No. 18-11368

In the 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; RAQUEL JONES, 203RD; TAMMY KEMP, 204TH; JENNIFER BENNETT, 265TH; AMBER GIVENS-DAVIS, 282ND; LELA MAYS, 283RD; STEPHANIE MITCHELL, 291ST; BRANDON BIRMINGHAM, 292ND; TRACY HOLMES, 363RD; TINA YOO CLINTON, NUMBER 1; NANCY KENNEDY, NUMBER 2; GRACIE LEWIS, NUMBER 3; DOMINIQUE COLLINS, NUMBER 4; CARTER THOMPSON, NUMBER 5; JEANINE HOWARD, NUMBER 6; CHIKA ANYIAM, 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; CARMEN WHITE, 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

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS CROSS-APPELLEES AND REVERSAL IN PART

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, other than those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: April 5, 2021

/s/ Dayna J. Zolle
Dayna J. Zolle

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for equality and liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Dallas County, Texas has a policy of using secured money bail to impose pretrial detention on criminal defendants too poor to pay. This policy denies the most basic form of liberty to those unable to pay, exerts coercive pressure on defendants charged with criminal offenses to plead guilty in order to be released, and makes it harder for others to prepare a defense. Using the bail system in this way perverts the historic use of bail as a mechanism for ensuring pretrial liberty for persons charged with a crime, and it is completely unnecessary in light of numerous alternative approaches that serve the government's interests in a defendant's

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

appearance at trial and in community safety. For all of these reasons, this policy cannot be squared with the text and history of the Fourteenth Amendment, which guarantees equal justice under the law to rich and poor alike.

Nearly 150 years ago, in the wake of a bloody Civil War fought over the issue of slavery, the Fourteenth Amendment added to our nation's charter sweeping guarantees of liberty and equality in order to secure "the civil rights and privileges of all citizens in all parts of the republic," *see* Joint Comm. on Reconstruction, *Report of the Joint Committee on Reconstruction*, No. 39-30, at xxi (1st Sess. 1866). Crafted against the backdrop of the suppression of rights in the South, the Fourteenth Amendment was designed to protect the full scope of liberty and to "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Together with its guarantee of equal protection, which "secur[ed] an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502, the Fourteenth Amendment gives to "the humblest, the poorest, the most despised" persons "the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766.

The Fourteenth Amendment's guarantees of liberty and equality together ensure equal justice under the law for all persons, rich and poor. As the Supreme Court has explained, "[b]oth equal protection and due process emphasize the central

aim of our entire judicial system—all people charged with crime must, as far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)). It is "a basic premise of our criminal justice system" that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

Thus, even when fair on their face, state rules that "grossly discriminat[e] in [their] operation," *Griffin*, 351 U.S. at 17 n.11, cannot be squared with the constitutional command of due process and equal protection for all persons. The Fourteenth Amendment does not tolerate a system of criminal justice in which "poor arrestees . . . are incarcerated where similarly situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond." *ODonnell v. Harris Cty.*, 892 F.3d 147, 162 (5th Cir. 2018). In a long line of cases rooted both in equal protection and due process principles, the Supreme Court has faithfully applied this constitutional commitment to equal justice for rich and poor alike, striking down deprivations of liberty that affect people based on how much money they possess. *See Griffin*, 351 U.S. at 17; *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

Dallas County's bail system runs afoul of these principles. Quite simply, pricing those too poor to pay out of the "traditional right to freedom before conviction," *Stack v. Boyle*, 342 U.S. 1, 4 (1951), violates the Fourteenth Amendment's mandate that all persons enjoy equal justice under the law. Nor can it be squared with the historic use of bail as a due process mechanism for preserving pretrial liberty, which ensures "the unhampered preparation of a defense" and "prevent[s] the infliction of punishment prior to conviction." *Id.* "The practice of admission to bail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, . . . [it] enable[s] them to stay out of jail until a trial has found them guilty." *Id.* at 7-8 (Jackson, J., concurring); *see United States v. Salerno*, 481 U.S. 739, 755 (1987) (fundamental constitutional principles make "liberty . . . the norm" and "detention prior to trial or without trial . . . the carefully limited exception").

The County's use of bail as a mechanism for imposing pretrial detention on those too poor to pay turns bail, a fundamental aspect of our heritage of liberty, into an engine of oppression. "[H]olding a defendant on an unaffordable bail amount defeats bail's purpose of securing pretrial liberty." *Brangan v. Commonwealth*, 80 N.E.3d 949, 966 (Mass. 2017). The Fourteenth Amendment does not permit "pretrial confinement for inability to post money bail" where an indigent defendant's "appearance at trial could reasonably be assured by one of the alternate forms of

release." *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc); *In re Humphrey*, No. S247278, 2021 WL 1134487, at *1 (Cal. Mar. 25, 2021) (holding that "conditioning freedom solely on whether an arrestee can afford bail is unconstitutional" because "[o]ther conditions of release . . . can in many cases protect public and victim safety as well as assure the arrestee's appearance at trial").

There is no conflict between ensuring pretrial liberty for all persons regardless of income and the government's plainly important interests in ensuring the presence of defendants at trial and in community safety. As the experiences of states across the country demonstrate, governments have many alternatives available to them that not only ensure the appearance of defendants at trial and preserve public safety, but also comport with the fundamental fairness that the Fourteenth Amendment guarantees to all persons. As these examples demonstrate, Dallas County's bail system unnecessarily denies pretrial liberty to indigent defendants and prevents the equal administration of justice. Plaintiffs are entitled to a court order requiring these unconstitutional practices to cease.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Guarantee Equal Justice Under the Law for All Persons.

The Fourteenth Amendment commands that "[n]o State" "shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend.

XIV, § 1. These overlapping guarantees "fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010), in order to "repair the Nation from the damage slavery had caused." *Id.* at 807 (Thomas, J., concurring). They enshrined in the Constitution the idea that "[e]very human being in the country, black or white, man or woman . . . has a right to be protected in life, in property, and in liberty," Cong. Globe, 39th Cong., 1st Sess. 1255 (1866), and they gave to "the humblest, the poorest, the most despised" persons "the same rights and the same protection of the law as [they gave] to the most powerful, the most wealthy, or the most haughty." *Id.* at 2766.

More specifically, "[d]ue process and equal protection principles converge," *Bearden*, 461 U.S. at 665, to ensure that the state may not "bolt the door to equal justice." *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring); *see M.L.B.*, 519 U.S. at 120 ("The equal protection concern relates to the legitimacy of fencing out [litigants] based solely on their inability to pay . . . . The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action."); *cf. Pugh*, 572 F.2d at 1057 ("Rules under which personal liberty is to be deprived are limited by the constitutional guarantees of all, be they moneyed or indigent . . . ."). The Fourteenth Amendment thus requires "procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Griffin*, 351 U.S. at 17.

Ensuring equal justice in the courts for all persons was of particular concern to the drafters of the Fourteenth Amendment. In the wake of the Civil War, widespread maladministration of justice in the South meant that neither newly freed persons nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 602, 783, 1065, 1090-91, 1093-94, 1263 (1866). The Framers understood that the lack of fundamental fairness in the courts was instrumental in the subordination of African Americans and their Unionist allies. Sadly, it was all too "easy to show how impossible it is for the freedmen . . . to receive anything like justice, protection, equity . . . . Judges, juries, lawyers, officers . . . carry with them such a hatred and contempt for the freedmen as to utterly preclude the idea that they can do him full justice." *Id.* at 1838; *id.* at 653 ("Where is your court of justice in any southern State where the black man can secure protection? Again there is no response."); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty, or property").

The Framers of the Fourteenth Amendment were familiar with abuses of the bail system and understood how the denial of bail could be used to deprive individuals of their liberty. The Black Codes, the South's effort to reimpose slavery and strip African Americans of fundamental rights, enforced bans on gun ownership

by African Americans by holding those who violated the law "in default of bail." An Act to Punish Certain Offenses Therein Named, and for Other Purposes, § 1 (Nov. 29, 1865), *reprinted in* S. Exec. Doc. 39-6, at 195-96 (1867). In effect, Black people who sought to possess arms for their defense were subjected to mandatory preventive detention.

These abuses—together with the injustices wrought in the North by the federal Fugitive Slave Act of 1850, *see* Akhil Reed Amar, *America's Constitution: A Biography* 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850")—convinced the Framers that it was necessary to add to the Constitution new limits on state governments in order to secure liberty and equality for all persons.

The Fourteenth Amendment guarantees to all persons—"no matter how poor, no matter how friendless, no matter how ignorant"—"due process of law . . . which is impartial, equal, exact justice," Cong. Globe, 39th Cong., 1st Sess. 1094 (1866), establishing "a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue." *Id.* at app. 256; Cong. Globe, 42d Cong., 1st Sess. app. 153 (1871) (arguing that the due process guarantee "realizes the full force and effect of the clause in Magna Carta, from which it was borrowed" and provides that "there is no power . . . to deprive any person of those great fundamental rights on which all true

freedom rests, the rights of life, liberty, and property, except by due process of law; that is by an *impartial trial* according to the laws of the land" (emphasis added)).

Under these principles, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755; *see Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). An "indigent defendant's loss of personal liberty . . . lies 'at the core of the liberty protected by the Due Process Clause,'" and its "threatened loss through legal proceedings demands 'due process protection.'" *Turner v. Rogers*, 564 U.S. 431, 445 (2011) (citations omitted). Detaining an individual prior to trial requires careful factual findings supporting the denial of this most basic form of liberty; detention cannot be imposed on the basis of indigency alone.

The Fourteenth Amendment also guarantees equal protection of the law to all persons, establishing "a shield and protection over the head of the lowliest and poorest citizen in the remotest region of the nation." Cong. Globe, 39th Cong., 1st Sess. 586 (1866). The constitutional guarantee of equal protection "establishes equality before the law," *id.* at 2766, ensuring that, in the administration of justice, all persons—regardless of their race, their gender, or the amount of money they possess—are entitled to equal rights under the law. The constitutional guarantee of equal protection also "abolishes all class legislation in the states and does away with the injustice of subjecting one caste of persons to a code not applicable to another."

Id. at 2766; *see id.* at 2459 ("Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man."); *id.* at 2766 ("It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."). This serves to ensure that "the Constitution, in the administration of justice, in the organization of tribunals for the administration of justice, is no respecter of persons." Cong. Globe, 36th Cong., 2d Sess. app. 83 (1861).

While the Fourteenth Amendment's guarantee of equality was written in the aftermath of the Civil War and the end of slavery, it protects all persons. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring), secures equal rights for all men and women of any race, whether young or old, citizen or not, rich or poor. *See* Cong. Globe, 39th Cong., 1st Sess. 343 (1866) ("[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and proudest man in the land[.]"); *id.* at 1159 ("A

true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black.").

Together, the Fourteenth Amendment's overlapping guarantees of due process and equal protection prevent the states from "bolt[ing] the door to equal justice," for rich and poor alike, *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring), a principle with deep roots in our constitutional heritage. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (quoting oath requiring Article III judges to swear to "administer justice without respect to persons, and do equal right to the poor and to the rich"); Magna Carta, chs. 39-40 (1215), http://avalon.law.yale.edu/medieval/magframe.asp ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay, right or justice."); John Locke, *Second Treatise of Government* § 142, at 75 (C.B. Macpherson ed., 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough."). Under these principles, imprisonment before trial may not be based on indigency alone. That would be tantamount to an order of pretrial detention imposed without any of the safeguards necessary to justify depriving an individual of their liberty prior to trial. *See* Sandra G. Mayson,

Detention by Another Name, 69 Duke L.J. 1643, 1645 (2020) ("[A]n order imposing unaffordable bail is an order of pretrial detention. It has precisely the same effect: the accused person sits in jail."); *Valdez-Jimenez v. Eighth Judicial Dist. Ct. of Nevada*, 136 Nev. 155, 165 (Nev. 2020) ("[W]hen bail is set in an amount that results in continued detention, it functions as a detention order.").

II. Supreme Court Precedent Prohibits Criminal Defendants from Being Imprisoned Solely as a Result of Indigency.

Consistent with the Fourteenth Amendment's text and history, the Supreme Court has long held that, under both due process and equal protection principles, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin*, 351 U.S. at 17. As the Court has explained, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973) (discussing cases striking down discrimination in the criminal justice system in which individuals "because of their impecunity . . . were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit"); *Walker v. City of Calhoun*, 901 F.3d 1245, 1261 (11th Cir. 2018) (recognizing that "differential treatment by wealth is impermissible" where "it results in a *total* deprivation of a benefit *because* of poverty").

Applying *Griffin*'s teachings, the Supreme Court has repeatedly held that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh*, 572 F.3d at 1056. As the Court has recognized, use of a blanket policy of incarcerating indigent defendants based on their inability to pay—particularly when there are alternative means of achieving the government's interests—cannot be squared with the Fourteenth Amendment's overlapping guarantees of liberty and equality for all persons. These protections apply both before and after trial.

In *Williams v. Illinois*, the Supreme Court held that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment . . . since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly." *Williams*, 399 U.S. at 243; *id.* at 264-65 (Harlan, J., concurring) (concurring on due process grounds). It did not matter that "the Illinois statutory scheme [did] not distinguish between defendants on the basis of ability to pay fines" because, as in *Griffin*, "'a law nondiscriminatory on its face may be grossly discriminatory in its operation.' Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine." *Id.* at 242 (quoting *Griffin*, 351 U.S. at 17 n.11). As the Supreme Court has since

explained, "[s]anctions of the *Williams* genre . . . are not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons'; they apply to all indigents and do not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127 (quoting *Williams*, 399 U.S. at 242) (internal citation omitted); s*ee Tate*, 401 U.S. at 397-98 (holding that "petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency").

The *Williams* Court recognized that its holding "may place a further burden on States in administering criminal justice," but it held that "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Williams*, 399 U.S. at 245. The Fourteenth Amendment requires states to "canvass the numerous alternatives" rather than simply apply a blanket policy of imprisoning indigent defendants for "involuntary nonpayment of a fine or court costs." *Id.* at 244; *Tate*, 401 U.S. at 399 (requiring states to use nondiscriminatory "alternatives . . . to serve its concededly valid interest in enforcing payment of fines"); *Hernandez v. Sessions*, 872 F.3d 976, 991 (9th Cir. 2017) ("[W]hen the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers

the individual's financial circumstances and alternative ways of accomplishing its purpose.").

In *Bearden v. Georgia*, the Supreme Court held that "*Griffin*'s principle of equal justice" did not permit a state court to revoke automatically an indigent's probation for failure to pay a fine. 461 U.S. at 664. Under due process and equal protection principles, "the State cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous. This would be little more than punishing a person for his poverty." *Id.* at 671. "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." *Id.* at 672. "To do otherwise," as the Supreme Court has explained, "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73.

The principles laid out in *Williams*, *Tate*, and *Bearden*—all cases involving defendants convicted after a fair trial—apply with even greater force to imprisonment *before* trial, when the presumption of innocence still attaches and the individual accused of a crime is entitled to the full scope of the Constitution's

protections. "Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." *Stack*, 342 U.S. at 4. Without this basic right, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* Virtually all of the Constitution's safeguards that "ensur[e] against the risk of convicting an innocent person" and "make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant," *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993), are harder to exercise and meaningfully enjoy when the defendant is denied his liberty and incarcerated before trial. "If a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972); *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (recognizing that defendants denied their pretrial liberty "are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense").

Even more troubling, in misdemeanor and low-level felony cases that make up a significant part of the criminal justice system in Dallas County and elsewhere, "pretrial detention can approach and even exceed the punishment that a court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario

becomes not zero days in jail, but the length of time already served." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492-93 (2004). Our system of "criminal justice . . . is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), and "pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial." Bibas, *supra*, at 2493. Indeed, "research shows that defendants detained in jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period." Pretrial Justice Inst., *Rational and Transparent Bail Decision Making: Moving from a Cash-Based to a Risk-Based Process* 2 (2012), http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf.

The Supreme Court has upheld the constitutionality of federal statutes providing for pretrial detention only in sharply limited circumstances, holding that "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, . . . a court may disable the arrestee from executing that threat." *Salerno*, 481 U.S. at 751. Despite "the individual's strong interest in liberty" and the "fundamental nature of this right," *id.* at 750, the Court approved the use of pretrial detention because of

"Congress' careful delineation of the circumstances under which detention will be permitted." *Id.* at 751; *Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) ("[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."); *Foucha*, 504 U.S. at 81-82 (holding that "*Salerno* does not save" a system of detention where the "scheme of confinement is not carefully limited" and the "State need prove nothing to justify continued detention").

Dallas County's bail policy imposes pretrial detention on indigent defendants too poor to pay and thereby denies the "'core of the liberty protected by the Due Process Clause,'" *Turner*, 564 U.S. at 445 (quoting *Foucha*, 504 U.S. at 80), without any "careful delineation of the circumstances," *Salerno*, 481 U.S. at 751, and without any findings at all. This policy subjects indigent defendants—simply because they are poor—to "one of the most feared instruments of state oppression and state indifference," *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting), makes it more difficult for them to "gather evidence, contact witnesses, or otherwise prepare [a] defense," *Barker*, 407 U.S. at 533, and pressures them to plead guilty simply to get out of jail. *See ODonnell*, 892 F.3d at 162 ("indigent misdemeanor arrestees are unable to pay secured bail, and, as a result, sustain an absolute deprivation of their most basic liberty interests—freedom from incarceration"). This practice "lump[s] [plaintiffs] together with other poor persons," effectively "punishing [them] for

[their] poverty." *Bearden*, 461 U.S. at 671. It creates a system in which "the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration," while the "poor arrestee . . . must bear the brunt of all of these, simply because he has less money than his wealthy counterpart." *ODonnell*, 892 F.3d at 163. That practice cannot be squared with the Fourteenth Amendment.

III. Experience Shows that Governments Have Ample Means to Ensure Pretrial Liberty for All Persons While Securing a Defendant's Attendance at Trial and Protecting Public Safety.

The use of secured money bail to impose pretrial detention on indigent defendants is not necessary to serve the fair administration of justice. To the contrary, governments have many alternative means at their disposal to ensure pretrial liberty for all persons—regardless of the amount of money in their bank account—while also ensuring the presence of defendants at trial and protecting public safety. Indeed, the experiences of state governments, as well as the federal government, make clear that the goals Dallas County purports to advance can be "served fully by alternative means," *Bearden*, 461 U.S. at 672, consistent with our nation's constitutional commitment to equal justice for rich and poor alike.

More than half a century ago, Congress recognized that it was unjust to maintain a bail system in which the "defendant with means can afford to pay bail," while the "poorer defendant . . . languishes in jail weeks, months, and perhaps even

years before trial." *See* President Lyndon B. Johnson, Remarks on the Signing of the Bail Reform Act of 1966 (June 22, 1966), http://www.presidency.ucsb.edu /ws/?pid=27666. To effectuate this promise of equal justice for rich and poor alike, federal law currently provides that "[a] judicial officer may not impose a financial condition that results in the pretrial detention of [a] person," 18 U.S.C. § 3142(c)(2), and requires courts to consider non-financial conditions on pretrial liberty in order to ensure that defendants appear for trial and do not pose a threat to public safety, *id.* § 3142(c)(1), (g); *United States v. McConnell*, 842 F.2d 105, 109 (5th Cir. 1988) (noting the congressional decision "proscribing the setting of a high bail as a *de facto* automatic detention practice"). The Bail Reform Act of 1966, which sought to ensure pretrial liberty for "all persons, regardless of their financial status," Pub. L. No. 89-465, § 2, 80 Stat. 214, together with the Bail Reform Act of 1984, Pub. L. No. 98-473, §§ 3141-50, 98 Stat. 1837, which gave courts the power to detain defendants shown to pose a danger to public safety, create a bail system based on the risk of flight or danger a defendant poses, not the amount of money he or she possesses.

In recent years, many states, too, have reexamined their bail systems, concluding that the availability of pre-trial release for persons charged with a crime should depend on the risks they pose, not the amount of money they can pay. Bail systems that rely on secured money bail, these jurisdictions have concluded, do not

serve the fair administration of justice or public security. They deprive indigent defendants of their pretrial liberty even when the defendants pose a low risk of flight or harm to public safety, while wealthier defendants who may, in fact, pose a greater risk to public safety are released. As these jurisdictions have concluded, ensuring that bail determinations respect the principle of equal justice for rich and poor alike enhances, rather than detracts from, public safety.

States across the country have reached the conclusion that the use of individualized pretrial risk assessment and non-monetary conditions of release—rather than secured money bail—can ensure pretrial liberty for rich and poor alike while ensuring attendance at trial and promoting public safety. *See* Md. R. 4-216.1(c)(1) (requiring "release on personal recognizance or unsecured bond" absent finding "that no permissible non-financial condition" will "reasonably ensure (A) the appearance of the defendant, and (B) the safety of each alleged victim, other persons, or the community"); N.J. Stat. Ann. § 2A:162-15 (West 2017) ("primarily relying upon pretrial release by non-monetary means to reasonably assure an eligible defendant's appearance in court when required" and "the protection of the safety of any other person or the community" and providing that "[m]onetary bail may be set for an eligible defendant only when it is determined that no other conditions of release will reasonably assure the eligible defendant's appearance in court when required"); 725 Ill. Comp. Stat. Ann. 5/110-1.5, 110-2, 110-5 (West 2021)

(abolishing, effective 2023, cash bail, requiring use of non-financial conditions of pretrial release, and providing that "[d]etention only shall be imposed when it is determined that the defendant poses a specific, real and present threat to a person, or has a high likelihood of willful flight"); Colo. Rev. Stat. Ann. § 16-4-103 (West 2014) (requiring courts, where "practicable and available," to use "an empirically developed risk assessment instrument designed to improve pretrial release decisions" and to "[c]onsider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration"); Ky. Rev. Stat. Ann. § 431.066 (West 2012) (providing for use of a "pretrial risk assessment" and requiring release "on unsecured bond or on the defendant's own recognizance" of "low risk" defendants and release with non-financial conditions, including "ordering the defendant to participate in global positioning system monitoring, controlled substance testing, increased supervision, or other such conditions," for "moderate risk" defendants); Ark. R. Crim. P. 9.2(a) (permitting setting of "money bail only" if "no other conditions will reasonably ensure the appearance of the defendant in court"); N.H. Rev. Stat. Ann. § 597:2(III)(b)(4) (West 2020) (prohibiting the use of a "financial condition that will result in the pretrial detention of a person solely as a result of that financial condition unless the court determines by clear and convincing evidence that the nature of the allegations presents a substantial risk that the person will not appear and that no reasonable alternative will assure the person's appearance").

A number of jurisdictions have made explicit that bail cannot be used to impose preventive detention on those too poor to pay. *See* Md. R. 4-216.1(e)(1)(A) (prohibiting the imposition of a "special condition of release with financial terms in form or amount that results in the pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition"); Ariz. R. Crim. P. 7.3(c)(2)(A) ("The court may not rely on a schedule of charge-based bond amounts, and it must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed monetary condition."); N.M. Const. art. II, § 13 (amended 2016) ("A person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond."); D.C. Code § 23-1321(c)(3) (authorizing use of a "financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in" the preventive detention statute).

These rules reflect concerns that using secured money bail to detain those too poor to pay neither promotes the fair administration of justice nor advances public safety. In Maryland, Attorney General Brian Frosh found that "bail was set higher for low risk defendants than for their moderate and high risk counterparts. Lower risk defendants are detained because they cannot afford the bail, while higher risk

defendants who have access to financial resources are able to make bail . . . ." Letter from Attorney Gen. Brian Frosh to Hon. Alan M. Wilner at 3 (Oct. 25, 2016), http://www.marylandattorneygeneral.gov/News%20Documents/Rules_Committee_Letter_on_Pretrial_Release.pdf. The change from a resource-based to a risk-based system reflected that "evidence-based pretrial risk assessments experience a reduction in their pretrial detention populations and an increase in defendants' appearance at trial without incurring a greater risk to public safety." *Id.* at 4.

In New Jersey, a 2014 report authored by the Joint Committee on Criminal Justice, which was chaired by the Chief Justice of the New Jersey Supreme Court and included the Acting Attorney General, prosecutors, defense attorneys, judges, and others, spurred bipartisan state efforts to limit the use of money bail. A "resource-based system" dependent on the use of secured money bail, the Committee found, resulted in "dual system error": "the detention of poor defendants who present manageable risks of pretrial misconduct and the release of more affluent defendants who present more severe and frequently less manageable risks of pretrial misconduct." *Report of the Joint Committee on Criminal Justice* 67 (2014), https://www.judiciary.state.nj.us/courts/assets/criminal/finalreport3202014.pdf. The report unanimously recommended a shift to a risk-based system, explaining that such a system "promotes both defendant's liberty interests and community safety," as well as "public confidence in the integrity of the judicial process." *Id.* "In a risk-

based system, those defendants who present an unmanageable risk of pretrial misconduct may be detained. Every other defendant is conditionally released, subject to the least restrictive conditions crafted to address their individualized risks of flight and danger." *Id.* at 65. This avoids the "incentive, inherent in any resource-based system, to address the unmanageable risks of such pretrial misconduct through the *sub rosa* consideration of danger in setting an unaffordably high money bail." *Id.* at 62.

Evidence from the states shows that these alternatives to secured money bail can help secure pretrial liberty, attendance at trial, and community safety. For example, in Kentucky, after converting to a risk-based system, the state increased the percentage of defendants who are released before trial and who appear for their court dates, while significantly reducing the numbers arrested for other crimes. *See* Pretrial Servs., *Pretrial Reform in Kentucky* 16-17 (2013), https://www.pretrial.org/download/infostop/Pretrial%20Reform%20in%20Kentucky%20Implementation%20Guide%202013.pdf; Laura & John Arnold Found., *Results from the First Six Months of the Public Safety Assessment–Court in Kentucky* 1 (2014), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf ("Kentucky's courts have achieved a truly remarkable result: They have been able to reduce crime by close to 15% among defendants on pretrial release, while at the same time increasing the percentage of

defendants who are released before trial."). Likewise, "[i]n D.C. approximately 85% of pretrial defendants are released with conditions that correlate to risk level. About 90% of the released defendants appear in court as required and remain crime-free during the pretrial period." *Governor's Commission to Reform Maryland's Pretrial System* 24 (2014) http://goccp.maryland.gov/pretrial/documents/2014-pretrial-commission-final-report.pdf.

This spate of state legislation demonstrates that there are "numerous alternatives" that both ensure pretrial liberty for rich and poor alike—as the Fourteenth Amendment requires—and serve the governmental interests in ensuring a defendant's appearance at trial and public safety. *Williams*, 399 U.S. at 244. Dallas County "is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones." *Id.* at 244-45. But given the host of nondiscriminatory alternatives available to satisfy all the governmental interests related to the fair functioning of its bail system, Dallas County may not deny the "traditional right to freedom before conviction," *Stack*, 342 U.S. at 4, to indigent defendants simply because they are poor. In doing so, Dallas County does "little more than punish[] [them] for [their] poverty." *Bearden*, 461 U.S. at 671. The "comfortable convenience of the status quo," *Williams*, 399 U.S. at 245, must give way to our Constitution's commitment to equal justice for rich and poor alike.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed in part and the case remanded for the entry of relief enjoining Dallas County's unconstitutional cash bail policy.

Respectfully submitted,

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Dated: April 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that 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 appellate CM/ECF system on April 5, 2021.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 5th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amicus curiae* 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 5th day of April, 2021.

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