CASE NO. 17-20333

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARANDA LYNN O'DONNELL,
Plaintiff-Appellee,
v.

HARRIS COUNTY, TEXAS, ET. AL.,

Defendants-Appellants.

LOETHA SHANTA MCGRUDER & ROBERT RYAN FORD,
Plaintiffs-Appellees,
v.

HARRIS COUNTY, TEXAS, ET. AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

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BRIEF FOR AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, Civil Action No. 16-01414

The American Bar Association and undersigned counsel of record certify that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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 possible disqualification or recusal:

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The American Bar Association (the "ABA") is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all fifty States, the District of Columbia, and the United States territories, and include prosecutors, public defenders, and private defense counsel. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments. Members also include judges, legislators, law professors, law students, and non-lawyer associates in related fields.[1]

Since its founding in 1878, the ABA has worked to protect the rights secured by the Constitution, including the rights under the Due Process and Equal Protection Clauses of those accused of crimes. The *ABA Standards for Criminal Justice* (the "Criminal Justice Standards") is a comprehensive set of principles articulating the ABA's recommendations for fair and effective systems of criminal justice, and reflects the legal profession's conclusions on the requirements for the proper administration of justice and fairness in the criminal justice system.[2] Now in their

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[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was the brief circulated to any member of the Judicial Division Council before filing.

[2] The Criminal Justice Standards are available at https://www.americanbar.org/groups/criminal_justice/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-15 (2009). Pertinent provisions of the Standards are set forth in an appendix to this brief.

third edition, the Criminal Justice Standards were developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public, and then approved by the ABA House of Delegates, the ABA's policymaking body. Courts have frequently looked to the Standards for guidance about the appropriate balance between individual rights and public safety in the field of criminal justice. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984); *Frank v. Blackburn*, 646 F.2d 873, 880 (5th Cir. 1980), *modified*, 646 F.2d 902 (5th Cir. 1981); *Hardin v. Estelle*, 365 F. Supp. 39, 46 (W.D. Tex.) *judgment aff'd*, 484 F.2d 944 (5th Cir. 1973); *Moore v. Quarterman*, No. CV H-08-2309, 2009 WL 10654176, at *7 (S.D. Tex. June 25, 2009). In fact, the Standards have been either quoted or cited in more than 120 U.S. Supreme Court opinions, 700 federal circuit court opinions, 2,400 state supreme court opinions, and 2,100 law journal articles. Pretrial Justice Institute, *Guidelines for Analyzing State and Local Pretrial Laws* II-ii (2017).

The ABA's Criminal Justice Standards on pretrial release ("Pretrial Release Standards") memorialize exhaustive study by the ABA about systems of pretrial release and detention that will secure the rights of the accused to a fair trial and the effective assistance of counsel, protect the community, and ensure that persons accused of crimes appear for court dates. As discussed below, those Standards reflect the ABA's conclusion that, although there may be rare circumstances in which

monetary conditions of release are necessary to ensure a defendant's appearance, money-bail requirements that fail to consider defendants' individual circumstances, especially their ability to pay, should be abolished. Such money-bail systems seriously impair the rights of the accused, and provide little if any benefit to the public. In addition, they result in the systemic jailing of release-eligible defendants solely because they cannot purchase their freedom. Money-bail systems that fail to incorporate individualized determinations of the appropriate conditions of release, and that result in large-scale wealth-based incarceration, violate the Fourteenth Amendment's Due Process and Equal Protection Clauses.

The ABA submits this brief to assist this Court with its examination of the money-bail system under review in this case. Under our system of justice, the right of any individual to liberty, and to effective defense against criminal charges, should not depend on that person's ability to pay. The Standards provide guidance on how jurisdictions can protect the constitutional rights of the accused while advancing their legitimate criminal justice interests.[3]

SUMMARY OF ARGUMENT

For decades, the ABA has urged jurisdictions to reduce their reliance on financial conditions on pretrial release. When the First Edition of the ABA's

[3] Undersigned counsel have fully authored the brief, with no counsel for a party authoring this brief in whole or part. Likewise, no person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation and submission of this brief, with no counsel or party making a monetary contribution to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Criminal Justice Standards was adopted in 1968, the ABA emphasized the serious constitutional concerns with money-bail systems, which discriminate against the indigent and impair defendants' ability to prepare an effective defense. The ABA's concerns about money bail have only deepened over time, and the Third Edition now provides that monetary conditions on pretrial release are appropriate only once the court considers the defendant's individual circumstances and the possibility of alternative conditions of release. Furthermore, a defendant's ability to pay bail must be reviewed both when bail is set and whenever a pretrial defendant who has been granted bail remains incarcerated based on an inability to pay.

Decades of research and study have shown that money bail harms defendants, with little offsetting public benefit. Money-bail systems frequently lead to wealth-based jailing of pretrial detainees. Pretrial detention disrupts indigent defendants' lives, leads to worse legal outcomes, and pressures innocent defendants to plead guilty. At the same time, money-bail systems do not improve appearance rates or public safety, and substantially consume public resources. It is no surprise, therefore, that a wide range of criminal justice stakeholders and a growing number of States and local jurisdictions have joined the ABA in rejecting the use of money bail.

Money-bail systems that result in the incarceration of presumptively innocent and otherwise release-eligible pretrial defendants violate the Fourteenth Amendment's Due Process and Equal Protection Clauses. The Supreme Court has repeatedly affirmed that individuals may not be jailed solely because of their

inability to pay fines, fees, and court costs. Money-bail systems that do not account sufficiently for a defendant's ability to pay cannot satisfy due process. The district court's order entering a preliminary injunction should be affirmed.

ARGUMENT

I. THE ABA'S CRIMINAL JUSTICE STANDARDS REJECT MONEY-BAIL SYSTEMS THAT FAIL TO CONSIDER ADEQUATELY A DEFENDANT'S ABILITY TO PAY.

The ABA's Standards have long rejected money-bail systems that fail to consider adequately a defendant's ability to pay. Such systems are inherently discriminatory, deleterious to the rights of the accused, unnecessary to ensure justice and public safety, and contrary to the bedrock constitutional principles that the ABA's Standards embrace. The ABA's current Standards—shaped by decades of exhaustive research—promote alternatives to money bail and pretrial detention, and endorse only those bail systems that adequately consider pretrial detainees' individual circumstances.

The First Edition of the ABA's Standards

The First Edition of the ABA's Criminal Justice Standards (the "First Edition"), adopted by the House of Delegates in 1968 following years of research, reflected the ABA's judgment that a person's liberty and ability to defend against criminal charges should not be determined by that person's financial resources. Animated by due process principles, the First Edition urged that reliance on money bail be reduced to minimal proportions and be "required only in cases in which no

other condition will reasonably ensure the defendant's appearance." American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release—Approved Draft, 1968* at 1.2 (the "First Edition"); *see also id.* at 5.3(a). The First Edition expressed the ABA's judgment that money bail is rarely necessary to serve the criminal justice system's legitimate needs: protecting the public and ensuring the defendant's appearance in court.

The accompanying Commentary likewise recognized money bail's serious harms.[4] It described how money bail "inevitably discriminates against the poor," citing studies showing that a significant percentage of defendants could not make bail of just $500. *Id*. at p. 3. The Commentary also recognized the human toll of pretrial detention, which subjects defendants "to the psychological and physical deprivations of jail life," jeopardizes defendants' employment, impacts defendants' innocent family members, and unnecessarily drains valuable public resources. *Id.* at pp. 2-3, 23.

The Second Edition of the ABA's Standards

Following a decade of further study, the ABA sharpened its criticism of money bail in the Second Edition of its Pretrial Release Standards, adopted in 1979.

[4] Unlike the Standards themselves, which set forth black-letter principles adopted by the ABA House of Delegates, commentary accompanying the Standards is not adopted by the House of Delegates. The commentary "does not necessarily represent the official position of the ABA," but it nonetheless "serves as a useful explanation of the black-letter standards." *See ABA Standards for Criminal Justice: Pretrial Release* at ii (3d ed. 2007).

See ABA Standards for Criminal Justice, ch. 10, Pretrial Release (2d ed. 1979) (the "Second Edition"). The ABA again noted serious constitutional concerns with systemically jailing people due to their inability to buy their liberty, stressing that "[r]elease on monetary conditions should be reduced to minimal proportions. *Id*. at 10.78-79 (citing, *inter alia*, *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Tate v. Short*, 401 U.S. 395 (1971)); *id.* at 10-1.3(c). The ABA approved money bail "only in cases in which *no other conditions* will reasonably ensure the defendant's appearance" and recommended that, when monetary bail is used, bail should be set "with regard for the defendant's ability to post bond" and only "at the lowest level necessary to ensure the defendant's reappearance." *Id.* (emphasis added).

Again recognizing that monetary release conditions rarely serve a legitimate function and are far less desirable than other non-monetary alternatives, the Second Edition suggested that any monetary pretrial release conditions at least take the form of an *unsecured* bond, or an unsecured bond accompanied by a *partial* cash payment. *See id.* at 10.78, 10-5.4(d). In other words, only in very rare circumstances should an otherwise release-eligible defendant's freedom be *conditioned on* the payment of any sum of money to the court.

The Third Edition of the ABA's Standards

Two decades of additional study and experience confirmed the ABA's conclusion that money-bail systems serve no legitimate public safety purpose, needlessly harm pretrial defendants, and impose unnecessary public costs. The Third

Edition of the ABA's Criminal Justice Standards, adopted in 2007 and currently in force, counsels that jurisdictions impose monetary release conditions only after considering defendants' individual circumstances, and ensure that defendants' finances never prevent their release. *See ABA Standards for Criminal Justice: Pretrial Release* (3d ed. 2007) (the "ABA Standards").

First, the ABA Standards include a presumption that money bail should rarely be used to secure a defendant's appearance in court. Importantly, the ABA Standards urge jurisdictions to adopt procedures designed to promote the release of defendants on their own recognizance—effectively a promise to appear in court—or, when necessary, on an unsecured bond. *Id.* at 10-1.4(a) & (c), 10-5.1(a). If release on personal recognizance would pose a "substantial risk" that a person will not show up for a court proceeding, endanger others' safety, or imperil the judicial system's "integrity" (through, for example intimidation of a witness), the Standards still promote release subject to the "least restrictive" condition or conditions that will "reasonably ensure" the person's later reappearance and deter the person from imperiling others or undermining the judicial process' integrity. *Id.* at 10-5.1(a)-(b), 10-5.2(a). The Standards encourage jurisdictions to impose conditions of release other than secured monetary bonds both because financial release conditions substantially undermine the Fourteenth Amendment's guarantees, and because the ABA's extensive research shows that, particularly when the defendant has community ties, non-financial release conditions such as supervised release or

simple court-date reminders are equally effective. The ABA Standards also recognize that consideration of non-financial release conditions is particularly important because of the disproportionate burden money bail imposes on indigent defendants. *Id.* at 10-5.3(d).

Second, the ABA Standards make secured money bail a last resort when setting pretrial release conditions. The Standards permit the imposition of "[f]inancial conditions other than unsecured bond . . . only when *no other less restrictive condition* of release will reasonably ensure the defendant's appearance in court."[5] And the Standards counsel that because a defendant's ability to pay has no rational connection to whether the defendant poses a danger to the community, monetary release conditions should be used only to ensure *reappearance*, not "to respond to concerns for public safety." *See id.* at 10-1.4(d).[6] The obvious corollary is that, if monetary release is only intended to ensure the defendant's later reappearance, the defendant must first actually be released. No release-eligible defendant should remain incarcerated simply because they cannot buy this freedom.

Third, the Standards prohibit bail systems that fail to account for an individual's ability to pay. *Id.* at 10-5.3(a). Consistent with the demands of due

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[5] ABA Standard at 10-5.3(a); *see also id.* at 10-5.3(d) (providing that judicial officer imposing financial conditions should first consider an unsecured bond).

[6] The Standards also recognize pretrial release conditions should be only be imposed as necessary to serve their legitimate purposes of ensuring defendants' reappearance and protecting the public; pretrial release conditions should never be imposed to punish or frighten the defendant, or to placate the public opinion. Standard 10-5.3(c).

process, the Standards urge that "[f]inancial conditions should be the result of an *individualized decision* taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the defendant's flight risk." *Id*. (emphasis added).

Moreover, the Standards unequivocally state that "[t]he judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay." *Id.* at 10-1.4(e). The ABA takes this position because, without such an ability-to-pay determination, a money-bail system "undermin[es] basic concepts of equal justice" and means that only "those who can afford a bondsman go free." *Id.* at pp. 111-12 (quoting Daniel J. Freed & Patricia Wald, *Bail in the United States* 21 (1964)). Accordingly, jurisdictions must fully consider each defendant's individual financial situation, including whether secured bail will prevent that person's release, and also must reconsider that defendants' financial situation whenever a release-eligible defendant remains incarcerated due to their inability to make bail.

The Pending ABA Resolution

Since the publication of its Standards, the ABA has continued to study and research the issue of money bail. Later this month, the ABA House of Delegates will consider a Resolution, prepared by the ABA Criminal Justice Section's Chair, urging jurisdictions "to adopt procedures favoring release of defendants upon their own recognizance or unsecured bond" and recommending that Courts "not impose

financial conditions of release that a defendant is unable to meet."[7] ABA, Resolution Regarding Financial Conditions of Pretrial Release 1:1-11 (under consideration). The Resolution is the culmination of a tremendous amount of research and will be accompanied by a detailed report prepared by experts in the field, updating the ABA on the state of the bail system since the ABA's adoption of the Standards in 2002.

Among these findings, the Report confirms that financial release conditions are not only rarely necessary, but that they have "adverse, and sometimes profoundly harmful, effects of which there was no knowledge fourteen years ago." *Id.*, Report at III. The report also recognizes that release conditions other than money bail are always sufficient to "reasonably ensure the defendant's appearance in court.'" *Id.*

Still, the ABA's research shows that, despite wide acceptance of the ABA's standards, pretrial confinement has increased substantially. In fact, the majority of individuals currently incarcerated have not yet been convicted of a crime. *Id.* As such, this Resolution reiterates the ABA's call to federal, state, local, and territorial governments to replace unconstitutional money-bail procedures with practices that rationally and effectively promote individual liberty, public safety, and the efficient administration of justice.

[7] The ABA will update the Court after the Resolution has been considered.

II. MONEY BAIL HARMS CRIMINAL DEFENDANTS AND DOES NOT SERVE THE FAIR AND PROPER ADMINISTRATION OF JUSTICE.

The ABA's Standards result from decades of research demonstrating that money-bail systems harm criminal defendants and their families, with no countervailing benefit to public safety or the administration of justice.

A. Money Bail Unfairly Harms Criminal Defendants and Undermines the Criminal Justice System.

Extensive research shows that money bail adversely affects criminal defendants and undermines the fairness, effectiveness, and credibility of our criminal justice system. In addition to depriving release-eligible persons of their liberty because of their inability to buy it, money bail often impairs pretrial detainees' ability to mount a defense to the charges against them and destabilizes their lives and those of their families.

First, money bail systematically places defendants in pretrial detention for no reason other than their inability to pay. In theory, money bail exists to facilitate a defendant's release; by definition, any defendant for whom bail is set is, by definition, release-eligible. Yet for many defendants, there is no option other than to wait in jail. Defendants and their families are frequently unable to afford a fixed monetary bond or a nonrefundable 10 or 20% commercial surety fee. Indeed, in many cases a commercial surety is not even an option; many bail bondsmen will not even offer small bonds—meaning that, ironically, indigent defendants who are charged with the least serious offenses may be more likely to stay in jail. *See* Brian

Montopoli, *Is the U.S. Bail System Unfair?*, CBS News (Feb. 8, 2013). Data show that many defendants are unable to meet even relatively small bond amounts; in New York City, for example, only 26% of criminal defendants made bail set at less than $500 at arraignment, and only 7% made bail set at $5,000 (the median amount for a felony). Mary T. Phillips, New York City Criminal Justice Agency, Inc., *A Decade of Bail Research in New York City*, 51 tbl. 7 (Aug. 2012). Even for those defendants who are ultimately able to secure the necessary resources, the process of doing so may take days or weeks.[8]

Second, the consequences of pretrial detention are profound: even a few days in jail can disrupt a defendant's life, leading to long-term negative consequences. Pretrial detainees cannot work or earn income while incarcerated and may lose their jobs while waiting for a hearing, making it even more difficult to make bail. *See Moving Beyond Money: A Primer on Bail Reform*, Criminal Justice Policy Program at Harvard Law School 7 (Oct. 2016) ("Moving Beyond Money"); *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972). Children may be left unsupervised, and elderly or sick relatives may have no one else to take care of them. Defendants living in shelters

[8] In rural areas, long distances and limited staff further increase the likelihood of prolonged detention before a defendant's first appearance before a judicial officer. It is therefore particularly important to find alternatives to money-bail systems in those jurisdictions. *See* Stephanie Vetter & John Clark, National Association of Counties, *The Delivery of Pretrial Justice in Rural Areas: A Guide for Rural County Officials* (2012). The ABA's Criminal Justice Standards state that "the defendant should in no instance be held by police longer than 24 hours without appearing before a judicial officer," Standard 10-4.1, but in many areas of the country, suspects are held for much longer times.

may lose housing for missing curfews or for prolonged absences. *See* Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015). For indigent defendants, even short periods of confinement can wreak havoc on an already precarious financial situation. Given indigent defendants' already diminished level of economic security and often shaky social safety nets, a prolonged pretrial detention may trigger a debilitating downward spiral, even if they are ultimately acquitted.

Moreover, detention does not just disrupt a defendant's life and hamper his or her ability to provide for the family. Incarcerated persons are also more likely to be sexually victimized, contract infectious diseases, and be exposed to unsafe and unsanitary living conditions, undermining their continued health and welfare. *See* Allen J. Beck et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, at 9 (2013); *Moving Beyond Money*, at 6. Alarmingly, pretrial detainees also commit four-fifths of jail suicides, a risk that is highest during the first seven days of incarceration, when detainees are experiencing the initial "shock of confinement." Margaret Noonan et al., U.S. Dep't of Justice, *Mortality in Local Jails and State Prisons, 2000-2013 – Statistical Tables* 3, 10, 12 (2015); *The "Shock of Confinement": The Grim Reality of Suicide in Jail*, NPR: All Things Considered (July 27, 2015).

Third, needless pretrial detention undermines the criminal justice system and frustrates detainees' legal rights. Pretrial detention impairs detainees' ability to prepare their case, including their "ability to gather evidence, contact witnesses, or

otherwise prepare [a] defense." *Barker*, 407 U.S. at 533. For more than fifty years, researchers have found that pretrial detention leads to worse case outcomes for indigent defendants. *See generally* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). Contemporary research too bears this out. Pretrial detainees are more likely to be convicted, more likely to receive jail or prison sentences, and, when convicted, are more likely to receive a longer prison or jail sentence. Phillips, *supra* at 115-21; Christopher T. Lowenkamp et al., Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013). These consequences are particularly perverse because they may weigh heaviest on the lowest-risk defendants; one study found that low-risk defendants detained for the entire pretrial period are more than five times more likely to be sentenced to jail compared to low-risk defendants released at some point before trial, and nearly four times more likely to be sentenced to prison—with sentences that, on average, are nearly three times longer. *See* Lowenkamp, *Investigating the Impact*, *supra* at 11.

Pretrial confinement contributes directly to these disparities. In part, pretrial detainees' adverse outcomes occur because their confinement prevents them from demonstrating their ability to comply with the law and contribute to society, including through employment, schooling, rehabilitation, and family obligations. Phillips, *supra* at 118. Furthermore, the prospect of prolonged pretrial detention may encourage guilty pleas from defendants who are innocent or have potential defenses

to the charges. *Moving Beyond Money*, at 7. In many cases, the anticipated length of pretrial detention may exceed the length of an actual post-conviction sentence; for some minor crimes, post-conviction incarceration may not even be an option. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004) (noting that defendants charged with misdemeanors or lesser felonies are more likely to be incarcerated before than after conviction). Thus, when given the choice between immediate release and trial after prolonged detention, many defendants, including *innocent* defendants, reasonably decide to plead guilty. Robert C. Boruchowitz et al., Nat'l Ass'n of Criminal Defense Lawyers, *Minor Crimes, Massive Waste* 32-33 (Apr. 2009).

Pretrial detainees' adverse case consequences are apparent in Harris County, Texas. Harris County misdemeanor defendants—otherwise eligible for release but imprisoned solely because of their inability to buy it—are twenty-five percent more likely to be convicted and forty-three percent more likely to be sentenced to jail than similarly-situated defendants who can afford their freedom. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 716-17 (2017). In fact, after controlling for "a wide range of confounding factors," including demographics and criminal history, researchers studying Harris County's bail system concluded that these adverse case outcomes were solely attributable to detainees' confinement. *Id.* at 717.

B. Money Bail That Results in Pretrial Wealth-Based Incarceration Does Not Advance Public Safety or the Interests of Justice.

For all of its costs to indigent defendants, money bail—particularly when imposed without regard to a defendant's individual circumstances—often fails to advance the primary interests of a pretrial release system: ensuring that released defendants appear for their court dates, and keeping high-risk defendants in detention. *See* Standard 10.1-1.

First, the available evidence indicates that money bail is rarely necessary to ensure defendants' future reappearance in court. Non-high risk defendants released on unsecured bonds reappeared for court dates at rates slightly *higher* than those posting secured bonds. *See* Michael R. Jones, Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 11 (2013). For example, the District of Columbia does not use money bail and maintains appearance rates for released defendants of 90%—as compared to a national average of less than 80%. *Compare* Pretrial Services Agency for the District of Columbia, *Performance Measures*, https://www.psa.gov/?q=data/performance_measures (data as of June 30, 2015) (last visited Aug. 7, 2017) *with* Thomas Cohen & Brian Reaves, Bureau of Justice Statistics, U.S. Dep't of Justice, *Pretrial Release of Felony Defendants in State Court* 8 fig. 5 (Nov. 2007), http://www.bjs.gov/content/pub/pdf/prfdsc.pdf. Furthermore, research shows significant increases in appearance rates from non-financial approaches, such as supervised release or basic reminders to pretrial

defendants of upcoming court dates. *See* Christopher T. Lowenkamp & Marie Van Nostrand, Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 17 (2013); Mitchel N. Herian & Brian H. Bornstein, *Reducing Failure to Appear in Nebraska: A Field Study*, 9 Nebraska Lawyer, Sept. 2010, at 11, 12-13 .

Second, there is no evidence that money-bail systems improve public safety. In fact, the opposite is true—low- and moderate-risk people who are detained for more than a day are significantly *more* likely to engage in a future crime, as compared with low- and moderate-risk people who are not. Christopher T. Lowenkamp et al., Arnold Found., *The Hidden Costs of Pretrial Detention* 17-18 (2013). And because innocent people will plead guilty to relatively low-level crimes in order to secure their release, the guilty person remains free and community safety suffers. *Moving Beyond Money*, at 7.

Third, despite the minimal benefit, excessive use of money bail imposes heavy costs on the criminal justice system. Needless incarceration based on someone's inability to afford their freedom bloats an already swollen criminal justice population—in 2015, pretrial detainees comprised over 62% of the people incarcerated in jails, up from 40% in 1983—and cost taxpayers an estimated $9 billion per year. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, U.S. Dep't of Justice, *Jail Inmates in 2015*, at 5, Table 4 (2016); Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Profile of Jail Inmates, 1989*, at 2 Table 1 (1991); Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail* 8 (Dec.

2015) (estimating the average daily cost per inmate at between $50 to $500). Wealth-based bail schemes thus impose substantial public costs and run counter to the ABA's policy of promoting fiscal responsibility by "eliminate[ing] unnecessary correctional expenditures, enhance[ing] cost effectiveness, and promot[ing] justice." ABA Crim. J. Sec., Report 107 (2002). In addition, jailed persons cannot contribute to society in other ways, including through employment, taxes, and spending. Pretrial detention's superfluous costs are particularly staggering when compared to the modest price of supervised release programs, estimated at only 10 dollars per individual per day. U.S. Gov't Accountability Office, GAO-15-26, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* 9-12, 19 (2014); *see also Pretrial Justice: How Much Does It Cost?*, Pretrial Just. Inst. 1-7 (2017).

Finally, wealth-based incarceration harms communities and worsens societal inequity by inherently discriminating against those with limited resources, disadvantaging them as compared to their more affluent peers. *Moving Beyond Money*, at 7. And because wealth strongly correlates with race, cash bail also exacerbates pre-existing racial disparities in the criminal justice system. *Id*. For example, a study of defendants accused of drug crimes found that Latinos and Blacks' odds of making bail were half those of Whites' with the same bail amounts and legal characteristics, suggesting that, on the whole, "Latinos and Blacks have fewer economic resources and networks than Whites with similar legal

characteristics." Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Justice Processing*, 22 Just. Q. 170, 183 (2005). The study's authors found that "Latino defendants are 67 percent more likely to be denied bail, 29 percent less likely to be granted a non-financial release, and receive bails that are 26 percent higher," and, most alarmingly for this Court's purposes, concluded that "ethnic disparity" is *most notable* "during the decision to grant a non-financial release." *Id.* at 183-84 (emphasis added). If Black and Hispanic defendants are less able to post bail, or more likely to receive higher bail amounts or be denied bail altogether, they are more likely to suffer the adverse consequences of pretrial confinement listed above.

C. A Consensus Has Developed that Money-Bail Schemes Are Unfair and Do Not Work.

Numerous organizations across the spectrum of the criminal justice system have joined the ABA in rejecting money-bail systems in favor of individualized pretrial release assessments.[9] For example, key recommendations from the U.S.

[9] *See, e.g.*, Nat'l Ass'n of Counties, *The American County Platform and Resolutions 2016-2017*, at 102, http://www.naco.org/sites/default/files/documents/2016-2017%20American%20County%20Platform.pdf (recommending that states and localities make greater use of non-financial pretrial release options, such as citation release and release on recognizance); Conference of Chief Justices, *Resolution 3*, at 2 (adopted Jan. 30, 2013) (urging court leaders to advocate for the presumptive use of nonfinancial release conditions); Am. Jail Ass'n, *Resolutions of the American Jail Association* 40 (2017), http://www.americanjail.org/files/About%20PDF/_AJA%20Resolutions%20-%20January%202017.pdf (recognizing that pretrial supervision can be a safe and cost-effective alternative); Nat'l Ass'n of Criminal Defense Lawyers, *Policy on Pretrial Release and Limited Use of Financial Bond* 1, https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=25175&libID=25144 (last visited August 7, 2017) ("Consistent with the current ABA Standards on Pretrial Release, these guidelines permit the denial of bail only when the judicial officer finds clear and convincing evidence the accused represents a significant risk of flight or imminent physical harm to others."); Am.

Department of Justice, Office of Justice Program's 2011 National Symposium on Pretrial Justice included "[e]liminating the use of the automatic, predetermined money bail." National Symposium on Pretrial Justice, *Summary Report of Proceedings* 39 (2011). In 2016, the Department of Justice again reminded courts that they "must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release." Dear Colleague Letter from Gupta, Principal Dep. Ass't Att'y Gen., Civil Rights Division and Foster, Director, Office for Access to Justice 2 (Mar. 14, 2016). Likewise, the National Sherriff's Association recognized that "a justice system relying heavily on financial conditions of release at the pretrial stage is inconsistent with a fair and efficient justice system." Nat'l Sheriffs Ass'n, Resolution 2012-6, *National Sheriffs' Association Supports & Recognizes The Contribution Of Pretrial Services Agencies To Enhance Public Safety* (2012).

Several state and local governments have likewise abandoned their money-bail schemes. As of 2015, 21 States expressly provided a presumption in favor of releasing defendants on personal recognizance or an unsecured bond, and 16 required courts to impose the least-restrictive condition on pretrial release. *See*

Probation and Parole Ass'n, *Resolution – Pretrial Supervision* (enacted June 2010), https://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3fa8c704-5ebc-4163-9be8-ca48a106a259 (recognizing pretrial supervision as a safe and cost-effective alternative to jail for many individuals awaiting trial); *see also* Nat'l Ass'n of Pretrial Services Agencies, *Standards on Pretrial Release* (3d ed. 2004), https://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf.

Amber Widgery, Nat'l Conference of State Legislators, *Guidance for Setting Release Conditions* (May 13, 2015); *cf.* Standard 10.1-6 (recognizing "policy favoring release"); *id.* at 10.1-2 ("In deciding pretrial release, the judicial officer should assign the least restrictive condition(s) of release.").

Several states and local jurisdictions have either authorized or adopted fact-sensitive risk assessment tools evaluating appropriate conditions of pretrial release. *See* Press Release, Arnold Found., *More Than 20 Cities and States Adopt Risk Assessment Tool To Help Judges Decide Which Defendants To Detain Prior to Trial* (June 26, 2015); *cf.* Standard 10-1.10 ("Every jurisdiction should establish a pretrial services agency or program to collect and present the necessary information, [and] present risk assessments[.]"). Most recently, New Jersey has nearly eliminated cash bail. *See* Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. Times (Feb. 6, 2017), *https*://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html.

In sum, evidence and experience show that money bail imposed without consideration of a defendant's ability to pay has no place in a modern system of criminal justice. In the few circumstances where a financial condition of release is necessary to ensure a defendant's appearance at trial, a court can impose one, provided that it is tailored so that defendants are never held in jail merely because they cannot afford to pay the bond. But in the great majority of cases, money bail—and certainly a money-bail system in which the amount of the bail is mechanically

set by reference to a schedule of charges, with no consideration of the defendant's ties to the community or financial circumstances—is unnecessary, and will only hobble the accused person's ability to muster a defense to the charges against him, all while imposing a grave human toll.

III. HARRIS COUNTY, TEXAS' BAIL SYSTEM ILLUSTRATES THE CONSTITUTIONAL PROBLEMS WITH MONEY BAIL.

The ABA's Criminal Justice Standards are built on the basic constitutional premise that individuals should not be incarcerated solely based on their inability to purchase freedom. Faithful application of the Standards—including individualized risk and financial assessments, the imposition of only the least restrictive release conditions, and a general presumption in favor of pretrial release—should ensure that defendants' constitutional rights will be protected. Here, however, Harris County's wealth-based bail scheme falls far short of ABA guidelines and violates both the Equal Protection and Due Process Clauses.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court emphasized that depriving a person of "conditional freedom simply because, through no fault of his own, he cannot pay … would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id*. at 672-73. Consistent with this basic principle, the Court has rejected a number of other government policies and practices in a wide range of contexts for "punishing a person for his poverty." *Id*. at 671 (revocation of probation for inability to pay fine); *see, e.g.*, *Tate v. Short*, 401 U.S. 395, 398 (1971)

(incarceration for inability to pay traffic fines); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (incarceration beyond statutory maximum due to inability to pay fine); *Smith v. Bennett*, 365 U.S. 708, 711 (1961) (inability to pay fee to file petition for writ of habeas corpus); *see also Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding trials must not depend on the amount of money a person is able to pay).

Before overriding a defendant's "strong interest in liberty," jurisdictions must recognize the "importance and fundamental nature" of the right to pretrial release and must carefully consider whether the government has advanced "sufficiently weighty" interests to the contrary. *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). Money-bail systems that fail to account for defendants' ability to pay and continue to incarcerate release-eligible persons based on their inability to buy their freedom do not meet that standard. As this Court explained in *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), when an indigent defendant's appearance can be assured by an alternate form of release, "pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint." *Id*. at 1058. Following this Circuit's reasoning, even if money bail might be constitutionally acceptable in certain circumstances, it can never be the only option available to indigent defendants. As the District Court found, that has effectively been the case in Harris County. *ODonnell v. Harris Cty.*, No. CV H-16-1414, 2017 WL 1735456, at *3 (S.D. Tex. Apr. 28, 2017).

In addition to treating defendants differently and arbitrarily depending on their financial status, money-bail systems violate the fundamental constitutional right to due process. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. Wealth-based bail schemes violate the bedrock constitutional principle that, prior to being deprived of liberty or property, persons must have notice and a meaningful opportunity to be heard. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Rigorous procedural requirements must be followed before a person can be jailed for non-payment; in any proceeding where ability to pay is at issue, an individual must both receive notice that ability to pay may be a critical question in the proceedings and must also have an opportunity to present their financial information, and the court must make an express finding that the person has the ability to pay. *Turner v. Rogers*, 564 U.S. 431, 446-48 (2011). Moreover, the amount of monetary bail must be revisited whenever any release-eligible defendant remains in jail following a bail determination; the purpose of bail is to enable a defendant's release, so if the amount set does not result in release, the setting of bail has not served its purpose. Procedural safeguards such as these are especially important in the context of pretrial detention, where the presumption of innocence is at its peak, and where every person granted bail is, by definition, release-eligible. Bail systems like Harris County's, which penalize persons who cannot afford to pay bail with pretrial detention, cannot satisfy these procedural due process requirements.

Due process also prohibits the government from limiting certain fundamental liberty interests—no matter how much process is provided—"unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). In *Salerno*, the Court held that a pretrial detention system that applied to those "arrested for a specific category of extremely serious offenses" who "Congress specifically found [were] far more likely to be responsible for dangerous acts in the community after arrest" was narrowly tailored to serve such a compelling state interest. *Salerno*, 481 U.S. at 750. Critically, however, the Court explained that the pretrial detention system there required the government to demonstrate "probable cause" that the arrestee committed the charged crime and to convince a neutral decision-maker, following a "full-blown adversary hearing," and a finding "that no conditions of release can reasonably assure the safety of the community or any person[s]." *See id*.

Harris County's pretrial detention scheme cannot satisfy this burden. Conditioning a person's release on their ability to buy it does nothing to further community safety. Quite the opposite, unwarranted pretrial detention often undermines public safety. Thus, wealth-based pretrial detention schemes—such as Harris County's—not only violate the ABA's Standards, but also are unconstitutional.

CONCLUSION

The judgment of the district court invalidating the Harris County money-bail system should be affirmed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 7,590 words. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that on August 9, 2017, I caused the foregoing Brief for American Bar Association as *Amicus Curiae* in Support of Plaintiffs-Appellees and Affirmance to be electronically filed via the Court's CM/ECF System. Counsel for all parties will be served via the Court's CM/ECF system at the email addresses on file.

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