No. 18-11368

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, On Behalf of Themselves and All Others Similarly Situated; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,

Plaintiffs-Appellants Cross-Appellees,

v.

DALLAS COUNTY, TEXAS; ERNEST WHITE, 194th; HECTOR GARZA, 195th; TERESA HAWTHORNE, 203rd; TAMMY KEMP, 204th; JENNIFER BENNETT, 265th; AMBER GIVENS-DAVIS, 282nd; LIVIA LIU FRANCIS, 283rd; STEPHANIE MITCHELL, 291st; BRANDON BIRMINGHAM, 292nd; TRACY HOLMES, 363rd; ROBERT BURNS, Number 1; NANCY KENNEDY, Number 2; GRACIE LEWIS, Number 3; DOMINIQUE COLLINS, Number 4; CARTER THOMPSON, Number 5; JEANINE HOWARD, Number 6; STEPHANIE FARGO, Number 7 Judges of Dallas County, Criminal District Courts,

Defendants-Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, Dallas County Magistrates; DAN PATTERSON, Number 1; JULIA HAYES, Number 2; DOUG SKEMP, Number 3; NANCY MULDER, Number 4; LISA GREEN, Number 5; ANGELA KING, Number 6; ELIZABETH CROWDER, Number 7; TINA YOO CLINTON, Number 8; PEGGY HOFFMAN, Number 9; ROBERTO CANAS, JR., Number 10; SHEQUITTA KELLY, Number 11 Judges of Dallas County, Criminal Courts at Law,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Case No. 3:18-cv-00154-N

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

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April 5, 2021

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. This representation, supplemental to that of the parties and other *amici*, is made so that members of the Court may evaluate possible recusal.

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/s/ Kellen Funk
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Motion for Leave to File

The undersigned 108 professors of criminal, procedural, and constitutional law hereby respectfully move under Fed. R. App. P. 29(a)(3) and Fifth Circuit Rule 29.1 for leave to file a brief in support of Plaintiffs-Appellants-Cross Appellees as *Amici Curiae*, and state as follows:

1. *Amici* are 108 law professors who teach and write about criminal, procedural, and constitutional law. *Amici* direct clinics, participate in bail hearings and other pretrial proceedings, or study the history and doctrinal traditions of those proceedings. *Amici* seek to assist the Court's consideration of the issues before it by surveying Supreme Court jurisprudence addressing federal constitutional constraints on pretrial detention, and by outlining a brief history of legal protections applied to bail and pretrial detention.
2. *Amici* previously participated in this case by filing a brief supporting Appellants-Cross Appellees when the appeal was before the panel. Since the filing of the panel brief, two state supreme courts have unanimously endorsed the federal law arguments *amici* urge for the Court's consideration. See *In re Humphrey*, --- P.3d ---, No. S247278, 2021 WL 1134487 (Cal. Mar. 25, 2021); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 460 P.3d 976 (Nev. 2020). This brief is revised to reflect recent jurisprudence concerning the federal constitutional constraints on pretrial bail.

3. Forty-two professors joined the brief submitted to the panel. After careful consideration and deliberation, 108 professors have now contributed to and endorsed the arguments set forth in this brief, and *amici* respectfully submit that the Court would benefit from consideration of the consensus views of field experts who otherwise differ widely from each other in interpretive methods and policy advocacy.
4. All parties have consented to the filing of this brief.

Respectfully Submitted,

/s/ *Kellen Funk*
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CERTIFICATE OF SERVICE

I certify that, on April 5, 2021, the foregoing brief of Professors of Criminal, Procedural, and Constitutional Law as *Amici Curiae* in support of Plaintiffs-Appellants-Cross-Appellees was filed via the Court's CM/ECF Document Filing System. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all registered CM/ECF filing users, including counsel of record for all parties to this appeal.

Dated: April 5, 2021

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No. 18-11368

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, On Behalf of Themselves and All Others Similarly Situated; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,

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BRIEF OF *AMICI CURIAE* PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are 108 law professors who teach and write about criminal, procedural, and constitutional law. *Amici* either direct clinics, participate in bail hearings and other pretrial proceedings, or study the history and doctrinal traditions of those proceedings. *Amici* seek to assist the Court's consideration of the issues before it by providing (1) an overview of Supreme Court jurisprudence addressing federal constitutional constraints on pretrial detention, and (2) a short history of legal protections applied to bail and pretrial detention from pre-Norman England to today. A full list of *amici* appears in the Appendix.

SUMMARY OF THE ARGUMENT

As professors of criminal and constitutional law, we urge this Court to recognize that when the government proposes to incarcerate a person before trial, it must provide thorough justification and process, whether the mechanism of detention is a detention order or its functional equivalent, the imposition of unaffordable money bail. This principle follows from the respect for physical liberty the Constitution enshrines. The protections of the criminal process—including the presumption of innocence, the guarantee of counsel, the requirement of proof

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

beyond a reasonable doubt, and the institution of bail itself—are meant to deny the state the power to imprison individuals merely on the basis of a criminal charge. These protections are illusory if a court can detain by casually imposing monetary bail amounts that cannot realistically be paid.

Two related lines of federal constitutional jurisprudence, exemplified by *Bearden v. Georgia*, 461 U.S. 660 (1983), and *United States v. Salerno*, 481 U.S. 739 (1987), establish that pretrial detention must be attended by a determination of necessity and robust process.[2] The Constitution does not permit people to be needlessly jailed for inability to post a cash bond. Rather, a court that wishes to impose or maintain an unaffordable bail amount must find that it serves a compelling interest of the state that no less-restrictive condition of release can meet. That determination must be made through a process that adequately guards against erroneous deprivations of liberty.

The principle that the government must thoroughly justify any order of pretrial detention is the central historical commitment of the American bail system. Clarification of this core constitutional mandate is essential to safeguarding a rational system of pretrial detention and release, and the freedom it protects.

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[2] This brief does not address whether unaffordable bail violates the Eighth Amendment. *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 605–10 (2018).

ARGUMENT

I. PRETRIAL DETENTION REQUIRES A DETERMINATION OF NECESSITY AND ROBUST PROCESS

A. The *Bearden* Line: Equal Protection and Due Process Forbid Detention on Money Bail Unless No Alternative Satisfies the State's Interests

The Supreme Court has long been attuned to the danger that, without vigilance, core civil liberties might become a function of resources rather than of personhood. In a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and culminating in *Bearden*, 461 U.S. 660, the Court has established that the state cannot condition a person's liberty on a monetary payment she cannot afford unless no alternative measure can meet the state's needs.

This line of jurisprudence began with challenges to wealth-based deprivations of another civil right: access to the courts. In *Griffin*, convicted prisoners lacked the funds to procure transcripts for their appeal. 351 U.S. at 12–15. The Supreme Court held that the Fourteenth Amendment prohibited Illinois from conditioning access to a direct appeal on wealth. *Id.* at 17; *see also Douglas v. California*, 372 U.S. 353, 357–58 (1963) (holding that California violated the Fourteenth Amendment by limiting indigent defendants' access to appellate counsel).

The Court later applied the logic of *Griffin* to wealth-based deprivations of liberty. The petitioner in *Williams v. Illinois* was held in prison after the expiration of his term pursuant to a law that permitted continued confinement in lieu of paying

off a fine. 399 U.S. 235, 236–37 (1970). The Court held that the Fourteenth Amendment prohibits the state from "making the maximum confinement contingent on one's ability to pay." *Id.* at 242. The next year, in *Tate v. Short*, the Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 401 U.S. 395, 398 (1971) (quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970)).

Bearden synthesized this line of cases. The petitioner in *Bearden* challenged the revocation of his probation for failure to pay a fine. 461 U.S. at 662–63. Explaining that "[d]ue process and equal protection principles converge in the Court's analysis" of claims of wealth-based discrimination in criminal proceedings, the Court held that the proper analysis for such claims requires "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Id.* at 665–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)) (brackets in original). Considering those factors, the Court concluded that the Fourteenth Amendment prohibits revocation of probation for inability to pay unless nothing short of revocation can satisfy the state's interests. *Id.* at 672–73. "Only if alternate

measures are not adequate to meet the State's interests . . . may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.* at 672.

The *Bearden* rule—that the Fourteenth Amendment prohibits unnecessary deprivations of liberty for inability to pay—applies "with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent." *Buffin v. City & County of San Francisco*, No. 15-cv-04959-YGR, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *accord Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) ("[Pretrial] imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."); *Walker v. City of Calhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018); *ODonnell v. Harris County*, 892 F.3d 147, 157 (5th Cir. 2018).

In the pretrial domain, *Bearden* prohibits the state from conditioning a person's liberty on unaffordable bail unless no other measure can serve the state's interests in future court appearance and public safety. "Only if alternate measures are not adequate" to meet those interests may a court imprison a defendant for inability to satisfy a financial obligation. *Bearden*, 461 U.S. at 672.[3] An increasing

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[3] Some courts facing recent challenges to money-bail systems have wrestled with the question of what standard of scrutiny to apply. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1113–20 (2019). The *Bearden* Court did not refer to "standards of scrutiny" but did provide a decision rule: "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." 461 U.S. 660, 672 (1983). Prior to *Bearden*, the Supreme Court had

number of federal and state courts have recognized this straightforward application of the *Bearden* doctrine, including this Court. *See, e.g.*, *ODonnell*, 892 F.3d at 162.[4]

B. The *Salerno* Line: Due Process Imposes Substantive and Procedural Limits on Pretrial Detention

The second line of relevant Supreme Court jurisprudence applies whether pretrial detention is imposed outright or via unaffordable money bail. Because the right to physical liberty is fundamental, policies that permit regulatory detention of adult citizens trigger strict scrutiny and must comply with robust limits.

1. Pretrial Detention Policy Must Be Carefully Tailored to a Compelling Government Interest

The Supreme Court has recognized that the right to pretrial liberty is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990). "Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Pretrial liberty, in particular, has been the subject

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stated that wealth discrimination merits heightened review when indigence causes an "absolute deprivation" of liberty. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20–21 (1973). For a "hybrid" scrutiny analysis, see Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397 (2019).

[4] *See also, e.g.*, *Shultz v. State*, 330 F. Supp. 3d 1344, 1359–61 (N.D. Ala. 2018); *Buffin v. City & County of San Francisco*, No. 15-cv-04959-YGR, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 460 P.3d 976, 988 (Nev. 2020); *In re Humphrey*, --- P.3d ---, No. S247278, 2021 WL 1134487, at *5–8. (Cal. Mar. 25, 2021); *State v. Pratt*, 166 A.3d 600, 605–07 (Vt. 2017); *State v. Brown*, 338 P.3d 1276, 1288–89 (N.M. 2014).

of legal protections since Magna Carta. *See infra* Part II. It is among "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal quotation marks and citation omitted). Pretrial liberty also secures other fundamental rights:

> [The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 4 (1951) (citation omitted).

As the Supreme Court has long acknowledged, the consequences of depriving an accused person of liberty are profound. "[T]ime spent in jail . . . often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972). A person behind bars "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533. Recent empirical research has confirmed that pretrial detention itself increases the likelihood of conviction and future crime, and has an adverse effect on future

employment prospects.[5] The cascading effects of detention affect entire communities. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612–16, 629–30 (2017).

Because the right to pretrial liberty is fundamental, the substantive component of due process requires that pretrial detention be narrowly tailored to a compelling state interest. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993). The Supreme Court has not explicitly announced that pretrial detention is subject to strict scrutiny. But in *Salerno*, the Court articulated the tailoring requirement of strict scrutiny in only slightly different terms. Having acknowledged the "fundamental nature" of the right to pretrial liberty, the *Salerno* Court upheld the challenged detention scheme on the basis that it was "a carefully limited exception" to the "norm" of pretrial liberty. 481 U.S. at 755, 746–52. It "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming" by limiting detention eligibility and requiring courts to comply with strict substantive and procedural requirements before detention could be imposed. *Id.* at 749–52.

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[5] *E.g.*, Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741–69, 787 (2017); Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224–32, 235 (2018); CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

"If there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc) (citation omitted). In *Foucha v. Louisiana*, for instance, the Court held that the challenged detention regime violated substantive due process because, "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." 504 U.S. 71, 81 (1992); *see also Flores*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."). Substantive due process thus requires a law or policy authorizing pretrial detention to be narrowly tailored to a compelling state interest.

2. An Order of Detention Must Comply with Robust Procedural Safeguards

The Due Process Clause also prohibits the deprivation of liberty or property without procedural safeguards. *Salerno*, 481 U.S. at 751–52 (holding that the Bail Reform Act's procedural safeguards satisfied the Due Process Clause); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).[6] Where the private interest at stake is liberty,

[6] Whereas *Medina v. California*, 505 U.S. 437 (1992), may govern challenges to state-law criminal adjudication procedures, *Mathews* would appear to govern challenges to pretrial detention process, especially when the claim alleges a *lack* of process. *See Salerno*, 481 U.S. at 746 (citing *Mathews*, 424 U.S. at 335); Garrett,

procedural safeguards are especially critical. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 445 (2011); *In re Gault*, 387 U.S. 1, 73 (1967) (Harlan, J., concurring in part and dissenting in part) (citations omitted).

The Supreme Court has not specified the minimum procedures necessary for pretrial detention, but *Salerno* highlighted certain protections in concluding that the federal Bail Reform Act satisfied procedural due process. The Act permitted detention only if a court found, by clear and convincing evidence in an adversarial hearing, that the defendant posed "an identified and articulable threat" that no condition of release could manage. *Salerno*, 481 U.S. at 751. The Act also provided for immediate appellate review of any detention order and imposed a speedy trial limit if a defendant were detained. *Id.* at 752. Congress understood these safeguards to be constitutionally required when it enacted the Bail Reform Act. *See* S. REP. NO. 98–225, at 8 (1983) ("[A] pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect."). Several district and state courts have recently concluded that due process requires equivalent protections for unaffordable bail. *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314–15 (E.D. La. 2018); *Shultz v. State*, 330 F. Supp. 3d 1344,

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supra note 3, at 408–09 & n.52 (noting that "the Court has applied the *Mathews* test to procedures for pretrial detention and involuntary civil commitment" and citing cases).

1358–59, 1370–73 (N.D. Ala. 2018); *In re Humphrey*, --- P.3d ---, No. S247278, 2021 WL 1134487, at *8-10 (Cal. Mar. 25, 2021); *Valdez-Jimenez v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 460 P.3d 976, 988 (Nev. 2020).

Given the importance of the liberty interest at stake, it is our view that, when a court seeks to impose detention, due process entitles the defendant to (1) a prompt hearing on the necessity of detention; (2) notice of the critical issue to be decided at the hearing (whether any less restrictive measure can meet the state's interests); (3) an opportunity to confront the state's evidence and present relevant evidence; (4) representation by counsel; (5) a judicial finding of necessity on the record, by clear and convincing evidence, with explanation of the facts and reasoning that support it; and (6) a right to immediate appeal.

3. An Order Imposing Unaffordable Bail Is an Order of Detention

As a matter of both logic and law, an order imposing unaffordable bail constitutes an order of detention. *See* Sandra G. Mayson, *Detention by Any Other Name*, 69 Duke L.J. 1643, 1645–46 (2020). It has the same result: the defendant remains in jail. *See ODonnell*, 892 F.3d at 158; *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). Because an order imposing unaffordable bail is a *de facto* detention order, the due process requirements for a detention order apply. *Accord*, *e.g.*, *In re Humphrey*, 2021 WL 1134487, at *1–2, 8–10; *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017) ("[W]here a judge sets bail in an amount . . . [such]

that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention[.]”).

In an analogous statutory context, the Bail Reform Act recognizes that unaffordable bail triggers full detention process. The accompanying Senate Report explained that, if a court concludes that an unaffordable money bond is necessary,

> then it would appear that there is no available condition of release that will assure the defendant’s appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and *therefore the judge may proceed with a detention hearing pursuant to section 3142(f)* and order the defendant detained, if appropriate.

S. REP. NO. 98-225, at 16 (1983) (emphasis added); *see also United States v. McConnell*, 842 F.2d 105, 108–10 & n.5 (5th Cir. 1988) (noting that unaffordable bail triggers full detention process, of which “the detention hearing is a critical component”); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (“[O]nce a court finds itself in this situation—insisting on terms in a ‘release’ order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order[.]” (emphasis in original)).

C. This Court Should Clarify That Pretrial Detention on Unaffordable Bail Requires a Determination of Necessity and Robust Process

As both *Bearden* and *Salerno* make clear, the Constitution does not permit the government to casually jail presumptively innocent people. *Bearden* and predecessor cases prohibit unnecessary incarceration for inability to pay; they require a determination that no less-restrictive measure can meet the state's interests. Due process, as elaborated in *Salerno* and later cases, requires that detention policies be narrowly tailored to a compelling state interest and include careful process.

Both lines of doctrine require an individualized determination of necessity before the state may detain a person on unaffordable bail. The *Bearden* rule requires it explicitly: "*Only if alternate measures are not adequate to meet the State's interests*" may a court imprison a defendant for inability to pay. 461 U.S. at 672 (emphasis added). The *Salerno* requirement of narrow tailoring also, at minimum, requires a determination of necessity before detention is imposed. A policy is not narrowly tailored to the state's interests if it systematically permits detention when less-restrictive alternatives would suffice.

Dallas County's current bail policy, which systematically permits unnecessary detention on unaffordable bail, thus violates equal protection and due process. The courts of this Circuit have already recognized, correctly, that equal protection and due process compel individualized consideration of a defendant's financial resources and of less-restrictive alternatives before a court imposes unaffordable money bail.

ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1150–54 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d at 162. But "consideration" of alternatives is not sufficient if the court is free to subsequently disregard them. Rather, if a less-restrictive alternative can meet the state's interests, *the court must impose it*. Only if the court finds that "alternate measures are not adequate to meet the State's interests," *Bearden*, 461 U.S. at 672, may it constitutionally order a defendant detained or impose a bond requirement that will result in detention. *Accord Valdez-Jimenez*, 460 P.3d at 988 ("[T]he State must prove . . . that bail, rather than less restrictive conditions, is necessary"); *In re Humphrey*, 2021 WL 1134487, at *24 ("In order to detain an arrestee . . . , a court must first find by clear and convincing evidence that no condition short of detention could suffice . . . ."); *cf. Rainwater*, 572 F.2d at 1057 ("The incarceration of those who cannot [pay], without *meaningful* consideration of other possible alternatives, infringes on both due process and equal protection requirements.") (emphasis added). Procedural due process requires safeguards to protect against error in this determination of necessity.

To be clear, these constitutional protections are not implicated where money bail results in prompt release (such that the bond can serve the incentive function it is designed to serve). It is *unaffordable* bail—a de facto detention order—that triggers constitutional protections, because it deprives the accused person of liberty. Nor do equal protection and due process prohibit unaffordable bail altogether. They

simply require a court to determine that the unaffordable bond requirement is necessary because no less-restrictive alternative will suffice, in a setting with adequate procedural protection, before the government incarcerates a presumptively innocent person. The requirement of justification and careful process is consistent with historical tradition. In fact, the right against arbitrary or unnecessary pretrial tradition is among the oldest rights of the English common law, as the following section explains.

II. THE PROTECTION OF PRETRIAL LIBERTY IS A THEME OF CONSTITUTIONAL HISTORY AND TRADITION

English and American law have long provided strict protections for defendants facing pretrial detention. The Founders, moreover, would have been unfamiliar with bail policies making liberty contingent on upfront payments of cash or collateral.

A. Bail Policies Historically Did Not Condition Liberty on a Defendant's Ability to Pay

As a preliminary matter, the Founders would have been unfamiliar with policies that made a defendant's pretrial liberty dependent on the ability to proffer cash or secured collateral. At the founding, the meaning of "bail" in the criminal context was merely "delivery" of a person to his "sureties" in exchange for a pledge—not a deposit. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769). For hundreds of years in common-law jurisdictions, a

"sufficient" surety might include nonfinancial pledges of good behavior, or a surety's unsecured pledges of property or money, conditioned on a defendant's appearance at trial. Timothy R. Schnacke, *A Brief History of Bail*, 57 JUDGES' J. 4, 6 (2018). The personal surety was not to be purchased; in fact, the United States today is almost completely alone (save for the Philippines) in permitting indemnification of sureties. F. E. DEVINE, COMMERCIAL BAIL BONDING 6–8 (1991).

Only in the last century has the term "bail" commonly incorporated upfront monetary transfers intended to secure an appearance. Schnacke, *Brief History*, *supra*, at 6–7. Modern bail policies that require upfront payment are therefore substantially more likely to result in pretrial detention for the indigent than the bail systems reflected in early English and American case law. *See Holland v. Rosen*, 895 F.3d 272, 293–95 (3d Cir. 2018). The Founders would not have recognized the bail system as it exists today.

B. The Anglo-American Legal Tradition Provides Special Protections to Prevent Arbitrary Pretrial Detention

While the form of bail has changed recently and dramatically, Anglo-American law has long imposed strict protections against arbitrary pretrial detention. Indeed, the tradition of strong procedural protections was well established long before the drafting of the U.S. Constitution.

The tradition finds its clearest post-Norman expression in Magna Carta, which enshrined the principle that imprisonment was only to follow conviction by one's

peers. Magna Carta ch. 32 (1216); *accord* Magna Carta ch. 39 (1215). From that principle, legislators and jurists over time derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, a defendant's right to bodily liberty on adequate assurance that he or she will reappear to stand trial. *See, e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (speedy trial "has its roots at the very foundation of our English law heritage" dating to Magna Carta and earlier); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (Magna Carta and trial right); *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981) ("Bail was a central theme in the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions.").

As the English Parliament gained power through the 1500s and 1600s, its signal acts of constitution-making aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. For example, the 1628 Petition of Right, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689 all "grew out of cases which alleged abusive denial of freedom on bail pending trial." Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 966 (1965).[7]

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[7] *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977); ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275 (1940); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

Each such act sought to increase fairness in pretrial custody determinations. In 1554, for instance, Parliament required that the decision to admit a defendant to bail be made in open session, that two justices be present, and that the evidence weighed be recorded in writing. *See* TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010). In 1628, responding to perceived abuses by the Stuart kings and their justices and sheriffs, who detained defendants for months without bail or charge, Parliament passed the Petition of Right prohibiting imprisonment without a timely charge. *See* JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 133–38 (1997). In the Habeas Corpus Act of 1679, Parliament "established procedures to prevent long delays before a bail bond hearing was held" to respond to a case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., BAIL AND PRETRIAL RELEASE, *supra*, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges, leading to defendants' pretrial detention. Parliament responded in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a protection later incorporated into the Eighth Amendment to the U.S. Constitution. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 528–29 (1983).

In sum, by the time of the United States' founding, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections enshrined in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner. All of these constraints were designed to ensure a fair, prompt consideration of each defendant's case for release.

American practice expanded the right to bail. Even before the English Bill of Rights, in 1641 Massachusetts made all non-capital cases bailable (and significantly reduced the number of capital offenses). Foote, *supra*, at 975. Pennsylvania's 1682 constitution provided that "all Prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." *See* Carbone, *supra*, at 531 (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). The vast majority of American states copied Pennsylvania's provision; many state constitutions, like Texas's, still contain that language. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). The Judiciary Act of 1789 likewise made all non-capital charges bailable, 1 Stat. 91, as did the Northwest Ordinance, 1 Stat. 52.

Thus, while adopting the English procedural protections regulating pretrial detention, early American constitutions also provided additional guarantees of

pretrial liberty. English practice often required a full hearing to determine whether the defendant was to be released on bail; by contrast, Americans *categorically* established—in state constitutions and in the statute founding the federal judiciary—that defendants facing non-capital charges would be entitled to release on bail. The only determination left to judicial discretion was the sufficiency of the sureties, that is, *how* to bail, not *whether* to bail. *See* TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014).

Though the federal government and some states later granted courts authority to allow "preventive" pretrial detention in some cases, *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966), that authority was accompanied by protections long identified with due process in the English constitutional tradition, and ordinarily has been quite limited. States that have authorized pretrial detention have generally also required a judicial finding by clear and convincing evidence, after an adversary hearing, that the accused presents an unmanageable flight risk or risk to public safety. *See, e.g.*, N.M. CONST., art. II, § 13; VT. CONST., art. II, § 40; WIS. CONST., art. I, § 8.

As this brief history illustrates, bail policies have for centuries been constrained by procedural and substantive protections that extend well beyond a prohibition on excessiveness. Laws protecting a defendant's right to pretrial release

"have consistently remained part of our legal tradition." *Jennings v. Rodriguez*, 138 S. Ct. 830, 864 (2018) (Breyer, J., dissenting).

C. The Anglo-American Bail System Has Long Recognized that Unattainable Bail Constitutes an Order of Detention

Although the nature of surety pledges has changed over time, jurists have consistently concluded that an unattainable surety requirement is tantamount to denying bail altogether.

From its inception, Anglo-American law has tethered bail to a defendant's means. Under the pre-Norman amercement system, the bail amount matched the potential fine upon conviction—which depended on the defendant's social rank. "[T]he baron [did] not have to pay more than a hundred pounds, nor the routier more than five shillings." 2 FREDERICK WILLIAM POLLUCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 514 (1895). Once magistrates set bail by discretion, they were required to consider the defendant's ability to procure sureties. *See, e.g.*, *Bates v. Pilling*, 149 ENG. REP. 805, 805 (K.B. 1834); *Rex v. Bowes*, 99 ENG. REP. 1327, 1329 (K.B. 1787) (per curiam); *Neal v. Spencer*, 88 ENG. REP. 1305, 1305–06 (K.B. 1698).

Even without upfront transfers of cash or collateral, jurists recognized that too high a pledge demand could result in detention. In 1819, Joseph Chitty, the prolific commentator on English criminal practice, noted that "[t]he rule is, . . . bail only is to be required as the party is able to procure; for otherwise the allowance of bail

would be a mere colour for imprisoning the party on the charge." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 131 (1816). Chitty counseled justices of the peace that if a defendant was entitled to bail, they could not "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a *denial of bail*." *Id.* at 102–03. If they did, the justices could both be prosecuted for a misdemeanor and sued for false imprisonment. *Id.*

The shift from unsecured pledges to upfront payments has made Chitty's point even more salient. Since the mid-twentieth century, numerous jurists and jurisdictions have recognized unaffordable bail as a *de facto* order of detention. Justice William O. Douglas, sitting as a Circuit Judge in 1960, reasoned that "[i]t would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, J., in chambers); *see also* Section I.B.3, *supra*.

In sum, jurists in every era have recognized that requiring an unobtainable surety is tantamount to denying bail altogether, and thus demands the same substantive and procedural protections as an outright denial of bail. *See also ODonnell*, 251 F. Supp. 3d at 1156. The district court's ruling on this point should be affirmed. *See Daves v. Dallas County*, 341 F. Supp. 3d 688, 694 (N.D. Tex. 2018).

III. OTHER CONSTITUTIONAL PROVISIONS DO NOT OBVIATE EQUAL PROTECTION AND DUE PROCESS CONSTRAINTS

Some have argued that the Fourth and Eighth Amendments provide the exclusive framework for claims related to bail and pretrial detention, on the ground that "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment . . . must be the guide for analyzing such a claim." *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). This argument is misguided, because neither the Fourth nor the Eighth Amendment provides "an explicit textual source of constitutional protection" against the "particular sort of government behavior" at issue in this suit.

The Fourth Amendment provides explicit textual protection against "unreasonable" searches and seizures, which the Supreme Court has interpreted to generally prohibit search or seizure without probable cause. U.S. CONST. amend. IV; *Gerstein v. Pugh*, 420 U.S. 103, 113–14 (1975). When a claimant alleges a search or seizure without probable cause, or a defect in the execution of a search or seizure, the Fourth Amendment provides the relevant analytical framework. *See Albright*, 510 U.S. at 270–71 (challenging "prosecution without probable cause"); *Graham*, 490 U.S. at 388, 394 (alleging excessive force during an investigatory stop); *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017) (alleging arrest and detention on the basis of "false evidence, rather than supported by probable cause").

The petitioners here do not contest probable cause for, or the execution of, their arrests. They instead challenge the policy that regulates detention and release of pretrial defendants after they have been seized. Clearly the Fourth Amendment does not preclude the application of other constitutional guarantees to the state's pretrial decision-making. If it did, the state could, with impunity, condition pretrial liberty on religion, race, or defendants' political views. And although probable cause is a necessary criterion for pretrial detention, it is not the sole necessary criterion. The requirement of probable cause is a floor, not a ceiling. *E.g. Gerstein*, 420 U.S. at 126 (holding that a "timely judicial determination of probable cause" is a "*prerequisite* to detention," not that it is sufficient justification) (emphasis added); *id.* at 125 n.27 (recognizing that the "probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct").

The Excessive Bail Clause does not provide explicit protection against systematic unwarranted detention either. The Clause protects against bail that is greater than necessary to provide reasonable assurance of future court appearance. *Stack*, 342 U.S. at 5. The plaintiffs here do not challenge their bail amounts *per se*. Rather, they allege that their bails were set without sufficient process or justification. *Accord In re Humphrey*, 2021 WL 1134487, at *15 n.4 (concluding that the petitioner's claims were properly analyzed pursuant to equal protection and due

process rather than the Excessive Bail Clause because he challenged “the *method* by which his bail was determined . . . that because the trial court failed to consider his ability to pay or the efficacy of less restrictive conditions of release, he was detained without adequate justification”).

Instead, applying *Albright*’s principles, it is the Equal Protection and Due Process Clauses that protect the “specific constitutional right[s] allegedly infringed” here. *Graham*, 490 U.S. at 393–94. The claim that Dallas County’s bail policy permits detention without adequate justification or procedures sounds in due process, because “[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.” *Zadvydas*, 533 U.S. at 690. And the claim that Dallas County imposes detention in a manner that impermissibly discriminates against the indigent sounds in equal protection. As the *Bearden* Court reasoned, financial assessments that serve to detain the indigent are best evaluated at the point where “[d]ue process and equal protection principles converge.” 461 U.S. at 665; *accord Humphrey*, --- P.3d ---, 2021 WL at *15 n.4.

Indeed, *Bearden* and *Salerno* themselves demonstrate that pretrial detention and bail are not analyzed solely under the Fourth and Eighth Amendments.[8] *Bearden* analyzed the conversion of fines into incarceration under equal protection and due

[8] The United States Congress also recognized substantive and procedural constraints beyond the Eighth Amendment’s excessiveness prohibition in enacting the Bail Reform Act of 1984. *See* S. REP. No. 98-225, at 8 (1983).

process doctrine, not the Excessive Fines Clause. *Salerno* evaluated the federal bail system under both procedural and substantive due process apart from either the Excessive Bail Clause or the Fourth Amendment. This court and the Eleventh Circuit have followed suit. *Walker*, 901 F.3d at 1260; *ODonnell*, 892 F.3d at 157.

Rather, as *Bearden* and *Salerno* illustrate, due process and equal protection forbid money bail practices that permit systematic detention without justification. American law has long maintained a commitment to protecting pretrial liberty against unwarranted incursions. When the government wishes to deprive a presumptively innocent person of the fundamental right of physical liberty pending trial, including by imposing unaffordable bail, due process requires a timely adversarial hearing; a finding on the record, by clear and convincing evidence, that detention (or unaffordable bail) is necessary because no less-restrictive alternative will suffice; and a right to immediate appeal.

CONCLUSION

For the reasons set forth above, we urge this Court to:

1) Re-AFFIRM this en banc Court's decades-long commitment to the proposition that pretrial "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible," *Rainwater*, 572 F.2d at 1056–57;

2) AFFIRM the holdings of trial courts in this Circuit that the imposition of unaffordable bail has the same legal effect and must meet the same substantive and procedural requirements as an outright denial of bail, *ODonnell*, 251 F. Supp. 3d at 1156–57, *Daves*, 341 F. Supp. 3d at 694–96, *Caliste*, 329 F. Supp. 3d at 311–12; *Thompson v. Moss Point*, Civil No. 15-182, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 6, 2015).

3) OVERRULE the panel decisions of this Circuit, including the vacated decision in this case, that the claims in this suit are "subject to procedural relief" alone, *ODonnell v. Goodhart*, 900 F.3d 220, 227 (5th Cir. 2018) (motions panel).[9] To the extent that requiring a "finding by the Magistrate Judges that no other alternative to secured release would serve the State's interest before detaining an individual before trial" is a "substantive" remedy, *see Daves*, 341 F. Supp. 3d at 695 (brackets deleted), it is one required by the Supreme Court and the history and tradition of pretrial liberty under the U.S. Constitution.

Dated: April 5, 2021 Respectfully submitted,

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[9] *See also ODonnell*, 892 F.3d 147, 163–64; *ODonnell v. Salgado*, 913 F.3d 479, 482 (5th Cir. 2019).

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[10] The views expressed herein are the personal views of *amici*. *Amici* and counsel for *amici* have listed their titles and affiliations for purposes of identification only.

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CERTIFICATE OF SERVICE

I certify that, on April 5, 2021, the foregoing brief of Professors of Criminal, Procedural, and Constitutional Law as *Amici Curiae* in support of Plaintiffs-Appellants-Cross-Appellees was filed via the Court's CM/ECF Document Filing System. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all registered CM/ECF filing users, including counsel of record for all parties to this appeal.

Dated: April 5, 2021

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,452 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point typeface.

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