No. 17-20333

In the United States Court of Appeals for the Fifth Circuit

MARANDA LYNN ODONNELL, LOETHA SHANTA MCGRUDER, and ROBERT RYAN FORD,
Plaintiffs-Appellees,

v.

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,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division,
No. 16-cv-1414

EMERGENCY MOTIONS OF JUDGES FOR HARRIS COUNTY CRIMINAL COURTS AT LAW 1-15 FOR STAY PENDING APPEAL AND LEAVE TO EXCEED THE WORD COUNT LIMIT

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May 12, 2017

CERTIFICATE OF INTERESTED PERSONS

Maranda ODonnell et al. v. Harris County, Texas et al., No. 17-20333

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Dated: May 12, 2017

s/ Charles J. Cooper
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Pursuant to FED. R. APP. P. 8(a), the Judges for Harris County's Criminal Courts at Law 1-15 respectfully move for an emergency stay pending appeal of the Preliminary Injunction ("PI Order," Exhibit 1) requiring the release on unsecured bond of 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 before 12:01 am on Monday, May 15, 2017**, the district court's injunction will take effect, *see* PI Order, App.5, and Harris County officials will be required immediately to begin releasing criminal defendants in violation of governing state law. The district court ordered that its injunction must take effect within eleven business days of its injunction order. Appellants requested a stay from the court below, but the district court denied the request last evening and also rejected Appellants' alternative request that the court at least stay the injunction long enough to permit Appellants a reasonable time to prepare, and this Court a reasonable time to consider and rule upon, a stay application. *See* Order Denying Stay, App.285.

Appellants respectfully request that the Court immediately enter an administrative stay while the Court considers and rules on the application for a stay pending appeal.

Finally, Appellants respectfully move for leave to exceed the 5,200-word limitation set forth in FED. R. APP. P. 27(d)(2). The court below entered a 193-page

opinion explaining its reasoning (Exhibit 3), a 78-page opinion denying an earlier motion to dismiss (Exhibit 4), and a 19-page opinion denying the stay motion (Exhibit 5). We respectfully submit that this oversize motion is necessary because of the extraordinary number and complexity of the legal and factual issues arising from the district court's rulings.

Pursuant to Fifth Circuit Rule 27.3, the undersigned certifies that the facts set forth in this motion are true and complete and that the filing of this motion was preceded by a telephone call to the Clerk's office and to counsel for the remaining parties advising them of the intent to file this motion. Counsel for Defendants-Appellants Harris County, Eric Hagstette, Joseph Licata, III, Ronald Nicholas, Blanca Estela Villagomez, and Jill Wallace have stated that they do not oppose the relief requested in this motion. Counsel for the Plaintiffs-Appellees have stated that they oppose all the relief requested in this motion and intend to file a response. Counsel for nominal Defendant Sheriff Ed Gonzalez have stated that they oppose the motions for an administrative stay and a stay pending appeal, but they do not oppose the motion to exceed the page limits. Counsel for Appellants have also contacted, by telephone and email, counsel for nominal Defendant Judge Darrell Jordan, to alert them to the filing of this motion; however, Judge Jordan's counsel has not responded with his position.

INTRODUCTION

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 court below 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 court below, 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 court justified the 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 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.164 (emphasis added).

The court's 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 this Court has squarely 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). Moreover, Plaintiffs'

[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* 7–8.

disparate-impact theory under the Equal Protection Clause is not viable, 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 reach the merits of this case to stay and ultimately reverse the preliminary injunction. The court below should have dismissed Plaintiffs' claims, brought under 42 U.S.C. § 1983, at the threshold for two independent reasons, both governed by binding precedent from this Court and the Supreme Court. First, the court was required to abstain from exercising jurisdiction over Plaintiffs' Section 1983 claims under *Younger v. Harris*, 401 U.S. 37 (1971). In *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981), this Court held that *Younger* abstention was required in a Section 1983 action challenging the alleged systematic imposition of excessive bail by Texas state court judges. *Tarter* conclusively requires abstention in this case as well.

Second, the relief the Plaintiffs have sought and the Court has entered—an order requiring their release from detention on an unsecured basis—is unavailable to Plaintiffs as a matter of law under the Supreme Court's decision in *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*). The district court's primary answer to *Preiser* is 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 in obedience to the court's injunction.

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 BAIL SYSTEM

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. 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* TEXAS 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.743.

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 the vast bulk of misdemeanor defendants 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.725. 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.314. 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.360.

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.319–20. 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.312.[2] If the Hearing Officer finds probable cause to detain, she must consider

[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.*

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.314. By the next business day after booking, the arrestee must also be brought before a County Judge in a counseled, adversarial hearing. Local Rule 4.3.1, App.314. 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.* An arrestee always retains the right to ask the County Judge to reconsider the bail setting, or to seek habeas review of the bail setting. *See* TEX. CODE CRIM. PROC. art. 11.09, 11.11.

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.321; *see also* PI Mem., App.65.

II. THE DISTRICT COURT'S MOTION TO DISMISS RULING

Appellants moved to dismiss, arguing *inter alia*, that (i) the district court should abstain from exercising jurisdiction pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), (ii) Plaintiffs' claims were not cognizable under 42 U.S.C. § 1983, (iii) the more specific provision of the Eighth Amendment governing bail foreclosed

Plaintiffs' equal protection and due process claims, and (iv) 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.

III. THE DISTRICT COURT'S PRELIMINARY INJUNCTION RULING

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

[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.

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 ability to pay part but not all of a surety's premium, she need not pay *any surety whatsoever*. Order of Clarification, App.8. 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 has 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.

ARGUMENT

"In determining whether to grant a stay pending appeal, this Court weighs: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Wood v. Collier*, 836 F.3d 534, 538 (5th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418, 426 (2009)). "The first two factors of the traditional standard are the most critical." *Nken*, 556 U.S. at 434. In determining likelihood of success, the district court's ultimate decision to enter a preliminary injunction is reviewed for abuse of discretion, but "[a] decision grounded in erroneous legal principles is reviewed *de novo,* and findings of fact are reviewed for clear error." *Texas v. United States*, 787 F.3d 733, 747 (5th Cir. 2015) (quotation marks omitted).

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL.

A. The District Court Should Have Abstained Under *Younger v. Harris*.

The district court erred by exercising jurisdiction over Plaintiffs' Section 1983 challenge to Harris County's pre-trial bail system in contravention of the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971). The district court's holding is foreclosed by *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981), where this Court held that abstention was required in a Section 1983 action alleging the systematic imposition of excessive bail by Texas state court judges, in violation of the Eighth Amendment. The plaintiff in *Tarter* sought, *inter alia*, "equitable relief against the judges based on the imposition of excessive bail …" *Id.* The Court held

that abstention was required under *Younger* and *O'Shea v. Littleton*, 414 U.S. 488 (1974), where the Supreme Court abstained under *Younger* from deciding an Eighth Amendment claim on behalf of "financially poor persons 'who, on account of their poverty, are unable to afford bail … in city ordinance violation cases.' " *Id.* at 491. "Because *O'Shea* involved a challenge to the imposition of excessive bail," this Court held, "it is conclusive as to Tarter's claim for equitable relief based on that ground." *Tarter*, 646 F.2d at 1013.

Although Appellants argued *Younger* throughout the proceedings below,[4] Appellants first alerted the district court to *Tarter*'s application of *Younger* in their emergency motion for a stay.[5] In its order denying the stay motion, the district court stated that Appellants had "waived" reliance on *Tarter*. Order Denying Stay, App.290. But parties must preserve arguments, not case citations; they are not limited to citing on appeal only those cases they cited to the district court. "[T]he basis for [Appellants'] objection presented below gave the district court the opportunity to address the gravamen of the argument presented on appeal," *United States v. Garcia-Perez*, 779 F.3d 278, 281–82 (5th Cir. 2015) (quotation marks omitted), which was sufficient to preserve this argument for review.

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[4] *See, e.g.*, Judges' Answer & Affirmative Defenses, App.443; Judges' Motion to Dismiss, App.610–617; Judges' Opposition to PI Motion, App.711.

[5] *See* Emergency Motion of Defendants for Stay Pending Appeal and Brief in Support at 5–6 (May 9, 2017), Doc. 311.

In any case, the district court fully considered and addressed *Tarter*, dismissing it as distinguishable because the court's injunction does not order "review of individual bail decisions." Order Denying Stay, App.293. But *Younger* and *Tarter* forbid federal courts from entering injunctions interfering with state court criminal proceedings without regard to the constitutional provision invoked to justify the injunction. And the district court's assertion that it has not ordered "review of individual bail decisions" cannot be squared with its order requiring the Sheriff to disregard state court orders imposing secured money bail and instead release misdemeanor defendants on unsecured personal bond. The district court has entered precisely the order forbidden in *Tarter*—an order eliminating a state magistrate's discretion to determine bail "on the peculiar facts and circumstances of [each] case," thus overriding "ad hoc decisions committed to the discretion of [state] judges." *Tarter*, 646 F.2d at 1013. Here, as in *Tarter*, enforcement of the district court's decree will "require excessive federal interference in the operation of state criminal courts," and in particular, will require the district court "to interrupt state proceedings to adjudicate allegations of asserted non-compliance with the order." *Id.*

In rejecting the application of *Younger* abstention in its order denying the motion to dismiss, the court below relied primarily on this Court's earlier decision in *Pugh v. Rainwater*, 483 F.2d 778, 780–81 (5th Cir. 1973), in which the Court held

that *Younger* did not bar a challenge to Florida's rules permitting the detention of arrestees without a probable-cause hearing. *See* Order Denying Motion to Dismiss, App.239. But the *Tarter* Court distinguished *Pugh*, explaining that the injunction requiring probable cause hearings was "a simple, nondiscretionary procedural safeguard to the criminal justice system" that, unlike a challenge to the setting of bail, "would not require … case-by-case evaluations of discretionary decisions." *Tarter*, 646 F.2d at 1013–14 & n.6.

The court below also held that *Younger* abstention was inappropriate because Plaintiffs are challenging the timeliness of the remedies provided under state law. *See* Order Denying Motion to Dismiss, App.242–43. But *Younger* abstention applies "[w]here state [judicial] proceedings allow a[ ] [litigant] to make constitutional objections to the proceedings at multiple stages." *Wightman v. Texas Supreme Court*, 84 F.3d 188, 190 (5th Cir. 1996). "Where vital state interests are involved, a federal court should abstain 'unless state law clearly bars the interposition of the constitutional claims.' " *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (quoting *Moore v. Sims*, 442 U.S. 415, 426 (1979)); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary").

Texas law provides misdemeanor defendants with numerous opportunities to challenge both the imposition of secured money bail and the timeliness of misdemeanor bail proceedings. They may challenge the bail initially set by a Hearing Officer, first, at a hearing held before a County Criminal Court at Law Judge within one business-day. Local Rule 4.3.1, App.314. Indeed, Plaintiff McGruder did just that and 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.408. If a defendant is dissatisfied either with the County Judge's resolution of his challenge to the bail or with the timeliness of his hearing before the County Judge, he may also seek review at any time through a state habeas corpus proceeding. *See* TEX. CODE CRIM. PROC. art. 11.01. Texas appellate courts regularly entertain appeals in such proceedings. *See, e.g.*, *Ex Parte Shires*, 508 S.W.3d 856 (Tex. 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).

The court below also relied on *Gerstein v. Pugh*, 420 U.S. 103 (1975), asserting that it stands "for the principle that when it comes to the adequacy of the state court proceedings as an opportunity to address constitutional harms, the opportunity must be available before the harm is inflicted." PI Mem., App.184 (citation, quotation marks, and emphasis omitted). The court misreads *Gerstein*; it

stands for the more limited proposition that *Younger* abstention is inappropriate when a constitutional objection cannot be raised *at all* in state court proceedings. *See Gerstein*, 420 U.S. at 108 n.9 (*Younger* did not apply because "the legality of pretrial detention without a judicial hearing … could not be raised in defense of the criminal prosecution"). And the availability of state habeas relief alone suffices to require *Younger* abstention. *See Wallace v. Kern*, 520 F.2d 400, 406 (2d Cir. 1975) (distinguishing *Gerstein* because "the federal plaintiffs there had no right to institute state habeas corpus proceedings except perhaps in exceptional circumstances and … their only other state remedies were a preliminary hearing which could take place only after 30 days"). This Court cited *Wallace* favorably in *Tarter* (albeit for a different point), 646 F.2d at 1013 n.5. Indeed, the *Tarter* Court's holding that *Younger* abstention was required in a Section 1983 challenge to Texas bail procedures inescapably, albeit implicitly, affirms the adequacy of the remedies Texas provides.

In rejecting the application of *Younger* abstention, the court below relied primarily on this Court's earlier decision in *Pugh v. Rainwater*, 483 F.2d 778, 780–81 (5th Cir. 1973), in which the Court held that *Younger* did not bar a challenge to Florida's rules permitting the detention of arrestees without a probable-cause hearing. *See* Order Denying Motion to Dismiss, App.239. But the *Tarter* Court distinguished *Pugh*, explaining that the injunction requiring probable cause hearings

was "a simple, nondiscretionary procedural safeguard to the criminal justice system" that, unlike the challenge to the setting of bail, "would not require … case-by-case evaluations of discretionary decisions." *Tarter*, 646 F.2d at 1013–14 & n.6.

B. Plaintiffs' Claims Are Not Cognizable Under Section 1983.

1. *Preiser v. Rodriguez* Requires State Prisoners Seeking Immediate or Speedier Release from Allegedly Illegal Confinement To Proceed Exclusively in Habeas and Prohibits Relief Under Section 1983.

The Plaintiffs have sought—and the court below 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 the Supreme 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 habeas *corpus*, and claims seeking such relief are not cognizable under 42 U.S.C. § 1983. The 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), the Supreme 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 Supreme 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 three reasons for declining to follow *Preiser*'s clear instructions. First, 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.414—and in particular, by the availability of habeas relief, Judges' Motion to Dismiss, App.614–15; Judges' Opposition to PI Motion,

App.704. 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.570–71 (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 court below 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, since (1) *Preiser* is "rooted in considerations of state sovereignty," and the rule against waivers of such issues is "applied less harshly than other waivers," *Watson v. New Orleans City*, 275 F.3d 46, 2001 WL 1268716, at *3 (5th Cir. 2001) (unpublished), (2) the issue is a pure question of law, *see New Orleans Depot Servs., Inc. v. Director, Office of Worker's Comp. Programs*, 718 F.3d 384, 388 (5th Cir. 2013), and (3) *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).

Next, the district court suggested that *Preiser*'s rule foreclosing relief under Section 1983 in this type of case was "dicta" that, notwithstanding the plain language chosen by *Preiser*, does not apply to " 'broad-based attacks,' such as class actions"

that challenge "a systemwide policy … , not any one hearing." Order Denying Stay, App.291, App.292. That is not the law.

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 the 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 that case 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. But *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.

Likewise, 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. Indeed, *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 allow a prospective injunction "that may have only an 'indirect impact' on the validity of a prisoner's [detention]" to be sought in a Section 1983 action challenging particular procedures, this Court has squarely held that where such a prospective injunction "is so intertwined [with the merits of the detention] that a favorable ruling on the former would 'necessarily imply' the invalidity of [the detention]," then such relief is only available through a habeas petition, under *Preiser*. *Clarke v. Stalder*, 154 F.3d 186, 189–91 (5th Cir. 1998) (en banc).

Here, no implication is required; the relief sought by Plaintiffs and entered by the district court falls squarely within the categorical prohibition announced in *Preiser*. The district court attempted to resist this conclusion with the remarkable assertion that its preliminary injunction "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. Under the rule announced in *Preiser*, such relief may not be granted in a Section 1983 action. The district court erred in entering it, and Appellants are likely to succeed in appealing it.

2. The District Court Erred in Concluding that Appellants Have a Policy or Practice that May Be Challenged in a Section 1983 Action.

Both Plaintiffs and the court below have disclaimed any facial challenge to the constitutionality of the state law governing the setting of bail in Harris County. *See* PI Mem., App.190 ("[P]laintiffs have not alleged the facial unconstitutionality of Texas statutes or the County Rules of Court …"). At the same time, the district court acknowledged that the law forecloses any as-applied challenge to the collective aggregation of *individual bail determinations*, since the setting of bail, or the affirming of a bail determination, is a quintessential judicial function for which neither the County Judges nor the County itself may be held liable under Section 1983. Order Denying Motion to Dismiss, App.257–58; Order Denying Stay Motion, App.289; 42 U.S.C. § 1983 (barring injunctive relief against "a judicial officer for

an act or omission taken in such officer's judicial capacity"); *Davis v. Tarrant Cty.*, 565 F.3d 214, 227 (5th Cir. 2009) ("[U]nder Texas law, a local judge acting in his or her judicial capacity is not considered a local government official whose actions are attributable to the county." (brackets and quotation marks omitted)).

Unable to hold the governing law unconstitutional on its face, and unable to rest an as-applied ruling on the aggregation of judicial decisions setting bail in individual cases, the court below held that Plaintiffs were likely to show the existence of an unwritten "custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve pretrial detention," which the court asserted is "neither created by judges in their judicial capacity nor mandated by Texas state law." PI Mem., App.138, App.171. Not only is this conclusion wrong as a matter of a law, it rests on a clearly erroneous factual finding that is refuted both by the evidence in the record and by the district court's own competing factual findings.

This Court has repeatedly held that a plaintiff may not obtain an injunction against a state judge's judicial acts by reframing his claims as challenging a *series* of judicial acts that, taken together, amount to an allegedly non-judicial policy or practice. In *Davis*, the plaintiff attempted to frame his challenge not to the individual denial of his application to serve as appointed counsel, but rather to the alleged "establishment and implementation of [a] county policy for the appointment of

counsel" that favored attorneys who were "part of the judges' 'good ol' boys' network" and was designed to "exclude qualified attorneys … in order to increase the conviction rate." *Davis*, 565 F.3d at 217–18. This Court recognized that "the alleged wrongful act in this case does not concern the appointment of counsel in a specific suit by the judge presiding over that suit …" *Id*. at 223. Nevertheless, the Court rejected Davis's attempt to reframe his suit as a challenge to "the selection of applicants … pursuant to a countywide policy," *id*., explaining that "the act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act," *id.* at 226; *see also Carbalan v. Vaughn*, 760 F.2d 662, 665 (5th Cir. 1985).

This Court applied those same principles in *Johnson v. Moore*, 958 F.2d 92 (5th Cir. 1992). There, the plaintiff "alleged that his constitutional rights were violated" when a local judge "sentenced him to jail numerous times … without representation of counsel," claiming that these repeated convictions evidenced a "policy of sentencing indigent criminal defendants to jail without benefit of counsel and without a knowing and intelligent waiver of the right to counsel." *Id.* at 93. As in *Davis*, this Court rejected the attempt to take what was actually a challenge to *a series of individual judicial determinations* and to reframe it as a challenge to an unwritten *policy* underlying those determinations. "We have repeatedly held … that

a municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker," and the plaintiff had failed "to show that his constitutional rights were violated as a result of the city's official policy," rather than a series of judicial decisions. *Johnson*, 958 F.2d at 94.

As in *Davis* and *Johnson*, so too here. Like the appointment of counsel and sentencing decisions at issue in those cases, each of the bail determinations here are quintessentially judicial acts. *See Cunningham ex rel. Cunningham v. City of W. Point*, 380 F. App'x 419, 422 (5th Cir. 2010) (unpublished) (rejecting Section 1983 challenge to denial of bail because "there is no doubt that [the] denial of bail [i]s a judicial action"). And *aggregating* individual bail determinations cannot give rise to a policy or practice subject to challenge under Section 1983.

Moreover, the court's finding that the "Hearing Officers and County Judges follow a 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," PI Mem., App.138, is clearly erroneous. It is contradicted by the sworn testimony of *all of the Defendant Hearing Officers and County Judges* (except nominal defendant Judge Jordan—who, as discussed below, testified that he *does not follow* the supposed custom or practice). Judge Paula Goodhart, for example, filed a declaration averring that in every bail hearing before her she individually reviews the amount of bail and "whether a personal bond is appropriate"

based on consideration of all five of the Article 17.15 factors. Declaration of Judge Goodhart, App.761. Each of the other defendant Hearing Officers and County Judges (except Judge Jordan) testified to similar effect. *See* App.766–805 (declarations of fifteen County Judges); App.807–18 (declarations of five Hearing Officers).

The court below nonetheless refused to credit the declarations of all of these County Judges and Hearing Officers, declaring instead that these same state judicial officers "follow a custom and practice of interpreting Texas law to use secured money bail set at prescheduled amounts to achieve pretrial detention." PI Mem., App.138. The Court's principal support for that finding is twofold: (1) various statistical analyses purporting to show that the majority of indigent defendants are required to post a secured bond, and (2) the testimony of one of the County Judges, Judge Jordan. But rather than supporting the existence of the supposed policy or practice of detaining misdemeanor defendants, both of these sources in fact *refute* the court's finding that such a policy exists.

The court's statistical evidence demonstrates conclusively that no such policy or practice exists. First, the district court found that in 2015 and 2016, approximately 50 percent of misdemeanor arrestees were released after posting a secured bond (in about 5 percent of cases by doing so directly with a "cash" bond; in about 45 percent, by paying a bail-bondsman to do so). PI Mem., App.80–81. Of the remaining 50

percent who did not post a secured bond, fully 20 percent (10 percent of all misdemeanor arrestees) were granted personal bond. *Id.*, App.80. That undisputed data point—the release on unsecured personal bond of one out of every five misdemeanor defendants who have not posted a secured bond—is *flatly inconsistent* with the existence of a supposed official policy to "detain misdemeanor defendants before trial who are otherwise eligible for release, but whose indigence makes them unable to pay secured financial conditions of release." *Id.*, App.175.

In fact, the 20 percent unsecured-bond rate derived from the court's findings almost certainly *understates* the proportion of defendants who are granted unsecured bail. Some significant share of the 50 percent of misdemeanor defendants who do not post bond are subject to some form of hold, such as a federal immigration detainer or outstanding warrant from another county, and are thus not entitled to bail of any kind. Others may rationally decide to plead guilty and obtain a lighter sentence and swift release without having to pay a bondsman's premium, even though they could afford to do so. *See* PI Mem., App.94 (defendants who plead guilty generally receive a sentence of "either the time already served in pretrial detention, or some number of days that with a two-for-one or three-for-one credit for the time served would allow release within a day of the first appearance."). If the denominator were reduced to account for these non-indigent arrestees, the share of

truly indigent defendants granted unsecured bail would likely be substantially higher than 20 percent.

Judge Jordan's testimony cannot overcome the uniform testimony of his colleagues and the statistical evidence demonstrating that the supposed policy or practice of categorically imposing secured bail does not exist. First, Judge Jordan did not take office until January 2017, well after this case was underway and a mere two months before the district court's preliminary injunction hearing. PI Mem., App.28. What is more, Judge Jordan testified that he *has never witnessed a* bail-setting hearing before a Hearing Officer. PI Hearing, App.718.

And Judge Jordan's testimony about his own bail-determination practices *refutes* the notion that the County Judges follow an established policy or practice of denying personal bail to indigent defendants. As the district court recognized, Judge Jordan's approach to setting bail is *directly contrary* to the supposed unwritten "custom and practice of using secured money bail to operate as de facto orders of detention in misdemeanor cases." PI Mem., App.141. But there is no finding—or evidence to support a finding—that Judge Jordan is openly and regularly violating "official Harris County policy" that has "the force of law." *Id.*, App.141, App.170. There is no evidence that Judge Jordan is subject to either official or informal sanctions for systematically violating a Harris County policy. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 168 (1970) (an informal policy or practice has "the force

of law … no less than legislative pronouncements" where state officials give it "compulsory" force "by imposing sanctions or withholding benefits"). To the contrary, Judge Jordan operates his court using his full judicial discretion, the same as the other County Criminal Court at Law Judges.

Plaintiffs have failed to show the existence of an unwritten policy of systematically denying personal bail to indigent defendants. All the record establishes is a series of thousands of individual bail determinations, a substantial percentage of which are inconsistent with the supposed unwritten policy. In any case, these determinations are quintessentially judicial decisions that, under this Circuit's law, cannot amount to a custom, policy, or practice with the force of law. Plaintiffs' failure to demonstrate such a custom or practice is fatal to their suit—and to the injunction entered below.

C. The Eighth Amendment Forecloses Plaintiffs' Claim.

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." This Court has squarely 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). The Supreme Court 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 v. Pugh*, 420 U.S. 103 (1975), for example, the 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." *Id.* at 125 n.27. *See also, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion); *Reynolds v. New Orleans City*, 272 F. App'x 331, 338 (5th Cir. 2008); *Becker v.*

Kroll, 494 F.3d 904, 919 (10th Cir. 2007); *Orin v. Barclay*, 272 F.3d 1207, 1213 n.3 (9th Cir. 2001). So too here: the Eighth Amendment expressly defines the constitutional limits that apply to bail determination; because Appellants have plainly not violated those limits, they are likely to succeed in this appeal.

D. Harris County's Bail System Does Not Violate Equal Protection.

Even if considered under the Equal Protection Clause, Plaintiffs' claim fails as a matter of law for three independent reasons. *First*, the Equal Protection clause does not permit disparate impact liability. "The Supreme Court has instructed us time and again … that disparate impact alone cannot suffice to state an Equal Protection violation; otherwise, *any* law could be challenged on Equal Protection grounds by whomever it has negatively impacted." *Johnson v. Rodriguez*, 110 F.3d 299, 306 (5th Cir. 1997). *See also, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976); *United States v. Crews*, 916 F.2d 980, 984 (5th Cir. 1990). 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).

They cannot make this showing. 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 was valid, *but see supra* Part I.C., 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 v. Kemp*, 481 U.S. 279, 298 (1987).

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 language from the Supreme Court about 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, only rational basis review applies, because "[n]either prisoners nor indigents constitute a suspect class," *Carson v. Johnson*, 112 F.3d 818, 821–22 (5th Cir. 1997), and arrestees 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).

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 treats 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 and permits release on bonds.

Both the Supreme Court and this Court have rejected, under rational basis review, the argument 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. *McGinnis v. Royster*, 410 U.S. 263 (1973), 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, 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). This Court likewise applied rational basis review and rejected an equal protection challenge where the interaction between secured money bail and a parole revocation order meant that an indigent who could not pay bail might serve a longer sentence than someone who could. *Smith v. U.S. Parole Comm'n*, 752 F.2d 1056, 1058 (5th Cir. 1985). The Court held that the Equal Protection Clause does not protect arrestees from "the greater sentence allegedly received by a parole violator because he was financially unable to make bail and thereby to force an immediate revocation hearing," *id.* at 1059, concluding instead that "unconstitutional wealth discrimination simply is not involved by this allegedly disparate treatment that results from Parole Commission policies that serve rationally legitimate, articulated governmental policies in the administration of parole violations," *id*.

The district court applied heightened scrutiny based on a trilogy of Supreme Court decisions involving penal fines[6] and this Court's *en banc* decision in *Pugh v. Rainwater*, 572 F.2d 1053 (1978). The fine cases are far afield because they involved

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

post-conviction punishment, but pre-trial detention on bail is not punishment. *See, e.g.*, *United States v. Powell*, 639 F.2d 224, 225 (5th Cir. 1981). Tellingly, *McGinnis* did not even cite *Williams* and *Tate* when it applied rational basis review to reject a bail-indigence claim. And *Pugh vacated* a panel opinion that had applied strict scrutiny to Florida's bail system, and the *en banc* court squarely rejected 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.

Third, even if Plaintiffs could maintain a disparate-impact claim and garner heightened scrutiny, Harris County's bail system easily survives the intermediate scrutiny that the district court applied. Intermediate scrutiny in equal protection cases requires that "a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The district court agreed that Harris County has "a compelling interest in assuring the presence at trial of persons charged with a crime," PI Mem., App.151 (quoting *Rainwater*, 572 F.2d at 1056), and the Supreme Court has also recognized a compelling interest in preventing crime by an arrestee who remains a threat to the community, *United States v. Salerno*, 481 U.S. 739, 751 (1987).

There is unquestionably a substantial relation between the time-honored secured bail system and the compelling governmental interests in appearance at trial and community safety. The court below concluded otherwise principally because it

found that release on secured bond does not assure better rates of appearance compared to release on unsecured personal bond. *See, e.g.*, PI Mem., App.141. This finding of legislative fact is entitled to no deference on appeal, *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc), and it contradicts both the evidence in the record and the entire history of human experience demonstrating the increased reliability of secured compared to unsecured lending.

The district court concluded that "[n]either secured nor unsecured bonds provide meaningfully different financial incentives" for the arrestee to appear at trial, PI Mem., App.102, but this statement is patently untenable. The court conceded that Harris County does not actually attempt to collect forfeited unsecured personal bonds, *id.*, so there is *no financial incentive at all* to appear when released on a personal bond. The court found that there is likewise no financial consequence of failing to appear under a secured bond because the arrestee may be "judgment-proof." *Id*. To the contrary, many arrestees who can afford the bondsman's premium are *not* judgment-proof. And the district court entirely ignored that (1) bondsmen may garnish the wages of judgment-proof debtors, (2) bondsmen usually require individuals who are *not* judgment-proof (e.g., parents or other relatives who will then be incentivized to ensure that the arrestee appears) to co-sign bonds, PI Hearing, App.743, and (3) the bondsman, of course, has a great financial incentive to ensure that unwilling arrestees appear at trial.

The district court also selectively highlighted studies that it claimed support the finding that appearance rates are comparable for misdemeanants released on secured and unsecured bonds. As an initial matter, this statistical evidence cannot support the court's equal protection holding as a matter of law because Plaintiffs have raised only an as-applied challenge. PI Mem., App.154. The Supreme Court has held that an as-applied equal protection challenge cannot be sustained on the basis of general statistical studies. In *McCleskey v. Kemp*, the Court rejected the argument that a defendant could prevail on an equal protection challenge to imposition of the death penalty based on statistical studies demonstrating racial disparity in the administration of the death penalty. 481 U.S. at 290–92. Rather, the Court held, the defendant had to "prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* at 292. The Court emphasized that the fact-specific nature of the sentencing process demanded "exceptionally clear proof" of discrimination in every case before it would permit an inference of purposeful discrimination in any particular case. *Id.* at 297; *see also id.* at 294. Bail determinations are just as fact-sensitive and defendant-specific as sentencing decisions, and Plaintiffs have not come close to establishing the exceptionally clear proof that the Supreme Court has demanded.

In any event, the statistical evidence in the record does not support the court's conclusion that appearance rates are the same for arrestees released on unsecured

bond and for those released on secured bond. Most importantly, the court's 193-page opinion *entirely ignores* the most relevant and compelling evidence in the record showing that failure-to-appear rates skyrocket when courts order the indiscriminate release of arrestees without secured money bail. Lucas County, Ohio, operated under a federal court decree that ordered, in times of overcrowding, the release of lower-level arrestees (primarily misdemeanants) without secured money bail, with little regard for their flight risk (much like the district court's injunction does here). Arnold Press Release, App.854; PI Hearing, App.752. Misdemeanants' failure-to-appear rates were an astonishing 60 percent, while the failure-to-appear rate for all arrestees (misdemeanants and felons) was 41.1 percent. PI Hearing, App.752–53; Lucas County PSA, App.873. When Lucas County implemented a pretrial risk assessment that did not simply release all misdemeanants on unsecured money bail with no additional conditions, but instead tailored bond types to arrestees' flight risk (much like Harris County's current system) the failure-to-appear rates for all arrestees plummeted to 28.8 percent, reflecting a 30 percent drop in the failure-to-appear rate. Lucas County PSA, App.873.

Another rigorous statistical study, this one of nearby Dallas, reached a similar finding: misdemeanor arrestees released on personal bonds failed to appear 39.6 percent of the time, while misdemeanor arrestees released on a secured commercial surety failed to appear 26.7 percent of the time—again, a roughly 30 percent decline

in the failure-to-appear rate. PI Mem., App.122; Dallas Study, App.826.

Ignoring the Lucas County study and discounting the Dallas study, the district court credited instead studies or anecdotes about bail systems in Philadelphia and Pittsburgh (the Gupta study), Denver, and New York. PI Mem., App.110–11. To discount the Dallas study, the district court went to great lengths to identify minor differences between the Houston and Dallas systems (e.g., less supervision of pretrial arrestees in Dallas)—but the district court did not explore at all whether the distant cities of Philadelphia, Pittsburgh, Denver, and New York provide better comparison points.

The district court also discredited the Dallas study because that city "does not compile comparative data on failures to appear," forcing the researchers to use proxy data. PI Mem., App.123. But the Gupta study that the court credited likewise used "proxies [that] are imperfect," because Philadelphia and Pittsburgh—like Dallas—did not specifically track failure to appear. Gupta Study, App.929. The Gupta study emphasized that the use of proxies was a "substantial caveat to [its] results," *id.*, App.945, leading the researchers to conclude that their "results should be interpreted as preliminary, and a more nuanced study of court appearances using more complete dat[a] is necessary," *id.*, App.929.

Defendants also presented studies consistently showing that for accused felons, the failure to appear rates are higher for those arrestees released on unsecured

compared to secured bonds. *See* App.883–923. The district court brushed these aside in a footnote because it concluded that the only relevant studies are those that isolate failure-to-appear rates among misdemeanor defendants. PI Mem., App.122. But the "landmark" Denver study that the court credited itself considered failure-to-appear rates among both felons and misdemeanants *without disaggregating them at all*. Brooker Study, App.979. The court also declined in a footnote to give "particular weight to anecdotal impressions of how release on secured money bail compares to completely unsupervised release," PI Mem., App.122, but it devoted an entire paragraph to touting anecdotal evidence from New York, supplied in an affidavit, about how charitable organizations are supposedly effective in New York City at ensuring presence at trial. PI Mem., App.121; *see also* Rahman Declaration, App.988.[7]

E. Plaintiffs Are Not Likely To Succeed on Their Due Process Claim.

While the district court held that plaintiffs are likely to succeed on their procedural due process claim, the injunction it entered has nothing to do with procedural due process. *First*, although the court's opinion purported to identify four

[7] This stay motion is not the occasion to explore all the flaws with the district court's review of the experts' hastily-cobbled-together analysis of Harris County's appearance rates. Suffice it to say for now that Harris County "does not track the comparative failure-to-appear rates," forcing the experts' to rely on flawed proxies that render their findings meaningless, PI Mem., App.117–18, and that Plaintiffs' expert artificially skewed his findings by stripping from his analysis the lowest-risk arrestees released on secured bond, *id.*, App.119.

"procedures" that Harris County may follow if it wants to set bail in excess of what arrestees can pay, PI Mem., App.164, the injunction does not permit Harris County to utilize those procedures. Instead, the injunction imposes a *blanket prohibition* on secured bail in excess of what arrestees can pay, regardless of how many procedural protections Harris County affords those arrestees.

Second, the fourth and most important "procedure" that the district court identified in its opinion 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 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 or heightened scrutiny that must be applied in those hearings. The district court, both in its injunction and its opinion, has in truth minted a new substantive due process right to affordable bail—a right that is squarely foreclosed by Eighth Amendment jurisprudence and thus unavailable under the banner of substantive due process. *Graham*, 490 U.S. at 395.

The district court's due process analysis is also deeply flawed on its own terms. *First*, misdemeanor arrestees have no liberty interest in pretrial release without posting sufficient sureties. Liberty interests protected by the Due Process Clause may arise from only one of two sources, "the Due Process Clause itself and

the laws of the States." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). The district court did not rely on a liberty interest created in the Due Process Clause itself, because arrestees have no federal constitutional liberty interest in pretrial release without sufficient sureties. Instead, "[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).

Instead, the district court looked for its liberty interest to state law, concluding that the Texas Constitution "has created a liberty interest in misdemeanor defendants' release from custody before trial." PI Mem., App.160. Not so. 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," as the court below found. If an arrestee does not provide sufficient sureties, there is no right to release.

The right to be bailable by sufficient sureties is not 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 County, 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 court's order thus does not mandate procedural protection for a liberty interest created by Texas (or federal constitutional) law, but instead improperly invents a new liberty interest. *See Kentucky Dep't of Corr.*, 490 U.S. at 460.

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 a putative liberty interest in being bailable by sufficient sureties. 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* Part I.A. 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 fully satisfy due process, and the district court erred by requiring greater procedural protections for bail hearings than the Supreme Court has held to be necessary for probable cause hearings to determine whether an arrestee may be held without bond. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 46 (1991), the Supreme Court held that due process is satisfied by probable cause hearings held within 48 hours of arrest. The Court emphasized that "courts 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 the Supreme 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 the Supreme 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 Circuit.

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. APPELLANTS WILL BE IRREPARABLY HARMED ABSENT A STAY.

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. A stay is warranted so that the citizens of Harris County will not suffer serious irreparable harm while this Court reviews the district court's unprecedented order.

A. The Injunction Prohibits the Enforcement of State Law.

Appellants will suffer irreparable harm because the district court's order enjoins the enforcement of state law, and this Court has made clear that "[w]hen a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). *See also Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014); *Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, Circuit Justice). Although the district court claimed that its order does not modify Texas law or the *Roberson* consent decree, 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 and the *Roberson* consent decree require 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.360. But the injunction overrides these mandates and requires bail to be based entirely on one factor only—the ability to pay.

Third, Texas law and *Roberson* grant Hearing Officers and County Judges discretion to determine whether bail shall be secured or unsecured. TEX. CODE CRIM. PROC. art. 17.03(a); *Roberson* Decree, App.360. 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.

Eight County Judges have signed declarations affirming that the district court's order enjoins Texas law and lamenting that the district court's injunction "endangers the public in immeasurable ways." App.991; App.995; App.999; App.1003; App.1007; App.1011; App.1015; App.1019.

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 largest county in this Circuit, 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, as they did in Lucas County, Ohio, when the pretrial system was similarly disrupted. Misdemeanants who present a serious risk to particular individuals or to the community at large will nonetheless 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.1026. 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.1026. 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.1022.

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.1027.

Third, by entirely upending the bail system of the third largest county in the United States and demanding that its order go into effect within 11 business days, 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.1026. 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.1022–23. 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.1030–31. 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.1041, prompting a four-page "Order of Clarification" from the Court,

see App.7–10. 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.1027, are just a few of the new costs the County will face.

III. A STAY WILL NOT CAUSE PLAINTIFFS SUBSTANTIAL INJURY AND IT WILL PROTECT THE PUBLIC INTEREST.

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.' " *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) (quoting *Nken*, 556 U.S. at 429). In this case, that status quo is longstanding—indeed, it pre-dates the Founding—and it is ubiquitous throughout the country. There is no need to allow the district court's unprecedented order to turn the status quo upside down before this Court has an opportunity to review the merits. Moreover, a stay of the injunction pending appeal will protect the public interest. "As the State is the appealing party, its interest and harm merges with that of the public." *Planned*

Parenthood, 734 F.3d at 419, and Appellants have already discussed at length the great harm to the public. *See supra* Part II.B.

CONCLUSION

Appellants respectfully request that the Court stay the district court's order until the parties have an opportunity to brief, and this Court has an opportunity to decide, the merits of Appellants' appeal of the preliminary injunction. Appellants request that the Court enter this stay before the district court's order takes effect on **Monday, May 15, 2017.** Appellants also respectfully request that the Court immediately enter an administrative stay while the Court considers and rules on the application for a stay pending appeal.

Dated: May 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion contains 13,384 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). Accordingly, Defendants-Appellants have sought the Court's leave to exceed the type-volume limitations of FED. R. APP. P. 27(d)(2).

This motion complies with the typeface requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(5) and the type style requirements of FED. R. APP. P. 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: May 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on May 12, 2017 by using the appellate CM/ECF system. I certify that service will be accomplished on May 12, 2017 by the appellate CM/ECF system on the following:

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