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, III; RONALD NICHOLAS; BLANCA ESTELA VILLAGOMEZ,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division

BRIEF FOR THE STATES OF TEXAS, ARIZONA, HAWAI'I, KANSAS, LOUISIANA, AND NEBRASKA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

[caption continued on next page]

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

SCOTT A. KELLER
Solicitor General
scott.keller@oag.texas.gov

JOSEPH D. HUGHES
Assistant Solicitor General
jody.hughes@oag.texas.gov

Counsel for Amici Curiae

SUPPLEMENTAL 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.

Amici Curiae	Counsel for Amicus Curiae
• The State of Texas • The State of Arizona • The State of Hawai‘i • The State of Kansas • The State of Louisiana • The State of Nebraska	• Ken Paxton, Texas Attorney General • Jeffrey C. Mateer, First Assistant Attorney • Scott A. Keller, Solicitor General (lead counsel) • Joseph D. Hughes, Assistant Solicitor General • Mark Brnovich, Arizona Attorney General • Douglas S. Chin, Hawai‘i Attorney General • Derek Schmidt, Kansas Attorney General • Jeff Landry, Louisiana Attorney General • Douglas J. Peterson, Nebraska Attorney General

/s/ Scott A. Keller
SCOTT A. KELLER
Counsel of Record for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions and Statutes

Other Authorities

Statement Regarding Amici Curiae

Amici curiae are the States of Texas, Arizona, Kansas, Hawai'i, Louisiana, and Nebraska. States, and their localities, have a substantial interest in "exercising [their] historic powers over such traditionally local matters as public safety and order." *Allen-Bradley Local No. 1111, United Elec., Radio and Machine Workers of Am. v. Wisc. Emp't Relations Bd.*, 315 U.S. 740, 749 (1942). The district court's injunction erroneously interferes with those historic powers by creating a novel constitutional right to avoid bail based on indigency, and its ruling has already resulted in the release of misdemeanor defendants. States have a significant public-safety interest in ensuring that defendants comply with duly ordered bail requirements.

Pursuant to Federal Rule of Appellate Procedure 29(a), the amici States are not required to obtain the consent of the parties or leave of court before filing this brief. Counsel for the amici States authored this brief in whole. No party or any party's counsel authored any part of this brief, and no person or entity, other than the States, made a monetary contribution for the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

The district court's order recognized a novel constitutional right: a categorical, substantive right for misdemeanor defendants to avoid bail if they cannot afford to pay. This holding contravenes this Court's longstanding recognition that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988). The district court evaded this Eighth Amendment doctrine by relying on equal protection cases that do not apply to the bail context. And the court's reliance on procedural due process cases could at most justify additional *process*—not a substantive, categorical requirement that monetary bail cannot be imposed on indigent misdemeanor defendants. The district court's sweeping conclusions therefore would invalidate multiple State laws. And the injunction threatens public safety in various ways. The district court's broad injunction should therefore be reversed.

ARGUMENT

I. The District Court's Recognition of a Novel Constitutional Right for Indigent Misdemeanor Defendants to Avoid Bail Erroneously Invalidates Multiple State Laws.

A. The district court held that the Due Process and Equal Protection Clauses prohibit government from setting "bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release." ROA.5743. No provision of the Constitution creates any such substantive, categorical right to avoid bail based simply on an inability to pay.

1. Decades ago, this Court held that "a bail setting is not constitutionally excessive merely because a defendant is financially unable to satisfy the requirement." *McConnell*, 842 F.2d at 107. Other circuits have recognized this as well. *See, e.g.*, *United States v. Cordero*, 166 F.3d 334, at *2 (4th Cir. 1998) (per curiam) (unpublished) (citing *United States v. Wright*, 483 F.2d 1068, 1070 (4th Cir. 1973)); *United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968); *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966); *see also United States v. Wong-Alvarez*, 779 F.2d 583, 584 (11th Cir. 1985) (per curiam) (rejecting argument that "if a pretrial detainee cannot make the financial provisions of a bond he is then held in detention in violation of the [federal bail] statute").

The district court, nevertheless, ignored this directly applicable Eighth Amendment precedent in divining a *substantive* requirement categorically prohibiting bail for indigent misdemeanor defendants who cannot afford to pay. *See, e.g.*, ROA.5743

("The credible and reliable record evidence shows that, in misdemeanor cases, secured money bail is not the only reasonable alternative to assure appearance and law-abiding conduct before trial."); *id.* (County "cannot, consistent with the federal Constitution, set that bail on a secured basis requiring up-front payment from indigent misdemeanor defendants otherwise eligible for release").

2. The district court tried to evade this Court's straight-forward application of Eighth Amendment doctrine, ROA.5708-10, by couching its analysis in terms of equal protection, ROA.5695-97, and procedural due process, ROA.5697-98. But neither equal-protection nor procedural-due-process principles can support the district court's categorical holding here.

a. The trio of equal-protection Supreme Court cases on which the district court relied are all distinguishable for two primary reasons. First, those three cases involved laws regarding post-conviction sentences—rather than bail where detainer is necessarily contemplated if payment cannot be made. And second, these three cases were essentially disparate *treatment* cases, as they all involved government decisions that imposed *different* rules for indigent versus non-indigent defendants. These three cases all addressed post-conviction sentences, setting forth the rule that government "cannot 'impos[e] a fine *as a sentence* and then *automatically conver[t]* it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."' *Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (emphases added) (quoting *Tate v. Short*, 401 U.S. 395, 398 (1971)); *see Williams v. Illinois*, 399 U.S. 235, 241-42 (1970). The Court held that once a State determined that a particular sentence (such as a monetary fine rather than imprisonment, *Bearden*, 461 U.S. at 667; *Tate*, 401

U.S. at 398, or a sentence with a specific statutory maximum, *Williams*, 399 U.S. at 241-42) was "the appropriate and adequate penalty for the crime" that satisfied its penological purposes, the State could not engage in disparate treatment by increasing that penalty solely because a defendant was indigent, *Bearden*, 461 U.S. at 667.

Bail, in contrast, operates in a crucially different manner that does not involve any disparate treatment. When a government sets a bail amount, it is expressly contemplating that a defendant *will be detained* pending trial if the bail amount is not paid. *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951). Government, in the bail setting, is not engaging in disparate *treatment* of the indigent—that is, purposefully subjecting indigent individuals to different rules that only apply to the indigent. Indeed, this Court expressly rejected the argument that the Equal Protection Clause required the indigent to be treated differently (there, by mandating a "presumption against money bail" for indigent individuals). *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (en banc). And while governments' setting of bail could have a disparate *impact* on the indigent, the Equal Protection Clause does not prohibit laws merely because of a disparate impact on protected classes. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 239 (1976).

Rational-basis review therefore applies to this equal-protection challenge, and the district court erred by applying heightened scrutiny. *See, e.g.*, *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). As this Court has recognized, rational-basis review is used when the same rules apply to both indigent and non-indigent defendants, even if the rule's application may have a disparate impact on indigent defendants; in that scenario, "unconstitutional wealth discrimination simply is not involved." *Smith v.*

U.S. Parole Comm'n, 752 F.2d 1056, 1059 (5th Cir. 1985) (citing *Doyle v. Elsea*, 658 F.2d 512, 517-19 (7th Cir. 1981) (per curiam)).

b. Procedural due process cases, moreover, cannot possibly support the district court's substantive, categorical injunction establishing a constitutional right for indigent misdemeanor defendants to avoid bail. At most, a procedural due process claim could only result in additional *process*—such as additional notice, hearings, or written decisions.[1] *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970). But even if an indigent misdemeanor defendant were given a timely, thorough hearing with written findings supporting the bail determination, the district court's injunction would still prohibit that bail setting. After all, the district court concluded that, "in misdemeanor cases, secured money bail is not the only reasonable alternative to assure appearance and law-abiding conduct before trial." ROA.5743.

This conclusion by the district court is not a procedural-due-process holding. Instead, it is an Eighth Amendment holding of excessive bail that even uses the language of the Supreme Court's Eighth Amendment doctrine: "[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional *assurance of the presence of an accused*. Bail set at a figure higher than an amount *reasonably calculated to fulfill this purpose* is 'excessive' under the

[1] Texas state law provides that one of the five statutory factors that must be considered by the official setting bail is the financial status of the individual: "The ability to make bail is to be regarded, and proof may be taken upon this point." Tex. Code Crim. Proc. art. 17.15(4). Plaintiffs, however, have not alleged any state-law claims in this lawsuit. *See* ROA.5700.

Eighth Amendment." *Stack*, 342 U.S. at 5 (emphases added). But as this Court and numerous other circuits have recognized, the mere inability to pay does not render bail excessive and thus invalid under the Eighth Amendment. *See McConnell*, 842 F.2d at 107. And even if the imposition of secured bail could be excessive as applied to certain misdemeanor defendants, that could only justify as-applied relief and not facial invalidation for all misdemeanor defendants. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (facial challenge "must establish that no set of circumstances exists under which the [government policy] would be valid").

B. The district court stated that its injunction did not order "changes to Texas State law," ROA.5560, but the breadth of the conclusions adopted in its opinion would displace multiple Texas state laws.

The Texas Constitution provides that "[a]ll prisoners shall be bailable *by sufficient sureties*, unless for capital offenses, when the proof is evident." Tex. Const. art. 1, § 11 (emphasis added). The district court's injunction, however, requires the release of indigent misdemeanor defendants without any surety that government officials have found to be sufficient.

Texas state law also sets forth five separate factors governing "the exercise of this discretion" in setting the "amount of bail":

1. "The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with."
2. "The power to require bail is not to be so used as to make it an instrument of oppression."

3. "The nature of the offense and the circumstances under which it was committed are to be considered."
4. "The ability to make bail is to be regarded, and proof may be taken upon this point."
5. "The future safety of a victim of the alleged offense and the community shall be considered."

Tex. Code Crim. Proc. art. 17.15. The fourth factor directs the government official setting bail to consider the financial status of an arrestee. But the district court's order elevates this single factor as the dispositive consideration for indigent misdemeanor defendants, thus displacing state law requiring examination of the other four factors.

State law also provides that government officials retain "discretion" to "release the defendant on his personal bond without sureties or other security." *Id.* art. 17.03(a). The district court's order, though, eliminates this discretion in setting bail for indigent misdemeanor defendants.

Texas law further grants government officials authority to set bail release conditions in certain situations involving misdemeanor defendants. *Id.* art. 17.03(b)(3), (c). The district court's injunction overrides this authority with regard to indigent misdemeanor defendants.

Finally, State law establishes that bail must be set at a hearing before a magistrate within 48 hours. *Id.* art. 14.06; *id.* art. 15.17. *Cf. id.* art. 17.033(a) (probable cause

determination—as opposed to bail setting—must occur within 24 hours). The district court's order requiring Harris County to release indigent misdemeanor defendants within 24 hours displaces this State law.

C. The district court's conclusions would threaten to invalidate or impair the operation of numerous state laws or rules that require or allow judges to set monetary bail for criminal defendants awaiting trial, including indigent misdemeanor arrestees. *See*, *e.g.*, Kan. Stat. Ann. § 22-2802 (authorizing judges to require bail or appearance bonds); *id.* § 12-4301 (authorizing bail or appearance bonds in municipal court); La. C. Cr. P. art. 316 (requiring judges to set bail in an amount that will ensure the defendant's appearance and the safety of the community in light of ten factors, including the defendant's ability to give bail); Miss. R. Crim. P. 8.2(a) (authorizing court to require bond in an amount "that will reasonably assure the defendant's appearance or that will eliminate or minimize the risk of harm to others or to the public at large"); Miss. Code. Ann. § 99-5-13 (authorizing courts to increase bail amounts); *id.* § 21.23.8(4)(a) (authorizing municipal judges to set bail for persons charged with offenses in municipal court); Neb. Rev. Stat. § 29-901(1)(c) (giving judges discretion to require monetary or surety bail as a condition of release). Those laws often require judges to consider factors that may include, but are not limited to, the defendant's ability to make bail. *E.g.*, La. C. Cr. P. art. 316; Neb. Rev. Stat. § 29-901(1). By making indigent status the sole factor, the district court's analysis, if applied in other states, would nullify state laws to the extent they require consideration of factors other than the defendant's ability to pay.

II. The District Court's Injunction Threatens Public Safety.

Under the district court's injunction, a misdemeanor defendant must be released pending trial regardless of the severity of the alleged criminal actions if that defendant is indigent. *See* ROA.5743. This injunction threatens public safety in multiple ways.

As an initial matter, the district court's reasoning would not be limited to Harris County, Texas. The injunction already has a substantial effect by applying even just to Harris County, given that it has the third largest population of any county in the United States.[2] But if this Court were to adopt the district court's reasoning, the broader pronouncements about the controlling legal principles regarding indigent misdemeanor defendants would apply in other jurisdictions. While the district court discussed the particular evidence about Harris County's bail system, the court's ultimate conclusions turned on broader legal conclusions under the Due Process and Equal Protection Clauses that were not specific to Harris County.

A categorical rule requiring the pretrial release of indigent misdemeanor defendants will increase the risk and rates of defendants failing to appear for trial. Without any surety posted by a defendant, the likelihood of the defendant appearing for trial is diminished. Some deterrent effect could be provided by the fact that failure to appear is a separate state-law crime. Tex. Penal Code § 38.10. But that simultaneously means that the crime rate would increase, thus requiring additional public resources to prosecute further crimes. And since failure to appear for a misdemeanor charge is

[2] *See* U.S. Census Bureau, Counties Population Totals Tables: 2010-2016, https://www.census.gov/data/tables/2016/demo/popest/counties-total.html.

itself only a misdemeanor crime, *id.* § 38.10(d)-(f), the district court's injunction would require release without bail payment for this separate crime if the defendant is indigent.

The district court's reasoning would also impose greater costs on pretrial supervision services. Harris County is a great example, as it supervises pretrial arrestees released without secured bond while it does not do so for those released on secured bond. *See* County Judges' Br. 54. This policy is rational given that those released on secured bond have a greater incentive to appear for trial, whereas supervision would be necessary to compensate for the diminished incentive to appear when an arrestee is released without secured bond. With more arrestees being placed in pretrial supervision, the quality of that supervision could easily decrease, making it even more likely that such individuals fail to appear.

The injunction will thus ultimately diminish the public fisc. Additional resources will have to be spent tracking down more defendants who fail to appear. The greater number of arrestees subject to supervision will divert resources. And additional failure-to-appear crimes will need to be prosecuted.

Conclusion

The Court should reverse the district court's injunction.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Scott A. Keller
SCOTT A. KELLER
Solicitor General
scott.keller@oag.texas.gov

JOSEPH D. HUGHES
Assistant Solicitor General
jody.hughes@oag.texas.gov

Counsel for Amici Curiae

Certificate of Service

On June 26, 2017, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ Scott A. Keller
Scott A. Keller

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,609 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ Scott A. Keller
Scott A. Keller