No. 18-11368

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, on behalf of themselves and all others similarly situated; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,

Plaintiffs-Appellants/Cross-Appellees

v.

DALLAS COUNTY, TEXAS;
(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES ON THE ISSUE ADDRESSED HEREIN

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Defendants-Appellees/Cross-Appellants

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Defendants-Appellees

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IN THE UNITED STATES COURT OF APPEALS
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v.

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MARIAN BROWN, *et al.*,

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES ON THE ISSUE ADDRESSED HEREIN

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## INTEREST OF THE UNITED STATES

The United States has a substantial interest in ensuring that state and local justice systems—and bail practices within those systems—are fair and nondiscriminatory. In 2018, the Office of Legal Policy reaffirmed the Department of Justice's longstanding commitment "to helping the justice system efficiently

deliver outcomes that are fair and accessible to all, irrespective of wealth and status." Office of Legal Policy, Access to Justice (Oct. 24, 2018), available at https://www.justice.gov/olp/access-justice. The Civil Rights Division has authority to investigate discriminatory criminal justice practices, including the problematic use of fines, fees, and bond procedures, see, *e.g.*, Consent Decree, at 83-84, 86-87, *United States* v. *City of Ferguson*, No. 4:16-cv-180 (E.D. Mo. Mar. 17, 2016), and has participated as *amicus curiae* in appeals, such as this one, challenging the constitutionality of a jurisdiction's pretrial bail system, see *Walker* v. *City of Calhoun*, Nos. 16-10521, 17-13139 (11th Cir.). Accordingly, the United States offers its views under Federal Rule of Appellate Procedure 29(a) to aid this Court in the resolution of this appeal.

## STATEMENT OF THE ISSUE

This case concerns Dallas County's automatic requirement that all arrestees post secured money bail, regardless of their ability to pay, without meaningful consideration of alternative means to satisfy the State's interests. The district court correctly held that Dallas County's bail system likely violates the Procedural Due Process and Equal Protection Clauses of the Fourteenth Amendment, and issued a preliminary injunction. The question in this case is:

Whether, to remedy the Fourteenth Amendment violation here, the district court's injunction must require the factfinder to determine that alternatives to

money bail are inadequate to meet the State's interests before denying pretrial release to someone financially unable to post bail.[1]

## STATEMENT OF THE CASE

American jurisdictions take a variety of approaches to bail. We discuss first—for context—the federal system under the Bail Reform Act of 1984. We then turn to the challenged bail system here, in Dallas County, Texas, which, like some states and other localities, instead uses a fixed schedule for bail under which arrestees can be released if they pay a specified amount tied to their offense.

### *1. Pretrial Release In Federal Courts*

In the federal system, under the Bail Reform Act of 1984, judges decide whether to detain a defendant based on risk of flight or danger to the public after a hearing at which both the government and the defendant may present evidence. See 18 U.S.C. 3142(a) and (f). The Act provides as a default that "[t]he judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court." 18 U.S.C. 3142(b). If the judge determines that release on personal recognizance or on an unsecured bond "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the

[1] The United States takes no position on any other issue presented in this case.

community, such judicial officer shall order the pretrial release of the person * * * subject to the least restrictive further condition, or combination of conditions, that * * * will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. 3142(c)(1)(B).

A judicial officer may impose financial conditions of release to ensure a defendant's future appearance and the public's safety, see 18 U.S.C. 3142(c)(1), but "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person," see 18 U.S.C. 3142(c)(2). Consistent with the Act, this Court and others have concluded that a federal court may impose financial conditions that a defendant may lack the resources to satisfy, only if the court determines that the financial condition is necessary to ensure the defendant's court appearance. See, *e.g.*, *United States* v. *McConnell*, 842 F.2d 105, 107-110 (5th Cir. 1988).

If the judge determines that no condition or combination of conditions will reasonably assure the defendant's presence at trial or the public's safety, the judge shall order the person detained pursuant to an order that includes written findings of fact and a written statement of the reasons for the detention. See 18 U.S.C. 3142(e) and (i). Taken together, the Act's provisions help ensure that federal courts base pretrial detention decisions on an individualized assessment of

dangerousness and risk of flight and that courts consider, in a meaningful way, defendants' ability to pay and the presence of nonmonetary conditions of release that can satisfy the government's regulatory interests. See 18 U.S.C. 3142(g) (listing factors that courts should consider in reaching such determinations).

*2. Dallas County's Pretrial Bail System*

In Dallas County, four types of officials are involved in the pretrial detention of all arrestees. Dallas County Criminal District Court Judges (Felony Judges) set the secured-bail schedule for felony offenses. ROA.5958, 5960.[2] Dallas County Criminal Court at Law Judges (Misdemeanor Judges) set the secured-bail schedule for misdemeanor offenses. ROA.5958, 5960. Magistrate Judges, who report to Felony Judges, preside over the arraignments at which bail is imposed for both misdemeanor and felony arrestees. ROA.5959-5960. Finally, the Dallas County Sheriff is responsible for enforcing the Magistrate Judges' bail determinations. ROA.5959.

When individuals are arrested in Dallas County, they are held in jail until their arraignment in front of a Magistrate Judge. ROA.5959. At the arraignment,

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[2] "ROA" refers to the Record on Appeal. "Panel Br." and "Panel Resp." respectively refer to plaintiffs' and certain defendants' initial briefing before the merits panel. "Pls.' Pet." refers to plaintiffs' petition for panel rehearing, while "Dallas Cnty. Pet." refers to Dallas County's petition for rehearing en banc. "Pls.' En Banc Br." refers to plaintiffs' supplemental en banc brief filed on March 29, 2021.

the Magistrate Judge informs the arrestee of the offense charged and sets the conditions for release. ROA.5960. To determine the bail amount, the Magistrate Judge relies on the schedules promulgated by the Misdemeanor and Felony Judges. ROA.5960. "These schedules operate like a menu, associating various 'prices' for release with different types of crimes and arrestees." ROA.5960.

During this process, the Magistrate Judges do not consider an arrestee's ability to pay. Before February 2018, the judges lacked information about an arrestee's financial resources to even do so. ROA.5961; see also Pls.' Panel Br. 7. In February 2018, the Felony Judges instructed the Magistrate Judges to provide arrestees with a financial affidavit to complete before their arraignment and to take ability to pay into consideration at arraignment. ROA.5961. But this change "made no material difference in the Magistrate Judges' practices." ROA.5961. "Magistrate Judges still routinely treat the schedules as binding, and make no adjustment in light of an arrestee's inability to pay." ROA.5961.

If the arrestee cannot afford the "price" of release, "he or she is kept in jail, assigned to a housing unit, and confined in a cell until his or her first appearance." ROA.5961. Misdemeanor arrestees typically wait four to ten days for their first appearance before a Misdemeanor Judge. ROA.5962. Felony arrestees wait

between two weeks and three months for their first appearance before a Felony Judge, depending on whether they waive indictment. ROA.5962.

Plaintiffs sued Dallas County, the Felony Judges, the Misdemeanor Judges, the Magistrate Judges, and the Sheriff for violations of the Fourteenth Amendment, and sought declaratory and injunctive relief.[3] ROA.56-114; see also ROA.415-478. They also moved the court to "preliminarily enjoin[] the County from enforcing its wealth-based pretrial detention system and order[] the County to provide the procedural safeguards and substantive findings that the Constitution requires before preventatively detaining any presumptively innocent individuals." ROA.191.

*3. Intervening* ODonnell *Litigation*

While plaintiffs' suit was pending, the Fifth Circuit decided a nearly identical challenge to Harris County's pretrial detention system. See *ODonnell* v. *Harris Cnty.*, 882 F.3d 528 (5th Cir. 2018), withdrawn and superseded on panel reh'g, *ODonnell* v. *Harris Cnty.*, 892 F.3d 147 (5th Cir. 2018) (*ODonnell I*); see also *ODonnell* v. *Goodhart*, 900 F.3d 220 (5th Cir. 2018) (*ODonnell II*).

In *ODonnell I*, this Court concluded that the plaintiffs in Harris County had shown "a likelihood of success on the merits of [their] claims that the County's

[3] The district court later certified a class of "[a]ll arrestees who are or will be detained in Dallas County custody because they are unable to pay a secured financial condition of release." ROA.5981.

policies violate procedural due process and equal protection." 892 F.3d at 152. The Court found that "[t]he fundamental source of constitutional deficiency in the due process and equal protection analyses is the same: the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances." *Id.* at 163.

As a remedy, the Court required Harris County to institute "constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances," including "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker." *ODonnell I*, 892 F.3d at 163. The Court declined to require the factfinder to issue a written decision, finding it sufficient to "requir[e] magistrates to specifically enunciate their individualized, case-specific reasons" for imposing secured money bail. *Id.* at 160. The Court suggested language for the injunction but "le[ft] the details to the district court's discretion." *Id.* at 164-166.

In *ODonnell II*, a motions panel of this Court issued a stay of the injunction that the district court had issued on remand. 900 F.3d at 223. The motions panel stated that the district court had "adopted the model injunction [from *ODonnell I*] but added four provisions of its own." *Id.* at 222. The motions panel rejected each

addition as violative of the mandate rule and unnecessary under the Due Process and Equal Protection Clauses. See *id.* at 224-228.[4]

*4. The District Court's Preliminary Injunction In This Case*

On September 20, 2018, after the motions panel had decided *ODonnell II*, the district court granted plaintiffs' request for a preliminary injunction in this case. ROA.5957.[5] As an initial matter, the court held that the Felony and Misdemeanor Judges were proper defendants, but not the Sheriff. ROA.5963-5964. The court did not decide whether the Magistrate Judges were proper defendants because "any injunction against the County would reach the Magistrate Judges, who are acting on behalf of the County." ROA.5964.

The court granted the preliminary injunction, finding that plaintiffs had shown a likelihood of success on the merits, a risk of irreparable harm, a balance of harm that "tilts heavily" in plaintiffs' favor, and a public interest that supported issuance of the injunction. ROA.5965-5971. As part of this analysis, the court

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[4] After the motions panel in *ODonnell II* granted the stay pending appeal, the original appellants (who were the defendant officials) lost their next election. Their successors voluntarily dismissed the case, and the plaintiffs-appellees moved to vacate *ODonnell II* because there would be no merits appeal. In *ODonnell* v. *Salgado*, 913 F.3d 479 (5th Cir. 2019) (per curiam) (*ODonnell III*), the Fifth Circuit denied the motion, explaining that "the published opinion granting the stay is the court's last statement on the matter and, like all published opinions, binds the district courts in this circuit." *Id.* at 482.

[5] The Memorandum Opinion and Order is also available at *Daves* v. *Dallas Cnty.*, 341 F. Supp. 3d 688 (N.D. Tex. 2018) (3:18-cv-0154).

found a substantial likelihood that plaintiffs would prevail on their equal protection and procedural due process claims. ROA.5965-5967. The court rejected plaintiffs' separate substantive due process claim. ROA.5967-5969.

For the preliminary injunction, the court adopted in full the procedures that the Fifth Circuit merits panel had proposed in *ODonnell I*. ROA.5971-5972; see also ROA.5974-5980. The court denied plaintiffs' request "to require a substantive finding that detention is strictly necessary before imposing it on an indigent arrestee." ROA.5971. Instead, the court adopted *ODonnell I*'s requirement for the "consideration" of other alternatives when an arrestee is unable to pay the fixed money bail amount and "decline[d] to speculate as to whether the Fifth Circuit intended this instruction to further require the precise substantive finding Plaintiffs seek." ROA.5972 n.10.

*5. The Now-Vacated Panel Opinion*

The parties cross-appealed the district court's order granting a preliminary injunction. As summarized by the Fifth Circuit panel in this case, the issues on appeal were: (1) "Do the Plaintiffs have standing generally?"; (2) "Should the court either abstain or first require the Plaintiffs to exhaust state-court remedies?"; (3) "Are the [Felony Judges] proper defendants?"; (4) "Is Dallas County a proper defendant?"; (5) "Is the Sheriff a proper defendant?"; and (6) "What relief, if any,

should be granted to the Plaintiffs?" *Daves* v. *Dallas Cnty.*, 984 F.3d 381, 389 (5th Cir. 2020), vacated, 988 F.3d 834 (5th Cir. 2021).

As relevant here, the final question concerns the appropriate relief for the likely procedural due process and equal protection violations. Defendants did not contest the substance of the injunction or the "district court's conclusion that the accused are entitled to an individualized assessment of bail." Appellees' Panel Resp. 7. Plaintiffs, however, sought "[a]n order prohibiting the detention of any arrestee based on inability to pay unless a judge finds that such detention is necessary to vindicate an important government interest." Pls.' Panel Br. 2. Because the district court followed the model injunction from *ODonnell I*, the panel rejected plaintiffs' argument. See *Daves*, 984 F.3d at 413.

After the panel issued its opinion, plaintiffs petitioned for panel rehearing and Dallas County petitioned for rehearing en banc. Plaintiffs' petition sought reconsideration of the panel's decision that plaintiffs lacked standing to seek injunctive relief against the Felony Judges. See Pls.' Pet. 1. The County's petition focused on whether the merits panel, bound by *ODonnell I*, incorrectly determined that the Misdemeanor Judges were "official policymakers." Dallas Cnty. Pet. 2-3.

On February 25, 2021, this Court granted the petition for rehearing en banc, vacated the panel opinion, and ordered supplemental briefing.

## SUMMARY OF ARGUMENT

Dallas County's automatic requirement that all arrestees post secured money bail, regardless of their ability to pay, without meaningful consideration of alternative means to satisfy the State's interests violates the Procedural Due Process and Equal Protection Clauses of the Fourteenth Amendment. The district court correctly concluded that plaintiffs were likely to succeed on the merits, and properly issued a preliminary injunction requiring Magistrate Judges to "consider alternatives to secured release." ROA.5972 n.10.

As a preliminary matter, we address the analytical framework for finding a constitutional violation in this context. In this case, the court followed *ODonnell I*'s analysis and evaluated plaintiffs' procedural due process and equal protection claims independently. Where these two types of claims converge, however, both the Supreme Court and this Court have applied a hybrid procedural due process and equal protection framework. See *Bearden* v. *Georgia*, 461 U.S. 660 (1983); *Pugh* v. *Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc). Although "neither *Bearden* nor *Rainwater* is a model of clarity" in setting out the applicable standard, a recent Eleventh Circuit decision—issued shortly after *ODonnell I*—adopts and explains the hybrid analytical approach for constitutional challenges to pretrial bail. See *Walker* v. *City of Calhoun*, 901 F.3d 1245, 1265 (11th Cir. 2018), cert. denied, 139 S. Ct. 1446 (2019).

To remedy a hybrid Fourteenth Amendment violation, bail procedures must provide "meaningful consideration of other possible alternatives" to satisfy the State's interests. See *Rainwater*, 572 F.2d at 1057. The district court here "decline[d] to speculate" whether "meaningful consideration" of alternatives required an impartial decisionmaker to expressly conclude that such alternatives are inadequate to meet the State's interests before imposing secured money bail. See ROA.5972 n.10 (citation omitted). This Court should clarify that the relevant decisionmaker must not only *consider* alternatives to the use of cash bail, but must also *determine* that these alternatives are inadequate to meet the State's interests.

## ARGUMENT

## TO REMEDY A HYBRID FOURTEENTH AMENDMENT VIOLATION ARISING FROM THE AUTOMATIC IMPOSITION OF SECURED MONEY BAIL, COURTS MUST CONSIDER AND DETERMINE THAT ALTERNATIVE MEANS ARE INADEQUATE TO MEET THE STATE'S INTERESTS

### *A. Plaintiffs Are Likely To Succeed On Their Fourteenth Amendment Claim*

The district court correctly held that plaintiffs are likely to succeed on their procedural due process and equal protection claims. See ROA.5965-5967. In so holding, however, the district court followed the Fifth Circuit's analysis in *ODonnell I* and evaluated the two claims separately. ROA.5965 n.6. But as exemplified by an Eleventh Circuit decision issued shortly after *ODonnell I*, the cleaner way to reach the same conclusion is to evaluate the two claims together

under a hybrid procedural due process and equal protection approach. See *Walker* v. *City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), cert. denied, 139 S. Ct. 1446 (2019).

1. The Supreme Court has long held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion); accord *Smith* v. *Bennett*, 365 U.S. 708, 710 (1961). In particular, the Supreme Court has recognized that categorically denying access to equal justice based on indigence, such as incarcerating individuals solely due to inability to pay a fine or fee, violates the Fourteenth Amendment. See *Williams* v. *Illinois*, 399 U.S. 235 (1970) (holding that an indigent defendant may not be incarcerated beyond the statutory ceiling based on inability to pay a fine and court costs); see also *Tate* v. *Short*, 401 U.S. 395 (1971) (holding that a fine cannot be converted to incarceration solely because of indigency).

As relevant here, the critical case for the use of a hybrid analytical framework for procedural due process and equal protection claims is *Bearden* v. *Georgia*, 461 U.S. 660 (1983). There, the Supreme Court held that the Fourteenth Amendment prohibits a State from revoking an indigent defendant's probation for failure to pay a fine and restitution "without determining that [the defendant] had not made sufficient bona fide efforts to pay or that adequate alternative forms of

punishment did not exist." *Id.* at 661-662; see also *id.* at 672. "To do otherwise," the Court noted, "would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine." *Id.* at 672-673.

Recognizing that "[d]ue process and equal protection principles converge in the Court's analysis in these cases," the *Bearden* Court rejected the parties' arguments concerning the appropriate level of scrutiny under a traditional equal protection framework. 461 U.S. at 665-666. Because "indigency in this context is a relative term rather than a classification, fitting the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished." *Id.* at 666 n.8 (internal quotation marks and citation omitted). "Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666.

Instead, the *Bearden* Court explained that the relevant analysis "requires a careful inquiry into such factors as the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating that purpose." 461 U.S. at 666-667 (citing *Williams*, 399 U.S. at 260 (Harlan, J., concurring)) (internal quotation marks omitted; brackets in original). Under this framework, the Supreme Court held that the trial court could not revoke probation

without "inquir[ing] into the reasons for the failure to pay" and "consider[ing] alternate measures" to accomplish the State's interest. See *id.* at 672.

2. Although *Bearden* concerned post-trial incarceration, the former Fifth Circuit and the Eleventh Circuit have followed the same approach and reached the same conclusion in the context of pretrial bail.

First, five years before *Bearden*, in *Pugh* v. *Rainwater*, 572 F.2d 1053 (5th Cir. 1978) (en banc), this Court considered whether Florida's bail system was constitutional absent a presumption against money bail. *Id.* at 1055-1056. Ultimately, the Court held that the new bail system, which had changed during the pendency of litigation, was not facially unconstitutional. *Id.* at 1058-1059.

In its analysis, however, this Court "accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." 572 F.2d at 1056 (citing *Williams*, *supra*; *Tate*, *supra*). The Court recognized the "delicate balanc[e]" between the State's "compelling interest in assuring the presence at trial of persons charged with [a] crime" and the individual's liberty interest given that they "remain clothed with a presumption of innocence and with their constitutional guarantees intact." *Id.* at 1056. Critically, the Court stated that "[t]he incarceration of those who cannot [afford bail], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements." *Id.* at 1057.

Second, in *Walker* v. *City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), cert. denied, 139 S. Ct. 1446 (2019), the Eleventh Circuit reiterated and clarified this hybrid approach. In reviewing the plaintiff's challenge to a local jurisdiction's use of money bail and the district court's resulting injunction, the Eleventh Circuit sought to answer "what process the Constitution requires in setting bail for indigent arrestees." *Id.* at 1251. The Eleventh Circuit explicitly followed the "type of hybrid due process and equal protection claim that *Rainwater* recognized." *Id.* at 1259-1260.

Although the district court in *Walker* purported to apply this hybrid framework, the Eleventh Circuit explained that the court had instead "appl[ied] heightened scrutiny from traditional equal protection analysis." 901 F.3d at 1265. The Eleventh Circuit held that the court erred in so doing, but noted that the district court's "confusion" in applying the hybrid due process and equal protection analysis was "perhaps unsurprising because neither *Bearden* nor *Rainwater* is a model of clarity in setting out the standard of analysis to apply." *Ibid.*

In an attempt to better explain the standard, the Eleventh Circuit described it as "something akin to a traditional due process rubric." *Walker*, 901 F.3d at 1265. The Eleventh Circuit noted that this characterization "makes particular sense" in this type of case "because the relief [the plaintiff] seeks is essentially procedural: a prompt process by which to prove his indigency and to gain release." *Ibid.* And in

a due process analysis, "[t]he fundamental requirement * * * is the opportunity to be heard at a meaningful time and in a meaningful manner." *Ibid.* (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976)) (alterations in original).

3. In this case, instead of analyzing plaintiffs' procedural due process and equal protection claims together under the hybrid approach, the district court addressed each individually under traditional analyses. See ROA.5965-5967. In a footnote, the district court explained that it was "aware that in the intersection of indigency and the criminal justice system, the Supreme Court has observed that '[d]ue process and equal protection principles converge in the Court's analysis.'" ROA.5965 n.6 (quoting *Bearden*, 461 U.S. at 665). Nevertheless, the court noted that its analysis "follows *ODonnell I* in discussing the two theories separately." ROA.5965 n.6. Addressing each theory independently, the court concluded that Dallas County's pretrial bail system likely violates the Fourteenth Amendment. ROA.5965-5967.

The United States's position is that, although an indigent arrestee's pretrial liberty implicates both due process and equal protection principles, these claims are more appropriately analyzed together than separately. See *Bearden*, 461 U.S. at 666-667 & n.8. As shown by *Walker*, the hybrid framework under *Bearden* and *Rainwater* provides a cleaner analytical framework than independently applying traditional equal protection and procedural due process rubrics. Using the equal

protection concerns as a stand-in for the liberty interest under the hybrid approach, courts can readily apply "something akin to a procedural due process mode of analysis." See *Walker*, 901 F.3d at 1265.

### *B. As A Remedy, A Factfinder's Meaningful Consideration Of Alternatives To Cash Bail Must Include A Reasoned Determination That Such Alternatives Are Inadequate To Meet The State's Interests*

To avoid the Fourteenth Amendment violation that would result from incarcerating arrestees solely based on inability to pay, a jurisdiction's bail procedures must provide "meaningful consideration of other possible alternatives." *Rainwater*, 572 F.2d at 1057. The remedy of "meaningful consideration" necessarily includes a reasoned determination regarding the adequacy of alternatives to satisfy the State's interests. See *Bearden*, 461 U.S. at 672-673. In this context, the State's interests include ensuring the arrestee's presence at trial and "preventing crime by arrestees." See *United States* v. *Salerno*, 481 U.S. 739, 749 (1987); see also *Rainwater*, 572 F.2d at 1056 & n.5. Thus, this Court should make clear that, before imposing secured money bail that will result in the detention of an arrestee who cannot pay, the factfinder must reach a reasoned determination that alternatives to cash bail are inadequate to meet the State's interests in securing an arrestee's future appearance at trial and lawful conduct while released.

The Supreme Court in *Bearden*, for example, clearly envisioned an individualized determination that encompassed both the ability to pay and the adequacy of available alternatives. The Court held that "the trial court erred in automatically revoking probation because petitioner could not pay his fine*, without determining* that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist." 461 U.S. at 661-662 (emphasis added). The Court recognized that if, on remand, "the Georgia courts determine that petitioner did not make sufficient bona fide efforts to pay his fine, or determine that alternate punishment is not adequate to meet the State's interests in punishment and deterrence," then "imprisonment would be a permissible sentence." *Id.* at 674. "Unless such determinations are made, however, fundamental fairness requires that the petitioner remain on probation." *Ibid.*

Similarly, this Court recognized in *ODonnell I* that the "constitutionally-necessary procedures" include a reasoned determination. See 892 F.3d at 163. Having found both a procedural due process and equal protection violation, the Court explained that the underlying problem was "the County's mechanical application of the secured bail schedule without regard for the individual arrestee's personal circumstances." *Ibid.* This Court required the County to "implement the constitutionally-necessary procedures to engage in a case-by-case evaluation of a given arrestee's circumstances, taking into account the various factors required by

Texas state law," one of which is ability to pay. *Ibid.* "The procedures are: notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a *reasoned decision* by an impartial decisionmaker." *Ibid.* (emphasis added).

In *ODonnell I*, this Court rejected a requirement that the reasoned decision be made in writing, but not that such a decision be made explicitly and on the record. See 892 F.3d at 160. The Court found any requirement for a written decision unnecessarily burdensome given the workload of the Magistrate Judges. See *ibid.* And, "since the constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees, requiring magistrates to specifically enunciate their individualized, case-specific reasons for so doing is a sufficient remedy." *Ibid.*

Based on the model injunction from *ODonnell I*, the injunction the district court issued here requires "an adequate process for ensuring there is individual consideration for each arrestee of whether another amount or condition provides sufficient sureties." ROA.5974-5975 And the injunction instructs the decisionmaker to "provide written factual findings or factual findings on the record explaining the reason for the decision" if he or she "declines to lower bail * * * or impose an alternative condition of release." ROA.5977.

Despite this language, the district court failed to make explicit that the preliminary injunction requires factfinders to reach a reasoned determination

regarding alternatives to paying the pre-fixed bail amount. Plaintiffs sought "a substantive finding that detention is strictly necessary before imposing it on an indigent arrestee." ROA.5971; see also Pls.' En Banc Br. 6, 27. The court highlighted that its "injunction is not absent an instruction to consider alternatives to secured release." ROA.5972 n.10. But, the court "decline[d] to speculate as to whether the Fifth Circuit intended this instruction to further require the precise substantive finding Plaintiffs seek." ROA.5972 n.10.

Given the apparent confusion over what, if any, finding is required before an impartial decisionmaker may impose the fixed bail amount on an arrestee who cannot pay, this Court should clarify that the remedy for a violation of the Fourteenth Amendment includes a determination that alternatives to cash bail are inadequate to ensure the arrestee's future appearance at trial and lawful conduct while released. Such a determination need not be in writing, but it still must be made explicit to ensure that the procedural protections afforded are effective. See *ODonnell I*, 892 F.3d at 160. In addition, this finding need not be made immediately; rather it is presumptively constitutional if made within 48 hours of arrest. See *ibid.*; see also *Walker*, 901 F.3d at 1266-1267. Finally, this determination requires only that the factfinder provide "individualized, case-specific reasons" for imposing secured money bail. *ODonnell I*, 892 F.3d at 160.

To be clear, this remedy does not rest on any substantive due process principles. Instead, this requirement remedies a hybrid procedural due process and equal protection violation. Nor does it foretell the end of cash bail. Although other jurisdictions, including the federal court system, use a different bail system altogether, the requirement of a reasoned determination does not preclude Dallas County's approach. If the Magistrate Judge determines that the arrestee is able to pay the secured bail amount or that alternatives to cash bail are inadequate to meet the State's interests in the arrestee's future appearance at trial or lawful conduct while released, then bail in a scheduled amount still may be constitutionally imposed. If, however, an indigent arrestee's appearance at trial or lawful conduct while released "could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail" would be unconstitutional. See *Rainwater*, 572 F.2d at 1058.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's issuance of a preliminary injunction and clarify that, to remedy a hybrid procedural due process and equal protection violation, the "meaningful consideration" of alternatives to cash bail includes a reasoned determination that such alternatives are inadequate to meet the State's interests.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5015 words according to the word processing program used to prepare the brief.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2019 in Times New Roman 14-point font, a proportionally spaced typeface.

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Dated: April 5, 2021

## CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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