without undermining public safety. A full list of amici appears in the Appendix.

SUMMARY OF ARGUMENT

The issue presented in this appeal is narrow: whether the district court abused its discretion by issuing a preliminary injunction that temporarily prohibits the pretrial detention of indigent misdemeanor defendants in Harris County, Texas, solely because they are unable to post bail, on the ground that the County's

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae and their counsel made such a monetary contribution. The parties to this appeal have consented to the filing of this brief.

practice likely violates the Fourteenth Amendment. *See Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 418–19 (5th Cir. 2001) (standard of review on a motion for preliminary injunction is abuse of discretion). As ably explained in the appellees' brief, the district court did not abuse its discretion and the preliminary injunction should therefore be affirmed.

In this brief, amici curiae—law-enforcement and corrections officials from around the country, including from Harris County, Texas—seek to emphasize that the unnecessary pretrial detention of indigent defendants, of the sort practiced in Harris County, does not further any substantial or compelling law-enforcement interest. To the contrary, arbitrarily imposed pretrial detention undermines public safety, damages the lives of detainees and their communities, and wastes public resources. Based on our experience, we believe that the district court's order will improve public safety in Harris County. It will enhance the confidence of members of the Harris County community in the criminal justice system. Research also shows that permitting defendants to be released only on bonds secured by money bail—which for indigent defendants usually results in pretrial detention—is

not more effective in assuring appearance in court than other forms of release.[2]

For these reasons, we strongly urge this Court to affirm the preliminary injunction.

ARGUMENT

I. CRIMINAL DEFENDANTS MAY NOT BE DETAINED PENDING TRIAL SOLELY DUE TO THEIR INABILITY TO POST MONEY BAIL.

The Supreme Court long ago acknowledged that:

> [F]ederal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 4 (1951) (internal citations omitted). Bail can take many forms and does not necessarily mean a financial condition secured by a cash bond. Except under carefully limited circumstances, bail must be in an amount and in a form that allows for pretrial release. In the criminal justice system, "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).

[2] To avoid confusion, this brief refers to all defendants-appellants collectively as "Harris County" and uses "defendants" to refer to those charged with crimes in Harris County or elsewhere.

In Harris County, forty percent of all misdemeanor defendants are detained until case disposition. ROA.5682. No person could reasonably contend that pretrial detention in Harris County falls within the "carefully limited exception" authorized by the Supreme Court. *Salerno*, 481 U.S. at 755. The question before this Court is whether Harris County's extensive use of pretrial detention for indigent defendants can be justified under the Constitution. Amici submit that it cannot.

Harris County tries to justify the detention of indigent defendants before trial by arguing that doing so assures public safety. *See* Brief of Appellants Fourteen Judges of Harris County Criminal Courts At Law [hereinafter Judges' Brief], at 53–55; Brief of Appellants Harris County, Texas, *et al.* [hereinafter County Brief], at 56 (adopting the arguments asserted in the Judges' Brief). Not only is this purported justification wrong as a factual matter, *see* Part II, *infra*, but it also fails as a matter of law.

A court may detain a dangerous defendant before trial to protect the public, but it may do so only after finding, based on clear and convincing evidence presented in an adversarial hearing, that no conditions of release could reasonably assure the safety of the community. *Salerno*, 481 U.S. at 751; *see also 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."). Here, the record is devoid of evidence establishing that Harris County followed the procedures and applied the standards required by *Salerno* before detaining forty percent of all misdemeanor defendants. Harris County's practice of detaining indigent defendants pending trial without affording them the procedural protections required by *Salerno* is therefore illegal. In any event, Texas law does not generally permit misdemeanor defendants to be detained pending trial on dangerousness grounds. *See* TEX. CONST. art. 1, §§ 11b–11c.

The Supreme Court has repeatedly held that incarcerating an indigent person solely because of his inability to pay is unconstitutional under the Fourteenth Amendment. *See Bearden v. Georgia*, 461 U.S. 660, 673–74 (1983); *Tate v. Short*, 401 U.S. 395, 397–98 (1971); *Williams v. Illinois*, 399 U.S. 235, 240–41 (1970). This Court itself long ago "accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). And this Court warned that, "in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Id.* at 1058. Harris County's detention practices are precisely

the kind of pretrial confinement the *Pugh* court acknowledged would be unconstitutional. *Id.*

This Court has also expressly acknowledged that federal law prohibits the setting of high bail as a *de facto* means of detaining defendants. *See United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988). That is precisely what the district court found was occurring in Harris County. ROA.5682. Bail was routinely set at amounts that guaranteed indigent defendants would be detained through trial. ROA.3239. Such *de facto* pretrial detention orders, made without an individual assessment of whether the defendant poses a danger to the community, are squarely at odds with both the Supreme Court's decision in *Salerno* and this Court's decision in *Pugh.*

II. THE DISTRICT COURT'S ORDER PROMOTES PUBLIC SAFETY AND COMMUNITY STABILITY.

The district court's order prohibiting Harris County's practice of detaining indigent defendants before trial based solely on their ability to pay will enhance public safety and community stability in several ways.

First, unnecessary pretrial detention leads to more crime, not less. Research shows that defendants detained before trial are more likely to commit crimes in the future than similarly situated defendants who are released before trial.

Second, detaining indigent defendants pending trial solely because they cannot afford bail undermines community stability. When defendants are detained pretrial, they frequently lose their jobs and may, as a result, lose their homes and custody of their children. Pretrial detainees are more likely to plead guilty and serve longer sentences than similarly situated defendants who are released before trial, exacerbating these collateral consequences of pretrial detention. Because pretrial detainees are more likely to come from poor neighborhoods, the effects of pretrial detention are likely concentrated and compounded in those communities.

Third, unnecessary pretrial detention wastes public dollars. The costs of detention outweigh the costs associated with monitoring defendants who are released.

Fourth, ending the arbitrary pretrial detention of indigent defendants will enhance confidence in the criminal justice system. Releasing low-risk indigent defendants pending trial will help restore a sense in the community that Harris County treats everyone fairly. Research indicates that enhancing confidence in the criminal justice system will decrease the failure-to-appear rate for released defendants, the very issue money bail is supposedly intended to address. Given that Harris County is in the process of reforming its bail system, affirming the district court's order will promote those positive reforms and help the County restore lawfulness and fairness to its bail system.

A. Pretrial Detention Leads To Increased Crime.

Research shows that unnecessary pretrial detention of misdemeanor defendants leads to increased crime. In a comprehensive study, researchers analyzed data for approximately 380,000 misdemeanor cases in Harris County filed between 2008 and 2013. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 734 (2017) [hereinafter *Heaton Study*]. The researchers used regression analysis to account for the impact of other variables on the likelihood of committing crime (such as the defendant's prior criminal history), which allowed them to isolate the effect of pretrial detention. The researchers also used a natural-experiment methodology (used by social-science researchers to mirror the rigorous controls used in randomized laboratory studies) to confirm their findings from the regression analysis.

What the Heaton Study found is startling. Pretrial detention of misdemeanor defendants in Harris County, when isolated from other potential causal factors, led to a significant increase in the likelihood that a defendant would commit crimes. Specifically, the study shows that misdemeanor defendants detained before trial in Harris County were 9.7 percent more likely to be charged with a new misdemeanor more than eighteen months after their bail hearings than similarly situated misdemeanor defendants who were released before trial. *Id.* at 767. The effect for felony charges was even more pronounced: Misdemeanor defendants detained

before trial were 32.2 percent more likely to be charged with a new felony eighteen months after their bail hearings than misdemeanor defendants who were released before trial. *Id.* These stark findings strongly suggest that, as the authors put it, pretrial detention "may ultimately serve to compromise public safety." *Id.* at 768.[3]

Other studies have found a similar effect of pretrial detention on the incidence of crime. For example, in one study using data on approximately 150,000 defendants from Kentucky, researchers assessed the relationship between pretrial detention and criminal activity. Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention* (Laura and John Arnold Found.), Nov. 2013, at 3–4, http://bit.ly/2uHxJ8k [hereinafter *Lowenkamp Study*]. That study found that misdemeanor defendants detained for more than one day before trial were more likely to commit new crimes after being released than similarly situated defendants detained for only one day. *Id.* at 4. The study also found that being detained for any amount of time pending trial is associated with an increased likelihood of committing a new crime after being released. *Id.* at 19–20.

[3] Another study analyzing over 2.6 million criminal court records for 1.1 million unique defendants in Harris County found that, for misdemeanor defendants, incarceration was associated with a 6.0 percentage point increase in the likelihood of being charged with a new misdemeanor and a 6.7 percentage point increase in the likelihood of being charged with a new felony. *See Heaton Study*, *supra*, at 766 n. 9 (citing Michael Mueller-Smith, The Criminal and Labor Market Impacts of Incarceration (Aug. 18, 2015) (unpublished manuscript), at 24–27).

Each of these studies used rigorous controls that were intended to isolate the effect of pretrial detention on crime from other potential causal factors. The Heaton Study controlled for, among other things, each defendant's prior criminal history and the amount of their bail. *Heaton Study*, *supra*, at 761. (The Heaton researchers controlled for bail amount because they reasoned that it reflects the government's assessment of the defendants' risk of committing additional crimes if they were released. *Id.*) The Lowenkamp Study controlled for the defendant's risk of recidivism and incarceration history, as well as other factors. *Lowenkamp Study*, *supra*, at 20. The use of appropriate control variables increases our confidence in the accuracy of the Heaton and Lowenkamp studies' findings.

Other research indicates that releasing more defendants pending trial may lead to a decrease in crime. A study focused on Kentucky showed that, after judges across the state in 2013 implemented a new data-driven, risk-assessment program to identify more effectively defendants suitable for release, the pretrial release rate rose to 70 percent of all defendants, up from 68 percent. *See* Laura and John Arnold Foundation, *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky*, July 2014, at 2, http://bit.ly/2vI5nLS. In the first six months after the new system was implemented, the average arrest rate for defendants who were released before trial decreased 15 percent. *Id.*

By contrast, neither Harris County nor its amici point to any evidence establishing that releasing defendants before trial will lead to an increase in crime. *See* Judges' Brief, at 53–54; Brief of *Amici Curiae* American Bail Coalition, *et al.*, at 12 ("Released defendants would have significantly less incentive to appear in court and *might* commit additional crimes while released.") (emphasis added). Rather than indulge in speculation, the district court properly found, based on actual data, that the use of secured bail in Harris County did not lead to lower rates of crime committed by defendants. ROA.5661–62.

B. Pretrial Detention Undermines Community Stability.

The Supreme Court long ago recognized that, "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Research confirms the Court's observations: Pretrial detention has a profound effect on the outcomes of detainees' cases and their employment. *First*, pretrial detention increases the likelihood that defendants will plead guilty, even to charges that they might have fought successfully. *Second*, pretrial detention is associated with longer sentences, keeping detained defendants from their families and their communities for a longer period of time than their counterparts who are released pending trial. *Third*, defendants who are detained before trial are less likely to earn any income (as reported to the IRS) and to receive unemployment insurance and the earned

income tax credit after being released. These consequences have a profound effect on the defendants' families as well as the communities where they live. Without a job or other source of income, it is difficult to maintain stable housing for oneself or one's family or provide for the basic necessities of life.

Research shows that defendants detained before trial are more likely to plead guilty than those released before trial. One study analyzing approximately 400,000 cases from Philadelphia and Miami-Dade County from 2006 to 2014 found that defendants detained before trial were 14 percent more likely to plead guilty than similarly situated defendants who were released pending trial. *See* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* (Nat'l Bureau of Econ. Research, Working Paper No. 22,511), Mar. 2017, at 2, http://bit.ly/2h0g0DN [hereinafter *Dobbie Study*]. Another study analyzing case data from around the United States found that being detained before trial was associated with a 7.4 percent increase in the probability of pleading guilty. Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments* (Working Paper), Nov. 9, 2016, at 13, *available at* http://bit.ly/2uGVrBF [hereinafter *Leslie Study*].

It is theoretically possible that defendants detained before trial are more likely to plead guilty because, on average, those defendants are more likely to be

convicted than defendants who are released pending trial. Research indicates, however, that the real reason pretrial detainees are more likely to plead guilty is that, by the time they negotiate disposition of their case, they have, in effect, already served their sentences in pretrial detention. "Because time spent in jail awaiting the resolution of the case is counted against sentence length, the cost of pleading guilty is lower for detained defendants because they have effectively paid part of the price of conviction in advance." *Leslie Study*, *supra*, at 2. Prosecutors commonly offer "time served" as a proposed sentence in plea deals for detained defendants. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 476 (2016). Consequently, detained defendants routinely face a choice: plead guilty and go home, or stay in jail for longer—sometimes much longer—in order to fight your case. Many defendants decide to go home. Defendants released before trial, by contrast, are free to decide whether to plead guilty without the specter of continued detention influencing their decision.

Pretrial detainees tend to get longer sentences than defendants released pending trial. In Harris County, misdemeanor defendants detained before trial are 43 percent more likely to receive a jail sentence than similarly situated defendants released before trial, and their sentences are on average nine days longer. *Heaton Study*, *supra*, at 747. According to another study from Philadelphia, defendants

detained pending trial were sentenced on average to 124 more days of incarceration than defendants who were released before trial, corresponding to a 42-percent increase in the length of incarceration. Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* (Working Paper), Nov. 8, 2016, at 3, http://bit.ly/2tLIbaL. Another study analyzing approximately 82,000 felony and misdemeanor cases in New York City from 2009 to 2013 found that the maximum sentence for defendants detained before trial is on average about two-and-a-half years longer than the maximum sentence for those released pending trial. *Leslie Study*, *supra*, at 13. Longer sentences for pretrial detainees means being absent from their families and their communities for longer than their counterparts released before trial.

The Supreme Court has recognized that pretrial detention "often means loss of a job." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). "Many detainees lose their jobs even if jailed for a short time, and this deprivation can continue after the detainee's release." Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356–57 (2014). Research confirms these observations. A study analyzing 400,000 cases from Philadelphia and Miami-Dade County, Florida, found that defendants detained before trial were 11.3 percent less likely than defendants released before trial to earn any income (as reported to the IRS) two years after a bail hearing, and 9.4 percent less likely to

earn any income three-to-four years after a bail hearing. *Dobbie Study*, *supra*, at 22. The same study found that defendants released before trial earned on average $948 more per year than pretrial detainees. *Id.* at 23.

Pretrial detention also reduces the amount of public benefits received by defendants. A study focused on defendants from Philadelphia and Miami-Dade County found that a defendant detained before trial received on average $179 less per year in benefits from the Earned Income Tax Credit (EITC) one to two years after his bail hearing. *Dobbie Study*, *supra*, at 23. Three to four years after the bail hearing, a defendant detained before trial received $293 less on average in unemployment insurance benefits and $205 less in EITC benefits. *Id.* These findings show that a defendant detained before trial not only receives fewer public benefits in the future than one who had been released before trial. In addition, being detained pending trial decreases the likelihood of a defendant's staying connected to the formal labor market, which is a prerequisite to obtaining unemployment insurance benefits and EITC. *Id.*

All of these effects have a profound impact not just on defendants, but also on their families and their communities. Research shows that defendants from poor ZIP codes are more likely to be detained pending trial than defendants from wealthier ZIP codes. *Heaton Study*, *supra*, at 737. In that study, 60–70 percent of all detained defendants came from the poorest ZIP codes. *Id.* Because pretrial

detainees tend to come from poor communities, the families and businesses in those neighborhoods are more likely to feel the cumulative effect of longer jail stays, lower employment, lower income, and lower receipt of employment-related public benefits than their counterparts located in wealthier areas.

C. Pretrial Detention Wastes Public Resources.

Harris County asserts that the district court's order will "cause irreparable harm to the public fisc." Judges' Brief, at 55; County Brief, at 56 (adopting the arguments asserted in the Judges' Brief). But the County has it exactly backwards: The costs associated with detaining defendants before trial dwarf the costs associated with monitoring defendants after being released.

A recent study conducted by the United States Department of Justice's Office of the Federal Detention Trustee demonstrates that pretrial detention costs much more than monitoring defendants who have been released pending trial. That study analyzed the costs associated with pretrial detention as compared to alternative measures of monitoring defendants after release, such as computer monitoring, third-party custody, and mental-health treatment. Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in Federal Court* (U.S. Dep't of Justice, Office of the Fed. Detention Trustee), Apr. 14, 2009, at 34–36, http://bit.ly/2h0KhlX [hereinafter *VanNostrand Study*]. The study found that the average cost of detaining a defendant through case disposition, across all risk

levels for defendants, was between $18,768 and $19,912, whereas the average cost of monitoring a defendant under one of the alternatives to detention was $3,860. *Id.* at 34, 36. The study further showed that the average cost of detaining a low-risk defendant before trial was four to six times more than the average cost associated with monitoring such defendants after release, even after factoring in additional costs for rearresting fugitives. *Compare id.* at 34 fig. 21 (Average Cost of Pretrial Detention) *with id.* at 35 fig. 22 (Average Cost of Release on Alternatives to Detention Program).

Other studies confirm the findings of the Department of Justice study. One study estimates that detaining a defendant before trial costs more than four times what it would cost to monitor him in the community, *Wiseman*, *supra*, at 1348, while another study concludes that it costs an average of $19,000 to detain a federal defendant before trial but only an average of $4,600 to monitor a released defendant, *VanNostrand Study*, *supra*, at 6.

Harris County Sheriff Ed Gonzalez, one of the amici, testified that "[t]he County's widespread detention of arrestees, because they are too poor to pay arbitrary amounts of money, is a waste [of] public resources and actually undermines public safety." Dist. Ct. Dkt. No. 281, Hear. Tr. Day 3, at 8:23–9:1. The research findings just described support his observations specific to Harris County. The district court's order temporarily stops the County's wasteful

detention practices, which will help conserve scarce and valuable resources for other aspects of law enforcement.

D. Ending Pretrial Detention Of Indigent Defendants Will Enhance Confidence In The Criminal Justice System.

"Decades of research and practice support the premise that people are more likely to obey the law when they believe that those who are enforcing it have the legitimate authority to tell them what to do. But the public confers legitimacy only on those they believe are acting in procedurally just ways." *Final Report of the President's Task Force on 21st Century Policing*, May 2015, at 9–10 [hereinafter *Task Force Report*]. In our experience, detaining indigent defendants who are unable to post bail because they are too poor to pay undermines the community's belief that the criminal justice system operates fairly for all defendants, eroding the legitimacy of law enforcement in the eyes of the community.

A 2017 Gallup survey found that only 27 percent of Americans have a "great deal" or "quite a lot" of confidence in the criminal justice system. *See Confidence in Institutions*, GALLUP.COM, http://bit.ly/K86edV. Even fewer Americans of color express confidence in the justice system. For example, the Pew Research Center reports that 76 percent of black Americans believe the criminal justice system is biased against them. Monica Anderson, *Vast majority of blacks view the criminal justice system as unfair* (Pew Research Ctr.), Aug. 12, 2014,

http://pewrsr.ch/1sGJJ38. A justice system like Harris County's—which allows people with money to be released pretrial while incarcerating poor people and, disproportionately, people of color—can only serve to exacerbate people's distrust of the criminal justice system.

As the face of the criminal justice system in our communities, law enforcement depends on the cooperation of all members of those communities. Based on our collective experience as law-enforcement and corrections officials, we believe that the district court's order will help restore a sense in the community that poor defendants will be treated fairly throughout the criminal justice process. Being treated fairly by the criminal justice system leads in turn to increased trust in law enforcement. *See Task Force Report*, *supra*, at 9–10. Mutual trust between the community and law enforcement helps to promote community policing, which in our view is vital to reducing crime and strengthening communities. *See id.* at 41. We believe that affirming the district court's order will make law enforcement better able to keep our communities safe.

For defendants released pending trial, confidence in the criminal justice system is associated with an increased likelihood of appearing in court. In a survey of approximately 450 misdemeanor defendants in Nebraska from March 2009 to May 2010, researchers found that defendants who successfully appeared in court had higher general trust in government and in the courts than those who

failed to appear. Brian H. Borstein et al., *Reducing Courts' Failure to Appear Rate: A Procedural Justice Approach* (Nat'l Crim. Justice Ref. Serv.), May 2011, at 10, 19–20, *available at* http://bit.ly/2unmKie. Those who failed to appear, by contrast, were more likely to report that they believed that people in power use the law to control people like themselves. *Id.* Because the district court's order will enhance confidence in the criminal justice system in Harris County, we believe that the order will make it more likely that defendants released pending trial will successfully appear for their required court appearances, helping to conserve public resources and promote public safety.

Affirming the district court's order will also support Harris County's efforts to reform its bail system. Harris County is in the process of implementing, among other reforms, a nationally validated risk-assessment tool designed to more accurately identify risky defendants. *See* ROA.5669–5675 (outlining reforms scheduled to be implemented starting on July 1, 2017). Other jurisdictions have adopted similar reforms, allowing them to release a larger percentage of defendants pending trial. For example, the shift to a risk-based assessment system in Washington, D.C., enabled the city in 2016 to release 98.6 percent of misdemeanor defendants pending trial. Pretrial Services Agency for the District of Columbia, *Release Rates for Pretrial Defendants within Washington, DC*, http://bit.ly/2eS9e2C. Harris County is also implementing a risk-assessment tool

to aid its bail system, but that and other proposed reforms will not be fully implemented for months at the earliest. *See* ROA.5728–29. The reforms will likely not, however, cure all of the constitutional infirmities present in the County's bail practices. *Id.* Accordingly, affirming the district court's injunction will both further the County's existing efforts to reform its bail system and ensure that it will remedy additional constitutional problems with that system.

III. PRETRIAL RELEASE WILL NOT CAUSE MORE DEFENDANTS TO FAIL TO APPEAR AT TRIAL.

Harris County asserts that releasing low-risk indigent defendants before trial, as required by the district court's order, will result in more defendants' failing to appear at trial. *See* Judges' Brief, at 53; County Brief, at 56 (adopting the arguments asserted in the Judges' Brief). But Harris County cites to no persuasive evidentiary basis for this assertion. In fact, research shows that criminal defendants released on bonds secured by money bail are not more likely to appear at trial than defendants released on other conditions of supervision. Contrary to Harris County's argument, detaining defendants pretrial because they cannot post bail does not enhance the ability of the government to prosecute individuals accused of crimes and does not further public safety.

In one study, researchers found that defendants released on unsecured bonds were just as likely to appear in court as those released on a bond secured by money

bail. Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* (Pretrial Justice Institute), Oct. 2013, at 3 [hereinafter *Jones Study*]. That study analyzed data on successful court appearances made by approximately 2,000 defendants booked into 10 Colorado jails over a 16-month period. *Id.* at 6. The study found that there was no statistically significant difference in the rate of appearance between defendants released on unsecured bonds[4] and those released on secured bonds. *Id.* at 11.

The Jones Study's findings indicate that, if anything, those released on unsecured bonds are more likely to appear in court than those released on secured bonds. The study showed that 88 percent of defendants released on unsecured bonds appeared as required by the court, while only 81 percent of defendants released on secured bonds made their required appearances. *Id*. For those defendants rated in the lowest risk category, 97 percent of those released on an unsecured bond appeared for their court appearances, while only 93 percent of their counterparts released on secured bonds faithfully made their appearances. *Id.*

[4] In Colorado, unsecured bonds are personal recognizance bonds required to have a monetary amount set. *Id*. at 7 n.3. The defendant does not need to post any money as a condition of release, but if the defendant fails to appear the court may require the defendant to pay the full amount of the bond. *Id.*

Another study analyzing data from Kentucky found that, the longer defendants were detained before trial, the more likely that they would fail to appear. *Lowenkamp Study*, *supra*, at 10. Specifically, defendants detained two to three days before trial were more likely to fail to appear (assuming, of course, that they were released at some point before case disposition) than defendants detained for only one day. *Id.* This effect was especially pronounced for low-risk defendants, who were 22 percent more likely to fail to appear if they were detained for a period of four to seven days, and 41 percent more likely to fail to appear if they were detained fifteen to thirty days. *Id.* Even a relatively short period of pretrial detention before trial may decrease the likelihood that defendants will appear for trial. Far from ensuring that crimes will be prosecuted, detaining defendants before trial because they cannot post money bail may exacerbate the very problem of defendants' failure to appear that, according to Harris County, money bail is supposed to address. Judges' Brief, at 53–55.[5]

[5] One study on which we rely did find that pretrial detention reduced missed court appearances. *See Dobbie Study*, *supra*, at 21 (defendant released before trial is 15.6 percent more likely to fail to appear in court). In amici's estimation, however, the clear preponderance of recent research indicates that detaining defendants before trial does not increase the likelihood of their appearing in court. *See Jones Study*, *supra*; *Lowenkamp Study*, *supra*. That conclusion is also consistent with amici's experience.

CONCLUSION

For the reasons set forth above, the district court's order granting the plaintiffs' motion for a preliminary injunction should be affirmed.

Date: August 9, 2017

Respectfully submitted,

/s/ *Bradley S. Phillips*
BRADLEY S. PHILLIPS
Counsel of Record
KENNETH M. TRUJILLO-JAMISON
MUNGER, TOLLES & OLSON, LLP
350 S. Grand Ave, Fiftieth Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

LISA A. FOSTER
2422 Tracy Place, NW
Washington, DC 20008
lafoster@gmail.com

Counsel for Amici Curiae Other Than Harris County Sheriff Ed Gonzalez

/s/ *Murray Fogler*
MURRAY FOGLER
Counsel of Record
FOGLER, BRAR, FORD, O'NEIL & GRAY LLP
711 Louisiana Street, Suite 500
Houston, TX 77002
Telephone: (713) 481-1010
mfogler@fbfog.com

Counsel for Amicus Curiae Harris County Sheriff Ed Gonzalez

Appendix

List of Amicus Curiae[1]

Clarence O'Neal Bradford
Chief, Houston (TX) Police Department (1997-2004)

Joseph E. Brann
Director, United States Department of Justice, Office of Community-Oriented Policing (1994-1999)
Chief, Hayward (CA) Police Department (1989-1994)

Lee Brown
Mayor, Houston (1998-2004)
Director, Office of National Drug Control Policy (1993-1995)
Commissioner, New York Police Department (1990-1992)
Chief, Houston (TX) Police Department (1982-1990)
President, International Association of Chiefs of Police (1990-1991)
Commissioner, Georgia Public Safety Commission (1978-1982)
Sheriff, Multnomah County (OR) (1974-1976)

Ronald Davis
Director, United States Department of Justice, Office of Community-Oriented Policing (2013-2016)
Executive Director, President's Task Force on 21st Century Policing (2014-2016)
Chief, East Palo Alto (CA) Police Department (2005-2013)
Officer, Oakland (CA) Police Department (1986-2005)

Kathleen Dennehy
Commissioner, Massachusetts Department of Corrections (2003-2007)

Steve Downing
Deputy Chief (Ret.), Los Angeles (CA) Police Department

Neill Franklin
Major (Ret.), Maryland State Police; Baltimore (MD) Police Department

[1] The amici's affiliations are listed for identification purposes only.

Appendix (Cont.)

Adrian Garcia
Sheriff, Harris County (TX) (2009-2015)

Thomas Hoffman
Director, California Dept. of Corrections & Rehabilitation, Division of Adult Parole Operations (2006-2009)
Captain, Deputy Chief, and Interim Chief of Police, West Sacramento (CA) Police Department (1994-2004)
Inglewood (CA) Police Department (1974-1994)

William Lansdowne
Chief, San Diego (CA) Police Department (2013-2014)

James L. Manfre
Sheriff, Flagler County (FL) (2001-2005; 2012-2016)

Charles H. Ramsey
Commissioner, Philadelphia (PA) Police Department (2008-2016)
Chief, Metropolitan Police Department of the District of Columbia (1998-2007)
Deputy Superintendent, Chicago (IL) Police Department (1994-1998)
Deputy Chief, Patrol Division, Chicago (IL) Police Department (1992-1994)
Chicago (IL) Police Department (1971-1998)

Norman H. Stamper
Chief (Ret.), Seattle (WA) Police Department (1994-2000)

Darrel W. Stephens
Chief, Charlotte-Mecklenburg (NC) Police Department (1999-2008)
Director, Police Executive Research Forum (1986-1992)

James Trainum
Detective, Metropolitan Police Department of the District of Columbia, Criminal Case Review & Consulting (1983-2010)

Appendix (Cont.)

Roger Werholtz
Interim Executive Director, Colorado Department of Corrections (2013)
Secretary, Kansas Department of Corrections (2002-2010)
Deputy Secretary, Kansas Department of Corrections (1987-2002)

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 5,594 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type face.

/s/ *Bradley S. Phillips*
Bradley S. Phillips

Counsel of Record for Amici Curiae Other Than Harris County Sheriff Ed Gonzalez

/s/ *Murray Fogler*
Murray Fogler

Counsel of Record for Amicus Curiae Harris County Sheriff Ed Gonzalez

CERTIFICATE OF SERVICE

I certify that, on August 9, 2017, the foregoing brief of Law-Enforcement and Corrections Officials as *Amici Curiae* in Support of Appellees was filed via the Court's CM/ECF Document Filing System. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all registered CM/ECF filing users, including counsel of record for all parties to this appeal.

/s/ *Bradley S. Phillips*
Bradley S. Phillips

Counsel of Record for Amici Curiae Other Than Harris County Sheriff Ed Gonzalez

Date: August 9, 2017