

No. 17-20333

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**In the United States Court of Appeals for the Fifth Circuit**

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MARANDA LYNN O'DONNELL,

*Plaintiff-Appellee,*

v.

HARRIS COUNTY, TEXAS, *et al.*,

*Defendants-Appellants,*

LOETHA SHANTA MCGRUDER, *et al.*,

*Plaintiffs-Appellees,*

v.

HARRIS COUNTY, TEXAS, *et al.*,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
For the Southern District of Texas, Houston Division  
No. 16-Cv-1414

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**AMICUS CURIAE BRIEF OF HON. DARRELL W. JORDAN,  
HARRIS COUNTY CRIMINAL COURT AT LAW NO. 16,  
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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## INTEREST OF AMICUS CURIAE

Judge Darrell W. Jordan is no ordinary friend of the court. He is the judge of the Harris County Criminal Court at Law No. 16, one of the judges sued in the *ODonnell* case. He testified at the preliminary injunction hearing, called by the plaintiffs.

As documented in the record and in the opinion below, Judge Jordan's bail practices were already like those the District Court ordered all the defendant judges to follow. He believes those practices are practical and necessary to protect the constitutional rights of the misdemeanor defendants who appear before him – and his judicial colleagues.

Judge Jordan knows that, in practice, misdemeanor bonds in Harris County are set according to a strict schedule, without taking into account the ability of the accused to pay. He knows that the hearing officers believe they have no real discretion to deviate from the schedule. Rather, they have told him they must stick to the schedule lest they risk the ire of the other judges – and their jobs. He knows that bond amounts are often set at a level intended to keep misdemeanor defendants incarcerated, in violation of current Texas law and without constitutional due process. Although Judge Jordan favors current legislative proposals that would allow pretrial detention of certain misdemeanor defendants, after a full hearing and

statement of reasons, he does not support the current practice of ordering de facto detention by setting bond amounts that defendants cannot afford to pay.

Judge Jordan therefore supports Appellees with this *amicus curiae* brief and urges this Court to affirm.<sup>1</sup>

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<sup>1</sup> Pursuant to Fed. R. App. P. 29, Judge Jordan and his counsel state:

All other parties have consented to the filing of this brief.

No party's counsel authored his brief, in whole or in part.

No party's counsel contributed money that was intended to fund preparing or submitting this brief.

No person, other than the *amicus curiae* and his counsel, contributed money that was intended to fund preparing or submitting this brief.

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those listed in the briefs of Appellants and Appellees, the following persons 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.

Hon. Darrell William Jordan  
Judge of the Harris County Criminal Court at Law No. 16

G. Allan Van Fleet, P.C.  
Van Fleet LP

Dated: August 9, 2017

/s/ Allan Van Fleet

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## TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE .....	i
TABLE OF CONTENTS.....	iv
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    Judge Jordan’s Background .....	3
II.   Judge Jordan’s Experience with the Harris County Misdemeanor Bond System in Practice .....	5
A.    Bond amounts are set according to a rigid schedule.....	5
B.    Hearing officers have no real discretion to deviate from the schedule.....	6
C.    Judges do not deviate from the schedule. ....	8
D.    Judges set bond amounts with the intent to keep some defendants in jail. ....	8
E.    Not being able to afford a bond has severe consequences.....	10
1.    Time in jail.....	10
2.    Pressure to plead guilty.....	10
3.    Denial of diversionary opportunities .....	12
III.   Judge Jordan’s Bonding Practices.....	13
A.    No one is kept in jail because they can’t afford a bond.....	14
B.    Low-risk defendants automatically get PR bonds. ....	15
C.    Other bonds are based on statutory factors, including ability to pay.....	16
D.    Some bonds come with conditions. ....	17

E. Bonds are generally set within 24 hours of arrest.....18

F. Judge Jordan’s practices are feasible.....19

CONCLUSION.....19

CERTIFICATE OF SERVICE .....21

CERTIFICATE OF COMPLIANCE.....22

## INTRODUCTION AND SUMMARY OF ARGUMENT

Darrell William Jordan knows well the issues and what is at stake in this case. He is the Judge of the Harris County Criminal Court at Law No. 16, one of the judges sued in this case. He testified at the preliminary injunction hearing, called by the plaintiffs. ROA.7489-7610. As a friend of this Court, he supports Plaintiffs-Appellees and the bonding reforms ordered by the District Court.

Judge Jordan knows – from his time on the bench and as a defense attorney who practiced before each of the other County Criminal Court at Law judges – that, in practice, bonds for misdemeanor defendants in Harris County are set according to a strict schedule that gives no consideration to the accused’s ability to pay.

Hearing officers have told him they believe they have no real discretion to deviate from the schedule, because they fear angering the judges who hire them and who decide whether to rehire them. The judges themselves don’t deviate from the schedule – except to raise bonds to punish those who fail to appear, or who commit other crimes while bonded out, or whom for whatever reason the judges want to keep in jail. Indeed, this was Judge Jordan’s practice when he first took the bench, because he thought it was what he was supposed to do.

From both sides of the bench, and as both defense counsel and Army prosecutor, Judge Jordan has seen the effects of a system that keeps people in jail

because they are too poor to pay for a bond. He has seen clients, incarcerated for weeks before trial because they couldn't afford to bond out, lose their jobs, autos, and homes. He has heard defendants protest their innocence, but plead guilty to get out on time served, rather than stay in jail. He knows that if you can't get out on bond, you can't take advantage of diversionary programs that require you to be in school or have a job or have access to drug testing facilities.

Judge Jordan's views on bail policy evolved during his first 45 days in office, including at a pivotal judicial conference in San Marcos. Under his revised approach, defendants are no longer kept in jail because they can't afford the bond dictated by schedule. Those who pretrial services determine are minimal risk – with bonds set at \$500 – automatically receive personal recognizance (PR) bonds requiring no advance cash payment. With others, he has an in-court “conversation” about the amount of bond they can afford. He requires reasonable surety bonds for many, but allows the poorest to be released on PR bonds. In some cases, he protects defendants from hurting themselves or others by imposing bond conditions, such as taking breath-alcohol tests or wearing GPS monitors to assure compliance with orders to stay away from family members.

Judge Jordan generally can bond out defendants within 24 hours of their arrest.



Judge Jordan's bond practices, as noted in the opinion below, are substantially similar to those the District Court ordered all Harris County Criminal Court at Law judges to follow. In Judge Jordan's experience, these practices are workable and protect the constitutional rights of the poorest who come before his court.

Judge Jordan urges this Court to affirm the District Court's order. He supports bonding reforms proposed by Harris County and the Texas Legislature. He particularly supports changing state law to allow pretrial detention of certain misdemeanor defendants, but only after conducting a full due-process hearing, not the ruse of setting bond at an amount the court knows a defendant cannot pay.

Despite proposed and promised reforms, Judge Jordan sees a system that is broken *now* – a bathtub that is leaking badly and ruining the foundation. It must be plugged now. He therefore urges this Court to affirm the District Court's injunction.

## **ARGUMENT**

### **I. Judge Jordan's Background**

When Judge Jordan looks into the eyes of a misdemeanor defendant seeking bail in his court, he sees his own past and what his present might have been.

The child of a broken home, he grew up shuttling between his father in Albany, Georgia and his mother in Columbia, Missouri. He earned admission to the University of Missouri – Columbia and graduated with a BA in History.

In 2001, he enlisted as a private first class in the United States Army. While in the Army, he was accepted to the Thurgood Marshall School of Law in Houston. He joined the Reserve Officers Training Corps at nearby University of Houston and was branched as an Adjutant General officer. While still in law school, he passed the bar exam to be able to join the Judge Advocate General Corps as a reservist. At the 75<sup>th</sup> Division Headquarters, he advised five generals and served as a prosecutor. Leaving the 75<sup>th</sup> for the 22d Division at Fort Hood, he became a defense attorney in the Army Trial Defense Services (TDS). He then transferred to the Texas Army National Guard, remaining in TDS and rising to the rank of Major. During the preliminary injunction proceedings in this case, Major Jordan was reassigned as Command Judge Advocate of a sustainment brigade, advising the commanding officer. ROA.7494-96.

Still in law school in 2003, Judge Jordan decided he wanted to be part of the criminal justice system. He started by interning with a defense attorney. He spent a summer with the Fort Bend County District Attorney's Office. After graduating, he served as a Policy Analyst in the Texas House of Representatives and as Legal Counsel/Policy Advisor in the Texas Senate during 2005-07. ROA.7494.

In 2008, Judge Jordan opened his own law practice, focusing on criminal defense. In the eight years before being elected to the bench, he represented over

1,000 clients. 60-70% were in misdemeanor cases, most of them in Harris County. ROA.7494-96.

In 2016, he was elected Judge of the Harris County Criminal Court at Law No. 16. He took office January 3, 2017. ROA.7493.

## **II. Judge Jordan's Experience with the Harris County Misdemeanor Bond System in Practice**

Judge Jordan has seen how the Harris County misdemeanor bond system really works, both as a judge and as a defense attorney who appeared before each of the other County Criminal Court at Law judges. ROA.7529. From both sides, he sees a broken system in desperate need of reform. ROA.7504.

### **A. Bond amounts are set according to a rigid schedule.**

Whatever statutes may provide, bond amounts for misdemeanor defendants in Harris County are set by a schedule promulgated by the County Criminal Court at Law judges acting collectively. The schedule determines the amount of your bond according to a risk assessment matrix that adds up "points" based on the nature of the offense, criminal history, and various socioeconomic factors. Under the system in effect at the time of the injunction, a prior felony earns you a point. But so does not having a job. So does not having a home of your own. So does not having a car. So does not having a land-line telephone. ROA.7505. If you are poor, you can rack

up a lot of points and a bond amount you simply cannot afford – not even the 10% premium (plus minimum fees) charged by bonding companies.

**B. Hearing officers have no real discretion to deviate from the schedule.**

Hearing officers are typically the first magistrates to set the amount of bonds. They receive a defendant's point total and a recommendation from pretrial services. On the books, hearing officers have discretion to set the bond amount or allow a PR bond. On the ground, they believe they have no real discretion, but must stick to the schedule or risk the ire of the judges.

Judge Jordan testified about his meeting with the Harris County hearing officers to discuss allowing more PR bonds. "When I went and met with them, they explained to me all the judges are their bosses and they have to do what it takes to keep the judges happy." ROA.7513. The judges appoint hearing officers and reappoint them. Judge Jordan felt the hearing officers treated him "as if the CEO was going to visit the local store."

At the preliminary injunction hearing, Judge Jordan was asked about a proposal to allow defendants to have counsel at bond hearings. He did not believe it would make a difference, if the hearing officers are in fear of losing their jobs for deviating from the schedule. The hearing officer says to herself, "I don't care about

a defense attorney I'm worried about feeding my family and paying my bills." ROA.7515.

One of the hearing officers described how he tried to "drive all over the city" to talk to as many judges as he could, "[s]o when his name comes up for review, he can hopefully be retained with his job." ROA.7516. Judge Jordan testified, "it was a big shocker to me when I read that they were supposed to be independent because they are not." ROA.7516.

Another hearing officer told Judge Jordan that the other judges would not even let them correct clerical errors, if it meant reducing a bond: "[S]ay you are supposed to have a \$2,000 bond but there is a typo and they enter \$10,000 bond. He said, 'We aren't allowed to change it. But if your bond is too low, if we accidentally put a \$5,000 bond and your bond should have been 10,000, we can correct that.' " ROA.7515.

Hearing officer Villagomez told Judge Jordan how she felt when the other judges told her (and the other hearing officers) that "if a person was undocumented, we had to give them a \$35,000 bond." She said, "That used to just hurt me inside." ROA.7515, 7584-85. But she believed she had no choice but to follow the judges' directive.

While the hearing officers understood that Judge Jordan wanted them to set more PR bonds for defendants in his court, he didn't want to jeopardize their jobs:

I said, "Look, make sure you guys only do this for Court 16 because I don't want to get you in trouble with all the other judges because they don't operate like I do, so be careful." ROA.7515.

Before leaving the hearing officers, Judge Jordan said:

Look, I apologize. I thought you guys were bad people, but you are just following what the judges told you to do.

They said, "Exactly." ROA.7516.

**C. Judges do not deviate from the schedule.**

Judge Jordan testified that in his experience as a criminal defense lawyer appearing in hundreds of cases before all of the other County Criminal Court at Law judges, the first hearing before a judge was hardly a "genuine" opportunity to get a defendant's bond reduced. "I don't know how you define 'genuine'. Could you go ask the judge to lower the bond? Yes. Was the bond going to be lowered? No." ROA.7498. The reason was always the same: "Because they stick to the bond schedule. That would be the answer. What does the bond schedule say?" *Id.*

**D. Judges set bond amounts with the intent to keep some defendants in jail.**

Texas law today does not permit pretrial detention of misdemeanor defendants, with the lone exception of those accused of domestic violence who

violate the terms of a protective order. At times, however, Harris County Criminal Court at Law judges will set bonds at amounts intended to keep defendants in jail.

Requiring a \$35,000 bond for undocumented misdemeanants is one example. Routinely, judges will double or triple or even quadruple an initial bond amount if the defendant fails to show or is arrested while out on bond. Even Judge Jordan did that in his early days on the bench. ROA.7539.

Judge Jordan – who supports proposed changes in Texas law that would allow pretrial detention of some misdemeanor defendants, after a full due-process hearing – admits that he has set a bond amount intending to keep someone in jail. A DWI defendant skipped 91 required breath-alcohol tests. His blood test came back .37 or, as the District Court observed, “Ten times drunk.” ROA.7564. Judge Jordan told the Afghanistan war veteran, “Look buddy, I have got to lock you up to save your life. ... [W]e had a talk and he told me it would take a lifetime to quit drinking. And I told him, I said: I’m not locking you up to be mean, I’m locking you up to save your life.” The District Court pressed Judge Jordan:

THE COURT: What mechanism did you use? Set a bond that he couldn’t afford?

THE WITNESS: Yeah. Yes, ma’am. ROA.7565

Judge Jordan confirmed to the District Court that he prefers a more straightforward method of denying bond, after due process, to someone who is a

danger to himself, or in need of psychiatric evaluation, or “in a case where either the community or the victim was at risk,” rather than having to order a bond he knows could not be paid and would effectively be an order of detention. ROA.7565-66.

**E. Not being able to afford a bond has severe consequences.**

Judge Jordan has seen the harm that results from not having the money to pay for a bond.

**1. Time in jail**

Of course, an accused misdemeanant unable to pay a bond will spend significant time in jail before her case is ever heard. Two to three weeks may pass before she even gets another hearing before a judge. ROA.7498-99. She cannot be with her family. She cannot return to her job, which she will probably lose. She cannot pay her bills. She cannot help her lawyer prepare her defense.

**2. Pressure to plead guilty**

Jail puts pressure on defendants to plead guilty – typically to be released immediately with probation or a sentence of time served. 85 to 90 percent of the time, prosecutors will offer a plea bargain at a misdemeanor defendant’s first hearing before a judge. ROA.7502.

Judge Jordan recounted the time a client was arrested as he walked out of Walmart with a friend who had shoplifted automotive goods. Then-attorney Jordan



met him at the initial hearing and learned that his client was not even in the automotive department. “Great,” Jordan said, “Let’s reset your case. Let’s get a copy of the video. We’ll show it to the DA and we can get your case dismissed.” ROA.7500. But that could take 45 days or so. Because the client could not afford the bond, that would be 45 days or so he would spend in jail. He said, “I have to get back home. I’m going to lose my job. What other options do we have?” Jordan told him that “they will give you time served today. You can take your conviction and leave. You can take probation and leave.” Although Jordan counseled him not to plead guilty and have a theft conviction on his record, the client insisted on taking the probation offer so he could get out of jail and back to his life. ROA.7501.

This was a common occurrence in Judge Jordan’s prior defense practice. “When people are in jail, they want to go home. ... Regardless of the evidence or what they are facing, they want to go home and will do anything to go home.” ROA.7501.

Even as a judge, he has had to stop pleas. The week before he testified in this case, he gave a PR bond to an indigent defendant who didn’t understand what it meant.

He said, “I’m innocent. I didn’t do it, but I want to go home so I’m pleading guilty.”

I said, “Sir, you don’t understand. I just gave you a PR bond.”

He says, “I don’t know what that means.”

I said, “It means you are going home today.”

He kept crying.

I said, “Sir, relax. You are going home. You don’t have to plead guilty to go home. Take this PR bond, go home, get some food and let your lawyer fight your case.

He said, “Thank you,” and left. ROA.7501.

### **3. Denial of diversionary opportunities**

In Harris County, misdemeanor defendants may be eligible for a diversionary program that will allow them to avoid conviction if they comply with conditions. Their cases are reset for, say, a year. In the marijuana program, PR bonds are automatic. But for other programs, “you have to be out on bond to get something like that because you have to show that you are enrolled in school, have a job, character letters, drug tests.” ROA. 7591.

The District Court asked if you must be low risk to qualify for these programs.

Judge Jordan testified:

Right. But the problem is, you can only even apply to one of those programs if you are out on bond. So here, that’s another way that if you have funds, you can get in the special program and have your case dismissed, where if you have no funds, you are left in jail and your options are probation or conviction.

THE COURT: Even if you would otherwise qualify for the diversionary program?

THE WITNESS: Absolutely.

THE COURT: And even if you are low risk in every category but you are indigent, you just don't have any money, you are still going to get a bond, a bail amount?

THE WITNESS: You are still going to have a bail and you are not going to be able to get in that program to have your case dismissed. ROA.7501.

### **III. Judge Jordan's Bonding Practices**

When Judge Jordan first took the bench, he followed the standard bonding practices he had witnessed as a lawyer practicing before the Harris County Criminal Courts at Law. He worked from pretrial services' point-driven risk assessments and the schedule. If defendants failed to show or were rearrested while out on bond, he doubled and tripled the initial amount. "[T]hat's what I had seen other judges do, so I thought that was the right thing." ROA.7510. He did take seriously his responsibility to review all defendants and bond amounts individually and approve PR bonds when appropriate. ROA.7504-05.

Over the next 45 days, his views on bonding practices evolved, as he went to judicial conferences and read research about bail policy. They reinforced his view that the Harris County system was broken and in need of reform. "I said, Wait a minute, this isn't right. So I changed." ROA.7510.

At a February 14, 2017 judicial training conference in San Marcos, Texas, Judge Jordan was especially moved by a discussion of bail practices and the October

2016 Report and Recommendations of the Texas Judicial Council’s Criminal Justice Committee. Research showed that each day a person stayed in jail, he was more likely to commit a crime. Recommendations stressed that defendants should be given PR bonds. “Basically everything that I had thought that I was doing that was right, it was backed up by everything that they presented at this conference.” ROA.7506.

Returning from San Marcos, Judge Jordan began to make systemic changes in the bonding practices in his court. ROA.7512.

**A. No one is kept in jail because they can’t afford a bond.**

Under his reformed practices, no defendant assigned to Judge Jordan’s court stays in jail because he can’t afford a cash or surety bond. Many are given PR bonds; others have bonds set at what they can afford. This includes defendants who have prior offences or who fail to appear or are rearrested while out on bond or who violate bond conditions.

It’s a matter of fairness.

If you have money, you can continually violate the conditions of bond, continually pick up new criminal offenses and you can get out and keep doing it.

If you are indigent and you don’t have any money, you can violate the conditions of your bond or pick up a new crime and you can have a bond set so high that then you are stuck in jail.

And so when I make decisions in my court and the DAs respond about priors or this or that, I ask them, So if they had \$250 [i.e., the premium for a \$2500 bond], does that make them safe? I mean, why does that make them a better candidate to be free because they have a little money?

\* \* \*

Because logically it doesn't make sense. \$250 does not make you safe or \$500 does not make you safe. ROA.7503-04.

Nor, in his experience, does having the money to pay for a cash or surety bond make a defendant more likely to show up for court.

I don't think bond has anything to do with people showing up for court. I have had clients with all types of charges and they come to court knowing they are going to prison for a long time. ... I think they come to court because they don't want to live their life on the run, you know, with a case hanging over their head and having to watch over their shoulder. ROA.7552.

**B. Low-risk defendants automatically get PR bonds.**

Judge Jordan first decided that defendants who were determined by pretrial services to be minimal risk, and therefore given \$500 bonds by hearing officers, should all be released on PR bonds. This was communicated at his meeting with the hearing officers. Occasionally, \$500 bonds show up on his morning docket, but the prosecutors know not even to discuss them with Judge Jordan. "That's automatic PR, because they have already gone through the evaluation system. And through

the broken evaluation system that they have, if they determine they were low risk, then certainly through my evaluation they would get a PR bond.” ROA.7518.

**C. Other bonds are based on statutory factors, including ability to pay.**

Defendants not qualifying for automatic PR bonds are reviewed individually by Judge Jordan. He has made it known that everyone denied a PR bond should be brought before him. ROA.7527. For each defendant on his morning docket, he has a paper with the offense and bond amount. He and the assistant district attorney first go through the list and Judge Jordan decides “who is getting PR bonds without me talking to them.” ROA.7518-19.

The remaining defendants are brought in individually and have a “conversation” with Judge Jordan that includes what they can afford to pay. “When you set a person’s bond and you don’t consider what they can afford to pay, in essence,” amounts are set “at levels for the purpose of preventing their actual pretrial release.” ROA.7509. Judge Jordan asks upfront what can they afford to pay. “If they tell me they don’t have any money, I give them a PR bond. If they do have money I give them a bond, whatever they have so they can get out and go home.” *Id.*

Apart from low-risk arrestees, Judge Jordan does not give PR bonds to persons who have the means to pay for a cash or surety bond. ROA.7531-32.

Judge Jordan described one hearing when he brought a defendant's father into the conversation by telephone. The father confirmed that his son worked for him and that he could advance \$200 of his son's salary. Judge Jordan reduced the defendant's two \$4000 bonds to two \$1000 bonds – as \$200 would cover the bondsman's 10% premium. ROA.7519-20, 7522. Judge Jordan estimates that he lowers bond amounts in 25-30% of his cases. ROA.7533.

**D. Some bonds come with conditions.**

Judge Jordan sometimes attaches conditions to the bonds – including PR bonds – that he orders. Having money to afford a cash or surety bond may not make you “safe,” but conditions may make you safer for the community or even for yourself. A DWI defendant may be required to have a breath-alcohol lock put on her car. Another may be required to take regular breath- and blood-alcohol tests. ROA.7564.

In “real bad” domestic violence cases, Judge Jordan will require defendants “to get a GPS monitor and we could set a range where if they go close to the house, then we're going to be notified and the victim can receive a text message stating that the person is close.” ROA.7558-59.

But in no part of Judge Jordan's analysis does he think setting a high money bond is going to make the victim safer. The assistant district attorney may say that

because of the risk of further violence, the bond needs to be \$5000. Judge Jordan's reply:

I say, "So if they have a friend that is going to loan them \$500, is the victim safe now?" And they don't have a response. Money does not make somebody safe.  
ROA.7559

Violating the conditions of a bond may result in stricter conditions, but Judge Jordan will not raise a bond amount or deny a PR bond in order to keep the defendant in jail. Again, it's a matter of not treating defendants unequally because they are poor:

[I]f you're rich, then, yeah, you can keep messing up how many – whatever that math is. And you just pay money and get back out.

And so I'm not going to treat poor people any differently. If you are rich and you can get back out, then because you are poor, should you have to sit and suffer in jail? So I do the same thing [release them on PR bonds].  
ROA.7562-63

**E. Bonds are generally set within 24 hours of arrest.**

Judge Jordan's reformed practices have not only resulted in more PR bonds, they have reduced the time it takes to get a bond. First, his instructions to the hearing officers result in PR bonds being set without the need to appear before him. Second, pretrial services personnel know Judge Jordan's approach and will bring PR bonds directly for his signature, especially when persons are arrested in a remote part of



Harris County and it will take time to transport them to downtown Houston for processing. They will have a bond before they reach the jail. ROA.7527,7547.

Third, Judge Jordan's standing order that defendants not receiving PR bonds be brought before him promptly reduces the time it takes to have the "conversation" and receive an affordable bond. ROA.7527. He is diligent with his docket, including on the morning of his testimony in this case. ROA.7497.

**F. Judge Jordan's practices are feasible.**

Judge Jordan's actual bonding practices closely resemble those the District Court ordered. He has shown that they are feasible. He has shown they are practical. He has shown they are efficient. He has shown they are fair to rich and poor alike.

There has been no crime wave of persons released from Judge Jordan's court on PR bonds or bonds they can otherwise afford.

As Judge Jordan testified, he would not be impeded in any way from carrying out his duties as a judge if the County and the Sheriff were enjoined from continuing to detain misdemeanor arrestees in jail on bond amounts they know are not financially affordable. ROA.7549.

**CONCLUSION**

Judge Jordan supports bond reforms being implemented in Harris County and being proposed in the Texas Legislature. He particularly believes that Texas law

should be changed to allow him and other misdemeanor judges to deny bond when it is necessary to protect victims, the community at large, or even the defendants themselves. But pretrial detention must be ordered only after a full due-process hearing including a record of the reasons. It must not be done by the ruse of setting bond in an amount the defendant cannot afford to pay. ROA.7571-72

Judge Jordan believes the District Court's injunction is necessary to fix Harris County's broken, unconstitutional bonding practices now. "It's almost like recognizing your tub is leaking and saying, Let's wait six months. We are going to have a new fix for it. If you truly care, then you fix it that day." ROA.7540. Without the injunction, "[e]verything will remain the same." ROA.7549.

He prays this Court to affirm.

Respectfully submitted,

/s/ Allan Van Fleet

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on June 19, 2017 by using the appellate CM/ECF system and that service was accomplished on all counsel of record by the appellate CM/ECF system.

Dated: August 9, 2017

/s/ Allan Van Fleet  
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*Counsel for Defendant-Amicus Curiae*  
*Judge Darrell William Jordan*

## CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(g), I certify the following: This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 4659 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Dated: August 9, 2017

/s/ Allan Van Fleet  
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*Judge Darrell William Jordan*