No. 17-20333

In the United States Court of Appeals for the Fifth Circuit

MARANDA LYNN ODONNELL,
Plaintiff – Appellee,

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; JUDGE ANALIA WILKERSON; DAN SPJUT; JUDGE DIANE BULL; JUDGE ROBIN BROWN; DONALD SMYTH; JUDGE MIKE FIELDS; JEAN HUGHES,
Defendants – Appellants.

LOETHA SHANTA MCGRUDER; ROBERT RYAN FORD,
Plaintiffs – Appellees,

v.

HARRIS COUNTY, TEXAS; JILL WALLACE; ERIC STEWART HAGSTETTE; JOSEPH LICATA; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ,

Defendants – Appellants.

Appeal from the U.S. District Court, S.D. Texas
Nos. 4:16-cv-1414; 4:16-cv-1436

Brief for the American Civil Liberties Union Foundation, American Civil Liberties Union of Texas, Lawyers' Committee for Civil Rights Under Law, and the Southern Poverty Law Center as *Amici Curiae* in support of Appellees

[caption continued on next page]

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CERTIFICATE OF INTERESTED PERSONS

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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Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, I hereby certify that the enclosed brief is the work of undersigned counsel and not authored by counsel for either party. No party or party's counsel contributed money intended to fund the preparation of this brief, and no person contributed money to fund the preparation or submission of this brief.

/s/ Samuel Brooke
Samuel Brooke
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF AMICI CURIAE

The American Civil Liberties Union Foundation ("ACLU") is a nationwide nonpartisan organization of over 1.6 million members dedicated to protecting constitutional rights, including the rights of all persons who face a criminal charge. The ACLU files amicus curiae briefs in state and federal courts across the country, and seeks to educate the public and contribute to the developing jurisprudence about the important subject addressed in this case. Recently, the ACLU litigated against Scott County, Mississippi for, *inter alia*, denying criminal defendants the right to an individualized bail hearing. *Burks, et al. v. Scott County, Mississippi, et al*., Case No. 14-cv-0745 (S.D. Miss.). The ACLU is currently engaged in litigation challenging similar unconstitutional wealth-based bail practices with the Southern Poverty Law Center ("SPLC") and Civil Rights Corps ("CRC") against Randolph County, Alabama. *Edwards v.Cofield, et al.*, Case No. 17-cv-0321 (M.D. Ala.). The ACLU, SPLC, and CRC have moved to intervene in litigation on the same grounds in Cullman County, Alabama. *Hester v. Gentry, et al.*, Case No. 17-cv-0270 (N.D. Ala.).

The American Civil Liberties Union of Texas ("ACLU of Texas") is a state affiliate of the national ACLU. The ACLU of Texas is committed to helping Texas re-envision a criminal justice system that is fair and free of racial bias, keeps our communities safe, and respects the rights of all who come into contact with it. Its

commitment to fair justice is evidenced by litigation challenging the criminalization of poverty, such as with recent cases in Texas federal courts targeting modern-day debtors' prisons in Santa Fe, Texas, and unconstitutional homelessness ordinances in Houston, Texas.

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 by leaders of the American bar, at the request of President John F. Kennedy, in order to mobilize the private bar in vindicating the civil rights of African-Americans and other racial minorities. The Lawyers' Committee is dedicated, among other goals, to preventing the criminalization of poverty, ending mass incarceration, and securing criminal justice reform through impact litigation and other means. To that end, the Lawyers' Committee is currently litigating a challenge to the State of Louisiana's failure to provide indigent defendants with effective assistance of counsel in criminal cases. *Allen, et al. v. Edwards, et al.*, Case No. 655079 (La. 19th Jud. Dis. Ct). The Lawyers' Committee is also litigating an action challenging a scheme in Pulaski County, Arkansas that results in the incarceration of indigent defendants because they are unable to pay outstanding criminal justice debt. *Dade v. Sherwood*, Case No. 4:16-cv-0602-JM (E.D. Ark). Additionally, the Lawyers' Committee is challenging a scheme operating in the Orleans Parish District Court that results in

the incarceration of indigent defendants who are unable to pay court fines, fees and assessments. *Cain v. City of New Orleans*, Case No. 2:15-cv-4479 (E.D. La.).

The Southern Poverty Law Center ("SPLC") is a non-profit organization dedicated to seeking justice on behalf of the most vulnerable members of society. Over the last several years, SPLC has commenced litigation to end municipalities' overreliance on fines, fees, and money bail to generate revenue, which has led to the unconstitutional treatment of indigent defendants. Additionally, SPLC has worked with cities across the State of Alabama to reform policies related to fine and fee collection, the use of for-profit probation, and money bail. Over 75 municipalities have since ended their use of money bail for most offenses. SPLC is counsel in the *Edwards* and *Hester* cases pending in Alabama discussed above.

This case presents another example of an increasingly disturbing problem: the rich and the poor do not receive equal justice in our courts, particularly concerning the matter of secured money bail. Under Defendant-Appellant Harris County's bail schedule, a defendant of means could pay for her immediate release while a poorer defendant is required to languish in jail.

Amici submit this brief to support the district court's decision that the County was responsible for this practice and to emphasize (1) that *Younger* abstention does not preclude jurisdiction in this case, (2) that Plaintiffs' Fourteenth

Amendment claims are properly brought, and (3) that wealth-based detention is not only illogical, but unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

ARGUMENT

I. The District Court Correctly Concluded that *Younger* Abstention Did Not Preclude Federal Court Jurisdiction.

Judicial Defendants argue that the district court should have abstained under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). But *Younger* is entirely inapplicable because Plaintiffs have no adequate opportunity to raise their claims in their pending proceedings, and relief in this case would not interfere with those proceedings. *See ODonnell v. Harris Cty.*, 227 F. Supp. 3d 706, 734 (S.D. Tex. 2016).

A. Plaintiffs Do Not Have an Adequate Opportunity to Raise Their Fourteenth Amendment Claim in the State Proceedings.

This Court's *en banc* decision in *Pugh v. Rainwater*, 483 F.2d 778 (5th Cir. 1973), disposes of Defendants' abstention arguments. *Pugh* held that *Younger* abstention does not bar federal court adjudication of "procedural rights" if the plaintiff "seeks to challenge an aspect of the criminal justice system which adversely affects him but which *cannot* be vindicated in the state court trial." *Id.* at 782 (emphasis original). The Fifth Circuit has never "declined to adjudicate federal questions," the panel explained, "merely because resolution of these questions would affect state procedures for handling criminal cases." *Id.* at 781. Instead, "[w]here . . . the relief sought is not 'against any pending or future court

proceedings as such,' *Younger* is inapplicable." *Id.* at 781–82 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 71 n.3 (1971)). This Court distinguished between a state court defendant challenging the merits of his criminal prosecution in federal court—by, for example, attempting to suppress the evidence presented in state court based on an unconstitutional search and seizure—and a federal court challenge to "an aspect of the criminal justice system which adversely affects" him but which is unrelated to the merits of the prosecution itself. *Id.* at 782.

The Supreme Court endorsed the *Rainwater* holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975), when it unequivocally concluded that the "District Court correctly held" that a federal court could impose an injunction against a state court if the injunction is "not directed at the state prosecutions" and instead enjoins a practice "that could not be raised in defense of the criminal prosecution" such as "the legality of pretrial detention without a judicial hearing." 420 U.S. at 108 n.9.

Courts have since relied on *Gerstein* to hold that *Younger* is inapplicable to injunctions that do not imperil the merits of a criminal prosecution or the admission of evidence at trial. In *Fernandez v. Trias Monge*, 586 F.2d 848 (1st Cir. 1978), for instance, the First Circuit relied on *Gerstein* to hold that *Younger* abstention did not bar a federal court injunction requiring an adversary probable cause hearing before a juvenile is placed in pretrial detention. 586 F.2d at 851–52. The court distinguished the plaintiff's challenge to his pretrial detention without a

hearing—which could not be raised as a defense to the prosecution—from the "paradigm situation calling for *Younger* restraint," namely a challenge to the statute in which the defendant is simultaneously being prosecuted or the procedures for the admission of evidence at trial. *Id.* at 851.

The district court here found that that "at least half" of misdemeanor arrestees were detained for more than 48 hours without a bail hearing because they could not afford to pay a predetermined amount of money bail, and thousands more were held even longer. *ODonnell v. Harris Cty.*, No. CV H-16-1414, 2017 WL 1735456, at *46 (S.D. Tex. Apr. 28, 2017). The district court correctly held that *Younger* abstention was inapplicable because Plaintiffs could not litigate their claim that these practices violated the Fourteenth Amendment in their state court trials and that, even if they could, injunctive relief would not imperil their underlying criminal prosecutions. *ODonnell*, 227 F. Supp. 3d at 734–37; *see also ODonnell*, 2017 WL 1735456, at *81 n.119. To paraphrase *Pugh*, "[i]f these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration." *Pugh*, 483 F.2d at 782.[1]

[1] Over the last two years, federal district courts across the country have also found that *Younger* abstention is unwarranted in nearly identical cases because plaintiffs were not challenging the merits of their prosecution and could not raise their constitutional claims as a

Defendants attempt to answer this question by asserting that Plaintiffs should have filed a petition for a writ of habeas corpus in Texas state court. But habeas proceedings are separate civil actions that an arrestee must initiate, and this Court has never applied *Younger* "to force a federal court to relinquish jurisdiction over a federal claim which could not be adjudicated in a *single* pending or future state proceeding . . ." *Pugh*, 483 F.2d at 782. Indeed, the Court in *Gerstein* affirmed a district court injunction even though the petitioner could have filed a habeas petition in the Florida state court. *See* Fla. Stat. Ann. § 79.01 (authorizing a writ of habeas corpus to any applicant who can demonstrate "probable cause to believe that he or she is detained without lawful authority.").[2]

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defense at trial or on appeal. *See, e.g.*, *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *3 (N.D. Ga. June 16, 2017) (abstention inappropriate because plaintiffs "would not have an adequate opportunity to raise their constitutional challenges" in the criminal proceedings); *Welchen v. Cty. of Sacramento*, No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563, at *8 (E.D. Cal. Oct. 11, 2016) (abstention inappropriate because Plaintiff's claims are "not a defense to the crimes which Plaintiff is charged with," and do not "have any connection to those criminal charges").

[2] Regardless, Plaintiffs are not seeking release from custody, but additional procedural protections before being detained on a money bail amount that they cannot afford. The writ of habeas corpus is designed for the purpose of giving a speedy remedy to one who is unlawfully detained, *Ex parte Ramzy*, 424 S.W.2d 220, 223 (Tex. 1968), and traditionally "has been accepted as the specific instrument to obtain release from [unlawful] confinement." *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). Although a writ of habeas corpus is the "sole federal remedy," available to a person seeking release or a reduction in the length of confinement, *Preiser*, 411 U.S. at 486, "§ 1983 remains available for *procedural challenges* where," as here, "success in the action would not necessarily spell immediate or speedier release for the prisoner." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005).

A contrary holding would undermine the longstanding rule that civil rights lawsuits under 42 U.S.C. § 1983 do not require litigants to exhaust their state court remedies. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961). *Younger* should not be extended to graft an exhaustion requirement onto § 1983 actions, and must be limited to the remedies available in the pending state proceedings. *Fernandez*, 586 F.2d at 852.

B. The Supreme Court's *Younger* Analysis in *O'Shea* Does Not Require Abstention in This Case.

Defendants argue that *O'Shea v. Littleton*, 414 U.S. 488 (1974), bars *all* federal court challenges to state court pretrial practices because *any* federal court relief would impermissibly interfere with state criminal prosecutions. Defendants read *O'Shea* too broadly, as their position would foreclose the relief that the Court provided in *Gerstein*—a case decided one year after *O'Shea*.[3]

In *O'Shea*, the Court held that *Younger* abstention was warranted because plaintiffs sought oversight over nearly every aspect of the local criminal justice system, including law enforcement, bail, trial, and sentencing practices. Plaintiffs alleged that law enforcement and judicial officers in Cairo, Illinois made enforcement decisions based on racial animus and to discourage black residents

[3] The Court's *Younger* analysis in *O'Shea* is arguably *obiter dictum* and thus not binding—as the Court decided the case on standing grounds. *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385–86 (5th Cir. 1998) ("That which is 'obiter dictum' is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision.") (internal quotations omitted).

from agitating for economic and political change. The Court correctly reasoned that federal court intervention against officials would be "unworkable" because it would require an "ongoing federal audit" of the entire criminal justice system, including by requiring state court judges to defend "their motivations" in adjudicating individual cases. *O'Shea*, 414 U.S. at 493 n.1 & 500, 510.

In *Gerstein*, however, the district court's injunction *did not* require ongoing review of state court judges' factual or legal decisions. Instead, the injunction simply added an additional procedural safeguard to protect criminal defendants' constitutional rights. The Court therefore reinforced this Court's analysis in *Pugh* that *Younger* abstention is not required even if the injunction would "affect state procedures for handling criminal cases," *see Pugh*, 483 F.2d at 779, so long as the injunctive relief would not "prejudice" the state court's "trial on the merits." *Gerstein*, 420 U.S. at 108 n.9.

This Court's decision in *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981), does not support abstention, either. The decision instead reflects that *Gerstein* and *O'Shea* can be reconciled. In *Tarter*, the plaintiff sought in federal court to enjoin state court judges from, *inter alia*, imposing excessive bail and from refusing to docket and hear *pro se* motions. 646 F.2d at 1011. This Court held that *Younger* abstention did not prevent a federal court from requiring all *pro se* motions to be docketed and heard because such an injunction would not require "case-by-case

evaluations of discretionary decisions" and would instead "add a simple, nondiscretionary procedural safeguard to the criminal justice system." *Id.* at 1013. An injunction against "excessive bail," however, would violate principles of comity because it would require "a federal court to reevaluate de novo each challenged bail decision." *Id.*

Here, Plaintiffs do not seek an injunction requiring a federal court to review individual money bail decisions, and they have not raised an Eighth Amendment claim based on excessive bail. Instead, Plaintiffs challenge the legality of their detention without an individualized inquiry into their ability to pay. As in *Tarter*, *Younger* abstention is unnecessary because an injunction would not endanger individual bail decisions, but would instead "add a simple, nondiscretionary" requirement that courts assess an arrestee's ability to pay before imposing secured money bail. *Id.*

Nor would the relief that Plaintiffs request interfere with any state court criminal prosecution or interpose the federal court's judgment for the state court's evaluation of the merits of the criminal trial. *See Conover v. Montemuro*, 477 F.2d 1073, 1082 (3d Cir. 1972) (challenge to intake proceedings did not warrant *Younger* abstention when relief requested would not substitute federal for state court fact-finding or hinder the state court's adjudicatory process).

Accordingly, this Court should affirm the district court's conclusion that *Younger* abstention did not preclude federal court jurisdiction over Plaintiffs' Fourteenth Amendment claim.

II. Defendants' Bail Policy Infringes Upon the Constitutional Rights of Minorities and the Poor.

The record establishes that Harris County's pretrial practices have sacrificed the principle of equality before the law in favor of efficiency, with devastating harms to minority communities and the poor.

A. Defendants' Pretrial Policies Frustrate the Presumption of Innocence.

The American criminal justice system operates from the central presumption that individuals are innocent until proven guilty beyond a reasonable doubt. *See Coffin v. United States*, 156 U.S. 432, 453 (1895); *see also Estelle v. Williams*, 425 U.S. 501, 503 (1976). This presumption of innocence "represents a commitment to the proposition that a man who stands accused of a crime is no less entitled than his accuser to freedom and respect as an innocent member of the community." Laurence H. Tribe, *An Ounce of Prevention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 404 (1970) (summarizing argument of Attorney General John N. Mitchell). Accordingly, the presumption of innocence is bound up with an individual's fundamental right to liberty. *See generally*, *United States v.*

Salerno, 481 U.S. 739, 750 (1987) (an individual's "strong interest in liberty" is a fundamental right).

The right to an individualized bail determination is central to the presumption of innocence. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.") Defendants' widespread practice of detaining individuals on generic predetermined bail amounts undermines the presumption of innocence and several critical pretrial rights. "Bail protects the interests of society in assuring a defendant's appearance at trial and it also protects the interest of the individual in allowing him to be free to establish his innocence." Attorney General Robert F. Kennedy, Address before ABA House of Delegates (August 6, 1962). By extension, while not a subject of this litigation, Harris County's pretrial practices threaten the Sixth Amendment's guarantee to a fair trial by restricting the ability of detained defendants to review documents and evidence, making them less able to help locate and contact potential witnesses, and otherwise disadvantaging their ability to avail themselves of the effective assistance of counsel by conferring with their lawyers and assisting in their own defense. *See* Klara Calhouse and John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 846–47 (2012). Unsurprisingly, misdemeanor

defendants regularly abandon valid defenses and plead guilty a median of 3.2 days after arrest. *See, e.g.* ROA. 5636–39.

B. Defendants' Pretrial Policies Particularly Harm Minorities and the Poor.

In Harris County, the Judicial Defendants' preventive detention policy does not protect the right to freedom of poor and minority misdemeanor defendants, but rather forces them to make the obscene choice between pleading guilty and being released with "time served" or fighting their charges and remaining in custody for weeks. As discussed above, these wealth-based practices also specifically harm persons with limited financial means. For example, as discussed in Plaintiffs' brief, the Judicial Defendants routinely refuse to order unsecured bail or personal recognizance release to the homeless. ROA. 4714–16. Minorities also suffer particular harms within such a wealth-based scheme because they are less likely to post bail. *See* Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 899 n. 89 (2003) (African-Americans and Latinos are more likely than whites to be detained on bail they cannot afford.). Race also strongly impacts whether a person will be released on his own personal recognizance, with African-Americans five times more likely to be detained than their white counterparts, and three times more likely to be detained than their

Latino counterparts. *See, e.g., Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUSTICE POLICY INST. 15 (2012).

C. Secured Money Bail Does Not Assure the Presence of Defendants at Trial, Nor Does It Promote Public Safety.

Harris County's system of wealth-based preventive detention, with its significant intrusion on the Constitutional rights of arrestees, particularly minorities and the poor, is especially indefensible because the system's dependence on secured money bail does not assure appearance at trial or promote public safety for those who can afford to purchase their release.

The Judicial Defendants argue that the district court's injunction "threatens public safety and the orderly administration of justice because failure-to-appear rates will increase." Br. at 51. This contention is not supported by any empirical evidence. *See, e.g., Bail Fail*, *supra*, at 21. Jurisdictions that have severely deprioritized money bail and maintained high court appearance rates illustrate that the argument is shortsighted. *See, e.g.*, Pretrial Services Agency for the District of Columbia, Research and Data: FY 2015 Performance Measures, https://www.psa.gov/sites/default/files/CSOSA%20FY2015%20AFR%20Final%2011-15-2015.pdf. Moreover, while no empirical evidence supports that money bail positively affects failure-to-appear rates, multiple studies demonstrate that simple court notification systems—not money bail—significantly increase appearance rates. *See Bail Fail*, *supra* at 33–35.

Nor does the use of secured money bail serve public safety goals. "[N]o study has ever shown that money [bail] can protect the public." Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NAT. INST. OF CORRECTIONS, 13 (Aug. 2014). For poor and minority defendants in particular, it merely serves to detain otherwise bailable individuals "by delaying or preventing pretrial release." *Id.* at 12. Such a policy cannot be presumed to promote public safety.

In fact, Harris County's policy so significantly burdens poor and minority defendants, in terms of accrued debt, lost wages, damage to reputation and other losses, that it likely decreases public safety by making these individuals more likely to commit crimes. *Id.* at 16 ("[E]ven small amounts of pretrial detention—perhaps even [a] few days . . . —have negative effects on defendants and actually makes them more at risk for pretrial misbehavior."). Controlling for all other factors, defendants detained pretrial are four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than those who are not detained. *Id.* There is also indication that even short-term pretrial detention is correlated with a higher long-term likelihood of recidivism. *Id.* at 17. In this way, public safety is undermined when the fundamental fairness of the justice system is called into question "due to its complacency with a wealth-based system of pretrial freedom." *Id.* at 15.

Harris County's policy of preventive detention needlessly infringes upon significant Constitutional rights of minorities and the poor without assuring defendants' appearance at trial or promoting public safety. Accordingly, this Court should affirm the preliminary injunction order below.

III. The Fourteenth Amendment and Eighth Amendment Provide Different, Fundamental Protections in the Pretrial Context.

A. *Graham v. Connor* does not foreclose Plaintiffs' Fourteenth Amendment claims.

The Judicial Defendants refer to this matter as "an Eighth Amendment case wearing a Fourteenth Amendment costume," and rely on discussion in *Graham v. Connor* for the proposition that courts must first "identif[y] the specific constitutional right allegedly infringed," and then judge "the validity of the claim … by reference to the specific constitutional standard that governs th[e] right." Br. 27; *Graham v. Connor* 490 U.S. 386, 394 (1989). Judicial Defendants' reliance on *Graham* and its progeny is misplaced. *Graham* does not foreclose to Plaintiffs the opportunity to defend against infringements of their "fundamental" right to pretrial liberty, a right long protected by the Fourteenth Amendment. *See Salerno*, 481 U.S. at 750–51; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

The U.S. Supreme Court has made clear that *Graham v. Connor* does not preclude Plaintiffs from raising substantive due process arguments, but rather reflects a "reluctan[ce] to expand the concept of substantive due process." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (citing *Collins v. Harker Heights, Tex.*, 503 U.S. 115, 125 (1992)). *Graham* "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments." *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997). Rather, as recognized by this Court, the "more specific provision" rule announced in *Graham* is implicated where the Fourth Amendment squarely "covers" a plaintiff's constitutional claims, particularly but not always in the context of excessive use of force. *Hernandez v. United States*, 757 F.3d 249, 278 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated and remanded sub nom. Hernandez v. Mesa*, 137 S. Ct. 2003 (2017).

Plaintiffs here do not allege that they were unreasonably searched or seized, a claim that would be covered by the Fourth Amendment, or that bail is excessive in any individual case, a claim that would be covered by the Eighth Amendment. Instead, Plaintiffs allege that Defendants operate a wealth-based detention system in which immediate access to money determines who is released and who is detained pretrial. This Circuit has long analyzed systems in which, as here, "[t]hose

with means avoid imprisonment [while] the indigent cannot escape imprisonment," under the Fourteenth Amendment. *Frazier v. Jordan*, 457 F.2d 726, 728–29 (5th Cir. 1972); *Pugh*, 572 F.2d 1053, 1056–57 (5th Cir. 1978) (en banc) ("The incarceration of those who cannot [pay money bail required by a master bond schedule], without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements."); *Barnett v. Hopper*, 548 F.2d 550, 554 (5th Cir. 1977), *vacated as moot*, 439 U.S. 1041 (1977) ("To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes an equal protection of the laws."); *see also Bearden v. Georgia*, 461 U.S. 660, 665 (1983) ("Due Process and equal protection principles converge" in challenges to wealth-based detention). Accordingly, Plaintiffs' claims arising out of their pretrial incarceration are not "covered" by the Fourth Amendment, and thus are not governed by *Graham.*

The Judicial Defendants further claim that *Gerstein v. Pugh* forecloses procedural due process claims by pretrial arrestees. Br. 30. However, the Supreme Court has flatly rejected the proposition that pretrial seizures may only be analyzed under the Fourth Amendment. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 51 (1993). In support of their claim, the judges cite *Reynolds v. New*

Orleans City, an unpublished opinion from this Court[4] that found plaintiffs' procedural claims properly brought under the Fourth Amendment rather than general due process principles. 272 F. App'x 331, 338 (5th Cir. 2008). *Reynolds* is easily distinguishable from the present case: there, the plaintiff was never arrested, incarcerated, or required to pay money bail, but challenged the order of evacuation that forced him to leave his home after Hurricane Katrina. *Id.*

In an effort to circumvent the natural reading of *Graham* and this Court's precedent, the Judicial Defendants argue that the injunction entered by the district court established a "*substantive* right to release," rather than simply requiring additional procedural protections before a defendant may be detained pretrial. Br. 30 (emphasis in original). This echoes a misstatement throughout their brief: Plaintiffs do not claim—and the district court did not grant—an injunction to protect a "right to release" or a "right to affordable bail." Br. 22–25, 30. Instead, Plaintiffs contend that heightened scrutiny must be satisfied before a defendant's liberty may be deprived, a right that has long sounded in the Fourteenth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."). A requirement that Harris County only impose pretrial incarceration where "no less

[4] *See* Fifth Circuit Rule 47.5.4: "Unpublished opinions issued on or after January 1, 1996 are not precedent."

restrictive alternative could assure the arrestee's appearance," does not guarantee any arrestee's release. Likewise, an injunction against wealth-based discrimination is agnostic as to whether compliance occurs through release or pretrial detention.

For these reasons, this Court should affirm the district court in finding Plaintiff's Fourteenth Amendment claims properly brought, and not foreclosed by *Graham*.

IV. Unaffordable Money Bail is Illogical and Unconstitutional.

The constitutional violations in this case resulted from Defendants' attempts to avoid individualized hearings and to allow access to money to dictate release. Defendants' insistence that Plaintiffs' claims can only be examined under the Eighth Amendment is an attempt to invoke this Court's decision in *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988), which held that an unaffordable bail amount is not necessarily excessive. The district court properly concluded that this is not an Eighth Amendment case. *ODonnell*, 2017 WL 1735456, at *73–74. However, even if this Court applied the Eighth Amendment, Plaintiffs would still be entitled to relief. As the district court concluded, Defendants could set bail beyond an individual's financial means if they satisfied the heightened requirements of a detention order, which would obligate judges to enter written findings that the bail amount was necessary after considering less restrictive

alternatives. *Id.*; *see also McConnell*, 842 F.2d at 108–09 (explaining requirements for *de facto* detention orders under federal Bail Reform Act).

There is a second reason. Undergirding *McConnell*'s conclusion that the Eighth Amendment permits unaffordable bail is the assumption that a judge can properly determine that unaffordable bail is reasonable to secure a defendant's presence at trial. *See McConnell*, 842 F.2d at 109–10. However, no court has fully examined this assumption, and the Supreme Court has not addressed the question. As explained below, the Eighth Amendment requires an individualized bail determination, but a court cannot logically tailor an unaffordable money bail amount to the individual. If the Court reaches this issue, it should overrule this aspect of *McConnell* and hold that an unaffordable bail amount violates the Eighth Amendment's guarantee against excessive bail.

A. Pretrial Release Decisions Must be Individualized.

As an initial matter, it is immaterial whether unaffordable bail is examined under the Fourteenth or Eighth Amendments. Though these provisions provide unique protections of the right to pretrial liberty, both secure the right to an individualized release determination. *Stack v. Boyle* established the basic principle that bail is excessive when set beyond what is necessary to achieve the state's pretrial interests. 342 U.S. 1, 5 (1951). While based on the Eighth Amendment, *Stack* necessarily protects the right to an individualized bail determination, much

like the *Bearden* line of cases forbidding wealth-based detention. *See* Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 693 (1985). Under either the Fourteenth or Eighth Amendments, a court cannot competently determine what is necessary to prevent flight and protect public safety without assessing an individual's likelihood of pretrial success if released.

B. Unaffordable Bail Is Objectively Unreasonable.

Any system of individualized assessment, whether performed by a judge or machine, must receive feedback to ensure reliable forecasting. This task in the pretrial context requires data on how well the judge's or the machine's assessments square with the actual successes and failures of released arrestees. One may then evaluate if the process is reliably distinguishing the "risky" from the "not risky." *See generally* Marie VanNostrand and Gena Keebler, *Pretrial Risk Assessment in Federal Court*, 73 FED. PROBATION 3 (Sept. 2009).

Under this framework, it is readily apparent that the practice of setting unaffordable bail has, and can have, no factual basis. Unaffordable bail is inherently counterfactual. It requires a court to speculate on the regulatory effect of a particular bail amount *if* the defendant could afford it. Arrestees who cannot afford bail go to jail for the duration of their case; thus, a judge never knows if the arrestee could have been safely released with an affordable bail. Judges consequently cannot develop credible expertise on setting unaffordable bail since it

is impossible to ascertain whether unaffordable bail was truly required in any given case. Timothy P. Cadigan and James L. Johnson, *The Re-validation of the Federal Pretrial Services Risk Assessment*, 76 FED. PROBATION at 3 (Sept. 2012). Such decisions are therefore not properly left to a judge's discretion, at least not if that discretion is meant to be sound. As the district court correctly noted, unaffordable bail only works in the sense that the detained reliably attend their court dates. *ODonnell*, 2017 WL 1735456, at *43. Put differently, unaffordable bail is unfalsifiable, and thus cannot be objective.

C. Unaffordable Bail Can Never Be Truly Tailored to the Individual.

Because unaffordable bail can never be objectively evaluated, it also can never be an appropriate release condition. In fact, if for some reason the defendant could later afford the bail amount, this would warrant a court determining whether this changed circumstance demands re-evaluating the bail. Consider this Court's decision in *McConnell*, a case about unaffordable bail that does not involve indigency. McConnell and several codefendants were charged in a bank fraud scheme involving over $4 million. 842 F.2d at 106. The court initially denied bail on the grounds that McConnell was a flight risk, and then later set a $750,000 surety bond with several release conditions. *Id.* Because the government froze his assets, McConnell requested a $250,000 bail, which the judge denied. *Id.* at 106–07. A panel of this Court found that the magistrate's refusal to reduce bail

complied with both the Eighth Amendment and the Bail Reform Act of 1984 because the magistrate adequately explained why unattainable bail was a necessary condition of release. *Id.* at 109–10.

McConnell of course dooms the Harris County bail system, where judges routinely detain arrestees on unaffordable bail without a thought to whether lower bail or non-financial conditions of release might suffice.[5] However, the panel's conclusion that unaffordable bond is not necessarily excessive—a conclusion incanted by the Defendant judges—is flawed. *See id.* at 107. The defect lies in the fact that it is difficult to discern the grounds on which the magistrate could reasonably conclude that $750,000, and not a penny less, was required for McConnell.

Imagine if the court learned a week later that McConnell now could afford the $750,000 surety bond. Given that McConnell was alleged to have defrauded banks for millions of dollars, it seems reasonable—indeed, likely—that either the government or the court would want to know the origins of this newfound wealth. *Cf. United States v. Madoff*, 586 F.Supp.2d 240, 254 n.15 (S.D.N.Y. 2009) (noting Second Circuit rule allowing trial court to "hold a hearing to ensure that whatever assets are offered to support a bail package are derived from legitimate sources") (quotations omitted). Thus, McConnell's ability to afford the previously

[5] *McConnell* examines the statutory and constitutional requirements of McConnell's bail coextensively.

prohibitive bail would invariably require reexamining his individual circumstances to decide whether that bail amount was still appropriate. But only then, *once McConnell could afford the bond*, would the court truly be making an individualized determination.

As this hypothetical demonstrates, individuals detained on what a court originally believed was unaffordable bail can unilaterally convert a *de facto* detention order into a temporary one, forcing the question of whether release remains consistent with the state's pretrial interests. In these situations, it is more accurate—and more honest, *State v. Brown*, 338 P.3d 1276, 1292 (N.M. 2014)—to say that the defendant cannot provide the level of security required to authorize release. Yet that is the language of an actual detention order, not a *de facto* detention order based on unaffordable money bail. Unaffordable bail therefore has no comfortable place in our constitutional system. Release conditions must be attainable, or they cannot truly be individualized.[6]

[6] In this sense, money bail is much different from a penal fine. A fine is punishment, and must be based on penological goals such as a defendant's culpability. While finances might permissibly be considered in setting the fine, under *Bearden*, the state need only consider ability to pay when it collects the fine, and this to determine if jail is a necessary alternative for those truly unable to pay. Consequently, an individual's means will rarely factor in deciding the propriety of a fine under the Eighth Amendment. This is not so with bail, where the propriety of the amount—under either the Eighth or Fourteenth Amendments—is inextricably bound up with the individual's capacity to satisfy it.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the textual portion of the foregoing brief (exclusive of the cover page, disclosure statement, tables of contents and authorities, certificates of counsel, but including footnotes) contains 5,965 words as determined by the word counting feature of Microsoft Word 2010. This brief thus complies with the type-volume limitation contained in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B). I further certify that this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font, in compliance with Fed. R. App. P. 32(a)(5)–(6).

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

/s/ Samuel Brooke
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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2017, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Through the Court's CM/ECF system, this brief has been served on counsel for all parties.

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