

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

**BRIEF OF AMICI CURIAE AMERICAN BAIL COALITION, PROFESSIONAL
BONDSMEN OF TEXAS, AND PROFESSIONAL BONDSMEN OF HARRIS
COUNTY IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the American Bail Coalition, the Professional Bondsmen of Texas, and the Professional Bondsmen of Harris County each certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock.

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

Amici are professional organizations of bail bondsmen and insurers. The American Bail Coalition (“Coalition”) is a non-profit professional trade association of bail insurance companies that underwrite criminal bail bonds throughout the United States, including in Harris County, Texas. The Coalition educates local communities, law enforcement, legislators, and other stakeholders on ways to protect the constitutional right to bail and establishes best practices for criminal justice systems throughout the country.

The Professional Bondsmen of Texas and Professional Bondsmen of Harris County are organizations devoted to protecting the constitutional right to bail. They also support and assist bondsmen in advancing their business in Texas. Among other initiatives, the Professional Bondsmen of Texas provide educational courses approved by the State Bar of Texas for Bail Bond Surety Licensure.

Amici have a strong interest in this case because the outcome will determine the extent to which bond schedules remain a constitutional mechanism for communities to set bail for criminal defendants. *Amici* believe that bond schedules and bail systems like Harris County’s are constitutionally permissible and, when used appropriately, allow for timely or expedited release of criminal defendants.¹

¹ Accredited Surety and Casualty Company, Inc., which is not an *amicus* or party, contributed funds to support the preparation and submission of this brief. No

INTRODUCTION AND SUMMARY OF ARGUMENT

Cities and states across our country are engaged in a serious debate about the role of bail in our criminal justice system, particularly for defendants with limited financial resources. In some places, legislators have chosen to limit bail to amounts that individual defendants can afford; in others, legislators have chosen to set bail at the same amounts for the same offenses, upholding the basic principle that all defendants should be treated equally while also protecting the community and the justice system against the unaccountable release of defendants.

The district court here short-circuited that legislative debate. In a sweeping 193-page opinion, accompanied by an unprecedented injunction compelling the mass release of criminal defendants on their own recognizance, the district court fundamentally redesigned Harris County's system. The court's order effectively abolishes the use of bail and bail schedules on the theory that criminal defendants are entitled to release if they claim to be indigent.

Nothing in the federal or state Constitution supports, let alone requires, that extreme position. And basic principles of federalism and the separation of powers forbid the district court's novel theory from being imposed on an unwilling county.

The text and history of our founding charter confirm that bail is a constitutionally-guaranteed option for defendants to obtain release in return for assurances that they

counsel for any party authored this brief in whole or in part. All parties have consented to the filing of this brief.

will appear at trial. But at no point from the Framing to today was every accused defendant guaranteed the resources to post bail or the right to immediate liberty if he lacked those resources. And nothing in the Eighth Amendment or Fourteenth Amendment has morphed to create a constitutional right for the indigent to obtain their immediate release just because others are offered bail in amounts they can post.

The district court's position rests on basic misconceptions about the purpose and function of bail. The court repeatedly characterized bail requirements for indigent defendants as "de facto detention orders," and mandated the release of defendants who did not post the required security as long as they would "otherwise be eligible" for bail. But eligibility for bail without posting a security is an oxymoron. The whole premise of bail is that the deposit of a security, which will be forfeited upon non-appearance, provides the necessary incentive for the defendant to appear. A defendant who cannot post a security is not "otherwise eligible" for release on bail any more than a homeowner who cannot afford to make monthly payments is "otherwise eligible" for a mortgage.

The district court purported to find as a matter of "fact" that defendants (at least misdemeanor defendants) who are released subject to monetary conditions are no more likely to appear than defendants who are released subject to no enforceable conditions at all. That remarkable proposition is at war with

economics, logic, and centuries of human experience. Since its earliest days, the Anglo-American legal system has used bail to strike a careful balance between providing criminal defendants with an opportunity to avoid pretrial deprivations of liberty, while also enabling communities to protect themselves and secure a defendant's appearance for trial. For almost as long, the commercial bail industry has facilitated those goals. By assuming responsibility for bail payments and enabling defendants to obtain release in exchange for a fraction of the required amount, the commercial bail industry allows all individuals to leverage social networks and community ties to obtain pretrial release. Moreover, because of the commercial surety's own financial stake, defendants bailed by a commercial surety are far more likely to appear in court and far less likely, if they fail to appear, to remain at-large.

But even if the district court's conclusion could be defended as a matter of fact, it is irrelevant as a matter of law. As the Supreme Court has reminded us, the Framers' "enshrinement of constitutional rights necessarily takes certain" factual issues and "policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). One can debate whether the people are safer with a right to firearms or more secure with a right against unreasonable searches, but no amount of factfinding can eliminate the rights protected by the Second and Fourth Amendments. The same reasoning applies to the Eighth Amendment. Even

assuming failure-to-appear rates were identical with or without bail, the Eighth Amendment still would guarantee a right to bail in non-excessive amounts for bailable offenses. And the fact that some defendants cannot afford bail provides no basis for a court to order them released without bail.

Plaintiffs do not claim that their bail was excessive under the Eighth Amendment, and with good reason: Well-settled precedent makes clear that bail is not constitutionally excessive just because a particular defendant cannot afford it. Instead, plaintiffs attack the County's bail system—and bail in general—under the Fourteenth Amendment, alleging it discriminates against the indigent. But the County's bail policy does no such thing. Under the County's bail schedule, bail is initially set to match the *crime* a defendant is accused of committing. The schedule does *not* impose greater amounts on the indigent. In other words, defendants facing like charges are treated alike, and all defendants unable to post their presumptive bail amounts are treated alike—the classic command of equal protection. The court's conclusion that equal treatment violates the equal protection clause is just as wrong as it sounds.

Neither do these procedures offend due process. Contrary to the reasoning below, indigent defendants are not entitled to immediate release if they do not receive their probable-cause and bail-setting hearing within 24 hours. Indeed, the Supreme Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44

(1991), sets a 48-hour deadline for a probable-cause hearing and expressly contemplates that probable-cause and bail hearings would occur together. It simply cannot be that *any* defendant arrested for *any* crime must be *immediately* released based on a bare assertion of indigency. Yet that is precisely what the district court's remarkable remedy requires, with potentially devastating consequences to public safety.

Questions about bail policy are serious and difficult. But they are primarily for policymakers. The federal judicial role is limited to ensuring conformity with the basic requirements of the Constitution, and Harris County's bail procedures are not even close to the constitutional line.

ARGUMENT

I. Bail Is A Liberty-Promoting Institution As Old As The Republic.

The district court viewed bail as a tool for detention. But by focusing on the consequences of failing to post a bond, the district court overlooked that bail is in fact a liberty-promoting institution as old as—indeed, far older than—the Republic. Throughout that long history, there have always been those who could not afford to post bail, but that neither renders a constitutionally-guaranteed institution constitutionally suspect, nor robs bail of its fundamental character as a guarantee of liberty.

Since before the Founding, American communities have relied on bail systems to give criminal defendants an option to secure their liberty before trial, while guaranteeing their appearance for prosecution through the “deposit of a sum of money subject to forfeiture.” *Stack v. Boyle*, 342 U.S. 1, 5 (1951). The colonies developed bail procedures based on English practices, and they retained those practices at independence. The Constitution guaranteed the option of bail for most crimes, but never guaranteed that particular defendants would be able to post bail. While bail practices have evolved over time, their chief purpose remains the same: Since our Nation’s birth, bail systems like Harris County’s have protected both the liberty interests of defendants and security interests of communities. This Court should not “sweep away what has so long been settled” by centuries of history and experience. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014).

A. The Modern System of Bail Is Deeply Rooted in American Legal Tradition.

Few aspects of criminal law have deeper roots than bail. The Bible refers to the release of Jason and other early converts in Thessalonica on the posting of a surety. *Acts* 17:9. The defining documents of English liberty—the Magna Carta of 1215, the Statute of Westminster of 1275, the Petition of Right of 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights of 1688—all recognize a defendant’s right to pre-trial liberty through bail. *See Cobb v. Aytch*, 643 F.2d 946,

958 n.7 (3d Cir. 1981) (en banc). And since well before independence, bail has been a mainstay of American criminal justice.

For example, in Virginia as early as 1689, sheriffs were responsible for administering bail, and Virginia's 1776 constitution stated that "excessive bail ought not to be required." William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 Alb. L. Rev. 33, 77-81 (1977). Georgia and North Carolina followed by adopting similar provisions. *Id.* at 82 n.293. Connecticut's 1776 constitution was explicit that defendants were guaranteed the option of bail for bailable offenses "if he can and will give sufficient Security ... for his appearance and good behavior in the meantime." The Eighth Amendment to the United States Constitution provides that "excessive bail shall not be required." U.S. Const. amend. VIII; *see also* Tex. Const. art. I, §11 ("All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident."). And on the same day that Congress passed the Eighth Amendment as part of the Bill of Rights, it passed the Judiciary Act of 1789, which required bail to be admitted in all cases "except where punishment may be by death." Duker, *supra*, at 85.

These statutory and constitutional provisions and the early case law applying them underscore that bail has always struck a balance between the accused's liberty and the community's security. In 1813, while riding circuit, Chief Justice John Marshall explained: "The object of a recognizance is[] not to enrich the

treasury, but to combine the administration of criminal justice with the convenience of a person accused, but not proved to be guilty.” *United States v. Feely*, 25 F. Cas. 1055, 1057 (C.C.D. Va. 1813); *see also Gramercy Ins. Co. v. State*, 834 S.W.2d 379, 381-82 (Tex. App.—San Antonio 1992, no writ) (“A bail bond is not punitive, nor is it intended to be a substitute for a fine or a revenue device to enrich the government’s coffers.”). And in 1835, Justice Story, writing for a unanimous Supreme Court, echoed that sentiment: “A recognizance of bail, in a criminal case, is taken to secure the due attendance of the party accused, to answer the indictment, and to submit to a trial, and the judgment of the court thereon.” *Ex parte Milburn*, 34 U.S. 704, 710 (1835). Thus, bail has always been understood as a liberty-preserving option available for “the convenience of a person accused,” but certainly not a guarantee of release without security or a means of discriminating against those who could not afford to post a security.

The modern bondsman likewise has deep roots in our legal tradition. Intrinsic to the common-law tradition of bail in England and the United States was the role of a surety, who would guarantee the accused’s appearance in court and undertake to produce the accused in the event of non-appearance. *See Duker, supra*, at 70. As Blackstone explained, the defendant was entrusted “to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of

going to gaol.” William Blackstone, *Commentaries* *294; *see also* Tex. Code Crim. Proc. art. 17.11, §1. Importantly, the government was required to offer the defendant the opportunity to obtain bail for aailable offense—failure to do so was “an offence against the liberty of the subject,” Blackstone, *Commentaries, supra*, at *294—but it did not guarantee that a surety would be willing to post bail for every defendant, let alone to do so on terms affordable to the accused. Because of the sureties’ responsibilities and liabilities, the government could guarantee only the option of bail, not a defendant’s release.

American courts adopted this view of suretyship. In 1869, the Supreme Court explained that “[b]y the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing.” *Reese v. United States*, 76 U.S. (9 Wall.) 13, 21 (1869). While that does not mean the principal “can be subjected by [the surety] to constant imprisonment,” the surety was empowered to “surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty.” *Id.* Under this arrangement, the government agreed “it will not in any way interfere with th[e surety] covenant.” *Id.* at 22.

B. Modern Commercial Sureties Are the Most Effective and Efficient Means To Balance the Interests of Defendants and Communities.

Consistent with its history, the commercial bail industry provides the most effective means of allowing defendants to obtain release before trial while ensuring

the protection of communities. Both detention before trial and release before trial while subject to onerous conditions, such as drug testing or GPS monitoring, impose heavy burdens on defendants. Release backed only by a promise to appear poses serious risks to communities and in no event is constitutionally required. As an extension of the historical surety system, the modern commercial bail industry strikes a balance between those competing interests. Indeed, by enabling defendants to post bond at a fraction of the government-imposed amount, the industry allows the accused to obtain release before trial without liberty-infringing conditions. And by assuming responsibility for the defendant's appearance at trial, the industry protects the community's interest in prosecuting criminals for their offenses.

1. The costs of abandoning monetary bail

The alternatives to monetary bail—uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions—are unpalatable. A system of uniform pretrial detention would promote community safety and secure defendants' appearances at trial, but impose intolerable burdens on defendants' liberty interests. The Framers thus eliminated the possibility of uniform pretrial detention by guaranteeing the option of non-excessive bail for most defendants.

Releasing all accused defendants on a mere promise to appear would not raise Eighth Amendment problems, but it would wreak untold consequences on communities. Released defendants would have significantly less incentive to appear in court and might commit additional crimes while released. *See, e.g.*, Byron L. Warnken, *Warnken Report on Pretrial Release* 19, 21 (Feb. 2002), <http://bit.ly/2s0N6XT> [hereinafter *Warnken Report*]; Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J. L. & Econ. 93, 94 (2004) [hereinafter *The Fugitive*]. Studies conservatively estimate that the cost to the public for each failure to appear is approximately \$1,775. *See* Robert G. Morris, Dallas County Criminal Justice Advisory Board, *Pretrial Release Mechanisms in Dallas County, Texas* 17 (Jan. 2013), <http://bit.ly/1tttqJD> [hereinafter *Dallas Report*]. Most communities have no interest in inviting these harms.

Defendants who fail to appear for scheduled court hearings also incur additional criminal charges and associated warrants, imposing more costs on law enforcement who must track down missing defendants and diverting scarce resources from other law-enforcement efforts. *The Fugitive, supra*, at 98. This is no trifling concern. As an example, Philadelphia releases a large share of its criminal suspects on personal recognizance and long prohibited commercial bail. In November 2009, Philadelphia's "count of fugitives (suspects on the run for at

least a year) numbered 47,801,” and in 2007 and 2008 alone, “19,000 defendants each year—nearly one in three—failed to appear in court for at least one hearing.” Pa. Joint State Gov’t Comm’n, *Report of the Advisory Committee on the Criminal Justice System in Philadelphia* 19 (Jan. 2013), <http://bit.ly/25Y8c8s>.

A regime comprised exclusively of unsecured bail would produce similarly high failure-to-appear rates nationwide. Law enforcement is not equipped to re-arrest all defendants who fail to appear. Thus, without monetary bail and the commercial surety system, communities risk encouraging further criminal behavior and losing any incentive for securing appearance, which adds to the public costs of crime and further diminishes the rule of law. Surety bonds are the best way of preventing these risks because the probability of being recaptured while released on a surety bond is 50% higher than for those released on other types of bonds or on recognizance. *The Fugitive, supra*, at 113.

The third alternative to monetary bail—uniform release subject to invasive pretrial deprivations of liberty like mandatory drug testing, GPS monitoring, and onerous reporting requirements—is similarly unsatisfying and raises serious constitutional concerns. Just as the government generally cannot employ pretrial detention without offering bail, it cannot employ other deprivations, such as GPS monitoring, without offering bail. Indeed, the Ninth Circuit has held that such

conditions are unconstitutional in some circumstances. *See United States v. Scott*, 450 F.3d 863 (9th Cir. 2006).

Bail systems strike a balance between these competing interests. Through commercial sureties, criminal defendants are able to gain release while awaiting trial without being subject to liberty-infringing conditions, while also maintaining a strong incentive to appear for trial and avoid additional arrest. Accused defendants thus suffer minimal disruption to their family lives and employment and maximize their ability to prepare a defense. And local communities can be confident in defendants' appearance at trial without the monetary costs of wide-scale detention or the concerns with an unsecured system of release.

2. The efficacy of commercial sureties

Any attack on the modern bail system bears the heavy burden of proposing a workable alternative. Plaintiffs offer none. And the evidence suggests there is none. The modern commercial surety system has statistically proven to be the most effective means of enabling defendants to obtain release pending trial while ensuring court appearances. One study examining failure-to-appear rates in Maryland—where the “vast majority of ... defendants were misdemeanor defendants”—concluded that defendants released on recognizance were 25.7% more likely to fail to appear compared to defendants released on commercial-surety bonds. *Warnken Report, supra*, at 17-18. Another study concluded that

misdemeanor defendants released on surety bonds were least likely to abscond. *Dallas Report, supra*, at 5.

These results mirror studies focusing on felony defendants. One such report determined that felony “[d]efendants released on surety bond are 28 percent less likely to fail to appear than similar defendants released on their own recognizance, and if they do fail to appear, they are 53 percent less likely to remain at large for extended periods of time.” *The Fugitive, supra*, at 118. That same report also noted that defendants charged with “minor crimes” may be more likely to flee because “defendants reason that police will not pursue a failure to appear when the underlying crime is minor.” *Id.* at 96-97. A Special Report from the U.S. Department of Justice similarly confirmed the value of commercial sureties: “Compared to release on recognizance, defendants on financial release were more likely to make all scheduled court appearances.” Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Pretrial Release of Felony Defendants in State Courts* 1 (2007), <http://bit.ly/2kG9rV3>. Specifically, a surety bond had a failure-to-appear rate of 18%, the second lowest. *Id.* at 8. The highest failure-to-appear rates belonged to emergency release (45%) and unsecured bonds (30%). *Id.*

These statistical results comport with common sense—and refute the district court’s suggestion that “secured financial conditions of pretrial release do not outperform alternative nonfinancial or unsecured conditions of pretrial release.”

ROA.5662. Indeed, defendants who obtain release through commercial sureties owe bondsmen the full amount of bail if they fail to appear. But since defendants often lack the resources to pay the full amount, commercial sureties are given incentives to produce defendants rather than pursue repayment. To do so, they often enlist the help of a defendant's community by obtaining contact information for friends and family, using cosigners on the surety, and requiring periodic check-ins and monitoring. *The Fugitive, supra*, at 97. Bondsmen are able to pursue these strategies without public expense or diverting resources of law enforcement. And because the bondsman earns his living in the industry, his incentive for returning defendants is high. By some estimates, a bondsman requires a 95% appearance rate from defendants just to break even. *Id.*

Moreover, unlike the costly, federally-funded pretrial supervision system in the District of Columbia—which both plaintiffs and the district court support, *see* ROA.5662; Dkt. 143 at 14²—the commercial-bail system allows defendants to tap into their family and community networks to secure their release at no cost to the public. This approach advances the basic purpose of bail, because defendants with significant community ties are more likely to appear. *See* Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 Pace L.

² “Dkt.” refers to the district court docket.

Rev. 800, 841 (2012). Commercial sureties also permit bail for only a fraction of what the court requires, and often offer installment plans to facilitate payment. Thus, rather than *discriminating* against the poor, the system is designed to *support* those of lesser means.

* * *

Understood within its historical context and sound policy objectives, our modern system of bail is not about poverty or wealth, but instead about providing a critical, constitutionally-guaranteed option for preserving liberty while ensuring community safety and appearance in court. The guarantee extends both to criminal defendants and to commercial sureties who help them to exercise their right to bail. *See, e.g., Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (a business may assert the constitutional rights of its potential customers). Defendants who cannot post bail are not detained because they are poor. Instead, they are detained because the government had probable cause to arrest and charge them with crimes, and wishes to secure their appearance at trial and protect the community. The government must give them the *opportunity* to post non-excessive bail, but it need not guarantee they have the means to do so. It is in the very nature of bail, going back to its roots, that not every defendant will be able to find a willing surety. Indeed, the bail system relies on the premise that those who know the defendant the best—his support system of family and friends—may *decline* to stake their

resources on assuring his appearance. But on plaintiffs' view, the government should release defendants immediately if they are unable to post bail under a bail schedule. This catch-and-release system is fundamentally inconsistent with American tradition, makes no practical sense, and is not compelled by the Constitution.

II. Harris County's Bail System Is Constitutional.

Plaintiffs and the district court mount a frontal constitutional attack on monetary bail. They insist that Harris County release any defendant who says he cannot post bail—and that it do so *immediately*. They also insist that the County release defendants who do not receive a probable-cause and bail-setting hearing within 24 hours of arrest. That is not the law. The Supreme Court has repeatedly recognized that monetary bail is a constitutional means of protecting society and securing the accused's appearance at trial. Indeed, the text of the Constitution presupposes that bail is permissible by prohibiting only *excessive* bail. The Court has likewise held that, to the extent an initial hearing is required, state and local governments need only act within a reasonable amount of time. Nothing in the Constitution or Supreme Court precedent requires a 24-hour deadline.

A. Monetary Bail and Bail Schedules Are Constitutional.

At its core, plaintiffs' suit is an assault on the traditional American system of secured monetary bail. According to the theory endorsed below, indigent

defendants merit pretrial release for no other reason than their inability to afford bail. And this is hardly an outlier case advancing that extreme position: Plaintiffs' attorneys have sought similar injunctions nationwide, touting their goal of "ending the American money bail system." Equal Justice Under Law, Litigation: Ending the American Money Bail System, <http://bit.ly/1TXOgJv>.

But the Constitution clearly permits monetary bail procedures aimed at securing appearance at trial and protecting society from danger. That much is clear from the Eighth Amendment, which affirmatively guarantees that bail be offered in non-excessive amounts as an alternative to pretrial detention for most defendants. In *Stack v. Boyle*, the Supreme Court emphasized that "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture," the Court explained, "serves as additional assurance of the presence of an accused." *Id.* at 5. Thus, far from prohibiting monetary bail, the Constitution generally guarantees its availability as an option and requires that it not be excessive. A guarantee that bail not be excessive, however, does not mean that bail must be affordable. The question of excessiveness turns on the nature of the offense and "upon standards relevant to the purpose of assuring the presence of th[e] defendant," not on whether the defendant can afford to post bail. *Id.*

Indeed, the mine-run of bail cases take the constitutionality of monetary bail as a given, and include no suggestion that all indigent defendants must be released. In *United States v. Salerno*, 481 U.S. 739 (1987), for instance, the Supreme Court rejected a facial attack on the federal Bail Reform Act, holding that neither the Due Process Clause nor the Eighth Amendment prohibited the government from detaining especially dangerous defendants, *without bail*, in order to protect the community from danger. The Court’s analysis, and the parties’ arguments, never questioned that pretrial detention and monetary bail are constitutional, and that “a primary function of bail is to safeguard the courts’ role in adjudicating the guilt or innocence of defendants.” *Id.* at 753.

The same principles underscore the validity of monetary bail schedules, which set default bail amounts for various crimes based on their severity. *See, e.g., Fields v. Henry Cty.*, 701 F.3d 180, 184 (6th Cir. 2012). Especially for large population centers—like Harris County, the Nation’s third-largest jurisdiction—this routinized process is more efficient than requiring individualized bail hearings for every single offense by every single offender immediately after arrest. By setting presumptive bail amounts, a “bond schedule represents an assessment of what bail amount would ensure the appearance of the average defendant facing such a charge” and is “therefore aimed at assuring the presence of a defendant.” *Id.* Moreover, because they apply to all alike, “bond schedules are aimed at

making sure that defendants who are accused of similar crimes receive similar bonds,” *id.*, consistent with Eighth Amendment interests in avoiding excessive bail, *cf. Stack*, 342 U.S. at 5. This efficient process saves time for both the government and accused. *See Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) (“Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting its requirements.”). Importantly, since bail is designed to provide an alternative to deprivations of liberty for the convenience of the accused, the fact that bail schedules allow the quick release of many defendants is a constitutional virtue, not a lurking vice. The rights of those who have difficulty meeting the presumptive bail amount are more than adequately guaranteed by the availability of a reasonably prompt hearing at which a magistrate can, if necessary and appropriate, adjust bail.

Thus, as with any system of monetary bail, bail schedules serve the same well-founded interests in enabling defendants to obtain release—in many cases, even more quickly than in traditional systems—while protecting the community and securing the defendants’ later appearances in court. That the method begins with a presumption that can be adjusted to meet the needs of unique cases renders it logical, not unconstitutional.

B. Plaintiffs’ Constitutional Challenge to the County’s Bail System Is Meritless.

Plaintiffs would have this Court ignore the deep history of monetary bail, the significant societal interest in securing appearance for prosecution, and the reasonable nature of the County’s bail schedule in favor of sound-bites and invective. They have not alleged that the bail assigned to them is “excessive” under the Eighth Amendment, which is the constitutionally prescribed avenue for challenging the amount of bail. *See, e.g., Stack*, 342 U.S. at 1; *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) (recognizing that when a constitutional provision addresses an issue directly that specific provision, rather than general guarantees of due process, governs the analysis). Instead, they accuse the County of “jailing ... people because they cannot pay a predetermined sum of money to secure their release,” in violation of the Fourteenth Amendment. Dkt. 143 at 1. Remarkably, the district court agreed, concluding that the Equal Protection and Due Process Clauses require the release of *any* misdemeanor defendant who merely says he cannot *afford* the required bail, or if he does not receive a bail hearing *within 24 hours*.

That is wrong from every angle. As a factual matter, criminal defendants are not jailed in Harris County because of indigency. Rather, they are jailed because County officials concluded—after a review of all relevant factors—that releasing them on unsecured promises to appear would present risks of nonappearance,

would endanger the community, or both. The named plaintiffs are prime examples. Each had either previous failures to appear, previous convictions, or a combination of the two. *See* Dkt. 80 at 22-24. This is not at all a case where defendants were “imprison[ed] solely because of indigent status.” *Cf. Rainwater*, 572 F.3d at 1056.

Plaintiffs’ claims fare no better as a legal matter. As an initial matter, the district court misconstrued Texas law. Texas law recognizes three types of bonds. A bail bond is a written undertaking entered into by the defendant and his sureties. Tex. Code Crim. Pro. art. 17.02. If a surety swears it is worth twice the amount of the bond, then only one surety must sign the bond. *Id.* art. 17.11, §1. A cash bond arises where the defendant executes a bail bond and then deposits cash in the full amount of the bond with the court. *Id.* art. 17.02. A personal bond is a bond without sureties. *Id.* 17.03. The district court appears to have rewritten Texas law to create a new type of bond that has not been used in Texas previously: an unsecured bond that the sheriff is authorized to approve. But there is no such bond authorized under Texas law. A bail bond without sureties, under Texas law, is a personal bond. Only the magistrate judge or the trial court judge (in certain cases) is authorized to grant a personal bond. *Id.* The sheriff or other peace officer may not, without authorization from a court or magistrate, release a defendant charged with a misdemeanor on personal bond. *See* Tex. Atty. Gen. Op. No. JM-760 (1987).

Plaintiffs’ federal constitutional claims are equally flawed. As to their affordable-bail claim under the Equal Protection Clause, the Fourteenth Amendment cannot be employed to invalidate bail procedures that the Eighth Amendment allows. Instead, “[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 these claims.’” *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham*, 490 U.S. at 395). That is reason to dismiss plaintiffs’ equal-protection claim.

The district court brushed the Eighth Amendment aside and relied on three Supreme Court cases to conclude that intermediate scrutiny should apply to the equal-protection claim, and that plaintiffs are likely to prevail: *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971), and *Bearden v. Georgia*, 461 U.S. 660 (1983). In those cases, the government inflicted additional *punishment* (through an extended sentence or a revocation of parole) on a convicted defendant because he could not afford a fine. *See Williams*, 399 U.S. at 240-41; *Tate*, 401 U.S. at 397-98; *Bearden*, 461 U.S. at 661-62. But Harris County’s bail schedule has no effect on a defendant’s sentence, and the Supreme Court clearly held in *Salerno* (which post-dates *Williams*, *Tate*, and *Bearden*) that “pretrial detention ... does not constitute punishment.” 481 U.S. at 748.

Nor does the Fifth Circuit's (pre-split) *Rainwater*, also invoked below, support plaintiffs' position. If anything, it confirms the County's actions are constitutional. In *Rainwater*, the court upheld Florida's monetary-bail schedule against an attack similar to that leveled here. The class of plaintiffs there, like plaintiff here, argued that the "inevitable result" of the bail schedule would be uniform "pretrial detention of indigents." *Rainwater*, 572 F.3d at 1058. But the court noted that Florida's policy required "that 'all relevant factors' be considered in determining 'what form of release is necessary to assure the defendant's appearance,'" and when necessary a "judge w[ould] determine the amount of a monetary bail." *Id.* That was enough to ensure the policy's constitutionality. So too here.

Without support in precedent, plaintiffs' argument resolves to no more than a wealth-based disparate impact claim under the Equal Protection Clause. But the Supreme Court and this Court have repeatedly rejected such claims. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Court turned away a claim by students in districts with lower property tax revenues (and thus lower funding for their schools), holding that strict scrutiny does not apply to wealth-based claims and more broadly that, "where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." *Id.* at 24; *see also Driggers v. Cruz*, 740 F.3d 333, 337 (5th Cir.

2014). The Court has also explained that the *Williams-Tate-Bearden* line of cases apply only to “an absolute deprivation of the desired benefit,” *Rodriguez*, 411 U.S. at 23, while the Equal Protection Clause requires only “an adequate opportunity to present [one’s] claims fairly,” *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

Those standards are plainly met here. The County does not deny defendants the opportunity to obtain pretrial release; nor does it deny them an adequate opportunity to present a defense. Indeed, all defendants receive the exact same opportunities under the County’s bail system. The mere fact that those who can promptly assure their appearance at trial are released more quickly than those who cannot does not render the County’s bail system unconstitutional—it makes it rational. And that is the only relevant standard. *See Welchen v. Cty. of Sacramento*, No. 2-16-cv-00185-TLN-KJN, 2016 WL 5930563, at *11 (E.D. Cal. Oct. 11, 2016) (“[R]ational basis review is proper for assessing the Bail Law at issue because wealth status is not a suspect class.”). And, of course, this Court’s reluctance to extend the *Williams-Tate-Bearden* line of cases makes particular sense in the context of bail. The unfortunate reality that not every accused is in a position to post bond has not changed since the dawn of the Republic nor in the century and a half since the Equal Protection Clause was added to the Constitution. It strains credulity that an institution expressly protected by the Constitution since

the Founding has become unconstitutional based on a basic feature unchanged since the Founding.

Nor does plaintiffs' Due Process claim have legs. As the district court would have it, all misdemeanor defendants who do not receive a probable-cause and bail-setting hearing within 24 hours must be released. But no provision of the Constitution supports that position. If anything, the Supreme Court's decisions confirm the opposite. The Supreme Court has long recognized that "States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity." *Riverside*, 500 U.S. at 52. To that end, the Court has held that, under the Fourth Amendment, law enforcement may constitutionally arrest individuals without a warrant and detain them for a reasonable period of time, not to exceed 48 hours from arrest, before holding a probable cause hearing. *Id.* at 54-56; *accord Gerstein v. Pugh*, 420 U.S. 103 (1975). This reasonable safe harbor reflects "a 'practical compromise' between the rights of individuals and the realities of law enforcement." *Riverside*, 500 U.S. at 53. And it applies to both serious felonies and misdemeanors punishable only by a fine. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

No shorter period of time can possibly be required for setting bail. Indeed, the Supreme Court explicitly contemplated that local governments might prefer to

“[i]ncorporat[e] probable cause determinations ‘into the procedure for setting bail or fixing other conditions of pretrial release.’” *Riverside*, 500 U.S. at 54. And *Riverside* set the outer limit at 48 hours precisely so this “flexibility” would be possible. *Id.* Like the competing interests in *Riverside*’s Fourth Amendment analysis, the Court’s bail cases have always recognized the need to weigh society’s “interest in preventing crime by arrestees” and “safeguard the courts’ role in adjudicating the guilt or innocence of defendants” against “the individual’s strong interest in liberty.” *Salerno*, 481 U.S. at 749-50, 753. Accordingly, there is no reason why probable-cause and bail-setting hearings must occur within 24 hours. Plaintiffs and the district court simply cannot read into the Fourteenth Amendment what the Supreme Court has avoided reading into the Fourth and Eighth Amendments. The injunction below simply cannot stand.

CONCLUSION

For the reasons set forth above, this Court should reverse 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 6,451 words as determined by the word counting feature of Microsoft Word 2010.

Pursuant to Circuit Rule 28A(h), 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/Paul D. Clement
Paul D. Clement

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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Dated: June 26, 2017

s/Paul D. Clement
Paul D. Clement

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I hereby certify that on June 26, 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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