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* NATIONAL LAW PROFESSORS OF CRIMINAL, PROCEDURAL, AND CONSTITUTIONAL LAW IN SUPPORT OF THE APPELLANTS-CROSS APPELLEES

KELLEN FUNK
Counsel for Amici
COLUMBIA LAW SCHOOL
435 W. 116th Street
New York, NY 10027
(505) 609-3854

January 30, 2019

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 Frances Stephanie Mitchell Brandon Birmingham Tracy Holmes Robert Burns Nancy Kennedy Gracie Lewis Dominique Collins Carter Thompson Jeannie 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

Amici Curiae	**Counsel**
Shima Baradaran Baughman Lara Bazelon Monica C. Bell Josh Bowers Erwin Chemerinsky Gabriel J. Chin Brett Dignam Jeffrey A. Fagan Barry Friedman Kellen Funk Russell C. Gabriel Brandon Garrett Russell M. Gold Ben Johnson Cliff Johnson Thea Johnson Cynthia E. Jones Issa Kohler-Hausman Richard A. Leo Gerald Leonard Suzanne A. Luban Sara Mayeux Sandra G. Mayson Allegra McLeod Melanie Newport Samuel P. Newton Keramet Reiter Ira P. Robbins Brendan D. Roediger Laurent Sacharoff Christine Scott-Hayward	Kellen Funk COLUMBIA LAW SCHOOL

Jeff Selbin Sarah Seo Alison Siegler Jonathan Simon Jocelyn Simonson Colin Starger Megan Stevenson Katharine Tinto Ron Tyler Samuel R. Wiseman Ellen Yaroshefsky	

/s/ Kellen Funk
KELLEN FUNK

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who teach and write about criminal, procedural, and constitutional law. Several *amici* direct clinics, participate in criminal litigation at bail hearings and other pretrial proceedings, or study those proceedings. *Amici* seek to assist the Court's consideration of the issues on appeal by providing (1) an overview of Supreme Court jurisprudence and the latest scholarship addressing the substantive constraints on depriving the indigent of pretrial liberty, and (2) a short history of substantive legal protections applied to bail and pretrial detention from pre-Norman England to today. A full list of *amici* appears in the Appendix.

SUMMARY OF THE ARGUMENT

As scholars and professors of criminal law, criminal procedure, and federal constitutional law, we urge this Court to reverse in part the decision below and hold that: *When the government proposes to incarcerate a person before trial, it must provide substantive justification, whether the mechanism of detention is a transparent detention order or its functional equivalent, the imposition of unaffordable money bail.*

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made such a monetary contribution. The parties to this appeal have consented to the filing of this brief.

This principle follows from the respect for physical liberty the Constitution enshrines. The protections of the criminal process—including the presumption of innocence, the requirement of proof beyond a reasonable doubt, and the institution of bail itself—are meant to deny the state the power to imprison individuals solely on the basis of a criminal charge. These are illusory protections if a court can detain a person by casually imposing a monetary bail amount that she cannot pay.

The principle that any order of detention requires substantive justification follows from two related lines of federal constitutional jurisprudence in *Bearden v. Georgia*, 461 U.S. 660 (1983) and *United States v. Salerno*, 481 U.S. 739 (1987).[2] A court contemplating money bail must determine whether it is likely to result in detention. If so, and the court nonetheless wishes to impose it, the court must find that the unaffordable bail amount serves a compelling interest of the state that no less restrictive condition of release can meet. This will rarely be the case. Few defendants pose an acute risk of willful flight or of committing serious harm in the pretrial phase. For the vast majority, attainable conditions of release can adequately protect the state's interests in ensuring appearance and protecting public safety, while also preserving the fundamental right to pretrial liberty.

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[2] This brief does not address whether unaffordable bail violates the Eighth Amendment. Case law on that question is mixed. *See* Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 605–10 (2018).

The principle that the government must thoroughly justify any order of pretrial detention is not radical. Rather, it is continuous with the historical commitments of the bail system. Clarification of this core constitutional mandate is essential to recovering a rational system of pretrial detention and release, and the freedom it protects.

ARGUMENT

I. THE *BEARDEN* LINE: EQUAL PROTECTION AND DUE PROCESS FORBID DETENTION ON MONEY BAIL UNLESS NO ALTERNATIVE SATISFIES THE STATE'S INTERESTS

The Supreme Court has long been attuned to the danger that, without vigilance, core civil liberties might become a function of resources rather than of personhood. In a line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12 (1956), and culminating in *Bearden v. Georgia*, 461 U.S. 660 (1983), the Court has established that the state cannot condition a person's liberty on a monetary payment she cannot afford unless no alternative method can meet the state's needs.

A. *Bearden* and Predecessor Cases Establish that the Government May Not Condition Liberty on Payment Unless No Alternative Meets Its Interests.

This line of jurisprudence began with challenges to wealth-based deprivations of another civil right: access to the courts. In *Griffin v. Illinois*, 351 U.S. 12 (1956), convicted prisoners lacked the funds to procure necessary

transcripts for a direct appeal. The Supreme Court held that the Fourteenth Amendment prohibited Illinois from conditioning access to a direct appeal on wealth. *Id*. at 17; *see also Douglas v. California*, 372 U.S. 353, 357 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (emphasis omitted)).

The Supreme Court has applied the logic of *Griffin* to wealth-based deprivations of physical liberty. The petitioner in *Williams v. Illinois* was held in prison after the expiration of his one-year term pursuant to an Illinois law that permitted continued confinement in lieu of paying off a fine. 399 U.S. 235, 236–37 (1970). The Court concluded that the Fourteenth Amendment prohibits the state from "making the maximum confinement contingent on one's ability to pay." *Id*. The following year, in *Tate v. Short*, the Court held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full." 401 U.S. 395, 398 (1971) (quoting and adopting the reasoning of *Morris v. Schoonfield*, 399 U.S. 508 (1970)).

Bearden, 461 U.S. at 660, synthesized this line of cases. The petitioner in *Bearden* challenged the revocation of his probation for failure to pay a fine. *Id*. at 662–63. The parties had argued over which tier of scrutiny should apply, but the

Court rejected "resort to easy slogans or pigeonhole analysis," instead requiring "a careful inquiry into such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" *Id*. at 666–67 (quoting *Williams*, 399 U.S. at 260 (Harlan, J., concurring)).

Considering the relevant factors, the *Bearden* Court concluded that the Fourteenth Amendment prohibits revocation of probation solely on the basis of nonpayment, when alternate measures may suffice to meet the state's interests. *Id*. at 672–73. To hold otherwise, the Court reasoned, "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id*. at 672–73.

B. The *Bearden* Doctrine Prohibits Unnecessary Detention on Money Bail.

The *Bearden* rule—that the Fourteenth Amendment prohibits unnecessary deprivations of liberty on the basis of indigence alone—applies "with special force in the bail context, where fundamental deprivations are at issue and arrestees are presumed innocent." *Buffin v. City & Cty. of San Francisco*, Civil No. 15-4959, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *accord Pugh v. Rainwater*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) ("[Pretrial] imprisonment solely

because of indigent status is invidious discrimination and not constitutionally permissible."); *ODonnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018); *Walker v. City of Calhoun*, 901 F.3d 1245, 1259–60 (11th Cir. 2018). In the pretrial domain, *Bearden* and its predecessors prohibit the state from conditioning a person's liberty on a payment she cannot make—unaffordable money bail or other secured financial condition of release—unless no "alternative measure" can adequately meet the state's interests. 461 U.S. at 672–73. The state's interest in the pretrial context is in ensuring defendants' appearance at future court dates and in protecting public safety. *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *Salerno*, 481 U.S. at 750; *see also ODonnell*, 892 F.3d at 162 ("[A]lthough the County had a compelling interest in the assurance of a misdemeanor detainee's future appearance and lawful behavior, its policy [of detaining indigent misdemeanor defendants] was not narrowly tailored to meet that interest.").

Although *Bearden* seems to have rejected the tiered-scrutiny framework, in practical effect, *Bearden* calls for heightened scrutiny when the individual interest at stake is physical liberty.[3] The Supreme Court held that the proper framework

[3] A number of courts have found systems that permit the casual or automatic imposition of unaffordable bail fail even rational basis review. *See, e.g.*, *Shultz v. Alabama*, 330 F. Supp. 3d 1344, 1365 n.23 (N.D. Ala. 2018), *appeal pending sub nom. Hester v. Gentry*; *State v. Blake*, 642 So. 2d 959, 968 (Ala. 1994); *cf. Griffin*, 351 U.S. at 17–18 ("Plainly, the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence . . . .").

for analyzing a claim of wealth-based discrimination in the criminal justice system was a multi-factored analysis similar to traditional due process but also informed by equal protection principles. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1315 (2017) (describing constitutional cases "involving rights that, when read together, magnify each other"). And even before *Bearden*, the Supreme Court recognized custodial detention as an exception to the rule that wealth discrimination merits only rational basis review where indigence causes an "absolute deprivation" of liberty.[4] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20–21 (1973). *Bearden* recognized that wealth-based deprivations of liberty implicate both substantive and procedural rights, and the requirement of heightened scrutiny is clear from *Bearden*'s final rule: "Only if alternative measures are not adequate to meet the State's interests" may a court imprison a defendant for inability to satisfy a financial obligation. 461 U.S. at 672. The rule itself states a narrow tailoring

[4] We agree with recent dissents in the Fifth and Eleventh Circuits that even a detention lasting a few days is, for that period, an absolute deprivation of bodily liberty requiring heightened scrutiny. *ODonnell v. Goodhart*, 900 F.3d 220, 230 (5th Cir. 2018) (Graves, J., dissenting); *Walker*, 901 F.3d at 1274 (Martin, J., dissenting in part). Nevertheless, the motions panel decision by this Court concerned only the *procedures* required under *Bearden*. *See ODonnell*, 900 F.3d at 227 ("a procedural violation is subject to procedural relief"). We now urge the Court to make clear the *substantive finding* required by *Bearden*, both after an individual arrest and when evaluating a municipal bail system as a whole.

requirement. Detention for nonpayment must be the only means of achieving the state's interests; if alternative means are available, detention is impermissible.

II. THE *SALERNO* LINE: DUE PROCESS REQUIRES THAT ANY ORDER OF DETENTION MEET ROBUST SUBSTANTIVE AND PROCEDURAL CRITERIA

The second line of Supreme Court jurisprudence that constrains pretrial detention applies whether detention is ordered outright or via unaffordable money bail. Because the right to physical liberty is fundamental, regulatory detention of an adult citizen triggers strict scrutiny, and must comply with robust substantive (and procedural) limits to survive.

A. Substantive Due Process Requires that Pretrial Detention Be Carefully Tailored to a Compelling Government Interest.

The Supreme Court has recognized that the right to pretrial liberty is "fundamental." *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 716 (1990). Physical liberty is not only a fundamental right, it also secures numerous other fundamental rights. In the pretrial context, 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).

As the Supreme Court has long acknowledged, the consequences of depriving a defendant of pretrial liberty are profound. "[T]ime spent in jail . . . often means loss of a job; it disrupts family life; and it enforces idleness." *Barker v. Wingo*, 407 U.S. 514, 532–33 (1972). A defendant behind bars "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Id.* at 533. Recent empirical research has confirmed that pretrial detention itself increases the likelihood of conviction. *E.g.*, Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224–26 (2018). Some evidence suggests that it increases the likelihood that the person detained will commit future crime. *E.g.*, Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 759–69 (2017); CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION (2013). Detention also has adverse downstream effects on defendants' employment prospects. Dobbie et al., *supra*, at 227–32, 235. Importantly, the research indicates that all of these adverse effects are triggered by as little as two or three days of detention. *Id*. at 212; LOWENKAMP ET AL., *supra*. The cascading effects of detention extend beyond the individual to the detriment of entire communities. *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612–16, 629–30 (2017);

SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 77–91 (2018). Pretrial release is therefore a public, and not just individual, interest. *Id*.

Because the right to pretrial liberty is fundamental, the substantive component of due process forbids pretrial detention unless the detention at issue is narrowly tailored to a compelling state interest. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993). The Supreme Court has not explicitly announced that pretrial detention is subject to strict scrutiny under substantive due process. But *Salerno* articulated the tailoring requirement of strict scrutiny in only slightly different terms. 481 U.S. at 755, 746–52. It "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming" by limiting detention eligibility and requiring courts to comply with strict substantive and procedural requirements before detention could be imposed. *Id.* at 749–52.

"If there was any doubt about the level of scrutiny applied in *Salerno*, it has been resolved in subsequent Supreme Court decisions, which have confirmed that *Salerno* involved a fundamental liberty interest and applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780–81 (9th Cir. 2014) (en banc). In *Foucha v. Louisiana*, for instance, the Court held that the detention of defendants acquitted on insanity grounds violated substantive due process on the basis that, "unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of

confinement is not carefully limited." 504 U.S. 71, 81 (1992); *see also Flores*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny."). Substantive due process thus requires that pretrial detention be narrowly tailored to a compelling state interest, which may include the state's interests in promoting public safety and the effective administration of justice.

B. An Order Imposing Unattainable Bail is an Order of Detention.

As a matter of both logic and law, an order imposing a secured condition of release that a defendant cannot satisfy constitutes an order of detention. It has precisely the same result: the defendant remains in jail. *See ODonnell*, 892 F.3d at 158 ("[W]hen the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order."); *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969). Because an order imposing unattainable bail is in fact a detention order, the due process requirements for a detention order apply. *Accord, e.g.*, *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017).

In an analogous statutory context, the federal Bail Reform Act recognizes that the setting of unaffordable bail triggers all procedures and protections that must attend a direct order of detention. The accompanying Senate Report explained that, if a court concludes that an unaffordable money bond is necessary,

> then it would appear that there is no available condition of release that will assure the defendant's appearance. This is the very finding which, under section 3142(e), is the basis for an order of detention, and *therefore the judge may proceed with a detention hearing pursuant to section 3142(f)* and order the defendant detained, if appropriate.

S. REP. No. 98-225, at 16 (1984) (emphasis added).

The Fifth Circuit, in declining to hold that the Bail Reform Act prohibits unaffordable bail entirely, went out of its way to emphasize that unaffordable bail *does* trigger full detention proceedings. *See United States v. McConnell*, 842 F.2d 105, 108–10 (5th Cir. 1988); *see also United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) ("[O]nce a court finds itself in this situation—insisting on terms in a 'release' order that will cause the defendant to be detained pending trial—it must satisfy the procedural requirements for a valid *detention* order.").

The notion that a court could circumvent the constitutional requirements for detention merely by announcing an unaffordable bail amount is logically and legally untenable. As Congress recognized in the Bail Reform Act and as the Fifth Circuit recognized in *McConnell*, an order imposing unaffordable bail is a detention order.

III. EQUAL PROTECTION AND DUE PROCESS PROHIBIT UNAFFORDABLE BAIL ABSENT A DETERMINATION OF NECESSITY

Bearden and predecessor cases prohibit unnecessary detention on money bail; they require a substantive determination that no less restrictive measure can

meet the state's interests. Due process doctrine, as elaborated in *Salerno* and cases that followed, requires that regulatory detention be narrowly tailored to a compelling state interest and imposed pursuant to a process that protects the liberty interest at stake. Both lines of doctrine thus require a substantive determination of necessity before the state may detain a person for inability to post bond.[5]

A. Equal Protection and Due Process Prohibit the Setting of Unaffordable Bail Absent a Determination of Necessity.

Both the *Bearden* and the *Salerno* lines of jurisprudence require a determination of necessity before the government can detain an individual for inability to post bail. To fulfill this requirement, a court must first consider a defendant's ability to pay. *Cf. Bearden*, 461 U.S. at 672; *Hernandez v. Sessions*, 872 F.3d 976, 992–93 (9th Cir. 2017). If the bail amount contemplated is beyond the defendant's ability to procure, such that the bail order will constitute an order of detention, the unaffordable bail amount violates due process and equal protection unless the court determines that it is the least restrictive means to meet a compelling state interest. *Accord Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc). The same is true of any bail *system* that permits the imposition of

[5] These lines of course involve *procedural* due process protections as well. For those requirements, see especially *Turner v. Rogers*, 564 U.S. 431, 444–45 (2011); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

unaffordable bail. *Accord ODonnell*, 892 F.3d at 162; *Brangan*, 80 N.E.3d at 959; *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979).

The state's interests during the pretrial phase are in ensuring the integrity of the judicial process—which includes ensuring a defendant's appearance at trial and the safety of witnesses—and in protecting public safety. *See, e.g.*, *Salerno*, 481 U.S. at 752–53. Yet these amorphous phrases can be misleading, because the state cannot claim an interest in *guaranteeing* defendants' appearance or in *eliminating* law-breaking. Every person poses some risk of nonappearance and of committing future crime. Short of jailing every accused person in escape- and crime-proof conditions, the state cannot eliminate all risk of nonappearance and future law-breaking. Any effort to do so would contravene the basic values of a legal order that prizes individual liberty and the presumption of innocence. *Id*. at 755. *See generally* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723 (2011). As the Supreme Court has recognized, "Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice." *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

The more precise formulation, then, is that the state has a compelling interest in eliminating significant, identifiable threats to witnesses, public safety, or the integrity of the judicial process. The drafters of the federal Bail Reform Act

recognized this nuance. *See* S. REP. 98-225, at 7 (1984). The *Salerno* Court did too. 481 U.S. at 750 (sustaining the Act in part because it addressed a "particularly acute problem").

B. The Requisite Determination of Necessity Is Difficult to Meet, Given the Modern Costs and Benefits of Alternatives to Detention.

It will rarely be the case that detention is the least restrictive means of eliminating flight and public safety risks. Few defendants pose such risk in the first place. For those that do, alternative conditions of release may be sufficient to manage it. As several courts have now noted, the evidence on the relative efficacy of secured money bond at ensuring appearance or preventing crime is mixed at best. *ODonnell*, 892 F.3d at 162 (noting that the district court's "thorough review of empirical data and studies found that the County had failed to establish any 'link between financial conditions of release and appearance at trial or law-abiding behavior before trial'" (referring to *ODonnell v Harris Cty.*, 251 F. Supp. 3d 1052, 1117–21 (S.D. Tex. 2017)); *Shultz*, 330 F. Supp. 3d at 1362–65.

Detention is especially unlikely to be necessary to ensure appearance. Most nonappearance is not willful flight from justice; many people fail to appear because they do not receive adequate notice of court dates, because they cannot afford to miss work, because they lack childcare or transportation, or for other psychological and logistical reasons. *See, e.g.*, Lauryn P. Gouldin, *Defining Flight*

Risk, 85 U. CHI. L. REV. 677, 729–35 (2018). As Professor Gouldin has explained, there are ample risk management measures short of detention that can effectively redress these obstacles to appearance. Court-reminder systems and transportation support appear particularly promising. *Id.* at 731–32; BRICE COOKE ET AL., UNIV. OF CHI. CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT (2018) (rigorous controlled study finding that redesign of court-date notice form and text-message reminders decreased nonappearance by 36%). When there is a real risk of willful flight, electronic monitoring should usually be effective to mitigate it. *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014). It should be the rare case indeed where detention is necessary to get a person to court.

It will also be rare that detention is the least restrictive alternative capable of meeting the state's interest in protecting public safety. It is important to note that "the government's interest in preventing crime by *anyone* is legitimate and compelling," *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006), but that interest rarely justifies *ex ante* detention. The state must generally restrict its preventive efforts to threatening *ex post* punishment for bad acts, rather than preemptively lock up anyone who might commit some future harm. *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018) (arguing that the

degree of risk that justifies detention is no different for defendants as for non-defendants).

Limiting detention eligibility to "a specific category of extremely serious offenses" is a logical component of narrow tailoring for detention on the basis of general dangerousness. *Accord* ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE § 10-5.9 (3d ed. 2007); TIMOTHY R. SCHNACKE, CTR. FOR LEGAL AND EVIDENCE-BASED PRACTICES, MODEL BAIL LAWS: RE-DRAWING THE LINE BETWEEN PRETRIAL RELEASE AND DETENTION 174–77 (2017) (advocating "eligibility net" limited to defendants charged with violent offenses and explaining statistical support for that limit). For those charged with minor offenses who will be released shortly in any case, detention provides minimal public safety value and might actually increase the likelihood of future crime. *E.g.* Heaton et al., *supra*, at 759–69; LOWENKAMP ET AL., *supra*.

Careful tailoring also requires an individualized risk determination and proof of danger that cannot be mitigated through less restrictive means. For that reason, categorical barriers to pretrial release are unlikely to pass constitutional muster. The Ninth Circuit, for instance, has held that a categorical bar on pretrial release for undocumented immigrants violates substantive due process. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 791 (9th Cir. 2014) (en banc). The Arizona Supreme Court has recently struck down two categorical release bars on the same basis.

Simpson v. Miller, 387 P.3d 1270, 1273 (Ariz. 2017) (categorical denial of pretrial bail for defendants accused of sexual conduct with a minor); *State v. Wein*, 417 P.3d 787, 789 (Ariz. 2018) (categorical denial of pretrial bail for persons charged with sexual assault). Few offense categories, in isolation, are "convincing proof" of "demonstrable danger."[6] *Salerno*, 481 U.S. at 750.

The substantive mandate of careful tailoring precludes detention absent an individualized showing that the defendant presents a serious risk of flight, harm to witnesses, or harm to the public that cannot be managed in any less restrictive way.

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[6] Nor do contemporary risk assessment tools suffice to make the requisite determination of necessity. The risks that such tools assess are typically overbroad. *E.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837, 867–71; Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 587 (2018). To determine if detention is necessary to ensure appearance, it is essential to distinguish between defendants who merely need help getting to court and defendants who pose a genuine risk of willful flight. Gouldin, *Defining Flight Risk*, *supra*. No existing risk assessment tool does that. Nor do these tools adequately distinguish between risk of arrest and risk of violence, Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 528–29 (2012), nor do they predict violence with much precision. MATTHEW DEMICHELE ET AL., LAURA & JOHN ARNOLD FOUND., THE PUBLIC SAFETY ASSESSMENT: A RE-VALIDATION AND ASSESSMENT OF PREDICTIVE UTILITY AND DIFFERENTIAL PREDICTION BY RACE AND GENDER IN KENTUCKY (2018) (defendants flagged as "high-risk" for violence and released were re-arrested for a violent crime only 3% of the time during the pretrial period). Lastly, no instrument that measures risk alone can address the ultimate question, which is whether some method of release can adequately *reduce* the risk. *See* Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 855–62 (2014).

Neither classification by charge alone or by any current pretrial risk assessment tool is *itself* sufficient to justify a deprivation of liberty. Rather, detention should not be imposed unless a court can articulate a significant safety threat to an identifiable victim, or an actual significant risk of flight from the jurisdiction.

IV. THE PROPOSITION THAT PRETRIAL DETENTION MUST BE THOROUGHLY JUSTIFIED IS CONSISTENT WITH CONSTITUTIONAL HISTORY AND TRADITION.

Although the Founders would have been unfamiliar with bail policies making liberty contingent on wealth, the Anglo-American legal tradition calls for careful scrutiny of any such policy to determine whether the policy imposes pretrial detention arbitrarily. English and American law have long provided strict protections for defendants facing pretrial detention.

A. Bail Policies Historically Did Not Condition Pretrial Liberty on a Defendant's Ability to Pay.

As a preliminary matter, the Founders would have been unfamiliar with policies that made a defendant's pretrial liberty dependent on the defendant's ability to proffer cash or secured collateral. The meaning of "bail" in the criminal context at the time of the founding was merely "delivery" of a person to his "sureties" in exchange for some pledge—not an actual deposit. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 294–96 (1769). The institution of pretrial bail derived from the system of amercements in pre-Norman

England. Under this system, all crimes were privately prosecuted and all convictions paid in fines, and a defendant could be released from pretrial confinement if a surety pledged to pay the total amount of the defendant's potential liability. The pledge became a payment due only if the defendant absconded before trial. June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 519–20 (1983). After the Normans replaced monetary fines with a system of public blood punishments, the pledge-based bail system continued, save that surety amounts were set not by a schedule of fines but by judicial discretion. *Id.* at 519, 521.

For hundreds of years thereafter in common-law jurisdictions, a "sufficient" surety might include nonfinancial pledges of good behavior, or a surety's unsecured pledges of property or money, conditioned on a defendant's appearance at trial. Timothy R. Schnacke, *A Brief History of Bail*, 57 Judges' J. 4, 6 (2018). The personal surety was not to be purchased; in fact, the United States today is almost completely alone (save for the Philippines) in permitting indemnification of sureties. F. E. DEVINE, COMMERCIAL BAIL BONDING 6–8 (1991).

Only in the last century has the term "bail" commonly incorporated upfront transfers intended to secure an appearance. Schnacke, *Brief History*, *supra*, at 6–7. Modern bail policies that require upfront payment are therefore substantially more likely to result in pretrial detention for the indigent than the bail systems reflected

in early English and American case law. *See Holland v. Rosen*, 895 F.3d 272, 293–95 (3d Cir. 2018) (discussing the consequences of the transition from a surety system to secured cash bonds in the late nineteenth century). The Founders would not have recognized the bail system as it exists today.

B. The Anglo-American Legal Tradition Provides Special Protections to Prevent Arbitrary Pretrial Detention.

While the form of bail has changed recently and dramatically, the Anglo-American tradition of imposing strict protections against arbitrary pretrial detention is longstanding. Indeed, the tradition was well-established long before the drafting of the U.S. Constitution.

The tradition finds its clearest post-Norman expression in Magna Carta, which enshrined the principle that imprisonment was only to follow conviction by one's peers. Magna Carta ch. 32 (1216); *accord* Magna Carta ch. 39 (1215). From that principle, legislators and jurists over time derived the presumption of innocence, the right to a speedy trial, and the right to bail—that is, a defendant's right to bodily liberty on adequate assurance that he or she would reappear to stand trial. *See, e.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967) (speedy trial "has its roots at the very foundation of our English law heritage" dating to Magna Carta and earlier); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963) (Magna Carta and trial right); *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981)

("Bail was a central theme in the struggle to implement the Magna Carta's 39th chapter which promised due process safeguards for all arrests and detentions.").

As the English Parliament gained power through the 1500s and 1600s, its signal acts of constitution-making aimed to constrain executive and judicial discretion in the administration of pretrial imprisonment. For example, "the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689" all "grew out of cases which alleged abusive denial of freedom on bail pending trial." Caleb Foote, *The Coming Constitutional Crisis in Bail I*, 113 U. PA. L. REV. 959, 966 (1965). *See generally* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 34–66 (1977); ELSA DE HAAS, ANTIQUITIES OF BAIL (1940); Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966 (1961).

Each such act sought to limit arbitrariness and increase fairness in that process. In 1554, for instance, Parliament required that the decision to admit a defendant to bail be made in open session, that two justices be present, and that the evidence weighed be recorded in writing. *See* TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INST., THE HISTORY OF BAIL AND PRETRIAL RELEASE 3 (2010). In 1628, responding to perceived abuses by the Stuart kings and their justices and sheriffs, who detained defendants for months without bail or charge, Parliament passed the Petition of Right prohibiting imprisonment without a timely charge. *See*

JOHN HOSTETTLER, SIR EDWARD COKE: A FORCE FOR FREEDOM 126 (1997). In the Habeas Corpus Act of 1679, Parliament "established procedures to prevent long delays before a bail bond hearing was held," responding to a case in which the defendant was not offered bail for over two months after arrest. SCHNACKE ET AL., BAIL AND PRETRIAL RELEASE, at 4. Undeterred, Stuart-era sheriffs and justices shifted tactics to require impossibly high surety pledges that no surety could responsibly pledge, leading to defendants' pretrial detention. Parliament responded again in 1689 with the English Bill of Rights and its prohibition on "excessive bail," a protection later incorporated into the Eighth Amendment to the U.S. Constitution. Carbone, *New Clothes*, *supra*, at 528–29.

In sum, by the time of the United States' founding, pretrial release on bail was a fundamental part of English constitutionalism, with procedural protections enshrined in Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights. Together, these statutes required bail determinations to be made in open court sessions, with an evidentiary record, and in a timely manner. They ensured that accused defendants were not detained without charge or without a court's consideration of release on bail. All of these constraints were designed to ensure a fair, prompt consideration of each defendant's case for release.

American practice expanded the right to bail. Even before the English Bill of Rights, in 1641 Massachusetts made all non-capital cases bailable (and

significantly reduced the number of capital offenses). Foote, *supra*, at 968. Pennsylvania's 1682 constitution provided that "all prisoners shall be Bailable by Sufficient Sureties, unless for capital Offenses, where proof is evident or the presumption great." *See* Carbone, *New Clothes*, *supra*, at 531 (quoting 5 AMERICAN CHARTERS 3061 (F. Thorpe ed. 1909)). The vast majority of American states copied Pennsylvania's provision in one form or another at different times; many state constitutions, like Texas's, still contain that language. Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 920 (2013). The Judiciary Act of 1789 likewise made all non-capital charges bailable, 1 Stat. 91, as did the Northwest Ordinance, 1 Stat. 52.

Thus, while adopting the English procedural protections regulating pretrial detention, early American constitutions also provided additional guarantees of pretrial liberty. English practice often required a full hearing to determine whether the defendant was to be admitted to bail; by contrast, Americans *categorically* established—in their state constitutions and in the statute founding the federal judiciary and territorial courts—that defendants facing non-capital charges would be eligible for bail. The only determination left to judicial discretion was the sufficiency of the sureties, that is, *how* to bail, not *whether* to bail. *See* TIMOTHY R. SCHNACKE, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, FUNDAMENTALS OF BAIL 29–36 (2014).

Though the federal government and some states later granted the discretion or authority to allow "preventive" pretrial detention in some cases, *see* Note, *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1490 (1966), that authority was accompanied by explicit protections long identified with due process in the English constitutional tradition, and ordinarily has been limited to circumstances where a strong government interest requires such detention. States that have expanded courts' authority to order pretrial detention have generally also required a judicial finding by clear and convincing evidence, after a full adversary hearing, that the accused presented an unmanageable flight risk or risk to public safety. *See, e.g.*, N.M. CONST., art. II, § 13; VT. CONST., art. II, § 40; WIS. CONST. art. I, § 8.

As this brief history illustrates, bail policies have for centuries been constrained by procedural and substantive protections that go well beyond a prohibition on excessiveness. Laws protecting a defendant's right to pretrial release "have consistently remained part of our legal tradition." *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting).

C. The Anglo-American Bail System Has Long Recognized that Unaffordable Bail Constitutes an Order of Detention.

Even as the nature of surety pledges have changed over time, jurists have consistently concluded that an unattainable surety requirement is tantamount to denying bail altogether.

Under the pre-Norman amercement system, the amount required for bail was coterminous with the amount of the fine for which the defendant would be liable upon conviction. But that amount differed based on the defendant's social rank. "[T]he baron [did] not have to pay more than a hundred pounds, nor the routier more than five shillings." 2 FREDERICK WILLIAM POLLUCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 514 (1895).

After the tie between the bail amount and the potential fine was severed, magistrates gained discretion to set the amounts that sureties would have to pledge based on a variety of factors, including the defendant's ability to procure sureties. *See, e.g.*, *Bates v. Pilling*, 149 ENG. REP. 805, 805 (K.B. 1834); *Rex v. Bowes*, 99 ENG. REP. 1327, 1329 (K.B. 1787) (per curiam); *Neal v. Spencer*, 88 ENG. REP. 1305, 1305–06 (K.B. 1698).

Even without upfront transfers of cash or collateral, jurists recognized that too high a standard for "sufficient" sureties could cause the pretrial detention of a defendant. In 1819, Joseph Chitty, the prolific commentator on English criminal practice, noted that "[t]he rule is, . . . bail only is to be required as the party is able

to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 131 (1816). Chitty counseled justices of the peace that in cases where they had to admit defendants to bail, they could not "under the pretence of demanding sufficient surety, make so excessive a requisition, as in effect, to amount to a *denial of bail*." *Id.* at 102–03. If they did, the justices could both be prosecuted for a misdemeanor and sued civilly for false imprisonment. *Id.*

The shift in the nature of suretyship from unsecured pledges to upfront payments has made Chitty's point even more salient. Since the mid-twentieth century, numerous jurists and jurisdictions have recognized unaffordable bail as a *de facto* order of detention. Justice William O. Douglas, sitting as a Circuit Judge in 1960, reasoned that "[i]t would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom. Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Bandy v. United States*, 81 S. Ct. 197, 198 (1960) (Douglas, J., in chambers); *see also* section II.B, *supra*.

In sum, although the nature of surety relationships has changed dramatically over time, jurists in every era have recognized that requiring an unobtainable surety is tantamount to denying bail altogether, and thus demands the same

substantive and procedural protections as an outright denial of bail. *See also* *ODonnell*, 251 F. Supp. 3d at 1156; *Shultz*, 330 F. Supp. 3d at 1360.

CONCLUSION

For the reasons set forth above, the district court's order denying in part the plaintiffs' motion for a preliminary injunction should be reversed.

Dated: January 30, 2019 Respectfully submitted,

/s/ *Kellen Funk*
Kellen Funk
Counsel for Amici
National Law Professors of Criminal, Procedural, and Constitutional Law

APPENDIX: LIST OF *AMICI CURIAE*[7]

Shima Baradaran Baughman, Professor of Law, University of Utah College of Law

Lara Bazelon, Associate Professor of Law and Director of the Criminal Juvenile Justice Clinic and the Racial Justice Clinic, University of San Francisco School of Law

Monica C. Bell, Associate Professor of Law, Yale Law School

Josh Bowers, Professor of Law, University of Virginia School of Law

Erwin Chemerinsky, Dean & Jesse H. Choper Distinguished Professor of Law, U.C. Berkeley School of Law

Gabriel J. Chin, Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, U.C. Davis School of Law

Brett Dignam, Vice Dean of Experiential Education & Clinical Professor of Law, Columbia Law School

Jeffrey A. Fagan, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School

Barry Friedman, Jacob D. Fuchsberg Professor of Law, New York University School of Law

Kellen R. Funk, Associate Professor of Law, Columbia Law School

Russell C. Gabriel, Clinical Professor and Director of the Criminal Defense Practicum, University of Georgia School of Law

Brandon Garrett, L. Neil Williams Professor of Law, Duke University School of Law

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[7] The views expressed herein are the personal views of *amici*. *Amici* and counsel for *amici* have listed their titles and affiliations for purposes of identification only.

Russell M. Gold, Associate Professor of Legal Analysis, Writing and Research, Wake Forest University School of Law

Ben Johnson, Assistant Professor of Law, Penn State Law

Cliff Johnson, Assistant Professor and Director of the MacArthur Justice Center, University of Mississippi School of Law

Thea Johnson, Associate Professor of Law, University of Maine School of Law

Cynthia E. Jones, Professor of Law, American University Washington College of Law

Issa Kohler-Hausman, Associate Professor of Law and Sociology, Yale Law School

Richard A. Leo, Hamill Family Chair Professor of Law and Social Psychology, University of San Francisco School of Law

Gerald Leonard, Professor of Law and Law Alumni Scholar, Boston University School of Law

Suzanne A. Luban, Clinical Supervising Attorney & Lecturer in Law, Stanford Law School

Sara Mayeux, Assistant Professor of Law, Vanderbilt Law School; Assistant Professor of History, Vanderbilt University

Sandra G. Mayson, Assistant Professor of Law, University of Georgia School of Law

Allegra McLeod, Professor, Georgetown University Law Center

Melanie Newport, Assistant Professor of History, University of Connecticut

Samuel P. Newton, Assistant Professor of Law, University of Idaho College of Law

Keramet Reiter, Associate Professor, U.C. Irvine School of Law and Department of Criminology, Law & Society

Ira P. Robbins, Barnard T. Welsh Scholar and Professor of Law, American University Washington College of Law

Brendan D. Roediger, Professor of Law and Director of the Civil Litigation Clinic, St. Louis University School of Law

Laurent Sacharoff, Professor of Law, University of Arkansas School of Law

Christine Scott-Hayward, Assistant Professor of Law and Criminal Justice, California State University, Long Beach

Jeff Selbin, Clinical Professor of Law & Director of the Policy Advocacy Clinic, U.C. Berkeley School of Law

Sarah Seo, Associate Professor of Law, University of Iowa College of Law

Alison Siegler, Clinical Professor of Law, University of Chicago Law School

Jonathan Simon, Robbins Professor of Criminal Justice Law, U.C. Berkeley School of Law

Jocelyn Simonson, Associate Professor of Law, Brooklyn Law School

Colin Starger, Associate Professor, University of Baltimore School of Law

Megan Stevenson, Assistant Professor of Law, George Mason University Antonin Scalia Law School

Katharine Tinto, Director of Criminal Justice Clinic, U.C. Irvine School of Law

Ron Tyler, Professor of Law & Director of the Criminal Defense Clinic, Stanford Law School

Samuel R. Wiseman, McConnaughhay and Rissman Professor, Florida State University College of Law

Ellen Yaroshefsky, Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics, Hofstra University Maurice A. Deane School of Law

CERTIFICATE OF SERVICE

I certify that, on February 7, 2019, the foregoing brief of National Law Professors of Criminal, Procedural, and Constitutional Law as *Amici Curiae* in support of Plaintiffs-Appellants Cross-Appellees was filed via the Court's CM/ECF Document Filing System. Pursuant to Fifth Circuit Rule 25.2.5, the Court's Notice of Docket Activity constitutes service on all registered CM/ECF filing users, including counsel of record for all parties to this appeal.

Dated: February 8, 2019

/s/ *Kellen Funk*
Kellen Funk
Counsel for Amici
National Law Professors of Criminal, Procedural, and Constitutional Law

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,494 words.

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/s/ *Kellen Funk*
Kellen Funk
Counsel for Amici
National Law Professors of Criminal,
Procedural, and Constitutional Law