No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HARRIS COUNTY, TEXAS, ERIC STEWART HAGSTETTE, JOSEPH LICATA, III, RONALD NICHOLAS, BLANCA ESTELA VILLAGOMEZ, JILL WALLACE, PAULA GOODHART, BILL HARMON, NATALIE C. FLEMING, JOHN CLINTON, MARGARET HARRIS, LARRY STANDLEY, PAM DERBYSHIRE, JAY KARAHAN, ANALIA WILKERSON, DAN SPJUT, DIANE BULL, ROBIN BROWN, DONALD SMYTH, MIKE FIELDS, AND JEAN HUGHES,

Applicants,

v.

MARANDA LYNN ODONNELL, LOETHA SHANTA MCGRUDER, AND ROBERT RYAN FORD,

Respondents.

EMERGENCY APPLICATION TO THE HON. CLARENCE THOMAS TO STAY PRELIMINARY INJUNCTIVE RELIEF PENDING A MERITS DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Pursuant to Supreme Court Rules 22 and 23, the above-captioned Applicants respectfully request an emergency stay of the preliminary injunction entered by the U.S. District Court for the Southern District of Texas requiring the release on unsecured bond of all Harris County, Texas, misdemeanor defendants who assert that they are unable to obtain the funds necessary to post a secured bond within 24 hours of arrest. **Absent a stay entered immediately**, the district court's injunction will take effect, and Harris County officials will be required to begin releasing scores if not hundreds of criminal defendants *each day* in violation of governing state law. *See* Gabrielle Banks & Brian Rogers, *Appeals court halts judge's order to change Harris Co. bail system*, HOUSTON CHRONICLE (May 12, 2017), https://goo.gl/Qlj5TS. The district court ordered that its injunction must take effect on May 15, App.2, and it refused Applicants' request for a stay pending appeal, App.285. The Fifth Circuit initially granted a temporary emergency stay on May 12, App.307, but after deliberating for more than three weeks, it issued a two-sentence order this morning denying the motion for stay pending appeal without explanation, App.304. Accordingly, the district court's preliminary injunction has now gone into effect. Because an order denying a stay pending appeal is not subject to en banc review in the Fifth Circuit, *see* CLERK'S OFFICE, PRACTITIONERS' GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 74 (2017), https://goo.gl/eEUkkx, relief is available only from this Court.

Appellants respectfully request that the Court immediately enter a temporary administrative stay while the Court considers and rules on the application for a stay pending appeal. *E.g.*, *Indiana State Police Pension Tr. v. Chrysler LLC*, 129 S. Ct. 2275, *vacated*, 556 U.S. 960 (2009).

Absent a stay, the preliminary injunction will upend the pretrial bail system in the largest jurisdiction in Texas and the third largest in the United States, one that processes over 50,000 misdemeanor defendants per year. The district court has ordered the release of any misdemeanor defendant not otherwise subject to a hold who signs an affidavit asserting that he or she cannot obtain, within 24 hours of arrest, the funds necessary to post bail. The court has also ordered the immediate release of any misdemeanor defendant who is not afforded a probable cause and bail-setting hearing before a Hearing Officer or County Judge within 24 hours of arrest.

The district court sought to minimize the radical nature of its ruling by asserting that its order does not govern in felony cases and does not require changes to Texas state law. PI Mem., App. 19. Neither assertion is reassuring. While it is true that this action is limited to a class of misdemeanor defendants, the court's reasoning is not so limited. According to the district court, whenever a state determines that a criminal defendant is eligible to be released on bail before trial, it may not require the defendant to make bond payments he cannot afford. Bail is generally available to non-capital felony defendants in Texas, so the court's reasoning would apply to them as well. And the court's ruling abrogates the provisions of Texas law granting state judicial officers discretion to set secured money bail.[1]

The district court justified its injunction by concluding that the Equal Protection Clause prohibits the imposition of traditional secured bail whenever an arrestee lacks sufficient resources to pay it. The court also held that the Due Process Clause prohibits the imposition of

[1] Secured money bail requires a defendant to post sureties prior to release, either by depositing a "cash bond" or by procuring a commercial bail bond. An unsecured "personal bond" does not require such sureties. Although personal bonds in Harris County technically require the arrestee to forfeit an amount of money to the County if he fails to appear, Harris County does not collect on the bond. Thus, personal bonds are akin to release on personal recognizance. *See infra* 6–7.

secured bail absent a written finding, entered by a judicial officer within 24 hours of arrest, that a secured bond is "the *only* reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial." PI Mem., App.92 (emphasis added).

These unprecedented constitutional rulings cannot stand. It is settled that plaintiffs may not base a constitutional challenge on the general equal protection and due process requirements of the Fourteenth Amendment when another constitutional provision specifically addresses the issue under review. Here, the Eighth Amendment expressly permits the imposition of bail so long as it is not "excessive," and every court of appeals to face the issue has held that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *E.g.*, *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988).

Even on their own terms, Plaintiffs' equal protection and due process arguments are not viable. This Court has *already rejected* the central premise of the district court's equal protection holding: that indigent arrestees are denied equal protection if they are detained longer than the non-indigent by reason of their inability to pay secured money bail. In *McGinnis v. Royster*, 410 U.S. 263 (1973), this Court upheld, under rational basis review, a New York "good time credit" statute that effectively allowed the earlier release of individuals who were able to post bail than those who were not, *id.* at 270, over Justice Douglas's argument, in dissent, that the state statute discriminated "against those too poor to raise bail and unable to obtain release on personal recognizance," *id.* at 280 (Douglas, J., dissenting). Plaintiffs' due process theory also fails under this Court's settled precedents, for Plaintiffs do not have a liberty interest in pretrial release without "sufficient sureties" required under state law, and the Due Process Clause does not require greater procedural protections for bail hearings than probable cause hearings.

While the district court's constitutional analysis is fundamentally flawed, this Court need not even consider the merits of this case to stay the preliminary injunction. The courts below should have dismissed Plaintiffs' claims at the threshold, under this Court's binding precedent, for the relief the Plaintiffs have sought and the district court has entered—an order requiring their release from detention on an unsecured basis—is simply unavailable to Plaintiffs as a matter of law under *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *Preiser* held that a prisoner seeking release from confinement may obtain such relief *only* through a petition for habeas corpus, and claims seeking such relief are not cognizable under 42 U.S.C. § 1983. *Id.* at 486; *see also Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975) (challenge to pretrial detention rules could proceed under Section 1983 only because pretrial "release was neither asked nor ordered, [and so] the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy") (citing *Preiser*). But Plaintiffs' suit is brought under Section 1983; they have not pleaded—and could not plead—*habeas* claims. The district court's primary answer to *Preiser* was to assert that the court's injunction "neither changes nor accelerates misdemeanor defendants' entitlement to release. Rather, the Order changes the timing for when bail is required …." Order Denying Stay, App.292. But the injunction, on its face, could not be clearer: misdemeanor defendants "must be promptly released …." PI Order, App.3. And its effect is equally clear: literally scores if not hundreds of misdemeanor defendants who would otherwise be detained for want of a secured bond will now be released daily in obedience to the court's injunction unless this Court grants a stay.

Applicants respectfully request a stay to preserve the status quo.

OPINIONS BELOW

The district court's opinion granting a preliminary injunction has not yet been published in the federal reporter, but it is available at 2017 WL 784899, and is reproduced at App.12. The order from the Fifth Circuit denying Applicants' emergency motion for a stay pending appeal is also not yet reported, but it is reproduced at App.340.

JURISDICTION

The Court of Appeals denied Applicants' emergency motion for a stay on June 6, 2017. This Court has jurisdiction under 28 U.S.C. §§ 1254(1), 1651(a), and 2101(f).

STATEMENT

"Bail, of course, is basic to our system of law," *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971), and Harris County, like most jurisdictions since the dawn of the American Republic, operates a bail system that relies in part on secured money bail. This case is one of a dozen lawsuits filed throughout the country in an organized campaign to "challeng[e] long-established bail practices," PI Mem., App.16, and use the Fourteenth Amendment to "end[ ] the American money bail system." *Ending the American Money Bail System*, EQUAL JUSTICE UNDER LAW, https://goo.gl/T6XxSF.

I. Harris County's Bail System

Plaintiffs challenge Harris County's bail system for Class A and Class B misdemeanors as allegedly violating the Fourteenth Amendment's equal protection and due process guarantees because it permits bail to be set in excess of an amount arrestees can afford. Class A misdemeanors are serious and often violent offenses that carry punishments of up to one year in jail, TEX. PENAL CODE § 12.21, and Class B offenses are punishable up to 180 days in jail, *id.* § 12.22. These crimes include, *inter alia*, certain types of assault, *id.* § 22.01, deadly conduct, *id.* § 22.05, terroristic threats, *id.* § 22.07, enticing a child, *id.* § 25.04, burglarizing a vehicle, *id.*

§ 30.04, criminal trespass, *id.* § 30.05, unlawfully carrying a handgun, *id.* § 46.02, resisting or evading arrest, *id.* §§ 38.03 and 38.04, and bail jumping or failing to appear for a court date, *id.* § 38.10.

Under the Texas Constitution, all misdemeanor arrestees are "bailable *by sufficient sureties*," TEX. CONST. art. I, § 11 (emphasis added), except that certain misdemeanants accused of family-violence crimes may be denied bail altogether, *id.* art. I, §§ 11b, 11c. Texas law contemplates two principal types of sureties: a "bail bond" (also known as secured money bail or a secured bond) or a "personal bond" (also known as an unsecured bond). *See* TEX. CODE CRIM. PROC. art. 17.01. Most defendants who provide secured money bail do so by procuring a surety bond from a bail bondsman rather than by posting cash up front. PI Mem., App.67–68. The bail bondsman posts bail and charges a non-refundable fee, usually about 10 percent of the total amount of the bond. *Id*., App.23. If the arrestee does not appear for her hearing, the bond is forfeited and the bondsman becomes liable for the full amount of the bond. *See* TEX. CODE CRIM. PROC. art. 17.02. The bondsman has recourse both to the arrestee and any co-signers on the bond. More than 90 percent of the time, the bail bondsman requires at least one indemnitor to co-sign the bond. PI Hearing, App.763.

A "personal bond," unlike a bail bond, does not require an individual to provide monetary sureties up front before release. PI Mem., App.62; TEX. CODE CRIM. PROC. art. 17.04. A bail amount is inscribed on the personal bond, and in theory this amount becomes due if the individual fails to appear. But arrestees often are judgment proof, and as the district court found, Harris County never actually attempts to collect the amount due on a personal bond. PI Mem., App.61–62, App.102. The personal bond is thus akin to release on personal recognizance, i.e.,

release on a mere promise to appear. *See, e.g.*, PI Hearing, App.745. Personal bonds may also have nonfinancial conditions of release, such as GPS monitoring. PI Mem., App.68.

Texas law grants magistrates—Hearing Officers and County Judges—authority to release defendants on personal bond without sureties or to require a secured money bond. *See* TEX. CODE CRIM. PROC. art. 17.03(a), 17.15. In setting the amount of the bond, Texas law requires magistrates to consider five factors, including likelihood that the defendant will appear at trial, dangerousness to the community, and ability to pay the amount necessary to post bond. *Id.* art. 17.15; HARRIS COUNTY CRIMINAL COURTS AT LAW RULE 4.2.3 ("Local Rules"), App.321. A consent decree entered in 1987 in a separate federal suit, *Roberson v. Richardson*, No. 84-2974 (S.D. Tex.), likewise requires magistrates to determine whether a personal bond is appropriate and to set the amount of bail in accordance with essentially the same five factors. *See Roberson* Decree, App.367.

When a misdemeanor defendant is arrested, the prosecutor immediately affixes a secured bail according to a bond schedule that is required under *Roberson*. Under the schedule, bail may vary from $500 to $5,000, depending on the crime and the arrestee's criminal history. Local Rule 9.1, App.326–27. If the arrestee does not post a secured bond, he must be brought before a Hearing Officer, typically within 24 hours of arrest, to have a probable cause determination. Local Rule 4.2.1.1, App.366.[2] If the Hearing Officer finds probable cause to detain, she must consider the *Roberson* and Article 17.15 factors and decide whether to change the scheduled bail amount or grant release on an unsecured personal bond. *See* Local Rule 4.2.3, App.321. By the next business day after booking, the arrestee must also be brought before a County Judge in a

[2] If the arrestee cannot be brought in person before the Hearing Officer within 24 hours of arrest, a probable cause determination will be made "on the papers." PI Mem., App.107. The district court found that this "situation rarely occurs." *Id.*

counseled, adversarial hearing. Local Rule 4.3.1, App.321. If the defendant does not plead guilty or waive a bail hearing, the County Judge must also apply the five *Roberson* and Article 17.15 factors and determine whether to change the arrestee's bail amount or type. *Id.* When the Hearing Officers and County Judges are determining the bond amount and type, they have before them a report, prepared by Harris County Pretrial Services, detailing the arrestee's financial resources and criminal history. PI Mem., App.68. In August 2016, the Local Rules were amended to provide that release on a personal (i.e., unsecured) bond is favored for twelve enumerated crimes. Local Rule 12.2, App.328; *see also* PI Mem., App.65.

Texas law provides misdemeanor defendants with numerous opportunities to challenge the imposition of secured money bail. In addition to the mandatory bail review conducted by the County Judge the next business day after booking, an arrestee always retains the right to ask the County Judge to reconsider the bail setting at any time. If a defendant is dissatisfied with the County Judge's resolution of his challenge, he may also seek review at any time through a state habeas corpus proceeding. *See* TEX. CODE CRIM. PROC. art. 11.01, 11.09, 11.11. Arrestees frequently obtain relief through these avenues. Indeed, Plaintiff McGruder did so *in this very case*: she was released on a personal bond by a County Judge on the next business day following her probable cause hearing before a Hearing Officer. *See* Personal Bond for Plaintiff McGruder, App.415. Further, Texas courts have specifically held that pretrial bail determinations may be challenged through a state habeas petition, *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001), and they regularly entertain appeals in such proceedings, *see, e.g.*, *Ex Parte Shires*, 508 S.W.3d 856 (Tex. Ct. App. 2016) (challenging constitutionality of state bail statute provision and raising procedural due process and substantive due process challenges to denial of bail in state habeas petition).

II. Procedural Background

1. Plaintiffs brought this class action under 42 U.S.C. § 1983, alleging that Harris County's bail system for Class A and Class B misdemeanors violates the Fourteenth Amendment's equal protection and due process guarantees because it permits bail to be set in excess of an amount arrestees can afford. The Defendants moved to dismiss, arguing *inter alia*, that (i) Plaintiffs' claims were not cognizable under 42 U.S.C. § 1983, (ii) the more specific provision of the Eighth Amendment governing bail foreclosed Plaintiffs' equal protection and due process claims, and (iii) neither the Equal Protection Clause nor the Due Process Clause prohibited imposition of traditional secured money bail in cases in which the defendant lacks the resources to post bond. The court below issued a 78-page opinion rejecting all of these arguments. *See* Order Denying Motion to Dismiss, App.206.

2. On April 28, 2017, the district court certified a class of all Class A and Class B misdemeanor arrestees detained by Harris County "for whom a secured financial condition of release has been set and who cannot pay the amount necessary for release on the secured money bail because of indigence." Memorandum and Order Certifying a Rule 23(b)(2) Class at 1, Doc. 303.

On the same day, the court issued a 193-page opinion concluding that Plaintiffs are likely to succeed on their Equal Protection and Due Process claims. *See* PI Mem., App.12. The court repeatedly acknowledged that Plaintiffs have not alleged, and the court did not hold, that the relevant Texas Constitutional and statutory provisions and Rules adopted by the Harris County Criminal Courts at Law are unconstitutional on their face. *E.g.*, *id.*, App.190. The court instead concluded that "Hearing Officers and County Judges follow a[n] [unwritten] custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve

pretrial detention of misdemeanor defendants who are too poor to pay, when those defendants would promptly be released if they could pay." *Id.*, App.138.

Applying intermediate scrutiny, *id.*, App.153, the court held that equal protection prohibits bail in excess of what an arrestee can pay unless "no less restrictive alternative can reasonably meet the government's compelling interest" in ensuring a defendant's presence at trial. *Id.*, App.155.[3] The court applied an unspecified level of heightened scrutiny to the due process claim, *id.*, App.154, and held that States are prohibited from setting bail in excess of what arrestees can pay unless they provide notice, a hearing within 24 hours of arrest before an impartial decisionmaker, and "a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial." *Id.*, App.164; *see also* App.166–67, App.178.

The court's injunction order grants every misdemeanor arrestee the right to self-report "the maximum amount of financial security the arrestee would be able to post or pay up front within 24 hours of arrest." PI Order, App.2. The injunction does not permit the County to challenge the arrestee's self-reported assertion, and a secured money bond in excess of the amount stated in the affidavit may not be enforced. *Id.*, App.3–4. If misdemeanor defendants submit a financial affidavit indicating inability to obtain funds sufficient to pay a commercial surety's premium within 24 hours of arrest, they "must be promptly released on unsecured money bail by the Harris County Sheriff no later than 24 hours after arrest." *Id.*, App.3. In an "Order of Clarification" entered on May 10, 2017, the court stated that if an arrestee declares her

[3] The District Court's order applies to all misdemeanor arrestees with minor exceptions for those subject to formal holds, pending findings of mental competency, and family violence detention procedures. PI Order, App.2–3.

ability to pay part but not all of a surety's premium, she need not pay *any surety whatsoever*. Order of Clarification, App.7. For example, if bail is set at $2,500 (making the bondsman's premium $250), and an arrestee admits she can pay $100, the arrestee must be released without any sureties, even though she could afford a $1,000 secured bond.

The court also ordered the release of all misdemeanor defendants who have not been offered a probable cause and bail-setting hearing within 24 hours of arrest, except for defendants who are subject to a formal hold, a pending finding of mental competency, or family violence procedures. PI Order, App.3–4. The court has further ordered that these provisions apply to defendants who are re-arrested on new misdemeanor charges or on warrants for failure to appear. *Id*., App.4. The court ruled that the injunction would take effect on May 15, 2017. App.5.

3. Applicants promptly noticed an appeal and moved the district court for an emergency stay until that appeal is resolved. On May 11, the district court entered a 19-page opinion denying a stay. It also refused to enter a temporary stay to give Applicants sufficient time to prepare, and the Fifth Circuit sufficient time to consider, an emergency stay motion in that court.

Applicants filed an emergency motion in the Fifth Circuit the following morning, and that same day the Court of Appeals granted a temporary stay to give it sufficient time to consider the motion. App.309. Earlier today, however, the Fifth Circuit entered an order denying Applicants' motion for a stay pending appeal without explanation. App.306. Accordingly, the preliminary injunction is now in effect.

REASONS FOR GRANTING A STAY

A request in this Court for a stay pending a decision by the Court of Appeals on the merits of their appeal is governed by three factors. *San Diegans For Mount Soledad Nat. War*

Memorial v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Ashcroft v. North Jersey Media Grp., Inc.*, 536 U.S. 954 (2002); *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J., in chambers). A Circuit Justice considering such a motion must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.' " *Mount Soledad National War Memorial*, 548 U.S. at 1302 (Kenedy, J., in chambers).

In this case, four Justices are likely to grant certiorari—and five Justices are likely to reverse the district court—on at least four issues: (1) whether Plaintiffs' request for an injunction ordering their mass release from custody is cognizable under Section 1983, notwithstanding this Court's decision in *Preiser*, (2) whether Plaintiffs may challenge their pretrial bail under the Fourteenth Amendment's equal protection and due process clauses, given that the Eighth Amendment's excessive bail clause specifically governs such bail determinations, (3) whether Plaintiffs' equal protection challenge is likely to succeed in light of this Court's clear instructions that there is no disparate impact liability under the equal protection clause and that wealth-based classifications are subject to only rational basis review, and (4) whether Plaintiffs' procedural due process claim is likely to succeed despite the fact that neither federal nor state law creates a liberty interest in obtaining pretrial release without posting sufficient sureties and that Texas law already provides procedural protections that *exceed* the requirements established by this Court's cases for probable-cause hearings, much less bail-determination hearings. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 46 (1991).

In the absence of a stay, the district court's order that Harris County—the third-largest jurisdiction in the Nation—immediately release without sufficient surety untold numbers of

potentially dangerous arrestees is certain to cause irreparable harm. And to the extent the scales are still in equipoise after consideration of these factors, the balance of the equities tips it decidedly in favor of staying the district court's deeply flawed opinion pending further review.

I. There Is a Reasonable Probability that This Court Will Grant Certiorari and a Fair Prospect that It Will Reverse any Fifth Circuit Decision Affirming the District Court's Injunction.

A. *Preiser v. Rodriguez* Bars Plaintiffs' Attempt To Challenge Their Detention Under Section 1983.

The Plaintiffs have sought—and the district court has entered—an order requiring Harris County to release them from detention on an unsecured basis. That relief is unavailable as a matter of law under this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). There, the Court held that a prisoner seeking release from confinement may obtain such relief *only* through a petition for a writ of habeas corpus, and claims seeking such relief are not cognizable under 42 U.S.C. § 1983. This Court explained that "the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law," whether "imposed pursuant to conviction" or "prior to trial." *Id*. at 485–86. Because habeas has "been accepted as the specific instrument to obtain release from [unlawful] confinement," this specific remedy displaces the general cause of action granted by 42 U.S.C. § 1983 for constitutional torts. *Id.* at 486; *see also Heck v. Humphrey*, 512 U.S. 477, 481 (1994) ("habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release"; such claims "are not *cognizable*" under § 1983).

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court confirmed that *Preiser* applies to Section 1983 challenges to pre-trial detention procedures, including specifically challenges to the

setting of bail. And although the Court concluded that the claims in *Gerstein* were cognizable under Section 1983, it did so only because the plaintiffs

> did not ask for release from state custody, even as an alternative remedy.… Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

Gerstein, 420 U.S. at 107 n.6. In the present case, by contrast, immediate release was both "asked [and] ordered." *Id*. Under *Preiser* and its progeny, such relief is simply not available under Section 1983.

In its Opinion denying Defendants' emergency stay motion, the district court gave essentially four reasons for declining to follow *Preiser*'s clear instructions. First, the district court suggested that *Preiser*'s rule foreclosing relief under Section 1983 in this type of case was "dicta." Order Denying Stay, App.291, App.292.

Preiser's statement of its holding speaks for itself:

> [W]e hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

411 U.S. at 500. That rule is by its own terms the holding of the Court, not mere dicta, and it has been reaffirmed by this Court numerous times. *Wilkinson v. Dotson*, 544 U.S. 74, 78, 79 (2005); *Edwards v. Balisok*, 520 U.S. 641, 643 (1997); *Heck*, 512 U.S. at 481; *Wolff v. McDonnell*, 418 U.S. 539, 554 (1974). The district court read *Heck* as calling *Preiser*'s rule into doubt, but that is not so. While the *Heck* Court did decline to follow dicta in *Preiser* discussing whether *damages* are available under Section 1983 (*contra Preiser*'s dicta, *Heck* held that in certain circumstances they are not), that issue has no relevance in this case. *Heck*, 512 U.S at 482. Indeed *Heck*, like the cases before and after it, reaffirmed *Preiser*'s central holding that "a state prisoner who

challenges the fact or duration of his confinement and seeks immediate or speedier release" may only proceed in habeas. *Id.* at 481.

Second, the district court argued that its injunction is not within the categorical prohibition announced in *Preiser*, based upon the remarkable assertion that the order "neither changes nor accelerates misdemeanor defendants' entitlement to release." Order Denying Stay, App.292. Yet the injunction it entered says this: "All misdemeanor defendants in the custody of Harris County" who are in the plaintiff class and are not subject to a formal hold or other exception to bail eligibility "*must be promptly released* on unsecured money bail by the Harris County Sheriff no later than 24 hours after arrest." PI Order, App.3 (emphasis added). The injunction also orders that all such defendants who have not been offered a probable cause and bail-setting hearing within 24 hours of arrest "*must be released* by the Harris County Sheriff on an unsecured personal bond." *Id.*, App.3–4 (emphasis added). An order that misdemeanor criminal defendants "must be promptly released," *id.*, App.3, is indisputably an order requiring "immediate or more speedy release," *Preiser*, 411 U.S. at 494.

Third, the notion that *Preiser* somehow does not apply in class actions seeking prospective injunctive relief against "regulatory procedures," *see* Order Denying Stay, App.291, is refuted by numerous cases. This Court's opinion in *Wolff* held a class action seeking speedier release from confinement "foreclosed under *Preiser*," 418 U.S. at 554, and *Gerstein*, as discussed above, plainly demonstrates that *Preiser* applies in precisely such a "broad based" class-action, Order Denying Stay, App.291; *see Gerstein*, 420 U.S. at 107 n.6. Similarly, while the case law does in some circumstances allow plaintiffs to seek under Section 1983 "an otherwise proper injunction enjoining the *prospective* enforcement of invalid . . . regulations," *Wilkinson*, 544 U.S. at 80, that is only because "[o]rdinarily, a prayer for such prospective relief

will not 'necessarily imply' the invalidity of [the plaintiff's detention]," *Edwards*, 520 U.S. at 648; *see also Wilkinson*, 544 U.S. at 80 (prospective relief appropriate where granting it would not "necessarily have meant immediate release or a shorter period of incarceration"); *Heck*, 512 U.S. at 482–83 (prospective relief is appropriate where it challenges the "wrong procedures, not . . . the wrong result" and therefore "do[es] [not] call into question the lawfulness of the plaintiff's continuing confinement"). Where that rationale does not apply, neither can the exception. *Id.* Indeed, *the very case the district court cited* as supposedly holding that *Preiser* does not apply to "broad based attacks . . . challenging regulatory procedures," Order Denying Stay, App.291 (quotation marks omitted), in fact makes clear that *Presier does apply* here:

> [I]n some broad-based attacks, resolution of the factual allegations and legal issues necessary to decide the § 1983 claim may, in effect, automatically entitle one or more claimants to immediate or earlier release. . . . *Such claims must also be pursued initially through habeas corpus*.

Serio v. Members of La. State Bd. of Pardons, 821 F.2d 1112, 1119 (5th Cir. 1987) (emphasis added); *accord Clarke v. Stalder*, 154 F.3d 186, 189–91 (5th Cir. 1998) (en banc).

Finally, the court concluded that Defendants had waived reliance on *Preiser* by failing to cite it earlier. But while Defendants did not cite *Preiser* by name until their emergency stay motion, they did clearly argue that Plaintiffs' Section 1983 challenge was foreclosed by their failure to exhaust available state remedies, Judges' Answer & Affirmative Defenses, App.421—and in particular, by the availability of habeas relief, Judges' Motion to Dismiss, App.621–22; Judges' Opposition to PI Motion, App.711. Defendants Harris County and its Sheriff even more specifically argued that "relief under § 1983 must yield to the federal habeas corpus statute, where an inmate seeks injunctive relief challenging the fact … or the duration of his sentence." Response to PI, App.577–78 (brackets and quotations marks omitted). The issue was thus adequately presented below, and the district court had a full opportunity to consider and pass

upon it on the merits. And, in any event, the district court considered and attempted to distinguish *Preiser* in denying Defendants' emergency stay motion. Order Denying Stay, App.289–93.

Even if this Court were to conclude otherwise, it should nonetheless exercise its discretion to consider the issue, *Youakim v. Miller*, 425 U.S. 231, 234 (1976), since: (1) *Preiser*, and the *habeas* exhaustion rule it safeguards, are "founded on concerns broader than those of the parties" such as fostering "respectful, harmonious relations between the state and federal judiciaries," *Wood v. Milyard*, 566 U.S. 463 (2012), and the issue therefore falls into the discretionary exception to the forfeiture rule this Court's cases have carved out for arguments pertaining to important "structural protection[s]," *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991), or "strong polic[ies] concerning the proper administration of judicial business," *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962), (2) *Preiser*'s clear rule obviates the necessity of adjudicating the constitutional questions presented in this case, *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345–56 (1936) (Brandeis, J., concurring), and (3) at this stage in the litigation, *Preiser*'s application both has been briefed before the Court of Appeals and may be "fully briefed on the merits by both parties" before this Court, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

* * * * *

Under the rule announced in *Preiser*, an order requiring the release of lawfully held detainees may not be granted in a Section 1983 action. The district court's obvious and blatant error in entering it is "so far [a] depart[ure] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a).

The court of appeals erred in declining to stay the injunction, and this Court is more than reasonably or fairly likely to grant certiorari and vacate it.

B. The Eighth Amendment Forecloses Plaintiffs' Claim Under the Fourteenth Amendment.

The district court invoked the Fourteenth Amendment to enter an injunction prohibiting Harris County from requiring a secured bond in excess of an amount misdemeanor defendants can pay. But the Eighth Amendment explicitly addresses bail, protecting defendants from the imposition of "Excessive bail." The courts of appeals have uniformly held that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988); *accord United States v. Tirado*, 72 F.3d 130, 1995 WL 684553, at *1 (6th Cir. 1995) (unpublished); *United States v. Jessup*, 757 F.2d 378, 389 (1st Cir. 1985), *abrogated on other grounds by United States v. O'Brien*, 895 F.2d 810 (1st Cir. 1990); *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1134 (7th Cir. 1984); *United States v. Wright*, 483 F.2d 1068, 1070 (4th Cir. 1973); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966). And this Court itself has long sanctioned secured money bail systems, i.e., "the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture," and it has recognized that this modern practice is consistent with the history of bail and the "ancient practice of securing the oaths of responsible persons to stand as sureties for the accused." *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

Because the Eighth Amendment specifically governs—and forecloses—the argument that the government cannot set bail in excess of what defendants can afford, Plaintiffs may not evade this settled law by invoking the more general provisions of the Fourteenth Amendment. When a constitutional provision provides a specific "source[ ] of constitutional protection against …

governmental conduct," the "validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized … standard" fashioned from the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989). In *Gerstein*, for example, this Court rejected a procedural due process challenge to pretrial detention because "[t]he Fourth Amendment … balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." 420 U.S. at 125 n.27. So too here: the Eighth Amendment expressly defines the constitutional limits that apply to bail determination; because Applicants have plainly not violated those limits, four Justices are likely to grant review of—and five Justices are likely to vote to reverse—any judgment affirming the district court's decision to grant an injunction.

C. The District Court's Equal Protection Holding Is Directly Contrary to This Court's Rejection of Disparate-Impact Liability Under the Equal Protection Clause and Its Refusal To Recognize Indigents as a Suspect Class.

Even if considered under the Equal Protection Clause, Plaintiffs' claim plainly fails under this Court's binding case-law for two independent reasons. *First*, this Court has repeatedly made clear that state or local policies do not violate the Equal Protection clause solely because they have a "disparate impact" on some class of persons. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272–74 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Accordingly, Plaintiffs must show that Harris County's bail system either discriminates "on its face" or is operated with "intentional or purposeful discrimination." *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

Plaintiffs do not make this showing and in fact do not even attempt it. Harris County's bail system is facially neutral: everyone, regardless of wealth, has bail set according to the same

factors, and neither Plaintiffs nor the court below have suggested that any of the governing provisions of Texas law are unconstitutional on their face. *E.g.*, PI Mem., App.190. The court below held that Harris County judicial officers have a "custom and practice" of using secured money bail in order to detain indigents, but even if this conclusion were valid, the district court did not find (nor could it credibly find) that the five Hearing Officers and fifteen County Judges all implement that custom or practice with *the purpose* of detaining indigents *because they are poor*. *See McCleskey*, 481 U.S at 298.

Indeed, it is the district court that has created an equal protection problem by replacing the County's facially neutral bail system with one that expressly classifies arrestees according to wealth. The injunction requires that (1) arrestees who claim they cannot pay the amount of bail that corresponds to their dangerousness and flight risk *need not* pay bail to be released, while (2) otherwise similarly situated arrestees who are able to pay *must* pay bail or remain detained. This classification is impermissible because, to borrow this Court's language in the context of post-conviction fines, the result "amount[s] to inverse discrimination since it would enable an indigent to avoid both the [bond amount] and [detention] for nonpayment whereas other defendants" must pay bond or be detained. *Williams v. Illinois*, 399 U.S. 235, 244 (1970).

Second, contrary to the ruling below, Plaintiffs' challenge is governed by rational basis review, not heightened scrutiny, and it easily satisfies that standard. Under this Court's precedents, state legislation is subject to heightened constitutional scrutiny only where it "proceeds along suspect lines [or] infringes fundamental constitutional rights," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993), and Harris County's bail system does neither. This Court has recognized neither prisoners nor indigents as a "suspect class" for equal-protection purposes, *see Harris v. McRae*, 448 U.S. 297, 323 (1980) (indigents); *City of Cleburne v.*

Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (listing suspect classes), and arrestees simply do not have a fundamental right to be free from detention without "giving adequate assurance" that they will stand trial, *Stack*, 342 U.S. at 4; *see also Bell v. Wolfish*, 441 U.S. 520, 534 (1979). Indeed, at least one Court of Appeals has squarely held that an equal protection claim that the government has "impermissibly discriminate[d] among [arrestees] based on their financial ability to post bail" is governed by rational basis review, *Spina v. Department of Homeland Sec.*, 470 F.3d 116, 130, 131 (2d Cir. 2006), and the district court's conclusion that heightened scrutiny applies, if affirmed on appeal, would thus create a split of authority on the issue.

The district court based its conclusion on a trilogy of decisions by this Court involving penal fines[4] and the Fifth Circuit's *en banc* decision in *Pugh v. Rainwater*, 572 F.2d 1053 (1978). The fine cases are far afield because they involved *post-conviction punishment*, but pre-trial detention on bail is not punishment. *See United States v. Salerno*, 481 U.S. 739, 746–47 (1987). And *Pugh vacated* a panel opinion that had applied strict scrutiny to Florida's bail system, squarely rejecting the argument that the Equal Protection Clause required Florida's bail system to adopt a presumption against money bail for the indigent. 572 F.2d at 1056.

Indeed, this Court has analyzed under rational basis review—and rejected—the very premise that the district court's holding is based upon: that indigent arrestees are denied equal protection if they are detained longer than the non-indigent by reason of their inability to pay secured money bail. In *McGinnis v. Royster*, 410 U.S. 263 (1973), this Court applied rational basis review and upheld a New York "good time credit" statute that allowed individuals who had posted bail to be eligible for release earlier than those who could not post bail, *id.* at 270,

[4] *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1983).

notwithstanding the dissent's argument that the statute discriminated "against those too poor to raise bail and unable to obtain release on personal recognizance," *id.* at 280 (Douglas, J., dissenting).

Like the New York statute in *McGinnis*, Harris County's bail system easily survives rational basis review. Secured money bail systems have been "a longstanding presence in the Anglo-American common law tradition," PI Mem., App.16, are expressly permitted by the Constitution, *Stack*, 342 U.S. at 5, and are grounded in the eminently reasonable notion, confirmed by the history of secured lending, that individuals are more likely to appear for their court date if, by failing to show up, they or their surety will forfeit a sum of money. The district court repeatedly stated that the imposition of secured money bail disparately harms the indigent because "[a] defendant who can pay is released regardless of risk" whereas an indigent misdemeanant who cannot afford the surety is detained. PI Mem., App.177. But the arrestee who pays the surety is simply not similarly situated to the arrestee who does not. The money bond is precisely the "sufficient suret[y]" required under Texas law, TEX. CONST. art. I, § 11, to mitigate the arrestee's flight risk.

D. The District Court's Due Process Holding Effectively Creates a Substantive-Due-Process Right to Pretrial Release, and Improperly Imposes Procedural Requirements on the Bail-Determination Inquiry that Are More Onerous than This Court Has Required for Probable-Cause Hearings.

This Court is also likely to grant review of—and to reverse—the district court's deeply flawed holding that Plaintiffs are likely to succeed on their procedural due process claim. The district court's due process holding contradicts this Court's binding precedent in two fundamental ways. *First*, this Court has held that the procedural strictures of the Due Process Clause apply only where the challenged law or policy infringes "a liberty or property interest . . . [created by] the Due Process Clause itself and the laws of the States," *Kentucky Dep't of Corr. v.*

Thompson, 490 U.S. 454, 460 (1989), and here no such interest is at stake.[5] The district court purported to find a liberty interest in "pretrial release" under Texas state law, concluding that the Texas Constitution "has created a liberty interest in misdemeanor defendants' release from custody before trial." PI Mem., App.160. But this "liberty interest" is of the district court's, not Texas law's, making. The Texas Constitution provides only that arrestees are "bailable *by sufficient sureties*," TEX. CONST. art. I, § 11 (emphasis added); it does not provide an unrestricted right to "release from custody before trial." *If an arrestee does not provide sufficient sureties, under Texas law there is no right to release.*

The right to be bailable by sufficient sureties cannot amount to a liberty interest protected by the Due Process Clause because magistrates have discretion to determine an arrestee's bond amount and type, and it is black-letter law that "[t]he grant of discretion . . . indicates that no entitlement and, hence, no liberty interest, was created." *Richardson v. Joslin*, 501 F.3d 415, 420 (5th Cir. 2007); *see also Fields v. Henry Cty.*, 701 F.3d 180, 187 (6th Cir. 2012) (no liberty interest in release on personal recognizance because magistrate had discretion whether to impose secured money bail). The district court thus cannot rely on a liberty interest created by Texas law. Instead, its opinion in effect creates a *new, federal constitutional* liberty interest in pretrial release. *See Kentucky Dep't of Corr.*, 490 U.S. at 460.

Any doubt that the court has created a new substantive-due-process right to pretrial release is removed by the fact that the fourth "procedure" the district court insisted was required by due process is actually a *substantive* requirement that a factfinder must "find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and

[5] Neither Plaintiffs nor the district court have argued that any property interest is at stake in this case.

law-abiding behavior before trial." PI Mem., App.164. "Procedural" due process might require notice, a hearing, and the right to cross-examine, *see Goldberg v. Kelly*, 397 U.S. 254, 267–71 (1970), but it does not set the specific *substantive* standards that must be applied in those hearings. Accordingly, the district court, both in its injunction and its opinion, has in truth minted a *new substantive due process right* to affordable bail. But it did so without undertaking the analysis required by this Court's case law before such a momentous judicial act—and indeed, *without even acknowledging what it was doing*.

The creation of an unenumerated, substantive right under the Due Process Clause ventures into an "unchartered area" where "guideposts for responsible decisionmaking . . . are scarce and open-ended," and the result is to "place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). With these hazards in mind, this Court has generally insisted that a court "asked to break new ground in this field" must "exercise the utmost care," and may proceed only if it concludes that the claimed unenumerated constitutional right, when "careful[ly] descri[bed]," is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720–21. The district court did not follow this "restrained methodology." *Id.* at 721. If it had, it would perhaps have recognized that the substantive "liberty interest" that it created, *sub silentio*, under the Due Process Clause not only has no basis in our history and tradition, but also: (1) is squarely foreclosed by the Eighth Amendment, which "provides an explicit textual source of constitutional protection" in this context and thus "must be the guide for analyzing these claims," rather than "the more generalized notion of 'substantive due process,' " *Graham*, 490 U.S. at 395, and (2) is directly contrary to the settled principle that "[f]or due process purposes, the constitutional liberty interest in release on bail arises *after* a magistrate has determined that an

accused may be released upon deposit of whatever sum of money will ensure the accused's appearance for trial." *Doyle v. Elsea*, 658 F.2d 512, 516 n.6 (7th Cir. 1981) (collecting cases).

This Court is likely to both review and to reverse the district court's blind-eyed decision to fashion a new substantive due process right to pretrial release that is at odds with our Nation's concept of ordered liberty and this Court's precedents.

Second, even if Plaintiffs had a State-created liberty interest, the district court erred as a matter of law by discarding as inadequate the procedural protections that Harris County provides for the supposed liberty interest in question. Harris County's bail system has some of the most robust procedural protections in the country. Arrestees typically appear before a Hearing Officer within 24 hours of arrest for a non-adversarial hearing at which bail is set, and they appear before a County Judge on the next business day after booking for a probable cause determination and review of the bail determination. Arrestees have a continued right to request reconsideration of the bail amount or type, either directly from the County Judge or through habeas proceedings. *See supra*, p. 8. Except for the initial appearance before the Hearing Officer, arrestees have a right to counsel at all stages—and Harris County is about to pilot a trial program whereby arrestees will even have counsel before the Hearing Officer. PI Mem., App.133. Moreover, Harris County will implement in July several state-of-the-art updates to its bail procedures that, by the district court's own admission, will provide for lower-risk arrestees "among the fastest processing [and release] speeds in the nation." PI Mem., App.131.

These procedures satisfy—indeed, surmount—the demands that due process imposes on probable cause hearings under this Court's precedent; *a fortiori*, they also satisfy the strictures applicable to bail hearings. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 46 (1991), this Court held that due process is satisfied by probable cause hearings held within 48 hours of arrest.

Importantly, one reason this Court allowed jurisdictions up to 48 hours to determine probable cause was so that they could "combine probable cause determinations with other pretrial proceedings, . . . *such as bail hearings* . . . ." *Id.* at 58 (emphasis added). *McLaughlin*'s holding thus necessarily implies that a bail hearing held within 48 hours is not untimely under the Due Process Clause. And the Court's cautionary language on constitutionalizing an unreasonable deadline for probable-cause hearings applies with equal force here:

> [C]ourts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Id. at 56–57.

These considerations apply with special force in Harris County, the third largest jurisdiction in the nation, where 50,000 misdemeanor defendants per year must be processed. Yet the court below largely ignored them—indeed, its 193-page opinion never cites *Riverside County*—and it has ordered relief that directly contradicts *Riverside County* by mandating the release of any arrestee who has "not appeared at a live (videolink) probable cause and bail-setting hearing within 24 hours of arrest." PI Order, App.3. In addition, while this Court has held that the 48-hour probable cause hearing may be a relatively informal "nonadversary proceeding on hearsay and written testimony" with "informal modes of proof," *Gerstein*, 420 U.S. at 120, the district court held that due process requires, within half the time permitted by this Court, a full-blown hearing at which the judicial officer must make a "written statement" and finding "as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial." PI Mem., App.164. There is no precedent for the notion that due process requires full-blown proceedings, complete with written findings, at the impracticable, no-exceptions speed of 24-hours-after-

arrest. If that is what due process requires, this Court will have to invalidate the bail procedures of virtually every single jurisdiction in the Nation.

Finally, the district court's injunction requiring hearings within 24 hours of arrest is invalid under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Under *Pennhurst*, federal courts lack the authority to order states to comply with state law, *id.* at 106, yet that is precisely what the district court has done here, purporting to enjoin Appellants to follow State law concerning the timeliness of a probable cause hearing, *see* PI Mem., App.165.

II. The Preliminary Injunction Will Cause Irreparable Harm if It Is Not Stayed By this Court.

The district court's startling constitutional ruling prohibits the enforcement of State law, mandates the release of untold numbers of potentially dangerous arrestees, presents a grave risk to public safety, and radically upsets the status quo. Without a stay from this Court, the citizens of Harris County will suffer serious irreparable harm while the Fifth Circuit reviews the district court's unprecedented order.

A. The Injunction Prohibits the Enforcement of State Law.

Applicants will suffer irreparable harm because "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). Although the district court claimed that its order does not modify Texas law, PI Mem., App.19, its order enjoins the enforcement of State law in at least four ways.

First, the Texas Constitution requires, again, that arrestees for non-capital offenses "shall be bailable by sufficient sureties." TEX. CONST. art. I, § 11. But the injunction mandates the release of criminal defendants *without* surety that the responsible state judicial officers have deemed "sufficient."

Second, Texas law requires Hearing Officers and County Judges to set bail by weighing five factors, only one of which is the ability to pay bail. TEX. CODE CRIM. PROC. art. 17.03(a); *Roberson* Decree, App.19. But the injunction overrides these mandates and requires bail to be based entirely on one factor only—the ability to pay.

Third, Texas law grants Hearing Officers and County Judges discretion to determine whether bail shall be secured or unsecured. TEX. CODE CRIM. PROC. art. 17.03(a). But the injunction overrides these mandates too, requiring unsecured bonds whenever an arrestee—no matter how long his rap sheet or great his flight risk—claims he cannot pay a secured bond.

Fourth, Texas law grants Hearing Officers and County Judges the power to set bail and determine release conditions. *See, e.g.*, TEX. CODE CRIM. PROC. art. 17.03. But the injunction usurps that power and transfers to the Sheriff of Harris County the power to set bail in the form of an unsecured personal bond and release defendants who claim they cannot pay bail.

B. The Injunction Presents a Grave Risk to Public Safety, Will Cause Confusion and Disarray, and Will Harm the Public Fisc.

Implementation of the district court's injunction will present a grave risk to public safety, will cause confusion and disarray in the third largest county in the United States, and will harm the public fisc. The harms threatened by the district court's orders are just as serious as they are obvious.

First, failure-to-appear rates will increase, raising serious public safety concerns. Bail jumping and failing to appear in court are crimes, TEX. PENAL CODE § 38.10, so the district court's order will cause crime rates to rise. Misdemeanants who present a serious risk to particular individuals or to the community at large will remain free, and thus able to commit further crimes. And the district court's order strips Harris County of the ability to create any serious incentives for prompt appearance at trial, because even if an arrestee fails to appear two,

three, or ten consecutive times, the arrestee must be continually released within 24 hours on unsecured bond. An inevitable collateral consequence is disrespect for a criminal justice system that has little power to compel an arrestee's appearance.

Second, the injunction will significantly impair Harris County's ability to protect the public through proper supervision of arrestees. Pretrial Services supervises arrestees released on personal bond but *not* those arrestees released on secured bonds. Banks Declaration, App.1031. The district court's order will cause the number of individuals released on personal bond to skyrocket; indeed, *that is its entire point*. As Kelvin Banks, the Director of Harris County Pretrial Services, explains in his declaration, Pretrial Services will be immediately overwhelmed with the task of supervising many more arrestees, leading to the inevitable: "Increased caseloads means that the quality of supervision provided may (and likely will) suffer." Banks Declaration, App.1031. Ed Wells, the Court Manager for the Harris County Criminal Courts at Law, has likewise declared that Pretrial Services will be overwhelmed by the huge increase in the number of arrestees it must supervise. Wells Declaration, App.1027.

A decrease in the quality of supervision will have at least two palpable effects. First, failure-to-appear rates will spiral upward even further due to Pretrial Services' inability to properly supervise defendants and prompt their attendance in court. Second, with diminished or non-existent supervision, arrestees will be less likely to comply with the non-financial conditions of their release. These non-financial conditions are vital to public safety, as Mr. Banks explains in his declaration: they require, for example, that arrestees refrain from using drugs; that drunk-driving arrestees comply with ignition interlock devices; and that violent arrestees comply with GPS monitoring to ensure they cannot harm their victims or the public. *See* Banks Declaration, App.1032.

Third, by abruptly upending the bail system of the third largest county in the United States, the district court's order will throw Harris County's criminal justice system into disarray, with negative consequences both foreseeable and not. Mr. Banks has declared that there is uncertainty over which State or County agency is tasked with supervising the thousands of arrestees who will now be released on unsecured bond. Banks Declaration, App.1031. Mr. Wells has declared that Pretrial Services will struggle to identify which arrestees must be given the district court's novel "affidavit of financial condition," and which defendants are mentally competent to execute those affidavits. Wells Declaration, App.1027–28. Caprice Cosper, the Director of Harris County's Office of Criminal Justice Coordination, has declared that the Court's injunction will substantially impair implementation of the new state-of-the-art changes, including the Arnold Tool, the result of several years' research and a $2 million investment from the MacArthur Foundation—changes that have been carefully designed to improve Harris County's pretrial system for arrestees and the public. *See* Cosper Declaration, App.1035–36. And this is only the beginning: the Sheriff of Harris County has already had to file a request to modify or clarify seven separate aspects of the Court's preliminary injunction, *see* Sheriff's Motion to Clarify, App.729, prompting a four-page "Order of Clarification" from the Court, *see* App.710. More confusion is inevitable as the injunction is hastily implemented. The harm will fall to the citizens of Harris County.

Fourth, the district court's order will cause irreparable harm to the public fisc. The County's cost to track down and arrest fugitive misdemeanants who do not appear in court will increase substantially. Costs will increase as a consequence of the gridlock, delay, and wasted judicial resources when hearings are continually rescheduled because an arrestee has failed to appear. And the costs to hire and train new employees to monitor arrestees, purchase and

maintain new GPS monitoring devices, and monitor ignition interlock devices, as attested to in Mr. Banks' declaration, *see* App.1032, are just a few of the new costs the County will face.

III. The Balance of the Equities Favors a Stay.

Given the multiple serious flaws in the district court's legal analysis, the importance of the stakes, and the level or irreparable harm that will be wrought by the district court's injunction, Applicants respectfully submit that this is not a "close case[ ]" that requires the Court to "balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). To the extent this Court disagrees, however, consideration of "the so-called 'stay equities,' " *San Diegans For Mount Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006), removes any remaining doubt that this Court should issue a stay and preserve the status quo pending further review of the district court's unprecedented constitutional ruling.

A stay of the preliminary injunction pending appeal will not substantially injure the Plaintiff class. "A stay pending appeal . . . simply suspends judicial alteration of the status quo." *Nken v. Holder*, 556 U.S. 418, 428–29 (2009) (quotation marks and brackets omitted). In this case, that status quo is longstanding—indeed, it pre-dates the Founding—and it is ubiquitous throughout the country. This Court should not allow the district court's unprecedented order to turn the status quo upside down before *any court* has taken a close second look at its legal analysis.

Moreover, a stay of the injunction pending appeal will protect the public interest. The inquiries into the public interest and the harm to the opposing party "merge when the Government is the . . . party" applying for a stay, *id.* at 435, and Applicants have already discussed at length the great harm to the public. *See supra*, pp. 28–31.

CONCLUSION

Applicants respectfully request that the Court stay the district court's order, pending the disposition of their appeal to the U.S. Court of Appeals for the Fifth Circuit. Applicants further respectfully request that the Court immediately enter an administrative stay while the Court considers and rules on the application for a stay pending appeal.

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Respectfully submitted,

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