

No. 17-20333

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 ESTELA 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

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMATION**

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the National Association of Criminal Defense Attorneys (NACDL) hereby moves this Court for an order allowing it to file the attached *amicus curiae* brief in support of Plaintiffs-Appellees Maranda ODonnell, Loetha McGruder and Robert Ford. In support of this motion, NACDL states:

Movant's Interest

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, court-appointed attorneys, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for court-appointed attorneys and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts,

seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has a particular interest in this case, *O'Donnell v. Harris County*, No. 17-20333, because of the impact that detention has on outcomes for criminal defendants subject to Harris County's policies and other jurisdictions' similar policies. NACDL files here out of concern that Harris County's pretrial detention system hinders criminal defendants' abilities to mount effective defenses and leads to guilty pleas and verdicts for reasons apart from actual guilt.

Desirability and Relevance of NACDL's *Amicus Curiae* Brief

NACDL submits that its *amicus curiae* brief will aid the Court's understanding of important considerations in this case that the District Court in its opinion and the parties in their briefs did not have an opportunity to address in great length. Harris County's pretrial bail policies have undermined and, without further judicial intervention, will continue to undermine the ability of indigent criminal defendants charged with misdemeanors to mount an effective defense, regardless of whether or not they have a meritorious defense, by imposing

unaffordable bail. Detained defendants charged with misdemeanors are more likely to plead guilty, be convicted at trial, receive longer sentences, and commit future crimes. While this phenomenon is mentioned by the District Court and borne out in the data, NACDL's amicus brief provides further evaluation, from the perspective of criminal defense lawyers, of how and why Harris County's policies result in poor outcomes for indigent defendants charged with misdemeanors. At bottom, Harris County's policies harm the attorney-client relationship and detainees' abilities to mount effective defenses. Given its mission and the expertise of its members, NACDL is particularly well-suited to provide insights into these issues. NACDL's perspective should be especially helpful considering the role that criminal defense attorneys, their clients, and the attorney-client relationship plays in the criminal misdemeanor system and how those roles are affected by pretrial detention of indigents. NACDL's insights will provide this Court with relevant information when performing its analysis of the constitutionality of Harris County's policies under equal protection and procedural due process doctrine.

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**BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-
APPELLEES AND AFFIRMATION**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the National Association of Criminal Defense Lawyers certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

No party's counsel authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting this brief.

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 potential disqualification or recusal.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, court-appointed attorneys, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for court-appointed attorneys and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case, *ODonnell v. Harris County*, No. 17-20333, because of the impact that detention has on subsequent trial preparation and mounting an effective defense.

INTRODUCTION AND SUMMARY OF ARGUMENT

Harris County's bail system is not the first to receive criticism for its disparate treatment of indigent defendants, but it may be the most deserving. As courts, legislatures, advocates, and academics across the country turn their attention toward bail reform, Harris County's policies stand out as particularly troubling. Harris County imposes bail upon an alarmingly high number of poor defendants who cannot afford to post it, resulting in these indigent defendants being detained until disposition. The effect of such policies is to create a two-tiered system that systematically impels poorer people towards conviction at a much higher rate than that of misdemeanor defendants who can afford to post bail.

While the record in this case is lengthy and the facts are complex, several telling details emerge as starkly compelling. In Harris County, 40 percent of defendants charged with misdemeanors remain detained at the time of disposition,¹ and indigent arrestees are more likely to be

¹ This rate is far lower in other jurisdictions that, like Harris County, allow pretrial detention following a failure to afford secured money bail. *ODonnell v. Harris Cty.*, 2017 WL 1735456, at *54 (S.D. Tex. Apr. 28, 2017). 1.5 percent and 3 percent of misdemeanor arrestees are detained until disposition in Washington D.C. and New York City, respectively. *Id.* 8.4 percent and 25 percent of both

detained. *ODonnell*, 2017 WL 1735456, at *54-55, *60; Paul Heaton, et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 Stan. L. Rev. 711, 736-41 (2017) (“Heaton Study”). In Harris County’s criminal justice system, two misdemeanor defendants who have committed the same offense and have the same personal characteristics, save for their level of wealth, can expect two vastly different experiences and outcomes. The defendant with sufficient means can expect to post the required bond and be released. Conversely, the indigent defendant can expect to be detained. Now a detainee, the indigent defendant faces significantly higher obstacles in mounting an effective defense, ultimately leading to harsher outcomes than the wealthier misdemeanor defendant who can afford bond and gain release. The indigent detainee is more likely to plead guilty and more likely be convicted at trial than the released defendant. This detainee can also expect to receive a longer sentence when convicted and has a higher likelihood of recidivism than the released defendant. Their fate is overwhelmingly determined solely by their economic status.

felony and misdemeanor arrestees are detained until disposition in New Jersey and Kentucky, respectively. *Id.*

Harris County’s de facto policy of detaining indigent misdemeanor defendants places the poor at a materially unfair disadvantage. The court below makes mention of this inequality, but only briefly. *ODonnell*, 2017 WL 1735456, at *40 (“The case law and commentary recognizes that those released from pretrial detention are better able to consult with counsel and prepare a defense . . .”). Detention’s impact on a defendant’s ability to raise a defense warrants closer consideration. As courts, lawmakers and scholars have found, particularly as of late, pretrial policies that increase detention have a broad and deep impact on the outcomes of criminal defendants. *See id.*; Heaton, *supra*, at 718 (“Interest in pretrial policy is now surging.”); Kamala D. Harris and Rand Paul, To Shrink Jails, Let’s Reform Bail, N.Y. Times, July 20, 2017, *available at* <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>. At its core, being detained hinders a client’s ability to effectively interact with his or her attorney and mount a defense, and drives a defendant to enter a guilty plea—often for reasons entirely divorced from whether the defendant is, in fact, guilty.

In contrast to defendants with sufficient financial resources to afford secured bail, indigent misdemeanor detainees are immediately and substantially disadvantaged. The attorney-client relationship is stunted because detention imposes limitations on communication with counsel, and detained defendants are less likely to place their trust in court-appointed attorneys, which leads to less candid communication between attorneys and clients. To further complicate matters, detainees in Harris County have a shorter time frame from arrest to case resolution than their peers who have been released on bail, providing attorneys and clients a shortened window to build rapport and develop a defense. Detained clients are also less able to assist their attorneys in understanding the facts of the case and gathering evidence, which is of particular importance for court-appointed attorneys who face large caseloads and significant resource constraints.

Detention undercuts most aspects of preparing a criminal defense, and, unsurprisingly, its consequences are readily observable. Judge Rosenthal's thorough opinion noted the differences in outcomes based on pretrial detention, and Paul Heaton's detailed *Stanford Law Review* article took an in-depth look at the downstream effects of pretrial

detention in Harris County. Detained defendants are more likely to plead guilty, more likely to be convicted, more likely to be sentenced to jail, and more likely to receive longer sentences than those who are released. *O'Donnell*, 2017 WL 1735456, at *61.

In short, by impeding an indigent defendant's ability to raise a defense, Harris County's policy jeopardizes a "central purpose" of the criminal justice system, which "is to convict the guilty and free the innocent." *See Herrera v. Collins*, 506 U.S. 390, 398 (1993). By jailing vast numbers of indigent defendants before disposition of their cases, Harris County wrongly subjects these defendants to a two-tiered criminal justice system in which they experience far worse outcomes solely as a result of their indigency.

ARGUMENT

I. Detention Negatively Impacts the Attorney-Client Relationship and Results in Less Effective Representation of Indigent Defendants.

Defendants who choose to remain detained, rather than plead guilty, face severe limitations on their ability to raise an effective defense at trial. Detainees are 25 percent more likely to be convicted and 43 percent more likely to be sentenced to jail than those defendants who were released. *O'Donnell*, at *40 (summarizing the Heaton Study,

which found “that the fact of detention itself, rather than the defendant's charge, criminal history, or other variables, causally affects” those outcomes).

1. *Detention impedes the development of a healthy attorney-client relationship.* Harris County’s criminal justice system disposes detainees to be wary of the court system and, in turn, their court-appointed counsel, whom they view as part of the system that has detained them. This dynamic hinders the client-attorney relationship from the outset, thereby significantly disadvantaging the client and leading to materially worse outcomes for defendants.

A healthy attorney-client relationship is key to mounting an effective defense, particularly for indigent criminal defendants. *See Argersinger v. Hamlin*, 407 U.S. 25, 34-37 (1972) (holding that criminal defendants charged with misdemeanors have a right to counsel at trial). Court-appointed attorneys navigate the complex criminal justice system for their clients, and clients provide necessary information to their attorneys. As the Supreme Court has recognized, “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the

proceedings against him.” *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see also Argersinger*, 407 U.S. at 34-37 (“[T]he problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial.”). Clients rely heavily on their counsel to evaluate the strength of their case, to negotiate for the most favorable plea agreement, and to explain the ramifications of various strategic approaches.

To effectively perform these functions, criminal defense attorneys rely on a defendant’s transparency, honesty, and cooperation in building a case. Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 Neb. L. Rev. 1320, 1324 (2002). Trusting clients are more willing to work with attorneys, and engaged clients can significantly assist in their own defense. *See Farai Chideya, et al., Public Defenders Have Their Say*, National Public Radio (May 8, 2008), *available at* <https://goo.gl/MRve6P>; Marcus T. Boccaccini, *Characteristics of the Ideal Criminal Defense Attorney From the Client’s Perspective: Empirical Findings and Implications for Legal Practice*, *Law & Psychol. Rev.* 81, 102 (2001) (showing that clients are more willing to engage with their defense if working with their “ideal”

attorney). Trusting clients are also more willing to defer to their attorneys' legal expertise and legal judgment.

Clients often believe that an attorney's level of effort is based on the attorney's belief in the client's guilt or innocence; thus vulnerable, indigent detainees have an incentive to paint themselves in the most favorable light. Jonathan Rapping, *Building a Relationship With Your Client*, 27 *J. of Crim. Justice Education & Research* 6, at p. 4 (Nov. 2005). Regardless of the client's innocence or guilt, a client "will lean towards 'fudging' the facts . . ." in an attempt to secure a zealous advocate. *Id.* Attorneys are most effective and able to avoid risk when they receive full and accurate disclosure of all facts. Any dynamic that discourages full transparency will negatively impact the defense.

From the time of arrest to first meeting their court-appointed attorney, detained defendants undergo a series of negative, dehumanizing experiences that engender hostility and wariness towards their counsel, permanently damaging the attorney-client relationship. These experiences begin shortly after arrest, when they are separated from their personal belongings and assigned to a cell. The bail hearing occurs shortly thereafter. At the bail hearing, most

misdemeanor defendants, who were uncounseled, were given no opportunity to explain their financial constraints to the people controlling their immediate fate.² *ODonnell*, 2017 WL 1735456, at *5-6 (detailing the named plaintiffs’ experiences at bail hearings). None of the three named plaintiffs in this case spoke on their own behalf. *Id.* Ms. ODonnell’s Pretrial Services Report recommended release on personal bond, but the Hearing Officer “told her that she did not ‘qualify’ for release on personal bond.” *Id.* at *5. Ms. ODonnell was affirmatively ordered not to speak. *Id.* Mr. Ford’s bail hearing lasted less than fifty seconds. *Id.* at *6. At their abbreviated bail hearings, neither Ms. ODonnell, Mr. Ford, nor Ms. McGruder were allowed to engage with the Hearing Officer or explain their financial constraints or how unaffordable secured bail would affect their lives. *Id.* at *5-6.

The detainees—cut off from their lives and facing an indefinite stay in Harris County Jail—unsurprisingly view their lawyers as a part

² Harris County has begun providing members of the class certified in this suit attorneys at their bail hearings as of July 1, 2017. *ODonnell*, 2017 WL 1735456, at *58; *see also* Mihir Zaveri, Harris County to Add Public Defenders to Bail Hearings, Houston Chronicle, May 23, 2017, *available at* <https://goo.gl/P7HDZZ>. Due to the recency of this change, it is unclear whether this will provide a defendant, through his or her attorney, any ability to explain financial constraints at the bail hearing or the disastrous impact that detention can have on the defendant’s personal life.

of the system that has just charged them with a crime and ordered them incarcerated. As a result, defendants commonly are unsure whether court-appointed attorneys are trustworthy and have their best interests at heart. *See* Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2478 (2004) (citing Daniel W. Stiller, Guideline Sentencing: Deepening the Distrust Between Federal Defendant and Federal Defender, 11 Fed. Sentencing Rep. 304 (1999); Tamara Rice Lave, Equal Before the Law, Newsweek, July 13, 1998 at 14) (“Defendants trust appointed counsel less and so are less likely to heed their advice.”); *see also* Rapping, *supra*, at 4 (“The energy required to build an advantageous attorney/client relationship is even greater for the public defender than it is for retained counsel.”). Harris County’s policy of incarcerating indigent misdemeanor criminal defendants places an unwarranted barrier between defendants and their counsel.

2. *Detention severely impairs defendants’ ability to communicate with counsel, assist in gathering evidence, and perform independent research.* While detained, a defendant’s ability to assist counsel in mounting a defense is severely limited. *See, e.g.*, 1966 U.S.C.C.A.N.

2293, 2299 (House of Representatives' Committee on the Judiciary observing that “[s]tudies have shown that failure to release has other adverse effects upon the accused’s preparation for trial . . .” and that “the defendant who remains in jail does not have the same access to his counsel as the man free on bail”); *see also ODonnell*, 2017 WL 1735456, at *40. By contrast, court-appointed attorneys whose clients have been released rely heavily on support from their clients to prepare a defense.

Detained clients confined to Harris County Jail cannot easily or spontaneously communicate with their attorneys, making it more difficult to review discovery, discuss the facts of the case, assess strategic decisions, and prepare for hearings or trial. Significantly, Harris County Jail does not allow incoming telephone calls to inmates; inmates can speak to their attorneys over the phone only if they place outbound calls to their attorneys. Inmate Phone Calls, Harris County Jail (last visited 3:10 PM Aug. 7, 2017), *available at* <https://goo.gl/d7HVbM>. Although attorneys are allowed to visit their clients, they must communicate in the presence of guards and through a phone separated by a clear divider. Video conferencing with inmates is available, but limited, and allowed for only forty minutes at a time.

Video Visitation Rules for Off-Site Visitation, Harris County Jail (last visited 3:17 PM Aug. 7, 2017), *available at* <https://goo.gl/UCCgeW>. Video visits must be scheduled six hours in advance, but visits cannot be scheduled more than seven days in advance. *Id.* Released clients, on the other hand, suffer from none of these restrictions.

Detained defendants also cannot assist their attorneys in gathering information or evidence. Attorneys often bring their released clients to the location of the alleged offense or other relevant locations. While there, attorneys and clients can collaborate and discuss the events that led to the charges. Recalling past events while in the physical location where they occurred is markedly more effective in gathering relevant information than relying on a client's unrefreshed recollection. Released clients may also assist counsel by locating witnesses, documents, and other evidence. For example, clients may remember a potential witness only by first name or perhaps might only be able to recognize a witness upon seeing him or her in person. Detained defendants can offer no such assistance and their defense suffers as a result.

Furthermore, Harris County provides limited tools for detainees who wish to be closely involved with the development of the legal theory of their defense or for those who wish to represent themselves pro se. Nearly 29 percent of misdemeanor detainees in Harris County do not request appointed counsel. *See* Heaton, *supra*, at 736. Detainees who wish to use Harris County Jail's law library must make an appointment. Inmate Handbook, Harris County Sheriff's Office, at 9 (revised March 2012), *available at* <https://goo.gl/tWFQiX>. Detainees can only use the library one day a week, and the library does not allow anyone to check out materials. *Id.* Harris County Jail policy requires a court order before additional access is granted. In practice, this severely limits detainees' ability to participate in their defense or defend themselves. *See, e.g.*, Petitioner's Second Motion for Extension of Time in Which to File His Petition for Review, *Leachman v. Stephens*, No. 17-0229, From an Appeal in the Second Court of Appeals Number 02-13-00357-CV (June 16, 2017) (requesting a filing deadline extension due to limited ability to use Harris County Jail law library resources).

3. *Attorneys have less time to prepare a defense for detained clients.* Harris County's practice of detaining indigent misdemeanor defendants leaves defense attorneys with less time to conduct investigations and prepare a defense for their clients. Harris County courts schedule hearings further apart for defendants who have been released on bail than for those who remain detained. *ODonnell*, 2017 WL 1735456, at *39; Heaton, *supra*, at 760 & n.136. Thus, the median time to disposition for released misdemeanor arrestees is months longer than for detained misdemeanor arrestees. *ODonnell*, 2017 WL 1735456, at *39; Heaton, *supra*, at 760 & n.136. That time can be profitably used to locate evidence, identify witnesses or engage in any of the myriad tasks necessary to dispose of the case on as favorable terms as possible for the defendant.

Of course, the gap between the median dates to disposition between the two populations is driven not only by differences in courts' scheduling, but also by the higher percentage of detained defendants who choose to plead guilty (84 percent), as compared to released defendants who plead guilty (49 percent). *ODonnell*, 2017 WL 1735456, at *39. As noted below, arrestees facing continued detention are

pressured to, and do, plead guilty shortly after being arrested, thereby reducing the time to disposition. *Id.* Thus, the difference in the time to disposition is partially driven by an urgency to resolve the matters of detained defendants. Whatever the contributing factors to tighten deadlines are, the result is to add to the plight of detained defendants by pressuring their counsel and impeding counsel's ability to mount an effective defense.

II. Harris County Pressures Indigent Detainees to Plead Guilty Rather Than Raise a Defense

Harris County systematically pushes indigent misdemeanor detainees towards pleading guilty. In a typical year, the courts process over 50,000 individuals arrested on misdemeanor charges, *O'Donnell*, 2017 WL 1735456, at *2, and are motivated to dispose of these cases quickly. *See Argersinger*, 407 U.S. at 34 (“[T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”). By setting unaffordable bail, Harris County gives detainees two choices: defend yourself and remain detained, and incur the consequences of detention, or plead guilty and secure an earlier release (often immediate). In recent years, more than *80 percent*

of defendants facing this decision chose to plead guilty, nearly *twice the rate* of released defendants. *ODonnell*, 2017 WL 1735456, at *61. Indeed, Harris County courts have gained a reputation as a “plea mill.” *See* Cory Roth Law Office, End the Plea Mill A Response of Michelle Alexander’s Opinion Piece in the New York Times (last visited 3:31 PM Aug. 7, 2017), *available at* <https://goo.gl/TmjTzV>; Robert J. Fickman, Harris County Texas: Where the Innocent Must Plead Guilty to Regain Their Liberty, A Letter to 15 Harris County Criminal Court Judges (last visited 3:33 PM Aug. 7, 2017), *available at* <https://goo.gl/6VaqkP>.

In Harris County, the decision to plead guilty is often driven not by the merits of the defense, but by the consequences of detention. When defendants and their counsel engage in the critical decision of whether to waive the right to trial and instead enter a guilty plea, they consider the likelihood of success at trial, as well as the costs and benefits of a plea. *See* Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1914 (1992) (analyzing plea bargaining and criticisms of it as questions of contract law). Counsel may anticipate that mounting a defense while detained is markedly more difficult than doing so while released, *see, infra*, Section I, and

they may advise their clients accordingly. This assessment lowers both counsel's and defendant's subjective assessment of the likelihood of acquittal, which incentivizes the defendant to accept a plea deal. Moreover, guilty pleas for misdemeanor offenses do not typically carry harsh sentences, often resulting in immediate release based on time served. *ODonnell*, 2017 WL 1735456, at *61.

In addition, detention, even for a short period of time, can threaten to destabilize a defendant's life, but even more so when the person is impoverished. While detained, indigent defendants risk job loss and face income loss. *ODonnell*, 2017 WL 1735456, at *72. These are defendants for whom income loss, much less job loss, can be catastrophic in the absence of savings or a community safety net. Bills may go unpaid, services may be cut off, rent may be late or may not be paid at all, leading to risk of eviction. For those who live in public housing, detention may also cause indigent defendants to violate public housing requirements and risk loss of a subsidized apartment. *Heaton*, *supra*, at 715 & n.15. A job lost by a detained defendant is made all the more difficult to replace by a criminal conviction. Moreover, while detained, these indigent defendants will be absent from their children

and other dependents, which invites encounters with child protective services.³ *Id.*

In addition to the material impact on their lives, defendants simply may not want to endure the discomforts, dangers and dehumanization inherent in being jailed. Harris County Jail is particularly dangerous, posing higher risks of sexual assault and death than other such institutions. *See* Allen J. Beck, et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. Department of Justice, at 13 (May 2013), *available at* <https://goo.gl/rG9xyD> (U.S. Department of Justice study finding that Harris County Jail had the third highest “inmate-on-inmate sexual victimization rate” in the country); Ryan J. Reilly & Dana Liebelson, *Texas’ Largest Jail Hasn’t Learned Much From Sandra Bland’s Death*, *Huffington Post* (Sept. 1, 2016, last updated Sept. 2, 2016), *available at* <https://goo.gl/Spz55R> (journalist study finding Harris County had a higher per capita death rate than average).

³ Other amici expand upon detention’s consequences on the personal and professional lives of indigent detainees.

III. Indigent Defendants Suffer Lasting Effects from the Poverty-Imposed, Disadvantaged Path Through The Harris County System.

Significant collateral consequences attach as a result of Harris County's two-tiered system of justice. Individuals with misdemeanor convictions "exit with a permanent, easily accessible electronic record of that contact [with the criminal justice system] that can affect future employment, housing, and many other basic facets of daily life." Jenny Roberts, *Crashing the Misdemeanor System*, 70 Wash. & Lee L. Rev. 1089, 1090 (2013). For example, should a detainee plead guilty to a possession of marijuana offense, Tex. Health & Safety Code Ann. § 481.121(b)(2) (West) (Class A marijuana possession misdemeanor of approximately 60 to 120 grams), the detainee is exposed to collateral immigration consequences. 8 U.S.C. § 1227(a)(2)(B) (marijuana possession of greater than 30 grams is a removable offense). Also, convicted offenders face a significant barrier to entry in many of Texas's licensed professions. *See* Marc Levin, *Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas*, Texas Public Policy Foundation (Nov. 2007), *available at* <https://goo.gl/Tbf9md>.

In addition, pretrial detention, itself, causes deleterious collateral consequences, regardless of the whether a detainee is convicted. A 2016 study of pretrial detention’s long-term effects found empirical evidence confirming that pretrial detention affects long-term outcomes. The study found “released defendants have significantly higher formal sector earnings and employment following the bail hearing.” Will Dobbie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, *American Economic Review*, at 22 (July 2016), *available at* <https://goo.gl/5R6Reu>. The study’s results suggest that “pre-trial release increases formal sector attachment both through an increase in formal sector employment and the receipt of tax- and employment-related government benefits.” *Id.* at 26. Also, detainees have a higher rate of recidivism. Heaton, *supra*, at 768. These are just a few of the numerous collateral consequences of Harris County’s policy.

Harris County’s two-tiered system for misdemeanor defendants carries with it plain short-term and long-term consequences that flow from the initial decision to detain misdemeanor defendants based upon their financial status. Detainees may accept an unwarranted plea

bargain for the sake of receiving their immediate freedom or they may defend themselves at a significant disadvantage. Neither option is just.

CONCLUSION

For the reasons set forth above, this Court should uphold the District Court's injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 4,091 words as determined by the word counting feature of Microsoft Word 2013.

I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Katherine R. Goldstein
Katherine R. Goldstein

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, Sophos Anti-Virus, updated August 9, 2017, and according to the program is free of viruses.

Dated: August 9, 2017

/s/ Katherine R. Goldstein
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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.

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