CASE 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,

Plaintiff–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,

Accused–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,

Accused-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division, No. 3:18-CV-154

David C. Godbey, U.S. District Court Judge

BRIEF FOR AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

[Continued on Next Page]

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record provides this statement of those with an interest in this brief.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The American Bar Association (the "ABA") is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, state, and federal governments, as well as judges, legislators, law professors, law students, and 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 of criminally-accused persons under the Due Process and Equal Protection Clauses. Among other ways of protecting these rights, the ABA has for years published the *ABA Standards for Criminal Justice* (the "Criminal Justice Standards"), which provide a comprehensive set of principles articulating the ABA's recommendations for fair and effective criminal justice systems.[2] As part of this work, the ABA develops and revises "Standards" on discrete topics through broadly representative task forces comprising prosecutors, defense lawyers, judges, academics, and members of the public. The ABA House of

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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 this brief circulated to any member of the Judicial Division Council before filing.

[2] American Bar Ass'n, *The ABA Standards for Criminal Justice* https://www.americanbar.org/groups/criminal_justice/standards/; Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14-15 (2009).

Delegates, the ABA's policymaking body consisting of hundreds of Bar leaders from every aspect of the profession, then approves the Standards.[3]

Courts frequently look to the Criminal Justice Standards for guidance about the appropriate balance between individual rights and public safety. *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). The Criminal Justice Standards have been 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).

Of particular relevance here, the Criminal Justice Standards for Pretrial Release memorialize the ABA's exhaustive study of systems of pretrial release and detention that balance the rights of criminally-accused persons with the need to ensure the accused's reappearance in court and protect the community. The ABA's extensive analysis also is reflected in other ABA guidance, including the ABA's Fourth Editions of the Criminal Justice Standards for the Prosecution and Defense Functions (the "Prosecution and Defense Function Standards"),[4] both promulgated

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[3] *See* Martin Marcus, *supra* note 2.

[4] American Bar Ass'n, *Criminal Justice Standards: Prosecution Function* (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; American Bar Ass'n, *Criminal Justice Standards: Defense Function* (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

in 2017, and the ABA's 2017 Resolution on pretrial detention (the "2017 Resolution").[5]

Given the ABA's research and expertise in matters of criminal justice and money bail systems, the ABA submits this brief to assist the Court with its examination of the Dallas County money bail system.[6]

SUMMARY OF ARGUMENT

For decades, the ABA has studied money bail systems and consistently urged legal systems to minimize reliance on financial conditions of pretrial release, as reflected in the Pretrial Release Standards, the Prosecution and Defense Function Standards, and the ABA's 2017 Resolution on pretrial detention.

Taken together, these ABA policies reflect three bedrock principles. First, money bail should not be used as de facto pretrial detention, meaning it should never result in a release-eligible defendant's detention based merely on an inability to pay. Second, money bail should be a last-resort remedy imposed only if non-monetary conditions are unable to secure the accused's return to court. Third, money bail conditions, when imposed, should always take into account the accused's ability to pay.

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[5] American Bar Ass'n, *Resolution 112C* (2017) (adopted), https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/112C.pdf.

[6] No counsel for a party authored this brief in whole or part, and no person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to the preparation and submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e). The Parties' counsel have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Although the ABA ultimately disfavors use of money bail, the ABA recognizes that some jurisdictions continue to use it and urges those jurisdictions to follow the ABA's guidance to ensure accused persons' constitutional rights are protected. Money bail systems that fail to follow the three principles outlined above seriously impair the rights of accused, presumptively-innocent persons. These systems not only conflict with the ABA's guidance but also violate the Constitution's Due Process and Equal Protection Clauses. Such systems defy a series of Supreme Court decisions affirming that individuals may not be jailed solely due to their inability to pay fines, fees, and court costs. Further, when employed without careful limitations, money bail systems provide little if any public benefit, detaining release-eligible persons solely because they cannot buy their freedom. It is no surprise, then, 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.[7]

The record in this case shows that Dallas County's money bail system runs contrary to the ABA's experienced and well-supported policies and violates essential constitutional rights. It also represents grievously flawed public policy. The ABA thus urges this Court to issue a ruling consistent with the ABA's arguments and clarify that money bail systems should never operate as de facto pretrial detention,

[7] *See infra* Section II.D.

should always consider the least restrictive conditions necessary to ensure an accused's release and reappearance, and should always take into account an accused's ability to pay.

ARGUMENT

I. THE ABA REJECTS MONEY BAIL SYSTEMS THAT ACT AS DE FACTO PRETRIAL DETENTION WITHOUT REGARD FOR NON-MONETARY ALTERNATIVES OR ABILITY TO PAY.

For over fifty years, the ABA has researched and analyzed money bail systems. Those efforts are reflected in the ABA's Criminal Justice Standards on Pretrial Release, its Defense Function Standards, its Prosecution Function Standards, as well as its 2017 Resolution on pretrial detention.

Starting with the First Edition of the ABA's Pretrial Release Standards, adopted in 1968, the ABA explained that a person's liberty and ability to defend against criminal charges should not hinge on that person's financial resources. The ABA also underscored serious constitutional concerns with money bail systems, noting that such systems can discriminate against the indigent and impair an accused's ability to prepare an effective defense. A decade later, the ABA sharpened its criticism of pretrial detention and money bail systems in the Second Edition of its Pretrial Release Standards. *See* American Bar Association, *ABA Standards for Criminal Justice*, ch. 10, Pretrial Release (2d ed. 1979).

An additional two decades of study and experience informed the now-current Third Edition of the ABA's Pretrial Release Standards, adopted in 2007. Among

other things, the Third Edition counsels that jurisdictions still employing money bail systems should do so only after considering the individual circumstances of accused persons, to ensure that personal finances alone never prevent their release. *See* American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, §10-5.3(e) (3d ed. 2007) (the "Pretrial Release Standard(s)").

Since adopting the Third Edition, the ABA has continued to research and analyze money bail systems. This further study culminated in three 2017 publications and statements. First, the ABA's 2017 Resolution urged states and local jurisdictions to implement procedures favoring pretrial release and holistic analysis of financial conditions of release. *See supra* note 5. Then, the ABA's Prosecution and Defense Function Standards provided further context regarding how prosecutors and defense attorneys should approach decisions regarding an accused's release or pretrial detention. *See* Standards 3-5.2 (Prosecution Function) and 4-3.2 (Defense Function) (4th ed. 2017). In particular, Standard 3-5.2(a) of the Prosecution Function Standards urges prosecutors not to seek money bail and instead to "favor pretrial release of a criminally accused, unless detention is necessary to protect individuals or the community or to ensure the return of the defendant for future proceedings."

Together, the ABA's Pretrial Release Standards, 2017 Resolution on pretrial detention, and Prosecution and Defense Function Standards reflect years of study by diverse groups of judges, academics, prosecutors, defense counsel, and other experts. The ABA's guidance collectively highlights the importance of ensuring that

money bail systems do not act as de facto pretrial detention, urge courts to consider non-monetary alternatives to bail, and stress that, if a jurisdiction does choose to impose money bail, courts should always consider an accused's ability to pay.

A. Money Bail Should Never Operate As De Facto Pretrial Detention.

The ABA's Pretrial Release Standards recognize that money bail may only appropriately serve to ensure an accused's later reappearance in court. *See* Pretrial Release Standard §10-1.4(c). Because money bail's purpose is to enable release and reappearance, if money bail does not result in release, its purpose has not been served. Thus, no pretrial defendant deemed eligible for money bail—and thus considered release-eligible—should remain incarcerated simply because they cannot buy their freedom.

Beyond explaining the purpose of money bail—to ensure release and reappearance—the ABA's Pretrial Release Standards also unequivocally explain what money bail is not. Financial conditions of pretrial release should not be used to "protect the safety of the community or any person," "prevent future criminal conduct during the pretrial period," "frighten the defendant," or "placate public opinion." *Id.* §10-5.3(b), (c). The first two considerations are relevant to whether a person should be released at all, not to setting money bail, and the last two considerations are unlawful and irrational bases to penalize a person not convicted of any crime.

Because the purpose of money bail is to facilitate a pretrial defendant's release and later reappearance, money bail should never operate as de facto pretrial detention for those unable to pay. This bedrock understanding is reinforced by the Pretrial Release Standards and the 2017 Resolution, which both state that financial conditions of release should not be imposed when they "result[] in the pretrial detention of a defendant solely due to the defendant's inability to pay." Pretrial Release Standard §10-1.4(e); *see also* 2017 Resolution. The ABA takes this position because it "undermin[es] basic concepts of equal justice" when only "those who can afford a bondsman go free." Pretrial Release Standard §10-5.3(a) Commentary at 111-12 (citation omitted).

Both the ABA's Pretrial Release Standards and its 2017 Resolution also explicitly condemn the use of "bail schedules" in which money bail is "fixed according to the nature of the charge." *See* Pretrial Release Standard §10-5.3(e); 2017 Resolution. Instead of making decisions "categorically," the ABA's Defense and Prosecution Standards counsel prosecutors to make recommendations "based on the facts and circumstances of the defendant and the offense," and urge defense counsel to discuss pretrial release with the prosecution. *See* Prosecution Function Standard §3-5.2(b); Nat'l District Attorneys Ass'n, *National Prosecution Standards* §4-4.2(a)-(c) (3d ed. 2009).

According to the record, Dallas County follows none of these ABA principles. Magistrate Judges responsible for setting bail were given a "menu"-like bail

"schedule[]," which set pre-determined monetary conditions of release for "different types of crimes and arrestees." *See Daves v. Dallas Cnty.*, 341 F. Supp. 3d 688, 692 (N.D. Tex. 2018). Magistrate Judges treated these bail schedules as binding, and bail was thus set in *pro forma*, closed-door bond hearings that lasted an average of "under 30 seconds." *Id.* In light of these facts, the district court reasonably concluded that Dallas County "automatically detains those who cannot afford the secured bond amounts recommended by the schedules." *Id*. at 693.[8]

It appears clear that this Court, too, has already recognized, like the district court in this case, that money bail systems should not be synonymous with pretrial detention. In *ODonnell v. Harris County*, involving a bail system similar to Dallas County's, this Court recognized that "magistrates may not impose a secured bail solely for the purpose of detaining the accused" and cautioned that "when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order." 882 F.3d 528, 541 (5th Cir. 2018), *aff'd as modified sub nom. ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018).

The ABA's years of research and analysis counsel in favor of the same result here. Money bail should never follow a fixed schedule that results in de facto pretrial detention of those who merely cannot pay. Instead, bail should be tailored to ensure pretrial reappearance, which first requires pretrial release.

[8] The ABA takes no position regarding any other issues presented in the present appeal.

B. Money Bail Is A Last Resort And Should Be Imposed Only When Non-Monetary Conditions Are Insufficient To Ensure Reappearance.

As this Court explained in *Pugh v. Rainwater*, when an accused'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." 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc). In fact, "[t]he incarceration of those who cannot [pay money bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id*. at 1057.

The ABA shares these opinions, as reflected in the ABA's 2017 Resolution and its Pretrial Release Standards, which state that jurisdictions should always favor non-monetary conditions and use money bail only as a last resort. The 2017 Resolution counsels courts to issue cash bail or secured bonds only when "necessary" and only when "no other [non-monetary] conditions will suffice" to ensure an accused's appearance in court. *See* 2017 Resolution. The Pretrial Release Standards likewise reinforce that secured money bail is a last resort when setting pretrial release conditions, explaining that "[f]inancial conditions other than unsecured bond" should be imposed "only" when "no other less restrictive condition of release will reasonably ensure the defendant's appearance in court." Pretrial Release Standards §10-5.3(a), (d) (recommending that judicial officers first consider unsecured bonds).

To minimize reliance on money bail, the Pretrial Release Standards and 2017 Resolution instead urge jurisdictions to promote release on persons' "own recognizance"—effectively a promise to appear in court—or, when necessary, rely on an unsecured bond. *Id.* §§10-1.4(a), (c); *id*. 10-5.1(a); *accord* 2017 Resolution. Indeed, even if release on personal recognizance would pose a "substantial risk" of future non-appearance, the Pretrial Release Standards recommend release subject to alternative "least restrictive" conditions that will "reasonably … ensure" the person's later reappearance and deter the person from imperiling others or undermining the judicial process' integrity. *See* Pretrial Release Standards §§10-5.1(a)-(b); *id*. 10-5.2(a). Such alternative non-monetary release conditions include, for example, pretrial services monitoring, release to the supervision of a family, or movement restrictions such as a curfew. *Id.*

The Pretrial Release Standards emphasize the importance of considering non-financial release conditions because of the disproportionate and unfair burden that money bail imposes on the indigent accused. As such, alternate conditions of release should be considered and imposed whenever possible to ensure that all release-eligible persons are released as intended.

C. Dallas County's Bail System Illustrates The Constitutional Problems With A Money Bail System That Fails To Consider Ability To Pay.

The ABA's Pretrial Release Standards embody the fundamental constitutional principle that individuals should not be incarcerated solely based on an inability to

purchase freedom, and faithful application of the ABA's guidance protects individuals' constitutional rights. By contrast, 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.

In *Bearden v. Georgia*, 461 U.S. 660 (1983), the Supreme Court held 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 Supreme Court has repeatedly rejected 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 also, e.g.*, *Tate v. Short*, 401 U.S. 395, 397-98 (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, 711-13 (1961) (inability to pay fee to file petition for writ of habeas corpus); *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).

In addition to detaining or releasing accused individuals differently and arbitrarily depending on their financial status, money bail systems violate due process. "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755

(1987). Inflexible, wealth-based bail schemes—as in Dallas County—violate the core constitutional principle that, prior to being deprived of their liberty, persons must be given a "*meaningful*" "opportunity to be heard." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (emphasis added). 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 be given an opportunity to present their individualized financial information; and the court must make an express finding that the specific person before it has the ability to pay. *Turner v. Rogers*, 564 U.S. 431, 446-48 (2011); *see also* American Bar Ass'n, *Ten Guidelines on Court Fines and Fees* (Aug. 2018). Moreover, judicial officers should revisit the amount of money bail whenever any release-eligible accused remains in jail following a bail determination because, as noted above, if setting bail does not result in release, bail has not served its purpose. Procedural safeguards are thus constitutionally essential in the context of pretrial detention, where the presumption of innocence is at its peak, and where every person granted bail is, by definition, judged release-eligible.

The ABA's Pretrial Release Standards reflect these constitutional principles, and thus have long rejected money bail systems that fail to adequately consider an accused's ability to pay. The Pretrial Release Standards, for example, promote alternatives to money bail and pretrial detention, and endorse only those bail systems that adequately consider an accused's individual circumstances. Pretrial Release

Standards §§10-5.3(a); *id*. 10-1.4(c). Consistent with the demands of due process, the Pretrial Release Standards also advise that financial release conditions result from an "individualized decision" that takes into account each accused's "special circumstances" including their "ability to meet the financial conditions." *Id*. §10-5.3(e). Likewise, the ABA's 2017 Resolution urges courts setting pretrial release conditions to use "individualized, evidence-based assessments" that account for an individual's ability to pay. *See* 2017 Resolution.

This Circuit, when examining Harris County's bail system, and consistent with the ABA's positions, recognized the importance of setting bail using individualized determinations that consider ability to pay. Specifically, this Court explained that "secured bail orders," which were "imposed almost automatically on indigent arrestees," did not demonstrate "sensitivity to the indigent misdemeanor defendants' ability to pay" and therefore did not "sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'" *ODonnell*, 882 F.3d at 541.

Dallas County's bail system—which does not meaningfully consider an accused's ability to pay[9]—runs afoul of these long-standing constitutional

[9] *See Daves*, 341 F. Supp. 3d at 692 (explaining that Dallas County relies on bail schedules and that, although Magistrate Judges were instructed to consider arrestees' "financial affidavit[s]" when setting bail, the financial affidavits made "no material difference" because Magistrate Judges continued to treat the bail schedules as binding and ignore arrestees' ability to pay).

protections, this Court's decision in *ODonnell*, and the ABA's longstanding, evidence-based guidance.

II. MONEY BAIL RESULTS IN EXCESSIVE, UNJUSTIFIABLE PRETRIAL DETENTION, HARMS THE CRIMINALLY ACCUSED, AND DOES NOT SERVE THE FAIR AND PROPER ADMINISTRATION OF JUSTICE.

As detailed in Section I, the ABA's Pretrial Release Standards urge jurisdictions to "limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings." Pretrial Release Standard §10-1.1. The Pretrial Release Standards set such strict guidance for money bail's imposition because pretrial detention leads to harsh and oppressive deprivation of liberty, "subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support." *Id*. Indeed, the ABA's Pretrial Release Standards reflect decades of research demonstrating that money bail systems harm the criminally accused and their families, with no countervailing benefit to public safety or the administration of justice. Recognizing these harms, a diverse group of organizations from across the ideological spectrum, as well as a majority of states and an increasing number of local governments, have all joined together to repudiate money bail systems.[10]

[10] *See infra* Section II.D.

A. Money Bail Unfairly Harms The Criminally Accused And Undermines The Criminal Justice System.

Extensive research shows that money bail often adversely affects the criminally accused and undermines the fairness, effectiveness, and credibility of our criminal justice system. In addition to depriving release-eligible persons of their liberty, money bail can impair pretrial detainees' Sixth Amendment rights to mount a defense to the charges against them and destabilizes their lives and those of their families.

First, as discussed, money bail systematically results in placing release-eligible accused persons in pretrial detention for no reason other than an inability to pay. This is true even where bond amounts may seem relatively small. Data from the DOJ's Bureau of Justice Statistics reveals that individuals in jail have a median annual income of $15,109 prior to incarceration, less than half the median income for non-incarcerated persons of similar ages. Bernadette Rabuy & Daniel Kopf, Prison Policy Institute, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time* 2 (May 10, 2016). Moreover, around 40% of American adults would need to borrow money, sell assets, or would be unable to pay for a $400 emergency expense. Federal Reserve, *Report on the Economic Well-Being of U.S. Households in 2018* (May 28, 2019). Many accused's inability to post bail reflects this reality. In Philadelphia, for example, a study of all criminal cases from September 2006 to February 2013 revealed that almost half of pretrial detainees with

bail deposit requirements of $500 did not post bail within three days of the bail hearing. Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511, 523 (2018).

Even for accused persons who are ultimately able to secure the necessary funding, the process of doing so may take days or weeks, meaning that financially-strapped accused persons will remain incarcerated long after being deemed release-eligible, solely due to their inability to pay.

Second, the consequences of pretrial detention are profound: Even a few days in jail can disrupt an accused's life, leading to long-term negative consequences, all of which are unjust for release-eligible persons detained only due to lack of money. Among other things, incarcerated pretrial detainees cannot work or earn income, and may lose their jobs and ability to support their families. Perversely, the loss of employment makes it even more difficult to make bail. *See* Will Dobbie & Crystal S. Yang, *The Economic Costs of Pretrial Detention*, Brookings Papers on Economic Activity 2, 11-15 (Mar. 2021) ("[I]ndividuals lose an average of $29,000 over the course of the working-age life cycle when detained in jail for just three days" pretrial as compared to those not detained pretrial); Will Dobbie et. al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 227 (2018) (finding that, three to four years after the initial bail hearing, accused persons *released* pretrial were almost 10% more likely to be employed); *see also Barker v. Wingo*, 407 U.S. 514, 532-33

(1972) (recognizing detrimental consequences of lengthy pretrial detention). In fact, pretrial detention does not only effect the economic prospects of the accused, it may also decrease the intergenerational mobility of the dependents of those detained pretrial. *See* Dobbie & Yang, *The Economic Costs of Pretrial Detention supra* p. 17 at 3, 22-25. Accused persons living in shelters also may lose housing for missing curfews or for prolonged absences. *See* Nick Pinto, *The Bail Trap*, N.Y. Times (Aug. 13, 2015). Given the already diminished level of economic security and shaky social safety nets of indigent accused persons, a prolonged pretrial detention may trigger a debilitating downward spiral, even if they are ultimately acquitted or (as is often the case for low-level offenses) charges are dismissed or diverted.

Beyond disrupting accused persons' lives outside of jail, detention itself can impose serious harms. Incarcerated persons are, for example, more likely to be sexually victimized, contract infectious diseases, and be exposed to unsafe and unsanitary living conditions, undermining their long-term as well as immediate health and welfare. *See* Allen J. Beck et al., U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12* 9 (2013); Criminal Justice Policy Program at Harvard Law School, *Moving Beyond Money: A Primer on Bail Reform* 6-7 (Oct. 2016) ("Moving Beyond Money"). And the COVID-19 pandemic has only exacerbated the dangers of contracting deadly diseases in prisons and jails. As of March 2021, nearly 391,000 prisoners tested positive for COVID-19, and over 2,500 died from the virus. The Marshall Project, *A State-by-State Look*

at Coronavirus in Prisons (Mar. 25, 2021, 6:40 PM). Pretrial detainees also suffer 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 (July 27, 2015).

Third, needless pretrial detention undermines the criminal justice system and frustrates detainees' legal rights. Pretrial detention impairs detainees' constitutional rights and 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 accused persons. *See generally* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). Contemporary research 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. Mary T. Phillips, New York City Criminal Justice Agency, Inc., *A Decade of Bail Research in New York City* 115-21 (Aug. 2012). These consequences are particularly perverse because they may weigh heaviest on the lowest-risk persons; one study found that low-risk accused persons detained for the entire pretrial period are more than five times more likely to be sentenced to jail compared to low-risk accused persons 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* Christopher T. Lowenkamp et al., Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* (Nov. 2013).

Pretrial confinement contributes directly to these disparities. In part, pretrial detainees' adverse outcomes occur because their confinement prevents them from demonstrating an ability to comply with the law and contribute to society, including through employment, schooling, rehabilitation, and family obligations. *See* Phillips, *supra* p. 19 at 118. Furthermore, the prospect of prolonged pretrial detention undermines the criminal justice system by encouraging guilty pleas from accused persons 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 even exceed the length of an actual post-conviction sentence. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2492 (2004) (noting that many accused persons charged with misdemeanors or lesser felonies and detained pretrial are likely to not be incarcerated after conviction). Thus, when given the choice between a plea that provides immediate release versus later resolution after prolonged detention, even the *innocent* will reasonably decide to plead guilty. *See* Robert C. Boruchowitz et al., Nat'l Ass'n of Criminal Defense Lawyers, *Minor Crimes, Massive Waste* 32-33 (Apr. 2009). Indeed, an astounding 90% of those held on bail enter a guilty plea, whereas criminal charges are dismissed for 50% of those who pay bail. *See* The Bail Project, *Why Bail?*, https://bailproject.org/why-bail/ (last

visited Apr. 5, 2021). Such a result is, of course, inconsistent with our most basic conceptions of fair, and constitutional, justice.

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, money bail imposed without regard to an accused's individual circumstances often fails to advance the primary interests of a pretrial release system: ensuring the reappearance of those released pretrial, while detaining only high-risk accused. *See* Pretrial Release Standard §10-1.1.

First, research and evidence increasingly demonstrate that money bail is rarely necessary to ensure most accused persons' future reappearance in court. For example, in New York City, the rate of money bail has decreased from a high of 48% of total bailed cases in 1990 to 16% in 2020. *See* Aubrey Fox & Stephen Koppel, New York City Criminal Justice Agency, Inc., *Pretrial Release Without Money: New York City, 1987-2020* 3 fig. 1 (Feb. 2021). All the while, over the past decade, the appearance rate for accused individuals released on recognizance has slightly improved, from 84% in 2007 to 86% in 2017. *See* Aubrey Fox & Stephen Koppel, New York City Criminal Justice Agency, Inc., *Pretrial Release Without Money: New York City, 1987-2018* 9 fig. 14 (Mar. 2019).

Furthermore, research shows significant increases in appearance rates from nonfinancial approaches, such as supervised release or providing basic reminders of upcoming court dates. *See* Melanie Skemer et al., MDRC, *Findings from an*

Evaluation of New York City's Supervised Release Program 54-57 (Sept. 2020); Christopher T. Lowenkamp & Marie VanNostrand, Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 17 (2013).

Second, there is no evidence that money bail systems improve public safety. In their first six-month report, the court-appointed monitors for the *ODonnell* consent decree noted that, even as the percentage of accused being released pretrial increased, recidivism rates within 90, 180, and 365 days of the initial complaint were uniformly lower in 2019 than before the consent decree. Independent Monitor for the *ODonnell v. Harris County* Decree, *Monitoring Pretrial Reform in Harris County, First Six Month Report of the Court-Appointed Monitor* 28 (Sept. 3, 2020). In fact, low- and moderate-risk people 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. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 786-87 (2017) (also estimating that, in Harris County, Texas, release on personal bond of the lowest risk accused would have resulted in 1,600 fewer felonies and 2,400 fewer misdemeanors within the eighteen months following release).

Third, excessive use of money bail and needless incarceration based on inability to pay bloats an already swollen jail population while imposing heavy costs on the criminal justice system. For example, although pretrial detainees comprised only about 40% of people incarcerated in jails in 1983, this number had swelled to

65% by 2019. *See* Todd D. Minton & Zhen Zeng, U.S. Dep't of Justice, *Jail Inmates in 2019* 6 tbl. 4 (Mar. 2021); Allen J. Beck, U.S. Dep't of Justice, *Profile of Jail Inmates, 1989* 2 tbl. 1 (1991). Nationwide, states and local jurisdictions spend $14 billion per year to house pretrial detainees. Pretrial Justice Institute, *Pretrial Justice: How Much Does it Cost?* 2 (2017).

The burden of incarcerating otherwise release-eligible pretrial accused is particularly apparent in Texas. In 1994, only 33% of the Texas jail population consisted of pretrial detainees. By 2016, that number had skyrocketed to nearly 74%. *See* Michael Haugen, Texas Public Policy Found., *In Rural Areas, Jail Populations Are Skyrocketing – Including Pretrial Detainees* (July 3, 2018). The increase in pretrial detainees obviously increases taxpayers' burdens. The average cost to house a Texas county jail inmate is estimated at $60.12 per day, and over $905 million annually for the total pretrial population. *See* Texas Judicial Council, *Criminal Justice Committee Report & Recommendations* 3 (Oct. 2016).

Meanwhile, supervised release programs are estimated to cost 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). And, of course, needless pretrial detention is also costly because jailed persons cannot contribute to society in other ways, including through employment, paying taxes, and spending.

The ABA recognizes pretrial detention's staggering public costs and recommends that legal systems act with fiscal responsibility to "eliminate unnecessary correctional expenditures, enhance cost-effectiveness, and promote justice." ABA Crim. J. Sec., Report to House of Delegates 107 (2002), https://www.prisonpolicy.org/scans/aba/blueprint.pdf.

C. Money Bail Systems Exacerbate Pre-Existing Racial Disparities.

Wealth-based incarceration harms society and worsens inequity by inherently discriminating against those with limited resources. *Moving Beyond Money*, at 7. And because wealth strongly correlates with race, cash bail exacerbates pre-existing racial disparities in the criminal justice system. *Id.* n.25. For example, a study of individuals accused of drug crimes found that Latino and Black defendants were detained due to inability to pay bail at twice the rate of White defendants with the same bail amounts and legal characteristics. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 Just. Q. 170, 183 (2005). The study's author 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, 186 (emphasis added).

Jurisdiction-specific data, including data from Texas, confirms the racial disparities in both the decision to set money bail and the amount of money bail set.

See, e.g., Shawn D. Bushway & Jonah B. Gelbach, National Science Found., *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* 31 (2011) ("For Dallas and Harris counties, our preferred estimates imply that judges set bail as if they value whites' lost freedom at least $64 per day more than they value blacks' lost freedom."). If racial minorities 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 detailed above.

D. A Consensus Has Developed That Money Bail Schemes Are Unfair And Do Not Work.

A majority of states, and many local governments, have now limited or altogether abandoned their money bail schemes. As of 2020, twenty-six states plus the District of Columbia expressly provided a presumption in favor of releasing an accused on personal recognizance or unsecured bond, and the same number require courts to impose the least-restrictive conditions on pretrial release. *See* Nat'l Conference of State Legislatures, *Pretrial Release: Guidance for Courts* (2020). Recently, Illinois became the first state to abolish cash bail. Cheryl Corley, *Illinois Becomes 1st State to Eliminate Cash Bail*, NPR (Feb. 22, 2021, 8:36 PM EST).

Likewise, numerous organizations and stakeholders across the spectrum of the criminal justice system have joined the ABA in rejecting money bail systems in favor of individualized pretrial release assessments. For example, in 2016, the

Department of Justice 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." Vanita Gupta and Lisa Foster, Dear Colleague Letter, U.S. Dep't of Justice 2 (Mar. 14, 2016). Likewise, the National Sheriffs' Association recognized in 2012 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). More recently, the Cato Institute, in a 2019 brief to the Supreme Court of the United States, argued that "money bail schedules . . . that fail to provide for a timely, individualized determination of bail and result[] in jailing people for being poor are inconsistent with that longstanding history and violate the fundamental right to pretrial liberty." *See* Brief of the Cato Institute as *Amicus Curiae* Supporting Petitioner at 18, *Walker v. City of Calhoun*, No. 18-814 (U.S. Jan. 28, 2019).

In sum, evidence and experience show that money bail imposed without considering an accused'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 reappearance, a court must ensure it is tailored so that accused individuals are never detained merely because they cannot pay bail. But in the great majority of cases, money bail—and certainly a money bail system where bail amounts are

mechanically set by reference to a schedule, without considering financial circumstance—only hobbles the criminal justice system while imposing a grave human toll.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Bar Association urges this Court to issue a ruling consistent with the ABA's arguments, and to clarify that money bail systems should never operate akin to de facto pretrial detention, should always consider the least restrictive conditions necessary to ensure the accused's release and reappearance, and should always take into account the accused's ability to pay.

Dated: April 5, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29 and Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32.2, the brief contains 6,353 words.

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) and Circuit Rule 32.1, respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2016 in Times New Roman 14-point font for the main text and 12-point Times New Roman for the footnotes.

Date: April 5, 2021

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CERTIFICATE OF SERVICE

I certify that on April 5, 2021, I caused the foregoing Brief for American Bar Association as *Amicus Curiae* in Support of Plaintiffs-Appellants/Cross-Appellees 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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