INTEREST OF AMICI CURIAE

Amici curiae are 85 current and former local, state, and federal prosecutors and law enforcement officials, former Department of Justice leaders, and former judges representing 35 different states and including elected and appointed officials from both political parties. Amici all are or have been responsible for public safety or involved in the criminal justice system in their jurisdictions. They have a strong interest in this case because detaining indigent defendants based solely on their inability to pay money bail, while others similarly situated but able to pay are released, offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors and law enforcement officials, and fails to promote safe communities.[1]

STATEMENT OF THE ISSUE

Whether Cullman County's bail procedures, by which those too poor to pay pre-determined money bail are detained before trial without individualized findings about their ability to pay or consideration of alternatives to ensure appearance and public safety, violates constitutional equal protection and due process requirements.

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

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

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

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

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

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

Unnecessary pretrial detention also has adverse consequences for public safety. Rather than keeping communities safer, pretrial detention—even for just 24 or 48 hours—can actually increase future criminal behavior and likelihood of arrest,

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

III. This Court Should Reject Arguments Made by the Bail Industry

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

Meanwhile, the U.S. Court of Appeals for the Third Circuit recently rejected a request for a preliminary injunction in a bail industry-backed lawsuit attacking New Jersey's reformed pretrial system that discourages money bail. The court found "no right" to money bail, *Holland v. Rosen*, 895 F.3d 272, 303 (3d Cir. 2018), and concluded that nonmonetary conditions of bail "allow[] the State to release low-risk

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

defendants, who may be unable to afford to post cash or pay a bondsman, while addressing riskier defendants' potential to flee, endanger the community or another person, or interfere with the judicial process," *id.* at 296.

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

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

The Third Circuit exhaustively examined the history of bail in *Holland* and concluded that at the time of the U.S. Constitution's ratification, "bail" did not contemplate monetary bail in the form of cash or corporate surety bonds. 895 F.3d at 290. Citing numerous historical and scholarly sources, the Third Circuit explained that "bail" at that time "relied on personal sureties—a criminal defendant was

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

The modest history of *money* bail cannot sustain a system that offends equal protection principles by detaining indigent defendants based solely on their inability to pay, while releasing those who can. The Supreme Court rejected a similar historical argument in *Williams v. Illinois*, where the defendant challenged a state law that resulted in him remaining incarcerated after the maximum statutory period of confinement because of his failure to pay fines and costs. 399 U.S. 235 (1970).

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

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

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

Here, not only is the "comfortable convenience of the status quo" constitutionally barred, but—just as importantly—it also is not a sensible way to

ensure appearance in court and to promote community safety in light of more effective alternatives that are consistent with a fair and impartial criminal justice system.

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

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

Money bail's defenders also have offered misleading evidence suggesting that the modern commercial surety system is statistically the most effective at ensuring court appearances. In doing so, they rely briefly on a handful of studies that largely do not purport to compare failure-to-appear rates of defendants released on commercial surety bonds with those released on nonfinancial conditions based on individualized risk assessments. *Hester* Brief, *supra,* at 13-14; *ODonnell* Brief, *supra*, at 14-17; *Walker* Brief, *supra*, at 12-16. Contrary to the bail industry's representations, the overwhelming weight of evidence demonstrates that secured

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

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

The bail industry also complains that release on nonfinancial conditions is financially costly and a drain on pretrial supervision systems. *Hester* Brief, *supra*, at 14-15; *see also ODonnell* Brief, *supra*, at 12; *Walker* Brief, *supra*, at 14-15. But

the financial cost of pretrial supervision pales in comparison to the cost of detention. *See supra* at 17-18.

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

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

> It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in *Griffin v. Illinois*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." Here, the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. . . . By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.

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

The bail industry also has denied that what *it* portrays as the bail schedule's equal treatment of charged defendants could possibly violate the Equal Protection

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

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

Amici recognize and share the interest of Cullman County and the general public in ensuring that defendants appear for trial and do not commit crimes while on pretrial release. But alternatives exist that are not only constitutional, but also

more effective, and promote a justice system that avoids perpetuating modern-day debtors' prisons and eroding community trust.

CONCLUSION

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

Respectfully submitted,

Dated: February 7, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i) because it contains 6,343 words, excluding the parts of the brief exempted by Rule 32(a)(7)(f).

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

/s/ Mary B. McCord
Mary B. McCord

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Mary B. McCord
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