No. 17-20333

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER DISTRICT AND STATE'S ATTORNEYS, STATE ATTORNEYS GENERAL, UNITED STATES ATTORNEYS, ASSISTANT UNITED STATES ATTORNEYS, AND DEPARTMENT OF JUSTICE OFFICIALS, IN SUPPORT OF PLAINTIFFS-APPELLEES

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August 8, 2017

CERTIFICATE OF INTERESTED PERSONS

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

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

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INTEREST OF AMICI CURIAE

Amici curiae are 67 current and former District and State's Attorneys, state Attorneys General, United States Attorneys, Assistant United States Attorneys, and Department of Justice officials, representing 30 states and the District of Columbia and including numerous elected and appointed officials from both political parties. Amici all have been responsible for public safety in their jurisdictions. They have a strong interest in this case because Harris County's practice of detaining indigent misdemeanor defendants based solely on their inability to pay money bail, while others similarly situated but able to pay are released, offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors, and fails to promote safer communities.[1]

SUMMARY OF ARGUMENT

Whether elected, appointed, or career, amici current and former prosecutors and senior government officials ("prosecutors") are accountable to their communities to pursue justice fairly and without regard to race, religion, ethnicity, gender, sexual orientation, disability, or wealth. Their work depends on building relationships with community members, so that those community members will report crimes, cooperate with law enforcement, testify in court proceedings, and sit

[1] No party's counsel authored this brief in whole or in part, and no person, other than amici curiae's counsel, funded the preparation or submission of this brief. All parties have consented to the filing of this brief.

fairly as jurors. Fostering such relationships and thus protecting the public cannot be achieved when the legitimacy of the criminal justice system is undermined by a practice of detaining indigent misdemeanor defendants before trial solely because of their inability to pay monetary bail, while releasing similarly situated defendants who can.

The failures of wealth-based bail systems, from the personal harm inflicted on those detained to the widespread adverse impact on the justice system, led to the Federal Bail Reform Act of 1966 and similar reform efforts in many states. Reformed jurisdictions base pretrial release decisions on individualized determinations of flight risk and dangerousness, and utilize non-financial conditions of release with pretrial supervision where appropriate. In the experience of amici, these types of reformed bail practices not only are more effective than money bail at ensuring appearance, but also contribute to the legitimacy of the criminal justice system, enhance public safety, better address the underlying causes of misdemeanor offenses and recidivism, and ultimately save taxpayers money.

Amici urge this court to adhere to the principle espoused in this circuit's *en banc* opinion in *Pugh v. Rainwater* that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d 1053, 1056 (5th Cir. 1978). *Rainwater* correctly relied on Supreme Court precedent invalidating state practices that resulted in the imprisonment of indigent convicted

defendants based solely on their inability to pay criminal fines. Attempts by appellants and their amici to distinguish those cases are unpersuasive. Moreover, reliance on the centuries-old history of bail does not make Harris County's practice constitutionally permissible, nor does the fact that the county's bond schedule is facially neutral, given its discriminatory implementation.

ARGUMENT

I. A Fair Criminal Justice System That Does Not Discriminate Based on Wealth Is Critical to Its Legitimacy

The Supreme Court has recognized that,

> [f]rom the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal 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) (citations omitted).

A. Federal bail reform replaced a discriminatory money bail system

As many advocates for bail reform over the decades have recognized, a bail system that detains certain people based solely on their inability to afford money bail "'results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of nonappearance by accused persons.'" H.R. Rep. No. 89-1541 (1966),

reprinted in 1966 U.S.C.C.A.N. 2293, 2298 (quoting report of Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure). As the House Committee on the Judiciary recognized in its report on the Bail Reform Act of 1966, "mere incarceration is not the only evil effect of the monetary bail system. Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with his family, his attitude toward social justice, the outcome of the trial, and the severity of the sentence." *Id.* at 2299. The Senate Committee on the Judiciary had the same view:

> There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses, cannot consult his lawyer in private, and enters the courtroom—not in the company of an attorney—but from a cell block in the company of a marshal. Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.

S. Rep. No. 89-750, at 7 (1965).[2]

The Federal Bail Reform Act of 1966 took the first major step toward ensuring that all persons, regardless of financial status, would have an opportunity for pretrial release. It required judicial officers to order the pretrial release of a non-capital

[2] *See also* H.R. Rep. No. 89-1541, 1966 U.S.C.C.A.N. at 2297 (during subcommittee hearings, "all [witnesses] favored the enactment of this proposal," except bail bondsmen).

defendant on personal recognizance or an unsecured appearance bond *unless* the judicial officer determined "that such a release will not reasonably assure the appearance of the person as required." Pub. L. 89-465, § 3(a), 80 Stat. 214, 214 (codified as amended at 18 U.S.C. § 3142). Upon such a finding, and after an individualized assessment of the defendant's circumstances, it permitted the judicial officer to impose conditions of release, giving priority to non-financial conditions. *Id.* The Federal Bail Reform Act of 1984 addressed what had been purposefully unaddressed in 1966, *see* S. Rep. No. 89-750, at 5, permitting courts to consider dangerousness when imposing conditions of release and, in turn, permitting detention where no conditions could reasonably ensure the defendant's appearance or public safety, though only after an individualized hearing affording the defendant due process. Pub. L. 98-473, § 203(a), 98 Stat. 1837, 1976-80 (codified at 18 U.S.C. § 3142(e)-(g)).[3] Significantly, the 1984 Act also added a provision explicitly prohibiting the imposition of a financial condition that results in pretrial detention. § 203(a), 98 Stat. at 1978 (codified at 18 U.S.C. § 3142(c)(2)).

In amici's experience, the procedures afforded under the federal bail system have been effective not only in mitigating the risk of non-appearance, but also in fashioning conditions of release that ensure public safety and protect victims, *see,*

[3] With limited exceptions, Texas law provides that most misdemeanor defendants are bailable on sufficient sureties and cannot be detained based on dangerousness. Tex. Const. art. I, §§ 11-11c. This exercise of state rights poses no constitutional concerns.

e.g., 18 U.S.C. § 3142(c)(1)(B)(v) (avoid contact with alleged victim), (vi) (report regularly to designated law enforcement or pretrial services agency), (viii) (refrain from possessing a firearm or dangerous weapon), and address personal circumstances that may have contributed to the unlawful behavior, *see, e.g.*, *id.* § 3142(c)(1)(B)(ii) (maintain or seek employment), (iii) (maintain or commence education), (ix) (refrain from excessive use of alcohol or any non-prescribed use of controlled substances), (x) (undergo medical, psychological, or psychiatric treatment). The federal system allows custom-tailoring of conditions to individual circumstances and encourages compliance by providing that violations may result in revocation of release and prosecution for contempt of court. *Id.* § 3148. And all of this is accomplished without the negative consequences associated with detaining indigent defendants solely because they cannot post money bail.

B. Individualized assessments and non-financial conditions of release, where appropriate, build confidence in the criminal justice system and are more effective than financial conditions

Although many states have reformed their bail statutes to allow for different pretrial release options based on individualized determinations of flight risk and dangerousness,[4] the use of monetary bail and the evils it imposes on indigents who

[4] *See, e.g.*, Arizona (Ariz. R. Crim. P. 7.2(a), 7.3); Arkansas (Ark. R. Crim. P. 9.1, 9.2(a)); Connecticut (C.G.S.A. §§ 54-63b(b), 54-63d(a), (c)); D.C. (D.C. Code § 23-1321); Illinois (725 ILCS 5/110-2); Kentucky (K.R.S. § 431.066); Maine (15 M.R.S.A. §§ 1002, 1026); Maryland (Md. Rule 4-216.1(b)); Massachusetts (M.G.L. Ch. 276, § 58); Michigan (M.C.L.A. § 780.62); Minnesota (49 M.S.A., Rules Crim. Proc. § 6.02(1)); Missouri (Mo. Sup. Ct. R. 33.01(d)-(e)); Montana (M.C.A. § 46-9-108(2)); Nebraska (Neb. Rev. Stat. § 29-901); New Mexico (N.M. Const.

cannot pay persist in many jurisdictions today, including Harris County. As prosecutors, amici know that detention of a misdemeanor defendant before trial may result in loss of employment, shelter, education, and even child custody. The individual detained may be unable to access mental health and other medical treatment, including drug treatment. Opportunities for pretrial diversion programs, often available to those on pretrial release for misdemeanor offenses, are unavailable to detainees.[5] And access to counsel may be severely hampered, undermining the preparation of a defense, enlistment of witnesses, and accumulation of evidence.

To avoid these consequences, the accused may see an early guilty plea as the most expedient way to obtain release, as many misdemeanor defendants are sentenced to time served. This in turn may result in the conviction of innocent people, caught in the Hobson's choice between pleading guilty and being released or contesting their charges and continuing to be detained even while retaining, at least formally, the presumption of innocence. As then-Supreme Court Justice Arthur Goldberg cautioned more than 50 years ago,

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art. II, § 13); North Carolina (N.C.G.S.A. § 15A-534(b)); North Dakota (N.D.R. Crim. P. 46(a)); New Hampshire (N.H.R.S.A. § 597:2); Oregon (O.R.S. §§ 135.245, 135.260); Rhode Island (R.I. Stat. § 12-13-1.3); South Carolina (S.C. Code § 17-15-10(A)); South Dakota (S.D.C.L. § 23A-43-3); Tennessee (T.C.A. § 40-11-116); Vermont (13 V.S.A. § 7554); Washington (Wash. Super. Ct. Crim. R. 3.2(b)); Wisconsin (W.S.A. §§ 969.01, 969.02, 969.03); Wyoming (Wy. R.C.R.P. 46.1(c)-(d)); *see also* Southern Poverty Law Center, *SPLC Prompts 50 Alabama Cities to Reform Discriminatory Bail Practices* (Dec. 6, 2016), ROA.17047.

[5] Pretrial diversion programs divert misdemeanor defendants away from incarceration and address underlying factors that contribute to criminal behavior, such as drug abuse, mental illness, and veteran-related issues. *See infra* at 12.

> Think of the needless waste—to the individual, the family, and the community—every time a responsible person presumed by a law to be innocent is kept in jail awaiting trial solely because he is unable to raise bail money. Careful screening and release without bail should be made the rule rather than the exception throughout the country.

Equality and Governmental Action, 39 N.Y.U.L. Rev. 205, 222 (1964).

Many of amici prosecutors have seen firsthand the adverse consequences that can result from pretrial detention of misdemeanor defendants. In amici's experience, individualized risk-based assessments and pretrial release with non-financial conditions where appropriate are more effective than money bail not only in mitigating the risk of non-appearance, but also in ensuring a fair criminal justice system, enhancing public safety, addressing the underlying causes of misdemeanor offenses and recidivism, and saving money.

For those amici who have prosecuted in the federal, state, and local courts, the importance of a fair criminal justice system, including at the critical early moment of setting pretrial release conditions, cannot be overstated. Because the people most adversely impacted by wealth-based bail systems are often those from communities where crime is more prevalent, victims and witnesses on whom prosecutors rely for evidence and testimony often are or have been defendants in criminal cases, especially misdemeanor cases. And it is quite common for a family member or close friend of a victim or witness to have been charged with a crime at some point. The willingness of these victims and witnesses to report crimes to law enforcement,

cooperate with prosecutors, show up for court proceedings, and testify truthfully depends on their confidence that the system will treat them and their loved ones fairly. Seeing indigent defendants detained (or experiencing it themselves) for no reason other than indigency, while others similarly situated but able to post bail go free, undermines the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

A fair criminal justice system that does not discriminate based on wealth is also critical to the effective functioning of our jury system. Jurors are drawn from the communities in which the crimes being prosecuted occur; and, in amici's experience, potential jurors—much like victims and witnesses—often have, themselves, been charged with a crime or are close to someone who has been charged with a crime. When jurors perceive the criminal justice system as unfair or illegitimate, the result can be a hung jury or, worse, jury nullification.

Moreover, as the extensive evidence on which the district court relied reveals, pretrial release with non-financial conditions determined by individual risk-based assessments is very effective at ensuring appearance for court proceedings.[6] In Kentucky, for example, county judges in 2013 began using a new risk-based assessment tool to inform decisions about pretrial release options. Laura and John

[6] Risk assessment tools can vary widely in form and function, and Amici do not endorse any particular model.

Arnold Foundation, *Results from the First Six Months of the Public Safety Assessment-Court in Kentucky* 1 (2014), ROA.14782. Data from July 1, 2014, through June 30, 2016, showed that 85 percent of defendants released before trial appeared as required; in the low-risk category, the appearance rate was 91 percent. Kentucky Pretrial Services, Administrative Office of the Courts ("Kentucky 2014-2016 Data"), ROA.9639.[7] In the District of Columbia, which also utilizes a risk-based assessment to evaluate pretrial release options and "almost never" requires secured money bail in misdemeanor cases, ROA.5591, data from FY 2016 showed that 91 percent of defendants released before trial made all scheduled court appearances. *See* Pretrial Services Agency for the District of Columbia, *Congressional Budget Justification and Performance Budget Request Fiscal Year 2018* 16 (2017), *https://www.psa.gov/sites/default/files/FY%202018%20PSA%20Congressional%20Budget%20Justification.pdf* ("DC PSA Budget Request")[8]; *cf.* Christopher T. Lowenkamp & Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes* 3, 12 (2013), ROA.16928, 16937 (in two-state

[7] Even prior to 2013, Kentucky used pretrial risk assessments and dictated presumptive, non-financial release for low- and moderate-risk defendants. Kentucky Pretrial Services, Administrative Office of the Courts, *Pretrial Reform in Kentucky* 13 (2013), ROA.17070.

[8] The data on pretrial criminal activity for released defendants are equally impressive: In Kentucky, between July 1, 2014, and June 30, 2016, 94 percent of released defendants assessed to be low-risk committed no new criminal activity, Kentucky 2014-2016 Data, ROA.9639; in Washington, D.C., in FY 2016, 98 percent of all released defendants remained arrest-free from violent crimes during pretrial release, while 88 percent remained arrest free from all crimes. DC PSA Budget Request at 16.

study, defendants who received supervision were significantly more likely to appear for assigned court dates than those released without supervision); Claire M.B. Brooker et al., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* 1, 6-7 (2014), ROA.15978, 15983-84 (in study of impact of bond type on pretrial release outcomes where pretrial supervision was ordered in all cases, no significant difference found in court appearance rate or public safety rate).

Studies of the use of money bail, meanwhile, reveal no greater effectiveness in mitigating the risk of non-appearance, while resulting in significant negative outcomes, including increased rates of conviction and recidivism. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization,* 45 J. Leg. Studies 471, 472-475 (2016), ROA.9737-40 (in study of Philadelphia and Pittsburgh court data, using issuance of bench warrants as proxies for failures to appear, concluding that money bail did not increase probability of appearance, but was significant independent cause of convictions and recidivism); *cf.* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention,* 69 Stan. L. Rev. 711, 714-15 (2017) (using Harris County misdemeanor case data, finding compelling evidence that pretrial detention "causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes").

As the federal system and more and more states have realized, pretrial supervision can be used to address some of the underlying drivers of misdemeanor criminal activity, thus breaking the cycle of recidivism and enhancing public safety. In Kentucky, dozens of misdemeanor diversion programs allow misdemeanor defendants to agree to successfully comply with individually tailored terms in order to obtain dismissal of the original criminal charges. Terms may include alcohol and drug treatment, mental health and counseling services, educational, vocational, and job training requirements, and volunteer work, among others. In 2012, Kentucky Pretrial Services supervised more than 4,000 misdemeanor diversion cases; 87 percent of misdemeanor clients successfully completed their programs, resulting in reduced trial dockets, decreased recidivism, and 25,000 hours of community service. Kentucky Pretrial Services, Administrative Office of the Courts, *Pretrial Reform in Kentucky* 6-7 (2013), ROA.17063-64.[9]

In the District of Columbia, the Pretrial Services Agency (PSA) has responsibility for over 17,000 misdemeanor and felony defendants each year, and supervises approximately 4,600 on any given day. DC PSA Budget Request at 1.

[9] In the last five years, approximately two-thirds of states passed legislation creating, authorizing, and expanding pretrial diversion programs. *See* National Conference of State Legislatures (NCSL), *Trends in Pretrial Release: State Legislation Update* (2017), http://www.ncsl.org/portals/1/html_largeReports/trends_pretrial_release17.htm; NCSL, *Trends in Pretrial Release: State Legislation* 3-4 (2015), http://www.ncsl.org/Portals/1/Documents/cj/pretrialTrends_v05.pdf.

PSA assigns supervision levels based on risk, but also provides or makes referrals for treatment to defendants with substance use disorders, mental health disorders, or both. *Id.* at 20, 24. In FY 2016, 88 percent of all defendants in pretrial supervision remained on release status through the conclusion of the release period without any request for revocation based on non-compliance. *Id.* at 16.

Although pretrial supervision and diversion programs require resources, the financial cost is far less than the cost of pretrial detention. In the District of Columbia, for example, the supervision cost per defendant was about $18 per day in 2014, and it is considered one of the costlier jurisdictions because PSA personnel are paid on a federal pay schedule. Clifford T. Keenan, Pretrial Services Agency for the District of Columbia, *It's About Results, Not Money* (2014), ROA.17086. Compared to the conservative $85-per-day estimate for pretrial detention, pretrial supervision is far more cost-effective. *See* Pretrial Justice Institute, *Pretrial Justice, How Much Does it Cost?* 1, 5 (2017), ROA.18067, 18071.

II. Appellants' and Their Amici's Attempts to Distinguish Supreme Court and Fifth Circuit Precedent on the Constitutional Infirmity of Wealth-Based Discrimination in the Criminal Justice System are Unavailing

Sitting *en banc*, this circuit has said: "At the outset we accept 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). Although the court went on to hold that Florida's then-new bail rule, adopted

while the appeal was pending, was not facially unconstitutional for failing to include a presumption against money bail among the six forms of release permitted, *id.* at 1058-59, the court also stated, "We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Id.* at 1058. With regard to the use of a set bond schedule—which has particular applicability to this case—the *en banc* court stated, "Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[] its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057.

Despite these clear pronouncements, Appellants Fourteen Judges of Harris County Criminal Courts at Law ("appellants"), Amici Curiae American Bail Coalition, Professional Bondsmen of Texas, and Professional Bondsmen of Harris County ("bondsmen"), and Amici Curiae States of Texas, Arizona, Hawai'i, Kansas, Louisiana, and Nebraska ("states") largely ignore *Rainwater* and argue that the Supreme Court cases on which *Rainwater* relied are inapposite. They suggest that, because *Williams v. Illinois,* 399 U.S. 235 (1970), and *Tate v. Short,* 401 U.S. 395 (1971), involved imprisonment of convicted defendants for failure to pay a fine, their

holdings—that such imprisonment violates the Equal Protection Clause when based solely on the inability of an indigent to pay the fine, *Williams*, 399 U.S. at 242; *Tate*, 401 U.S. at 398—have no applicability to detention pretrial based solely on inability to pay money bail. *See* Appellants' Br. at 36-38; Bondsmen Br. at 24 (relying on *United States v. Salerno*, 481 U.S. 739, 748 (1987) (pretrial detention "is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause"), to argue that *Williams* and *Tate* apply only to sentencing after conviction); States Br. at 4-5.

Appellants and their amici are wrong. As the Supreme Court noted in *Bearden v. Georgia*, 461 U.S. 660, 664 (1983), the Court "has long been sensitive to the treatment of indigents in our criminal justice system," and has applied the principle of "equal justice," articulated in *Griffin v. Illinois*, 351 U.S 12, 19 (1956) (plurality), in numerous contexts.[10] *See Bearden*, 461 U.S. at 664 (citing cases invalidating state practices denying indigents access to appellate review, appellate counsel, transcripts and other materials for appeal, and *Williams* and *Tate*). In *Bearden*, the Court applied the rule of *Williams* and *Tate* to invalidate a state practice of automatically revoking probation for failure to pay a fine or restitution, without considering

[10] In *Griffin*, the Supreme Court invalidated a practice of limiting appellate review of criminal convictions only to persons who could afford a trial transcript, pronouncing: "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" 351 U.S. at 17 (quotation omitted).

whether the probationer has made all efforts to pay yet cannot do so, and without considering whether other alternative measures are adequate to meet the state's interest in punishment and deterrence. *Id.* at 672. "To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-73.

If anything, the principles articulated in these cases have even greater applicability before trial, when the accused is presumed innocent and the liberty interest is therefore notably higher than after conviction. *See Stack*, 342 U.S. at 4 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); *Rainwater*, 572 F.2d at 1056 (accused persons "remain clothed with a presumption of innocence and with their constitutional guarantees intact"). The legitimacy of our criminal justice system and its presumption of innocence before trial—essential to the effectiveness of prosecutors and law enforcement officials—should not be undermined by a bail system that infringes on both due process and equal protection requirements.

III. Amici's Additional Arguments Should be Rejected

A. The historical use of bail does not make discrimination based solely on inability to pay constitutionally permissible

The bondsmen argue that the district court overlooked the history of bail as a "liberty-promoting institution" older than the Republic. Bondsmen Br. at 6. They argue that the Eighth Amendment's provision that "[e]xcessive bail shall not be

required," and similar provisions of early state constitutions, guaranteed the option of bail for bailable offenses, but "never guaranteed that particular defendants would be able to post bail." *Id.* at 7-8.

Although the bondsmen are correct that bail has a long history, they are wrong to suggest that *money* bail has a long history. As the Supreme Court explained in *Stack*, "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. Indeed, *Stack* recognized that assurances had evolved over time from "the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused" to "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture." *Id.* at 5.

The "liberty-promoting institution" to which the bondsmen refer did not even include money bail until the 1800s, with the first commercial surety reportedly opened for business in America in 1898. *See* Timothy R. Schnacke, National Institute of Corrections, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* (2014), ROA.17329, 17400-01. For centuries before that, bail was based on a personal surety system whereby the surety agreed to stand in for the accused upon default, but was not permitted to be repaid or otherwise profit from the arrangement. *Id.*, ROA.17329. It was only when the demand for personal sureties outgrew the supply, leading to

many bailable defendants being detained, that American states began permitting money bail. *Id.* Ironically, the purposeful move toward money bail to help more bailable defendants be released evolved quickly to unnecessary pretrial detention due to bondmen's demands for payment up front, *id.*, ROA.17330, which, as this case illustrates, many misdemeanor defendants are unable to pay.

Even if the bondsmen are relying on the much shorter history of money bail, that history cannot sustain a system that offends equal protection by detaining indigent misdemeanor defendants solely based on their inability to pay while releasing those who can. The Supreme Court rejected a similar historical argument in *Williams.* Acknowledging that the custom of imprisoning indigent defendants for non-payment of fines dated back to medieval England and that "almost all States and the Federal Government have statutes authorizing incarceration under such circumstances"—all factors that should be "weighed in the balance"—the Supreme Court made clear that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." 399 U.S. at 239-40. The Court continued: "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of

fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." *Id.* at 240.[11]

In *Williams*, the Court considered the state's interests in enforcing judgments against those financially unable to pay a fine, and made clear that numerous alternatives to imprisonment existed that could be enacted by state legislatures or imposed by judges within the scope of their authority. *Id.* at 244-45 & n.21. In its final nod to history, the Court concluded:

> We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge has permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.

Id. at 245.

Here, not only is the "comfortable convenience of the status quo" constitutionally barred, it also is not a sensible way to ensure appearance in court and advance community safety in light of more effective alternatives that are consistent with a fair and impartial criminal justice system. The bondsmen argue that the commercial bail industry "provides the most effective means of allowing

[11] The bondsmen also argue that no Fourteenth Amendment equal protection challenge should lie because the Eighth Amendment provides the textual source for the right to bail. Bondsmen Br. at 24; *see also* Appellants' Br. at 29-30. But in *Rainwater*, analyzing the equal protection challenge to Florida's then-new bail rule, this Circuit recognized "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d at 1056.

defendants to obtain release before trial while ensuring the protection of communities." Bondsmen Br. at 10-11. But as the studies relied on by the district court establish, commercial bail is not more effective at ensuring appearance or law-abiding conduct than release on unsecured bonds and non-financial conditions of supervision. ROA.5661-62. It thus cannot be the basis for a practice that discriminates against the indigent solely because they cannot post money bail, particularly where, as in *Williams*, other effective alternatives exist.[12]

B. Prosecutor amici do not advocate a "uniform" or "categorical" system, but a system based on individualized assessments

The bondsmen suggest that the money bail system is preferable to "uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions," Bondsmen Br. at 11, while the states argue that a "categorical rule" requiring the pretrial release of indigent misdemeanor defendants will increase failures to appear and crime. *See* States Br. at 10. Neither appellees nor prosecutor amici advocate any of these extremes.

In the diverse and extensive experience of amici prosecutors, any "uniform system" or "categorical rule" that fails to take into consideration the personal

[12] The commercial bail bond industry has been strongly criticized for failing to post low-money bail, inadequate training, and physically and economically coercive practices. Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* 12-13 (2016), ROA.17017-18. The commercial bail bond industry has been banned in Illinois, Kentucky, Oregon, and Wisconsin. Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 4 (2007), ROA.4090.

circumstances of individual defendants and the circumstances of their alleged crimes would not enhance public confidence in the system and—other than uniform detention—would do little to ensure appearance and public safety.

The bondsmen nonetheless argue that the modern commercial surety system is statistically the most effective at ensuring court appearances, relying briefly on a handful of studies that largely do not purport to compare failure-to-appear (FTA) rates of defendants released on commercial surety bonds with those released on non-financial conditions based on individualized risk assessments. Bondsmen Br. at 14-15. Discussing the one study (of felony defendants only) that included a category for "conditional release," the bondsmen neglect this category and instead compare the FTA rate of those released on secured bonds (18 percent) to those given emergency release to relieve jail overcrowding (45 percent) and those released on unsecured bonds (30 percent). *Id.* at 15 (citing Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 8 (2007), ROA.4094). The FTA rate of those in the "conditional release" category (representing just 12 percent of the sample), was 22 percent—much closer to the FTA rate of those released on secured bonds. *Pretrial Release* at 2, 9, ROA.4088, 4095. Notably, in one very dated study relied on by the bondsmen for its conclusion that surety bonds are more effective than personal recognizance, Bondsmen Br. at 15, the same study credited some of the success of surety bonds to

bondsmen using many of the same tools that pretrial services agencies use: collecting information about defendants' residences, employers, and families; monitoring defendants and requiring them to check in periodically; and reminding defendants of court dates. *See* Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 96-97 (2004), ROA.4066.[13] [14]

The bondsmen's assertion that the imposition of pretrial conditions of release is not only "invasive" and "liberty-infringing," but also "raise[s] serious constitutional concerns," Bondsmen Br. at 13-14, is not well founded, particularly when it is made to support continuing a practice of detaining indigent misdemeanor defendants solely based on their inability to pay. This practice is not merely "liberty-infringing"; it is a wholesale deprivation of liberty. Moreover, the sole case cited by the bondsmen, *United States v. Scott*, 450 F.3d 863 (9th Cir. 2006), hardly calls into question the constitutionality of pretrial supervision. In *Scott*, the defendant had agreed as a condition of pretrial release to random drug testing and home searches

[13] Although this study included defendants released with supervision in the "own-recognizance" category for comparison purposes, the authors acknowledged that "supervised release" is not a standard term. *The Fugitive* at 102, ROA.4069. Moreover, the study used data from 1990-1996, when imposition of non-financial conditions of release supervised by pretrial services was much less prevalent than today.

[14] In addition to these two studies of felony defendants only, the bondsmen cite one dated study commissioned by the Maryland Bail Bond Association, which compared FTA rates from 1992 for those released on unsecured bail, 10-percent deposit bail, full cash bail, and corporate security bail, but not with those released on non-financial conditions. Bondsmen Br. at 14 (citing Byron L. Warnken, *Warnken Report on Pretrial Release* 17-18 (2002)).

without a warrant, and later sought to suppress evidence found during a warrantless search. *Id.* at 865. Because the "unconstitutional conditions doctrine" limits the government's ability to exact waivers of constitutional rights—particularly Fourth Amendment rights—as a condition of benefits, the court held that Scott's consent to search was valid only if the search was reasonable. *Id.* at 866-68. The court never purported to address other pretrial conditions of release, nor did it suggest that conditions that do not directly infringe on well established constitutional rights, such as those protected by the Fourth Amendment, raised any concerns.

Appellant's amici complain that release on non-financial conditions is costly, both in terms of funding and the drain on pretrial supervision systems. Bondsmen Br. at 16; States Br. at 11. But the financial cost of pretrial supervision pales in comparison to the cost of detention. *See supra* at 13. And pretrial detention does nothing to address underlying conditions, such as drug abuse, mental health issues, or lack of employment and educational opportunities, which can be addressed through non-financial conditions, thus contributing to better outcomes for misdemeanor defendants and lowering the risk of recidivism. Amici prosecutors do not deny that greater reliance on pretrial supervision of misdemeanor defendants instead of detention will increase the resource burden on pretrial supervision agencies. But the net benefit, in both financial savings and investment in the

community, makes for an easy trade-off that also supports prosecutors' efforts to build bonds with the people they serve and to enhance public safety.

C. The facial neutrality of Harris County's bond schedule does not save it from constitutional infirmity

Finally, the bondsmen attempt to deflect the constitutional challenge to Harris County's practice by arguing that "[d]efendants who cannot post bail are not detained because they are poor. Instead they are detained because the government had probable cause to arrest and charge them with crimes, and wishes to secure their appearance at trial and protect the community." Bondsmen Br. at 17. The Supreme Court rejected this very argument in *Williams*:

> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois*, 'a law nondiscriminatory on its face may be grossly discriminatory in its operation.' *Id.* at 17 n.11. Here, the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

399 U.S. at 242.

Appellants and the bondsmen dispute that what they perceive as Harris County's equal treatment of charged defendants could violate the Equal Protection Clause. Appellants' Br. at 31; Bondsmen Br. at 5. Indeed, appellants argue that "the only potential equal protection violation in this case comes from the classification created by the injunction itself" because those who cannot post bail must be released while those who are similarly situated but are able to pay must pay or be detained. Appellants' Br. at 31-32. But this argument, too, was rejected by the Supreme Court in *Williams*. *Williams* recognized that non-enforcement of judgments against those financially unable to pay "would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 399 U.S. at 244. But non-enforcement was unnecessary, *Williams* explained, because states could rely on alternative enforcement mechanisms that did not result in imprisonment of indigents beyond the statutory maximum for involuntary nonpayment of fines and court costs. *Id*. This solution was reiterated in *Tate v. Short* a year later, when the Court applied *Williams*'s equal protection analysis to invalidate the practice of imprisoning indigents for failure to pay the fine on a fines-only offense: "There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." 401 U.S. at 399 (citing

Williams); *see also Bearden*, 461 U.S. at 668-69 ("fundamentally unfair" to revoke probation automatically without considering alternatives).

Amici prosecutors recognize and share the interest of Harris County, the State of Texas and its fellow States, and the public at large in ensuring that misdemeanor defendants appear for trial and do not commit crimes while on pretrial release. But there are numerous alternatives to pretrial detention available to Harris County, including release on unsecured bond with such non-financial conditions deemed necessary based on the circumstances of the individual and offense. These are not only effective; they are constitutional. They also promote a justice system that avoids perpetuating modern-day debtors' prisons that incarcerate individuals based on wealth and that inherently delegitimize and erode community trust.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on August 8, 2017, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/Mary B. McCord
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CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i) because it contains 6,495 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

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

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