

No. 17-20333

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MARANDA LYNN O'DONNELL,
Plaintiff-Appellee,

v.

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

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

v.

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

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

**BRIEF FOR TEXAS BAPTISTS CHRISTIAN LIFE COMMISSION,
TEXAS CATHOLIC CONFERENCE OF BISHOPS, AND CLERGY AND
RELIGIOUS LEADERS AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLEES**

Jonathan Marcus
Counsel of Record
Paul M. Kerlin
Ryan Travers
Michael Leo Pomeranz
SKADDEN, ARPS, SLATE, MEAGHER
& FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

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

Pursuant to Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate potential disqualification or 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	Charles J. Cooper Michael W. Kirk Harold S. Reeves William C. Marra John D. Ohlendorf COOPER & KIRK, PLLC John Ellis O'Neill

Judge Analia Wilkerson Dan Spjut Judge Diane Bull Judge Robin Brown Donald Smyth Jean Hughes <i>(Fourteen Judges for Harris County Criminal Courts of Law)</i>	John R. Keville Sheryl Anne Falk Robert Lawrence Green, III Corinne Stone WINSTON AND STRAWN LLP
Judge Mike Fields <i>(Judge for Harris County Criminal Court of Law)</i>	Bruce Powers HARRIS COUNTY ATTORNEY'S OFFICE
Harris County, Texas Eric Stewart Hagstette Joseph Licata, III Ronald Nicholas Blanca Estella Villagomez Jill Wallace <i>(County and Hearing Officers)</i>	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

Defendants	Counsel
Sheriff Ed Gonzalez	Murray Jules Fogler FOGLER, BRAR, FORD, O'NEIL & GRAY, L.L.P.
Judge Darrell William Jordan	Laura Beckman Hedge HARRIS COUNTY ATTORNEY'S OFFICE

Other Interested Parties	Counsel
American Bail Coalition Professional Bondsmen of Texas Professional Bondsmen of Harris County	Paul D. Clement Christopher G. Michel Andrew C. Lawrence KIRKLAND & ELLIS LLP

<p>State of Texas State of Arizona State of Hawai'i State of Kansas State of Louisiana State of Nebraska</p>	<p>Ken Paxton Jeffrey C. Mateer Scott A. Keller Joseph D. Hughes TEXAS ATTORNEY GENERAL</p> <p>Mark Brnovich ARIZONA ATTORNEY GENERAL</p> <p>Douglas S. Chin HAWAI'I ATTORNEY GENERAL</p> <p>Derek Schmidt KANSAS ATTORNEY GENERAL</p> <p>Jeff Landry LOUISIANA ATTORNEY GENERAL</p> <p>Douglas J. Peterson NEBRASKA ATTORNEY GENERAL</p>
<p>Conference of the Chief Justices</p>	<p>Thomas Phillips Evan A. Young BAKER BOTTS, L.L.P.</p>
<p>Texas Baptists Christian Life Commission Texas Catholic Conference of Bishops Archbishop Joseph A. Fiorenza Rabbi Samuel E. Karff Reverend William A. Lawson The Right Reverend C. Andrew Doyle Reverend Michael Rinehart</p>	<p>Jonathan Marcus Paul M. Kerlin Ryan Travers Michael Leo Pomeranz SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP</p>

Date: August 9, 2017

s/Jonathan Marcus
 JONATHAN MARCUS

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY ARGUMENT	3
ARGUMENT	4
I. The Harris County bail system imposes a moral cost, offending religious principles regarding the treatment of the poorest members of society.	4
II. Harris County’s bail system imposes human costs.	10
(A) Detainees are cut off from family, friends, work, and education.	10
(B) The current bail system induces plea bargains and affects case outcomes.....	14
(C) Pretrial detention has long-term consequences.....	16
III. Harris County’s bail system imposes a social cost, burdening taxpayers and the community as a whole.....	17
IV. Harris County’s bail system severely injures misdemeanor arrestees, outweighing any harm from enjoining that system during the pendency of this litigation.	19
CONCLUSION.....	23

TABLE OF AUTHORITIES

Page

CASES

Barker v. Wingo,
407 U.S. 514 (1972).....16

Daniels Health Scis. L.L.C. v. Vascular Health Scis., L.L.C.,
710 F.3d 579 (5th Cir. 2013)20

Heil Trailer Int’l Co. v. Kula,
542 F. App’x 329 (5th Cir. 2013).....20

Jones v. City of Clanton,
Civil Action No. 2:15-cv-34-MHT, 2015 WL 5387219 (M.D. Ala.
Sept. 14, 2015).....6

Stack v. Boyle,
342 U.S. 1 (1951).....15, 21

United States v. Salerno,
481 U.S. 739 (1987).....21

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).....20

STATUTES

Tex. Code Crim. Proc. Ann. art. 17.033(a) (West 2015).....23

Tex. Code Crim. Proc. Ann. art. 22.01-02 (West 2009).....22

Tex. Const. art. 1 § 113, 22

U.S. Const. amend. XIV § 13

OTHER AUTHORITIES

Michael Barajas, *Why the Harris County Jail is Overcrowded with Legally Innocent People*,
Houston Press (July 1, 2015),
<http://www.houstonpress.com/news/why-the-harris-county-jail-is-overcrowded-with-legally-innocent-people-7555627>.....7

The Bible,
Deuteronomy 1:16-17.....9

The Bible,
Leviticus 19:154

Thomas H. Cohen & Brian A. Reaves, “Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004,” *Special Report* (NCJ 214994),
Nov. 2007, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics,
<http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf>10

Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform*,
(Oct. 2016) <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>22

Sharon Dolovich, *Incarceration American Style*,
3 Harv. L. Pol’y Rev. 237 (2009).....14

Meagan Flynn, *Harris County Sheriff May Hand Over 17-Year-Olds to Private Prison Contractor*,
Houston Press (Sept. 29, 2016),
<http://www.houstonpress.com/news/harris-county-sheriff-may-hand-over-17-year-olds-to-private-prison-contractor-8812196>.....7

Lisa Foster, Director of the Office for Access to Justice, *Remarks at ABA’s 11th Annual Summit on Public Defense*,
Feb. 6, 2016, <https://www.justice.gov/opa/speech/director-lisa-foster-office-access-justice-delivers-remarks-aba-s-11th-annual-summit>13

Arthur J. Goldberg, *Equal Justice for the Poor, Too*,
The New York Times (Mar. 15, 1964),
[http://www.nytimes.com/1964/03/15/equal-justice-for-the-poor-
too.html](http://www.nytimes.com/1964/03/15/equal-justice-for-the-poor-too.html)6

Andrea Greer, *Turns Out, It’s Expensive to Violate People’s Rights*,
Burnt Orange Report (June 7, 2016),
[http://www.burntorangereport.com/diary/32159/turns-expensive-
violate-peoples-rights](http://www.burntorangereport.com/diary/32159/turns-expensive-violate-peoples-rights)17

Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial
Detention*, 69 Stan. L. Rev. 711 (2017).....10, 15, 16, 17, 18

*Jailhouse Stories: Voices of Pretrial Detention in Texas: Leonardo Onescu
Harris County Jail*,
Houston, TX, <http://www.jailhousestories.org/leonardo-onescu>12

Rev. Bill Lawson, Archbishop Joseph Fiorenza & Rabbi Samuel Karff, *Our
Shared Morals and Sense of Justice Demand Bail Reform*,
Houston Chronicle, July 16, 2016, [http://www.houstonchronicle.com/
opinion/outlook/article/Lawson-Fiorenza-and-Karff-Our-shared-
morals-and-8382340.php](http://www.houstonchronicle.com/opinion/outlook/article/Lawson-Fiorenza-and-Karff-Our-shared-morals-and-8382340.php)4

Oliver Lazarus, *America’s System of Requiring Bail Can Keep the Innocent
in Prison for Months — or Years*,
(Jul. 24, 2015), [https://www.pri.org/stories/2015-07-24/americas-
system-requiring-bail-can-keep-innocent-prison-months-or-years](https://www.pri.org/stories/2015-07-24/americas-system-requiring-bail-can-keep-innocent-prison-months-or-years).....12

Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*,
Laura and John Arnold Foundation Report, 4, 11 (Nov. 2013),
[http://www.arnoldfoundation.org/wp-
content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf)17

Memorandum from Harris Cty., Tex. Comm’rs Court, *Harris County
FY2017 Budget*, (Feb. 10, 2017),
[https://www.harriscountytexas.gov/agenda/2017/2017-02-14-Vol3-
FY2017-18-Policy%20Issues%20and%20Budgets-FINAL.pdf](https://www.harriscountytexas.gov/agenda/2017/2017-02-14-Vol3-FY2017-18-Policy%20Issues%20and%20Budgets-FINAL.pdf).....18, 19

Todd D. Minton & Daniela Golinelli, *Jail Inmates in 2015*, U.S. Department
of Justice, Office of Justice Programs, Bureau of Justice Statistics
(Dec. 2016)7

National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice*, (1965) <https://www.ncjrs.gov/pdffiles1/photocopy/355ncjrs.pdf>.5

Amanda Petteruti & Natassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, Justice Policy Institute Report (Apr. 2008), http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf16

James Pinkerton & Anita Hassan, *Jailhouse Jeopardy: Guards Often Brutalize and Neglect Inmates in Harris County Jail, Records Show*, Houston Chronicle (Oct. 3, 2015), <http://www.houstonchronicle.com/news/special-reports/article/Violence-neglect-by-jailers-common-in-county-6548623.php>6

James Pinkerton, Anita Hassan, & Lauren Caruba, *Harris County Jail Considered ‘Unsafe and Unhealthy’ for Inmates, Public*, Houston Chronicle (Nov. 21, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php>7, 8

James Pinkerton, Anita Hassan, & Lauren Caruba, *Some Inmates Who Died in County Jail Had Treatable Conditions*, Houston Chronicle (Nov. 21, 2015), <http://www.houstonchronicle.com/news/article/Without-treatment-some-inmates-have-died-at-6649389.php>.....8

James Pinkerton & Lauren Caruba, *Tough Bail Policies Punish the Poor and the Sick, Critics Say*, Houston Chronicle (Dec. 28, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail-policies-punish-the-poor-and-the-sick-6721984.php>.....7, 8, 11, 12

Nick Pinto, *The Bail Trap*, The New York Times Magazine (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>.....5

Bernadette Rabuy & Daniel Kopf, *Detaining the Poor*,
Prison Policy Institute, May 10, 2016,
<https://www.prisonpolicy.org/reports/incomejails.html>13, 17

Brian Rogers, *Jail Reform Tackles Racial Disparities*,
Houston Chronicle (Apr. 13, 2016),
<http://www.houstonchronicle.com/news/houston-texas/houston/article/Jail-reform-tackles-racial-disparities-7247268.php>6, 7

Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*,
Social Sci. Res. Network (Jan. 12, 2017) (Working Paper, Univ. of Pa.), <https://ssrn.com/abstract=2777615>.....14

Ram Subramanian et al., Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America*,
(Feb. 2015) (updated July 19, 2015)15

Texas Commission on Jail Standards, *Abbreviated Population Report for 7/1/2017*, <http://www.tcjs.state.tx.us/docs/AbbreRptCurrent.pdf>10

Texas Fair Defense Project Report, *Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies*,
(2014),
<https://www.pretrial.org/download/research/Depenalizing%20Poverty%20A%20Proposal%20for%20Improving%20Harris%20County%20Bail%20Policies%20-%20TFDP%202014.pdf>13, 14

Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*,
123 Yale L. J. 1344 (2014)16

INTEREST OF AMICI CURIAE

Representatives of diverse religious communities throughout the State of Texas join here as *amici curiae* in support of plaintiffs-appellees. Detainees at Harris County Jail and other facilities receive frequent visits from local churches and their jail ministries. As a result, those serving their churches and religious communities possess unique, firsthand insight regarding the moral and other harms arising from a bail system like the one in Harris County.

The Texas Baptists Christian Life Commission (“CLC”) is the ethics and public policy ministry of the Baptist General Convention of Texas, which includes 5,400 churches. The CLC does not speak for Texas Baptists, but it addresses policy issues that are of concern to Texas Baptists from a biblical perspective.

The Texas Catholic Conference of Bishops (“TCCB”) is a federation of all Roman Catholic dioceses and ordinariates located in the State of Texas. The public policy issues addressed by the TCCB include institutional concerns of the Catholic Church as well as issues related to Catholic moral and social teaching.

Archbishop Joseph A. Fiorenza is Archbishop Emeritus, Archdiocese of Galveston-Houston in Houston, Texas.

Rabbi Samuel E. Karff is Rabbi Emeritus, Congregation Beth Israel in Houston, Texas.

Reverend William A. Lawson is Pastor Emeritus, Wheeler Avenue Baptist Church in Houston, Texas.

The Right Reverend C. Andrew Doyle is Bishop of the Episcopal Diocese of Texas, encompassing Austin, Beaumont, Galveston, Houston, Waco, and Longview/Tyler, Texas.

Reverend Michael Rinehart is Bishop of the Texas-Louisiana Gulf Coast Synod, Evangelical Lutheran Church in America.

Notwithstanding their differences in theology, *amici* share the conviction that the incarceration of individuals because they are impoverished cannot be morally justified. Such discrimination violates the ethical standards of American society, the moral obligations owed to those most disadvantaged, and the Constitutional guarantee of equal protection of the laws.¹

¹ No counsel for any 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. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Harris County bail system exacerbates the harsh circumstances in which so many impoverished men and women find themselves, depriving them of liberty solely because they cannot afford to purchase their freedom. The costs of this policy—moral, human, and societal—are unacceptable. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.” U.S. Const. amend. XIV § 1. Yet Harris County and its officers have denied plaintiffs-appellees and other indigent arrestees equal protection by denying them the right to bail, *see* Tex. Const. art. 1 § 11 (guaranteeing the right to bail), because they, unlike others more fortunate, cannot afford the bondsman’s premium.

As representatives of a cross-section of faiths and communities, *amici* believe it important to provide their perspective on defendants-appellants’ immoral and unconstitutional bail policy. Views grounded in the moral imperatives that exist among us all—that the poor are human beings, that discriminating against them signifies and results in spiritual decay, and that the unique suffering experienced in jail harms not only the jailed and the jailor but also the families and communities of both—must guide the evaluation of the constitutionality of Harris County’s bail system.

ARGUMENT

I. The Harris County bail system imposes a moral cost, offending religious principles regarding the treatment of the poorest members of society.

The Harris County bail system corrodes the moral foundation of our common good—that all of us are equal in the eyes of justice. This fundamental principle is articulated both in founding documents and in scripture: “You shall do no injustice in judgment; you shall not be partial to the poor or defer to the great, but you are to judge your neighbor fairly.” Leviticus 19:15. That we are all judged—as individuals, as leaders, as the government itself—by our treatment of those who are most disadvantaged is a throughline connecting ecclesiastical and ecumenical communities. Such an intrinsic moral requirement has no special regard for particular interpretations of faith; it compels us all in equal measure—those of different faiths and no faith alike—to treat all others with mercy. *See* Rev. Bill Lawson, Archbishop Joseph Fiorenza & Rabbi Samuel Karff, *Our Shared Morals and Sense of Justice Demand Bail Reform*, Houston Chronicle, July 16, 2016, <http://www.houstonchronicle.com/opinion/outlook/article/Lawson-Fiorenza-and-Karff-Our-shared-morals-and-8382340.php>. And yet, despite this core tenet, failure is all too common in fulfilling ethical obligations to those most in need.

The religious community has witnessed defendants-appellants force those arrested merely for misdemeanor offenses to battle a punitive bail system before

any trial or any verdict, despite the presumption of innocence. Through the use of secured-money bail requirements in amounts individuals cannot afford to pay, the Harris County bail system imposes extended punishment in the form of pretrial detention on those individuals who cannot afford to pay the required amount. Because this detention is ordered without respect to detainees' risk of flight, public safety, or guilt of the underlying offense, this punishment solely arises from their poverty. Detention for no other reason than an individual's financial condition—particularly in light of the availability of non-financial conditions of release—sends a demoralizing message to the detainee and inflicts collateral damage on families and communities.

Former U.S. Attorney General Robert F. Kennedy spoke to similar equitable concerns decades ago: “[U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money.” National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice* at 297 (1965), <https://www.ncjrs.gov/pdffiles1/photocopy/355ncjrs.pdf>. More than 50 years later, the Harris County bail system continues to ignore these warnings. Without funds to spare, without adequate access to health care, without necessary support for children and family, the disadvantaged face severe risks from excessive

bail and extended detention. Justice that is blind to these dangers and that indiscriminately forces poor defendants to pay for their physical liberty is no justice at all. *See Jones v. City of Clanton*, Civil Action No. 2:15-cv-34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015) (explaining that a new bail policy accounting for individual circumstances demonstrates “marked strides in improving the quality of the justice” delivered).

The most vulnerable members of society experience harmful and too often tragic results because they cannot purchase their freedom.² *See* Nick Pinto, *The Bail Trap*, *The New York Times Magazine* (Aug. 13, 2015), <https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>. For some, the physical harm from extended detention has been likened to the abuse inflicted in the worst kinds of animal shelters. *See* James Pinkerton & Anita Hassan, *Jailhouse Jeopardy: Guards Often Brutalize and Neglect Inmates in Harris County Jail, Records Show*, *Houston Chronicle* (Oct. 3, 2015), <http://www.houstonchronicle.com/news/special-reports/article/Violence-neglect-by-jailers-common-in-county-6548623.php>. Defendants who cannot afford bail can remain incarcerated for

² Up to 75 percent of Harris County Jail’s inmates—half of whom face non-violent felony or misdemeanor charges—remain incarcerated for an inability to pay bail and not as a result of any conviction. Brian Rogers, *Jail Reform Tackles Racial Disparities*, *Houston Chronicle* (Apr. 13, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Jail-reform-tackles-racial-disparities-7247268.php>.

months in overcrowded conditions, at times for periods longer than actual sentences, and are subject to an ever-present risk of assault. *See* Rogers, *Jail Reform Tackles Racial Disparities*, *supra*.³

Since 2009, more than 75 Harris County inmates have died, including those suffering from treatable conditions. *Id.*; *see also* Michael Barajas, *Why the Harris County Jail is Overcrowded with Legally Innocent People*, Houston Press (July 1, 2015), <http://www.houstonpress.com/news/why-the-harris-county-jail-is-overcrowded-with-legally-innocent-people-7555627>; James Pinkerton & Lauren Caruba, *Tough Bail Policies Punish the Poor and the Sick, Critics Say*, Houston Chronicle (Dec. 28, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail-policies-punish-the-poor-and-the-sick-6721984.php>; Meagan Flynn, *Harris County Sheriff May Hand Over 17-Year-Olds to Private Prison Contractor*, Houston Press (Sept. 29, 2016), <http://www.houstonpress.com/news/harris-county-sheriff-may-hand-over-17-year-olds-to-private-prison-contractor-8812196>. Recent reports attribute most of these deaths to natural causes. James Pinkerton, Anita Hassan, & Lauren Caruba, *Harris County Jail Considered 'Unsafe and Unhealthy' for Inmates, Public*, Houston

³ Nationally, local jails may hold up to 467,000 detainees merely awaiting trials for crimes. Todd D. Minton & Daniela Golinelli, *Jail Inmates in 2015*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2016).

Chronicle (Nov. 21, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php>. Ten people died of Hepatitis B or C; ten committed suicide; another eight suffered from HIV or AIDS; and five were infected with the MRSA staph infection. *Id.* Of these deaths, at least 19 were treatable or preventable, including deaths from chronic conditions—diabetes, tuberculosis, and mental illness—exacerbated by substandard treatment in jail. *Id.* Issues around mental illness alone plague the approximately 2,200 inmates taking psychotropic medication. *Id.*

More than mere statistics, these figures reflect real harm to real people. For example, Kenneth Beckett died in the Harris County jail in 2009 from respiratory failure, believed to have resulted from exposure in jail to swine flu. James Pinkerton, Anita Hassan, & Lauren Caruba, *Some Inmates Who Died in County Jail Had Treatable Conditions*, Houston Chronicle (Nov. 21, 2015), <http://www.houstonchronicle.com/news/article/Without-treatment-some-inmates-have-died-at-6649389.php>. Tung Nguyen, described as a Vietnamese refugee, ultimately died as a detainee in the Harris County Jail, succumbing to mental illness and heart disease because his family was unable to satisfy the county's bail demand. James Pinkerton & Lauren Caruba, *Tough Bail Policies Punish the Poor and the Sick, Critics Say*, Houston Chronicle (Dec. 28, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Tough-bail->

policies-punish-the-poor-and-the-sick-6721984.php.

In the face of these tragic outcomes, defendants-appellants nevertheless have chosen to perpetuate this immoral system, subjecting detainees to pretrial detention based on their financial status—eschewing available non-financial conditions for release—regardless of an arrestee’s flight risk, threat to public safety, or guilt of the underlying offense. Harris County’s bail regime exacts too high a moral cost. To hinge extended detention on a defendant’s empty pocketbook fails as a matter of compassion, of common sense, of public purpose, and of basic morality. By not considering alternative measures to ensure indigent defendants return to court, defendants-appellants have degraded our justice system, denying plaintiffs-appellees equal treatment under the law.

Scripture provides guidance in highlighting the ethical and constitutional shortcomings in the Harris County bail system. Moses declared: “And I charged your judges at that time, saying: ‘Hear the causes between your brethren, and judge righteously between a man and his brother, and the stranger that is with him. . . . [Y]ou shall hear the small and the great alike; you shall not be afraid of the face of any person.’” Deuteronomy 1:16-17. This then is the charge across faiths: to denounce this bail system, to urge an end to the primacy of wealth over justice, and to spare individuals, families, and communities the harms that inexorably follow.

II. Harris County’s bail system imposes human costs.

In Harris County, approximately 65 percent of the jail population is awaiting trial. *See* Texas Commission on Jail Standards, Abbreviated Population Report for 7/1/2017, at 4, <http://www.tcjs.state.tx.us/docs/AbbreRptCurrent.pdf>. Pretrial detention isolates detainees from family, interrupts their employment or education, and has a coarsening effect with deleterious consequences for detainees, including increased rates of recidivism, following their release. *See, e.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711 (2017). This isolation is especially troubling given that, ultimately, approximately 20 percent of pretrial detainees in the United States will have their case dismissed or will be acquitted. *See* Thomas H. Cohen & Brian A. Reaves, “Pretrial Release of Felony Defendants in State Courts: State Court Processing Statistics, 1990-2004,” *Special Report* (NCJ 214994), Nov. 2007, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf>. Many more might be innocent. Yet the perverse incentives and dire conditions that pretrial detention imposes often induce detainees to plead guilty regardless of their guilt or innocence.

(A) Detainees are cut off from family, friends, work, and education.

Pretrial detention based on an inability to pay bail isolates detainees—individuals who often pose no flight risk or threat to public safety. A defendant

accused merely of a misdemeanor but who is unable to post bail can face pretrial detention that extends for days, weeks, or even months. In that time, children will need to be cared for, jobs will be left unattended, schoolwork will be missed. *See id.* For instance, one of the plaintiffs in this case, Maranda ODonnell, was held for three days for driving with an invalid license because she was unable to pay the \$2,500 secured-money bail. *See* Order of Preliminary Injunction at 10-12, Dkt. No. 304 (April 28, 2017). Another plaintiff, Robert Ford, was held for five days for shoplifting before pleading guilty because he was unable to pay the \$5,000 secured-money bail. *Id.* at 12-13. This unjustified detention is an all-too-common experience in Harris County.

The overcrowded jails, like those in which plaintiffs-appellees were detained, feature violence, lack of medical treatment, and other harsh circumstances. The conditions are so brutal they can kill, even pretrial detainees, as evidenced by the aforementioned *Houston Chronicle* investigation. *See* Pinkerton & Caruba, *supra*. These conditions, and the harms they cause, beset detainees who cannot afford to pay a bondsman the premium for secured-money bail—regardless of their flight risk or the availability of alternative measures to ensure their presence at trial, and regardless of their guilt or innocence.

The stories of Sandra Oliver, Leonardo Onescu, and Kenneth Fomby—their minor offenses, the unaffordable secured-money bail, and their extended pretrial

detention—are illustrative. Sandra Oliver was charged with trespassing in Harris County in October 2010 with bail set at \$5,000. *See id.* Two days later, Oliver remained in the overcrowded Harris County jail when she suffered a pulmonary embolism and was rushed to the hospital, where she died. *Id.* Leonardo Onescu was held in Harris County jail for shoplifting less than \$100. *Jailhouse Stories: Voices of Pretrial Detention in Texas: Leonardo Onescu Harris County Jail, Houston, TX*, <http://www.jailhousestories.org/leonardo-onescu>. Unable to pay his \$15,000 bail, he remained in detention *for five months*. *Id.* During that time, Onescu witnessed physical assaults and faced delays receiving prescribed mental health medication. *Id.* And there is Kenneth Fomby, who was wrongly accused of several charges in Birmingham, Alabama. Oliver Lazarus, *America's System of Requiring Bail Can Keep the Innocent in Prison for Months — or Years* (Jul. 24, 2015), <https://www.pri.org/stories/2015-07-24/americas-system-requiring-bail-can-keep-innocent-prison-months-or-years>. Because he was unable to pay bail, Fomby spent *months* in prison before being released and having his case dropped. *Id.* These few examples are representative of pretrial detainees inside Harris County Jail and other prisons who have been subjected to days, weeks, or months in pretrial detention in appalling conditions simply because they were unable to pay bail.

families to struggle further to make ends meet. *Id.* This county-mandated absence also can mean eviction from their home. *Id.* Detainees' children may be forced to be supported by other family members or be placed in foster care, all while the detainees wait in prison for minor crimes, of which they may not be guilty. Sharon Dolovich, *Incarceration American Style*, 3 Harv. L. Pol'y Rev. 237, 246 (2009). And elderly family members may be left without caretakers. Texas Fair Defense Project, *supra*, at 4.

The current bail system damages detainees personally and professionally from the moment they enter, exposing them to potential physical and mental harm in detention, causing economic harm outside of jail, and making the most vulnerable even more desperate.

(B) The current bail system induces plea bargains and affects case outcomes.

The current bail system skews pretrial detainees' decision-making and adversely affects the outcomes of their cases. Most problematic, it induces detainees unable to afford bail to plead guilty, not because they are guilty but because they are poor. *See* Appellees' Br. 11 (noting that Harris County leads the nation in exonerations, due in large part to guilty pleas by misdemeanor defendants seeking to end their pretrial detention); *see also* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, Social Sci. Res. Network (Jan. 12, 2017) (Working Paper, Univ. of Pa.),

<https://ssrn.com/abstract=2777615>. Despite being “innocent until proven guilty,” detainees face prolonged detention if they contest the charges against them. As noted above, *supra* Part II.A, every day in detention taxes detainees’ physical health, their social and psychological well-being, and their families’ finances. For misdemeanor defendants, whose pretrial detention can exceed a potential, actual sentence, pleading guilty to charges can open the door to relieving those hardships. See Subramanian et al., Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America*, 40 (Feb. 2015) (updated July 19, 2015). As a result, studies have shown that pretrial detainees charged with misdemeanors and unable to afford bail are 25 percent more likely to plead guilty than misdemeanor defendants able to pay bail. See Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, *supra*, at 747.

Furthermore, those detainees who choose not to plead guilty face worse outcomes than defendants who can pay for their release. It is axiomatic that the prosecution bears the burden of proving a defendant’s guilt, but the reality for pretrial detainees unable to pay bail is that they are required to prove their innocence to secure their release. The task of proving one’s innocence is made all the more difficult by the detention itself. *Cf. Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“[The] traditional right to freedom before conviction permits the unhampered preparation of a defense....”). Detention can hamper a defendant’s “ability to

gather evidence, contact witnesses, or otherwise prepare his defense.” *Barker v. Wingo*, 407 U.S. 514, 533 (1972). Unable to afford bail, pretrial detainees are forced to prepare their defense while in prison, away from family, friends, and legal counsel. Unsurprisingly, these detainees are 43 percent more likely to be sentenced to jail, and on average they receive jail sentences that are twice as long as defendants who were not subject to pretrial detention. See Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, *supra*.

(C) Pretrial detention has long-term consequences.

The damage caused by pretrial detention extends forward, limiting opportunities for gainful employment for detainees in the months and years after their detention, and contributing to higher rates of recidivism.

Pretrial detainees often have trouble finding employment for years after release and, if and when they do find employment, work fewer hours and make lower wages for as many as fifteen years after their release. See Amanda Petteruti & Natassia Walsh, *Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, Justice Policy Institute Report, 17 (Apr. 2008), http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf. Moreover, compared to alternatives like electronic monitoring, detention leads to a greater likelihood of recidivism. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 Yale L. J. 1344, 1353 (2014). This

increased recidivism is found even among low-risk defendants detained for two to three days, who are 39 percent more likely to be arrested for new criminal activity during the remaining pretrial period and 17 percent more likely in the two-year period following case conclusion. *See* Christopher Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation Report, 4, 11 (Nov. 2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf. Thus, even a brief detention for an inability to pay bail can harm individuals in the months and years that follow.

III. Harris County's bail system imposes a social cost, burdening taxpayers and the community as a whole.

In addition to the moral costs imposed on society, and the concrete costs levied on detainees and their families, the bail system results in significant social costs for taxpayers and the community. Harris County, for example, spent \$248 million on detention and medical costs for prisoners in fiscal year 2016-2017. According to the Harris County Sherriff's Department, it requires \$75 per day to hold someone in jail, with the county's taxpayers spending \$513,075 in one month alone in 2016 to detain individuals not yet convicted of any crime. *See* Andrea Greer, *Turns Out, It's Expensive to Violate People's Rights*, Burnt Orange Report (June 7, 2016), <http://www.burntorangereport.com/diary/32159/turns-expensive-violate-peoples-rights>. The imposition of high bail is the largest factor driving pretrial incarceration and these consequent costs. *See* Bernadette Rabuy and

Daniel Kopf, *Detaining the Poor*, Prison Policy Initiative Report (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

Beside the benefits that would flow from non-financial release conditions, a study found that even had Harris County just released the defendants assigned the lowest amount of bail (\$500) on personal bond, the county would have saved \$20 million in supervision costs alone between 2008 and 2013. *See* Heaton et al., *supra*, at 787. Of this small segment of the pretrial population, release on personal bond would have reduced incarceration in the county jail by at least 400,000 days over the time period and would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors in the 18 months following release. *Id.* (estimating subsequent charges based on recidivism figures). These figures would increase further if low-risk defendants who were assigned higher amounts for bail are included.

The current bail system increases incarceration, which consumes the county's annual budget. In 2016, Harris County spent more money on detention costs than it spent collectively on roads, public health care, libraries, community services, and care for disabled and abused children. *See* Memorandum from Harris Cty., Tex. Comm'rs Court, *Harris County FY2017 Budget*, (Feb. 10, 2017), <https://www.harriscountytexas.gov/agenda/2017/2017-02-14-Vol3-FY2017-18-Policy%20Issues%20and%20Budgets-FINAL.pdf>. The money the county allocates for

low-risk, misdemeanor defendants detained for failure to pay bail could be allocated to any number of programs that would support impoverished members of the community. *Id.* The resources could fund health services, which only received \$23.6 million, or the Children’s Assessment Center, which provides a safe haven to sexually abused children and their families and received only \$5.7 million in 2016. *Id.* Or the money could be allocated to mental health services, which received merely \$19.4 million in 2016, and would help many of those at risk of committing an offense. *Id.*

No matter the measure, it is clear that Harris County’s incarceration of low-risk offenders for extended periods solely because they are unable to pay bail is a highly inefficient use of taxpayer money. Moreover, the taxpayer expenditure does not end with the first incarceration, because those pretrial detainees unable to afford bail are more likely to commit future crimes than those who are not detained. As a result, beyond harming the individual detainees, the current system demands taxpayer money that could be far better spent supporting the community, particularly the most impoverished.

IV. Harris County’s bail system severely injures misdemeanor arrestees, outweighing any harm from enjoining that system during the pendency of this litigation.

The preliminary injunction prevents irreparable harm. As established above, each imposition of a secured-money condition on an indigent arrestee condemns

that person—because of his or her poverty—to incarceration and its attendant dangers. Moreover, that individual human cost is coupled with the moral damage that the community likewise cannot afford. This daily violation of *amici*'s religious principles and the Constitution has been enjoined, preliminarily, in recognition of the defendants-appellants' obligation under the Constitution to guarantee the poor the same protection of liberty as the rich.

To prevail on a motion for a preliminary injunction, movants must demonstrate, among other things, that the hardship absent the injunction would outweigh the hardship caused by the injunction. *See, e.g., Daniels Health Scis. L.L.C. v. Vascular Health Scis., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013). Calculating the balance of the hardships requires the district court to consider “the effect on each party” that “granting or withholding” the motion for preliminary injunction would have. *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 336 & n.33 (5th Cir. 2013) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The district court properly exercised its discretion in finding that the balance of hardships favored plaintiffs-appellees. On one hand, as established above, withholding a preliminary injunction would severely harm plaintiffs-appellees. On the other, if the injunction harms Harris County and the other defendants-appellants at all, that harm is minimal, as explained below.

The purpose of bail is assuring presence at trial. The preliminary injunction

does not threaten this interest in any way. The injunction does not preclude the imposition of secured-money bail. It allows the county to set bail, including secured-money bail, in an amount appropriate to ensure that a misdemeanor arrestee released prior to trial returns to court. The injunction also allows for non-financial alternatives to assure an indigent arrestee's presence at trial. By limiting the amount of secured-money bail to an amount an arrestee can afford, the injunction requires secured-money conditions of release to operate actually *as* conditions of release. After all, bail cannot ensure an arrestee returns to court unless the arrestee is first freed from detention prior to trial. *Cf. United States v. Salerno*, 481 U.S. 739, 754 (1987) (a court must set bail at no more than the “sum designed to ensure” prevention of flight, where that prevention is the government’s only goal); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”).

The preliminary injunction does not endanger public safety. To begin, the injunction here accounts for arrestees who might pose particular safety risks. *See, e.g.,* Order of Preliminary Injunction at 2-3, Dkt. No. 304 (April 28, 2017) (ordering separate procedures for misdemeanor defendants subject to formal holds, such as outstanding warrants, or subject to family-violence detention procedures). Moreover, the county does not assert that public safety is an interest it considers in

determining whether to set secured or unsecured bail and in what amount. Under the Texas Constitution, *all* arrestees for non-capital offenses are eligible for release on bail, without respect to the risk the arrestees may pose to public safety. Tex. Const. art. 1 § 11; *see also* Judges' Opp. to Pls' Mot. for Prelim. Injunc. at 17-18, Dkt. No. 166 at 13-14 (observing that outright pretrial detention "is not an option in Harris County because arrestees have a right to bail" (citing Tex. Const. art. 1 § 11)). Because Texas law prohibits pretrial detention for public safety reasons (with special exceptions for which the district court accounted), the preliminary injunction does not permit the release of misdemeanor defendants who could otherwise be detained as a threat to public safety.

In addition, pretrial bail serves as a poor tool for ensuring public safety (as opposed to appearance). Texas bondsmen forfeit their bond only if the bailee fails to appear, *not* if the bailee commits another crime while released before trial. Tex. Code Crim. Proc. Ann. art. 22.01-02 (West 2009). In fact, other jurisdictions have moved away from the use of money bail and have not found this to undermine public safety. *See* Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform*, (Oct. 2016) <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> (discussing experience of the Mesa County, Colorado Pretrial Services Agency).

In sum, the injuries that misdemeanor detainees suffer when the county

detains them for the sole reason that they are poor are far greater than any putative harm to the county from enjoining that unconstitutional practice. The district court's injunction could not have been more appropriate or more squarely in the public interest in promoting our collective moral obligation to those most in need and in ensuring the Constitutional guarantee of equal protection of the laws.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's preliminary injunction.

Respectfully submitted,

s/ Jonathan Marcus

Jonathan Marcus

Paul M. Kerlin

Ryan Travers

Michael Leo Pomeranz

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP

1440 New York Avenue, N.W.

Washington, D.C. 20005

T: (202) 371-7000

F: (202) 661-0596

E: jonathan.marcus@skadden.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 4,932 words, excluding the portions exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font.

Date: August 9, 2017

s/ Jonathan Marcus _____
JONATHAN MARCUS

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

- (1) all required privacy redactions have been made;
- (2) the hard copies submitted to the clerk are exact copies of the ECF submission;
- (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Forefront Endpoint Protection, updated August 9, 2017, and according to the program is free of viruses.

Date: August 9, 2017

s/ Jonathan Marcus
JONATHAN MARCUS

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: August 9, 2017

s/ Jonathan Marcus _____

JONATHAN MARCUS