No. 18-11368

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellants Cross-Appellees,

v.

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

Defendants-Appellees Cross-Appellants,

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

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER PROSECUTORS, DEPARTMENT OF JUSTICE OFFICIALS, LAW ENFORCEMENT OFFICIALS, AND JUDGES IN SUPPORT OF PLAINTIFFS-APPELLANTS

[Counsel listed on inside cover]

MARY B. MCCORD
JOSHUA A. GELTZER
SETH WAYNE
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 661-6607
mbm7@georgetown.edu
Counsel for Amici Curiae

CERTIFICATE OF INTERESTED PERSONS

The following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that members of the Court may evaluate possible recusal.

Plaintiffs-Appellants-Cross-Appellees	**Counsel**
Shannon Daves Shakena Walston Erriyah Banks Destinee Tovar Patroba Michieka James Thompson Faith in Texas Texas Organizing Project Education Fund	Alec Karakatsanis Elizabeth Rossi A. Dami Animashaun CIVIL RIGHTS CORPS Daniel S. Volchok Saurabh Sanghvi Beth C. Neitzel WILMER CUTLER PICKERING HALE AND DORR LLP Andre Segura Trisha Trigilio Kali Cohn ACLU FOUNDATION OF TEXAS Brandon J. Buskey Andrea Woods ACLU FOUNDATION CRIMINAL LAW REFORM PROJECT Susanne Pringle TEXAS FAIR DEFENSE PROJECT

Defendants-Appellees-Cross-Appellants	**Counsel**
Dallas County, Texas	Elizabeth Gabrielle Bloch Katharine D. David

	Philip J. Morgan Benjamin R. Stephens HUSCH BLACKWELL, LLP Peter L. Harlan DISTRICT ATTORNEY'S OFFICE FOR THE COUNTY OF DALLAS
Ernest White Hector Garza Teresa Hawthorne Tammy Kemp Jennifer Bennett Amber Givens-Davis Livia Liu Francis Stephanie Mitchell Brandon Birmingham Tracy Holmes Robert Burns Nancy Kennedy Gracie Lewis Dominique Collins Carter Thompson Jeanine Howard Stephanie Fargo	Eric Alan Hudson OFFICE OF THE ATTORNEY GENERAL, FINANCIAL LITIGATION AND CHARITABLE TRUSTS DIVISION

Defendants-Appellees	**Counsel**
Marian Brown Terrie McVea Lisa Bronchetti Steven Autry Anthony Randall Janet Lusk Hal Turley Dan Patterson Julia Hayes Doug Skemp Nancy Mulder Lisa Green	Elizabeth Gabrielle Bloch Katharine D. David Philip J. Morgan Benjamin R. Stephens HUSCH BLACKWELL, LLP Peter L. Harlan DISTRICT ATTORNEY'S OFFICE FOR THE COUNTY OF DALLAS

Angela King	
Elizabeth Crowder Tina Yoo Clinton Peggy Hoffman Roberto Canas, Jr. Shequitta Kelly	Peter L. Harlan DISTRICT ATTORNEY'S OFFICE FOR THE COUNTY OF DALLAS

/s/ Mary B. McCord
MARY B. MCCORD

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STATEMENT OF INTEREST

Amici curiae are 82 current and former local, state, and federal prosecutors and law enforcement officials, former Department of Justice leaders, and former judges representing 34 different states and including elected and appointed officials from both political parties. Amici all are or have been responsible for public safety or involved in the criminal justice system in their jurisdictions. They have a strong interest in this case because detaining indigent defendants based solely on their inability to pay money bail, while others similarly situated but able to pay are released, offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors and law enforcement officials, and fails to promote safe communities.[1]

[1] No party's counsel authored this brief in whole or in part. No person, other than amici curiae's counsel, funded the preparation or submission of this brief. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Whether elected, appointed, or career, amici current and former local, state, and federal prosecutors and law enforcement officials, former Department of Justice leaders, and former judges ("amici"), are or have been accountable to their communities to pursue justice fairly and without regard to race, religion, ethnicity, gender, sexual orientation, disability, or wealth. Their work depends on preserving the integrity of the justice system and building trusting relationships with community members, so that those community members will report crimes, cooperate with law enforcement, testify in court proceedings, and sit fairly as jurors. Fostering such relationships and thus protecting the public cannot be achieved when the legitimacy of the criminal justice system is undermined by a practice of detaining indigent defendants before trial solely because of their inability to pay monetary bail, while releasing similarly situated defendants who can.

The failures of wealth-based bail systems, from the personal harm inflicted on those detained to the widespread adverse impact on the justice system, have led to federal and state reform measures. Reformed jurisdictions base pretrial release decisions on individualized determinations of flight risk and dangerousness, and utilize non-financial conditions of release with pretrial supervision where appropriate. In the experience of amici, these types of reformed bail practices not only are more effective than money bail at ensuring appearance, but also preserve

the legitimacy of the criminal justice system, enhance public safety, better address the underlying causes of crime and recidivism, and ultimately save taxpayers money.

Amici urge this court to adhere to the principle espoused in this circuit's *en banc* opinion in *Pugh v. Rainwater*, reiterated last year in *ODonnell v. Harris County*, that "[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." 892 F.3d 147, 157 (5th Cir. 2018) [*ODonnell II*] (quoting *Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc)).

ARGUMENT

I. A Criminal Justice System Free From Wealth-Based Discrimination Is Critical to the System's Legitimacy and Is Constitutionally Required

A. Bail-Reform Efforts Have Long Recognized that Wealth-Based Detention Is Unjust

The "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951) (citation omitted). In so ruling, the U.S. Supreme Court was not merely addressing monetary bail, but was affirming more broadly the "right to release before trial . . . conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." *Id.*; *see*

also Holland v. Rosen, 895 F.3d 272, 291 (3d Cir. 2018) ("[N]onmonetary conditions of release are also 'bail.'").

As many lawmakers committed to fair and just bail practices have recognized over the decades, a bail system that detains certain people based solely on their inability to afford money bail "'results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of nonappearance by accused persons.'" H.R. Rep. No. 89-1541, at 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2293, 2298 (quoting report of U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure). As the Senate Committee on the Judiciary acknowledged in its report on the Federal Bail Reform Act of 1966:

> There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses [and] cannot consult his lawyer in private . . . . Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.

S. Rep. No. 89-750, at 7 (1965). Significantly, the U.S. House of Representatives Report on the bill also noted that, with the exception of bail bondsmen, all subcommittee-hearing "witnesses favored the enactment of this proposal" to reform the federal bail system. H.R. Rep. No. 89-1541, at 7, 1966 U.S.C.C.A.N. at 2297.

The Federal Bail Reform Act of 1966 took a major step toward ensuring that all persons, regardless of financial status, would have an opportunity for pretrial release. It required judicial officers to order the pretrial release of a noncapital defendant on personal recognizance or an unsecured appearance bond *unless* the judicial officer determined "that such a release will not reasonably assure the appearance of the person as required." Pub. L. No. 89-465, § 3(a), 80 Stat. 214, 214 (codified as amended at 18 U.S.C. § 3142). Upon such a finding, and after an individualized assessment of the defendant's circumstances, it permitted the judicial officer to impose conditions of release, giving priority to nonfinancial conditions. *Id.*

When the Federal Bail Reform Act of 1984 was passed, allowing courts to consider dangerousness when imposing conditions of release and permitting detention where no conditions could reasonably ensure the defendant's appearance or public safety, the Act also added a provision explicitly prohibiting the imposition of a financial condition that results in pretrial detention because the defendant lacks the ability to pay. Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, 1976-80 (codified at 18 U.S.C. § 3142(c)(2), (e)-(g)).

In amici's experience, procedures that discourage monetary bail, such as those afforded under the federal bail system, have been effective not only in mitigating the risk of nonappearance but also in fashioning conditions of release that ensure public

safety and protect victims, *see, e.g.*, 18 U.S.C. § 3142(c)(1)(B)(v) (avoid contact with alleged victim); (vi) (report regularly to designated law enforcement or pretrial services agency); (viii) (refrain from possessing a firearm or dangerous weapon), and in addressing personal circumstances that may have contributed to the unlawful behavior, *see, e.g.*, *id.* § 3142(c)(1)(B)(ii) (maintain or seek employment); (iii) (maintain or commence education); (ix) (refrain from excessive use of alcohol or any nonprescribed use of controlled substances); (x) (undergo medical, psychological, or psychiatric treatment). These systems can allow for custom-tailoring of conditions to individual circumstances and encourage compliance by providing that violations may result in revocation of release and prosecution for contempt of court. *Id.* § 3148.

B. Unnecessary Pretrial Detention Has Severe Adverse Consequences that Implicate Public Safety

Although many states have reformed—or are in the process of reforming—their bail systems to allow for different pretrial-release options based on individualized determinations of flight risk and dangerousness,[2] the use of money

[2] *See, e.g.*, Arizona (Ariz. R. Crim. P. 7.2(a), 7.3); Arkansas (Ark. R. Crim. P. 9.1, 9.2(a)); California (S.B. 10, 2018 Leg., 2017-2018 Reg. Sess. (Cal. 2018) (effective Oct. 1, 2019)); Connecticut (Conn. Gen. Stat. §§ 54-63b(b), 54-63d(a), (c)); D.C. (D.C. Code § 23-1321); Illinois (725 Ill. Comp. Stat. 5/110-2); Kentucky (Ky. Rev. Stat. Ann. § 431.066); Maine (Me. Rev. Stat. tit. 15, §§ 1002, 1026); Maryland (Md. Rule 4-216.1(b)); Massachusetts (Mass. Gen. Laws. ch. 276, § 58); Michigan (Mich. Comp. Laws. § 780.62); Minnesota (Minn. Stat. § 609.49, Minn. R. Crim. P. § 6.02(1)); Missouri (Mo. Sup. Ct. R. 33.01(d)-(e)); Montana (Mont. Code Ann. § 46-9-108); Nebraska (Neb. Rev. Stat. § 29-901); New Hampshire (N.H. Rev. Stat. Ann. § 597:2); New Jersey (N.J. Stat. Ann. § 2A:162-15); New

bail and the hardships it unfairly imposes on indigent people persist in many jurisdictions today.

Amici are well aware that detention before trial, even briefly, can result in the loss of employment, housing, government assistance, education, and child custody. An individual detained in jail—even though still presumed innocent—may be unable to access necessary mental-health and medical treatment, including drug therapy. Opportunities for pretrial diversion programs, which address underlying factors that contribute to criminal behavior, may be unavailable. And access to counsel while in detention may be severely hampered, undermining preparation of a defense, enlistment of witnesses, and accumulation of evidence. These factors contribute to worse outcomes for detained indigent defendants, including a greater likelihood of conviction and a greater likelihood of longer sentences compared to those released.[3]

To avoid these negative consequences, accused persons may seek quick guilty pleas, particularly if they are eligible for probation, as the most expedient way to

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Mexico (N.M. Const. art. II, § 13); North Carolina (N.C. Gen. Stat. § 15A-534(b)); North Dakota (N.D. R. Crim. P. 46(a)); Oregon (Or. Rev. Stat. §§ 135.245, 135.260); Rhode Island (R.I. Gen. Laws § 12-13-1.3); South Carolina (S.C. Code Ann. § 17-15-10(A)); South Dakota (S.D. Codified Laws § 23A-43-3); Tennessee (Tenn. Code Ann. § 40-11-116); Vermont (Vt. Stat. Ann. Tit. 13, § 7554); Washington (Wash. Super. Ct. Crim. R. 3.2(b)); Wisconsin (Wis. Stat. §§ 969.01 to .03); Wyoming (Wy. R. Crim. P. 46.1(c)-(d)); *see also* S. Poverty Law Ctr., *SPLC Prompts 50 Alabama Cities to Reform Discriminatory Bail Practices* (Dec. 6, 2016), https://www.splcenter.org/news/2016/12/06/splc-prompts-50-alabama-cities-reform-discriminatory-bail-practices.

[3] Conference of State Court Admins., *2012-2013 Policy Paper: Evidence-Based Pretrial Release* 5 (2013), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx.

obtain release.[4] As the district court explained in *ODonnell v. Harris County*, the evidence presented there "overwhelmingly prove[d] that thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention." 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017) [*ODonnell I*]. This desperate decision made by defendants in pretrial detention may result in the conviction of innocent people, caught in the Hobson's choice between (1) pleading guilty and being immediately (or more quickly) released, or (2) contesting their charges and continuing to be detained even while retaining, at least formally, the presumption of innocence. As the district court in *ODonnell I* concluded, that predicament is "the predictable effect of imposing secured money bail on indigent misdemeanor defendants." *Id.* The same is true for felony defendants.

Unnecessary pretrial detention also has adverse consequences for public safety. Rather than keeping communities safer, pretrial detention—even for just 24 or 48 hours—can actually increase future criminal behavior and likelihood of arrest, particularly for defendants who are deemed to pose a lower risk. A study of

[4] *See* Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 2 (Nat'l Bureau of Econ. Research Working Paper No. 22511, 2017), https://www.princeton.edu/~wdobbie/files/bail.pdf (finding decrease in conviction rates for people released pretrial, "largely driven by a reduction in the probability of pleading guilty," with data suggesting the decrease occurs "primarily through a strengthening of defendants' bargaining positions before trial").

defendants in a Kentucky jail found that the duration of pretrial detention was associated with significant increases in both new pretrial criminal activity (after release) and future recidivism,[5] and data from Harris County, Texas, show that pretrial detention of misdemeanor defendants is associated with increased future crime and re-incarceration.[6] Amici have deep concerns that Dallas County's current system increases danger to victims and the community, contrary to one of the chief purported purposes of bail. Moreover, pretrial detention is very costly, *see infra* at 17-18, and diverts resources that could be better used for more effective public safety interventions.

In amici's experience, individualized assessments and pretrial release with nonfinancial conditions where appropriate are more effective than money bail not only in mitigating the risk of nonappearance, but also in ensuring a fair criminal justice system, enhancing public safety, addressing the underlying causes of criminal

[5] Christopher T. Lowenkamp et al., Laura & John Arnold Found., *The Hidden Costs of Pretrial Detention* 4 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.

[6] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 718 (2017) (examining misdemeanor defendants in Harris County and finding that "detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges" in 18-month period after a bail hearing); *see also* Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 3 (Working Paper, 2015), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf (examining effects of post-sentencing incarceration in Harris County and finding that "short-run gains" of incapacitation while a person is jailed "are more than offset by long-term increases in post-release criminal behavior").

activity and recidivism, and saving public funds that can be better invested in preventing and fighting crime.

C. Perception of Fairness is the Foundation of an Effective Criminal Justice System

The importance of a fair criminal justice system, including at the critical early moment of setting pretrial release conditions, cannot be overstated. As amici are well aware, the people most adversely impacted by wealth-based bail systems are often those from communities where crime is more prevalent. Victims and witnesses on whom prosecutors rely for evidence and testimony often are or have been defendants in criminal cases, especially misdemeanor cases. And it is quite common for a family member or close friend of a victim or witness to have been charged with a crime at some point.

The willingness of these victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully depends in part on their confidence that the judicial system will treat them and their loved ones fairly. Seeing indigent defendants detained (or experiencing it themselves) simply because they are unable to afford money bail, while others similarly situated but able to post bail go free, undermines the legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

A fair criminal justice system free from wealth-based discrimination is also critical to the effective functioning of our jury system. Jurors are drawn from the communities in which the crimes being prosecuted occur. In amici's experience, potential jurors—much like victims and witnesses—often have themselves been charged with a crime or have family or friends who have been charged with crimes. When jurors perceive the criminal justice system as unfair or illegitimate, they might discredit evidence presented by prosecutors or, worse, fail to follow the law.

D. Equal Protection and Due Process Prohibit Wealth-Based Detention

Sitting *en banc*, this Circuit has said: "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). With regard to the use of a set bond schedule—which has particular applicability to this case—the *en banc* court stated, "Utilization of a master bond schedule provides speedy and convenient release for those who have no difficulty in meeting[] its requirements. The incarceration of those who cannot, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057.

Just last year, this Circuit relied on *Rainwater* and Supreme Court precedent to conclude that the policy of Harris County, Texas, to mechanically apply a secured bail schedule without regard to individual arrestees' circumstances violated both due

process and equal protection requirements. *See ODonnell II*, 892 F.3d at 161-63; *see also Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (plurality) ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.") (internal quotation marks omitted); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (invalidating a state's practice of automatically revoking probation for failure to pay a fine or restitution, without considering whether the probationer had made all efforts to pay yet could not do so, and without considering whether other alternative measures were adequate to meet the state's interest in punishment and deterrence).

In *ODonnell II*, this Court described the stark inequality of Harris County's system:

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. . . . [W]ith [the County's] lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, 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. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The district court held that this state of affairs violates the equal protection clause, and we agree.

ODonnell II, 872 F.3d at 163. This Court also found that the procedures in Harris County violated due process principles because they "almost always" resulted in the

setting of a money bail amount that detained the indigent and thereby failed to "sufficiently protect detainees from magistrates imposing bail as an 'instrument of oppression.'" *Id.* at 159.

The district court in this case found on an extensive factual record that Dallas County's "post-arrest system automatically detains those who cannot afford the secured bond amounts recommended by the [pre-set misdemeanor and felony] schedules." *Daves v. Dallas Cty.*, No. 18-0154, *slip op.* at 6 (N.D. Tex. Sept. 20, 2018). Applying *ODonnell II*, the district court concluded that plaintiffs had shown a likelihood of success on the merits of their claims that Dallas County's procedures were constitutionally deficient under the equal protection and procedural due process clauses, warranting issuance of a preliminary injunction. *Id.* at 9-11. These conclusions were correct. The legitimacy of our criminal justice system and its presumption of innocence before trial—essential to the effectiveness of prosecutors and law enforcement officials—should not be undermined by a bail system that infringes on both due process and equal protection requirements.

II. Where Nonfinancial Conditions of Pretrial Release Are Used, They Are Effective at Achieving Court Attendance and Preserving Public Safety

Alternatives to money bail can accomplish the pretrial goals of maintaining community safety and assuring a defendant's presence at trial as well as, or better than, money bail, but without the attendant unfairness to indigent defendants. As an extensive body of evidence reveals, pretrial release with nonfinancial conditions

determined by individualized assessments[7] can be very effective at ensuring appearance for court proceedings.

In Kentucky, for example, county judges in 2013 began using a new risk-based assessment tool to inform decisions about pretrial release options. 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. Data from 2014 and 2015 show that 85 percent of defendants released before trial appeared as required; in the low-risk category, the appearance rate was over 90 percent. Kentucky Administrative Office of the Courts Data, http://www.icmelearning.com/ky/pretrial/resources/KentuckyPretrialServicesFYData.pdf [hereinafter *Kentucky 2014-2015 Data*].

[7] Amici recognize that algorithmic risk-assessment instruments have received significant recent criticism for their potential to perpetuate pre-existing racial disparities in the justice system and to increase unnecessary pretrial incarceration. *See The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns*, http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf. Amici do not endorse the use of any specific tool, and urge that any assessment tools be transparent and tailored to avoid perpetuating racial disparities. Additionally, risk assessment instruments should be used only in conjunction with timely individualized assessments performed by impartial judicial decisionmakers.

In the District of Columbia, which also utilizes a risk-based assessment to evaluate pretrial-release options, data from FY 2016 show that 91 percent of defendants released before trial made all scheduled court appearances.[8]

The data on pretrial criminal activity for released defendants are equally impressive: in Kentucky in 2014 and 2015, 94 percent of released defendants assessed to be low-risk committed no new criminal activity, *Kentucky 2014-2015 Data*, *supra*; and in Washington, D.C., in FY 2016, 98 percent of all released defendants remained arrest-free from violent crimes during pretrial release, while 88 percent remained arrest-free from all crimes. *DC PSA Budget Request*, *supra*, at 16. And a study of the impact of the type of bond (*i.e.*, secured or unsecured) on pretrial-release outcomes where pretrial supervision was ordered showed no significant differences in court-appearance rates or new criminal-activity rates.[9]

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[8] *See* Pretrial Servs. Agency for D.C., *Congressional Budget Justification and Performance Budget Request Fiscal Year 2018*, at 16 (2017), https://www.psa.gov/sites/default/files/FY%202018%20PSA%20Congressional%20Budget%20Justification.pdf [hereinafter *DC PSA Budget Request*]; *cf.* Christopher T. Lowenkamp & Marie VanNostrand, Laura & John Arnold Found., *Exploring the Impact of Supervision on Pretrial Outcomes* 3, 12 (2013), https://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_Supervision_FNL.pdf [hereinafter *Lowenkamp Study*] (in two-state study, defendants who received supervision were significantly more likely to appear for assigned court dates than those released without supervision).

[9] Claire M.B. Brooker et al., *The Jefferson County Bail Project: Impact Study Found Better Cost Effectiveness for Unsecured Recognizance Bonds Over Cash and Surety Bonds* 1, 6-7 (2014), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=5fd7072a-ae5f-a278-f809-20b78ec00020&forceDialog=0.

Studies on the use of money bail, meanwhile, reveal that it is no more effective at mitigating the risk of nonappearance and results in significant negative outcomes, including increased rates of conviction and recidivism. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 472-75 (2016) (concluding, in study of Philadelphia and Pittsburgh court data, that money bail did not increase probability of appearance but was "a significant, independent cause of convictions and recidivism"); Heaton et al., *supra*, at 714-15 (using Harris County, Texas, misdemeanor case data and finding compelling evidence that pretrial detention "causally increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes").

As the federal system and many states have recognized, pretrial supervision can also address some of the underlying drivers of criminal activity, thus breaking the cycle of recidivism and enhancing public safety. In Kentucky, dozens of diversion programs allow defendants to agree to comply with individually tailored terms in order to obtain dismissal of criminal charges. Terms may include alcohol and drug treatment, mental health and counseling services, educational, vocational and job-training requirements, and volunteer work. In 2012, Kentucky Pretrial Services supervised more than 4,000 misdemeanor diversion cases; 87 percent of misdemeanor clients successfully completed their programs, resulting in reduced

trial dockets, decreased recidivism, and 25,000 hours of community service. Kentucky Pretrial Services, Administrative Office of the Courts, *Pretrial Reform in Kentucky* 6-7 (2013), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95c0fae5-fe2e-72e0-15a2-84ed28155d0a&forceDialog=0.[10]

In the District of Columbia, the Pretrial Services Agency (PSA) has responsibility for over 17,000 misdemeanor and felony defendants each year and supervises approximately 4,600 on any given day. *DC PSA Budget Request*, *supra*, at 1. PSA assigns supervision levels based on risk but also provides or makes referrals for treatment to defendants with substance-use and mental-health disorders. *Id.* at 20, 24. In FY 2016, 88 percent of all defendants in pretrial supervision remained on release status through the conclusion of the release period without any request for revocation based on noncompliance. *Id.* at 16.

Although pretrial-supervision and -diversion programs require resources, the financial cost is far less than that of pretrial detention. In the District of Columbia, considered one of the costlier jurisdictions because PSA personnel are paid on a

[10] In the last five years, over two-thirds of states passed legislation creating, authorizing, and expanding pretrial diversion programs. *See* Nat'l Conference of State Legislatures (NCSL), *Trends in Pretrial Release: State Legislation Update* (2018), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/pretrialEnactments_2017_v03.pdf; *see also* NCSL, *Trends in Pretrial Release: State Legislation* 3-4 (2015), http://www.ncsl.org/portals/1/ImageLibrary/WebImages/Criminal%20Justice/NCSL%20pretrialTrends_v05.pdf.

federal pay schedule, supervision cost only about $18 per defendant per day in 2014. Clifford T. Keenan, Pretrial Servs. Agency for D.C., *It's About Results, Not Money* (2014), https://www.psa.gov/?q=node/499. Compared to the (conservative) $85-per-day estimate for pretrial detention, pretrial supervision is far more cost effective. *See* Pretrial Justice Inst., *Pretrial Justice, How Much Does It Cost?* 1, 5 (2017), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd; *see also* Marie VanNostrand & Gena Keebler, *Pretrial Risk Assessment in Federal Court*, Fed. Probation, Sept. 2009, at 17-18 (finding annual cost of pretrial detention until case resolution to vary between $18,768 and $19,912, while pretrial release and supervision averaged $3,860). Even limited and low-cost steps to encourage appearances, such as phone calls or text-message reminders about court dates, effectively reduce failure-to-appear rates.[11]

[11] *See, e.g.*, Timothy R. Schnacke et al., *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 Ct. Rev. 86, 89 (2012) (finding that reminder calls significantly decreased failure-to-appear rates); Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, ABA J. (July 17, 2018, 7:10 A.M.), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail (describing effective reductions of failure-to-appear rates through text-message reminders in California and New York City).

III. This Court Should Reject Arguments Made in Other Cases by the Bail Industry's Defenders

Individuals with vested interests in the perpetuation of money bail have repeatedly challenged attempts to reform unjust bail systems around the country. Representatives of the bail industry, who have a direct financial stake in requiring incarcerated people to purchase their freedom through commercial surety bonds, have filed briefs as amici curiae in cases arising in Harris County, Texas,[12] the City of Calhoun, Georgia,[13] and Cullman County, Alabama.[14] And, in a federal class action challenging the City of San Francisco's money-bail schedule, the California Bail Agents Association was permitted to intervene to defend the practice when all defendants conceded its unconstitutionality. Order Granting Motion to Intervene, *Buffin v. City & Cty. of San Francisco*, No. 15-cv-04959 (N.D. Cal. Mar. 6, 2017), ECF No. 119.

Meanwhile, the U.S. Court of Appeals for the Third Circuit recently rejected a request for a preliminary injunction in a bail industry-backed lawsuit attacking New Jersey's reformed pretrial system that discourages money bail. The court found

[12] Brief for Am. Bail Coal. et al. as Amici Curiae Supporting Appellants, *ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333) [hereinafter *ODonnell* Brief].
[13] Brief for Am. Bail Coal. et al. as Amici Curiae Supporting Defendant-Appellant, *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018) (No. 17-13139) [hereinafter *Walker* Brief].
[14] Brief for Am. Bail Coal. et al. as Amici Curiae Supporting Defendants-Appellants, *Hester v. Gentry*, No. 18-13894 (11th Cir. filed Dec. 21, 2018) [hereinafter *Hester* Brief].

"no right" to money bail, *Holland v. Rosen*, 895 F.3d 272, 303 (3d Cir. 2018), and concluded that nonmonetary conditions of bail "allow[] the State to release low-risk defendants, who may be unable to afford to post cash or pay a bondsman, while addressing riskier defendants' potential to flee, endanger the community or another person, or interfere with the judicial process," *id.* at 296.

A. The Historical Use of Money Bail Does Not Make Discrimination Based Solely on Inability to Pay Constitutionally Permissible

The bail industry has argued that money bail is a "liberty-promoting institution" far older than the Republic. *Hester* Brief, *supra,* at 6; *ODonnell* Brief, *supra*, at 6; *Walker* Brief, *supra,* at 4. Although *bail* broadly has a long history, *money* bail does not. The U.S. Supreme Court explained in *Stack* that the "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." 342 U.S. at 4. *Stack* recognized that assurances had evolved over time from "the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused" to "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture." *Id.* at 5.

The Third Circuit exhaustively examined the history of bail in *Holland* and concluded that at the time of the U.S. Constitution's ratification, "bail" did not contemplate monetary bail in the form of cash or corporate surety bonds. 895 F.3d

at 290. Citing numerous historical and scholarly sources, the Third Circuit explained that "bail" at that time "relied on personal sureties—a criminal defendant was delivered into the custody of his surety, who provided a pledge to guarantee the defendant's appearance at trial and, in the event of nonappearance, a sum of money." *Id.* at 288. No upfront payment was required and personal sureties did not receive compensation for making a pledge on behalf of a criminal defendant. *Id.* at 289. The first commercial surety operation for money bail reportedly opened for business in the United States only in 1898, *id.* at 295, the apparent product of "the expansive frontier and urban areas in America diluting the personal relationships necessary for a personal surety system," *id.* at 293. Ironically, the purposeful move toward money bail to help more bailable defendants be released was quickly undercut by "rampant abuses in professional bail bonding," *id.* at 295, including unnecessary pretrial detention due to bondspersons' demands for payment up front, which many defendants are unable to make.[15]

The modest history of *money* bail cannot sustain a system that offends equal protection principles by detaining indigent defendants based solely on their inability to pay, while releasing those who can. The Supreme Court rejected a similar historical argument in *Williams v. Illinois*, where the defendant challenged a state

[15] *See also* Timothy R. Schnacke, Nat'l Inst. of Corr., *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 26 (2014), https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf.

law that resulted in him remaining incarcerated after the maximum statutory period of confinement because of his failure to pay fines and costs. 399 U.S. 235 (1970). Acknowledging that the custom of imprisoning indigent defendants for nonpayment of fines dated to medieval England and that "almost all States and the Federal Government have statutes authorizing incarceration under such circumstances," the Court made clear that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Id*. at 239. The Court continued: "The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." *Id.* at 240.

In *Williams*, the Court considered the state's interests in enforcing judgments against those financially unable to pay a fine and made clear that numerous alternatives to imprisonment exist that could be enacted by state legislatures or imposed by judges within the scope of their authority. 399 U.S. at 244-45 & n.21. In its final nod to history, the Court concluded, "We are not unaware that today's holding may place a further burden on States in administering criminal justice. . . . But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo." *Id.* at 245.

Here, not only is the "comfortable convenience of the status quo" constitutionally barred, but—just as importantly—it also is not a sensible way to ensure appearance in court and to promote community safety in light of more effective alternatives that are consistent with a fair and impartial criminal justice system.

B. A Bail System Premised on Individualized Assessments Is the Fairest and Most Effective Bail System

Bail industry representatives have suggested elsewhere that the money bail system is preferable to "uniform detention, uniform unsecured bail, or uniform release subject to liberty-infringing conditions." *Hester* Brief, *supra*, at 10; *ODonnell* Brief, *supra*, at 11; *Walker* Brief, *supra*, at 9. But amici do not advocate any of these extremes. A "uniform system" or "categorical rule" that fails to take into consideration the circumstances of individual defendants and their alleged crimes would not enhance public confidence in the system and—other than uniform detention—would do little to ensure appearances by defendants and promote public safety.

Money bail's defenders also have offered misleading evidence suggesting that the modern commercial surety system is statistically the most effective at ensuring court appearances. In doing so, they rely briefly on a handful of studies that largely do not purport to compare failure-to-appear rates of defendants released on commercial surety bonds with those released on nonfinancial conditions based on

individualized risk assessments. *Hester* Brief, *supra*, at 13-14; *ODonnell* Brief, *supra*, at 14-17; *Walker* Brief, *supra*, at 12-16. Contrary to the bail industry's representations, the overwhelming weight of evidence demonstrates that secured money bail is not more effective than unsecured bonds or nonfinancial conditions in meeting the objectives of bail. In *ODonnell I*, the district court heard expert testimony and reviewed extensive academic and empirical studies, finding that secured money bail "does not meaningfully add to assuring misdemeanor defendants' appearance at hearings or absence of new criminal activity during pretrial release." 251 F. Supp. 3d at 1119-20. This was true for both Harris County and other jurisdictions, *id.* at 1120, and studies show the same results for felony defendants, *see* Gupta, *supra*, 45 J. Legal Stud. at 496 (finding, in a combined study of misdemeanor and felony defendants, "that money bail has a negligible effect, or, if anything, increases failures to appear").

The bail industry's assertion that the imposition of pretrial conditions of release is itself constitutionally problematic, *Hester* Brief, *supra*, at 12; *ODonnell* Brief, *supra*, at 13-14; *Walker* Brief, *supra*, at 12-13, is similarly unfounded. The Third Circuit in *Holland* soundly rejected similar arguments in that case, finding no procedural due process violation in the imposition of release conditions after a hearing, and no Fourth Amendment violation based on the intrusiveness of release conditions. 895 F.3d at 300, 301-02.

The bail industry also has complained that release on nonfinancial conditions is financially costly and a drain on pretrial supervision systems. *Hester* Brief, *supra*, at 14-15; *ODonnell* Brief, *supra*, at 12; *Walker* Brief, *supra*, at 14-15. But the financial cost of pretrial supervision pales in comparison to the cost of detention. *See supra* at 17-18.

C. The Bond Schedule's Facial Neutrality Does Not Save It From Constitutional Infirmity

Money bail's defenders have also attempted to deflect challenges to bail schedules by arguing that "[d]efendants who cannot post bail are not detained because they are poor," but are detained "because the government had probable cause to arrest them and charge them with a crime, and wishes to secure their appearance at trial." *Hester* Brief, *supra*, at 15; *ODonnell* Brief, *supra*, at 17; *Walker* Brief, *supra*, at 16. The Supreme Court rejected this very argument in *Williams*:

> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois*, "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. . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

399 U.S. at 242 (citation omitted).

The bail industry also has denied that what *it* portrays as the bail schedule's equal treatment of charged defendants could possibly violate the Equal Protection Clause, *Walker* Brief, *supra*, at 4, implying that a system that takes individual circumstances, including indigence, into consideration would "discriminate in favor of the indigent[.]" *Id.*; *see also Hester* Brief, *supra*, at 4-5; *ODonnell* Brief, *supra*, at 5. But this argument, too, was rejected in *Williams*. The Supreme Court there recognized that nonenforcement of judgments against those financially unable to pay "would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 399 U.S. at 244. But nonenforcement was unnecessary, *Williams* explained, because states could rely on alternative enforcement mechanisms that did not result in imprisonment of indigents beyond the statutory maximum for involuntary nonpayment of fines and court costs. *Id.* at 244-45.

This solution was reiterated in *Tate v. Short* a year later, when the Supreme Court applied *Williams* to invalidate the practice of imprisoning indigents for failure to pay the fine on a fines-only offense: "There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines." 401 U.S. 395, 399 (1971).

Amici recognize and share the interest of Dallas County and the general public in ensuring that defendants appear for trial and do not commit crimes while on pretrial release. But alternatives exist that are not only constitutional, but also more effective, and promote a justice system that avoids perpetuating modern-day debtors' prisons and eroding community trust.

CONCLUSION

The district court's ruling that Dallas County's bail system violates equal protection and due process requirements should be affirmed.

Respectfully submitted,

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/s/ Mary B. McCord
MARY B. MCCORD
JOSHUA A. GELTZER
SETH WAYNE
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave. NW
Washington, D.C. 20001
(202) 661-6607
mbm7@georgetown.edu
Counsel for Amici Curiae

APPENDIX: LIST OF AMICI

Roy L. Austin, Jr.
Former Deputy Assistant to the President, Office of Urban Affairs, Justice, and Opportunity
Former Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice
Former Assistant U.S. Attorney, District of Columbia

Aramis Ayala
State Attorney, Ninth Judicial Circuit (Orange and Osceola Counties), Florida

Branville Bard
Commissioner, Cambridge Police Department, Massachusetts

William G. Bassler
Former Judge, United States District Court for the District of New Jersey

Diana Becton
District Attorney, Contra Costa County, California

Sherry Boston
District Attorney, Stone Mountain Judicial Circuit (DeKalb County), Georgia

Kenyen Brown
Former U.S. Attorney, Southern District of Alabama

Chris Burbank
Director, Law Enforcement Engagement, Center for Policing Equity
Former Chief, Salk Lake City Police Department, Utah

A. Bates Butler III
Former U.S. Attorney, District of Arizona

John T. Chisholm
District Attorney, Milwaukee County, Wisconsin

Jerry L. Clayton
Sheriff, Washtenaw County, Michigan

U.W. Clemon
Former Chief Judge, United States District Court for the Northern District of Alabama

W. J. Michael Cody
Former U.S. Attorney, Western District of Tennessee
Former Attorney General, State of Tennessee

Alexis Collins
Former Deputy Chief, Counterterrorism Section, National Security Division, U.S. Department of Justice
Former Counsel to the Assistant Attorney General for National Security, U.S. Department of Justice
Former Assistant U.S. Attorney, Eastern District of New York

Scott Colom
District Attorney, Sixteenth Circuit (Lowndes, Oktibbeha, Clay and Noxubee Counties), Mississippi

Michael W. Cotter
Former U.S. Attorney, District of Montana

Brendan Cox
Former Chief, Albany Police Department, New York

William B. Cummings
Former U.S. Attorney, Eastern District of Virginia

Benjamin R. David
District Attorney, Sixth Prosecutorial District (New Hanover and Pender Counties), North Carolina

Gregory K. Davis
Former U.S. Attorney, Southern District of Mississippi

Satana Deberry
District Attorney, Sixteenth Prosecutorial District (Durham County), North Carolina

Walter Dellinger
Former Acting Solicitor General, U.S. Department of Justice
Former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

W. Thomas Dillard
Former U.S. Attorney, Northern District of Florida
Former U.S. Attorney, Eastern District of Tennessee

Thomas J. Donovan, Jr.
Attorney General, State of Vermont
Former State's Attorney, Chittenden County, Vermont

Michael T. Dougherty
District Attorney, Twentieth Judicial District (Boulder County) Colorado

Mark A. Dupree, Sr.
District Attorney, Wyandotte County, Kansas

George C. Eskin
Former Judge, Santa Barbara County Superior Court, California
Former Assistant District Attorney, Ventura County and Santa Barbara County, California
Former Chief Assistant City Attorney, Criminal Division, City of Los Angeles, California

John P. Flannery
Former Assistant U.S. Attorney, Southern District of New York

Kimberly M. Foxx
State's Attorney, Cook County, Illinois

Brian E. Frosh
Attorney General, State of Maryland

Kimberly Gardner
Circuit Attorney, City of St. Louis, Missouri

Sarah F. George
State's Attorney, Chittenden County, Vermont

Sim Gill
District Attorney, Salt Lake County, Utah

Joe Gonzales
District Attorney, Bexar County, Texas

Eric Gonzalez
District Attorney, Kings County, New York

Mark Gonzalez
District Attorney, Nueces County, Texas

James P. Gray
Former Judge, Superior Court of Orange County, California
Former Assistant U.S. Attorney, Central District of California

Vanita Gupta
Former Head of the Civil Rights Division, U.S. Department of Justice

Nancy Guthrie
Former Judge, Ninth Judicial District, Wyoming

Andrea Harrington
District Attorney, Berkshire County, Massachusetts

Robert J. Hoffman
Former Chief, Plainfield Police Department, Connecticut

John Hummel
District Attorney, Deschutes County, Oregon

Gerald Kogan
Former Chief Justice, Supreme Court of Florida
Former Judge, Eleventh Judicial Circuit, Florida
Former Assistant State Attorney, Eleventh Judicial Circuit (Miami-Dade County), Florida

Lawrence S. Krasner
District Attorney, Philadelphia, Pennsylvania

Miriam Aroni Krinsky
Executive Director, Fair and Just Prosecution
Former Assistant U.S. Attorney, Central District of California
Former Criminal Appellate Chief and Chief, General Crimes, Central District of California
Former Chair, Solicitor General's Criminal Appellate Advisory Group

Scott Lassar
Former U.S. Attorney, Northern District of Illinois

J. Alex Little
Former Assistant U.S. Attorney, Middle District of Tennessee
Former Assistant U.S. Attorney, District of Columbia

Chris Magnus
Chief, Tucson Police Department, Arizona

James Manfre
Former Sheriff, Flagler County, Florida

Beth McCann
District Attorney, 2nd Judicial District (Denver County), Colorado

Mary B. McCord
Former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice
Former Assistant U.S. Attorney and Chief, Criminal Division, District of Columbia

Brian Middleton
District Attorney, Fort Bend County, Texas

Stephanie Morales
Commonwealth's Attorney, Portsmouth, Virginia

J. Tom Morgan
Former District Attorney, DeKalb County, Georgia

Marilyn Mosby
State's Attorney, Baltimore City, Maryland

Tina Nadeau
Chief Justice, New Hampshire Superior Court
Former Assistant Attorney General, State of New Hampshire

Kim Ogg
District Attorney, Harris County, Texas

Wendy Olson
Former U.S. Attorney, District of Idaho

Channing Phillips
Former U.S. Attorney, District of Columbia
Former Senior Counselor to the Attorney General and Deputy Associate Attorney General, U.S. Department of Justice

Abdul D. Pridgen
Chief, Seaside Police Department, California

Karl A. Racine
Attorney General for the District of Columbia

Ira Reiner
Former District Attorney, Los Angeles County, California
Former City Attorney, City of Los Angeles, California

Rachael Rollins
District Attorney, Suffolk County, Massachusetts

Jeffrey F. Rosen
District Attorney, Santa Clara County, California

Stephen D. Rosenthal
Former Attorney General, Commonwealth of Virginia

Marian T. Ryan
District Attorney, Middlesex County, Massachusetts

Barry Schneider
Former Judge, Maricopa County Superior Court, Arizona

Ronal Serpas
Co-Chairman, Law Enforcement Leaders to Reduce Crime & Incarceration
Former Police Superintendent, New Orleans, Louisiana
Former Police Chief, Metropolitan Nashville, Tennessee
Former State Patrol Chief, Washington

Carol A. Siemon
Prosecuting Attorney, Ingham County, Michigan

Robert J. Spagnoletti
Former Attorney General, District of Columbia

Norm Stamper
Former Chief, Seattle Police Department, Washington

Darrel Stephens
Former Chief, Charlotte-Mecklenburg Police Department, North Carolina

David E. Sullivan
District Attorney, Northwestern District, Massachusetts

Thomas P. Sullivan
Former U.S. Attorney, Northern District of Illinois

Marsha Ternus
Former Chief Justice, Iowa Supreme Court

Raúl Torrez
District Attorney, Bernalillo County, New Mexico

Anthony F. Troy
Former Attorney General, Commonwealth of Virginia

Michael W. Tupper
Chief, Marshalltown Police Department, Iowa

Cyrus R. Vance, Jr.
District Attorney, New York County, New York

Tori Verber Salazar
District Attorney, San Joaquin County, California

Peter Volkmann
Chief, Chatham Police Department, New York

Andrew H. Warren
State Attorney, Thirteenth Judicial Circuit (Tampa), Florida

CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on January 30, 2019, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Mary B. McCord
Mary B. McCord

CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i) because it contains 6,300 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

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

/s/ Mary B. McCord
Mary B. McCord