IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 18-11368

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; ERNEST WHITE, 194th; HECTOR GARZA, 195th; TERESA HAWTHORNE, 203rd; TAMMY KEMP, 204th; JENNIFER BENNETT, 265th; AMBER GIVENS-DAVIS, 282nd; LIVIA LIU FRANCIS, 283rd; STEPHANIE MITCHELL, 291st; BRANDON BIRMINGHAM, 292nd; TRACY HOLMES, 363rd; ROBERT BURNS, Number 1; NANCY KENNEDY, Number 2; GRACIE LEWIS, Number 3; DOMINIQUE COLLINS, Number 4; CARTER THOMPSON, Number 5; JEANINE HOWARD, Number 6; STEPHANIE FARGO, Number 7 Judges of Dallas County, Criminal District Courts,

Defendants-Appellees Cross-Appellants,

MARIAN BROWN; TERRIE MCVEA; LISA BRONCHETTI; STEVEN AUTRY; ANTHONY RANDALL; JANET LUSK; HAL TURLEY, Dallas County Magistrates; DAN PATTERSON, Number 1; JULIA HAYES, Number 2; DOUG SKEMP, Number 3; NANCY MULDER, Number 4; LISA GREEN, Number 5; ANGELA KING, Number 6; ELIZABETH CROWDER, Number 7; TINA YOO CLINTON, Number 8; PEGGY HOFFMAN, Number 9; ROBERTO CANAS, JR., Number 10; SHEQUITTA KELLY, Number 11 Judges of Dallas County, Criminal Courts at Law,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Texas, Case No. 3:18-cv-00154-N

BRIEF OF AMERICANS FOR PROSPERITY FOUNDATION, CATO INSTITUTE, CLAUSE 40 FOUNDATION, DUE PROCESS INSTITUTE, AND PROFESSOR SHON HOPWOOD AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS CROSS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. Americans for Prosperity Foundation;

B. Michael Pepson, counsel for Americans for Prosperity Foundation;

C. Cato Institute;

D. Clark M. Neily III and Jay R. Schweikert, counsel for the Cato Institute;

E. Clause 40 Foundation;

F. Timothy O'Toole, counsel for Clause 40 Foundation;

G. Due Process Institute;

H. Shana-Tara O'Toole, counsel for Due Process Institute;

I. Professor Shon Hopwood.

SO CERTIFIED, this 5th day of April, 2021.

/s/ Jay R. Schweikert

Counsel for *Amici Curiae*

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INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation is a nonprofit organization committed to educating and training Americans to be courageous advocates for a free and open society.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.

Clause 40 Foundation is a nonpartisan nonprofit organization whose mission is to honor and promote the due process rights guaranteed in the U.S. Constitution.

Due Process Institute is a nonprofit, bipartisan organization that works to preserve and restore procedural fairness in the criminal-justice system through litigation and advocacy.

Shon Hopwood is an Associate Professor of Law at Georgetown University Law Center, where he studies and writes about various aspects of the American criminal justice system.

This case concerns *amici* because holding prisoners through non-individualized bail schemes undermines due process and the Eighth Amendment.

[1] No counsel for either party authored this brief in whole or in part. No one other than *amici* and their members made monetary contributions to its preparation or submission.

SUMMARY OF THE ARGUMENT

The right to pretrial liberty is supported by nearly a millennium of Anglo-American constitutional and common law, and the Fourteenth Amendment protects this right in two distinct ways. First, due process prohibits pretrial detention generally where such detention is unnecessary to serve the government's interests. Second, the Equal Protection and Due Process Clauses forbid the government from detaining a defendant solely because of their lack of financial resources. As Plaintiffs-Appellants explain, predetermined, scheduled bail schemes that do not account for the government's interests in pretrial detention or individualized ability to pay violate both of these rights. *Amici* write separately to elaborate on the extent to which centuries of Anglo-American jurisprudence underscore the right to pretrial liberty generally and are flatly incompatible with the bail practices used by Dallas County.

ARGUMENT

I. THE RIGHT TO BAIL EXISTED AT COMMON LAW AND WAS INCORPORATED INTO THE U.S. CONSTITUTION.

A. English Authorities from Before Magna Carta to the Revolution Confirm the Right to Bail.

Since time immemorial, concomitant to the general right to pre-trial liberty, bail has been a procedural right for all offenses against the Crown, except those specifically excluded at law. *See* 4 William Blackstone, Commentaries *295 ("By the ancient common law, before and since the [Norman] conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case." (footnotes omitted)). This tradition of bail rights continued through Magna

Carta, the English Revolution, the English Restoration, the Colonial Era, and into American jurisprudence.

"[T]he root idea of the modern right to bail" originates from "tribal customs on the continent of Europe," developing far earlier than written guarantees of freedom like Magna Carta or the U.S. Constitution. Elsa De Haas, Antiquities of Bail: Origin and Development in Criminal Cases to the Year 1275, at 128 (1966). Pre-Norman England was largely governed by the Germanic tribal custom of *wergild*—the payment due to a family for the slaying or assault of a relative. *Id.* at 3-15. By providing sufficient surety that the *wergild* would be paid, the blood feud between the families subsided and the perpetrator was given safe conduct. *Id.* at 12-13. As the Germanic law evolved into the classic common law of post-Norman Conquest England, the *wergild* surety became the crown pleas of replevy and mainprize, secured by bail pledges. *See* 2 Sir Frederick William Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I, at 584 (2d ed. 1898, reprinted 1984); De Haas, *supra*, at 32-33, 64-65, 68, 85 (noting that the pleas are listed in the Statute of Westminster I).

In 1215, Magna Carta codified the fundamental right to pretrial liberty: "No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta ch. 32 (1216). Thus, men were to be left at liberty until there is a verdict in their cases. Indeed, "the King's courts at Westminster" were greatly concerned with "'the liberty of the subject'" in bail cases. 2 Pollock & Maitland, *supra*, at 586. The 1275 Statute of Westminster laid out which crimes were bailable and those where the right to bail may be abrogated by the risk of

disturbance of the peace of the community. Statute of Westminster I, 3 Edw. III, c. 3, 15; De Haas, *supra*, at 95. In 1689, Parliament further underscored the importance of the right to pre-trial liberty by expressly including a right against excessive bail in the Bill of Rights, thereby legislating against a chief form of attack on the fundamental right to bail employed by the Stuart Kings—the unlawful holding of prisoners through unaffordable bail. Bill of Rights, 1 W. & M., c. 2 (1689).

B. American Constitutional and Common Law Incorporates and Upholds a Right to Bail.

"In crossing the Atlantic, American colonists carried concepts embedded in these documents [Magna Carta, 1275 Statute of Westminster I, Habeas Corpus Act of 1679, and the 1689 Bill of Rights] that became the foundation for our current system of bail." *New Mexico v. Brown*, 338 P.3d 1276, 1284 (N.M. 2014).

Both the colonies that became states and later states incorporated the right to bail into their own law. "One commentator who surveyed the bail laws in each of the states found that forty-eight states have protected, by constitution or statute, a right to bail 'by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.'" *Id.* (quoting Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 Ariz. L. Rev. 909, 916 (2013)).

On the federal level, the general right to pre-trial liberty from the time of Magna Carta was preserved in the Constitution's Due Process Clauses. *Compare* U.S. Const. amend. V ("nor shall any person . . . be deprived of . . . liberty . . . without due process of law"), *and* amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property,

without due process of law"), *with* Magna Carta ch. 32 (1216) ("No free man shall be arrested or imprisoned . . . or victimized in any other way . . . except by the lawful judgment of his peers or by the law of the land."). The Eighth Amendment expressly forbids any imposition of "excessive bail." U.S. Const. amend. VIII. And in the Judiciary Act of 1789, Congress codified bail as the procedural mechanism for preserving the right to pre-trial liberty by enacting an absolute right to bail in non-capital cases and a limited right to bail in capital cases. 1 Stat. 73, § 33, at 91 ("Upon all arrests in criminal cases, bail shall be admitted, except where punishment may be by death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein.").

The case of *United States v. Lawrence*, 4 Cranch C. C. 518 (1835), illustrates how the right to bail applied even for the most serious non-capital crimes in the early Republic. In this case, Richard Lawrence had attempted to assassinate President Andrew Jackson, failing only because two properly loaded pistols both misfired. Because no physical harm occurred, the laws of the time considered this act to be the crime of assault with intent to murder (which did not carry the death penalty). Any crime that was not a capital crime—even one as serious as this—was bailable, and the actual bail set in this case ($1,500) explicitly accounted for "the ability of the prisoner to give bail." *Id.*

Modern Supreme Court precedent has reaffirmed these ancient principles: "In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). The Supreme Court in *Stack v. Boyle* made clear that a "right to bail" is a component of pre-trial liberty as

understood in American law "[f]rom the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure":

> [F]ederal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. *See Hudson v. Parker*, 156 U.S. 277, 285 (1895). Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

342 U.S. 1, 4 (1951) (Vinson, C.J.).

Since *Stack v. Boyle*, the Supreme Court has backed away from the idea that the Eighth Amendment's Excessive Bail Clause incorporates a general right to bail in *all* cases. *Salerno*, 481 U.S. at 752-54 ("The above-quoted dictum in *Stack v. Boyle* is far too slender a reed on which to rest this argument. The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail."). Yet *Salerno* still incorporated a fundamental right to pre-trial liberty under the Due Process Clauses. *Id.* at 746-53.

The *Salerno* Court was correct that certain crimes are not and have not been bailable at common law and that "the right to bail they have discovered in the Eighth Amendment is not absolute." *Id.* at 753. That has been clear since Bracton and Coke. *See* 2 Henri de Bracton, De Legibus et Consuetudinibus Angliae 295 (c. 1235, reprinted 1990); Sir Edward Coke, A Little Treatise of Baile and Maineprize (1635) (listing offenses for which a person had a right to bail and no right to bail at common law). But the Eighth Amendment itself is not the textual anchor for the general right to bail and pre-trial liberty (though it clearly presumes such a right exists). Rather, as the *Salerno* Court found, the general right to pre-

trial liberty is preserved in the Due Process Clauses, and the Eighth Amendment affirms a different yet related right against *excessive* bail. Excessive bail claims give rise to claims of denial of bail altogether, however, so the Eighth Amendment protects against a specific type of encroachment on rights generally guaranteed by the Due Process Clauses.

In sum, American law incorporates over 950 years of English constitutional and common law establishing a fundamental right to bail to secure pretrial liberty.

II. THE RIGHT TO BAIL GUARANTEES NON-EXCESSIVE, INDIVIDUALIZED ASSESSMENTS NOT FIXED BY A PRE-DETERMINED SCHEME.

Just as centuries of Anglo-American jurisprudence protect the right to pretrial liberty generally, so do they also recognize that bail is to be set with respect to the individual circumstances of the defendant, including their ability to pay.

This general principle of proportionality extends all the way back to early Norman common law. *See* De Haas, *supra*, at 84 ("It is noteworthy that no fixed amount seems to have been charged for the privilege of bail release . . . . It is our conclusion that . . . they failed generally to abide by any set formula."); 2 Pollock & Maitland, *supra*, at 514 (noting that in applying amercements to the sureties of those who fled on bail bond, "[a]ccount can now be taken of the offender's wealth or poverty . . . . there also seem to be maximum amercements depending on the wrong-doer's rank; the baron will not have to pay more than a hundred pounds, nor the routier more than five shillings").

These common-law roots were expanded and strengthened as a result of the abuses of the Stuart Kings before and after the English Civil War. In *Darnel's Case* in 1627, judges of the King's Bench "proved their subservience to the King [Charles I] by denying

[habeas] release" to five knights committed to prison by special royal command for unnamed offenses. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. Pa. L. Rev. 959, 966 (1965); *Darnel's Case*, 3 How. St. Tr. 1 (1627). The House of Commons took up the case and responded with the 1628 Petition of Right, asserting the right to pre-trial liberty under Magna Carta and overruling *Darnel's Case*—"no freeman in any such manner as is before mentioned, be imprisoned or detained." Petition of Right, 3 Car. I, c.1 (1628); 3 How. St. Tr. 1, at 224 ¶ x; Foote, *supra*, at 967. Further abuses by Stuart King Charles II led to the adoption of the Habeas Corpus Act of 1679, which noted that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable." 31 Cha. II, c. 2 (1679). Finally, having exhausted all of those loopholes, Charles II turned to "setting impossibly high bail" in order to "erect[] another obstacle to thwart the purpose of the law on pretrial detention." Foote, *supra*, at 967.

After William and Mary assumed the throne, Parliament responded to the Stuart bail policy with the 1689 Bill of Rights, which expressly provided that "excessive bail ought not be required." Bill of Rights, 1 W. & M., c. 2 (1689). The courts of the King's Bench bent to parliamentary supremacy after the destruction of Stuart absolutism and examined actions for excessive bail with respect to the rank and ability of the individual to post bond. *E.g.*, *Neal v. Spencer*, 88 Eng. Rep. 1305, 1305-06 & n.a (K.B. 1698) (collecting cases that note diversity of bails given for same offense); *King v. Bowes*, 1 T.R. 696, 700, 99 Eng. Rep. 1327, 1329 (K.B. 1787) (Archbald, J.) ("Excessive bail is a relative term; it depends on

the nature of the charge for which bail is required, upon the situation in life of the parties, and on various other circumstances.”).

Early American common law also adopted the English understanding that setting bail includes particularization to a defendant’s wealth, lest it be unconstitutionally “excessive” considering individual circumstances. *See* Joseph Chitty, A Practical Treatise on the Criminal Law 130-31 (1832) (“[S]uch bail only is to be required as the party is able to procure; for otherwise the allowance of bail would be a mere colour for imprisoning the party on the charge.”); William Smithers Church, A Treatise of the Writ of Habeas Corpus 532, § 397 (1886) (“To require larger bail than the prisoner can give is to require excessive bail, and to deny bail in a case clearly bailable by law.”); George Arthur Malcolm, The Constitutional Law of the Philippine Islands Together with Studies in the Field of Comparative Constitutional Law 497 (1920) (“It is substantially a denial of bail, and a violation of constitutional guaranties against excessive bail, to require a larger sum than, from the circumstances, the prisoner can be expected to give.”).

Accordingly, the established common law of the sufficiency of bail from the Norman Conquest of England through to the modern American law requires that magistrates and judges take into account the individual financial circumstances of the defendant in setting bail. Pre-determined, scheduled bail schemes like those employed by Dallas County, by their very nature, do not provide the individualized determinations that the Fifth, Eighth, and Fourteenth Amendments demand.

CONCLUSION

For the foregoing reasons, as well as those presented by Plaintiffs-Appellants, the Court should grant the relief requested by Plaintiffs-Appellants.

Respectfully submitted,

DATED: April 5, 2021.

/s/ Jay R. Schweikert

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,590 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 12-point Book Antiqua typeface.

/s/ Jay R. Schweikert
April 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Jay R. Schweikert*
April 5, 2021