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THE PHILADELPHIA COMMUNITY BAIL FUND, BY AND THROUGH ITS TRUSTEES, CANDACE MCKINLEY AND LAUREN TAYLOR,
THE YOUTH ART & SELF-EMPOWERMENT PROJECT, BY AND THROUGH ITS TRUSTEES, SARAH MORRIS AND JOSHUA GLENN,
GERALD THOMAS, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
STEPHON THOMAS, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
DAMIER MORAGNE, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
KIMBERLY BLACKWELL, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
JEREMY HARRIS, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
HASHEEN JACOBS, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
Z.L, A MINOR HELD ON BAIL HE COULD NOT AFFORD, BY AND THROUGH HIS MOTHER ALYCIA BROWN,
NASIR WHITE, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,
EVAN SLATER, AN INDIVIDUAL HELD ON BAIL HE COULD NOT AFFORD,

PETITIONERS,

V.

ARRAIGNMENT COURT MAGISTRATES of the FIRST JUDICIAL DISTRICT of the COMMONWEALTH OF PENNSYLVANIA,

RESPONDENTS.

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS IN SUPPORT OF PETITIONERS

Sozi Pedro Tulante (No. 202579)
sozi.tulante@dechert.com
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2450

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

ARGUMENT 4

I. For Over 50 Years Federal Law Has Recognized that Pretrial Detention Solely Based on Wealth is Unjustified 4

II. The Collateral Consequences of Unnecessary Pretrial Detention are Grave and Concerning 12

III. Wealth-Based Bail Schemes Undermine the Public's Faith in Our Criminal Justice System 16

CONCLUSION 17

APPENDIX: LIST OF AMICI 18

TABLE OF AUTHORITIES

CASES

Barker v. Wingo,
407 U.S. 514 (1972).....12, 13

ODonnell v. Harris Cty., Texas,
251 F.Supp. 3d 1052 (S.D. Tex. 2017).....14, 15

Stack v. Boyle,
342 U.S. 1 (1951).....15

United States v. Salerno,
481 U.S. 739 (1987).....8

STATUTES

18 U.S.C. § 3142.....*passim*

Federal Bail Reform Act of 1966, Pub. L. No. 89-46, 80 Stat. 214.....5, 6, 7, 8

Federal Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.....7, 8, 10

OTHER AUTHORITIES

S. Rep. No. 89-750 (1965).....6

H.R. Rep. No. 89-1541 (1966).....7

National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice* (1965).....5

Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary, 88th Cong. (1964).....5

Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123 (2005).....13

Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511 (2018).....13

Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 2 (Nat'l Bureau of Econ. Research Working Paper No. 22511, 2017) 14

STATEMENT OF INTEREST[1]

Amici are 21 former prosecutors who investigated and prosecuted crime in the U.S. Attorney's Office for the Eastern District of Pennsylvania and continue to work and live in the Philadelphia area.[2] Amici consist of both former supervisors and line prosecutors and in total have prosecuted just about every imaginable type of federal crime: corruption, fraud, narcotics trafficking, robberies, firearms offenses, racketeering, child exploitation, among others. Though no longer acting as prosecutors, Amici maintain an interest in ensuring the fairness of the criminal justice system in the legal community in which they still practice. As prosecutors, Amici dedicated their careers to promoting justice fairly, with respect to victims, defendants, and all actors in the criminal justice system, all without regard to race, religion, political affiliation, ethnicity, gender, sexual orientation, disability, or wealth. Thus, Amici know full well that promoting such justice depends on working with the communities that they served and forming relationships predicated on trust, accountability, and a shared belief of the legitimacy of the criminal justice system. Such strong relationships are foundational to a justice system in which community

[1] No entity other than amici or their counsel authored or paid for this brief.

[2] Amici's counsel is also a former federal prosecutor who worked in the United States Attorney's Office for the Eastern District of Pennsylvania and lives and works in the Philadelphia area.

members feel safe to report crimes, cooperate with law enforcement, testify in court proceedings, and sit fairly as jurors.

One issue that imperils these relationships, in Amici's experience, is the practice of detaining indigent defendants before trial solely because of their inability to pay monetary bail while releasing similarly situated defendants who can. For over 50 years, the federal bail system, though far from perfect, has at least recognized the fundamental injustice of linking a person's freedom to his or her ability to pay; as such, federal law explicitly discourages the use of monetary bail. Instead, it encourages a multifactor approach to fashioning conditions of release that take into account public safety, protecting victims, and circumstances in the defendant's life that may have contributed to the alleged unlawful behavior. Amici know firsthand that when courts tailor conditions of release to the needs of both the defendant and the community—rather than adhering to the rigid structures of a cash bail system—the system operates thoughtfully, equitably, and in accordance with the public good.

As alleged in detail by the Petitioners in their Second Amended Complaint, the bail practices in Philadelphia raise substantial concerns. Among other things, as alleged, Respondents, the Arraignment Court Magistrates of Pennsylvania's First Judicial District, fail to determine whether indigent defendants have the resources to pay the bail imposed. Second Amended Complaint [Sec. Am. Compl.] ¶ 68. Indeed, Respondents deem defendants indigent for the purposes of assigning them counsel,

only to impose hundreds or thousands of dollars in bail moments later. *Id.* at ¶ 67. And they fail to assess required factors under the Pennsylvania Rules of Criminal Procedure in weighing whether alternative conditions of release were available. *Id.* at ¶ 76. These alleged practices sow distrust in the criminal justice system and, regrettably, weaken the relationships between communities and law enforcement.

The federal bail system, in contrast, effectively promotes public safety, protects victims, and has similar levels of defendant nonappearance as does Pennsylvania's system. And it achieves these ends without depriving defendants of liberty or process. By refusing to assess defendants' financial and individual circumstances, as well as community needs, when deciding bail (as happens in the federal system), Respondents threaten defendants' constitutional rights and the legitimacy of Philadelphia's criminal justice system—all for no ascertainable public benefit. The federal bail system demonstrates that the consideration of nonmonetary bail—or at least an assessment of the defendant's individual circumstances—can offer similar outcomes without creating such pervasive individual and community harms.

Amici do not seek to blindly wade into a highly charged political issue or upend the current bail system in Philadelphia state court root and branch. Amici have served under Republican and Democratic administrations and, at bottom, believe that the problems described by Petitioners should give us all pause, irrespective of

our sincerely held political labels and affiliation. Nor do Amici contend that the federal bail system is flawless, or the only workable model, or even a system that should be replicated without more by Respondents to satisfy due process. Indeed, Amici understand that Philadelphia courts have real resource constraints and also have to process substantially more people than the federal court system in the Eastern District of Pennsylvania. Nevertheless, Amici, relying on their substantial experience and commitment to justice, hope to share with this Court the well-documented benefits of a rational bail regime that, above all, seeks to ensure the safety of the community and the defendant's appearance for future proceeding, all without treating individuals disparately because of their financial status.

ARGUMENT

I. For Over 50 Years Federal Law Has Recognized that Pretrial Detention Solely Based on Wealth is Unjustified

It is well established that our criminal justice system should treat us all equally with no regard to our ability to pay. This basic principle was not always self-evident. For most of our country's history the opposite was true, as the federal bail system consistently punished the poor. In response, reformers in the 1960s started considering ways to challenge that view. One prominent proponent for reform was Attorney General Robert F. Kennedy. In 1965, he hosted a National Conference on Bail and Criminal Justice to confront the infirmities of state and federal bail schemes. At the close of the conference, Attorney General Kennedy said:

> [U]sually only one factor determines whether a defendant stays in jail before he comes to trial. That factor is not guilt or innocence. It is not the nature of the crime. It is not the character of the defendant. That factor is, simply, money. How much money does the defendant have?[3]

As the Senate Judiciary Committee weighed legislation to reform federal bail practices, Attorney General Kennedy expanded on this view and testified that "the rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail," and cited the "unrealistic and often arbitrary" process for setting bail as the main cause of this disparity.[4] He explained that bail was set "without regard to a defendant's character, family ties, community roots or financial status" and frequently set solely based on the nature of the crime.[5]

Congress responded by passing the Federal Bail Reform Act of 1966 ("the 1966 Act").[6] The stated purpose of the 1966 Act was "to revise the practices relating to bail to assure that all persons, *regardless of their financial status*, shall not needlessly be detained pending their appearance to answer charges, to testify, or

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[3] National Criminal Justice Reference Service, *Proceedings and Interim Report from the National Conference on Bail and Criminal Justice* at 297 (1965), https://www.ncjrs.gov/pdffiles1/Photocopy/355NCJRS.pdf.

[4] *See Hearings on S. 2838, S. 2839, & S. 2840 Before the Subcomm. on Constitutional Rights and Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 88th Cong. (1964), http://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/08-04-1964.pdf.

[5] *Id.*

[6] Bail Reform Act of 1966, Pub. L. No. 89-465, § 2, 80 Stat. 214 (1966).

pending appeal, when detention serves neither the ends of justice nor the public interest."[7]

The Senate Report accompanying the 1966 Act made clear the overwhelming and bipartisan concern that defendants were being detained solely because of their inability to pay:

> Every witness before the subcommittees agreed that, at least in noncapital cases, the principal purpose of bail is to assure that the accused will appear in court for his trial. There is no doubt, however, that each year thousands of citizens accused of crimes are confined before their innocence or guilt has been determined by a court of law, not because there is any substantial doubt that they will appear for trial but merely because they cannot afford money bail. There is little disagreement that this system is indefensible.[8]

The Senate did not stop there and further elaborated on the myriad of ways that defendants were disadvantaged by being detained while awaiting trial:

> There was widespread agreement among witnesses that the accused who is unable to post bond, and consequently is held in pretrial detention, is severely handicapped in preparing his defense. He cannot locate witnesses [and] cannot consult his lawyer in private. . . . Furthermore, being in detention, he is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.[9]

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7 *Id.* (emphasis added).

8 S. Rep. No. 89-750, at 6 (1965).

9 *Id.* at 7.

Many of the same concerns were also expressed by the House of Representatives, whose own report recognized that, with the exception of bail bondsmen, all subcommittee-hearing "witnesses favored the enactment of this proposal" to reform the federal bail system.[10] The House also pointed out that a bail system that detains certain people based solely on their inability to afford money bail "'results in serious problems for defendants of limited means, imperils the effective operation of the adversary system, and may even fail to provide the most effective deterrence of nonappearance by accused persons'"[11]

The 1966 Act was groundbreaking. It transformed federal law by requiring courts to allow the pretrial release of a noncapital defendant on personal recognizance or an unsecured appearance bond *unless* the court finds "that such a release will not reasonably assure the appearance of the person as required."[12] Less than two decades later Congress took another major step when it passed the Federal Bail Reform Act of 1984 ("the 1984 Act"), which, despite minor subsequent adjustments, still provides the basic structure for the present federal bail scheme. The 1984 Act preserved many of the vital provisions of the 1966 Act but "allow[ed]

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[10] H.R. Rep. No. 89-1541, at 7, *as reprinted in* 1966 U.S.C.C.A.N. at 229.

[11] *Id.* at 11 (quoting report of U.S. Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure).

[12] Pub. L. No. 89-465, § 3(a), 80 Stat. 214 (codified as amended at 18 U.S.C. § 3142).

a federal court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.'" *United States v. Salerno*, 481 U.S. 739, 741 (1987) (alteration in original) (quoting Bail Reform Act of 1984) (upholding the preventive detention provisions in the 1984 Act). Notably, the Act made clear that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person."[13]

Together, the 1966 Act and the 1984 Act—referred collectively now as the Bail Reform Act—developed a thorough, well-ordered, and dynamic bail system that is intended to keep the community safe and secure the defendant's appearance, all without penalizing a defendant merely for being poor. A few things about the bail regime are worth noting. For instance, before making a final decision about pretrial detention, judges are required to conduct an individualized assessment and evaluate the defendant's community ties, employment, criminal history, and other enumerated factors.[14]

In weighing these factors and considering pre-trial release, judges must consider only two things: (1) whether release would endanger the safety of those in

[13] Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, (codified at 18 U.S.C. § 3142(c)(2), (e)-(g)).

[14] 18 U.S.C. § 3142(g).

the community, and (2) whether, if released, the defendant would return to court as needed.[15]

Under the Bail Reform Act, to the extent that the court is concerned about the safety of the community and about the risk of defendant's nonappearance if the defendant were released, the court may address these concerns by imposing a range of release conditions, such as maintaining a curfew, maintaining or seeking employment, abstaining from drug or alcohol use, regular reporting, among others.[16] Federal law contemplates that a court, upon conducting an individualized assessment, may impose a financial condition to reasonably assure the defendant's appearance or safety of the community, given that money bail provides a strong incentive for deterring flight and ensuring the defendant's appearance in court.[17] But, as explained before, federal law prohibits courts from imposing cash bail that a defendant cannot afford and that would result in the defendant remaining in jail.[18]

Only after a court determines that all other available options have been exhausted, including release of personal recognizance and release under conditions,

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[15] *See generally* 18 U.S.C. §§ 3142(b)-(d).

[16] *Id.* § 3142(c)(1)(B).

[17] *Id.* Indeed, a court may order any bail bond or other security forfeited if the defendant fails to appear at judicial proceedings as required. *Id.* at § 3146(d).

[18] *Id.* § 3142(c)(2).

and after a hearing, can the court order the defendant detained pending trial.[19] At that hearing, the defendant is entitled to counsel and is afforded the opportunity to cross-examine witnesses and present information either by proffer or in another form.[20] In issuing the order, the court must find "that no conditions or combinations of conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community."[21]

Thus, the bail reform efforts that began with passage of the 1964 Act over 50 years ago, and have been in place largely undisturbed for over 30 years since the 1984 Act, created a federal bail system where pretrial detention flows from a court's objective assessment of flight risk and dangerousness and not on wealth.

And Amici know that the federal bail system's procedures, which discourage money bail, have been largely successful in limiting the risk of nonappearance and allowing courts to fashion conditions of release that protect members of the public, including crime victims. Indeed, there are a litany of release conditions that a court may impose to achieve those ends. A court, for instance, can direct a defendant to

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[19] *Id.* § 3142(a)(4), (e), (f), (g).

[20] *Id.* § 3142.

[21] *Id.* § 3142(e).

avoid contact with an alleged victim;[22] to refrain from possessing a firearm;[23] or to report regularly to a pretrial services agency or law enforcement.[24] The court can also order the defendant to comply with conditions that will give the defendant stability and minimize the risk of any more criminal behavior. Just by way of example, the court can require that the defendant maintain or seek employment;[25] maintain or seek education;[26] refrain from excessive use of alcohol or any nonprescribed use of controlled substance;[27] or undergo medical, psychological, or psychiatric treatment.[28] The array of conditions can be tailored to match the circumstances of each defendant. And the defendant has every incentive to comply, knowing that violations may result in revocation of release and prosecution for contempt of court.[29]

The Second Amended Complaint describes practices that the reform efforts above sought to eliminate. For instance, they impose cash bail at sums so high that

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[22] *Id.* § 3142(c)(1)(B)(v).

[23] *Id.* § 3142(c)(1)(B)(viii).

[24] *Id.* § 3142(c)(1)(B)(vi).

[25] *Id.* § 3142(c)(1)(B)(ii).

[26] *Id.* § 3142(c)(1)(B)(iii).

[27] *Id.* § 3142(c)(1)(B)(ix).

[28] *Id.* § 3142(c)(1)(B)(x).

[29] *Id.* § 3148.

no defendant could reasonably be expected to pay. Instances of this include assigning a 16-year-old defendant a $300,000 cash bail; assigning a defendant on public assistance a $500,000 cash bail; and assigning an unemployed defendant a $350,000 cash bail. Sec. Am. Comp. ¶ 76. In each of these cases, Respondents imposed bail *after* assigning the defendant a public defender. *Id.*

II. The Collateral Consequences of Unnecessary Pretrial Detention are Grave and Concerning

As former prosecutors, Amici saw firsthand the tremendous toll on individuals who are detained and the collateral consequences of their detention beyond the loss of liberty. The collateral consequences are grave, as the Supreme Court explained nearly 50 years ago:

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. . . . Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent.

Barker v. Wingo, 407 U.S. 514, 532-33 (1972).

Defendants who are detained before trial forfeit more than just their freedom. Many of them may lose their jobs, housing, relationships or marriages, government assistance, and custody of their children, all while still presumed innocent. In addition, they also may lose access to needed medical and mental-health services while incarcerated. Sec. Am. Comp. ¶¶ 99-100.

In Amici's experience, both as former prosecutors and many as current defense attorneys, pretrial detention substantially interferes with the preparation of a case, as it becomes difficult for a defendant to confer with counsel, identify and seek favorable witnesses, gather evidence, and otherwise get ready for trial. *See Barker*, 407 U.S. at 532-33 (noting that a defendant in pretrial detention "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense").[30] Given the foregoing, it is not surprising then that detained indigent defendants have an increased likelihood of conviction and greater exposure to longer sentences. This reality is reflected by a study from a researcher at Antonin Scalia Law School at George Mason University. In that study, a scholar reviewed records of all criminal cases, totaling 331,971, from Philadelphia between September 2006 and February 2013 and concluded that defendants who had been held pretrial saw a 13% increase in the likelihood of getting convicted of at least one charge, a 124-day increase in the length of the maximum incarceration sentence, and a 41% increase in nonbail court fees.[31] In light of these realities, defendants detained pretrial in many

[30] *See also* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1165 (2005).

[31] Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. Econ. & Org. 511, 512-13, 534-35 (2018).

cases plead guilty relatively early as the quickest way to get their freedom.[32] Sec. Am. Comp. ¶ 105.

Perhaps most concerning to Amici is the evidence that unnecessary pretrial detention may actually harm public safety. Indeed, recent federal litigation challenging the constitutionality of the bail practices in Harris County, Texas, has validated these concerns. In that case, the district court judge evaluated substantial evidence and explained that "[r]ecent studies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings." *ODonnell v. Harris Cty., Texas*, 251 F.Supp. 3d 1052, 1121 (S.D. Tex. 2017) (citing studies), *aff'd as modified*, 882 F.3d 528 (5th Cir. 2018), *and aff'd as modified sub nom. ODonnell v. Harris Cty.*, 892 F.3d 147 (5th Cir. 2018). To bolster this conclusion, the court cited a study by scholars from the University of Pennsylvania Law School whose research showed:

> [I]f, during the six years between 2008 to 2013, Harris County had given early release on unsecured personal bonds to the lowest-risk misdemeanor defendants—those receiving secured bail amounts of

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

> $500 or less—40,000 more people would have been released pretrial; nearly 6,000 convictions and 400,000 days in jail at County expense would have been avoided; those released would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors in the eighteen months following pretrial release.

Id. at 1122 (citing study later published in Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017)). Amici share the concern that even brief pretrial detention may increase future criminal behavior and the likelihood of re-arrest, especially for defendants who present the lowest risk to society.

Lastly, Amici believe that it is improper to set a high bail solely based on the crime charged, while ignoring the defendant's particular circumstances and without evaluating the risk of reoffending and of flight. *Stack v. Boyle*, 342 U.S. 1, 6 (1951) ("To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."). In Amici's opinion, as elaborated above, a bail scheme that emphasizes individualized assessments and pretrial release with nonfinancial conditions, where appropriate, is more effective than a wealth-based bail system. A bail system like the one established by the Bail Reform Act reduces the risk of flight and more effectively promotes a fair criminal justice system, protects the public, and targets the root causes of criminal behavior while also freeing up valuable public funds for reinvesting into the community.

III. Wealth-Based Bail Schemes Undermine the Public's Faith in Our Criminal Justice System

Lastly, Amici are concerned that a criminal justice system that links freedom solely to an accused's ability to pay does tremendous harm to the public's trust in that system. For many people, bail proceedings offer the first interaction between the defendant and the justice system, and any perception of injustice at that stage of the proceedings fuels the cynicism that may follow the defendant through the remainder of his or her experience in the criminal justice system. These harms do not end with the defendant. Many of the victims and witnesses on whom prosecutors depend for critical testimony and evidence may have family members or close friends who have been charged with a crime. Therefore, in Amici's experience, the victims and witnesses who have seen (or experienced) first-hand, wealth-based discrimination are less likely to trust the criminal justice system. These individuals, consequently, may be more reluctant to voluntarily cooperate with prosecutors and other law enforcement, take the stand, report crimes, and fully participate in a criminal justice system that they perceive treats them or their friends and family.

This distrust of the system may extend to jury service. Jurors who believe that the criminal justice system tolerates wealth discrimination are more likely to see the system as illegitimate and may be less willing to credit the prosecutor's case or the testimony from members of law enforcement at trial. And many of these jurors,

much like the witnesses and victims, may come from the same communities as the defendants adversely impacted by a wealth-based bail system.

CONCLUSION

In short, Amici believe that this Court should take into account Amici's views and experience in fashioning a remedy to address the infirmities in the Respondents' reliance on cash-bail in Philadelphia.

Respectfully submitted,

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (No. 202579)
sozi.tulante@dechert.com
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2450

February 7, 2020

Counsel for Amici Curae

APPENDIX: LIST OF AMICI

David L. Axelrod
Former Assistant United States Attorney Eastern District of Pennsylvania

John C. Dodds
Former Assistant United States Attorney Eastern District of Pennsylvania

Thomas M. Gallagher
Former Assistant United States Attorney Eastern District of Pennsylvania

Virginia A. Gibson
Former Assistant United States Attorney Eastern District of Pennsylvania

Barry Gross
Former Assistant United States Attorney Eastern District of Pennsylvania

Christopher R. Hall
Former Assistant United States Attorney Eastern District of Pennsylvania

Peter D. Hardy
Former Assistant United States Attorney Eastern District of Pennsylvania

Matthew J.D. Hogan
Former Assistant United States Attorney Eastern District of Pennsylvania

Randall P. Hsia
Former Assistant United States Attorney Eastern District of Pennsylvania

John N. Joseph
Former Assistant United States Attorney Eastern District of Pennsylvania

Ronald H. Levine
Former Assistant United States Attorney Eastern District of Pennsylvania

Jessica Natali
Former Assistant United States Attorney Eastern District of Pennsylvania

Lauren N. Ouziel
Former Assistant United States Attorney Eastern District of Pennsylvania

John J. Pease, III
Former Assistant United States Attorney Eastern District of Pennsylvania

James A. Petkun
Former Assistant United States Attorney Eastern District of Pennsylvania

A. Nicole Phillips
Former Assistant United States Attorney Eastern District of Pennsylvania

Richard L. Scheff
Former Assistant United States Attorney Eastern District of Pennsylvania

Michael A. Schwartz
Former Assistant United States Attorney Eastern District of Pennsylvania

Eric W. Sitarchuk
Former Assistant United States Attorney Eastern District of Pennsylvania

Thomas H. Suddath, Jr.
Former Assistant United States Attorney Eastern District of Pennsylvania

Robert E. Welsh
Former Assistant United States Attorney Eastern District of Pennsylvania

CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Pa. R. A. P. 531(b)(3), the text of this *amicus curiae* brief consists of 3,825 words as counted by the Microsoft Word word-processing program used to generate this brief.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Respectfully submitted,

/s/ Sozi Pedro Tulante
Sozi Pedro Tulante (No. 202579)
sozi.tulante@dechert.com
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-2450

Counsel for Amici Curae

February 7, 2020