No. 18-11368

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHANNON DAVES; SHAKENA WALSTON; ERRIYAH BANKS; DESTINEE TOVAR; PATROBA MICHIEKA; JAMES THOMPSON, On Behalf of Themselves and All Others Similarly Situated; FAITH IN TEXAS; TEXAS ORGANIZING PROJECT EDUCATION FUND,

Plaintiffs-Appellants Cross-Appellees,

v.

DALLAS COUNTY, TEXAS; 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

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CERTIFICATE OF INTERESTED PERSONS

The following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that members of the Court may evaluate possible recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is warranted here because it would assist this Court in resolving the important legal questions presented by this appeal, questions that bear on the basic issue of personal liberty for thousands of individuals in one of the country's largest jurisdictions.

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INTRODUCTION

For most people arrested in Dallas County, Texas, liberty prior to trial depends on whether they are able to buy their release. Those with money can quickly pay the required amount of cash bail and walk free, while the many without money remain behind bars, despite being presumed innocent of the charges.

For indigent arrestees, moreover, pretrial detention in Dallas County can persist for weeks or even months; in fact, it routinely lasts that long before an arrestee even has her first appearance before a judge. But whether or not it lasts that long, the harms inflicted by this detention are enormous: As the district court here found, for example, those who cannot afford the price of release lose not just their liberty, but also "their jobs, their homes, and much more." ROA.5970. To minimize such consequential (and often irreparable) losses, the vast majority of indigent arrestees promptly plead guilty, because it is the fastest route to freedom.

The district court here correctly found that Dallas County's widespread detention of indigent arrestees, and the many "severe consequences" that follow, "result[] *solely* because an individual cannot afford" the cash bail the county requires. ROA.5962-5963 (emphasis added). The court also correctly concluded that the county's practices in this regard are unconstitutional. In particular, the county's unwavering use of a cash-bail schedule—without consideration of either a

particular arrestee's ability to pay or alternatives to requiring an upfront cash-bail payment—violates both equal protection and procedural due process. Those holdings are not only correct, but also compelled by binding precedent and the court's factual findings.

The district court, however, erred in its analysis, and hence in the preliminary injunction it issued, in three respects. First, despite having held that Dallas County's bail system detains arrestees solely on the basis of their indigence, in violation of the Equal Protection and Due Process Clauses, the court did not require that the constitutional violations (that wealth-based detention) cease. The court merely required that the county, before continuing to act unlawfully, *consider* alternatives that would not be unconstitutional. That is insufficient. As the Supreme Court has long recognized, when a court finds a substantive constitutional violation, it must order a substantive remedy, i.e., relief that prevents the violation from recurring. And the Court's decision in *Bearden v. Georgia*, 461 U.S. 658 (1983), makes clear what that relief is in these circumstances: An order prohibiting the detention of any arrestee based on inability to pay unless a judge finds that such detention is necessary to vindicate an important government interest. The district court's failure to recognize and apply these basic principles was reversible error.

Second, the district court erroneously rejected plaintiffs' claim that Dallas County's bail system also violates their substantive-due-process right to pretrial liberty. The court did so by misconstruing *United States v. Salerno*, 481 U.S. 739 (1987), and other longstanding precedent holding that the fundamental liberty interest in freedom before conviction may be abridged only in "carefully limited" circumstances in which the government's interests in pretrial detention are shown to outweigh an individual's interest in pretrial liberty, *id.* at 755—a showing that Dallas County never requires. The district court likewise misread this Court's decision in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (opinion on rehearing), as well as binding precedent recognizing that plaintiffs' claim is properly brought under the Fourteenth Amendment.

Third, the district court erred in holding that the Dallas County sheriff is not a proper defendant under 42 U.S.C. §1983 (the law through which plaintiffs seek redress for the constitutional violations the court found). The court reasoned that the sheriff could not be enjoined under the statute (as interpreted in *Monell v. Department of Social Services*, 436 U.S. 658 (1978)) because she "does not have [municipal] policymaking authority." ROA.5964. But the lack of such authority means only that her conduct cannot serve as a basis for *Dallas County's* liability under §1983; as a state actor, the sheriff is still subject to prospective relief under *Ex Parte Young*, 209 U.S. 123 (1908). This Court initially made the same

oversight in *ODonnell*, but corrected it when the plaintiffs there sought panel rehearing on that ground. The Court should likewise correct the mistake here.

The district court's errors (certainly the first two) appear to have been driven in part by its mistaken conclusion that plaintiffs' claims both break new legal ground and would require the release of every arrestee. In reality, plaintiffs' claims are grounded in decades of consistent precedent from both the Supreme Court and this Court. And they do not prevent a jurisdiction from detaining any person who it can show actually *needs* to be detained in order to serve its interests in protecting public safety and ensuring appearance at trial. The question that neither Dallas County nor the district court answered—and that lies at the heart of this appeal—is why the government should be allowed to deprive people of one of their most basic rights when it does not make that showing, i.e., does not show that there is any sound reason to keep a presumptively innocent person in jail.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§1331 and 1343. It entered a preliminary injunction, ROA.5974, and accompanying opinion, ROA.5957, on September 20, 2018. Plaintiffs-appellants noticed an appeal on October 19, 2018, ROA.6057, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. §1292.

ISSUES PRESENTED

1. Whether the district court's preliminary injunction impermissibly fails to remedy the equal-protection/due-process violation that the court identified.

2. Whether Dallas County's bail practices violate plaintiffs' fundamental interest in pretrial liberty.

3. Whether the Dallas County sheriff is a proper defendant here under 42 U.S.C. §1983.

STATEMENT OF THE CASE

A. Dallas County's Post-Arrest Process

In Dallas County, the Criminal District Court Judges (referred to in this litigation as the "felony judges") promulgate a secured-bail schedule that is used to determine conditions of release for all felony arrestees. ROA.5960, 5963. ("Secured" bail means the money must be paid up front, whereas with "unsecured" bail, the money must be paid only if the arrestee misses a required court appearance. ROA.5960.) The county's Criminal Court at Law Judges (referred to here as the "misdemeanor judges") issue a similar schedule for misdemeanor arrestees. ROA.5960, 5963. As the district court found, the county's bail schedules "operate like a menu," listing the "'price' [of] release" for each crime and category of arrestee. ROA.5960. Dallas County's magistrates—who report to the judges and determine conditions of release for arrestees—treat the secured-bail

schedules as binding. ROA.5961. The result, the court found, is "automatic[]" "pretrial detention of indigent arrestees." ROA.5962.

1. Appearance Before A Magistrate. When a person is arrested and taken to jail in Dallas County, he or she is scheduled for a hearing before a magistrate (typically referred to as an "arraignment"). ROA.5959. Whether conducted in person or by video, arraignments usually last less than 30 seconds. ROA.5959, 5961. In that scant time, the magistrate calls the arrestee by name, recites the charge or charges, and announces the price of release, i.e., the secured-bail amount listed for that charge on the applicable schedule. ROA.5960-5961. For example, secured bail for an arrestee charged with a class B misdemeanor (e.g., trespass) is $500—whatever the arrestee's financial resources. ROA.492.

Arraignments are closed to the public, no lawyers are present, and arrestees are regularly instructed not to speak or ask questions. *E.g.*, ROA.486, 6593-6594. Magistrates do not inform arrestees of the factual allegations underlying the charged offense or advise them of the basic rights at stake in the hearing. ROA.6594. Magistrates also make no finding with respect to whether pretrial detention is necessary to satisfy any government interest, i.e., whether the government's interests could be achieved with either unsecured bail (requiring no upfront cash payment) or non-financial conditions of pretrial release (electronic monitoring, for example). ROA.6479, 6594, 6601. Nor do magistrates consider

arrestees' ability to pay when automatically imposing the amount of secured bail in the schedule. ROA.5961, 6594. Indeed, when this lawsuit was filed, magistrates could not consider ability to pay, because they had no information about arrestees' financial resources. ROA.5961, 6594, 8337.

In February 2018 (one month after this case was filed), the felony judges authorized magistrates to permit unsecured release in certain cases and instructed them to consider a financial affidavit that arrestees were to be given an opportunity to complete before arraignment. ROA.5960-5961. But these changes, the district court found, "had minimal effect" in practice: Magistrates continue to "treat the[] [secured-bail] schedules as binding," giving no individualized consideration to alternative conditions of release, nor adjusting the scheduled amount "in light of an arrestee's inability to pay." ROA.5961, 5963. Because "[r]outine reliance on the schedules is still the policy of Dallas County," the court found, the "vast majority" of arrestees must pay the "'price[]' for release" listed in the schedule, or face prolonged pretrial detention. ROA.5960-5961.[1]

Arrestees who have the resources to pay the scheduled bail amount can do so and immediately walk free. ROA.5961. Those who cannot pay are "confined in a

[1] Even the rare arrestee who is ultimately released on unsecured bond usually obtains that relief only after waiting for counsel to be appointed, because the misdemeanor and felony judges will consider granting a personal bond only if a defense lawyer requests one. ROA.6597.

cell until [their] first appearance." *Id.* In Dallas County, misdemeanor arrestees usually wait four to ten days for their first appearance before a judge. ROA.5962. Felony arrestees who waive indictment normally wait several weeks; those who do not waive indictment wait "two to three months." *Id.*

2. Appearance Before A Judge. Indigent arrestees usually meet their appointed counsel at their first appearance before a judge—which, as just explained, occurs days, weeks, or months after the arrestee has been confined to a jail cell. ROA.6596. At that appearance, the district court found, judges do not consider alternative conditions of pretrial release or hold on-the-record hearings concerning bond reduction. ROA.5962. Before such a hearing will be held, counsel must file a written motion; a hearing is then "usually scheduled for a week or more after the motion is filed." *Id.*

Most misdemeanor and low-level-felony arrestees who remain detained at their first appearance plead guilty, because "[d]oing so most often results in sentences of time served and immediate release." ROA.5962. Indigent arrestees who do not plead guilty (and who cannot pay the required cash bail) return to jail to await their next appearance, weeks or months down the road. ROA.5962, 6599.

B. Procedural History

Plaintiffs filed this action under 42 U.S.C. §1983 in January 2018, and promptly moved for a preliminary injunction. At the hearing on that motion, the

parties presented live testimony from defendant judges and expert witnesses, and submitted academic studies, declarations, government records, and video recordings of bail hearings. Based on the evidence submitted, the district court issued a preliminary injunction.

As an initial matter, the court determined that the threshold requirements of municipal liability under §1983 were satisfied, in that "'(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right.'" ROA.5963 (quoting *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009)). Specifically, the court found that the county magistrates' "[r]outine reliance" on the bail schedules—"treat[ing] the schedules as binding," ROA.5960-5961; imposing secured bail "in an overtly mechanical way"; and "mak[ing] no adjustment in light of an arrestee's inability to pay," ROA.5961, 5967—is a practice "so common and well settled as to constitute a custom that fairly represents municipal policy." ROA.5963. The court also ruled that the felony and misdemeanor judges are "proper defendants under section 1983" and that, because they are responsible (in "their capacity as county policymakers" rather than in their judicial capacity) for the practices challenged here, "their actions can subject the County to liability." ROA.5963-5964. The court concluded, however, that the sheriff "cannot act as a policymaker" on behalf of the county, as she is "legally obligated to execute all lawful process."

ROA.5964. But instead of holding only that the sheriff's actions therefore could not give rise to *county* liability, the court held that "the sheriff is not a proper defendant under section 1983." *Id.*

The district court then found, after reviewing the evidence regarding the post-arrest processes described above, that as a matter of practice Dallas County "automatically detains" for the entire pretrial/pre-plea period virtually all arrestees who cannot afford the preset price of release, while promptly releasing those who can. ROA.5962. The court found that such detention "results solely because an individual cannot afford the secured condition of release." *Id.*

The district court also addressed changes that Dallas County had made to its bail policies a month after this case was filed. In particular, the county authorized magistrates to grant release on unsecured bond in certain cases (instead of imposing the preset secured amount) and instructed magistrates to consider a financial affidavit that arrestees were to be given before arraignment. ROA.5960-5961. The district court determined that these changes had made no meaningful difference in practice, i.e., that the county's policy of "[r]outine reliance on the [bail] schedules" remains "firmly in place." ROA.5961, 5963. Indeed, the record showed that bail hearings still lasted just seconds; that arrestees were still instructed not to speak or ask questions; and that magistrates still enforced the bail schedules without considering alternative release conditions or finding that pretrial

detention was necessary. ROA.5961, 8184-8188. Interviews with recent arrestees, moreover, showed that not all arrestees were provided the new financial affidavit and that those who did receive it were given no explanation of its purpose. ROA.8310, 8317, 8323-8324, 8330.

Turning to the effects of the county's policy, the court found that rigid reliance on the secured-bail schedules seriously harms indigent arrestees who are "automatically detain[ed]" for "days, weeks, and, in some cases, even months." ROA.5961-5962. The resulting "severe" harms, the court stated, "extend[] well beyond the initial deprivation of liberty." ROA.5963, 5969-5970. More specifically, the court found that pretrial detention leads to "loss of employment, loss of education, loss of housing and shelter, deprivation of medical treatment, inability to care for children and dependents, and exposure to violent conditions and infectious diseases in overcrowded jails." ROA.5963; *accord* ROA.5970. The court found that the county's infliction of these harms serves no government interest, because money bail "fare[s] no better than unsecured or non-financial conditions at assuring appearance [in court] or law-abiding behavior," ROA.5970.

In addition to the harms the district court detailed, the record here showed that because arrestees detained prior to trial face intense pressure to plead guilty so as to avoid languishing in jail for months (often on charges that carry less jail time than that—if any), pretrial detention leads to significantly higher rates of

conviction (including wrongful conviction) for arrestees too poor to pay the secured-bail amount. *E.g.*, ROA.5069, 6446, 6783, 7461.

The district court's findings regarding the county's bail practices (both how they work and their deleterious effects) are consistent with the experiences of the named plaintiffs here, all of whom were indigent Dallas County arrestees. Within hours of arrest, each was told "how much they had to pay get out" and informed that he or she could "go home" right away by handing over the necessary cash. ROA.483-484. There was no consideration of alternative conditions of release for any of the named plaintiffs, nor any finding that pretrial detention was necessary for any asserted government interest. ROA.479-491. Nor was any of the named plaintiffs asked whether he or she could afford the amount in question. *Id.* And once detained, Erriyah Banks went days without the medication or diet mandated by her health conditions (despite requesting them), and she worried that her mother, whom she cared for, was struggling without her. ROA.484-485. Patroba Michieka, meanwhile, feared that he had lost his job because he had missed work while detained. ROA.489. And Shannon Daves, a transgender woman, spent days in solitary confinement (despite the lack of any misconduct or disciplinary concern), never leaving her cell, speaking to anyone, or even knowing "what time of day it [was]," ROA.479-480.

Having made its factual findings, the district court determined that plaintiffs were likely to succeed on their equal-protection and procedural-due-process claims. Quoting this Court's analysis in *ODonnell*, the district court explained that the equal-protection problem "essentially amount[s] to the following:"

> [T]ake two misdemeanor arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.

ROA.5965 (alteration in original) (quoting *ODonnell*, 892 F.3d at 163). The fact that Dallas County's system gives rise to such "vastly different pretrial outcomes" "*solely*" because one arrestee has money and the other does not, the district court held, violates the Equal Protection Clause. ROA.5962, 5965-5966, 5971 (emphasis added). This conclusion, the court continued, is not altered by the fact that this case involves both felonies and misdemeanors, whereas *ODonnell* involved only misdemeanors. ROA.5966 & n.7. Whatever the crime charged, the court explained, the constitutional violation persists so long as an otherwise-

identical arrestee with access to funds "can pay the requested amount and leave" while his indigent counterpart remains locked up. *Id.*[2]

As to procedural due process, the district court held that the county's procedures failed to protect indigent arrestees' basic liberty interests. ROA.5967. Because "the decision to impose secured bail is essentially automatic," the court stated, arrestees who cannot afford the scheduled money-bail amount are routinely and erroneously detained. *Id.* The court thus ruled that additional procedural safeguards are required to ensure the accuracy of bail proceedings.

The district court, however, rejected plaintiffs' separate claim that Dallas County's bail practices violate the substantive-due-process right to pretrial liberty. The court held that even where cash bail is set at an amount an arrestee cannot pay, resulting in a de facto pretrial-detention order, the detention does not infringe arrestees' fundamental interest in liberty prior to conviction. Accordingly, the court reasoned, pretrial detainees are not entitled to an individualized finding that pretrial detention is necessary to serve an important government interest. ROA.5968.

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[2] Although the district court spoke only in equal-protection terms here, it recognized that the ban on detaining individuals solely because they are poor rests on a "converge[nce] of equal protection and due process. *Bearden*, 461 U.S. at 665, *quoted in* ROA 5965 n.6.

The district court offered several reasons for its conclusion. First, the court asserted that *ODonnell* had rejected the substantive-due-process claim plaintiffs press here, ROA.5968, even though *ODonnell* did not discuss that claim. Second, the court agreed that the Supreme Court's decision in *Salerno* "firmly emphasizes the importance of the right to pretrial liberty," yet the court declined to grant any relief pursuant to that right because it thought that plaintiffs' pretrial-liberty claim fell outside *Salerno*'s scope. *Id.* Finally, the court reasoned that plaintiffs should have proceeded under the Eighth Amendment rather than the Due Process Clause.

The district court's preliminary injunction "mandat[ed] only additional procedures at the moment bail is set," ROA.5970 n.9, procedures that include "notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision-maker," ROA.5972; *see also* ROA.5975-5977. In the court's view, such procedural-due-process relief is all that the Constitution requires.

SUMMARY OF ARGUMENT

I. The district court failed to remedy the equal-protection/due-process violation it found. The court correctly held that Dallas County's secured-bail practices are unlawful under *Bearden v. Georgia* and other cases from the Supreme Court and this Court, which hold that individuals may not be incarcerated solely due to their indigency unless doing so is necessary to vindicate an important

government interest. As the district court found, Dallas County jails thousands of indigent people every day without showing any such need.

Bearden makes clear that the remedy for this violation is an order barring incarceration based on inability to pay unless a judge finds the requisite necessity, i.e., finds that alternatives to detention are not adequate to meet the government's interests. Instead of issuing such an order, however, the court merely ordered the county to correct its separate violation of procedural due process. This failure to remedy the *substantive* constitutional harm the court found was reversible error.

The district court's assertion that its failure to correct the constitutional violation was compelled by *ODonnell* does not withstand scrutiny. In that case, this Court *affirmed* the district court's conclusion that a finding of necessity was required by *Bearden*, and remanded with clear instructions for the district court to remedy the constitutional violations it had properly identified. While the Court in dicta also provided sample modifications of the district court's injunction that did not mention the required finding, that omission reflected only the fact that the district court there had issued an injunction that obviated the need for such a finding. But *ODonnell* manifestly could not contravene *Bearden*'s holding that the finding is constitutionally required.

II. The district court erred in holding that Dallas County's secured-bail practices do not infringe the fundamental due-process right to pretrial liberty. The

Supreme Court has repeatedly recognized this right, including in *Salerno*, and has also repeatedly stressed that any curtailment of the right survives heightened scrutiny only if a judicial officer has found that the pretrial detention of a particular arrestee is necessary to serve a compelling purpose. Yet Dallas County—despite the fact that its bail practices result in the pretrial incarceration of nearly all indigent arrestees for the entire pretrial/pre-plea period—requires no such finding.

The district court's three rationales for nonetheless holding that the county's bail practices do not infringe the right to pretrial liberty are infirm. First, the court incorrectly read *ODonnell* to implicitly reject the substantive-due-process argument that plaintiffs advance. Second, contrary to the district court's view, it does not matter under *Salerno* and related cases whether pretrial incarceration results from a *transparent* order of detention or (as in the case of utterly unattainable secured bail) a *de facto* order of detention. Either way, the arrestee is detained prior to conviction, infringing the fundamental interest in pretrial liberty, and that infringement must be justified. Finally, the district court was wrong in asserting that plaintiffs were required to proceed under the Eighth Amendment rather than the Fourteenth. As the Supreme Court has repeatedly instructed—and as *Salerno* itself illustrates—where government conduct infringes more than one constitutional protection, the courts must address each one.

III. The district court erred in holding that the sheriff is not a proper defendant under §1983. The court's holding was based on its conclusion that the sheriff lacks policymaking authority for the county. But even if that is correct, the sheriff can still be enjoined as a state actor under §1983 and *Ex Parte Young*. The district court's contrary ruling mirrored the mistake this Court made in *ODonnell*. Just as the Court corrected that mistake on rehearing in *ODonnell*, it should correct the mistake here.

STANDARD OF REVIEW

This Court reviews "a district court's ultimate decision to grant or deny a preliminary injunction for abuse of discretion." *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 267 (5th Cir. 2012). "As to each element of the district court's preliminary-injunction analysis, however, the district court's … conclusions of law are subject to broad review and will be reversed if incorrect." *Id.* (quotation marks omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO REMEDY THE *WILLIAMS-TATE-BEARDEN* VIOLATION THAT IT IDENTIFIED

The district court correctly ruled that under longstanding precedent from both the Supreme Court and this Court, Dallas County's bail practices violate the Fourteenth Amendment by making arrestees' pretrial liberty turn solely on whether they have access to money. Under that precedent, including *Bearden v. Georgia*,

the remedy for this violation is clear: The court should have enjoined defendants from incarcerating arrestees for inability to pay secured bail unless a judge *finds* that doing so is necessary to serve an important government interest. The district court instead concluded (based on a misreading of *ODonnell*) that the most it could do was require that for each arrestee, a judge "consider alternatives to secured release," ROA.5972 n.10, i.e., consider releasing the arrestee either on unsecured bond (meaning a promise to pay if a required court appearance is missed) or with some non-monetary condition. That is wrong. In fact, *ODonnell* followed binding precedent holding that an arrestee may not be detained because of her inability to pay absent a finding that such detention is necessary.

A. Dallas County's Bail System Unconstitutionally Jails Arrestees Solely Due To Indigence

The Supreme Court has repeatedly held that, under a convergence of equal-protection and substantive-due-process principles, individuals may not be "subjected to imprisonment solely because of [their] indigency." *Tate v. Short*, 401 U.S. 395, 398 (1971); *accord Williams v. Illinois*, 399 U.S. 235, 240-241 (1970); *Bearden*, 461 U.S. at 665-666. This Court, sitting en banc, has applied those cases to the pretrial context, holding that "in the case of an indigent[] whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would" be un-constitutional. *Pugh v. Rainwater*, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc);

accord id. at 1056 ("[I]mprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."); *ODonnell*, 892 F.3d at 163 (holding that Harris County's secured-bail system unconstitutionally jailed individuals solely due to their indigence).

What all these cases recognize is that incarcerating a person because of an inability to pay a particular amount of money, when a similarly situated individual with money would go free, amounts to "little more than punishing a person for his poverty." *Bearden*, 461 U.S. at 671. That violates both equal protection and substantive due process unless the government establishes that the incarceration is necessary to further an important government interest. *See id.* at 666; *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972) (striking down a scheme in which people were jailed for days if they could not pay fines because the practice was not narrowly tailored to meet a compelling interest).

The district court correctly determined that under this binding precedent, Dallas County's practices are unconstitutional. As the court found, the county jails thousands of people every day "solely because [they] cannot afford the secured condition of release." ROA.5962. In other words, "[w]ealthy arrestees—regardless of the crime they are accused of—who are offered secured bail can pay the requested amount and leave. Indigent arrestees in the same position cannot." ROA.5966. The cases cited above make clear that such incarceration based on

indigence is unconstitutional unless "appearance at trial could [not] reasonably be assured by one of the alternate forms of release," *Rainwater*, 572 F.2d at 1058.

B. *Bearden* And *Rainwater* Required The District Court To Remedy The Constitutional Violations It Recognized By Mandating A Substantive Finding

Having correctly identified the constitutional violation just discussed, the district court imposed a preliminary injunction that fails to remedy it. As explained, *see supra* p.15, the injunction mandates certain procedural protections, such as bail hearings at which arrestees are given notice and opportunity to be heard. The district court intended those protections to address the procedural-due-process violation caused by Dallas County's imposition of secured-money bail absent individualized consideration. But the violation of the right protected by *Williams*, *Tate*, and *Bearden* is a separate, *substantive* harm, one not cured by the procedures the district court mandated. *See Washington v. Harper*, 494 U.S. 210, 220 (1990) (distinguishing substance and procedure by explaining that a "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it," whereas a "procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance"). The district court's injunction allows the substantive constitutional violation that the court identified—indigent

arrestees being detained pretrial, absent any compelling need, solely because of their inability to pay—to persist so long as the county merely jumps through the procedural hoop of *considering* the possibility of not committing that violation.

That is not sufficient. If it were, then government would be free to violate virtually every substantive constitutional right. It could, for example, censor protected speech for any reason—or no reason—so long as it took the procedural step of considering the possibility of not censoring. Likewise, the government would be free to ban every individual from possessing any firearm, anywhere, so long as in individual cases it first considered not imposing such a ban. That is obviously wrong. In both situations, curtailment of the right is lawful only if it meets the applicable substantive standard. *See Harper*, 494 U.S. at 220. And the remedy for violations of either right is to enjoin the violations.

The same is true with the substantive right not to be detained solely based on indigence: The right may be curtailed only if a judge finds that such detention is necessary to serve an important government interest. And the remedy for violations of the right—including Dallas County's violations here—is to enjoin such detention absent a judicial finding of necessity.

Indeed, that finding is exactly what the Supreme Court required in *Bearden*. The question there was "whether a sentencing court can revoke a defendant's probation for failure to pay the imposed fine and restitution, absent evidence *and*

findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 461 U.S. at 665 (emphasis added). The Court's unambiguous answer was no: "Only if the sentencing court *determines* that alternatives to imprisonment are not adequate in a particular situation," the Court held, could Georgia imprison someone for inability to pay. *Id.* at 672 (emphasis added). Under the district court's injunction here, by contrast, detention based solely on indigence would have been permissible in *Bearden* if the state trial court had simply said: "I have *considered* alternatives to jailing Mr. Bearden because he is too poor to pay a fine, but I am going to jail him regardless of whether doing so is necessary to serve the government's interest." That is wrong. The same substantive finding that *Bearden* required before detention based solely on indigence is permissible—that "alternative measures are not adequate to meet the State's interests," *id.*—is required here.

Bearden, of course, also involved a procedural component: The Court held infirm Georgia's practice of "revok[ing] probation automatically without considering whether adequate alternative methods of punishing the defendant are available." 461 U.S. at 668-669. But that only reinforces the point. Procedural protections would not be required unless there was a substantive liberty interest, because such protections, as noted, exist to help ensure the accuracy of whatever substantive finding is required. *See Harper*, 494 U.S. at 220. *Bearden* therefore

did not merely correct a procedural problem (by requiring the sentencing court to "consider[]" alternatives to imprisonment). It also required a substantive determination that no adequate alternative existed, holding that "*[u]nless such determinations are made* … fundamental fairness requires that the petitioner remain" free. 461 U.S. at 674 (emphasis added). Again, that is what the district court should have required in this case.

Bearden cannot be distinguished on the ground that it involved individuals who had already been found guilty. This Court has repeatedly "concluded that the distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without difference." *ODonnell*, 892 F.3d at 162 n.6 (citing *Rainwater*, 572 F.2d at 1056). Indeed, this Court has indicated that, if anything, the constitutional concerns expressed in *Williams*, *Tate*, and *Bearden* are accentuated in the pretrial context because of the "'punitive and heavily burdensome nature of pretrial confinement' and the fact that it deprives someone who has only been 'accused but not convicted of crime' of their basic liberty." *Id.* (quoting *Rainwater*, 572 F.2d at 1056); *see also United States v. Payan*, 992 F.2d 1387, 1396 (5th Cir. 1993) ("Nothing in the … *Bearden* opinion prevents its application to any given enforcement mechanism."). This Court's precedent thus

establishes that the substantive finding of necessity mandated by *Bearden* is also required here.[3]

While the foregoing suffices to require modifications to the preliminary injunction (because *Bearden*, *ODonnell*, and *Rainwater* are each binding here), other courts to consider the issue have likewise concluded that a judicial finding of necessity is required to justify incarceration based on indigence. *See In re Humphrey*, 19 Cal. App. 5th 1006, 1025-1031, *review granted*, 417 P.3d 769 (2018); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 312-315 (E.D. La. 2018); *Schultz v. State*, 330 F. Supp. 3d 1344, 1373 (N.D. Ala. 2018), *appeal pending*, No. 18-13898 (11th Cir.). So has the United States. *See* U.S. Amicus Brief 19, *Walker v. City of Calhoun*, No. 17-13139 (11th Cir. Sept. 13, 2017) (arguing that under cases like *Bearden* and *Rainwater*, secured-money bail may be imposed on an indigent arrestee only after an "individualized assessment of risk and a finding of no other adequate alternatives").

Finally, Supreme Court case law in other contexts confirms that mere consideration of alternatives cannot remedy the *Bearden* violation here. With race

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[3] One important government interest often invoked to support such a finding of necessity is public safety. *See Salerno*, 481 U.S. at 742. But this interest cannot save the challenged policy here, because under that policy, *every* class member can be released pretrial by paying the scheduled amount, ROA.5961. This shows that the county's current policy does not consider any class member to present a public-safety risk that requires pretrial detention.

discrimination under the Fourteenth Amendment, for example, the Court has explained that "consideration of workable race-neutral alternatives"—a procedural remedy—"is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would" achieve the government's compelling interest. *Fisher v. University of Texas at Austin*, 570 U.S. 297, 312 (2013). If a race-neutral alternative *could* achieve the government's interest, then the government must not make race-based classifications, and the court must order (substantive) relief to that effect.

Similarly, in the Eighth Amendment juvenile-sentencing context, the Supreme Court has held that procedural protections alone are not sufficient to implement the "substantive [rule] that life without parole is an excessive sentence for children whose crimes reflect transient immaturity." *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016). "Even if a court *considers* a child's age before sentencing him or her to a lifetime in prison," the Court admonished, "that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" *Id.* at 734 (emphasis added); *see also Malvo v. Mathena*, 893 F.3d 265, 274 (4th Cir. 2018) (*Montgomery* confirmed that a court violates this substantive rule whenever it sentences a juvenile offender to life without parole "*without first concluding* that the offender's 'crimes reflect

permanent incorrigibility'" (emphasis added)), *petition for cert. filed*, No. 18-217 (U.S. Aug. 20, 2018). Unless a court *finds* that a child is permanently corrupt, it may not sentence him or her to life in prison with no possibility of parole. *Montgomery*, 136 S. Ct. at 736-737. Protecting a substantive liberty interest, in other words, requires not just considering the questions the Constitution demands; it requires answering those questions.

C. Contrary To The District Court's View, *ODonnell* Does Not Bar The Finding That *Bearden* And *Rainwater* Require

Defendants below scarcely engaged with any of the authorities cited above holding that before incarcerating an arrestee for inability to pay, a court must find that no alternative conditions of release would satisfy the government's interests. Defendants instead argued that *ODonnell*—despite lacking the power to overrule *Bearden* or *Rainwater*—had "impliedly rejected" the need for such a finding. ROA.5707. The district court agreed with that argument, declining to require the requested finding on the ground that "[t]he Fifth Circuit has designed appropriate relief for an almost identical case" and "[d]oing anything different here would put the Court in direct conflict with binding precedent." ROA.5971. That was error.

Far from implicitly rejecting the argument plaintiffs make here, this Court affirmed that the relevant finding is necessary. The district court in *ODonnell* held in its "conclusions of law" that the finding was indeed required by Supreme Court precedent. *ODonnell v. Harris County*, 251 F. Supp. 3d 1052, 1140 (S.D. Tex.

2017) (holding that under *Bearden*, a court can detain an indigent arrestee for inability to pay secured bail only if it "finds, based on evidence and in a reasoned opinion … that no less restrictive alternative can reasonably meet the government's compelling interest"). On appeal, this Court "AFFIRM[ed]" the district court's "conclusions of law" with two exceptions: "its conclusion that the County Sheriff qualifies as a municipal policymaker under § 1983 and its determination of the specific procedural protections owed under procedural due process." 892 F.3d at 166. As to the latter, this Court recited the "procedures" that the district court had concluded were constitutionally required, including the requirement of "a written statement by the factfinder as to the evidence relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial." *Id.* at 159. And none of the errors the Court identified in the district court's holding regarding those procedures cast doubt on the district court's conclusion about the need for or content of this finding. Rather, this Court concluded (1) that a *written* statement of reasons was not required so long as the reasons were "specifically enunciate[d]" on an individualized basis, (2) that the district court overstated the state-law liberty interest—describing it as an absolute interest in pretrial release rather than a right to bail on "sufficient sureties"—and (3) that the requirement to have the bail hearing within 24 hours of arrest should be relaxed to 48 hours. *Id.* at 158, 160. In

short, this Court left in place the district court's ruling that the finding plaintiffs seek here is required.[4]

Nor do this Court's discussion and holding in *ODonnell* regarding the remedy in that case support the district court's reading here. As explained, the district court in *ODonnell* had held the necessity finding to be constitutionally required, but its remedial order said nothing about the finding because it granted broader relief, holding that any indigent arrestee unable to pay secured bail but otherwise eligible for release could not be detained *at all*, *see* 251 F. Supp. 3d at 1161. Thus, under the district court's remedy, there was no occasion for the constitutionally required finding to be made; there would not be any pretrial detention, so a court would never need to find that such detention was necessary to serve an important government interest. Because the district court's remedy did not include the requisite finding, this Court did not expressly address whether it is required.

Instead, this Court held that the district court's remedy "amount[ed] to the outright elimination of secured bail for indigent misdemeanor arrestees." 892 F.3d

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[4] The district court here read *ODonnell*'s discussion of the Texas liberty interest to have rejected the existence of a federal "right against wealth-based detention" (that is, the right set forth in *Bearden*, *Tate*, *Williams*, *Rainwater*, and *Frazier*). ROA.5966-5967. That reading of *ODonnell* is wrong—and inconsistent with the district court's own identification of an equal-protection violation, which involves that very right.

at 163. That remedy was overbroad, the Court further held, because under both *Bearden* and *Rainwater*, the State *can* constitutionally use secured bail to detain an indigent person, so long as it determines that doing so is necessary to vindicate an important interest. This Court therefore vacated the preliminary injunction and remanded for the district court "to craft a revised injunction … narrowly tailored to cure the constitutional deficiencies the district court properly identified." *Id.* at 166-167.

In dicta, the Court offered possible revisions to the district court's injunction, describing them as "the sort of modification that would be appropriate." *ODonnell*, 892 F.3d at 164. Although those revisions did not require a finding that alternatives to detention were inadequate to serve the government's interests, that is neither surprising nor consequential. As explained, the district court's remedy obviated the need for such language. And nothing in this Court's discussion of its "modification[s]" indicates that the Court meant for them to be comprehensive. What matters is the Court's clear directive that on remand the district court had to craft an injunction "narrowly tailored to cure the constitutional deficiencies the district court properly identified." *Id.* at 166. The district court here had the same

obligation, which again means requiring a finding that alternative measures are inadequate before detaining an arrestee for inability to pay secured bail.[5]

A final point: Contrary to the district court's suggestion, ROA.5972 n.10, the injunction's requirement that the government consider whether other conditions provide "sufficient sureties" does not provide the relief that plaintiffs seek. The district court took that language from *ODonnell*, which had identified a violation of procedural due process regarding a Texas liberty interest that, subject to certain exceptions, all arrestees "'shall be bailable by sufficient sureties.'" 892 F.3d at 158, 164-165 (quoting Tex. Const. art. 1, §11). But that language is inadequate to vindicate the (separate) *federal* right established by *Tate*, *Williams*, *Bearden*, and *Rainwater*. The injunction must accordingly require the necessary finding and concomitant procedures that ensure that right's protection.

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[5] On remand in *ODonnell*, the district court issued a modified injunction and the defendants again appealed, only to dismiss their appeal earlier this month. At the outset of the appeal, however, a divided motions panel granted the defendants' motion to stay parts of the modified injunction pending the appeal. *See ODonnell v. Goodhart*, 900 F.3d 220 (5th Cir. 2018). That ruling is not relevant here because those parts of the revised *ODonnell* injunction concerned the *timing* of bail hearings (specifically whether detention of indigent arrestees was permissible for no more than 48 hours prior to an individualized bail hearing), and thus the motions panel did not speak to what findings are required at the hearing itself. In any event, this Court has repeatedly held that "'a motions panel decision is not binding precedent.'" *Cimino v. Raymark Industries Inc.*, 151 F.3d 297, 311 n.26 (5th Cir. 1998) (quoting *Northshore Development, Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988)).

II. THE DISTRICT COURT ERRED IN HOLDING THAT DALLAS COUNTY'S BAIL PRACTICES DO NOT VIOLATE THE RIGHT TO PRETRIAL LIBERTY

Dallas County's secured-bail practices infringe the right to pretrial liberty. Because this right—the due process liberty interest in not being jailed prior to conviction—is fundamental, the county's infringement of it is subject to heightened scrutiny. The county's existing practices do not satisfy such scrutiny. The district court's failure to recognize all this was reversible error.

A. Dallas County's Bail Policy Violates Plaintiffs' Substantive-Due-Process Right To Pretrial Liberty

"In our society," the Supreme Court has explained, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. This norm reflects longstanding foundational principles: As the Court has repeatedly said, "[f]reedom from bodily restraint has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasis added) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)); *accord Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Consistent with these other cases, *Salerno* recognized a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749.

Salerno recited that rule in the context of a facial challenge to the Bail Reform Act of 1984, a law that authorizes the pretrial confinement of dangerous

arrestees if a judge finds that pretrial detention is necessary to protect public safety. *See* 481 U.S. at 742; 18 U.S.C. §3142(e)-(f), (i). The Supreme Court deemed the statute consistent with the Due Process Clause, but only—given the "fundamental nature of th[e] right" at stake, 481 U.S. at 750—after concluding that the law's provisions satisfied heightened scrutiny, *see id.* at 750-751 (describing the government interest in preventing pretrial crime by those charged with "extremely serious" federal felony offenses as "compelling" and "overwhelming" and the statute as "careful[ly] delineat[ing] … the circumstances under which detention will be permitted"). In particular, *Salerno* upheld pretrial detention only where a "'judicial officer finds that no condition or combination of conditions'" of release will satisfy the government's interests. *Id.* at 742 (quoting 18 U.S.C. §3142(e)). Absent such a "sharply focused scheme," the Court has since stressed, a state may not detain a presumptively innocent person. *Foucha*, 504 U.S. at 81; *see id.* at 83 (striking down Louisiana's practice of detaining mentally competent insanity acquittees because it, unlike the Bail Reform Act, was not a "carefully limited exception[] permitted by the Due Process Clause").

Both the Supreme Court itself and lower courts have since confirmed that *Salerno* applied heightened scrutiny. In one case, for example, the Supreme Court cited *Salerno* as part of its "line of cases which interprets … 'due process of law' to … forbid[] the government to infringe certain 'fundamental' liberty interests …

unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). And in another case, the Court stated that the statutory scheme *Salerno* addressed was "narrowly focused on a particularly acute problem in which the government interests [were] overwhelming." *Foucha*, 504 U.S. at 81. Not surprisingly in light of these cases, the en banc Ninth Circuit has squarely held that "*Salerno* applied heightened scrutiny." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-781 (9th Cir. 2014) (en banc); *accord, e.g., Simpson v. Miller*, 387 P.3d 1270, 1276-1277 (Ariz. 2017) ("heightened scrutiny" applies where, as in *Salerno*, the "fundamental" "right to be free from bodily restraint" is implicated), *cert. denied sub nom. Arizona v. Martinez*, 138 S. Ct. 146 (2017).

Heightened scrutiny is accordingly required here. That is because in practice, an order requiring an unattainable financial condition of release is—as every appellate court to consider the question has held—an order for pretrial detention. As the D.C. Circuit put it, for example, "the setting of bond unreachable because of its amount would be tantamount to setting no conditions at all." *United States v. Leathers*, 412 F.2d 169, 171 (D.C. Cir. 1969) (per curiam); *accord United States v. Mantecon-Zayas*, 949 F.2d 548, 550 (1st Cir. 1991) (per curiam); *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017); *Humphrey*, 19 Cal. App. 5th at 1015. The district court in *ODonnell* reached the same conclusion,

stating that when secured-money bail is set "at unpayable amounts," it operates "as [a] de facto pretrial detention order." 251 F. Supp. 3d at 1150. Indeed, the court found that Harris County had a "policy and practice of imposing secured money bail *as* de facto orders of pretrial detention." *Id.* at 1059-1060 (emphasis added). Under these cases, Dallas County (like the government in *Salerno*) must show that its use of secured bail to detain an indigent arrestee is "narrowly tailored to serve a compelling state interest," *Reno*, 507 U.S. at 302.

Making that showing is neither novel nor unmanageable; it has been required in federal court since the Bail Reform Act's enactment in 1984, and is likewise the law in other jurisdictions. *See, e.g.*, D.C. Code §23-1321; N.M. Const. art. II, §13; N.J. Stat. Ann. §2A:162-15-21. To justify pretrial detention, the government need only conduct an individualized hearing and present evidence sufficient for a judicial officer to conclude that there are no other alternatives sufficient to mitigate a specifically identified risk posed by the arrestee.

Dallas County comes nowhere close to meeting this requirement. It does not mandate an individualized inquiry into an arrestee's ability to pay secured money bail (meaning that it does not even determine whether an individual arrestee will be detained or not), let alone require a finding that pretrial detention of any arrestee is necessary to serve a compelling purpose. Nor, because it does not require the requisite finding, does it provide any of the procedural protections essential to

ensure the accuracy of that finding, including a hearing; notice to the arrestee about the purpose of the hearing (and the relevant rights the arrestee has); the assistance of counsel; and an opportunity to be heard, to present evidence, and to cross-examine witnesses. *See Salerno*, 481 U.S. at 751-752 (detailing the "extensive safeguards" required to "further the accuracy of [the substantive] determination"). As a result, Dallas County's practices—as the district court found—make pretrial detention the "norm" for indigent arrestees rather than "the carefully limited exception," *id.* at 755; *see* ROA.5962 (district court finding that the county "automatically detains" virtually all indigent arrestees for the entire pretrial/pre-plea period). As other courts have recognized, *Salerno* and *Foucha* make clear that such a system violates both substantive and procedural due process. *See, e.g.*, *Brangan*, 80 N.E.3d at 963; *Humphrey*, 19 Cal. App. 5th at 1026, 1031-1038; *Caliste*, 329 F. Supp. 3d at 311-314.[6]

[6] Plaintiffs preserved for trial the arguments that at a pretrial-detention hearing, arrestees are entitled to the assistance of counsel and a heightened evidentiary standard applies (i.e., before detention may be imposed, the county must prove by clear and convincing evidence that no alternative conditions of release will satisfy the government's interest in ensuring appearance in court). *See, e.g.*, ROA.5948 n.158, 5579 n.3, 5583 n.5. Because plaintiffs did not press for a preliminary ruling on these components of their procedural-due-process claim, they were not briefed or addressed below.

B. The District Court's Rationales For Its Substantive-Due-Process Ruling Are Flawed

The district court's preliminary injunction mandates some of the procedural protections that, as discussed in the previous subsection, were essential to *Salerno*'s upholding of the Bail Reform Act. *See* ROA.5960, 5975-5977. The court did so, however, based not on the substantive-due-process right to pretrial liberty but solely on a state-created liberty interest, namely the Texas "right to be bailable upon sufficient sureties," *see* ROA.5967; *supra* p.31. The court rejected plaintiffs' claim that Dallas County's bail practices violate the federal interest in pretrial liberty. ROA.5967-5969. The court offered three bases for doing so; each lacks merit.[7]

First, the district court concluded that *ODonnell* implicitly rejected the substantive-due-process argument that plaintiffs advance here. That is wrong. As a preliminary matter, *ODonnell* assuredly did not (because it could not) reject decades of binding precedent holding that presumptively innocent arrestees have a fundamental interest in liberty prior to trial, *see supra* p.32. Such a holding would leave every jurisdiction in the country free to detain every individual arrested (for any crime at all) within its borders—without any showing that pretrial detention

[7] The court stated that it was rejecting plaintiffs' argument for only "two reasons," ROA.5967, but its second reason was actually two separate ones (the second and third ones addressed in the text that follows).

was justified. That practice would offend the very "core" of due process, *Youngberg*, 457 U.S. at 316.

ODonnell, moreover, never passed on substantive due process (as the district court recognized). ROA.5968. The district court asserted, however, that it could nonetheless rely on *ODonnell* because (in its view) the substantive-due-process "right to pretrial liberty was still a factor" there. *Id.* That reasoning fails. To begin with, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001); *see also Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144 (2011) (where an issue "is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that" that issue was rejected or questioned).

In any event, it is not true that the federal interest in pretrial liberty "was still a factor in *ODonnell*[]," ROA.5968. The district court's sole basis for asserting as much was *ODonnell*'s statement that "the right to pretrial liberty of [the] accused" is "particularly important." 892 F.3d at 159, *quoted in* ROA.5968. But that statement referred to the *state-law* liberty interest that *ODonnell*'s procedural-due-process holding rested on, the interest *ODonnell* described as "a [Texas] right to bail that appropriately weighs the detainees' interest in pretrial release and the court's interest in securing the detainee's attendance," *id.* at 158. A fuller excerpt

from the sentence the district court quoted makes clear that it was this state-law interest, and not substantive due process, that *ODonnell* was discussing: "We note that the liberty interest *of the arrestees here* [is] particularly important: the right to pretrial liberty[.]" *Id.* at 159 (emphasis added). The only liberty interest that *ODonnell* addressed for "the arrestees here," meaning the plaintiffs in *ODonnell*, was the state-law interest, *see id.* at 157 (stating that "*the* protected liberty interest at issue here" arises from "the law of Texas" (emphasis added)). *ODonnell* therefore provides no support for the district court's rejection of plaintiffs' substantive-due-process argument here.

Second, the district court asserted that *Salerno* did not support that argument. The court acknowledged that "*Salerno* firmly emphasizes the importance of the right to pretrial liberty." ROA.5968. But the court drew a distinction between "requiring that arrestees be granted *some* condition of release" and "requiring that arrestees be granted a condition of release they can afford." *Id.* In other words, the district court read *Salerno* to hold that if a judicial finding of necessity is not made (and if the associated procedural protections required under the Bail Reform Act are not provided), due process requires only that an arrestee be offered some theoretical way of obtaining pretrial release, even one utterly impossible to achieve as a practical matter. *Id.*

This reasoning, for which the district court notably cited no authority, is untenable. The very heart of the decision in *Salerno* was that there is a due-process right to pretrial liberty—in the Supreme Court's words, a "'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial," 481 U.S. at 749. That right would be meaningless if it meant merely that "arrestees [must] be granted *some* condition of release absent a showing that they are a flight risk," ROA.5968. If that were true, then the government could detain *every* arrestee, by always imposing a condition of release the arrestee cannot possibly satisfy—be it running a 4-minute mile, reciting the first 600 digits of pi, posting a $300 trillion bond, or (as with plaintiffs here) paying a lower amount of cash yet one the arrestee still cannot remotely afford.

That is not the law. To the contrary, *Salerno* held, as explained, that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." 481 U.S. at 755. The district court's reading of *Salerno* makes a mockery of that holding. What matters under *Salerno* is the *outcome* of the proceeding, i.e., whether someone is in fact detained before conviction. Whenever that is the outcome, the government must justify its infringement of the fundamental interest in liberty "prior to trial or without trial." *Id.*

Third, the district court reasoned that plaintiffs' claim had to be brought under the Eighth Amendment rather than the Due Process Clause because, in the court's view, the Excessive Bail Clause is a "specific constitutional provision" that "cover[s]" that claim. ROA.5969. That reasoning is doubly flawed.

As an initial matter, the district court incorrectly described plaintiffs' substantive-due-process claim as seeking "the abolition or lessening of monetary bail." ROA.5969. Plaintiffs do not seek to end the use of secured bail; they recognize that it can be a constitutional condition of release, even for an indigent arrestee. Plaintiffs merely assert that where the use of secured bail results in a de facto order of pretrial detention, due process requires the government to satisfy the same scrutiny that *Salerno* held applies to transparent orders of pretrial detention. That claim is not controversial; as noted, *see supra* pp.34-35, courts are unanimous in viewing the imposition of an unattainable financial condition of release as tantamount to granting no condition at all. Nor would embracing plaintiffs' claim be unduly burdensome for governments: As explained, *see supra* p.35, the rule plaintiffs seek has been the law in other jurisdictions for many years.

To be sure, the government frequently will not be able to show that the imposition of unattainable secured bail satisfies heightened scrutiny, because pretrial detention is not only the "carefully limited exception," *Salerno*, 481 U.S. at 755, but also imprudent in most cases as a policy matter, *see supra* pp. 11-12

(summarizing the often-damaging effects of pretrial detention for both the public and the detainee). Indeed, the record here—like "reams of [similar] empirical data" in *ODonnell*, 892 F.3d at 154—shows that pretrial detention caused by the mechanical use of secured-money bail both increases failure-to-appear rates and makes low- or moderate-risk arrestees *more* likely to commit crime in the future. ROA.5939-5940 (summarizing record evidence regarding the effects of pretrial detention); *see also ODonnell*, 251 F. Supp. 3d at 1121-1122 (finding, based on studies of hundreds of thousands of Harris County cases, that "even brief pretrial detention" increases the likelihood that arrestees "will commit future crimes or fail to appear at future court hearings"); ROA.5970 (agreeing with *ODonnell* findings, which this Court affirmed). But the possibility that government, whether because of similar evidence or otherwise, will be unable to show that other conditions cannot satisfy its interests does not change the fact that under plaintiffs' claims a judge can constitutionally require unattainable secured bail. Nor, of course, does it justify the district court's approach of refusing to subject de facto detention orders to the same due-process scrutiny that *Salerno* applied to transparent ones.[8]

[8] In response to the evidence that secured-money bail actually results in more crime, the county may claim that imposing such bail protects public safety by deterring those out on bail from committing crimes. That claim would fail because under Texas law, money bail cannot be forfeited solely because the arrestee commits a crime while out on bail. *See* Tex. Code Crim. P. art. 22.01-22.02; 22.13(5). Secured bail thus creates no deterrent to crime. *See ODonnell v. Harris*

In addition to mischaracterizing plaintiffs' claims as seeking to end the use of secured-money bail, the district court's ruling that plaintiffs must proceed under the Eighth Amendment rested on a case that holds the opposite. In *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018), *petition for cert. filed*, No. 18-814 (U.S. Dec. 27, 2018), the Eleventh Circuit explained—as *ODonnell* had explained in rejecting much the same reasoning the district court embraced here, *see* 892 F.3d at 157—that in *Rainwater*, this Court analyzed a challenge to Florida's money-bail system under the Fourteenth Amendment (equal protection and due process). *See Walker*, 901 F.3d at 1258 (citing *Rainwater*, 572 F.2d at 1056-1057). *Walker* then recited *Rainwater*'s holding that "'[t]he incarceration of those who cannot' meet a [secured-bail] schedule's requirements, 'without meaningful consideration of … alternatives, infringes on both due process and equal protection requirements.'" *Id.* at 1258 (first alteration in original) (quoting *Rainwater*, 572 F.2d at 1057). This holding—that a challenge like plaintiffs' is cognizable under the Fourteenth Amendment—is binding on this Court, as it was binding in *Walker*, *see id.* at 1258 n.7.

County, 251 F. Supp. 3d 1052, 1109 (S.D. Tex. 2017), *aff'd in relevant part*, 892 F.3d 147, 166 (5th Cir. 2018) (opinion on rehearing); *Reem v. Hennessy*, 2017 U.S. Dist. LEXIS 210430, at *8 (N.D. Cal. Dec. 21, 2017). It therefore can protect public safety only if it operates as a detention order—in which case it should, as explained, satisfy the same standards required for such an order.

The district court's holding that plaintiffs must proceed under the Eighth Amendment rather than the Fourteenth contravenes Supreme Court precedent as well. The Court has repeatedly "rejected" the notion "that the applicability of one constitutional amendment pre-empts the guarantees of another." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). "Certain wrongs," the Court has explained, "affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992); *see also, e.g., Colorado Christian University v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (recognizing that "statutes involving discrimination on the basis of religion … are subject to heightened scrutiny whether [a claim] arise[s] under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted)). Where a plaintiff invokes more than one constitutional provision, the Supreme Court has instructed, a court must "examine each constitutional provision in turn." *Soldal*, 506 U.S. at 70.[9]

Salerno itself illustrates this principle. The arrestees there argued that the deprivation of their pretrial liberty pursuant to the Bail Reform Act violated both the Due Process Clause of the Fifth Amendment *and* the Excessive Bail Clause of

[9] Here of course, plaintiffs, as is their prerogative, have pressed *only* a Fourteenth Amendment claim.

the Eighth Amendment. 481 U.S. at 746. The Court never so much as hinted that only one of those theories was permissible. To the contrary, it analyzed respondents' claim under both. *See id.* at 746-751 (substantive due process), 752-755 (Eighth Amendment). The district court erred in failing to follow the Supreme Court's directive.

True, the Supreme Court has cautioned that reliance on substantive due process is sometimes improper where challenged conduct is covered by a specific constitutional provision. *See Graham v. Connor*, 490 U.S. 386, 394 (1989). But that caution is not implicated here. *Graham* reflects only a "reluctan[ce] to expand the concept of substantive due process." *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Plaintiffs' claims involve no such expansion; they rely on the venerable principle that substantive due process encompasses the core interest in bodily liberty prior to trial, *see supra* p.32 (citing cases holding that this interest has "always" been protected by the Due Process Clause).

In short, none of the district court's rationales for rejecting plaintiffs' substantive-due-process claim withstands scrutiny. And again, that claim (contrary to the district court's evident view) breaks no new ground as a matter of law or policy. It is instead compelled by established precedent, *see supra* pp.32-35, and validated in practice by the federal system and other jurisdictions, which have not only implemented workable alternatives to pretrial detention for most arrestees, but

also continued to detain arrestees when doing so is in fact necessary (where, for example, a court properly finds, after a hearing, that an arrestee presents a serious public-safety threat that cannot be sufficiently mitigated), *see supra* p.35. The district court's ruling on plaintiffs' substantive-due-process claim should be reversed and the injunction amended accordingly. *See supra* p.31 (explaining that the injunction must be revised to ensure adequate protection for plaintiffs' federal constitutional rights).

III. THE SHERIFF IS PROPERLY ENJOINED UNDER 42 U.S.C. §1983

The district court erred in holding that the sheriff is not a proper defendant here under §1983. Even if, as the district court determined, the sheriff "does not have [municipal] policy making authority," ROA.5964—such that her conduct cannot serve as a basis for *Dallas County's* liability under §1983—the sheriff herself is properly enjoined under the statute. In holding otherwise, the district court repeated an error this Court made in *ODonnell*, one the Court corrected on rehearing.

In its initial decision in *ODonnell*, this Court concluded that county sheriffs in Texas lack municipal policymaking authority because, under Texas law, they are "legally obliged to execute all lawful process," including "judicial orders imposing secured bail." *ODonnell v. Harris County*, 882 F.3d 528, 538 (5th Cir. 2018) (subsequent history omitted). But instead of holding simply that the sheriff's

conduct therefore could not give rise to county liability under §1983 (as interpreted in *Monell*), this Court ruled that the sheriff was "not an appropriate party" under the statute. 882 F.3d at 538.

The *ODonnell* plaintiffs sought panel rehearing on that issue. *See* Appellees' Reh'g Pet., *ODonnell*, No. 17-20333 (5th Cir. Feb. 28, 2018) ("*ODonnell* Reh'g Pet."). As their petition explained, §1983 authorizes suits in "equity" against any "person" who, "under color of any statute," "causes" a "deprivation of any rights[] … secured by the Constitution." 42 U.S.C. §1983. And because the sheriff is "legally obliged to execute all lawful process," *ODonnell*, 882 F.3d at 538, "he is a 'person' acting 'under color of a[] statute' who 'causes' a 'deprivation of rights[] … secured by the Constitution'" any time he enforces unconstitutional bail orders, *ODonnell* Reh'g Pet. 4 (quoting the statute). Indeed, the petition also explained (at 5) that the Eleventh Amendment, as interpreted in *Ex Parte Young*, permits prospective injunctive relief against state officials for violating federal law, 209 U.S. at 159-160, so long as the officials have "*some connection* with the enforcement of the" challenged acts, *id*. at 157 (emphasis added). That requirement is plainly met where, as here, the official is required by state law to enforce the challenged acts. *See Air Evac EMS, Inc. v.*

Texas Department of Insurance, Division of Workers' Compensation, 851 F.3d 507, 519 (5th Cir. 2017).[10]

Apparently agreeing with these points, the *ODonnell* panel granted rehearing and revised its ruling on this issue. Clarifying that the sheriff is "not an appropriate party" *for the purpose of* "attaching municipal liability," this Court deleted its conclusion that the sheriff "cannot be sued under § 1983." *Compare* 892 F.3d at 156 *with* 882 F.3d at 538. This Court should correct that same error here. Even if the Dallas County Sheriff—like the Harris County Sheriff—"does not qualify as a municipal policymaker" whose conduct can subject the county to liability under §1983, 892 F.3d at 156, she herself can properly be enjoined under the statute from enforcing constitutional violations.

[10] Injunctive relief against the sheriff is also necessary to remedy the constitutional violations the district court found—as the court appeared to recognize. *See* ROA.5979 (ordering the sheriff to "treat the limitations period on [certain defendants'] holds as beginning to run" at a particular time), 5977 (authorizing the sheriff "to decline to enforce [secured-bail] orders … if the orders are not accompanied by a record showing that the required individual assessment was made and an opportunity for formal review was provided").

CONCLUSION

The district court's judgment should be reversed in part consistent with the foregoing arguments, and its preliminary injunction modified accordingly.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because—according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the brief contains 11,201 words, excluding the portions exempted by Rule 32(f). This brief complies with 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 using Microsoft Word 2016 in 14-point Times New Roman font.

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I electronically filed the foregoing on January 23, 2019, using the Court's appellate CM/ECF system, which effected service on all counsel of record.

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